1968

CANADA

LAW REPORTS

RAPPORTS JUDICIAIRES

DU CANADA

Supreme Court of Canada
Cour Suprême du Canada

Editors—Arrêtistes
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PUBLISHED PURSUANT TO THE STATUTE BY
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Ottawa, 1968

90294—1

JUDGES
OF THE
SUPREME COURT OF CANADA

The Right Honourable JOHN ROBERT CARTWRIGHT, P.C., *Chief Justice of Canada.*

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.

The Honourable LOUIS-PHILIPPE PIGEON.

ATTORNEYS GENERAL OF CANADA

The Honourable PIERRE ELLIOTT TRUDEAU.

The Honourable JOHN N. TURNER, Q.C.

SOLICITORS GENERAL OF CANADA

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

The Honourable GEORGE J. MCILRAITH, Q.C.

MEMORANDA

On the fourth day of September, 1967, the Honourable John R. Cartwright, Chief Justice of Canada, was sworn in as a member of Her Majesty's Privy Council.

On the second day of April, 1968, Her Majesty the Queen, upon the recommendation of the Prime Minister of Canada, granted the title "Right Honourable" for life to the Honourable John R. Cartwright, Chief Justice of Canada.

On the second day of April, 1968, Her Majesty the Queen, upon the recommendation of the Prime Minister of Canada, granted the title "Right Honourable" for life to the Honourable Robert Taschereau, former Chief Justice of Canada.

JUGES
DE LA
COUR SUPRÊME DU CANADA

Le Très honorable JOHN ROBERT CARTWRIGHT, C.P., *juge en chef du Canada.*

L'honorable GÉRALD FAUTEUX.

L'honorable DOUGLAS CHARLES ABBOTT, C.P.

L'honorable RONALD MARTLAND.

L'honorable WILFRED JUDSON.

L'honorable ROLAND A. RITCHIE.

L'honorable EMMETT MATTHEW HALL.

L'honorable WISHART FLETT SPENCE.

L'honorable LOUIS-PHILIPPE PIGEON.

PROCUREURS GÉNÉRAUX DU CANADA

L'honorable PIERRE ELLIOTT TRUDEAU.

L'honorable JOHN N. TURNER, C.R.

SOLLICITEURS GÉNÉRAUX DU CANADA

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

L'honorable George J. MCILRAITH, C.R.

MEMORANDA

Le quatrième jour de septembre 1967, l'honorable John R. Cartwright, Juge en Chef du Canada, a été assermenté comme membre du Conseil Privé de Sa Majesté.

Le deuxième jour d'avril 1968, Sa Majesté la Reine, sur la recommandation du Premier Ministre du Canada, a conféré à vie le titre «Très Honorable» à l'honorable John R. Cartwright, Juge en Chef du Canada.

Le deuxième jour d'avril 1968, Sa Majesté la Reine, sur la recommandation du Premier Ministre du Canada, a conféré à vie le titre "Très Honorable" à l'honorable Robert Taschereau, ancien Juge en Chef du Canada.

90294—1½

ERRATA
in—dans le
volume 1968

Page 517, line 2 of caption. After the word "birds" insert the word "during".

Page 517, ligne 2 de l'en-tête. Après le mot «birds» il faut insérer le mot «during».

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

Bisson v. Corporation of the District of Powell River (B.C.), 62 W.W.R. 707, appeal dismissed and cross-appeal dismissed with costs, June 20, 1968.

Booth v. The Queen (Ont.), appeal dismissed, March 1, 1968.

Corrivault et al. v. Boulanger (Que.), [1968] Que. Q.B. 585, appeal dismissed with costs, December 3, 1968.

Côté et al. v. Turmel (Que.), [1967] Que. Q.B. 309, appeal dismissed with costs, December 4, 1968.

Equitable, Compagnie d'Assurance contre le feu v. Gagné (Que.), [1966] Que. Q.B. 109, appeal dismissed with costs, May 22, 1968.

Fillion v. Bizier et al. (Que.), [1967] Que. Q.B. 107, appeal dismissed with costs, March 28, 1968.

Gaddie v. The Queen (Ont.), appeal dismissed, October 24, 1968.

International Fertilizers Limited v. Harbour Developments Limited (N.B.), 67 D.L.R. (2d) 688, appeal dismissed with costs, May 21, 1968.

Kline v. The Queen (Alta.), appeal dismissed, November 15, 1968.

Maclin Motors Limited v. Kolling (Alta.), appeal dismissed with costs, October 29, 1968.

Medicine Hat, Municipal Corporation of the City of v. Bist (Alta.), appeal dismissed with costs, February 19, 1968.

Meeker Cedar Products Limited v. Edge, Edgewood Logging Limited and Getson (B.C.), 68 D.L.R. (2d) 294, appeal dismissed with costs, October 29, 1968.

Meredith v. The Queen (Sask.), appeal dismissed, June 10, 1968.

Midwest Surveys & Engineering (B.C.) Limited v. Mobil Oil Canada Limited (B.C.), appeal dismissed with costs, October 28, 1968.

Minister of National Revenue v. C. I. Burland Properties Limited (Ex.), [1968] 1 Ex. C.R. 437, appeal allowed with costs, June 6, 1968.

Nault v. Nault et al. (Man.), appeal dismissed with costs, February 23, 1968.

O'Connell (H.J.) Ltd. v. Pitre et al. (Que.), appeal dismissed with costs, December 2, 1968.

Olsen et al. v. Nordstrand et al. (B.C.), 68 D.L.R. (2d) 645, appeal dismissed with costs, October 25, 1968.

Pacific Petroleums Limited v. Royal Trust Company et al. (Alta.), 66 D.L.R. (2d) 375, appeal dismissed with costs, October 30, 1968.

Plouffe, François, Heirs of v. Pitre et al. (Que.), appeal dismissed with costs, December 2, 1968.

Price and Hansen v. The Queen (Ont.), appeal dismissed, October 24, 1968.

Reine, La v. Schirm et al. (Que.), [1968] Que. Q.B. 63, appeal dismissed on question of jurisdiction, March 13, 1968.

Singer Company of Canada Limited v. The Queen (Ex.), [1968] 1 Ex. C.R. 129, appeal dismissed with costs, March 19, 1968.

South End Development Company Limited v. Moscovitch et al. (N.S.), appeal dismissed with costs, November 20, 1968.

Terminal Dock & Warehouse Company Limited v. Minister of National Revenue (Ex.), [1968] 2 Ex. C.R. 78, appeal dismissed with costs, October 21, 1968.

Union Canadienne Compagnie d'assurances v. Mimeault (Que.), [1967] Que. Q.B. 572, appeal dismissed with costs, May 23, 1968.

Whitfield v. Canadian Marconi Company (Que.), [1968] Que. Q.B. 92, appeal dismissed, March 8, 1968.

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.

Advance T.V. & Car Radio Centre Limited v. Attorney General of Canada (Man.), 1 D.L.R. (3d) 231, leave to appeal refused, December 2, 1968.

Alkok v. Grymek et al. (Ont.), [1968] S.C.R. 452, motion to vary judgment granted, May 22, 1968.

Arkoulis v. The Queen (Immigration Appeal Bd.), notice of discontinuance of application for leave to appeal filed, April 17, 1968.

Attorney-General of British Columbia v. MacMillan, Bloedel and Powell River Ltd. (B.C.), notice of discontinuance of appeal filed, February 2, 1968.

Beckford v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, November 12, 1968.

Bird v. The Queen (Ont.), leave to appeal refused, November 12, 1968.

Borus et al. v. Rachey (Sask.), notice of discontinuance of appeal filed, July 22, 1968.

Boyer v. La Reine (Que.), leave to appeal refused, May 27, 1968.

Bridge v. Herzog et al. (Alta.), notice of discontinuance of appeal filed, April 10, 1968.

Canada Trust Company v. Lloyd et al. (Sask.), [1968] S.C.R. 300, motion to vary judgment refused with costs, March 25, 1968.

Canada Trust Co. et al. v. Whittall et al. (B.C.), leave to appeal refused with costs, November 12, 1968.

Carrière v. The Queen (Ont.), notice of discontinuance of appeal filed, March 4, 1968.

Chapman et al. v. Ginter (B.C.), [1968] S.C.R. 560, motion to vary judgment granted, June 17, 1968.

Corcoran v. The Queen (Alta.), leave to appeal refused, January 24, 1968.

Corsi v. The Queen (Que.), [1967] Que. Q.B. 867, leave to appeal refused, February 5, 1968.

Crestile Ltd. v. Operative Plasterers and Cement Masons Internat. Assn. of the U.S. and Canada, Local No. 48 (Ont.), [1968] 2 O.R. 269, notice of discontinuance of application for leave to appeal filed, October 18, 1968.

Cunningham v. The Queen (Ont.), leave to appeal refused, March 25, 1968.

Dalmanieras v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused with costs, May 28, 1968.

Desroches v. Procureur général du Québec (Que.), [1967] Que. Q.B. 604, leave to appeal refused with costs, October 1, 1968.

De Sousa Leal et al. v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, June 24, 1968.

DeVarennes v. The Queen (Que.), [1968] Que. Q.B. 673, leave to appeal refused, April 29, 1968.

Dlugos v. The Queen (Sask.), leave to appeal refused, October 7, 1968.

Dominion Dairies Ltd. v. Minister of National Revenue (Exch.), [1966] Ex. C.R. 397, notice of discontinuance of appeal filed, March 15, 1968.

Dumont Express (1962) Limited v. Procureur général du Québec (Que.), leave to appeal refused with costs, May 27, 1968.

Elliott v. Deputy Minister of National Revenue, Customs and Excise (Ex.), [1964] Ex. C.R. 29, leave to appeal refused, April 23, 1968.

Flamand v. The Queen (Man.), leave to appeal refused, October 21, 1968.

Floor & Wall Covering Distributors Ltd. v. Minister of National Revenue (Exch.), [1967] 1 Ex. C.R. 390, notice of discontinuance of appeal filed, August 20, 1968.

Ford v. The Queen (Ont.), leave to appeal refused, February 5, 1968.

Freiman v. Attorney General of Canada (Man.), 1 D.L.R. (3d) 231, leave to appeal refused, December 2, 1968.

Fruitman & Lando v. Institute of Chartered Accountants of Ontario (Ont.), [1968] 2 O.R. 691, leave to appeal refused with costs, October 22, 1968.

Gaddie v. The Queen (Ont.), leave to appeal refused, June 24, 1968.

Gillis v. The Queen (B.C.), leave to appeal refused, October 1, 1968.

Ginn v. The Queen (Alta.), leave to appeal refused, January 24, 1968.

Gooding Lumber Co. v. Parrish & Heimbecker Ltd. (Ont.), [1968] 1 O.R. 716, leave to appeal refused with costs, April 23, 1968.

Guité v. The Queen (Que.), [1968] Que. Q.B. 927, leave to appeal refused, October 1, 1968.

Hage v. The Queen (Alta.), leave to appeal refused, October 1, 1968.

Hélie v. The Queen (Que.), [1968] Que. Q.B. 472, leave to appeal refused, March 25, 1968.

Hoogendorn v. Greening Metal Products and Screening Equipment Co. et al. (Ont.), [1968] S.C.R. 30, motion to vary judgment granted March 4, 1968.

Hovianseian v. The Queen (Ont.), leave to appeal refused, February 26, 1968.

Huff v. The Queen (Ont.), leave to appeal refused, May 1, 1968.

International Woodworkers of America, Local 1-405 et al. v. Flanders Inst. (B.C.), 66 D.L.R. (2d) 438, leave to appeal refused with costs, March 25, 1968.

Kanester v. The Queen (B.C.), leave to appeal refused, October 1, 1968.

Katz et al. v. The Queen (Man.), leave to appeal refused, January 28, 1968.

Kelcey v. Princess Garment Limited (Ont.), [1968] 2 O.R. 257, leave to appeal refused without costs, December 16, 1968.

Kelcey v. Princess Garment Limited (Ont.), [1968] 2 O.R. 257, motion to quash granted with costs, December 16, 1968.

Kolot & Holland v. The Queen (Sask.), motion for writ of habeas corpus refused, April 23, 1968.

Kozlov (Lew) Realties Ltd. v. Monarch Land Holdings, Ltd. (Que.), [1968] Que. Q.B. 462, notice of discontinuance of appeal filed, September 13, 1968.

Lake v. The Queen (Ont.), leave to appeal refused, March 4, 1968.

Laliberté v. Roy (Sask.), leave to appeal refused, June 17, 1968.

Léveillé v. Procureur général de la province de Québec (Qué.), leave to appeal refused with costs, December 20, 1968.

Life Aid Products Ltd. v. Therapeutic & Research Corp. (Ex.), leave to appeal refused with costs, September 26, 1968.

Lipskar v. The Queen (Ont.), leave to appeal refused, January 25, 1968.

Logan Industries Limited et al. v. City of Winnipeg et al. (Man.), notice of discontinuance of appeal filed, December 13, 1968.

Matteotti v. Cooper et al. (Alta.), 62 W.W.R. 460, leave to appeal refused with costs, March 18, 1968.

Mead Johnson & Co. v. G. D. Searle & Co. (Exch.), 53 R.P.C. 1, notice of discontinuance of appeal filed, May 8, 1968.

Metropolitan Toronto v. W. Harris & Co. Ltd. (Ont.), [1965] 1 O.R. 622, notice of discontinuance of appeal filed, May 15, 1968.

Midland Superior Express v. Truckers, Cartagemen, Construction & Building Material Employees et al. (Alta.), 66 D.L.R. (2d) 639, leave to appeal refused with costs, April 23, 1968.

Miller et al. v. Dowding (N.S.), notice of discontinuance of appeal filed, March 6, 1968.

McLeod v. The Queen (B.C.), leave to appeal refused, May 27, 1968.

McNiven v. The Queen (Ont.), motion for writ of habeas corpus refused, January 23, 1968.

McSween v. The Queen (Ont.), leave to appeal refused, October 7, 1968.

Neff et al. v. Imperial Flowers Limited (Ont.), leave to appeal refused with costs, November 21, 1968.

Petitpas v. Municipalité de Havre St-Pierre (Que.), [1968] Que. Q.B. 78, leave to appeal refused with costs, February 5, 1968.

Phillion v. The Queen (Ont.), notices of discontinuance of appeal and of application for leave to appeal filed November 14, 1968.

Reid v. The Queen (Ont.), leave to appeal refused, June 26, 1968.

Rogers v. The Queen (B.C.), 65 W.W.R. 193, leave to appeal refused, October 7, 1968.

Roper v. Anderson (Que.), [1967] Que. Q.B. 170, leave to appeal refused with costs, March 15, 1968.

Saunders v. The Queen (Ont.), leave to appeal refused, June 17, 1968.

Schuett v. Guarantee Investment & Mortgage (Que.), leave to appeal refused with costs, November 19, 1968.

Selas Corporation v. Ford Motor (Ex.), leave to appeal refused with costs, September 16, 1968.

Selkirk v. Clarkson et al. (Ont.), leave to appeal refused with costs, October 7, 1968.

Shatner v. Bar of the Province of Quebec et al. (Que.), leave to appeal refused with costs, December 16, 1968.

Simard et al. v. Minister of National Revenue (Exch.), [1962] C.T.C. 310, notice of discontinuance of appeal filed, February 19, 1968.

Sinette v. The Queen (Que.), leave to appeal refused, March 11, 1968.

Socony Mobil Oil Co. Inc. v. Phillips Petroleum Co. (Exch.), notice of discontinuance of appeal filed, April 11, 1968.

Stewart v. The Queen (Alta.), leave to appeal refused, March 4, 1968.

Stokes v. The Queen (Ont.), leave to appeal refused, June 24, 1968.

Syndicat des Professeurs de l'État du Québec v. Procureur général du Québec (Que.), [1968] Que. Q.B. 951, leave to appeal refused with costs, October 1, 1968.

Tahsis Company Limited v. Vancouver Tug Boat (B.C.), 65 W.W.R. 257, motion for rehearing refused with costs, November 12, 1968.

Teperman & Sons Limited v. The Queen (Ont.), [1968] 2 O.R. 174, leave to appeal refused, May 6, 1968.

Therrien v. Car & General Insurance et al. (Que.), leave to appeal refused with costs, May 21, 1968.

Thomas Supply & Equipment Co. Ltd. et al. v. Clairol Internat. Corpn. et al. (Exch.), notices of discontinuance of appeal and of cross appeal filed, August 15, 1968 and September 24, 1968.

Union Gas Company of Canada v. Attorney General of Ontario (Ont.), leave to appeal refused with costs, December 2, 1968.

Vana v. Tosta et al. (Ont.), [1968] S.C.R. 71, motion to vary judgment granted, January 29, 1968.

Vancouver Block v. Wilson (B.C.), 61 W.W.R. 648, leave to appeal refused with costs, January 23, 1968.

Winton (H.G.) Limited v. One Medical Place Limited et al. (Ont.), [1968] 2 O.R. 384, notice of discontinuance of appeal filed December 5, 1968.

Whonnock Lumber v. G. & F. Logging (B.C.), 65 W.W.R. 147, leave to appeal refused with costs, October 21, 1968.

Woods v. Minister of Manpower & Immigration (Immigration Appeal Bd.), leave to appeal refused, October 9, 1968.

Woodworth v. The Queen (B.C.), leave to appeal refused, October 21, 1968.

Yehia and Yehia v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, November 12, 1968.

Yorkshire Insurance Company Limited v. Ploughman (B.C.), [1967] I.L.R. 196, leave to appeal refused with costs, January 23, 1968.

TABLE OF JUDGMENTS AND MOTIONS

TABLE DES JUGEMENTS ET REQUÊTES

A

B

B—*Concluded—Fin*

C

C—*Continued—Suite*

C—*Concluded—Fin*

D

E

F

G

G—*Concluded—Fin*

H

I

I—*Concluded—Fin*

J

K

L

L—*Concluded—Fin*

M

M—*Continued—Suite*

M—*Concluded—Fin*

Mc

N

O

P

Q

Q—*Continued—Suite*

Q—*Concluded—Fin*

R

S

S—*Concluded—Fin*

T

T—*Concluded—Fin*

U

V

W

W—*Concluded—Fin*

Y

TABLE OF CASES CITED

TABLE DES CAUSES CITÉES

A

B

90294—2½

B—*Concluded—Fin*

D—*Concluded—Fin*

H

I

J

K

L

L—*Concluded—Fin*

P

Q

R

R—*Continued—Suite*

R—*Concluded—Fin*

W

THE SUPREME COURT OF CANADA

GENERAL ORDER

WHEREAS by virtue of Section 103 of the *Supreme Court Act*, R.S.C. 1952, c. 259, as amended by R.S.C. 1952, c. 335, and the Statutes of Canada, 1956, c. 48, the undersigned Judges of the Supreme Court of Canada are empowered to make general rules and orders as therein provided:

IT IS ORDERED that the Rules of the Supreme Court of Canada be and they are hereby amended by substituting for subsection 5 of Rule 12 the following:

> (5) Where evidence is printed in English the questions shall be preceded by the letter "Q", and the answer, by the letter "A". Where evidence is printed in French the questions shall be preceded by the letter "Q" or by the letter "D" and the answer by the letter "R". There shall be no double-spacing between an answer and the following question to the same witness by the same person. This subsection shall not apply to the evidence when it is in the form required by the Court of Appeal of the province from whence it comes and when reproduced from existing stencils, offset plates or type or by facsimile reproduction.

The said amendment as it appears above shall come into force this day.

And the Registrar of the Court is directed to take all necessary action to effect the tabling of this Order before the Houses of Parliament in the manner provided in Section 103 of the Supreme Court Act.

DATED at Ottawa, this 17th day of June, 1968.

J. R. CARTWRIGHT C.J.C.
GÉRALD FAUTEUX
R. MARTLAND
W. JUDSON
ROLAND A. RITCHIE
E. M. HALL
WISHART F. SPENCE
LOUIS-PHILIPPE PIGEON

90290—A

COUR SUPRÊME DU CANADA

ORDONNANCE GÉNÉRALE

CONSIDÉRANT que l'article 103 de la *Loi sur la Cour suprême*, chap. 259 des Statuts revisés du Canada de 1952, modifiée par le chap. 335 des Statuts revisés du Canada de 1952 et le chap. 48 des Statuts du Canada de 1956, autorise les juges soussignés de la Cour suprême du Canada à édicter des règles et ordonnances générales de la manière y prévue;

IL EST ORDONNÉ que les Règles de la Cour suprême du Canada soient modifiées en remplaçant l'alinéa 5 de la Règle 12 par ce qui suit, et elles sont, par les présentes, ainsi modifiées:

(5) Quand les témoignages sont imprimés en anglais les questions doivent être précédées de la lettre «Q» et la réponse doit être précédée de la lettre «A». Quand les témoignages sont imprimés en français les questions doivent être précédées de la lettre «Q» ou de la lettre «D», au choix, et la réponse doit être précédée de la lettre «R». Il ne doit pas exister d'interligne double entre une réponse et la question suivante posée au même témoin par la même personne. Le présent paragraphe ne s'applique pas aux témoignages imprimés dans la forme prescrite pour la Cour d'appel de la province d'origine lorsque l'impression en est faite au moyen des mêmes stencils, plaques ou caractères ou par un procédé de reproduction.

La dite modification telle que prévue ci-dessus entrera en vigueur ce jour même.

Le registraire de la Cour est chargé de prendre les mesures nécessaires pour effectuer le dépôt de la présente ordonnance devant les Chambres du Parlement, de la manière prévue par l'article 103 de la *Loi sur la Cour suprême*.

DATÉE, à Ottawa, ce 17e jour de juin 1968.

J. R. CARTWRIGHT J.C.C.
GÉRALD FAUTEUX
R. MARTLAND
W. JUDSON
ROLAND A. RITCHIE
E. M. HALL
WISHART F. SPENCE
LOUIS-PHILIPPE PIGEON

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

KILGORAN HOTELS LIMITED, ALBERT NIGHTINGALE and MORRIS NIGHTINGALE .... APPELLANTS;

AND

JOHN SAMEK, DAVID SYCH and MARY TRAVINSKI ..... RESPONDENTS.

1967

*Oct. 4, 5
Nov. 21

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Interpretation of repayment clause—Instalments to be applied in payment of interest and balance in reduction of principal—Whether "blended payments" within meaning of s. 6 of Interest Act, R.S.C. 1952, c. 156.

A mortgage granted by the appellants to the respondents for the principal sum of $315,000 provided for quarterly repayments of $7,002 on specified dates, "such instalments to be applied FIRST in payment of the interest due from time to time, calculated [quarterly, not in advance, at the rate of 6½ per cent per annum], and the BALANCE to be applied in reduction of the principal sum". On application for an order interpreting the said mortgage and declaring that no interest was chargeable thereunder, the appellants contended (1) that the payments of interest and principal as stated in the repayment clause were "blended payments" within the meaning of s. 6 of the *Interest Act*, R.S.C. 1952, c. 156; (2) that being blended payments the mortgage did not contain a statement sufficient to satisfy the requirements of said s. 6 showing the amount of such principal money and the rate of interest chargeable thereon calculated yearly or half-yearly not in advance; (3) that in consequence no interest whatever was payable under the said mortgage.

The trial judge dismissed the appellants' application, holding that the payments to be made under the mortgage were not blended. On appeal, the Court of Appeal dismissed the appeal and the appellants then appealed to this Court.

Held: The appeal should be dismissed.

The quarterly payments required to be made by the mortgagor were not blended payments of principal money and interest within the meaning of the word "blended" as used in s. 6 of the *Interest Act*. The purpose of this section is to protect a mortgagor from having concealed from him the true rate of interest which he is paying. In the case at bar there was no concealment. The amount of principal and the interest were clearly stated. On each quarterly payment date the mortgagor was required to pay interest at 6½ per cent on the principal outstanding and to pay on account of principal the difference between the amount of such payment and the sum of $7,002. It was impossible to say that this brought about the result that the payments of principal and interest were "blended", that is to say, "mixed so as to be inseparable and indistinguishable".

*PRESENT: Cartwright C.J. and Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

1967

KILGORAN HOTELS LTD *et al.* v. SAMEK *et al.*

APPEAL from an order of the Court of Appeal for Ontario, dismissing an appeal from an order of Brooke J. Appeal dismissed.

Claude R. Thomson, for the appellants.

R. N. Starr, Q.C., for the respondents.

The judgment of the Court was delivered by

HALL J.:—This appeal involves the interpretation to be placed on the repayment clause in a mortgage granted by the appellants to the respondents on March 12, 1965, covering an hotel property in Toronto for the principal sum of $315,000. The repayment clause in the mortgage reads as follows:

> PROVIDED THIS MORTGAGE TO BE VOID on payment of THREE HUNDRED & FIFTEEN THOUSAND ($315,000.00) Dollars of lawful money of Canada with interest at six & one-half (6½%) per centum per annum calculated quarter-yearly, not in advance, as well after as before maturity and both before and after default, as follows:—
>
> > The sum of THREE HUNDRED AND FIFTEEN THOUSAND DOLLARS ($315,000.00) with interest thereon at the aforesaid rate computed from the 23rd day of March 1965, shall become due and be paid in instalments of $7,002.00 each, on the 23rd day of March, June, September and December in each and every year from and including the 23rd day of June 1965 to and including the 23rd day of December 1984, (such instalments to be applied FIRST in payment of the interest due from time to time, calculated at the said rate of 6½% per centum per annum, and the BALANCE to be applied in reduction of the principal sum) and the BALANCE of the said principal sum of THREE HUNDRED AND FIFTEEN THOUSAND DOLLARS with interest thereon as aforesaid shall become due and payable on the 23rd day of March 1985.

The appellants contend: (1) that the payments of interest and principal as stated in this clause are "blended payments" within the meaning of s. 6 of the *Interest Act,* R.S.C. 1952, c. 156; (2) that being blended payments the mortgage does not contain a statement sufficient to satisfy the requirements of said s. 6 showing the amount of such principal money and the rate of interest chargeable thereon calculated yearly or half-yearly not in advance; (3) that in consequence no interest whatever is payable under the said mortgage.

Section 6 of the *Interest Act* reads:

> Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on

any plan under which the payments of principal money and interest are blended, or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The learned trial judge, Brooke J., dismissed the appellants' application for a declaration that no interest was payable, holding that the payments to be made under the mortgage in question were not blended payments. He did not deal with appellants' contention #2 above. The Court of Appeal for Ontario, after hearing argument on the blended payment issue only, dismissed the appeal without giving reasons.

I would dismiss the appeal on the ground that the quarterly payments required to be made by the mortgagor are not blended payments of principal money and interest within the meaning of the word "blended" as used in s. 6 of the *Interest Act*. Section 2 of that Act reads as follows:

2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount that is agreed upon.

The rate of interest agreed upon as set out in the mortgage in this case is 6½ per cent payable quarterly.

The purpose of s. 6 of the *Interest Act* is to protect a mortgagor from having concealed from him the true rate of interest which he is paying.

In the case at bar there is no concealment. The amount of principal and the rate of interest are clearly stated. On each quarterly payment date the mortgagor is required to pay interest at 6½ per cent on the principal outstanding and to pay on account of principal the difference between the amount of such interest payment and the sum of $7,002. This is the plain effect of the repayment clause; it appears to me impossible to say that this brings about the result that the payments of principal and interest are "blended", that is to say, "mixed so as to be inseparable and indistinguishable". They are distinguished by the very wording of the clause:

Such instalments to be applied first to payment of the interest due from time to time calculated at the said rate of 6½ per centum per annum and the balance to be applied in reduction of the principal sum.

1967

KILGORAN HOTELS LTD. *et al.* *v.* SAMEK *et al.*

Hall J.

The arithmetical calculation involved on each payment date could scarcely be simpler.

Having reached the conclusion that the Courts below correctly held that this is not a case in which the mortgage provides for blended payments of principal and interest within the meaning of s. 6 of the *Interest Act*, I find it unnecessary to consider the question whether had the mortgage provided for blended payments it contained a statement sufficient to satisfy the requirements of s. 6, that is to say, showing the amount of principal money and the rate of interest chargeable thereon calculated yearly or half-yearly not in advance.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: Claude R. Thomson, Toronto.

Solicitors for the respondents: Starr, Allen & Weekes, Toronto.

1967

*Juin 12
Oct. 3

J. ÉMILE GROULX .....APPELANT;

ET

LE MINISTRE DU REVENU NATIONAL ....INTIMÉ.

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA

Revenu—Impôt sur le revenu—Intérêts et capital réunis—Vente d'une ferme par versements ne portant pas intérêts—Versements constituent-ils une fusion de capital et d'intérêts—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 7(1).

En 1956, l'appelant a vendu une grande partie de sa ferme pour un prix de $395,000, dont $85,000 comptant et le solde devant être payé par versements s'échelonnant durant une période de huit ans. Ce solde ne portait pas d'intérêts à moins de retard dans les versements. Le Ministre a considéré les versements reçus en 1958 et 1959 comme étant une fusion du capital et des intérêts dans le sens de l'art. 7(1) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148. La Cour de l'Échiquier a jugé—la question n'étant pas contestée—qu'il était contraire à la règle générale de ne pas exiger d'intérêts dans un tel cas, et aussi que la preuve laissait croire que la propriété avait été vendue à un prix supérieur à sa valeur marchande. Le juge au procès a donc conclu que les dispositions de l'art. 7(1) de la Loi devaient être appliquées aux versements. Le contribuable en appela devant cette Cour.

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*CORAM: Les Juges Fauteux, Abbott, Ritchie, Hall et Spence.

Arrêt: L'appel doit être rejeté.

La preuve justifiait les conclusions auxquelles le juge de première instance en était arrivé sur les faits.

Taxation—Income tax—Interest and capital combined—Sale of farm—Balance of price to be paid by instalments without interest—Whether instalments constituted combined payments of capital and interests—Income Tax Act, R.S.C. 1952, c. 148, s. 7(1).

In 1956, the appellant sold part of his farm for a sum of $395,000, of which $85,000 was to be paid in cash and the remainder by instalments over the next eight years. These instalments did not bear any interests except in the case of default. The Minister considered the instalments received in 1958 and 1959 as being combined payments of capital and interests within the meaning of s. 7(1) of the *Income Tax Act*, R.S.C. 1952, c. 148. The Exchequer Court held—the question being admitted—that it went against the general rule not to stipulate for interests in such a case, and also that the evidence showed that the property had been sold at a price beyond its fair market value. The trial judge concluded, therefore, that the provisions of s. 7(1) of the Act applied to these instalments. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

The evidence fully justified the conclusions reached by the trial judge on the facts.

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

APPEL d'un jugement du Juge Kearney de la Cour de l'Échiquier du Canada[1], renversant une décision de la Commission d'appel d'impôt sur le revenu. Appel rejeté.

Alfred Tourigny, c.r., et *Gilles Renaud*, pour l'appelant.

Alban Garon et *Pierre Guilbault*, pour l'intimé.

Le jugement de la Cour fut rendu par

LE JUGE HALL:—L'appelant en appelle du jugement de la Cour de l'Échiquier du Canada[1] prononcé le septième jour de mars 1966, par l'honorable Juge Kearney maintenant l'appel de l'intimé, le Ministre du Revenu national, de la décision de la Commission d'Appel de l'Impôt concernant

[1] [1966] R.C. de l'É. 447, [1966] C.T.C. 115, 66 D.T.C. 5126.

1967

GROULX v. MINISTRE DU REVENU NATIONAL

Le juge Hall

les cotisations établies par le Ministre pour les années d'imposition 1958 et 1959 de l'appelant. La seule question en litige dans cet appel est celle de savoir si les sommes de $15,000 et de $19,136.20 reçues par l'appelant en 1958 et 1959 respectivement, suivant les termes d'un contrat de vente peuvent raisonnablement être considérées comme ayant été reçues par l'appelant à titre d'intérêt conformément aux dispositions de l'art. 7(1) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148.

L'appelant était propriétaire d'une ferme, située dans la paroisse de St-Laurent, depuis une vingtaine d'années. Il a habité, et habitait encore au moment de la vente, une maison située sur la ferme, et il a exploité cette ferme pendant plusieurs années et ce jusqu'en 1952.

De 1950 à 1956, l'appelant fut approché par différentes personnes pour vendre sa ferme mais refusa toutes ces offres car il ne voulait pas aux conditions qui lui étaient faites se départir de cette ferme qu'il avait exploitée si longtemps. Or, vers le 20 juillet 1956, alors que la valeur des terres était à la hausse, l'appelant fut approché par une compagnie du nom de Thorndale Investment Corporation avec laquelle il traitait à distance, qui lui présenta une offre d'achat au montant de $350,000. Il refusa l'offre encore une fois, déclarant qu'il voulait $450,000 pour sa ferme.

Dans les deux jours qui suivirent, des négociations intenses eurent lieu entre l'appelant et Thorndale Investment Corporation. En effet, l'appelant a commencé par demander $450,000 alors que Thorndale Investment Corporation offrait $350,000. Après discussion, l'appelant diminua alors son prix à $400,000; mais ce prix fut jugé trop élevé par l'acheteur. L'appelant consentit enfin une réduction additionnelle de $5,000 qui ne fut pas considérée comme suffisante par la compagnie acheteuse. L'appelant a donc décidé de laisser tomber l'intérêt afin de conclure la vente.

Un contrat notarié fut signé le 19 juillet 1956 par lequel M. Groulx vendit une grande partie de sa ferme soit une superficie totale de 2,256,859 pieds carrés à Thorndale Investment Corporation pour un prix de $395,000 soit $0.17742 le pied carré, dont $85,000 comptant et le solde de $310,000 payable avant le 1er juin 1964, par versements annuels commençant en 1958. Le solde ne portait pas d'intérêt à moins de retard dans les versements et alors l'intérêt était de 6 pour cent.

Les principales clauses du contrat de vente pertinentes au litige sont les suivantes:

(a) The present Sale is thus made for the price or sum of Three hundred and ninety-five thousand dollars ($395,000), on account whereof the Vendor acknowledges to have received from the Purchaser the sum of Eighty-five thousand dollars ($85,000) whereof quit for so much.

The balance of price, namely the sum of Three hundred and ten thousand dollars ($310,000) the Purchaser obliges itself to pay to the Vendor as follows:—

Fifteen thousand dollars ($15,000) on the first day of June, nineteen hundred and fifty-eight;

Twenty-five thousand dollars ($25,000) on the first day of June, nineteen hundred and fifty-nine;

Fifty thousand dollars ($50,000) on the first day of June, nineteen hundred and sixty;

Fifty thousand dollars ($50,000) on the first day of June, nineteen hundred and sixty-one;

Fifty thousand dollars ($50,000) on the first day of June, nineteen hundred and sixty-two;

Fifty thousand dollars ($50,000) on the first day of June, nineteen hundred and sixty-three; and

Seventy thousand dollars ($70,000) on the first day of June, nineteen hundred and sixty-four.

(b) The purchaser shall have the right to increase the amount of any payment or to make payments on account or pay the entire balance at any time.

(c) The said balance of price shall not bear any interest if the said instalments are paid on or before their due dates, but any instalment not paid on its due date shall bear interest at the rate of six per centum (6%) per annum from such due date and compounded half-yearly but not in advance until paid.

(d) Should however, the Purchaser pay any instalment above set forth before its due date, it will be entitled to a discount calculated at the rate of five per cent (5%) per annum from the date upon which payment is made to the respective due date.

Dans ses motifs de jugement, le savant juge de la Cour de l'Échiquier a dit:

. . . nous avons ici à traiter plus particulièrement de deux questions de faits. Premièrement, le Ministre était-il justifiable de prétendre que, si le contribuable avait suivi en l'occurrence une pratique bien reconnue dans le monde des affaires, la balance de $310,000, payable par versements, aurait porté intérêt au taux de 5% ou 6% jusqu'à ce que cette dette fut entièrement payée?

La réponse affirmative à cette question ne fait aucun doute, puisqu'elle n'est pas contestée. Au surplus, je suis d'opinion que la preuve établie par l'appelant démontre que c'est presque toujours la pratique dans les cas analogues pour toute balance de prix garantie par hypothèque, de porter intérêt à 5%.

1967

GROULX v. MINISTRE DU REVENU NATIONAL

Le juge Hall

Par voie de défense, l'intimé prétend que, nonobstant l'admission qu'en règle générale les taux d'intérêt ci-haut mentionnés s'imposent, il s'agit ici d'un cas d'espèce comportant une circonstance spéciale et que, par conséquent, elle mérite considération exceptionnelle. A l'appui de cette prétention, l'intimé déclare qu'il n'a pas suivi la coutume de charger l'intérêt parce que sa ferme ne produisait rien.

La seconde question à résoudre est celle de savoir si la preuve laisse croire que la propriété a été vendue à un prix supérieur à sa valeur marchande.

Le procureur de l'appelant a admis que la méthode employée par M. Lemire pour établir que la propriété a été vendue à une valeur supérieure à sa valeur marchande lui paraît peut-être boiteuse à certains points de vue, parce qu'il a procédé sur la base de son expérience et ne connaissait pas la définition «valeur marchande» donnée par la Cour Suprême. Toutefois, il a soumis que ceci ne voulait pas dire que ses évaluations étaient erronées. En tout cas, les directives indiquées par la Cour Suprême ne m'interdisent pas d'analyser, au meilleur de mes capacités, le témoignage de M. Lemire afin d'en déduire des indices valables de la valeur réelle de cette propriété. De plus, je considère dans les circonstances, que c'est notre devoir d'agir ainsi.

En appel d'un jugement rendu par la Cour Suprême du Nouveau-Brunswick dans *The King* vs *Jones,* (1950) S.C.R. 220, 289, où il s'agissait de taxation et du principe applicable à l'évaluation de certaines terres boisées, dans les notes de l'honorable Juge Rand, parlant pour la Cour, on trouve, entre autres, les observations suivantes:

> «The figure of $5 an acre was the average price estimated by the assessors from their local knowledge of sales of small holdings, such as 100 acre lots. It was said that these sales ran from $3 to $8 an acre, and that $5 was, therefore a fair valuation. In this the assessors were undoubtedly wrong. Each taxpayer is entitled to have the value of his property separately ascertained. The difference in the prices used might possibly have arisen from differences in time and market conditions rather than in real marketable worth, in which case the propriety of the amount would depend upon equivalence in value, in the absence of which throughout the parish an average figure could not be used. But such a figure is obviously to be distinguished from an average valuation of a large tract of land belonging to one taxpayer and exhibiting wide variations in the value of its several parts.
>
> But the Judge in appeal considered the assessment *de novo* in all its aspects. Rejecting the principle in the inadequate form urged by the company, he properly construed the Statute to provide for valuation on a market basis, as between a willing seller and a willing purchaser, each exercising a reasonable judgment, having regard to all elements and potentialities of value as well as of all risks, and reducing them all to a present worth: *Montreal Island Power Co.* vs *The Town of Laval des Rapides,* (1935) S.C.R. 304.
>
> * * *
>
> He found that $5 was not in excess of the fair value of the land.»

Il n'est pas contesté que la question qui se pose est celle de déterminer la valeur marchande ou réelle de la propriété.

* * *

Je suis d'abord d'opinion que l'appelant a au moins établi une cause *prima facie* que la propriété a été vendue à un prix supérieur à sa valeur marchande et que l'intimé n'a pas réussi, comme il lui incombait, à prouver le contraire.

* * *

A mon avis, l'intimé n'était pas un fermier ordinaire. Comme il appert de ses déclarations de revenus imposables transmises à cette Cour, son revenu taxable pour l'année 1958 excédait $12,500, alors que pour 1959 il était de $15,000. Il recevait une partie de ces montants à titre de salaire d'une compagnie dont il était le président, mais la majeure partie venait de ses investissements. Son témoignage révèle que les transactions immobilières ne lui étaient pas étrangères. Quant à sa déclaration de n'avoir jamais songé à la taxe évitée en renonçant à l'intérêt, un enfant pourrait calculer que l'intérêt à 5% sur une balance de prix de $310,000 excédait $15,000 par année.

Un contribuable aussi entraîné aux affaires que l'intimé, devrait apprécier d'emblée l'avantage pécuniaire de ne pas majorer du double son revenu taxable.

La loi sur l'intérêt, S.R. 1952, vol. III, c. 156, s. 2, édicte que:

> «Sauf disposition contraire de la présente loi ou de toute autre loi du Parlement du Canada, une personne peut stipuler, allouer et exiger, dans tout contrat ou convention quelconque, le taux d'intérêt ou d'escompte qui est arrêté d'un commun accord.»

L'intimé, je crois, a révélé qu'en sacrifiant l'intérêt son intention avait été de s'assurer un prix de $395,000 en capital—et son témoignage ne pouvait guère créer un état de choses caractérisant mieux une capitalisation des intérêts.

On peut ajouter que des circonstances supplémentaires—nommément le fait que c'est l'intimé lui-même qui a proposé le non paiement d'intérêt, la faiblesse des raisons pouvant motiver ce geste et les réponses indéfinies données par M. Feinstein à la question de savoir s'il aurait payé le prix de $395,000 n'eut été le fait qu'il se trouvait dispensé de payer l'intérêt—militent contre l'intimé. Je crois devoir conclure alors qu'il y a suffisament de preuve pour justifier les cotisations dont il s'agit.

La preuve justifie pleinement les conclusions auxquelles l'honorable Juge Kearney en est arrivé quant aux faits. L'appel est rejeté et le jugement de la Cour de l'Échiquier est confirmé avec dépens contre l'appelant.

Appel rejeté avec dépens.

Procureurs de l'appelant: Lemay, Poulin & Corbeil, Montréal.

Procureur de l'intimé: E. S. McLatchy, Ottawa.

1967
*May 3, 4
Oct. 3

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

AND

BENABY REALTIES LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Expropriation of land resulting in taxable profit to taxpayer—Appropriate year of assessment—Expropriation Act, R.S.C. 1952, c. 106, s. 23—Income Tax Act, R.S.C. 1952, c. 148, s. 85B (1)(b).

The respondent, conducting its business on the accrual basis, made a profit when the Crown expropriated part of its land. The expropriation took place during the respondent's 1954 taxation year, but an agreement fixing the amount of compensation and the payment of that compensation took place only in the respondent's 1955 taxation year. The respondent argued that, by virtue of s. 23 of the *Expropriation Act*, R.S.C. 1952, c. 106, it had the right to receive compensation from the moment of expropriation, that the compensation was therefore "receivable" in the taxation year 1954 within the meaning of s. 85B.(1)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148, and was required to be accounted for as income for that year. The Minister contended that the taxpayer's profit did not form part of its income for the year 1954 because it was not received in that year and because it did not become an amount receivable in that year. The Exchequer Court set aside the Minister's assessment and held that the profit was taxable and should be assessed in the respondent's 1954 taxation year. The Minister appealed to this Court, where the appeal was argued on the assumption that the profit was taxable.

Held: The Minister's appeal should be allowed.

It is true that at the moment of expropriation the respondent acquired a right to receive compensation in place of the land, but, in the absence of a binding agreement between the parties or of a judgment fixing the compensation, the respondent had no more than a right to claim compensation and there was nothing which could be taken into account as an amount receivable due to the expropriation. Until the amount was fixed either by arbitration or agreement, there could be no amount receivable under s. 85B.(1)(*b*) of the *Income Tax Act*.

Revenu—Impôt sur le revenu—Expropriation d'une terre—Contribuable réalisant un profit imposable—Année d'imposition—Loi sur les expropriations, S.R.C. 1952, c. 106, art. 23—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 85B (1)(b).

La compagnie intimée, qui faisait affaires en vertu du principe de comptabilité d'exercice, a réalisé un profit lorsque sa terre fut expropriée par la Couronne. L'expropriation a eu lieu durant l'année d'imposition 1954 de l'intimée, mais une entente établissant le montant de l'indemnité et le paiement de cette indemnité ont eu lieu

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

durant l'année d'imposition 1955 de l'intimée. L'intimée a soutenu que, en vertu de l'art. 23 de la *Loi sur les expropriations*, S.R.C. 1952, c. 106, elle avait droit de recevoir une indemnité du jour de l'expropriation, que l'indemnité était en conséquence «recevable» durant l'année d'imposition 1954 dans le sens de l'art. 85B.(1)(*b*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, et devait être considérée comme étant un revenu pour cette année. Le Ministre a soutenu que le profit réalisé par le contribuable ne faisait pas partie de son revenu pour l'année 1954 parce qu'il n'avait pas été reçu durant cette année et parce qu'il n'était pas devenu un montant recevable durant cette année. La Cour de l'Échiquier a mis de côté la cotisation du Ministre et a jugé que le profit était imposable et qu'il devait être cotisé dans l'année d'imposition 1954 de l'intimée. Le Ministre en appela devant cette Cour. A l'audition, il fut assumé que le profit était imposable.

Arrêt: L'appel du Ministre doit être maintenu.

Il est vrai que l'intimée avait acquis, au moment de l'expropriation, le droit de recevoir une indemnité pour tenir lieu du terrain, mais, en l'absence d'une entente irrévocable entre les parties ou d'un jugement établissant l'indemnité, l'intimée n'avait pas plus qu'un droit de réclamer une indemnité et il n'y avait rien qui pouvait être considéré comme étant un montant recevable, occasionné par l'expropriation. Tant que le montant n'était pas établi soit par arbitrage ou par une entente, il n'y avait aucun montant recevable sous l'art. 85B.(1)(*b*) de la *Loi de l'impôt sur le revenu.*

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

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

Paul Ollivier, Q.C., for the appellant.

N. N. Genser, Q.C., Philip F. Vineberg, Q.C., and *Sidney Phillips, Q.C.*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The sole question in this appeal is whether a profit of $263,864.03 was properly assessed in the taxation year 1955. The judgment of the Exchequer Court[1] holds that this profit must be excluded in assessing the profits for the taxation year 1955 on the ground that it should have been assessed in the taxation year 1954.

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[1] [1965] C.T.C. 273, 65 D.T.C. 5161.

1967

MINISTER OF NATIONAL REVENUE v. BENABY REALTIES LTD.

Judson J.

The facts are simple. On January 7, 1954, the Crown in right of Canada expropriated two parcels of land belonging to the respondent company, Benaby Realties Limited, on the Island of Montreal. The company's 1954 fiscal year ended on April 30, 1954. On November 9, 1954, as a result of an agreement fixing the amount of compensation, the Crown paid the sum of $371,260. This happened during the company's 1955 fiscal year, which ended on April 30, 1955. The profit of $263,864.03 is the difference between the cost of the land and the amount of compensation.

It was argued in the Exchequer Court that the profit was not taxable but the judgment of the Exchequer Court was against this and the appeal in this Court was argued on the assumption that this was a taxable profit. The only issue was the appropriate year of assessment.

The taxpayer's argument in this Court is that from the moment of expropriation, the taxpayer no longer had its land but had instead the right to receive compensation. This is set out in s. 23 of the *Expropriation Act*, which reads:

> The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in Her Majesty.

The taxpayer conducted its business on the accrual basis unders s. 85B.(1)(*b*), which reads:

> 85B.(1) In computing the income of a taxpayer for a taxation year,
> (*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year.

The Crown's argument is that the general rule under the *Income Tax Act* is that taxes are payable on income actually received by the taxpayer during the taxation period; that there is an exception in the case of trade receipts under s. 85B.(1)(*b*), which include not only actual receipts but amounts which have become receivable in

the year; that the taxpayer's profit from this expropriation did not form part of its income for the year 1954 because it was not received in that year and because it did not become an amount receivable in that year.

In my opinion, the Minister's submission is sound. It is true that at the moment of expropriation the taxpayer acquired a right to receive compensation in place of the land but in the absence of a binding agreement between the parties or of a judgment fixing the compensation, the owner had no more than a right to claim compensation and there is nothing which can be taken into account as an amount receivable due to the expropriation.

The Exchequer Court founded its judgment on *Newcastle Breweries v. Inland Revenue Commissioners*[2], which was a case involving the government's requisitioning of a supply of rum in 1918. The company accepted the government's price without prejudice to its right to claim a larger amount. This was subsequently granted under legislation enacted in 1920. This additional sum was received in 1922. The Inland Revenue then reopened the company's 1918 trading account to include this additional sum and the Courts held throughout that this could be done. What happened was that in 1918 there was a compulsory sale at a fixed price with an award of additional compensation under statutory authority three or four years later.

The application of this decision to the *Canadian Income Tax Act* is questionable. This decision implies that accounts can be left open until the profits resulting from a certain transaction have been ascertained and that accounts for a period during which a transaction took place can be reopened once the profits have been ascertained.

There can be no objection to this on the properly framed legislation, but the *Canadian Income Tax Act* makes no provision for doing this. For income tax purposes, accounts cannot be left open until the profits have been finally determined. Taxpayers are required to file a return of income for each taxation year (s. 44(1)) and the Minister must "with all due despatch" examine each return of income and assess the tax for the taxation year. However, in many cases, compensation payable under the *Expropriation Act* is not determined until more than four years after

[2] (1927), 12 Tax Cas. 927.

1967

MINISTER OF NATIONAL REVENUE v. BENABY REALTIES LTD.

Judson J.

the expropriation has taken place and, in many of these cases, the Minister would be precluded from amending the original assessment because of the four-year limitation for the assessment (s. 46(4)).

My opinion is that the *Canadian Income Tax Act* requires that profits be taken into account or assessed in the year in which the amount is ascertained.

Try v. Johnson[3] is much closer to the point in issue here. The claim was for compensation under legislation which imposed restrictions on "Ribbon Development". When the case reached the Court of Appeal, the amount of compensation was admitted to be a trade receipt. The argument in that Court was directed to the appropriate year of assessment. The judgment was that the right of the frontager to compensation under the *Ribbon Development Act* contained so many elements of uncertainty both as to the right itself and the quantum that it could not be regarded as a trade receipt for the purpose of ascertaining the appropriate year of assessment until the amount was fixed either by an arbitration award or by agreement.

Under the *Canadian Expropriation Act*, there is no doubt or uncertainty as to the right to compensation, but I do adopt the principle that there could be no amount receivable under s. 85B.(1)(*b*) until the amount was fixed either by arbitration or agreement.

The case of *Minister of National Revenue v. Lechter*[4] does not support the taxpayer's submission. In that case, the expropriation was in the 1954 fiscal year; the settlement was in the 1955 fiscal year and, according to its terms, payment should have been made within 60 days. For some reason the Treasury Board authorization was 7 months later and the actual payment 10 months later, both events falling within the 1956 fiscal year.

The judgment says no more than this, that the 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. The governing factor was the settlement made in the 1955 taxation year.

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[3] [1946] 1 All E.R. 532.

[4] [1966] S.C.R. 655, [1966] C.T.C. 434, 66 D.T.C. 5300, 58 D.L.R. (2d) 481.

I would therefore allow the appeal, set aside the judgment of the Exchequer Court and restore the assessment of the Minister, with costs in this Court and in the Exchequer Court.

Appeal allowed with costs.

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

Solicitors for the respondent: Genser, Phillips and Friedman, Montreal.

1967

MINISTER OF NATIONAL REVENUE v. BENABY REALTIES LTD.

Judson J.

BRITISH COLUMBIA POWER CORPORATION, LIMITED ... APPELLANT;

AND

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

1967

*Mar. 16, 17

Oct. 3

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductions—Legal expenses—Litigation successfully attacking validity of expropriation legislation—Whether a deductible expense—Communications by corporation to shareholders—Whether costs a deductible expense—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(a), (b).

The appellant's principal capital asset consisted of all the issued common shares of the British Columbia Electric Company Limited. When the British Columbia government expropriated those shares, the appellant commenced litigation in order to obtain a greater compensation. The action was successful and the appellant obtained a higher price for the shares. In computing its income for the years 1962 and 1963, the appellant sought to deduct its outlays for the litigation costs on the ground that they fell within the exception in s. 12(1)(*a*) of the *Income Tax Act*, R.S.C. 1952, c. 148, and not within para. (*b*) thereof. The appellant sought also to deduct from its income for those two years the costs of communications to its shareholders, the purpose of which was to inform them of the expropriation and of ensuing developments occurring form time to time. The Exchequer Court upheld the Minister's assessment and ruled that the appellant was not entitled to deduct the litigation costs or the costs of communications to the shareholders. The taxpayer appealed to this Court.

Held: The appeal should be allowed in part.

The litigation outlays fell within s. 12(1)(*b*) of the *Income Tax Act* and were therefore not deductible. The case was governed by the judgment in *M.N.R. v. Dominion Natural Gas Co. Ltd.*, [1941] S.C.R. 19, where the proposition was established that legal expense incurred in order to preserve an existing capital asset was a payment on account of capital. In the present case, the action was brought and the legal expenses incurred in order to preserve the appellant's title to the shares. Such a payment falls within s. 12(1)(*b*) of the Act.

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

1967

B.C. POWER CORPN., LTD. v. MINISTER OF NATIONAL REVENUE

As to the costs of communications to the shareholders, the reasonable furnishing of information from time to time to shareholders by a company respecting its affairs is properly a part of the carrying on of the company's business of earning income and is an expense properly deductible.

Revenu—Impôt sur le revenu—Déductions—Dépenses légales—Procès attaquant avec succès la validité d'une législation d'expropriation—Dépense est-elle déductible—Communications par une compagnie à ses actionnaires—Le coût est-il une dépense déductible—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(a), (b).

L'actif principal de la compagnie appelante se composait de toutes les actions communes émises de la British Columbia Electric Company Limited. Lorsque le gouvernement de la Colombie-Britannique a exproprié ces actions, l'appelante a commencé des procédures devant les tribunaux dans le but d'obtenir une plus grosse indemnité. Les procédures ont été couronnées de succès et l'appelante a obtenu un plus haut prix pour les actions. En calculant son revenu pour les années 1962 et 1963, l'appelante a tenté de déduire les sommes qu'elle avait déboursées en frais de procès pour le motif que ces sommes tombaient dans l'exception de l'art. 12(1)(*a*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, et non pas sous le para. (*b*) de cet article. L'appelante a tenté aussi de déduire de son revenu pour ces deux années, le coût des communications à ses actionnaires, dont le but était de leur annoncer l'expropriation et de les tenir, de temps à autre, au courant des développements subséquents. La Cour de l'Échiquier a maintenu la cotisation du Ministre et a jugé que l'appelante n'avait pas droit de déduire les frais de procès ni le coût des communications aux actionnaires. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être maintenu en partie.

Les sommes déboursées en frais de procès tombaient sous l'art. 12(1)(*b*) de la *Loi de l'impôt sur le revenu* et en conséquence n'étaient pas déductibles. Cette cause était gouvernée par le jugement dans *M.N.R. v. Dominion Natural Gas Co. Ltd.*, [1941] R.C.S. 19, où il a été établi qu'une dépense légale faite en vue de conserver un actif en capital était un paiement à compte de capital. Dans le cas présent, les procédures légales ont été instituées et les dépenses légales ont été faites en vue de conserver le droit de l'appelante aux actions. Un tel paiement tombe sous l'art. 12(1)(*b*) de la Loi.

Quant au coût des communications aux actionnaires, une mise au courant raisonnable, de temps à autre, par une compagnie à ses actionnaires relativement aux affaires de cette compagnie fait, à bon droit, partie de l'exercice des affaires de la compagnie de gagner un revenu et est une dépense qui est déductible.

APPEL d'un jugement du Juge adjoint Sheppard de la Cour de l'Échiquier du Canada[1], maintenant la cotisation du Ministre. Appel maintenu en partie.

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[1] [1967] 1 Ex. C.R. 109, [1966] C.T.C. 454, 66 D.T.C. 5310.

1967

B.C. POWER CORPN., LTD. v. MINISTER OF NATIONAL REVENUE

APPEAL from a judgment of Sheppard, Deputy Judge of the Exchequer Court of Canada[1], upholding the Minister's assessment. Appeal allowed in part.

D. McK. Brown, Q.C., H. H. Stikeman, Q.C., and *D. M. M. Goldie,* for the appellant.

P. M. Thorsteinsson and *D. G. H. Bowman,* for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Exchequer Court[1] which decided that the appellant was not entitled, in computing, for the purposes of tax, its income for the years 1962 and 1963, to deduct certain litigation costs, or to deduct certain expenses incurred for communications to its shareholders. The amounts involved for litigation costs were $742,623.89 in the year 1962 and $414,199.81 in 1963. The expense for communications to shareholders was $6,020.31 in 1962 and $3,126.27 in 1963.

The appellant was incorporated under the *Companies Act of Canada* on May 19, 1928, and was empowered to own, control and manage companies and enterprises in the public utility field. It owned all of the issued common shares of British Columbia Electric Company Limited, hereinafter referred to as "the Electric Company", a public utility company incorporated under the *Companies Act of British Columbia* in 1926. The income of the appellant was mainly derived from dividends paid to it by the Electric Company.

With effect on August 1, 1961, the British Columbia Legislature enacted the *Power Development Act, 1961.* This statute, *inter alia,* provided that:

1. Each share, issued or unissued, of the capital stock of the Electric Company vested in Her Majesty the Queen, in right of the Province.
2. The term of office of each director of the Electric Company holding office when the Act came into force was terminated.
3. The Lieutenant-Governor in Council should appoint the directors of the Electric Company.

[1] [1967] 1 Ex. C.R. 109, [1966] C.T.C. 454, 66 D.T.C. 5310.

1967

B.C. POWER CORPN., LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

4. Holders of common shares of the Electric Company at the time the Act came into force were to receive as compensation for their shares $110,985,045.

5. Upon the request of the appellant, the Electric Company would purchase all the undertaking and property of the appellant at a price equivalent to $38.00 for each issued share of the appellant's capital stock less the amount paid for the Electric Company shares, referred to in paragraph 4 above. This worked out at approximately $68,500,000 for assets worth about $11,000,000.

Directors of the Electric Company were subsequently appointed by the Lieutenant-Governor in Council, who took possession of the undertaking and who paid to the appellant the sum of $110,985,045.

On September 21, 1961, the appellant submitted for fiat a petition of right asking that full and complete compensation for the Electric Company shares be determined by the Court. This was refused by the Provincial Secretary.

On November 13, 1961, the appellant commenced an action against the Attorney-General of British Columbia, the Electric Company and others, and asked for a declaration that the Act was ultra vires of the British Columbia Legislature.

In December 1961, the appellant reduced its capital and paid to its shareholders $18.70 per share, in a total amount of $89,236,605.70.

On March 29, 1962, two further Acts were passed. The *Power Development Act, 1961, Amendment Act, 1962,* increased the compensation for the Electric Company shares to $171,833,052. It vacated the appellant's option for the sale of its undertaking and property. The sum of $60,848,007 was thereafter paid to the appellant.

The *British Columbia Hydro and Power Authority Act* amalgamated the Electric Company and the British Columbia Power Commission under the name of British Columbia Hydro and Power Authority.

The appellant amended its pleadings to allege the invalidity of these two statutes.

The trial of the action commenced on May 1, 1962, and was completed on February 25, 1963. Chief Justice Lett delivered judgment on July 29, 1963, holding that all three

statutes were *ultra vires* of the British Columbia Legislature. A considerable part of the 144 day trial was occupied with evidence as to the value of the Electric Company shares, and a value was determined in the judgment of $192,828,125.

On the day the judgment was delivered, the appellant informed the Premier of British Columbia, by telegram, that its principal concern was to obtain fair compensation. He replied on August 1, 1963, accepting the amount found due by the Chief Justice. By agreement a reference was made to the Chief Justice to determine what amount should be paid to the appellant for its shares in the Electric Company. He fixed a figure of $197,114,358 and the appellant, on September 27, 1963, sold those shares to Her Majesty in right of the Province of British Columbia, for that amount, crediting the two payments of $110,985,045 and $60,848,007 already received.

On November 1, 1963, the shareholders of the appellant resolved to wind up the company, and on November 6, 1963, an order was made appointing a liquidator.

The first issue on this appeal is as to whether the appellant, in the determination of its income tax, is legally entitled to deduct its outlays for the litigation costs. Its right to do so depends upon whether it can establish that such outlays fall within the exception to para. (*a*) and do not fall within para. (*b*) of s. 12(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, 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 a property or 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.

I have reached the conclusion that the outlays in question do fall within s. 12(1)(*b*) and for that reason are not deductible. This makes it unnecessary to determine whether or not, apart from s. 12(1)(*b*), they fall within the exception to s. 12(1)(*a*).

In my opinion this case is governed by the judgment of this Court in *The Minister of National Revenue v. Dominion Natural Gas Company Limited*[2].

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[2] [1941] S.C.R. 19, [1940] 4 D.L.R. 657.

1967

B.C. POWER CORPN., LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

The question in that case was as to whether Dominion Natural Gas Company Limited could properly deduct from its income legal expenses incurred by it for litigation, concerning its franchise rights in the City of Hamilton. The case ultimately reached the Privy Council: *United Gas and Fuel Company of Hamilton, Limited v. Dominion Natural Gas Company Limited*[3]. In brief, in 1904, Dominion had been granted a franchise by the Township of Barton enabling it to lay its pipe lines and distribute gas in the township. In the same year, United Company had been granted a franchise from the City of Hamilton. Later, portions of the township became annexed to the City of Hamilton. The United Company, which in 1931 had been granted an exclusive franchise in the city, sued Dominion for a declaration that Dominion was wrongfully maintaining its mains in the streets of the city, an injunction to restrain such use of the streets and the distribution of gas in Hamilton, and a mandatory injunction to compel the removal of its mains from such streets.

The position in which Dominion was then placed was that it faced a challenge to its legal right to continue the use of its mains and to distribute gas in the Hamilton area. It defended the action successfully, and incurred legal expense in so doing.

It was held in this Court that those expenses were not deductible for income tax purposes. Chief Justice Duff and Davis J. held that they did not fall within the category of "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within s. 6(*a*) of the *Income War Tax Act*, R.S.C. 1927, c. 97, as they were not working expenses incurred in the process of earning "the income". They also held that the expense was a capital expense, incurred "once and for all" and for the purpose of procuring "the advantage of an enduring benefit" within the sense of the language of Lord Cave in *British Insulated and Helsby Cables Ltd. v. Atherton*[4]. That well known statement is as follows:

> But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

[3] [1934] A.C. 435, 3 D.L.R. 529.

[4] [1926] A.C. 205 at 213.

Kerwin J. (as he then was) and Hudson J., at p. 31, held that the legal costs were a "payment on account of capital" (quoting the words of s. 6(1)(*b*) of the *Income War Tax Act*) because "it was made (to use Viscount Cave's words) with a view of preserving an asset or advantage for the enduring benefit of a trade".

Crockett J. held that the expenses were excluded under s. 6(1)(*a*).

Referring to this case, in his judgment in *The Minister of National Revenue v. The Kellogg Company of Canada Limited*[5], Chief Justice Duff, at p. 60, said:

> It was held by this Court that the payment of these costs was not an expenditure "laid out as part of the process of profit earning" but was an expenditure made "with a view of preserving an asset or advantage for the enduring benefit of the trade" and, therefore, capital expenditure.

In the *Kellogg* case the taxpayer was held entitled to deduct the legal expenses there involved, which had been incurred in defending a suit brought for alleged infringement of a registered trade mark. Chief Justice Duff, at p. 60, in distinguishing that case from the *Dominion* case, said:

> The right upon which the respondent 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.

The *Dominion* case was distinguished in *The Minister of National Revenue v. Goldsmith Bros. Smelting & Refining Company Limited*[6], in which the taxpayer was held to be entitled to deduct the legal expense involved in defending successfully a charge of participating in an illegal combine, on the basis that the *Dominion* case was concerned with money paid to preserve a capital asset.

The facts in *Evans v. The Minister of National Revenue*[7] were distinguished from those in the *Dominion* case because the issue in relation to which legal expense had been incurred did not relate to an item of fixed capital, but to a right to receive income.

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[5] [1943] S.C.R. 58, 3 Fox Pat. C. 13, 2 C.P.R. 211, 2 D.L.R. 62.

[6] [1954] S.C.R. 55, [1954] C.T.C. 28, 54 D.T.C. 1011, 20 C.P.R. 68, 2 D.L.R. 1.

[7] [1960] S.C.R. 391, [1960] C.T.C. 69, 60 D.T.C. 1047, 22 D.L.R. (2d) 609.

1967

B.C. POWER CORPN., LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

In *Premium Iron Ores Ltd. v. The Minister of National Revenue*[8], the legal expenses had been incurred in resisting the claim of a foreign government to collect income tax. The preservation of a capital asset was not in issue.

The authority of the *Dominion* case is not weakened by subsequent alterations in the statute, in so far as it deals with the question as to what constitutes a payment on account of capital. The definition of what constitutes an allowable deduction under s. 12(1)(*a*) of the *Income Tax Act* is broader in its terms than that contained in s. 6(1)(*a*) of the *Income War Tax Act,* as was pointed out by Abbott J. in *British Columbia Electric Railway Company Limited v. The Minister of National Revenue*[9]. However, there is no material difference between s. 12(1)(*b*) of the *Income Tax Act* and s. 6(1)(*b*) of the *Income War Tax Act* dealing with payments on account of capital.

The appellant's submission was that the purpose of the action in which its costs were incurred was to test the validity of provincial legislation which, if valid, would have had the effect of divesting the appellant of its shares in the Electric Company. The action was not for the purpose of bringing into existence an asset or advantage of enduring benefit to the appellant or for the purpose of recovering a capital asset.

Reliance was placed on the decision of Lawrence J. in *Southern v. Borax Consolidated, Limited*[10]. In that case the taxpayer had incurred legal expense in resisting an action brought by the City of Los Angeles claiming the invalidity of its title to land in California on which its subsidiary had erected wharves and buildings. It claimed the right to deduct these expenses in computing its income tax, the issue being as to whether they were wholly and exclusively laid out for the purposes of the trade, within the provisions of the English Act.

Lawrence J., holding that these expenses were properly deductible, said at p. 120:

> 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

[8] [1966] S.C.R. 685, [1966] C.T.C. 391, 66 D.T.C. 5280, 58 D.L.R. (2d) 289.

[9] [1958] S.C.R. 133 at 136, [1958] C.T.C. 21, 77 C.R.T.C. 29, 58 D.T.C. 1022, 12 D.L.R. (2d) 369.

[10] [1941] 1 K.B. 111, 23 Tax Cas. 597, [1940] 4 All E.R. 412.

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, in my opinion, make it any different.

At p. 117 he had said:

> The title of the company, which must be assumed, in my opinion, to have been a good title, remains the same; there is nothing added to the title or taken away, and the title has simply been maintained by this payment.

This decision was cited with approval by Lord Greene M.R., in *Associated Portland Cement Manufacturers Ltd. v. Inland Revenue Commissioners*[11], where he said:

> The money that you spend in defending your title to a capital asset, which is assailed unjustly, is obviously a revenue expenditure.

It may be noted, however, that this was not the issue actually before the Court in that case. What was actually decided was that payments made to two retiring directors, in order to prevent competition with the company's business, were in the nature of capital expenditure and not deductible.

Favourable reference was also made to the case of *Southern v. Borax* in some of the judgments in the House of Lords in *Morgan v. Tate & Lyle Ltd.*[12], in which the taxpayer was permitted to deduct from income the cost of a campaign to oppose the threatened nationalization of the sugar industry.

In that case the question of whether the expenses were of a capital nature was not raised, and so the only issue was as to whether, under rule 3(*a*), the expenses represented money "wholly and exclusively laid out or expended for the purposes of the trade".

This case may be contrasted with the earlier decision of the Privy Council in *Ward & Company, Limited v. Commissioner of Taxes*[13], which decided that expenses incurred by a New Zealand brewery in distributing anti-prohibition literature prior to a poll of the electors upon the possible introduction of legislation prohibiting intoxicants, was not a deductible expense for income tax

[11] [1946] 1 All E.R. 68 at 72, 27 Tax Cas. 103.
[12] [1955] A.C. 21, 35 Tax Cas. 367, [1954] 2 All E.R. 413.
[13] [1923] A.C. 145.

1967

B.C. POWER CORPN., LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

purposes. The relevant statutory provision in that case precluded deduction of expenditure "not exclusively incurred in the production of the assessable income".

The *Ward* case was distinguished in *Morgan v. Tate & Lyle Ltd.*, as it was by Kerwin J. in the *Dominion* case because of the difference in wording between the New Zealand statute and the relevant provisions under consideration in each of those cases.

The reasoning in *Southern v. Borax* was critically analysed by Dixon J. (as he then was) in his dissenting reasons in *Hallstroms Pty. Ltd. v. Federal Commissioner of Taxation*[14], when he said:

> Upon the facts as they appear from the case stated set out in the report (1941) 1 K.B., at pp. 111-114; 23 Tax Cas., at pp. 597-599, I do not think that this decision can be supported. The costs were incurred in order to retain a capital asset of the company employed in the business as fixed capital and to avoid the payment, in consequence of its loss, of a charge upon revenue of indefinite duration. Next to the outlay of purchase money and conveyancing expenses in acquiring the title to the land, it would be hard to find a form of expenditure in relation to property more characteristically of a capital nature.
>
> The basis of the decision of Lawrence J. may be seen from two passages in his judgment. In the first, his Lordship said: "In my opinion the principle which is to be deduced from the cases is that where a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital, but that if no alteration is made in the fixed capital asset by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital assets of the company", (1941) 1 K.B., at pp. 116, 117; 23 Tax Cas., at p. 602. The first or positive statement contained in this passage is open to no substantial objection, but the second, the converse and negative proposition that if no alteration is made in the capital asset by the payment it is a revenue expenditure, appears to me to have no foundation in principle or authority. No alteration in a fixed capital asset was effected by the outlay that was in question in what has become the leading case upon the subject (*British Insulated and Helsby Cables Ltd. v. Atherton,* (1926) A.C. 205; 10 Tax Cas. 155) and there was none, to take one or two examples only, in *English Crown Spelter Co. Ltd. v. Baker,* (1908) 5 Tax Cas. 327; 99 L.T. 353; in *Countess Warwick Steamship Co. Ltd. v. Ogg,* (1924) 2 K.B. 292; 8 Tax Cas. 652; in *Collins v. Joseph Adamson & Co.,* (1938) 1 K.B. 477 (at all events as to one of the two payments) and in *Henderson v. Meade-King Robinson & Co. Ltd.,* (1938) 22 Tax Cas. 97, at p. 105. The New Zealand decision in *Commissioner of Taxes v. Ballinger & Co. Ltd.,* (1903) 23 N.Z.L.R. 188 seems much in point and is quite opposed to the view of Lawrence J.
>
> The second passage in the judgment of Lawrence J. reads thus: "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

[14] (1946), 72 C.L.R. 634 at 650.

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, in my opinion, make it any different. (1941) 1 K.B., at p. 120; 23 Tax Cas., at p. 605)."

It is possible to find in this statement two reasons not necessarily interdependent. One is the lack of any fresh acquisition of assets. That, in my view, does no more than put aside one possible state of facts in which the payment would have certainly been of a capital nature. The other is that the defence of the title against impeachment amounted to maintenance, the costs forming part of the business expenditure in the ordinary course upon maintaining the company's assets. An analogy which suggests itself is the cost of restoring the front door of the business premises after an attempted entrance by bandits. No ground was disclosed in the case stated, as set out in the reports, and none exists in the known customs or propensities of Californian city authorities, for supposing that the company was exposed to regular or recurrent attacks upon the validity of its title. His Lordship probably did not doubt that the purpose of the litigation was to decide once and for all whether the taxpayer had or had not a valid title; but, as appears from the first of the foregoing passages cited from his judgment, his Lordship regarded outlays making no alteration in a fixed capital asset as amounting in substance to a matter of maintenance. I should have thought that the decided cases illustrated the fact that these are not exhaustive alternatives. A decision of the Canadian Supreme Court that is entirely at variance with the view of Lawrence J. is the *Minister of National Revenue v. Dominion Natural Gas Co. Ltd.* (1941) S.C.R. (Can.) 19.

This view of *Southern v. Borax* was affirmed by the High Court of Australia in *Broken Hill Theatres Proprietary Ltd. v. Federal Commissioner of Taxation*[15], where it is stated at p. 434:

> We would add that we all think, as Dixon J. thought in *Hallstroms'* case, that, on the facts as stated, the decision of Lawrence J. in *Southern v. Borax Consolidated* cannot be supported.

It must be borne in mind that the only issue which had to be determined in *Southern v. Borax* was whether the expense there involved was wholly and exclusively laid out for the purposes of the trade, under the relevant English statutory provision somewhat equivalent to, but not identical with, our s. 12(1)(*a*). The existence in our Act of both paras. (*a*) and (*b*) of s. 12 shows that Parliament contemplated that there might be expenses made for the purpose of gaining or producing income, which were of a capital nature, and which, under para. (*a*) taken alone, might be deducted, but, by virtue of para. (*b*), notwithstanding the fact that they so qualified under para. (*a*), could not be deducted. There was no equivalent to para. (*b*) under consideration in that case.

[15] (1952), 85 C.L.R. 423.

1967

B.C. POWER CORPN., LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

To the extent that *Southern v. Borax* is authority for the proposition that a legal expense which is incurred to protect from attack a taxpayer's title to a capital asset is not a capital but a revenue expenditure, it cannot be reconciled with the decision of this Court in the *Dominion* case. Dominion's gas franchise was a capital asset. The attempt by United to establish that such franchise was non-existent within the boundaries of the City of Hamilton was an attack upon its title to that asset. The attack was found to be unwarranted and Dominion's franchise remained a valid franchise as it had always been. Nothing was added to or taken away from it as a result of the proceedings. But the proposition established by this Court was that legal expense incurred in order to preserve an existing capital asset was a payment on account of capital. A payment of that kind falls within s. 12(1)(*b*).

In the present case, the appellant was faced with legislation the effect of which was to vest title to the shares which it had owned, in the Crown, at a price fixed by the statute. These shares constituted the appellant's principal capital asset. In the opinion of the appellant the compensation fixed was not adequate. In order to obtain what it considered to be a fair compensation (which the learned trial judge has found, on ample evidence, to have been the appellant's primary purpose) it was necessary to seek to set the legislation aside. The action was brought and the legal expenses incurred in order to preserve the appellant's title to the shares. Thereafter, the appellant was able to dispose of the shares to the Crown at a more favourable price. In essence, the main purpose and the result of the litigation was to improve the consideration received for the disposition of a capital asset.

In my opinion the principle established in the *Dominion* case must apply to the facts in the present case, and, consequently, the appeal on this point fails.

The second, and relatively minor item relates to the claim for deduction of the cost of communications to shareholders. The purpose of these letters was to inform shareholders, first, as to the situation which faced the appellant when the legislation was passed, and, later, as to developments which had occurred from time to time.

The learned trial judge refused to allow a deduction in respect of these expenses, holding that they related to capital and not to earning income within s. 12(1)(*a*).

With respect, I am of the opinion that these expenses should be viewed differently from the legal expenses previously discussed. Those expenses represented payments to preserve a capital asset. The expenses now under discussion did not, and I do not regard them as falling within s. 12(1)(*b*). Are they properly deductible under s. 12(1)(*a*)?

The ultimate control in law of a limited company rests with its shareholders and it is they who have the legal power to determine its policy. This power cannot be properly exercised unless the shareholders are informed periodically with respect to the company's affairs. A public company incorporated under the *Companies Act*, R.S.C. 1952, c. 53, is required, by s. 121, to furnish its shareholders with copies of its balance sheet, statement of income and expenditure and statement of surplus prior to its annual meeting.

In my opinion, the reasonable furnishing of information from time to time to shareholders by a company respecting its affairs is properly a part of the carrying on of the company's business of earning income and a corporate taxpayer should be entitled to deduct the reasonable expense involved as an expense of doing business.

I am, therefore, of the opinion that this expense was properly deductible.

The appellant also urged that the judgment of the learned trial judge, which awarded to the respondent two-thirds of his taxed costs against the appellant and to the appellant one-third of its taxed costs against the respondent, should be varied by awarding to the appellant all its costs and by depriving the respondent of any costs. It was submitted that, as the appellant had succeeded in part at the trial, thus justifying its resort to the Court for relief, it should be entitled to all its costs.

In my opinion the matter of costs was at the discretion of the learned trial judge and the appellant has failed to establish that the discretion was not properly exercised according to law.

In the result, I would allow the appeal in part and refer the assessment in question back to the Minister of National

1967

B.C. POWER CORPN., LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

Revenue for reconsideration and reassessment in accordance with the reasons for judgment herein. As the appellant has failed in respect of the major part of its appeal, I would award costs of the appeal to this Court to the respondent.

Appeal allowed in part; costs to the respondent.

Solicitors for the appellant: Russell & Dumoulin, Vancouver.

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

1967

*June 2
Nov. 27

DIRK HOOGENDOORN ..... APPELLANT;

AND

GREENING METAL PRODUCTS AND SCREENING EQUIPMENT COMPANY AND THE UNITED STEELWORKERS OF AMERICA, LOCAL 6266 ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour relations—Collective agreement providing for compulsory deduction of union dues—Refusal by appellant to sign deduction authorization—"Wildcat" strike arising out of objection of other employees to appellant's continued employment—Matter submitted by company and union to arbitration—Application to quash award—Whether appellant entitled to be represented at arbitration hearing in his own right.

A collective agreement between the respondent company and the respondent union provided for the compulsory deduction of union dues. The appellant H was discharged for refusing to execute an authorization for deduction of such dues. He was later reinstated because the company accepted representations made by his solicitors that the article relating to deduction of dues could only have application to new employees and not to those in the employment of the company at the time of the execution of the agreement. The agreement was subsequently amended so as to make the said article applicable to all present and future employees.

H persisted in his refusal to sign authorization after the collective agreement was amended and there followed a "wildcat" strike, which arose out of the objection of the other employees of the company to H's continued employment. To break this impasse, the company and the union agreed to submit the matter to arbitration. The arbitrator concluded that the company was in violation of the collective agree-

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

ment and directed it to notify H to deliver an authorization for deduction of his union dues, and if he did not comply, then the company was to exercise its powers to dismiss him.

H was not notified of, nor present, nor represented directly at the hearing. He moved in the Supreme Court of Ontario to quash the award. His motion was dismissed. He appealed to the Court of Appeal against the dismissal. This appeal failed. The only modification made by the Court of Appeal was to direct the deletion of that part of the arbitrator's award which directed the company to discharge H if he failed to comply with the request for an authorization. An appeal from the judgment of the Court of Appeal was brought to this Court.

Held (Judson and Ritchie JJ. dissenting): The appeal should be allowed.

Per Cartwright, Hall and Spence JJ.: On the facts it was obvious that the arbitration proceeding was aimed entirely at securing H's dismissal because of his refusal either to join the union or pay the dues. The proceeding was unnecessary as between the union and the company. Both fully understood and agreed that the collective agreement required H to execute and deliver to the company a proper authorization form.

The issue was whether an employee whose status was being affected by the hearing was entitled to be represented in his own right as distinct from being represented by the union which was taking a position adverse to his interests. The majority of the Court agreed that the employee was entitled to be heard. In the circumstances of the case it was improper for the arbitrator to proceed as he did in H's absence. Natural justice was not done by proceeding in his absence and without notice to him.

Per Judson and Ritchie JJ., *dissenting*: The case was concerned solely with a policy grievance and the interpretation of the article in the agreement relating to deduction of dues. As held by the majority decision of the Court of Appeal, H had no enforceable right to participate in the administration of the collective agreement, or to intervene in arbitration respecting the union's policy grievance, and had, therefore, no right to notice of the arbitration.

The rights or interests of H were not in issue and could not be affected by the answer to the question placed before the arbitrator, namely, whether the company was required under the terms of the collective agreement to require each employee to execute a dues authorization form.

[*Re Bradley et al. and Ottawa Professional Fire Fighters Association et al.*, [1967] 2 O.R. 311, applied.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from an order of Grant J. on an application to him to quash a labour arbitration award. Appeal allowed, Judson and Ritchie JJ. dissenting.

B. A. Kelsey, for the appellant.

John H. Osler, Q.C., for the respondents.

[1] [1967] 1 O.R. 712, 62 D.L.R. (2d) 167.

1967

HOOGENDOORN v. GREENING METAL PRODUCTS AND SCREENING EQUIPMENT Co. *et al.*

CARTWRIGHT J.:—The relevant facts and the question in issue are set out in the reasons of other Members of the Court and do not require repetition.

I agree with the reasons and conclusion of my brother Hall and wish to add only a few words, to emphasize my view that the decision of this appeal turns on the peculiar facts of the case.

I agree with the opinion of my brother Judson as to the scheme of *The Labour Relations Act*, R.S.O. 1960, c. 202, which he expresses as follows:

> . . . The scheme of *The Labour Relations Act* is to provide for a bargaining agent which is given power to conclude an agreement with an employer, on behalf of the employees of that employer, which agreement becomes binding upon all employees. No ratification or consent by the employees or any of them is required before a lawful agreement can be concluded and the bargaining agent is given specific authority by the Act to make the kind of agreement represented by art. 5.02 in the instant case. No individual employee is entitled as of right to be present during bargaining or at the conclusion of such an agreement. To require that notice and the right to be present be given to each employee on any occasion when a provision in a collective agreement having general application to all employees was being interpreted would be to destroy the principle of the bargaining agent and to vitiate the purpose of the Act.

The reason that I differ from the result at which he arrives is that I am unable to regard the arbitration which was held as anything other than an inquiry as to a single question, that is whether or not the employer was bound to discharge the appellant.

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

The judgment of Judson and Ritchie JJ. was delivered by

JUDSON J. (*dissenting*):—Greening Metal Products and Screening Equipment Company and the United Steelworkers of America, Local 6266, entered into a collective agreement on March 18, 1965. The company and the union amended art. 5.02 of the original agreement on September 1, 1965, so as to read as follows:

> As a condition of their continued employment, all present employees shall, on or before the 15th day of September, 1965, and all future employees shall, within 30 days following their employment be required to execute and deliver to the Company an authorization for deduction of their union dues or an amount equivalent to the regular monthly dues paid by members as the case may be. Such authorization may be revoked by any employee by giving written notice to the Company and the Union within the 30 day period prior to the termination date of the contract.

Before the amendment of September 1, 1965, art. 5.02 had read as follows:

> All employees shall as a condition of employment within thirty (30) days of their employment be required to execute an authorization for deduction of their union dues or an amount equivalent thereto. Such authorization may be revoked by the employees by giving written notice to the company and the union within the thirty day period prior to the termination date of the contract.

Hoogendoorn had been discharged on March 22, 1965, for refusing to execute an authorization for deduction of union dues under the original art. 5.02. He was reinstated on April 5, 1965, because the company accepted representations made by his solicitors that the article could only have application to new employees and not to those in the employment of the company at the time of the execution of the agreement. This was the reason why the agreement was amended on September 1, 1965.

Hoogendoorn persisted in his refusal to sign authorization after the collective agreement had been amended. On March 18, 1966, all other employees of the plant ceased to work and pickets were set up as a result of his continued refusal to execute a dues authorization form.

The company and the union went to arbitration on the question whether the company was in violation of art. 5.02 of the current collective agreement as amended on September 1, 1965. They agreed to submit the matter to a sole arbitrator. The award of the arbitrator was in the following terms:

> . . . I therefore conclude that the company is in violation of Article 5.02 as amended and require the company to notify the employee Hoogendoorn in writing forthwith by registered mail that he must execute and deliver to the company a proper authorization form for deduction of his union dues or an amount equivalent to the regular monthly dues paid by members as the case may be (enclosing such form) within seven (7) days from the date of the postmark date on the envelope containing the notice or be discharged from his employment. If Mr. Hoogendoorn fails to comply then I direct that the company exercise its powers as an employer and discharge him.

Hoogendoorn was not notified of, nor present, nor represented directly at the hearing. He moved before Grant J. in the Supreme Court of Ontario to quash the award. His motion was dismissed. He appealed to the Court of Appeal against the dismissal. This appeal failed. The only modification made by the Court of Appeal was to direct the deletion

1967

HOOGENDOORN v. GREENING METAL PRODUCTS AND SCREENING EQUIPMENT Co. *et al.*

Judson J.

of the last sentence of the arbitrator's award, which had directed the company to discharge Hoogendoorn if he failed to comply with the request for an authorization.

The only issue in the present appeal is whether Hoogendoorn was entitled to notice of and representation at the arbitration proceedings. The union says that this was a "policy grievance" for the purpose of obtaining a decision whether the employer was in breach of one of the provisions of the collective agreement—a provision of general application to all employees. The majority decision of the Court of Appeal accepted this and held that Hoogendoorn had no enforceable right to participate in the administration of the collective agreement against the wishes of the union, or to intervene in arbitration respecting the union's policy grievance, and that he had, therefore, no right to notice of the arbitration.

The dissenting judgment of Wells J.A. held that the union was seeking the dismissal of Hoogendoorn and at the same time was the only agency that in fact represented him before the arbitration, and that, in these circumstances, he should have been notified of the arbitration and allowed to intervene and state his case, and that failing to do this was failure to render natural justice.

I agree with the majority judgment. The scheme of *The Labour Relations Act*, R.S.O. 1960, c. 202, is to provide for a bargaining agent which is given power to conclude an agreement with an employer, on behalf of the employees of that employer, which agreement becomes binding upon all employees. No ratification or consent by the employees or any of them is required before a lawful agreement can be concluded and the bargaining agent is given specific authority by the Act to make the kind of agreement represented by art. 5.02 in the instant case. No individual employee is entitled as of right to be present during bargaining or at the conclusion of such an agreement. To require that notice and the right to be present be given to each employee on any occasion when a provision in a collective agreement having general application to all employees was being interpreted would be to destroy the principle of the bargaining agent and to vitiate the purpose of the Act.

What was before the learned arbitrator was an allegation that the respondent company had violated the agreement by failure to notify the appellant Hoogendoorn of the obli-

gation imposed on all employees, including Hoogendoorn, to execute an authorization to deduct dues, as a condition of employment. The disputed clause was in no sense more or less applicable to Hoogendoorn than to any other employee within the bargaining unit and the question of whether or not the clause had been violated was, at that stage, the exclusive concern of the company and the union.

The rights or interests of Hoogendoorn were not in issue and could not be affected by the answer to the question placed before the arbitrator, namely, whether the company was obligated under the terms of the collective agreement to require each employee to execute a dues authorization form. There was only one possible answer to this question and it applied to all employees whether they agreed or disagreed with the existence of art. 5.02 in the collective agreement. What they would do when the demand for the authorization was made by the company was entirely within their own choice, although it is obvious that the consequence of a refusal would be dismissal. The arbitration procedure has been attacked as a sham battle designed to secure the dismissal of one man. This, I do not accept. I agree with the *ratio* of the majority reasons of the Court of Appeal expressed in the following terms:

> On the facts the contention fails. It was not in the union's power to procure the discharge of the applicant if he was prepared to pay the periodical union dues. Discharge is for management, either as a matter of cause at large or as specifically provided by the collective agreement. The union policy grievance was designed to force management to put the option under art. 5.02 before the applicant. If he decided to pay, his job was secure against union coercion.

The question of the right to notice of and the right to participate in an arbitration has again been dealt with by the Ontario Court of Appeal in reasons dated June 14, 1967, in the case of *Re Bradley et al. and Ottawa Professional Fire Fighters Association et al*[2]. That case had to do with art. 12.01 of the collective agreement dealing with promotions. It provided that all promotions in the fire department were to be based on seniority of years of service together with efficiency. The Fire Chief made a number of promotions of men whom I will refer to as included in Group A. The association protested and claimed that the promotions should have been made in favour of Group B.

[2] [1967] 2 O.R. 311, 63 D.L.R. (2d) 376.

1967

HOOGENDOORN v. GREENING METAL PRODUCTS AND SCREENING EQUIPMENT Co. *et al.*

Judson J.

The arbitrator stated that "the grievance concerns solely the proper interpretation to be placed on s. 12.01". He did construe this provision and it was admitted in the Court of Appeal that if he had stopped there, Group B could not have challenged his award because the arbitration would have amounted to no more than a declaratory proceeding by which the association and the city would have resolved their difference as to the proper meaning of art. 12.01. How that meaning would affect promotions already made or those to be made in the future would be a matter for further consideration and determination.

However, he went further. He revoked the promotions of five of the six members of Group A. Both the judge of first instance on an application for *certiorari* and the Court of Appeal held that in spite of the arbitrator's declaration that he was concerned only with the interpretation of art. 12.01, he went on to apply it to five members of Group A without giving them an opportunity to be heard. The Court of Appeal held, in agreement with Hartt J., that the award should be quashed. They distinguished the case from Hoogendoorn's case. What the Fire Fighters' Association did was to take up the cause of Group B in opposition to Group A. The association did not represent Group A. Nevertheless, it persisted throughout the proceedings in asking for the replacement of Group A by Group B, whose cause alone it was advocating. Hoogendoorn's case is concerned solely with a policy grievance and the interpretation of art. 5.02.

I would dismiss the appeal with costs.

The judgment of Hall and Spence JJ. was delivered by

HALL J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[3] which dismissed an appeal from the order of Grant J. on an application to him to quash an arbitration award made by His Honour G. H. F. Moore as arbitrator, pursuant to an agreement between the respondent company and the respondent union, entered into to bring an end to a "wildcat" strike which had started on March 18, 1966, and continued to March 25, 1966.

The facts are shortly that the appellant Hoogendoorn became an employee of the respondent company in Sep-

[3] [1967] 1 O.R. 712, 62 D.L.R. (2d) 167.

tember 1955. On June 27, 1962, the respondent union, Local No. 6266, was certified by the Ontario Labour Relations Board as the sole and exclusive agency representing the employees. A collective agreement was entered into in December 1962, which provided for a check-off of union dues. Subsequently, on March 18, 1965, there was a new collective agreement which provided for the compulsory deduction of union dues. Hoogendoorn had taken the position and had told the company that he and two other employees could not join or financially support the union because of political and religious convictions. Following this, on March 22, 1965, Hoogendoorn and the two other employees were dismissed. Hoogendoorn was reinstated on April 5, 1965, following a protest from his solicitors that the dismissal was unlawful and a threat of legal action for reinstatement and damages. The two other employees appear to have accepted their dismissal and gone elsewhere.

The situation remained static until September 1, 1965, when Article V of the collective agreement of March 18, 1965, was amended to read:

> 5.01 During the term of this Agreement the Company agrees to deduct Union dues or a sum equivalent to Union dues as certified by the Union to be currently in effect according to the Constitution of the International Union from the wages of each employee, who has authorized such deduction, on the second pay day of each calendar month and to remit the amounts so deducted to the International Secretary-Treasurer of the United Steelworkers of America.
>
> 5.02 As a condition of their continued employment, all present employees shall, on or before the 15th day of September, 1965, and all future employees shall, within 30 days following their employment be required to execute and deliver to the Company an authorization for deduction of their union dues or an amount equivalent to the regular monthly dues paid by members, as the case may be. Such authorization may be revoked by any employee by giving written notice to the Company and the Union within the 30 day period prior to the termination date of the contract.

Hoogendoorn's solicitors again notified the company and the union that even as amended Article V did not apply to him. The company and the union thereupon agreed between themselves that the amendment should not be enforced until March 17, 1966, the expiry date of the March 18, 1965, agreement. However, by virtue of Article XXVIII the collective agreement continued in force from year to year unless terminated by notice as provided in that article. As no notice of termination had been given, the agreement continued in force after March 17.

1967

HOOGENDOORN v. GREENING METAL PRODUCTS AND SCREENING EQUIPMENT Co. *et al.*

Hall J.

As of March 17, 1966, Hoogendoorn still refused to sign any authorization as required by arts. 5.01 and 5.02 to the deduction of union dues and as a result, there occurred the "wildcat" strike previously referred to. This strike arose out of the objection of the other employees to Hoogendoorn's continued employment. To break this impasse, the company and the union agreed to submit the matter to arbitration. A grievance in writing, dated March 22, 1966, reading as follows:

> It is the Union contention that on March 18, 1966, the Company did violate Article V, Section 5.02 of the Current Collective Agreement as amended on September 1st, 1965.

was brought by the union.

The company and the union did not follow the grievance procedure set out in Article VIII of the collective agreement, but entered into an agreement which read in part as follows:

> The parties appearing at this hearing re the dispute covered in grievance dated March 22, 1966 have mutually agreed to waive the grievance procedure as outlined in the collective agreement, and to waive a Board of Arbitration, and instead submit this matter to a sole arbitrator whose authority will be the same as that of a Board of Arbitration under the collective agreement.

Referring to this, Wells J.A. said:

> It was argued also that this was a policy grievance, and as such the only parties concerned were the union and the employer company. In my opinion the hearing was not a policy grievance at all. The provisions of Articles 7 and 8 were completely disregarded, particularly section 8.04 which provides:
>
> > No matter may be submitted to arbitration which has not been properly carried through all previous steps of the Grievance Procedure.
>
> The arbitration before us can only be described as an *ad hoc* body set up by the union and employer to solve the situation created by the unlawful strike caused by Hoogendoorn's continued employment. If there was a power to do this it must be justified under Part 26, section 26.01, which is as follows:
>
> > The parties reserve the right to amend and supplement this Contract by mutual agreement at any time during the duration thereof.

On the facts it is obvious that the proceeding was aimed entirely at securing Hoogendoorn's dismissal. The learned arbitrator correctly understood the situation for he concluded his award by saying: "If Mr. Hoogendoorn fails to comply, then I direct that the Company exercise its powers as an employer and discharge him". The majority in the Court of Appeal recognized the impropriety of this direc-

tion and ordered that it be deleted from the award, holding that it was severable and that the award could be amended by its deletion and as so amended, should be upheld. On this aspect of the case, Wells J.A. said:

> In my opinion, there might be some weight to this point of view if the proceedings before the learned arbitrator had proceeded as an impersonal interpretation of the agreement without reference to any individual. One has only to look at the learned arbitrator's reasons however, to realize that this was not the case. He dealt exclusively with Hoogendoorn's case and any reference to general principles as unrelated to Hoogendoorn, in my opinion, was coincidental.

I agree that this represents the actual situation as it developed. I think the learned arbitrator correctly understood what he was adjudicating upon namely, Hoogendoorn's continued employment and nothing else. His proper understanding of his function in the *ad hoc* arbitration proceeding led him inevitably to ordering Hoogendoorn's dismissal. The arbitration proceeding was unnecessary as between the union and the company. Both fully understood and agreed that the collective agreement required Hoogendoorn to execute and deliver to the company a proper authorization form for deduction of the monthly union dues being paid by members of the union. Both the company and the union wanted him to do so. The arbitration proceeding was not necessary to determine that Hoogendoorn was required so to do. Both knew he was adamant in his refusal. The proceeding was aimed at getting rid of Hoogendoorn as an employee because of his refusal either to join the union or pay the dues. It cannot be said that Hoogendoorn was being represented by the union in the arbitration proceeding. The union actively took a position completely adverse to Hoogendoorn. It wanted him dismissed.

I can come to no other conclusion but that in the circumstances of this case it was improper for the learned arbitrator to proceed as he did in Hoogendoorn's absence. The issue here is whether natural justice was done by proceeding in his absence and without notice to him. On this issue I agree fully with Wells J.A. when he said:

> The requirements that natural justice should be done is a fundamental one in our jurisprudence and I think may be succinctly stated by quoting from the opinion of the Judicial Committee of the Privy Council in the case of *University of Ceylon v. Fernando,* reported in [1960] 1 All E.R. 631. This was a case of a student accused of cheating at examinations

1967

HOOGENDOORN v. GREENING METAL PRODUCTS AND SCREENING EQUIPMENT Co. *et al.*

Hall J.

and the Judicial Committee examined the problem at some length. Lord Jenkins expressing the reasons for the report by the Committee made the following observations at p. 638, which I would respectfully adopt.

> The last general statement as to the requirements of natural justice to which their Lordships would refer is that of HARMAN J., in *Byrne v. Kinematograph Renters Society, Ltd.* [1958] 2 All E.R. 579 at p. 599, of which their Lordships would express their approval. The learned judge said this:
>
> > What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more.

As I have indicated, these observations apply in my opinion to the circumstances revealed in this case. Without questioning anyone's good faith, I am of the opinion that Hoogendoorn, under all the peculiar circumstances, which I have indicated, was entitled to be heard and with respect, I differ from the view that part of the learned arbitrator's decision can be deleted and that what is left is a proper adjudication of the problem, without any intervention by Hoogendoorn.

The case of *Re Bradley et al. and Ottawa Professional Fire Fighters Association et al.*[4] was relied on by the respondents. That case had to do with art. 12.01 of a collective agreement dealing with promotions. It provided that "all promotions in the [Fire] Department shall be based on seniority of years of service together with efficiency". The Chief of the Fire Department promoted a number of men, six in all. The Association objected, claiming that others should have been promoted. The dispute was referred to arbitration. The arbitrator, Judge Shortt, stated at the outset of his award that "the grievance concerns solely the proper interpretation to be placed upon Section 12.01". In this respect, the grievance there being arbitrated was singularly like the grievance dealt with by the arbitrator in the instant case which reads:

> It is the Union contention that on March 18, 1966, the Company did violate Article V, Section 5.02 of the Current Collective Agreement as amended on September 1st, 1965.

The present case and the *Ottawa* case are identical in that upon such similar submissions the arbitrator in the *Ottawa* case went beyond interpreting clause 12.01 and directed that five of the six promotions made by the Chief of the department be revoked. The Court of Appeal set aside the award because it was made without notice to the five

[4] [1967] 2 O.R. 311; 63 D.L.R. (2d) 376.

men so affected although three of them were in fact present during the arbitration hearing as onlookers and not as parties and the other two were alleged to have been aware of the pending arbitration.

Laskin J.A. said at pp. 313-4 of the judgment in the *Ottawa* case:

> Judge Shortt in his award stated at the outset that "the grievance concerns solely the proper interpretation to be placed upon Section 12.01". He went on to construe this provision, and it is conceded that if he had concluded his award after giving his construction, it would not have been open to Bradley and the other *certiorari* applicants to challenge it. The arbitration would then have amounted to a declaratory proceeding by which the Association and the city would have resolved their difference as to the proper meaning of art. 12.01; and how that meaning would affect promotions already made or those to be made would be a matter for further consideration and determination. If the arbitrator had proceeded in this manner the case would be within the principles examined by this Court in *Re Hoogendoorn and Greening Metal Products & Screening Equipment Co. et al.*, [1967] 1 O.R. 712, 62 D.L.R. (2d) 167.

Judge Shortt went beyond his terms of reference in directing that the disputed promotions be revoked. The arbitrator in the present case likewise went too far when he directed the company to dismiss Hoogendoorn. Accordingly, on substantially the same question, the Court of Appeal appears to have taken directly opposite positions. It deleted the direction to discharge Hoogendoorn in the one case and upheld the award and in the other it refused to delete the part revoking the promotions and struck down the whole award. I think it was right in the *Ottawa* case and wrong in Hoogendoorn's. In both cases the issue was whether an employee whose status was being affected by the hearing was entitled to be represented in his own right as distinct from being represented by the union which was taking a position adverse to his interests.

It follows that I would allow the appeal and quash the award made by the learned arbitrator.

The appellant should have his costs here and in the Courts below.

Appeal allowed with costs, JUDSON *and* RITCHIE JJ. *dissenting.*

Solicitors for the appellant: Wright & McTaggart, Toronto.

1967

HOOGENDOORN v. GREENING METAL PRODUCTS AND SCREENING EQUIPMENT Co. *et al.*

Hall J.

Solicitors for the respondent, Greening Metal Products and Screening Equipment Co.: Miller, Thomson, Hicks, Sedgwick, Lewis & Healy, Toronto.

Solicitors for the respondent, The United Steelworkers of America, Local 6266: Joliffe, Lewis & Osler, Toronto.

EDITORIAL NOTE:—On March 4, 1968, a motion was made on behalf of the respondent Greening Metal Products and Screening Equipment Company that the judgment pronounced in the above appeal on November 27, 1967, be varied to read as follows: "The appeal is allowed, and the Order of the Court of Appeal and the Order of Grant J. are set aside and it is directed that an Order be entered quashing the arbitration award made on the 1st day of April, 1966, by His Honour Judge G. H. F. Moore. The Appellant will recover from the Respondent, The United Steelworkers of America, Local 6266, his costs of the application before Grant J., of the appeal to the Court of Appeal and of the appeal to this Court; Judson and Ritchie JJ. dissenting."

There being no objection on the part of the counsel, the order was granted as asked and no order was made as to the costs of this application.

1967

*June 16, 19, 20 Oct. 3

FLORENCE REALTY COMPANY LIMITED and FLORENCE PAPER COMPANY LIMITED .... APPELLANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Agreement to pay compensation for closing railway siding—Calculation of amount of compensation—Whether income tax should be deducted—Land offered by Crown for relocation at low price—Whether Crown estopped from denying need for relocation—Exchequer Court Act, R.S.C. 1952, c. 98, ss. 18(1)(g), 47(b).

Pursuant to an order of the Board of Transport Commissioners, the appellant company, which carried on a used paper business in a building in the City of Ottawa leased from a related company, the

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

other appellant, lost the use of a private railway siding which it had under an agreement with the C.P.R. The order to abandon the siding had been obtained by the National Capital Commission as part of its program of redevelopment of the City of Ottawa. It was agreed between the National Capital Commission and the appellant that compensation for the loss of the siding would be fixed by the Exchequer Court of Canada pursuant to s. 18(1)(*g*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98. If the Court determined that the appellant was required to relocate its business as a result of the removal of the railway services, the compensation to be paid would be an amount which the appellant, as a prudent owner, would pay rather than be forced to relocate. On the other hand, if the Court determined that the appellant was not required to relocate its business, then the compensation would be an amount which a prudent owner would pay rather than lose such rail services, it being agreed that the appellant would have had the use of the siding for a further ten years. The National Capital Commission also offered the appellant land in an industrial park it owned at 20 per cent less than the market price. The appellant carried on business without the siding at the old location for several months, but eventually took advantage of the offer of land and relocated its business.

The Exchequer Court, which was seized of the matter by a petition of right, found that if the appellant were forced to relocate, the prudent owner would have paid a sum of $152,802.63 rather than be forced to relocate and that, on the other hand, if it were not forced to relocate then the prudent man would have paid $91,300 rather than lose the rail services. It also found that if the appellant had closed down its business entirely its loss would have been $225,000. It also found that it was not physically impossible to carry on the enterprise without the railway siding services and concluded that the prudent owner would take the least costly of these three alternatives. He therefore fixed the compensation at $91,300, after having deducted a sum for income tax. The company appealed to this Court.

Held: The appeal should be dismissed.

In fixing the amount of compensation, the trial judge used a sound method and applied the proper principles. Moreover, the trial judge was right to reduce the compensation by an amount to cover the income tax. The prudent owner would calculate the income tax when determining the sum he would be prepared to pay rather than lose the railway siding services.

As found by the trial judge, the Crown was not estopped from alleging that the appellant was not required to relocate simply because it had offered land to relocate. This was not a case in which the 10 per cent allowance should be made. Section 47(*b*) of the *Exchequer Court Act* was a complete answer to the claim for interest.

Couronne—Promesse de payer une indemnité pour la fermeture d'une ligne de chemin de fer de service—Calcul du montant de l'indemnité—Doit-on déduire un montant pour l'impôt sur le revenu—Terrain offert par la Couronne à un bas prix pour déménager l'entreprise—La Couronne est-elle empêchée de nier le besoin d'un déménagement—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, arts. 18(1)(g), 47(b).

1967

FLORENCE REALTY CO. LTD. *et al.* *v.* THE QUEEN

Spence J.

Selon les termes d'une ordonnance de la Commission des Transports du Canada, la compagnie appelante, qui exploitait une entreprise de papier de seconde main dans un édifice à Ottawa qu'elle louait d'une compagnie parente, l'autre appelante, a perdu l'usage d'une ligne de chemin de fer de service qui desservait son entreprise. Cette ordonnance avait été obtenue par la Commission de la Capitale Nationale dans les termes de son programme de développement de la cité d'Ottawa. Il fut entendu entre la Commission de la Capitale Nationale et l'appelante que l'indemnité pour la perte du chemin de fer serait fixée par la Cour de l'Échiquier du Canada en vertu de l'art. 18(1)(*g*) de la *Loi sur la Cour de l'Échiquier*, S.R.C. 1952, c. 98. Si la Cour en venait à la conclusion que l'appelante serait obligée de déménager son entreprise à la suite de la perte du chemin de fer, l'indemnité à être payée serait un montant que l'appelante, comme propriétaire prudent, serait prête à payer plutôt que d'être forcée de déménager. D'un autre côté, si la Cour en venait à la conclusion que l'appelante ne serait pas obligée de déménager son entreprise, l'indemnité dans ce cas serait un montant qu'un propriétaire prudent serait prêt à payer plutôt que de perdre la ligne de chemin de fer de service. La Couronne et l'appelante s'accordent pour dire que l'appelante aurait eu l'usage du chemin de fer pour un autre dix ans. La Commission de la Capitale Nationale a aussi offert à l'appelante un terrain situé dans un parc industriel à un prix de 20 pour-cent de moins que sa valeur marchande. L'appelante a continué son entreprise pendant quelques mois sans le chemin de fer à son ancien endroit, mais éventuellement elle a accepté l'offre du terrain et a déménagé son entreprise.

La Cour de l'Échiquier, qui a été saisie de cette affaire par une pétition de droit, a jugé que si l'appelante était obligée de déménager, le propriétaire prudent aurait payé une somme de $152,802.63 plutôt que d'être forcé de déménager et que, d'un autre côté, si l'appelante n'était pas forcée de déménager, l'homme prudent alors aurait payé $91,300 plutôt que de perdre le chemin de fer. Elle a aussi jugé que si l'appelante avait mis fin à son entreprise elle aurait accusé une perte de $225,000. Elle a de plus jugé qu'il n'était pas physiquement impossible de continuer l'entreprise sans le chemin de fer, et a conclu que le propriétaire prudent aurait opté pour la moins onéreuse de ces trois alternatives. Il a donc fixé l'indemnité à $91,300, après avoir déduit un montant pour l'impôt sur le revenu. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Dans la détermination du montant de l'indemnité, le juge au procès s'est servi d'une bonne méthode et a appliqué les principes appropriés. De plus, le juge a eu raison de réduire l'indemnité par un montant représentant l'impôt sur le revenu. Le propriétaire prudent aurait calculé l'impôt sur le revenu en établissant le montant qu'il serait prêt à payer plutôt que de perdre le chemin de fer.

Tel que jugé en première instance, la Couronne n'était pas empêchée d'alléguer que l'appelante n'était pas obligée de déménager son entreprise pour la seule raison que la Couronne avait offert un terrain dans ce but. Il ne s'agit pas ici d'un cas où une indemnité de 10 pour-cent doit être ajoutée. L'article 47(*b*) de la *Loi sur la Cour de l'Échiquier* est une réponse complète à la réclamation des intérêts.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], sur une pétition de droit. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], on a petition of right. Appeal dismissed.

B. J. MacKinnon, Q.C., and *W. I. C. Binnie*, for the appellants.

Keith E. Eaton, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of Gibson J. in the Exchequer Court of Canada[1] by which he fixed the compensation to be paid to the appellants at the sum of $91,300 and provided that the appellants should have their costs of the action up to February 21, 1966, on which date the respondent filed a Confession of Judgment in the amount of $100,000 pursuant to rule 104 of the Exchequer Court Rules, with a set-off in favour of the respondent of the costs of action subsequent to the said February 21, 1966.

The litigation in the Exchequer Court of Canada arose under the following circumstances.

The (suppliants) appellants Florence Realty Company Limited for very many years owned a building in the City of Ottawa with frontages on Boteler, Bolton and Dalhousie Streets, and had leased that building to its related company the Florence Paper Company Limited for the purpose of carrying on a used paper business. From 1918 on, the Florence Paper Company had leased from the Canadian Pacific Railway Company certain other lands contiguous to the said building which the company said was essential to its business operations, and the paper company was also serviced by a private railway siding under an agreement in writing with the C.P.R.

As an integral part of its programme of development of the Lower Town Ottawa area, and particularly the construction of the MacDonald-Cartier Bridge connecting

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[1] [1967] Ex. C.R. 226.

1967

FLORENCE REALTY CO. LTD. *et al.* v. THE QUEEN

Spence J.

Ottawa with Hull, the National Capital Commission and the C.P.R. determined that the railway siding should be abandoned. That abandonment could only be effected if the Board of Transport Commissioners gave an order permitting the same. The National Capital Commission obtained the consent of the suppliants-appellants to such order of the Board of Transport Commissioners by entering into an agreement with the suppliants-appellants and with others whose businesses would cease to have railway siding and rail service by reason of the abandonment.

The agreement between the appellants and the N.C.C. dated May 5, 1964, was produced at trial as exhibit P-29. By that agreement, the parties agreed upon principles to be applied in awarding the compensation for the loss of the railway siding services in the following terms:

1. For the purposes of this agreement the Commission acknowledges that but for the Memorandum of Understanding between the Commission, the Canadian Pacific Railway Company and the Canadian National Railway Company dated the 17th day of October, A.D. 1963, the siding agreements or leases which the Company has with the Canadian Pacific Railway would have been renewed from time to time and the Canadian Pacific Railway Company and/or the National Capital Commission would not have made an application to the Board of Transport Commissioners to abandon the operation of that part of its Sussex Street Subdivision from mileage 1.2 to the end of the Subdivision at mileage 6.7, and/or for abandonment of railway sidings used by the Company in connection therewith for ten years from the 24th day of March, A.D. 1964.

2. The Commission on behalf of the Crown and the Company and the Landlord agree that the amount, if any, to be paid to the Company pursuant to the principles hereinafter mentioned shall be determined by the Exchequer Court of Canada pursuant to paragraph (*g*) of sub-section (1) of Section 18 of the Exchequer Court Act.

3. In the event that the Court determines that the Company is required to relocate its business as a result of the removal of the railway services, including the cancellation of the lease of land, if any, and other agreements with the Canadian Pacific Railway Company relating to railway services on the Sussex Street Subdivision, then the compensation to be paid shall be an amount which the Company, as a prudent owner, would pay rather than be forced to relocate and shall include all damages suffered by the owner by reason thereof.

4. If the Court determines that the Company is not required to relocate its business then the compensation shall be an amount which a prudent owner would pay rather than lose such rail services and shall include business disturbance (which includes the cost of re-adapting the plant) and the present value of any anticipated loss of profits.

5. The parties agree that if the Company has no private siding agreement with the Canadian Pacific Railway Company relating to rail-

way services on the Sussex Street Subdivision, then no compensation shall be payable pursuant to the terms of this agreement unless:

(*a*) there is a team track located immediately adjacent to the lands and premises upon which the Company carries on its business operations; and

(*b*) substantially all of the freight shipped or delivered by the Company is shipped or delivered by the Canadian Pacific Railway Company and is loaded or unloaded at the team track referred to in subparagraph (*a*) hereof; and

(*c*) the freight shipped or delivered to or from the Company's plant located on the said lands and premises is loaded or unloaded into and from the railway cars to the plant located on the said lands and premises without the necessity of loading or unloading into a truck or other vehicle;

then, notwithstanding the provisions of paragraphs 3 and 4 hereof the amount of compensation payable pursuant to the terms of this agreement shall be the amount which the Company, as a prudent owner, would pay rather than to lose the use of the team track and shall include increased costs of operating.

6. The compensation, if any, shall be determined on the basis that the Company was the absolute owner of the lands and premises upon which the business operations are being carried on, and the amount of compensation so determined shall be apportioned by the Court as to the portion payable to the Company and the portion payable to the Landlord.

7. The parties hereto agree that the compensation shall be determined as of the 24th day of March, A.D. 1964.

8. The Commission on behalf of the Crown agrees to pay the Company and the Landlord the amount, if any, so determined.

9. The parties hereto agree that costs, including those of expert witnesses, shall be at the discretion of the Court.

It will be noted that in para. 2 above, the parties agreed that the compensation should be determined by the Exchequer Court pursuant to para. (*g*) of s. 18(1) of the *Exchequer Court Act*. In order to obtain a fixation of such compensation the appellants issued a Petition of Right.

The agreement by which the appellants held the private railway siding rights was subject to cancellation on two months' notice if leave were granted by the Board of Transport Commissioners, and the lease of lands held by the appellants from the railway company provided for cancellation on one month's notice.

The learned Exchequer Court judge held, therefore, that the appellants' reasonable expectation of continuing possession of the said lands or of having siding agreement continued was not a legal interest that could be considered in assessing compensation and, therefore, that clause 1 as recited above had the effect of creating such legal interest

1967

FLORENCE REALTY CO. LTD. *et al.* *v.* THE QUEEN

Spence J.

in both the siding agreement and the lease of lands, and fixing it with a duration of ten years, i.e., until March 24, 1974. Although it was submitted in argument that there was no basis for such a finding and that on the other hand the appellants might have continued to enjoy such siding rights and lease of lands for an indefinite period, I am of the opinion that, with respect, the learned Exchequer Court judge was correct and that it would be impossible to conceive of the appellants continuing their industry on the site which is the subject matter of this appeal for a period beyond March 1974. It would appear indeed that the provisions of the said para. 1 are generous.

The building is within 100 yards of Sussex Drive, a main driveway along the Ottawa River in this part of Ottawa. There are very many public buildings in the area including the National Research Council and the new City Hall. It is proposed, and reference thereto was made in the evidence, to erect other prestige government buildings in the immediate area. The site is now covered by the provisions of By-law AZ-64 of the General Zoning By-laws of the City of Ottawa which restricts the use of the site to residential purposes and therefore the company was occupying it as a non-conforming use.

In all of the circumstances, therefore, the fixing of the ten-year period for the ascertainment of the compensation which would be due to the appellants was a proper decision.

The learned Exchequer Court judge conceived it as his task to determine whether the compensation would be payable under the provisions of para. 3 or of para. 4 aforesaid, and, with respect, correctly determined that in approaching the problem he should use the formula stated by this Court in *Diggon-Hibben Ltd. v. The King*[2], as approved in *Woods Mfg. Co. v. The King*[3]. In the former case, Rand J., said at p. 715:

> . . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

The learned Exchequer Court judge, therefore, addressed himself to the task of determining whether compensation should be paid on the basis that the company was required

[2] [1949] S.C.R. 712, 64 C.R.T.C. 295, 4 D.L.R. 785.
[3] [1951] S.C.R. 504, 67 C.R.T.C. 87, 2 D.L.R. 465.

to relocate its business as a result of the removal of the railway siding in which case such compensation would be the amount that a prudent man would pay rather than be forced to relocate, or whether the compensation would be payable the company not being required to relocate its business, in which latter case the amount would be what the prudent owner would pay rather than lose such rail service. The learned Exchequer Court judge found that if the company were forced to relocate the prudent owner would have paid rather than be forced to relocate the sum of $152,802.63 and that, on the other hand, if the appellants were not forced to relocate then the prudent man would have paid rather than lose the rail service the sum of $91,300. He also found that if the appellants had closed down their business entirely their loss would have been $225,000 which included goodwill and all other assets but no land and buildings. It was not physically impossible to carry on the enterprise without the railway siding services. Therefore, the learned Exchequer Court judge said the prudent owner would take the least costly of these three alternatives and the prudent owner not being required to relocate, the compensation would be payable in accordance with para. 4 of the agreement. Therefore, such compensation should be fixed at $91,300.

In argument on the appeal, it was submitted most forcefully that the learned Exchequer Court judge could not decide in this fashion whether or not the appellants were required to relocate but had to determine apart from the question of costs whether or not the appellants were required to relocate considering (a) the physical impossibility of carrying on their enterprise in the site without the siding, or equally (b) the additional cost of carrying on without the siding being such that the operating profit would be so reduced that no prudent owner would continue to operate its business under such circumstances.

I am of the opinion that this criticism of the method used by the learned Exchequer Court judge is not sound. Certainly there was no physical impossibility in carrying on the business without the siding. It was, in fact, carried on without the siding for months after the abandonment of the same on June 15, 1964. If, as it was inevitable, the costs of operation of the business without the siding were increased then the present value of that increase in costs

1967

FLORENCE REALTY CO. LTD. et al. v. THE QUEEN

Spence J.

was the subject of the compensation which was to be fixed and was fixed by the Exchequer Court. Under such circumstances, the prudent owner, it is true, would receive a smaller net operating profit in each of the ten years between 1964 and 1974, but he would have to credit the net operating revenue with a portion of the compensation which he received. Therefore, the true return upon his investment would be not the $12,000 odd per year which the evidence accepted by the learned Exchequer Court judge proved it would be after the abandonment of the siding, but $12,000 odd per year plus the appropriate instalment from the compensation to make up the same net profit on the investment which had accrued during the six years prior to the abandonment of the siding.

It is appropriate at this time to note that the learned Exchequer Court judge fixed this compensation after a lengthy trial at which he heard a very large number of witnesses who gave both factual and opinion evidence and that he was called upon to weigh and assess that evidence. The learned Exchequer Court judge, with respect, carried out that task and in his reasons for judgment, said:

> Mr. Quayle's estimate was predicated in the main on two test railroad car unloadings done by Canadian Pacific Railway Company in 1964. These unloadings were obviously staged for the purpose of preparing for this hearing (see Exhibits P-2 to P-17). No care was taken to make either of them a representative sample of what might occur if the team track was regularly used for loading and unloading, and in my view, all the evidence predicated thereon is unreliable and I do not accept the conclusions from the calculations made thereon by Mr. Quayle. I also do not accept any conclusions from calculations made by Mr. Quayle from hearsay evidence of the operations of Florence Paper Company Limited given to him by officers of Florence Paper Company Limited. And in so far as the same is based on the evidence of Mr. Frank Florence given in the witness box, I say it is also unreliable, because he exaggerated the difficulties of the operation, and made extravagant and unconscionable claims for compensation, and minimized the obvious greater efficiency of the new plant on Sheffield Road.

This Court as long ago as 1890 in *Vezina v. The Queen*[4] said:

> It must be an exceptional case in which, on a mere estimate of damage depending on appreciation of the evidence and the exercise of judgment, this court can be expected to interfere with the amount settled by the tribunal primarily charged with the inquiry, and which has facilities for arriving at a correct conclusion that are not possessed by the appellate court. Where the tribunal of first instance has proceeded on correct

[4] (1889), 17 S.C.R. 1 at 16.

principles and does not appear to have overlooked or misapprehended any material fact, an appeal against the amount awarded will in most cases resemble an appeal against an assessment of damages in an action, which would be a hopeless proceeding unless some very special reason for the interference of the appellate court can be shown.

That statement was quoted with approval by Taschereau J., as he then was, in *The King v. Elgin Realty Co. Ltd.*[5].

In the decision of this Court delivered on January 24, 1967, in *Robert A. Kramer v. The Wascana Centre Authority*[6], I had occasion to say:

> In my view, it is not the duty of this Court to engage in calculations or to exercise judgment as to land valuation in the Province of Saskatchewan. It is the duty of this Court to consider whether those calculations and assessment of land valuations were made in accordance with the proper and well recognized principle.

It is, therefore, my duty to consider the reasons of the learned Exchequer Court judge only for the purpose of determining whether he applied proper principles and not to attempt any recalculation of amounts, especially when the learned Exchequer Court judge's calculations depended on the weighing of the probative value of the evidence given before him.

As I have said, the learned Exchequer Court judge determined that the compensation which would be payable if the appellants were required to relocate was $152,802.63. If any of the submissions made in argument as to the appropriate costs had the appellants been required to relocate were successful they could only have the effect of increasing that amount and therefore making the discrepancy between that amount and the amount of compensation which the learned Exchequer Court judge found was payable, if the appellants were not required to relocate, the larger, and therefore make it even clearer that the appellants were not entitled to compensation on the basis of being required to relocate as outlined in para. 3 of the agreement. Therefore, it is my intention to consider the compensation which the learned Exchequer Court judge found to be payable on the basis of para. 4 of the said agreement the appellants not being required to relocate their business.

That amount was $91,300 which the learned Exchequer Court judge determined as follows. Upon consideration of

[5] [1943] S.C.R. 49 at 51, 55 C.R.T.C. 262, 1 D.L.R. 497.
[6] [1967] S.C.R. 237.

1967

FLORENCE REALTY CO. LTD. et al. v. THE QUEEN

Spence J.

the evidence adduced he accepted the estimate given by one James Ross, a chartered accountant called by the respondent who had been practising in the City of Ottawa and had been a chartered accountant since 1932. That evidence was that the additional cost due to the loss of the railway siding services would be $16,100 per year including an amount of $5,000 per year for additional supervision, which amount would cover only incidental expenses not readily ascertainable in detail. He fixed the present value at 6 per cent of $16,100 annually for ten years at $118,500, and therefore found that the gross compensation would be that sum of $118,500. That compensation, however, had it come into the appellants' hands in the form of larger gross profits in each year would have been subject to income tax. Therefore, the learned Exchequer Court judge reduced the sum by an estimate of $27,200 so that he found the net compensation payable should be $91,300.

It was submitted by counsel for the appellants that this method of procedure was contrary to the decision of this Court in *The Queen v. Jennings*[7]. It is true that there Judson J., giving judgment for the Court upon the issue, expressly refused to follow the majority decision in *British Transport Commission v. Gourlay*[8], and held that in fixing compensation for physical injuries sustained by a plaintiff which affected his earning capacity there should not be any deduction made on account of income tax which the plaintiff might have been called upon to pay on the income which he might have received had he not sustained the injuries.

I am not of the opinion that the decision of this Court in *The Queen v. Jennings* is applicable to exclude the deduction of income tax liability from the compensation payable to the appellants herein.

Here, the task of the tribunal fixing the compensation was to place itself in the position of the prudent owner who would make a payment rather than lose the railway siding services. Any prudent company executive, in calculating the additional profits which his company would obtain if it continued to have the use of the railway siding, would immediately realize that such additional profits

[7] [1966] S.C.R. 532, 57 D.L.R. (2d) 644.
[8] [1956] A.C. 185.

would be subject to income tax and therefore would be willing to pay, in order to continue to obtain those additional profits, only the net return to the company after allowing for such income tax as the company would have been required to pay. Otherwise, the prudent company executive would be making a payment of more than he can hope to recover by the additional profits, which would certainly not be prudent. I am, therefore, of the opinion the situation is not that in *The Queen v. Jennings*, and the course adopted by the learned Exchequer Court judge was a proper course.

In the Exchequer Court, counsel for the appellants advanced the argument that the Crown was estopped from alleging that the appellants were not required to relocate and that, therefore, the compensation must be calculated on the higher basis set out in para. 3 of the agreement. That argument was not advanced in this Court. If it were necessary to do so, I would simply adopt the reasons of the learned Exchequer Court judge who found that there was no representation within the meaning of that term as used in estoppel jurisprudence and that the appellants were free to make their decision to relocate or not and further that there was no intention on the part of the National Capital Commission to induce the appellants to relocate. The National Capital Commission offered to sell land to the appellants and to others who had lost their rail services at 20 per cent less than the market price. The appellants did take advantage of that offer and have relocated but I am in agreement with the view expressed by the learned Exchequer Court judge when he said:

> There are many reasons why the suppliant, Florence Paper Company Limited, herein did not make this choice but, in my view, they are unrelated to the loss of the private railway siding and rail services. For example, they obviously were aware that they could not carry on forever relying on obtaining and using $1.05 to $1.65 labour. The evidence of Mr. Quayle was that there was only one person paid $1.65 and the others' wages ranged from $1.05 to $1.40 and that the wages paid by Florence Paper Company Limited were 23.4% less than those paid in comparable industries in the Ottawa area. They obviously must have considered that they could not rely for too much longer on the "bull gang" as opposed to automation by using lift trucks, conveyor belts and other modern equipment. They knew that their Boteler Street plant could not be adapted to use this modern equipment. They knew that substantial functional depreciation, and economic depreciation had taken place. They also would consider that this cheaper site which they got at a most reasonable price from the National Capital Commission would in the long run effect further economies in rental alone. In addition, they knew

1967

FLORENCE REALTY CO. LTD. et al. v. THE QUEEN

Spence J.

that more economies would result because of the larger land area resulting in easier manoeuverability of incoming and outgoing trucks. They also knew that they could more efficiently handle paper in a new plant especially when they incorporated the new techniques carried out in other more modern plants in Canada and the United States in their new building and obtained the services of an architect to make certain that they had a modern efficient and more functional building. These are some, but there were undoubtedly many other reasons why they decided to relocate, which again are unrelated to the issue in this action.

The appellants also argue that they should be entitled to a 10 per cent increase of the compensation and that they should be allowed interest on the compensation from the date the appellants vacated the Boteler Street plant, i.e., December 1965. The question of 10 per cent increase of compensation was settled in this Court in *Drew v. The Queen*[9]. That percentage will only be allowed when there are special circumstances, i.e., when the loss suffered by the suppliants cannot be determined with complete accuracy. In this case, in my opinion, the learned Exchequer Court judge has determined the compensation with complete accuracy and therefore the situation in which the 10 per cent allowance may be made does not exist. In so far as the interest is concerned, in my view, s. 47(*b*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98, is a complete answer. That subsection provides:

> 47. In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow
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> * * *
>
> (*b*) interest on any sum of money that the court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.

The appellants also submit that the Order of the Exchequer Court should have included a specific direction for the payment of the costs of obtaining the services of expert witnesses, and point out para. 9 of the agreement which reads as follows:

> 9. The parties hereto agree that costs, including those of expert witnesses, shall be at the discretion of the Court.

Such a direction is not necessary. The Registrar of the Exchequer Court will tax the costs in accordance with the usual procedure and, in view of para. 9, will consider the

[9] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.

appellants' claims for the costs of expert witnesses. In so far as the trial is concerned, the matter has been settled by the decision of the learned Exchequer Court judge as to set-off for costs since the trial occurred after the Confession of Judgment had been filed.

1967

FLORENCE REALTY CO. LTD. *et al.* v. THE QUEEN

Spence J.

I am of the opinion, therefore, that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Hughes, Laishley, Mullen & Touhey, Ottawa.

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

THE PUBLIC TRUSTEE, Administrator Ad Litem of the Estate of JOHN DROZD, Deceased ..... APPELLANT;

1967

*Oct. 25

AND

FRANK WEISBROD and MARY WEISBROD and FRANK WEISBROD, Administrator of the Estate of MARY WEISBROD, Deceased ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Jurisdiction—Supreme Court of Canada—Order appointing Public Trustee administrator ad litem made after discharge of original administrator —Application to discharge order dismissed—Appeal to Supreme Court of Canada quashed—Leave to appeal refused—Supreme Court Act, R.S.C. 1952, c. 259, as amended, ss. 2(b), 44(1)—The Trustee Act, R.S.A. 1955, c. 346, s. 33a [*en. 1960, c. 111, s. 1*].

The respondents FW and MW sustained injuries in a collision between their automobile and an automobile driven by JD, who died as a result of injuries suffered in the accident. Letters of administration were granted in the estate of the deceased and some six months later the administrator was discharged after having administered the estate and passed his accounts. Subsequently, the respondents obtained an order under s. 33a of *The Trustee Act* of Alberta appointing the Public Trustee, who consented thereto, administrator *ad litem* of the estate of JD, for the purposes of a suit to be commenced by the respondents against the estate of JD. Following the making of this

*PRESENT: Cartwright C.J. and Martland, Ritchie, Spence and Pigeon JJ.

1967

PUBLIC TRUSTEE v. WEISBROD AND WEISBROD

order an action was commenced by FW and MW against the Public Trustee as administrator *ad litem* as aforesaid. On an application by the Public Trustee to discharge the said order, it was held that the application should be dismissed and this decision was affirmed, on appeal, by the Appellate Division. The Public Trustee then appealed to this Court. The appeal having come on for hearing the question of the Court's jurisdiction was raised from the Bench and argument was heard on that question. Counsel for the appellant asked that, if the Court should come to the conclusion that it did not have jurisdiction, leave to appeal should be granted and the Court heard counsel on that question also.

Held: The appeal should be quashed and leave to appeal should be refused.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming an order of Milvain J. Appeal quashed and leave to appeal refused.

W. G. Chipman, Q.C., for the appellant.

William A. Stevenson, for the respondents.

On the conclusion of the argument, the following judgment was delivered.

THE CHIEF JUSTICE (orally for the Court):—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] pronounced on February 8, 1967, affirming the order of Milvain J., made on April 18, 1966, dismissing an application by the Public Trustee, Administrator *ad litem* of the estate of John Drozd, deceased, to discharge an order made by Cairns J., on December 10, 1964, appointing the Public Trustee Administrator *ad litem* of the estate of John Drozd, deceased, "for the purposes of a suit to be commenced by Frank Weisbrod and Mary Weisbrod against the estate of John Drozd, deceased".

The last-mentioned order of Cairns J. recites that counsel for the Public Trustee had consented to the making of the order.

Following the making of the order of Cairns J. an action was commenced by Frank Weisbrod and Mary Weisbrod against the Public Trustee as Administrator *ad litem* as aforesaid.

[1] (1967), 59 W.W.R. 96.

The notice of motion before Milvain J. to set aside the order of Cairns J. was styled in that action but Milvain J. gave leave to amend and did amend the style of cause to read as follows:

> "IN THE MATTER OF THE ESTATE OF JOHN DROZD, DECEASED, AND IN THE MATTER OF THE TRUSTEE ACT, BEING CHAPTER 346 OF THE REVISED STATUTES OF ALBERTA, 1955, AND THE AMENDMENTS THERETO:
>
> BETWEEN:
>
> FRANK WEISBROD and MARY WEISBROD,
> APPLICANTS
> AND
> THE PUBLIC TRUSTEE, ADMINISTRATOR AD LITEM, OF THE ESTATE OF JOHN DROZD, DECEASED,
> RESPONDENT"

This was the style of cause used in the application before Cairns J.

When the appeal came on for hearing the question of our jurisdiction was raised from the Bench and we had the benefit of full argument on that question. Mr. Chipman asked that, if we should come to the conclusion that we have no jurisdiction, leave to appeal should be granted and we heard counsel on that question also.

We have all reached the conclusion that we do not have jurisdiction to hear the appeal.

The only question directly raised is whether the order of Cairns J. appointing the Public Trustee to be Administrator *ad litem* should stand. That order is not a "final judgment" as defined in s. 2(*b*) of the Supreme Court Act reading as follows:

.....

2. (*b*) "final judgment" means any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

The order of Cairns J. does not determine in whole or in part any substantive right of the parties in the judicial proceeding which was before him. The question raised was as to a matter of procedure rather than one of substance.

It is difficult also to see how an order made on consent can be said to determine a matter "in controversy".

1967

PUBLIC TRUSTEE v. WEISBROD AND WEISBROD

Cartwright C.J.

In view of the wording of s. 33a of *The Trustee Act* of Alberta it is at least arguable that the order of Cairns J. was a discretionary order and that consequently we are deprived of jurisdiction by subs. (1) of s. 44 of the Act.

Assuming for the moment that, contrary to the views we have expressed, the order of Cairns J. was a final judgment within the meaning of the Act and was not discretionary, we are of opinion that we are without jurisdiction because there is no amount or value in controversy in this judicial proceeding. It is not sufficient that the judgment sought to be appealed will have an effect on the pending action against the Administrator *ad litem*. No amount is directly involved.

For all these reasons we conclude that we are without jurisdiction.

After a careful consideration of all that was said by counsel on the application for leave to appeal we are unanimously of opinion that this is a case in which leave to appeal ought not to be granted.

The appeal is quashed for lack of jurisdiction with costs as of a motion to quash.

The application for leave to appeal is dismissed without costs.

Appeal quashed with costs; application for leave to appeal refused without costs.

Solicitors for the appellant: Emery, Jamieson, Chipman, Sinclair, Agrios & Emery, Edmonton.

Solicitors for the respondents: Hurlburt, Reynolds, Stevenson & Agrios, Edmonton.

FARMERS MUTUAL PETROLEUMS LIMITED ..... APPELLANT;

1967

*May 19, 23
Oct. 3

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductions—Legal expenses incurred in defending title to mineral rights—Drilling and exploration expenses paid under agreement—Whether deductible—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a), (b), 83A(3).

Following its incorporation in 1949, the appellant company acquired mineral rights from land owners who had previously granted leases of their petroleum and natural gas rights to oil companies. The land owner transferred to the appellant his interest in the mineral rights, including the benefits from his lease, in return for one share of the appellant's capital stock for each acre transferred and also a trust certificate as evidence that the appellant thereafter held in trust for the land owner one fifth of the mines and minerals and the benefits therefrom. When oil was discovered in 1955, many of the land owners instituted actions in the Courts for declarations that the agreements had been induced by fraudulent misrepresentations and were therefore void. About 250 such actions were begun. The appellant successfully defended these actions. A royal commission recommended that a Board be constituted for the purpose of achieving the renegotiation of the contracts, if possible. The appellant sought to deduct from its income for the years 1959 and 1960 the legal expenses it incurred in defence of its title to the minerals, as well as those involved in opposing legislation proposed by the royal commission and in making representations to the Board. The appellant argued that these legal expenses were deductible as having been incurred to protect a right to income. The trial judge confirmed the Minister's position that they were not deductible and held that they were a payment on account of capital.

A second issue in this appeal involved an arrangement between the appellant and Scurry-Rainbow Oil Ltd., a major shareholder in the appellant company, which had acquired a beneficial interest in certain Crown petroleum and natural gas permits held jointly by other companies. The owners of these permits had covenanted that all drilling and exploration costs would be shared by them in proportion to their respective interests. By its agreement with Scurry-Rainbow Oil Co., the appellant agreed to pay all such costs incurred by the former company in return for a percentage of the joint permits. The question in issue was as to whether the moneys so paid by the appellant were deductible as being "drilling and exploration expenses" incurred within the meaning of s. 83A(3) of the Act. The trial judge held that they were not deductible. The company appealed to this Court.

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

1967

FARMERS MUTUAL PETROLEUMS LTD. v. MINISTER OF NATIONAL REVENUE

Held: The appeal should be dismissed.

As to the Legal Expenses.

The object and purpose of the lawsuits was to compel the restoration to the land owners of the mineral rights purchased by the appellant. Those rights were items of fixed capital and were so regarded by the appellant. The legal costs of the litigation were incurred to preserve capital assets and therefore s. 12(1)(*b*) of the Act prevented their deduction. This case could not be distinguished from the case of *M.N.R. v. Dominion Natural Gas Co. Ltd.*, [1941] S.C.R. 19. The same consideration applied in respect to the legal expenses involved in opposing the proposed legislation and in appearing before the Board.

As to the Exploration Costs.

The payments made by the appellant were not in respect of expenses which it had incurred in respect of exploration or drilling. They were payments of expenses which had been incurred by another and were made, not to meet a liability of the appellant for the cost of exploration or drilling, but made for the acquisition of an interest in the lands. In these circumstances, the payments could not be deducted under s. 83A(3) of the Act.

Revenu—Impôt sur le revenu—Déductions—Dépenses légales encourues pour défendre titre à des droits minéraux—Paiements en vertu d'un contrat de dépenses de forage et d'exploration—Sont-ils déductibles—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 12(1)(a), (b), 83A(3).

A la suite de son incorporation en 1949, la compagnie appelante a acquis des droits miniers des propriétaires de terrains qui avaient antérieurement loué à des compagnies d'huile les droits au pétrole et au gaz naturel s'y trouvant. Ces propriétaires ont transféré à l'appelante leurs intérêts dans les droits miniers, ainsi que les bénéfices relevant de leurs baux, moyennant une action du capital de l'appelante pour chaque acre cédé et aussi un certificat de fiducie comme preuve que l'appelante détenait dorénavant en fiducie pour le propriétaire du terrain un cinquième des mines et des minéraux ainsi que les bénéfices en découlant. Lorsque l'on fit la découverte d'huile en 1955, plusieurs des propriétaires des terrains ont institué des actions devant les Cours pour faire déclarer que les contrats passés avec l'appelante avaient été obtenus par des représentations frauduleuses et étaient en conséquence nuls. 250 de ces actions furent instituées, et la compagnie appelante s'est défendue avec succès. Une Commission royale a recommandé la constitution d'une Régie dans le but de renégocier les contrats, si possible. La compagnie appelante a tenté de déduire de son revenu pour les années 1959 et 1960 les dépenses légales encourues pour défendre son titre aux minéraux ainsi que celles encourues pour combattre la législation proposée par la commission royale et pour faire des représentations devant la Régie. L'appelante a soutenu que ces dépenses légales étaient déductibles comme ayant été encourues pour protéger un droit à un revenu. Le juge au procès a confirmé la position prise par le Ministre à l'effet qu'elles n'étaient pas déductibles et a jugé qu'elles étaient un paiement à compte de capital.

Une deuxième question dans cet appel se rapportait à une entente entre l'appelante et Scurry-Rainbow Oil Ltd., un actionnaire principal de la

compagnie appelante, qui avait acquis un intérêt dans certaines licences de pétrole et de gaz naturel détenues en commun par d'autres compagnies. Les propriétaires de ces licences avaient convenu que tous les frais de forage et d'exploration seraient partagés par eux en proportion de leurs intérêts respectifs. En vertu de son entente avec Scurry-Rainbow Oil Co., la compagnie appelante a convenu de payer tous les frais encourus par la première compagnie moyennant un pourcentage dans les licences communes. La question à débattre était de savoir si les sommes payées par l'appelante étaient déductibles comme étant des «dépenses de forage et d'exploration» déboursées dans le sens de l'art. 83A(3) de la Loi. Le juge au procès a jugé qu'elles n'étaient pas déductibles. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Quant aux dépenses légales.

L'objet et le but des poursuites judiciaires étaient de forcer la restitution, en faveur des propriétaires des terrains, des droits miniéraux que l'appelante avait obtenus. Ces droits étaient un item de capital fixe et étaient considérés ainsi par l'appelante. Les frais légaux des procès ont été encourus pour protéger des biens en capital et, en conséquence, l'art. 12(1)(*b*) de la Loi en empêchait la déduction. On ne peut pas distinguer cette cause de celle de *M.N.R. v. Dominion Natural Gas Co. Ltd.*, [1941] R.C.S. 19. La même règle devait s'appliquer aux dépenses légales encourues pour combattre la législation proposée et pour comparaître devant la Régie.

Quant aux frais d'exploration.

Les paiements faits par l'appelante n'étaient pas des dépenses qu'elle avait encourues relativement à l'exploration ou le forage. Il s'agissait de paiements de dépenses qui avaient été encourues par une autre compagnie et qui avaient été faits, non pas pour rencontrer une obligation de l'appelante de payer les frais de l'exploration ou du forage, mais plutôt pour acquérir un intérêt dans un terrain. Dans ces circonstances, les paiements ne pouvaient pas être déduits sous l'art. 83A(3) de la Loi.

APPELS de deux jugements du Juge Cattanach de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appels rejetés.

APPEALS from two judgments of Cattanach J. of the Exchequer Court of Canada[1], in an income tax matter. Appeals dismissed.

J. H. Laycraft, Q.C., and *Sheldon Chumir*, for the appellant.

D. G. H. Bowman and *J. London*, for the respondent.

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[1] [1966] Ex. C.R. 1126, [1966] C.T.C. 283, 66 D.T.C. 5225.

1967

FARMERS MUTUAL PETROLEUMS LTD. v. MINISTER OF NATIONAL REVENUE

The judgment of the Court was delivered by

MARTLAND J.:—These are appeals from judgments of the Exchequer Court[1] which refused to permit the appellant, in computing its income, in the years 1959 and 1960, to deduct, in respect of legal expenses, the respective amounts of $80.10 and $10,623.43, and in respect of expenses claimed by the appellant as exploration and drilling expenses, the respective amounts of $53,273.38 and $143,581.10.

The facts involved in respect of these two matters are distinct from each other, so I will deal with each of the items separately.

Legal Expenses:

The appellant was incorporated under the laws of the Province of Saskatchewan on December 1, 1949, for the object, inter alia, of acquiring mineral rights and exploring for petroleum and natural gas.

Following its incorporation the appellant began a vigorous and successful campaign to acquire mineral rights from land owners. The system followed by the appellant was to acquire the fee simple title to minerals from land owners who had previously granted leases of their petroleum and natural gas rights to major oil producing companies. Those leases were uniform and standard. They were for a period of ten years providing to the land owner an annual rent of ten cents per acre and reserving a royalty of 12½ percent to the land owner in the event of a producing well or wells being brought into existence.

The land owner transferred to the appellant his entire estate and interest in the mineral rights, including all benefits from the existing lease. In return, he received one share of the capital stock of the appellant for each acre transferred and a trust certificate as evidence that the appellant thereafter held in trust for him one-fifth of the mines and minerals and the benefits therefrom.

In this manner the appellant acquired the mineral rights in approximately 750,000 acres in Saskatchewan and issued

[1] [1966] Ex. C.R. 1126, [1966] C.T.C. 283, 66 D.T.C. 5225.

approximately 2,500 trust certificates. The appellant received as income four-fifths of the rentals payable thereon and four-fifths of any royalties from producing lands.

In 1955 when oil was discovered in south eastern Saskatchewan many of the land owners instituted actions in the Court of Queen's Bench of Saskatchewan for declarations that the agreements between them and the appellant were induced by fraudulent misrepresentation and were accordingly void, and for orders revesting in the land owners the mineral rights and the interest in the leases which had been transferred and assigned to the appellant. In all about 250 such actions were begun, the pleadings being virtually identical in all cases.

The appellant successfully defended such of those actions as came to trial so that it remained possessed of the mineral rights and benefits under the contracts above described. None of the lands involved nor any of the actions commenced were lost by the appellant nor did the appellant lose any of the income which it was receiving from the lands. The legal expenses so incurred by the appellant constitute part of the amounts that were claimed by it as a deduction from income and that were disallowed by the Minister.

After the appellant had succeeded in some cases in the courts, many of the land owners formed a mineral owners' protective association to advocate and obtain legislative relief. A "Royal Commission on Certain Mineral Transactions" was appointed by the Saskatchewan Government to inquire into allegations that many owners of freehold mineral rights in Saskatchewan had been deprived of such rights by means of fraud or misrepresentation. This Commission recommended that a Board be constituted for the purpose of achieving, if possible, the voluntary re-negotiation of contracts whereby the owners were deprived of their freehold mineral rights through misrepresentation, whether innocent or fraudulent.

The Mineral Contracts Re-negotiation Act, 1959, was enacted to implement the recommendations of the Commission. Further legislation of a similar tenor was proposed in 1960.

The appellant employed counsel to make representations on its behalf opposing the proposed legislation, suggesting

1967

FARMERS MUTUAL PETROLEUMS LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

variations in the terms thereof and making representations to the Board later established pursuant to legislation enacted with respect to contracts entered into by it which were sought to be re-negotiated.

The learned trial judge confirmed the Minister's position and held that the legal expenses incurred were a "payment on account of capital" made "with a view of preserving an asset or advantage for the enduring benefit of a trade".

The decision of the learned trial judge was based upon the judgment of this Court in *Minister of National Revevenue v. Dominion Natural Gas Company Limited*[2]. Counsel for the appellant sought to distinguish the *Dominion* case and also contended, in the alternative, that that case would have been decided differently today on the same facts in view of changes which have since occurred in the relevant provisions of the *Income Tax Act*.

The relevant provisions of the *Income Tax Act*, R.S.C. 1952, c. 148, are 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,
>
> (*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 12(1)(*a*) and (*b*) were derived from s. 6(1)(*a*) and (*b*) of the *Income War Tax Act*, R.S.C. 1927, c. 97, which provided as follows:

> 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;
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

Counsel for the appellant advanced the proposition that legal expenses incurred to protect a right to income are deductible regardless of whether the protection of that right also involves preserving a capital asset. The appellant, he said, immediately upon its acquisition of title to the

[2] [1941] S.C.R. 19, [1940] 4 D.L.R. 657.

mineral rights from a land owner had the right to receive and retain as its income four-fifths of the acreage rental payable by the lessee of the mineral rights. The legal expenses incurred were to protect that income. In the *Dominion* case, that which was protected was a franchise which, in itself, did not produce income.

In my opinion, this proposition is not valid, because it is directly contrary to the intent of paras. (*a*) and (*b*) of s. 12 when read together. To be deductible for tax purposes an outlay must satisfy at least two basic tests:

(1) It must be made for the purpose of gaining or producing income (s. 12(1)(*a*)).

(2) It must not be a payment on account of capital (s. 12(1)(*b*)).

Both of these tests must be satisfied concurrently to justify deductibility. In *British Columbia Electric Railway Company v. Minister of National Revenue*[3], Abbott J. said at p. 137:

> 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 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 determined whether such disbursement is an income expense or a capital outlay.

It can certainly be said that the appellant, in resisting the lawsuits launched against it, was seeking to protect its income, because it was seeking to protect the assets from which its income was derived. It can, therefore, be argued that the expenses were properly deductible under s. 12(1)(*a*). This is not contested by the respondent. The object and purpose of the lawsuits, however, was to compel the restoration to the land owners of the mineral rights which the appellant had purchased. The learned trial judge has found, and the evidence establishes, that those rights were items of fixed capital, and were so regarded by the appellant. At the time the litigation occurred, the sum total of the mineral rights acquired by the appellant, all of which were of the kind involved in the litigation,

[3] [1958] S.C.R. 133, [1958] C.T.C. 21, 77 C.R.T.C. 29, 58 D.T.C. 1022, 12 D.L.R. (2d) 369.

1967

FARMERS MUTUAL PETROLEUMS LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

represented all of the appellant's capital assets. The appellant did not trade in them, but intended to retain them perpetually.

It was to protect those capital assets from attack that the legal costs of the litigation were incurred, and, to quote the words of Dixon J. (later Chief Justice) in *Hallstroms Pty. Ltd. v. Federal Commissioner of Taxation*[4], referring to the costs of defending title to land:

> Next to the outlay of purchase money and conveyancing expense in acquiring the title to land, it would be hard to find a form of expenditure in relation to property more characteristically of a capital nature.

The fact that the leases acquired by the appellant, along with the mineral rights, were more immediately connected with the production of income than was the franchise involved in the *Dominion* case does not affect the matter in principle. It is relevant in relation to the application of s. 12(1)(*a*), but in relation to s. 12(1)(*b*) we must ask the question, was this outlay for the purpose of preserving a capital asset? In my opinion it clearly was and, if that is so, s. 12(1)(*b*) prevents its deduction.

With respect to the second submission respecting the *Dominion* case, while s. 12(1)(*a*) of the present Act is less restrictive than was s. 6(1)(*a*) of the *Income War Tax Act*, s. 12(1)(*b*) of the *Income Tax Act* is essentially the same as was s. 6(1)(*b*) of the *Income War Tax Act*. In my opinion, for the reasons which I gave in the recent case of *British Columbia Power Corporation Limited v. Minister of National Revenue*[5], the *Dominion* case has established the proposition that legal expense incurred with a view of preserving an asset of advantage for the enduring benefit of the trade is a capital expenditure and is not deductible.

I agree with the learned trial judge that the legal expenses involved in opposing the proposed legislation and in appearing before the Board created by such legislation are subject to the same considerations. They are not different in kind from the costs of the litigation in the courts.

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[4] (1946), 72 C.L.R. 634 at 650.

[5] [1968] S.C.R. 17 [1967] C.T.C. 406, 67 D.T.C. 5258, 65 D.L.R. (2d) 1.

Exploration and Drilling Expense

Scurry-Rainbow Oil Limited, hereinafter referred to as "Scurry", became a major shareholder in the appellant. Scurry was the successor in title to Canadian Pipe Line Producers Ltd. in respect of an agreement, dated May 19, 1954, to which the latter company was a party along with Canada Southern Petroleum Ltd., West Canadian Petroleum Ltd., Trans Empire Oils Ltd. and British Empire Oil Co. Ltd. Under the terms of that agreement the entire legal and beneficial interest in certain Crown petroleum and natural gas permits covering approximately 1,500,000 acres in British Columbia would be held jointly by the parties. The beneficial interest acquired by Scurry was 22 percent of the reservations covered by the agreement.

Canada Southern Petroleum Ltd. had been named as manager-operator under the terms of the agreement, but it was succeeded by Phillips Petroleum Corporation, hereinafter referred to as "Phillips". Under the agreement the parties agreed to conduct a seismic program, and, contingent upon its results, to drill a well for the joint account and at the joint expense of the parties in proportion to their interests. The manager-operator was given sole and exclusive management and control of the exploration, drilling and production operations on the land.

The parties had the right to receive progress information and to inspect and examine the books and records of the manager-operator. There was also provision for meetings and consultation and for surrender, sale or assignment of all or part of a party's interest in the lands.

Paragraph 11 of the agreement governed the matter of costs and expenses:

11. *COSTS AND EXPENSES*

The parties hereto mutually covenant and agree with one another that all exploration costs, drilling costs, completion costs, abandonment costs, production costs, and all other costs and expenses of every nature and kind chargeable to the joint account hereunder incurred in respect to any and all operations carried on hereunder in respect to any of the lands described in the Permits set out in Schedule "A" shall be borne and paid by the parties hereto in proportion to their respective interest in the lands and Permits upon which such exploration, drilling or producing operations are carried on, as such interests appear in Schedule "B" hereof. Subject to the further provisions of this Agreement, Manager-Operator shall initially advance and pay all costs and expenses incurred in connection with the said lands and shall charge the Joint-Operators with their proportionate share thereof upon the cost and expense basis provided for in

1967

FARMERS MUTUAL PETROLEUMS LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

the attached Accounting Procedure. Joint-Operators agree that they will promptly reimburse the Manager-Operator for Joint-Operators' proportionate share of all such costs and expenses within the time limited by the said Accounting Procedure.

On January 2, 1959, Scurry and the appellant entered into an agreement, which, after certain preliminary recitals referring to the agreement of May 19, 1954, read as follows:

> AND WHEREAS the parties hereto desire to enter into this Agreement whereby Farmers Mutual shall have the right to acquire certain interests in the said lands subject to the terms and conditions as hereinafter provided.
>
> NOW THEREFORE THIS AGREEMENT WITNESSETH that Farmers Mutual hereby agreed to pay all costs which may be incurred by Scurry-Rainbow in the performance of its obligations with respect to the seismic program referred to herein. Scurry-Rainbow agrees that upon the completion of the said seismic program on the said lands and the payment by Farmers Mutual of all costs which would have been incurred by Scurry-Rainbow on this seismic program, Farmers Mutual shall have earned an undivided Three (3%) Percent interest in the said lands and the interests owned by Scurry-Rainbow and Farmers Mutual shall thereafter be:
>
> SCURRY-RAINBOW OIL LIMITED .....19% interest
> FARMERS MUTUAL PETROLEUMS LTD. ..... 3% interest
>
> Scurry-Rainbow agrees to execute any and all further documents required in order to vest the interest aforesaid in Farmers Mutual in the event that the seismic program herein is completed. After Farmers Mutual shall have earned the Three (3%) Percent interest referred to herein, Scurry-Rainbow agrees to grant and hereby grants to Farmers Mutual the option to earn an additional Eight (8%) Percent interest in the said lands on the condition that Farmers Mutual agrees to pay and pays Scurry-Rainbow's entire cost of drilling the well referred to herein. After the said well shall have been drilled and Scurry-Rainbow's share of the costs paid by Farmers Mutual, Scurry-Rainbow agrees to execute any and all further documents required in order to vest the Eight (8%) Percent interest in Farmers Mutual.

Under the terms of the 1954 agreement, Phillips, as manager-operator, conducted a seismic program and carried on a drilling program. Phillips invoiced Scurry for its proportionate share of these expenses. On receipt of an invoice, Scurry would usually send an invoice to the appellant for the amount Scurry was required to pay to Phillips, and Scurry would pay Phillips. On two occasions Scurry sent the Phillips' invoice to the appellant, which paid Phillips directly.

On October 5, 1959, the appellant elected to exercise its option, under its agreement with Scurry, to earn the additional 8 per cent interest in the lands by paying Scurry's entire cost of drilling the well.

Section 83A(3) of the *Income Tax Act*, at the relevant times, provided as follows:

83A. (3) A corporation whose principal business is

(*a*) production, refining or marketing of petroleum, petroleum products or natural gas, or exploring or drilling for petroleum or natural gas, or

(*b*) mining or exploring for minerals,

may deduct, in computing its income under this Part for a taxation year, the lesser of

(*c*) the aggregate of such of

(i) the drilling and exploration expenses, including all general geological and geophysical expenses, incurred by it on or in respect of exploring or drilling for petroleum or natural gas in Canada, and

(ii) the prospecting, exploration and development expenses incurred by it in searching for minerals in Canada,

as were incurred after the calendar year 1952 and before the end of the taxation year, to the extent that they were not deductible in computing income for a previous taxation year, or

(*d*) of that aggregate, an amount equal to its income for the taxation year

(i) if no deduction were allowed under paragraph (*b*) of subsection (1) of section 11, and

(ii) if no deduction were allowed under this section,

minus the deductions allowed for the year by subsections (1), (2) and (8a) of this section and by section 28.

The question in issue is as to whether the moneys paid by the appellant pursuant to its agreement with Scurry were deductible in computing the appellant's income tax, as being "drilling and exploration expenses... incurred by it on or in respect of exploring or drilling for petroleum or natural gas in Canada". The learned trial judge held that they were not deductible by the appellant. His reasons for so holding are summarized in his judgment as follows:

The submission on behalf of the appellant, as I understand it, is that by the agreement between Scurry and the appellant dated January 2, 1959 the appellant reimbursed Scurry for its outlay for exploration and drilling expenses. Since an expense cannot be incurred by a party who is truly reimbursed, therefore it cannot be said that the expenses were incurred by Scurry but rather they must have been incurred by the appellant which was out of pocket in the precise amount of the expenses and that Scurry was merely the conduit between the appellant and the manager-operator.

In my opinion the agreement between Scurry and the appellant is not susceptible of such interpretation. The substance of that transaction, as I see it, was that the appellant purchased an interest in lands from Scurry and that the price to be paid therefor was determined and measured by the cost of the exploration and drilling expenses incurred by Scurry. It was a condition precedent to any payment to Scurry by the appellant that Scurry should have incurred exploration and drilling expenses and I can

1967

FARMERS MUTUAL PETROLEUMS LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

entertain no doubt that the money paid by the appellant to Scurry was in consideration for a transfer of an interest in land from Scurry to the appellant although that consideration was measured by the yardstick of the costs incurred by Scurry. What Scurry received was payment for an asset sold by it to the appellant and accordingly Scurry was not reimbursed for the exploration expenses incurred by it. Conversely what the appellant paid for and received was the transfer of an interest in lands and therefore did not pay for exploration and drilling expenses.

I am in agreement with these conclusions. Exploration and drilling expenses were incurred in respect of the work carried on by Phillips as manager-operator under the 1954 agreement. This work was done by Phillips on behalf of all the parties to that agreement as well as on behalf of itself, and a portion of the expense was incurred by Phillips, as agent for Scurry.

The 1954 agreement contained provision for an assignment of interest by the parties to it, but there was no assignment of interest effected by Scurry in favour of the appellant. The appellant did not acquire any contractual rights under that agreement, and Phillips had no right to require the appellant to assume any obligation to pay any part of the exploration and drilling expenses which, as manager-operator, Phillips had incurred.

The 1959 agreement between Scurry and the appellant, after referring to the 1954 agreement, recites that the parties "desire to enter this agreement whereby Farmers Mutual shall have the right to acquire certain interests in the said lands". The obligation of the appellant was to pay "all costs which may be incurred by Scurry in the performance of its obligations with respect to the seismic program referred to herein". The appellant was thereby to acquire a 3 percent interest in the lands. It also obtained an option to earn an additional 8 percent interest by paying Scurry's entire cost of drilling the well.

The position is, therefore, that the appellant did not itself incur exploration or drilling costs in respect of land in which it had an interest. What it did do was to pay for a contractual right to acquire an interest in lands on which exploration and drilling had taken place by paying expenses already incurred by Scurry in connection therewith. The payments made by the appellant were not in respect of expenses which it had incurred in respect of exploration or drilling. They were payments of expenses which had been

1967

FARMERS MUTUAL PETROLEUMS LTD. v. MINISTER OF NATIONAL REVENUE

incurred by another and were made, not to meet a liability of the appellant for the cost of exploration or drilling, but made for the acquisition of an interest in the lands.

In these circumstances, in my opinion, the payments made by the appellant cannot be deducted, under s. 83A(3), in computing its income for tax purposes.

Martland J.

In my opinion, both appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellant: Chambers, Saucier, Jones, Peacock, Black, Gain & Stratton, Calgary.

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

1967

*Mar. 20
Nov. 27

GEORGE VANA (*Plaintiff*) .....APPELLANT;

AND

STANLEY TOSTA and BOLESLAW LAXAREWICZ (*Defendants*) .... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Motor vehicle accident—Wife killed and husband and children injured—Defendants liable—Assessment of damages—Factors considered—The Fatal Accidents Act, R.S.O. 1960, c. 138.

As a result of a collision between the plaintiff's motor vehicle and that of the defendant T, the plaintiff's wife, aged 37, was killed; their children (a daughter, aged 12, and a son, aged 9) sustained comparatively slight injuries and the plaintiff himself, aged 47, was seriously injured. In an action arising out of the accident, the trial judge found that at the time of the collision T's car was being driven by the defendant L in a wanton and reckless manner. He awarded the plaintiff on his own behalf and as next friend for his children a total sum of $49,720. An appeal to the Court of Appeal was confined entirely to the quantum of damages. That Court reduced the damages awarded under *The Fatal Accidents Act*, R.S.O. 1960, c. 138, from $20,000 to $10,000 for the plaintiff; from $10,000 to $2,000 for his daughter and from $5,000 to $1,500 for his son, and also reduced the award for personal injuries of the plaintiff from $10,000 to $8,500. An appeal by the plaintiff from the judgment of the Court of Appeal was brought to this Court.

Held (Judson and Ritchie JJ. dissenting in part): The appeal should be allowed.

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

1967

VANA v. TOSTA *et al.*

Per curiam: The trial judge had not acted on any wrong principle of law when he took the element of "nervous shock" into consideration in awarding damages for the appellant's personal injuries and there was evidence to support his view in this regard. As the only ground upon which the Court of Appeal interfered with the general damage award was the inclusion of "nervous shock" as a factor for which the appellant was entitled to be compensated, this was a case in which the proper course was to restore the award of $10,000 made by the trial judge.

Per Cartwright, Hall and Spence JJ.: With respect to the award to the appellant under *The Fatal Accidents Act,* the award of the trial judge was excessive and not justified by the evidence. In reducing the award by $10,000 the Court of Appeal erred in placing too much emphasis on the possibility of remarriage and in taking into account any services the appellant's mother and mother-in-law might contribute to maintaining the home. Also, the case could not be considered as one where the earnings of the wife which she retained for herself were quite apart from any contribution made by her husband for her support, but rather as one where her earnings in part contributed to her support as well as to that of the balance of the family and the loss of those earnings was, therefore, a pecuniary loss to the husband. After reviewing the evidence as a whole, and giving due weight to the possible remarriage, remote as it might be, and what it would cost to hire a housekeeper and the other factors involved, the conclusion was reached that an award of $14,000 should be made.

The case of *St. Lawrence & Ottawa Railway Co. v. Lett* (1885), 11 S.C.R. 422, established that the children under the circumstances suffered the pecuniary loss from their mother's early death without the care, education and training (and also the guidance, example and encouragement) which only a mother can give. To allow damages under these circumstances attributable to such pecuniary loss of only $1,000 to a girl of 12 years of age and $500 to a boy of 9 years of age (these amounts being the net result of the Court of Appeal's judgment) was a "purely conventional assessment" and was, therefore, an error in principle. The amount of the award for this loss to the daughter should be increased from $1,000 to $2,000 and to the son from $500 to $1,000, resulting in the total award to the daughter under the provisions of *The Fatal Accidents Act* being fixed at $3,000 and the total award to the son under the provisions of *The Fatal Accidents Act* being fixed at $2,000. The award of the trial judge in the sums of $10,000 and $5,000 was unreasonable in that it was so "inordinately high as to be a wholly erroneous estimate of the damages".

Per Judson and Ritchie JJ., *dissenting:* The Court of Appeal's reduction of the trial judge's award for the appellant's damages under *The Fatal Accidents Act* from $20,000 to $10,000 should not be interfered with. The trial judge erred in principle in including factors which could not properly be classified as pecuniary loss and he failed to allow for certain contingencies of life, including the possibility that the appellant might remarry.

With regard to the damages awarded to the children, the Court of Appeal appeared to have concluded that the trial judge erred in principle by failing to confine himself to the actual evidence of pecuniary loss suffered by the children in the loss of their mother when he made his award to them for that loss. There was no error in principle

in the conclusion reached by the Court of Appeal and the award it suggested in respect of the loss of the care and guidance of the mother was appropriate having regard to all the circumstances.

[*St. Lawrence & Ottawa Railway Co. v. Lett* (1885), 11 S.C.R. 422, followed; *Grand Trunk Railway Co. of Canada v. Jennings* (1888), 13 App. Cas. 800; *Marsh v. Absolum*, [1940] N.Z.L.R. 448; *Hine v. O'Connor and Chambers and Fire Brigades Board*, [1951] S.A.S.R. 1, considered; *Naylor v. Yorkshire Electricity Board*, [1966] 3 W.L.R. 654; *Shaw v. Mills*, 1961 C.A. Eng. (unreported), referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], varying a judgment of Haines J. Appeal allowed, Judson and Ritchie JJ. dissenting in part.

R. G. Phelan, Q.C., and *E. A. Sabol*, for the plaintiff, appellant.

W. B. Williston, Q.C., R. J. Rolls and *J. F. Evans*, for the defendants, respondents.

The judgment of Cartwright, Hall and Spence JJ. was delivered by

SPENCE J.:—I have read the reasons for judgment of Ritchie J. and I am in complete agreement therewith in so far as they concern the restoration of the trial judge's award to the appellant which was attributable to nervous shock.

The Court of Appeal reduced by $10,000 the amount awarded the appellant under *The Fatal Accidents Act*, R.S.O. 1960, c. 138. The learned trial judge had awarded $20,000. The Court found that Haines J. did not take into account the possibility that the appellant might remarry and that he had no intention of hiring a housekeeper excepting his own mother to whom he had promised $30 a week as and when he could afford it. He was in debt due to the accident and unable then to pay anything. The mother was 75 years of age. On any basis, her usefulness as a housekeeper would be limited and of short duration. The Court also took into account that the appellant's mother-in-law who lived nearby and was then 62 years of age could be of assistance.

The possibility of remarriage is a limited one and should not be overemphasized in arriving at the amount to be awarded. There are many eventualities to be taken into consideration.

[1] [1966] 1 O.R. 394, 54 D.L.R. (2d) 15.

1967

VANA
v.
TOSTA *et al.*

Spence J.

Speaking of the appellant, the learned trial judge said:

> . . . In the accident he suffered extensive injuries to his spine. The eleventh thoracic vertebra was moved forward on the twelfth thoracic vertebra and remains in this position. The first lumbar vertebra (which is immediately below the twelfth thoracic vertebra) was crushed to the extent of 20 to 25%. The second lumbar vertebra was driven downwards into the third lumbar vertebra, leaving a permanent dent or depression in the third lumbar vertebra. This is seen readily in the x-rays. The intervertebral space between the second and third vertebrae was damaged and narrowed.

He also held, and the evidence fully supports the finding, that the appellant will eventually require a spinal fusion—surgery in which he must accept a failure rate of 5 to 15 per cent and, pending this surgery, will undergo back pain. This pain in time will become unbearable to be relieved only by the spinal fusion which when done will incapacitate him for seven months. The likelihood of remarriage seems very remote in these circumstances. It was of this man that the trial judge said:

> Finally, I must consider the matter of remarriage. I have seen the plaintiff and have studied him closely throughout the trial. I think remarriage unlikely.

MacKay J.A. said:

> The learned trial Judge *refused* to take into consideration the possibility of the remarriage of the Plaintiff husband. I can find nothing in the evidence that would warrant this conclusion.

(The italics are mine.)

Haines J. did not, as the record shows, *refuse* to take into consideration the possibility of remarriage. He said, "I think remarriage unlikely" and in the circumstances outlined above I agree with him. The appellant was not questioned as to his intentions in this regard either in chief or on cross-examination. At the time of the trial he was going on 48 years of age with two young children, a girl thirteen and a boy eleven. The accident happened August 18, 1963. The appeal was heard on April 23, 1965. The appellant had not remarried nor is it suggested that he has done so to date.

In my view, the respect accorded to the assessment made by the trial judge extends considerably beyond the question of credibility and his observation of the plaintiff during the course of the trial which he would apply to the evidence given as to the plaintiff's physical injuries should be considered as forming the basis for his conclusion that the plaintiff would not remarry which, therefore, in my view,

is more than a personal opinion but rather is a conclusion which should be accepted by an appellate court.

In reducing the award by $10,000 the Court of Appeal erred in placing far too much emphasis on the possibility of remarriage and in taking into account any services the appellant's mother and mother-in-law might contribute to maintaining the home. It is trite law that a wrongdoer cannot claim the benefit of services donated to the injured party. In the present case it amounts in my judgment to conscripting the mother and mother-in-law to the services of the appellant and his children for the benefit of the tortfeasor and any reduction of the award on this basis is and was an error in principle. There being error in principle, the amount awarded by the Court of Appeal is reviewable in this Court: *Widrig v. Strazer et al*[2].

The next question is whether the $20,000 awarded by the learned trial judge should be restored or varied and whether the amount fixed by the Court of Appeal should stand. I am of opinion that the $20,000 awarded was excessive and not justified by the evidence. I am also of opinion that the Court of Appeal erred in cutting the award in two for the reasons given in the judgment of MacKay J.A., Mr. Justice MacKay pointed out that the evidence is indefinite as to how much of the wife's earnings were used for herself and how much might reasonably be expected to enure to the benefit of the husband and children. It is significant to observe that the wife's earnings only totalled about $1,500 per year and that the husband was a man in moderate circumstances. Out of the sum of $1,500 a year, the mother put aside about $200 a year for the future benefit of the two children. It must be realized that what she expended out of the balance for her own maintenance was, under the circumstances of a moderate income family, a contribution to what would ordinarily have been provided by her husband. The husband was under the duty of supporting his wife in accordance with their circumstances in life, and the case cannot be considered as one where the earnings of the wife which she retained for herself were quite apart from any contribution made by her husband for her support, but rather as one where her earnings in part contributed to her support as well as to that of the

[2] [1964] S.C.R. 376.

1967

VANA
v.
TOSTA *et al.*

Spence J.

balance of the family and the loss of those earnings was, therefore, a pecuniary loss to the husband. The situation resembles somewhat that dealt with by Ritchie J. in *Corrie v. Gilbert*[3]. In that case he said at p. 464:

> It is unusual in this Court on an appeal such as this to reject both the award of the jury and that of the Court of Appeal, but there is no doubt that under s. 46 of the *Supreme Court Act* it is empowered to give the judgment that the Court whose decision is appealed against should have given, and for the reasons which I have stated, I do not think the award made by either of the Courts below should be affirmed.

However, after reviewing the evidence as a whole and giving due weight to the possible remarriage, remote as it may be, and what it will cost to hire a housekeeper and the other factors involved, I have reached the conclusion that an award of $14,000 should be made and I would vary the judgment appealed from accordingly.

I deal next with that part of the judgment of the Court of Appeal for Ontario which would reduce the award under *The Fatal Accidents Act* to the daughter Nancy Vana from $10,000 to $2,000 and the award under the said *Fatal Accidents Act* to the son Steven Vana from $5,000 to $1,500.

Before setting these amounts, the learned judges in appeal said:

> The conclusion I have reached is that the learned trial judge erred in principle in that he took into consideration matters that cannot be classed as pecuniary loss; that he failed to allow for the contingencies of life to which I have referred; that he made assumptions in the absence of evidence and disregarded evidence that would tend to mitigate or lower the damages.

This statement followed immediately the consideration of the damages awarded to the two children under the provisions of *The Fatal Accidents Act*. If the initial words which I have quoted are taken to mean that the judgment of Ritchie C.J. in this Court in *St. Lawrence & Ottawa Railway Company v. Lett*[4] is no longer law, then I must, with respect, express disagreement. It would seem from the addendum which MacKay J.A. added to his reasons in which he discusses the cases of *Grand Trunk Railway Company of Canada v. Jennings*[5], *Marsh v. Absolum*[6] and *Hine v. O'Connor and Chambers and Fire Brigades Board*[7], that such an interpretation might be justified.

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[3] [1965] S.C.R. 457.
[4] (1885), 11 S.C.R. 422.
[5] (1888), 13 App. Cas. 800.
[6] [1940] N.Z.L.R. 448.
[7] [1951] S.A.S.R. 1.

Despite anything that was said in *Grand Trunk Railway Company v. Jennings* or comments made in the Australian and New Zealand cases, the decision of this Court in *St. Lawrence & Ottawa Railway Company v. Lett* is unaffected and remains good law in Canada. I am, therefore, in agreement with my brother Ritchie when he expresses that view in his reasons for judgment.

Even if it is not proper to interpret the judgment of MacKay J.A. as having disregarded the *Lett* case, the learned justice in appeal did comment:

> I am also of the view that in assessing damages to the children for the loss of the care and guidance of their mother that the principle applied in the case of *Benham v. Gambling,* [1941] A.C. 157, is to some extent applicable. In that case, damages of £1,200 had been awarded for the shortening of life of an infant 2½ years of age. The House of Lords reduced the amount to £200. At p. 168 Viscount Simon L.C. said:
>
> > The truth, of course, is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, very moderate figures should be chosen. My noble and learned friend Lord Roche was well advised when he pointed out in *Rose v. Ford,* [1937] A.C. 826, the danger of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award.

My brother Ritchie has referred to the criticism made of *Benham v. Gambling,* particularly by Danckwerts L.J. in *Naylor v. Yorkshire Electricity Board*[8], and expressed a disinclination to approve the formulation of any conventional figure by way of compensation for the loss of a mother's care and guidance. He was, however, of the opinion that MacKay J.A. had not intended to adopt any such conventional figure in his reasons but rather was indicating the desirability for moderation and for guarding against "this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award".

With respect, I must disagree with this conclusion of my brother Ritchie. As he pointed out in his reasons, the net result of MacKay J.A.'s judgment is that he awarded Nancy Vana only $1,000 on account of the loss of her

[8] [1966] 3 W.L.R. 654.

1967

VANA
v.
TOSTA *et al.*

Spence J.

mother's care and guidance and that he awarded Steven Vana only $500 for such loss. Nancy Vana was 12½ years of age at the time of the accident in which her mother died, and Steven Vana was a little less than 10 years of age. In my view, awards of $1,000 and $500, respectively, to those two children for the loss of the care and guidance of their mother made as of the year 1963 were, to use the words of Danckwerts L.J. in *Naylor v. Yorkshire Electricity Board*, "a purely conventional assessment" and therefore were in error of principle. In such circumstances as I have already pointed out, it becomes the duty of this Court to assess what would be an amount awarded upon a proper principle.

I am of the opinion that the award of the learned trial judge in the sums of $10,000 and $5,000 was unreasonable in that it was so "inordinately high as to be a wholly erroneous estimate of the damages": *Davies et al. v. Powell Duffryn Associated Collieries Ltd.*[9] The award should be based upon a realistic assessment of the evidence of the particular circumstances of the case under consideration. It would not be proper to be guided by any criterion such as the necessity of finding "a very moderate figure" as recommended by Viscount Simon L.C. in *Benham v. Gambling*. The allowance of a proper amount for damages, in view of all the circumstances, would avoid the danger pointed out by Lord Roche in *Rose v. Ford*[10] of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award. That danger should be avoided not by the use of what Danckwerts L.J. termed "a purely conventional assessment" but by the trial judge making a careful charge to the jury or to himself if, as in the present case, he is trying the issue without the assistance of a jury, that the award must be based upon a reasonable assessment of all the circumstances and evidence in the case. What is that evidence in the present case? Without going into detail, I shall summarize it. The deceased woman was a good wife and industrious helpmate to her husband, and was a good mother to her children. No attempt was made by her husband to show that she was any extraordinary paragon but he gave such evidence without elaboration as would justify

[9] [1942] A.C. 601.

[10] [1937] A.C. 826.

the aforesaid conclusion. In my view, to require the establishment of any different situation by the plaintiff would only encourage the gross exaggeration of evidence in an attempt to bolster claims and result in the exaggeration of the verdict to which Lord Roche referred. The *St. Lawrence & Ottawa Railway Company v. Lett* case established that these two children under these circumstances suffered the pecuniary loss from their mother's early death without the care, education and training (and I would also add the guidance, example and encouragement) which only a mother can give. I have already expressed the view that to allow damages under these circumstances attributable to such pecuniary loss of only $1,000 to a girl of 12 years of age and $500 to a boy of 9 years of age is a "purely conventional assessment" and is, therefore, an error in principle. I would increase the amount of the award for this loss to the daughter Nancy Vana from $1,000 to $2,000 and to the son Steven Vana from $500 to $1,000. This would result in the total award to Nancy Vana under the provisions of *The Fatal Accidents Act* being fixed at $3,000 and the total award to Steven Vana under the provisions of *The Fatal Accidents Act* being fixed at $2,000.

I would, therefore, allow the appeal to the extent of increasing the award under *The Fatal Accidents Act* to the appellant from $10,000 to $14,000, to Nancy Vana under *The Fatal Accidents Act* from $2,000 to $3,000, and to Steven Vana under *The Fatal Accidents Act* from $1,500 to $2,000.

As I have already stated, I agree with Ritchie J. in increasing the award to the appellant George Vana for his own personal injuries from $8,500 to $10,000. The appellant should have his costs at trial and in this Court. There should be no costs in the Court of Appeal for Ontario.

The judgment of Judson and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting in part*):—This is an appeal from a judgment of the Court of Appeal of Ontario[11] varying the judgment of Mr. Justice Haines by reducing the damages which he had awarded to the appellant George Vana for

[11] [1966] 1 O.R. 394, 54 D.L.R. (2d) 15.

1967

VANA
v.
TOSTA *et al.*

Ritchie J.

personal injuries and to the children and himself under *The Fatal Accidents Act*, R.S.O. 1960, c. 138, in respect of the death of Mrs. Vana.

The damages in question were claimed as the result of a collision between the appellant's motor vehicle and that of the respondent Tosta, which the learned trial judge found to have been driven by the respondent Laxarewicz in a wanton and reckless manner. This appeal is confined entirely to the quantum of damages; the liability of the respondents is not questioned. The effect of the collision was that Mrs. Vana, who was occupying the front seat with her husband, was thrown from the car and sustained multiple injuries as a result of which she died; Vana himself was seriously injured and comparatively slight injuries were sustained by both children.

The learned trial judge awarded the plaintiff on his own behalf and as next friend for his children a total sum of $49,720, and the Court of Appeal varied this judgment by reducing the award for personal injuries to Mr. Vana from $10,000 to $8,500 on the ground that the trial judge had wrongly taken into consideration as an item of damage the fact that Vana had suffered nervous shock, and further varied the judgment at trial by reducing the amounts awarded under *The Fatal Accidents Act* on the ground, *inter alia*, that the trial judge had wrongly assessed the damages claimed on behalf of the children for loss of their mother's care and guidance as being "a pecuniary loss" within the meaning of that statute.

In dealing with the claim of the appellant Vana for nervous shock, the Court of Appeal made the following finding:

> There is no allegation of claim in the Statement of Claim that the Plaintiff, George Vana, suffered or is suffering from nervous shock as a consequence of his wife's death; neither he nor the medical witnesses gave any evidence that he did or was suffering from nervous shock from this cause. There was evidence that Mrs. Vana was bleeding from the mouth, nose and ears, but no evidence that her body was mangled or torn.
>
> I must therefore conclude that the learned trial Judge was in error in holding that this was a matter that he was entitled to take into consideration in assessing this Plaintiff's damages for personal injuries. Had it not been for this error I would not be disposed to interfere with the general damages awarded, although I think they were perhaps too high, but because of this error I would reduce them to $8,500.00.

With the greatest respect for the views thus expressed by Mr. Justice MacKay on behalf of the Court of Appeal, I am unable to agree with this finding.

The claim for personal injuries caused to the plaintiff is expressed in para. 10 of the statement of claim in the following terms:

> The personal injuries caused to the Plaintiff, George Vana, were compound fractures of the first and third lumbar vertebrae and of the 12th thoracic vertebra with severe shock, hospitalization, pain and a tendency to arthritic changes in the area of the fractures . . .

It is true that the claim thus made for "severe shock" is capable of being construed as being limited to the shock which Vana sustained as a result of his injuries, but when this claim is considered in conjunction with the circumstances of his wife's death, I do not think that it is to be read as excluding the nervous shock which he sustained from this cause as an element of damage.

The uncontradicted evidence of the appellant was to the effect that after the accident, injured as he was, he got out of his car to find his wife in a condition which he described as follows:

> . . . then I crawled to the window and I looked out the window because my wife wasn't in the seat. She was lying on the ground. She was on her stomach and her feet were under the car and I don't remember how I got out of the car but I went to her and I saw that she was badly hurt. She was bleeding from her nose and her mouth and her ears and some people had started to try to breathe through her mouth for resuscitation and I remember one fellow says, "Don't let the blood choke her, turn her head to the side" and they made me sit down.

As to there being no evidence of Vana suffering nervous shock from this cause, reference should be had to the following answer made by him in his examination-in-chief:

> Q. Yes, and what was your condition when you got to the Brant Hospital?
> A. Well, I was in shock and I laid in the Emergency Room there and Dr. DeJong came and said that I should lay on the stretcher till he takes me up for X-rays . . .

In considering the validity of the inclusion of nervous shock as an element of damage in such cases reference may usefully be had to what was said by Sellers L.J. in the Court of Appeal in England in the case of *Shaw v. Mills* which appears to be unreported except in Kemp and Kemp on The Quantum of Damages—Fatal Injuries Claims, 2nd ed. at p. 178. That was a case in which a man

1967

VANA v. TOSTA *et al.*

Ritchie J.

and his wife and three daughters were standing on a footpath when they were run into by a motorcycle with the result that the wife and youngest daughter were killed and the husband and the two other children (Jean and Barbara) were injured. Lord Justice Sellers is quoted as saying:

> In addition to their physical injuries the husband and Jean and Barbara saw the distressing sight before them. This circumstance, one would have thought would have resulted, in anyone of maturity in a shock which would have an effect upon their health quite apart from any other factors whatsoever. It is that element in these cases which has given rise to these appeals in respect of the personal injuries to the husband and to the elder daughter.

The appeal was dismissed.

The development of the law in this Court with respect to the function of a provincial court of appeal in reviewing an award of damages made at trial has recently been thoroughly reviewed by Spence J. in *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*[12], at pages 18 to 20 and I would also adopt the following language taken from the reasons for judgment of Lord Wright in *Davies et al. v. Powell Duffryn Associated Collieries Limited*[13], at p. 617 where he said:

> In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misrepresented the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

I do not think that the learned trial judge in the present case acted on any wrong principle of law when he took the element of "nervous shock" into consideration in awarding damages for the appellant's personal injuries and I am, as I have indicated, of opinion that there was evidence to support his view in this regard. As the only ground upon which the Court of Appeal interfered with the general damage award was the inclusion of "nervous shock" as a factor for which the appellant was entitled to be compensated, I am with the greatest respect of opinion that this is a case in which the proper course is to restore the award of $10,000 made by the trial judge.

In considering the damages to be awarded to George Vana under *The Fatal Accidents Act*, the Court of Appeal

[12] [1966] S.C.R. 13.

[13] [1942] A.C. 601.

observed that the learned trial judge had failed to take into consideration many of the hazards and uncertainties of life which should have been weighed before reaching a conclusion as to the pecuniary loss which he suffered by reason of his wife's death.

One of the matters which must always be considered in determining the amount to be awarded to a husband under *The Fatal Accidents Act* for the loss of his wife is the possibility of his remarriage and in this regard the learned trial judge found:

> Finally, I must consider the matter of remarriage. I have seen the plaintiff and have studied him closely throughout the trial. I think remarriage unlikely.

As Mr. Justice MacKay has said, there is nothing in the evidence that would warrant this conclusion and it appears to me that it must be based entirely from the trial judge's assessment of the bearing and manner of the appellant on the witness stand.

It must, of course, be accepted that the trial judge is in a better position to assess the quality of a witness whom he has studied closely throughout the trial than any court of appeal; the respect accorded to such an assessment is, however, normally limited to the question of credibility and I do not think that the same considerations apply to the trial judge's finding that remarriage was unlikely. His observations in this regard can, I think, only be treated as an expression of personal opinion based upon his observation of the appellant for a part of one day on the witness stand during which no one asked him whether he contemplated the possibility of remarriage or not. This does not appear to me to constitute a sufficient foundation for excluding such a possibility in the case of a 47-year old man, as the trial judge appears to have done, and I agree with Mr. Justice MacKay that the trial judge erred in disregarding this factor in making his award under *The Fatal Accidents Act*.

At the time of her death Mrs. Vana was engaged as a part-time waitress earning an average of $30 per week which the learned trial judge found she contributed to the household, and from which she also managed to create a bank account of $600 in three years which was to be used

1967

VANA
v.
TOSTA *et al.*

Ritchie J.

for the college education of the children. In considering this phase of the matter as an element of pecuniary loss recoverable by the husband under *The Fatal Accidents Act*, the trial judge described it as follows:

> Loss of the wife's contribution of $1,500 a year to the household for a period which I estimate at least ten years. It may well be that she would have worked much longer. She was in good health.

As Mr. Justice MacKay has pointed out, the learned trial judge did not appear to take into consideration the fact that any compensation awarded for the loss of these earnings would be paid in advance and that in the ordinary course of living the wife might, by reason of illness or for other reasons not have continued to work. Mr. Justice MacKay also pointed out that the evidence is indefinite as to how much of the wife's earnings were used for herself and how much might reasonably be expected to enure to the benefit of the husband and children. I agree with these observations made on behalf of the Court of Appeal and I also agree that part of the wife's estimated future earnings would be properly allocated to the damages awarded to the children.

Other factors which the trial judge took into consideration in making his award of $20,000 to George Vana under *The Fatal Accidents Act* were the expense of employing a housekeeper and perhaps another part-time assistant to train and guide the children, the expense of providing board and lodging for those employed to replace the wife's services, the expense of furnishing rooms and providing amenities for such employees and the further extra expense which might from time to time be incurred in providing those countless little services that would have been provided by the wife which will not be provided by employees. With respect to these items Mr. Justice MacKay points out that the uncontradicted evidence is to the effect that Mr. Vana had no intention of hiring any housekeeper except his own mother whom he had promised to pay at the rate of $30 a week. It must be remembered that the mother was 75 years of age and might well not be able to perform these duties for very long but it is also worthy of note that the other grandmother who lives across the street from them was only 62 and in Mr. Vana's own language, "she could more or less give guidance to Nancy and in her dealings with school work and so forth."

Mr. Justice MacKay has also pointed out that there is no evidence that the expense of providing board and lodging for a housekeeper would be any greater than the cost of maintaining a wife and that the husband would not be responsible for paying for the clothing and personal effects of a housekeeper. I agree with the Court of Appeal that the learned trial judge erred in principle in including in his award to Mr. Vana under *The Fatal Accidents Act* factors which cannot properly be classified as pecuniary loss and that he failed to allow for the contingencies of life to which reference has been made. I think, with the greatest respect for the learned trial judge, that it is also fair to say that in certain respects he erred in the manner in which he interpreted the evidence.

For these reasons and for those stated by Mr. Justice MacKay, I would not interfere with the Court of Appeal's reduction of the trial judge's award for George Vana's damages under *The Fatal Accidents Act* from $20,000 to $10,000.

It has been established since the earliest times that the damages to be awarded under *The Fatal Accidents Act* are confined to actual or expected pecuniary loss suffered by the claimant. The effect of the unbroken line of authority to this effect has not been materially changed since the principle was stated by Pollock C.B., in *Franklin v. South Eastern Railway Company*[14], where he said:

> Now it is clear that damage must be shown, for the jury are to "give such damages as they think proportioned to the injury." It has been held that these damages are not to be given as a solatium; but are to be given in reference to a pecuniary loss . . .

The damages to be awarded to the two Vana children under *The Fatal Accidents Act* must be considered in light of this principle, and the main question to be determined in this regard is whether the loss which the children suffered in being deprived of the mother's care and moral training can be said to be "a pecuniary loss" for which damages are recoverable under the statute.

The learned trial judge, following the decision of this Court in *St. Lawrence and Ottawa Railway Company v. Lett*[15], held that such damages were recoverable and that

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[14] (1858), 3 H. & N. 211, 157 E.R. 448.
[15] (1885), 11 S.C.R. 422.

1967

VANA v. TOSTA et al.

Ritchie J.

they should be substantial and he accordingly awarded $10,000 to the 12-year old daughter and $5,000 to the 9-year old boy. The Court of Appeal reduced these damages to $2,000 and $1,500 respectively.

In *St. Lawrence and Ottawa Railway Company v. Lett*, (hereinafter referred to as the *Lett* case) the Chief Justice, speaking for a narrow majority of this Court (3 to 2), made the following statements at p. 426:

> I cannot think the injury contemplated by the legislature ought to be confined to a pecuniary interest in a sense so limited as only to embrace loss of money or property, but that, as in the case of a husband in reference to the loss of a wife, so, in the case of children, the loss of a mother may involve many things which may be regarded as of a pecuniary character.

And again at p. 432:

> I think the statute intended that where there was a substantial loss or injury there should be substantial relief. I cannot think that in giving compensation to a child for the loss of its parent the legislature intended so to limit the remedy as to deprive the child of compensation for the greatest injury it is possible to conceive a child can sustain, namely, in being deprived of the care, education and training of a mother, unless it could be shown that the loss was a pecuniary loss of so many dollars or so much property, a construction which in ninety-nine cases out of a hundred, would simply amount to saying that though there was an almost irreparable injury, affecting the present and future interests of the child, no compensation was to be awarded; in other words, it would be, in effect, to deny to a child compensation for the death of a mother by negligence in almost every conceivable case.

It is apparent that this decision of the Chief Justice constituted a clear recognition of the fact that the loss to children of the care and guidance of their mother is to be regarded as a loss of a pecuniary character which is to be assessed as a separate head of damage.

Leave to appeal from this decision to the Privy Council was refused but three years later the case of *Grand Trunk Railway Company of Canada v. Jennings*[16], (hereinafter referred to as the *Jennings* case) which involved the death of a father, was decided by the Privy Council and in that case Lord Watson had occasion to say:

> When a man has no means of his own and earns nothing, it is obvious that his wife or children cannot be pecuniary losers by his decease.

It is argued that the decision in this case was inconsistent with the view of the majority in the *Lett* case and that it

[16] (1888), 13 App. Cas. 800.

stands as authority for the proposition that the lack of a mother's care and guidance is not to be treated as a pecuniary loss for the purpose of assessing damages under *The Fatal Accidents Act*. This argument was based on the premise that there is no difference in principle between the moral and practical training of a mother and that of a father and that, as the Privy Council found no pecuniary loss to have been occasioned by the father's death in the *Jennings* case, it must follow that their Lordships did not agree with the reasoning in the *Lett* case.

The cases in Australia and New Zealand —to which Mr. Justice MacKay referred support this proposition as is indicated by the language employed by Mr. Justice Kennedy in *Marsh v. Absolum*[17], where he said at p. 475:

> I think that the lack of a mother's care and moral training is a great loss to a child but it is not a pecuniary loss.

The view adopted by the Australian and New Zealand courts has not been shared by the courts in Canada where the *Lett* case has been widely followed in different provinces ever since it was decided. I do not think that Mr. Justice Ruttan of the Supreme Court of British Columbia was overstating the matter when he said in *DeBrincat v. Mitchell*[18]:

> The guiding principle as contained in the judgment of Chief Justice Ritchie in the Supreme Court decision of *Lett v. St. Lawrence and Ottawa Elec. Ry.* (1885) 11 S.C.R. 422, keeps re-appearing in extensive quotation in many of the cases that have been decided in the succeeding 70 years. Pecuniary loss is the loss of some benefit or advantage which is capable of being estimated in terms of money, as distinct from mere sentimental loss. Here we must value the loss of the services of a young wife to a young husband, their respective ages being 30 and 32 at the time of the accident; and the loss of a mother of two small children, aged three and five years.

More recently Mr. Justice Patterson of the Supreme Court of Nova Scotia in the case of *Walter et al. v. Muise*[19] referred at length to the *Lett* case and made a small allowance to the infant children for loss "of the care of a mother for something over a year" notwithstanding the fact that the evidence indicated that they had become adjusted to life with their step-mother.

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[17] [1940] N.Z.L.R. 448.
[18] (1958), 26 W.W.R. 634 at 635.
[19] (1964), 48 D.L.R. (2d) 734.

1967

VANA
v.
TOSTA *et al.*

Ritchie J.

It is contended that the reasons for judgment delivered by Mr. Justice MacKay on behalf of the Court of Appeal are predicated on acceptance of the proposition that the loss of a mother's care and training is not a pecuniary loss and that in this regard the Court of Appeal were accepting the views expressed in the Australian and New Zealand cases. That the Court of Appeal recognized the loss of a mother as being a loss of a pecuniary character for which her surviving children were entitled to recover damage is made plain by Mr. Justice MacKay where he says:

> In my view there is little evidence aside from that as to the amounts being saved by the mother for their education to justify an award of any substantial amount to the children.

In the present case the mother had put aside $200 a year for three years for the future benefit of the two children and assuming, as the trial judge did, that she would continue to do this for ten years, this would amount to a fund of $1,000 for each child; but the Court of Appeal has awarded $2,000 to the girl and $1,500 to the boy and it accordingly appears to me that this must include an award of $1,000 to the girl and $500 to the boy as a separate item of damage in compensation for the deprivation of their mother's care and training. In my view the recognition of this separate head of damage is in conformity with the principle invoked by the Chief Justice in the *Lett* case and clearly indicates that the Court of Appeal rejected the interpretation placed on the *Jennings* case by the Australian and New Zealand authorities.

In the course of his reasons for judgment, Mr. Justice MacKay refers to four Ontario cases, in which awards were made to children under *The Fatal Accidents Act* in respect of the death of their mother and he quotes from Mr. Justice Laidlaw in *Wannamaker v. Terry*[20], where he said at p. 589:

> All members of this Court agree that the service performed by a mother for her infant children is a very important matter of consideration and the continuance of her life is an important thing to them, but what the jury have to decide is how much this service was worth in dollars and cents. How much in dollars and cents were they deprived of by her death.

As I have indicated, I do not read the decision of the Court of Appeal as excluding the loss of their mother as an

[20] [1956] O.W.N. 588.

element in assessing the damages to be awarded to the children under *The Fatal Accidents Act*. Mr. Justice MacKay did, however, express the following view:

> I am also of the view that in assessing damages to the children for the loss of the care and guidance of their mother that the principle applied in the case of *Benham v. Gambling*, [1941] A.C. 157, is to some extent applicable.

In *Benham v. Gambling* damages of £1,200 had been awarded at trial in respect of the shortening, and therefore the loss of prospective enjoyment, of the life of a child of 2½ years. The House of Lords reduced the award to £200 and the portion of the decision of Viscount Simon L.C., which Mr. Justice MacKay considered "to be to some extent applicable" in assessing damages to the children for the loss of the care and guidance of their mother, was that passage in which the Lord Chancellor pointed out that where the jury or judge of fact was faced with "attempting to equate incommensurables", in terms of damages, "very moderate figures should be chosen".

The case of *Benham v. Gambling* has not been without its critics and in the recent case of *Naylor v. Yorkshire Electricity Board*[21] the Court of Appeal deviated from it to the extent of taking the reduced value of the pound into consideration. In the course of his reasons for judgment, Danckwerts L.J. said:

> Accordingly, in *Benham v. Gambling* the House of Lords, under the compelling influence of Viscount Simon L.C., evolved by a process of judicial legislation a theory that the damages should be a strictly moderate figure, somewhere between a minimum of £200 and a maximum of £500. This, of course, was a purely conventional assessment which paid no regard to the real facts or, perhaps I should say, the difficulties of the case. . . . Since then the value of money has fallen two and a half times, and, conventional or not, the figure of £200 or £500 must be even more unrealistic than it was in 1941.

Having regard to this decision and to the decision of the High Court of Australia in *Skelton v. Collins*[22], I would deprecate the formulation of any "conventional figure" by way of compensation for the loss of a mother's care and guidance. I do not, however, think that Mr. Justice MacKay intended to adopt any such figure but rather that he was indicating the desirability for guarding against "this

[21] [1966] 3 W.L.R. 654.

[22] (1966), 39 A.L.J.R. 480.

1967

VANA
v.
TOSTA *et al.*

Ritchie J.

head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award".

In my opinion, the decision of the Chief Justice of this Court in the *Lett* case goes no further than deciding that children may be entitled to compensation under *The Fatal Accidents Act* in respect of the loss of their mother's care and guidance and that where they have thereby sustained "substantial injury", the damages should be commensurate with that injury. In this context the words "substantial injury" are used in contradistinction to "mere sentimental" injury, but in order to justify anything more than a moderate award under this head, there must, in my view, be evidence to support a reasonable inference that the future of the children has been adversely affected by their mother's death and that they will suffer a resultant pecuniary loss which is capable of being expressed in terms of "such damages as will afford a reasonable ... compensation for the substantial loss sustained", to employ the phrase used by the Chief Justice in the *Lett* case.

In the *Lett* case damages were awarded to five of the deceased mother's children. The two youngest, a girl of 14 and a boy of 11, were awarded $1,200 and $1,300 respectively and the Chief Justice was able to affirm this award as representing compensation for the loss of the mother's educational and moral training. It is difficult, more than 80 years later, to understand all the factors which influenced the Court in affirming this award, although I think it can safely be said that children at that time were much more dependent on the education which was received in the home than they are today when education at the public expense is available to all. In any event, it is quite clear that the Chief Justice considered himself bound by the English authorities decided under *Lord Campbell's Act* and that he applied the principle that such damages were not to be awarded as a *solatium* but rather in reference to a loss which he regarded "as of a pecuniary character".

In the present case, aside from the fact that she was putting aside $200 a year for her children and was in good health, the evidence of Mrs. Vana's activities in the home

is to be found in the following excerpt from the appellant's examination-in-chief:

> Q. What activities did your wife follow?
> A. Well, she was a den mother as for the young boy about three months out of the year she conducted meetings for the cub scouts and my daughter she used to take my daughter to piano lessons and my wife did her own cooking and baking and ...

And later:

> Q. Well then, what were her relations with her children?
> A. Well she was a very faithful housewife as far as mother, schooling, she did her job excellently, she did her own ironing, washing, cleaning and took care of the children and she did she loved roses, she had her own little rose garden in the back lot there.

This evidence indicates that Mrs. Vana was an excellent mother but the task of translating the loss of her influence and character on the lives of her children into terms of a damage award is so beset with uncertainties and lends itself so readily to being inflated in the eyes of the trial court in terms of sympathy, speculation and conjecture, that as I have indicated, I adopt the suggestion which I take to be implicit in the decision of the Court of Appeal, that the proper course by which a trial judge should be guided in such cases is to instruct himself or the jury as the case may be that the amount to be awarded should bear a realistic relationship to the evidence, if any, which makes it reasonably probable that the children will actually suffer a pecuniary loss as a result of their mother's death.

I think that this is the basis of the decision of the Chief Justice in the *Lett* case, *supra,* and the fact that in 1885, in light of the evidence which was before him, the Chief Justice considered awards of $1,200 and $1,300 to be appropriate for the loss of a mother to children who were 14 and 11 years old respectively, does not appear to me to be inconsistent with the award made by the Court of Appeal in the present case nor in my view does it necessarily follow from Mr. Justice MacKay's reference to the case of *Benham v. Gambling, supra,* that the assessment made by the Court of Appeal was "a purely conventional" one. In my opinion, the Court of Appeal, like the Chief Justice in the *Lett* case, took the view that any award of damages under *The Fatal Accidents Act* must be supported by evidence of actual pecuniary damage or damage "of a pecuniary character" and that the element of *solatium* is to be excluded in mak-

1967

VANA
v.
TOSTA *et al.*

Ritchie J.

ing such an award. In awarding damages to children for the death of their mother there must be, as I have indicated, evidence which makes it reasonably probable that the children will actually suffer a pecuniary loss as a result of their mother's death.

There may be cases where the evidence would only justify a very small amount and others in which a very substantial award would be appropriate. The result of each case must, of course, depend on its own facts and the circumstances affecting the measure of the damages to be awarded to children by reason of their mother's death may range from a case where, before her death, the mother was so physically or mentally incapacitated as to be unable to play any useful part in her children's lives in which case the children cannot be said to have suffered any resultant pecuniary injury, to the case of the death of a widowed mother who was the sole support of her infant children and whose death, leaving them without guidance, to adjust to life entirely on their own, would obviously constitute a substantial loss. In each case the question is one for the trial tribunal to decide subject to review by the Court of Appeal in cases where the trial court has erred in principle or has awarded an amount which is so inordinately high or so inordinately low as to make it an entirely erroneous estimate of the damage. In the present case the Court of Appeal appears to have concluded that the trial judge erred in principle by failing to confine himself to the actual evidence of pecuniary loss suffered by the children in the loss of their mother when he made his award to them for that loss.

The considerations which should govern this Court in reviewing an award such as the one here made by the Court of Appeal are, in my opinion, those to which Judson J. referred in *Hossack et al. v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*[23], at p. 34 where he said:

> ... 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.

[23] [1966] S.C.R. 28.

1967

VANA
v.
TOSTA *et al.*

Ritchie J.

I see no error in principle in the conclusion reached by the Court of Appeal and as I think that the award suggested by Mr. Justice MacKay in respect of the loss of the care and guidance of Mrs. Vana is appropriate having regard to all the circumstances, I would not interfere with it.

In the result, I would allow this appeal in part by restoring the award of $10,000 made by the learned trial judge in respect of George Vana's personal injuries and would affirm the assessments made by the Court of Appeal under *The Fatal Accidents Act.*

The appellant has succeeded in part and under all the circumstances I think he should have the costs of this appeal.

Appeal allowed with costs, JUDSON *and* RITCHIE JJ. *dissenting in part.*

Solicitors for the plaintiff, appellant: Phelan, O'Brien, Rutherford, Lawer & Shannon, Toronto.

Solicitors for the defendants, respondents: Evans, Philp & Gordon, Hamilton.

DIMENSIONAL INVESTMENTS LIMITED ..... APPELLANT;

1967

May 16, 17
Oct. 3

AND

HER MAJESTY THE QUEEN .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Sale of land—Indian lands—Contract for sale by Crown of Indian lands—Time of essence—Provision for termination of contract and forfeiture of money in the event of default—Whether penalty clause or pre-estimate of damages—Whether unconscionable penalty —Exchequer Court Act, R.S.C. 1952, c. 98, s. 48—Indian Act, R.S.C. 1952, c. 149, ss. 37 et seq.

By a contract dated March 14, 1959, the appellant company arranged to purchase Indian lands which had been surrendered to the Crown for sale on behalf of the Indians, in accordance with ss. 37 to 41 of the *Indian Act,* R.S.C. 1952, c. 149. The price was $6,521,946 to be paid by instalments over a period of two years. A sum of $323,763 was made payable to individual Indians on the execution of the contract, as well as a sum of $750,000 to the Crown. So long as the appellant was

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

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

not in default, it was entitled to obtain grants of portions of the land on making certain additional payments calculated on the property to be conveyed. The last payment required under the agreement was not paid. The contract contained a clause stipulating that time was of the essence and that upon default the Crown could terminate the contract and retain "any moneys paid under this agreement as liquidated damages and not as a penalty". The Crown having terminated the contract, the appellant, by its petition of right, sought to recover the moneys which it had paid in excess of what it had been required to pay for land which it had been granted. The trial judge reached the conclusion that but for s. 48 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, the appellant would have been entitled to relief from forfeiture in respect of the moneys which remained in the hands of the Crown at the time of the presentation of the petition of right. The company appealed to this Court.

Held: The appeal should be dismissed.

Section 48 of the *Exchequer Court Act* afforded a complete defence to the Crown. That section provides that a clause in a contract with the Crown in which a drawback or a penalty is stipulated on account of non performance of any condition or neglect to complete any public work shall be construed as importing an assessment of damages by mutual consent.

Whether a provision in a contract is penal or not depends upon the construction of the contract but the question of unconscionability depends upon the circumstances of each case at the time when the clause is invoked. There was no evidence as to the value of the lands retained by the Crown and it therefore did not appear to be possible to say with any degree of certainty that the appellant's breach would not result in damage to the Crown to the approximate amount which it had retained.

Couronne—Vente de terres—Terres des Indiens—Contrat pour la vente par la Couronne de terres des Indiens—Le temps étant de l'essence du contrat—Clause prévoyant la terminaison du contrat et la forfaiture des argents dans le cas de défaut—La clause impose-t-elle une peine ou est-elle une évaluation préalable des dommages—La peine est-elle déraisonnable—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 48—Loi sur les Indiens, S.R.C. 1952, c. 149, arts. 37 et seq.

En vertu d'un contrat en date du 14 mars 1959, la compagnie appelante a convenu d'acheter des terres d'Indiens qui avaient été cédées à la Couronne pour être vendues au profit des Indiens, conformément aux arts. 37 à 41 de la *Loi sur les Indiens*, S.R.C. 1952, c. 149. Le prix était de $6,521,946 et devait être payé par versements sur une période de deux ans. Une somme de $323,763 était payable aux Indiens individuellement lors de la signature du contrat, ainsi qu'une somme de $750,000 à la Couronne. En autant que la compagnie appelante ne manquait pas à ses engagements, elle avait droit d'obtenir l'octroi de parties de ces terres en payant des montants additionnels calculés sur la valeur de la propriété transférée. Le dernier paiement dû en vertu du contrat n'a pas été fait. Le contrat contenait une clause stipulant que le temps était de l'essence et que, sur défaut, la Couronne pouvait mettre fin au contrat et retenir tous les argents

payés en vertu du contrat comme étant les dommages convenus et non pas comme étant une peine. La Couronne ayant mis fin au contrat, la compagnie appelante, par sa pétition de droit, a tenté d'obtenir la remise des argents qu'elle avait payés en surplus de ce qu'elle était tenue de payer pour les terres qui lui avaient été octroyées. Le juge au procès en est venu à la conclusion que si ce n'eût été de l'art. 48 de la *Loi sur la Cour de l'Échiquier*, S.R.C. 1952, c. 98, la compagnie appelante aurait pu recouvrer les argents qui étaient encore entre les mains de la Couronne lorsque la pétition de droit fut présentée. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

L'article 48 de la *Loi sur la Cour de l'Échiquier* était une défense complète en faveur de la Couronne. Cet article porte qu'une clause dans un contrat avec la Couronne stipulant une retenue ou imposant une peine pour l'inexécution d'une condition ou pour la négligence de parfaire un ouvrage public, doit être interprétée comme impliquant une évaluation, de consentement mutuel, des dommages.

Qu'une clause dans un contrat soit pénale ou non dépend de l'interprétation du contrat, mais la question de savoir si elle est déraisonnable dépend des circonstances dans chaque cas au moment où la clause est invoquée. Il n'y avait pas de preuve de la valeur des terres retenues par la Couronne, et alors il ne semble pas être possible de dire avec un degré quelconque de certitude que les dommages subis par la Couronne et occasionnés par la rupture du contrat ne s'élevaient pas au montant approximatif retenu par la Couronne.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada[1], sur une pétition de droit. Appel rejeté.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], on a petition of right. Appeal dismissed.

W. B. Williston, Q.C., and *R. J. Rolls*, for the appellant.

D. S. Maxwell, Q.C., and *N. A. Chalmers*, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Thurlow of the Exchequer Court of Canada[1] by which he ordered that the present appellant was not entitled to any of the relief which it had claimed in its petition of right.

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[1] [1966] Ex. C.R. 761.

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

The appellant is a company which was created solely for the purpose of entering into the transaction which is the subject matter of the present litigation. The appellant's principals were land speculators and had arranged for the purchase of certain Indian lands which had been surrendered to Her Majesty for sale on behalf of the Sarnia Band of Indians in accordance with ss. 37 to 41 of the *Indian Act*. This arrangement was made the subject of an agreement dated March 14, 1959, which was executed on behalf of the Crown and the appellant and each page of which was signed by the solicitor for the Indian Band. The provisions of this agreement have been thoroughly analyzed by Mr. Justice Thurlow and it is only necessary for me to say that it provided for the total purchase price of $6,521,946 to be paid by instalments over a period of two years. The sum of $323,763.63 was made payable to individual Indians on the execution of the agreement and so long as the appellant was not in default under the agreement, it was entitled to obtain grants of portions of the land on making certain additional payments calculated on the area and location of the property to be conveyed. The last payment required under the agreement, which amounted to $4,198,549.15, together with interest in the amount of $107,408.28, fell due on March 15, 1961, and was not paid within 30 days after notice had been given to the appellant by the Minister in accordance with para. 10 of the agreement which reads as follows:

> The Purchaser convenants and agrees that if default be made in payment of the said purchase price and interest, or any part thereof, upon the days and times hereinbefore provided, or if default be made in the performance or observance of any of the covenants, agreements and stipulations to be performed and observed by the Purchaser, the Minister shall be entitled to give the Purchaser thirty days' notice in writing requiring it to remedy such default, and upon such notice having been given and such default not having been remedied, this agreement shall, at the option of the Minister, be terminated and all rights and interest hereby created or then existing in favour of the Purchaser or derived by it under this agreement with respect to the lands not already granted to the Purchaser shall cease and determine and the Minister shall be entitled to retain any moneys paid under this agreement as liquidated damages and not as a penalty.

This paragraph must be read in conjunction with para. 13 which provides:

> It is agreed by and between the parties hereto that time shall be of the essence of this agreement, and that no extension of time for any payment by the Purchaser or for rectification of any breach of any covenant,

agreement or stipulation herein contained shall operate as a waiver of this provision with respect to any other payment or rectification or extension of time, except as specifically granted in writing by the Minister.

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

It seems to me to be important to note that in dealing with the appellant the Crown was from the outset dealing with a company which never at any time had assets which were equivalent to the balance required at the end of the term of the agreement, and that at least from August 1959, it ceased to have backers who had any such assets. In view of this situation, it is not surprising that the appellant never at any time sought specific performance of the agreement, and that six months after default it was still not prepared to seek this remedy unless it was given a further two years in which to raise the money.

The position at the time of the default was that the appellant had paid $2,323,396.85 which, it is agreed, was $1,350,000 in excess of what it was required to pay for land which had been granted to it or its nominees. Of this $1,350,000 however, $375,000 had been paid out by the Crown to individual members of the Indian Band in accordance with the provisions for surrender and the learned trial judge has found that at the time of the commencement of these proceedings, at least $975,000 of the amount paid by the appellant remained in the hands of the Crown as trustee for the Indian Band.

The appellant's case is that in spite of the express language contained in the last line of the above paragraph, the provisions entitling the Minister "to retain any moneys paid under this agreement as liquidated damages" did not constitute an agreement for a genuine pre-estimate or assessment of the damages which were likely to result from breach of the agreement, but that it was in the nature of a penalty and that in the circumstances of the case it was unconscionable for the Crown to terminate the suppliant's rights in the land and also to retain the money which remained in its hands and which had been paid by the appellant. The appellant sought the return of the money by way of relief against the forfeiture which it contended had been wrongly imposed upon it by the terms of para. 10 of the agreement.

In dismissing the appellant's claim, the learned trial judge found s. 48 of the *Exchequer Court Act* to be applicable to the circumstances. That section, which applies to

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

claims over which the Exchequer Court has jurisdiction which arise out of "any contract in writing" reads as follows:

> 48. No clause in any such contract in which a drawback or penalty is stipulated for on account of the non-performance of any condition thereof, or on account of any neglect to complete any public work or to fulfil any covenant in the contract, shall be considered as comminatory, but it shall be construed as importing an assessment by mutual consent of the damages caused by such non-performance or neglect.

I am in full agreement with Mr. Justice Thurlow in holding, for the reasons which he has stated, that this section applies to the contract here in question and affords a complete defence to the respondent. It accordingly follows that I would dismiss this appeal and it would be unnecessary to deal with the matter further were it not for the fact that Mr. Justice Thurlow in his most thoughtful judgment, has considered the question of whether the appellant would have been entitled to relief if s. 48 did not apply to the agreement here in question, and has reached the conclusion that but for s. 48, the appellant would have been entitled to relief from forfeiture in respect of the $975,000 which remained in the hands of the Crown at the time of the presentation of the petition of right. In reaching this conclusion, Mr. Justice Thurlow has rested his reasoning primarily on the decision of the majority of the Court of Appeal in *Stockloser v. Johnson*[2] (hereinafter referred to as the *"Stockloser" case*) in which case Denning L.J. summarized the view of the majority at page 489 in the following terms:

> *But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause),* then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman v. Drinkle* (1916) 1 A.C. 275, where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner.
>
> The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell L.J. has said about it, differing herein from the view of Romer L.J. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money.

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[2] [1954] 1 Q.B. 476, [1954] 1 All E.R. 630.

Although he does not expressly say so, it is clear to me from Mr. Justice Thurlow's reasons for judgment that he was of opinion that the Crown's retention of the moneys as well as the lands in the present case was "unconscionable" and that it is for this reason that he would have granted relief from forfeiture had it not been for the provisions of s. 48 of the *Exchequer Court Act*.

The *Stockloser case, supra,* is characterized by a sharp difference of opinion between Romer L.J., who spoke for himself alone, and Somervell L.J. with whom Denning L.J. agreed. Lord Justice Romer concluded that "in the absence of some special circumstances, such as fraud, sharp practice or other unconscionable conduct of the vendor" no intervention was permissible except to allow an extension of time for payment. Somervell and Denning L.JJ. on the other hand, thought that the province of equity was not so circumscribed and that it permitted more general relief whenever the forfeiture clause was of a penal nature—where, that is, the sum forfeited was wholly disproportionate to the damage suffered—provided that in the circumstances it was unconscionable for the money to be retained. The opinion of the majority, which was adopted by Thurlow J., is set forth at length elsewhere in these reasons, but I do not find it necessary for the purposes of this case to adopt either view because even if the opinion of the majority were to prevail, it would not, in my opinion, entitle the appellant to succeed in the circumstances of the present case.

The portion of Lord Somervell's judgment which is italicized and expressly adopted by Mr. Justice Thurlow occurs at page 487 and reads as follows:

> *I think that the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think that they indicate that the court would have power to give relief against the enforcement of the forfeiture provisions, although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances.*

Mr. Justice Thurlow expresses the opinion that this view follows logically from what was said by Mr. Justice Duff in this Court in *Snell v. Brickles*[3], and in this regard

[3] (1914), 49 S.C.R. 360 at 371, 20 D.L.R. 209.

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

I think it should be noted that the latter case was one in which specific performance was sought and granted and was not one in which "the purchaser was not able to find the balance". This distinction appears to me to be fundamental.

It was strongly urged by counsel on behalf of the appellant that the last line of para. 10 of the agreement made provision for a penalty and that it could not be treated as providing for a genuine pre-estimate of damages. In this regard it is perhaps desirable to refer to the difference between "a penalty" and "liquidated damages" as it was succinctly expressed by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.*[4], where he said:

> The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

In considering the agreement at issue in the present appeal, it must, as I have said, be remembered that the appellant was a land speculator and the Crown was exposed to a very real commercial danger which it would have suffered had the appellant failed to make its payment after having drawn down and sold the more valuable lands leaving the respondent with less commercially attractive and possibly closed in lands and thereby seriously reducing such assets as remained. Under these circumstances, any exact determination of the damage flowing from a breach of the agreement was almost an impossibility and it appears to me to be not at all unreasonable to view the provisions of para. 10 of the agreement as reflecting a genuine pre-estimate of the damage to which both parties had agreed.

As has been indicated, even if para. 10 had been found to impose a penalty rather than a genuine pre-estimate of damage, it does not follow from the *Stockloser* case, *supra,* that this would have constituted a ground for granting the relief claimed. It is clear that the majority of the Court of Appeal in the *Stockloser* case subscribed to the view that in order to afford such relief it must also

[4] [1915] A.C. 79 at 86.

be found to "be unconscionable for the seller to retain the money". As this was the view adopted by Mr. Justice Thurlow, it appears to me to be desirable to take note of what was said by Lord Radcliffe in this connection in *Campbell Discount Co. Ltd. v. Bridge*[7]. In that case the members of the House of Lords were unanimous in holding that a provision in a hire purchase agreement for a second-hand car constituted a penalty from which the purchaser should be relieved. In the course of his reasons for judgment, Lord Radcliffe, however, had occasion to say, at page 626:

> Even such masters of equity as Lord Eldon and Sir George Jessel, it must be remembered, were highly sceptical of the court's duty to apply the epithet 'unconscionable' or its consequences to contracts made between persons of full age in circumstances that did not fall within the familiar categories of fraud, surprise, accident, etc., even though such contracts involved the payment of a larger sum of money on breach of an obligation to pay a smaller sum (see the latter's judgment in *Wallis v. Smith* 21 Chancery Division 243).

In the same case and at the same page, Lord Radcliffe said:

> 'Unconscionable' must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other, and equity lawyers are, I notice, sometimes both surprised and discomfited by the plentitude of jurisdiction, and the imprecision of rules that are attributed to 'equity' by their more enthusiastic colleagues.

Whether a provision in a contract is penal or not depends upon the construction of the contract but the question of unconscionability must depend upon the circumstances of each case at the time when the clause is invoked. In the present case I do not think that the invoking of the provisions of para. 10 of the agreement was unconscionable. There is no evidence as to the value of the lands retained by the Crown and it therefore does not appear to me to be possible to say with any degree of certainty that the appellant's breach would not result in damage to the respondent to the approximate amount which it retained.

In this Court Mr. Williston raised an argument which had not been mentioned in the Court below to the effect that the notice of termination of the agreement was defective in that it was dated March 15, 1961, and the appellant

[5] [1962] A.C. 600.

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

could not be said to have been in default under the provisions of para. 1(*c*) of the agreement until the end of that day.

The carbon copy of the notice in question which was produced by the appellant bears the notation "signed and mailed on March 16th, 1961" and it is to be noted that para. 14 of the agreement reads as follows:

> Wherever in this agreement it is required or permitted that notice or demand be given or served by either party to this agreement to or on the other, such notice or demand shall be given or served in writing and forwarded by registered mail addressed as follows: . . .

I take it from these provisions that the date of mailing is to be treated as the date of the giving of the notice and that the notice in question is accordingly to be taken as having been given on March 16, 1961.

Quite apart from the fact that until the argument in this Court the appellant's case was conducted on the basis that the Crown had terminated the contract in accordance with its strict legal right and that the appellant was seeking equitable relief, I am in any event of opinion that the notice was in accordance with the terms of the agreement.

For all these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Starr, Allen & Weekes, Toronto.

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

GÉRARD HUDON et FERNAND HUDON (*Demandeurs*) ..... APPELANTS;

1966
*Déc. 13
1967
Oct. 26

ET

LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC (*Défendeur*) ..... INTIMÉ.

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

Négligence—Voirie—Contrat pour l'enlèvement de la neige—Passage à niveau dangereux—Connaissance et acceptation du risque—Partage de responsabilité—Code Civil, art. 1053.

Par leur pétition de droit, les appelants réclament les dommages qu'ils ont subis lorsque leur camion, dont ils se servaient pour enlever la neige en vertu d'un contrat passé avec le ministère de la Voirie, s'est pris dans un trou à une traverse de chemins de fer et a été frappé par un train. Les appelants blâment le ministère de la Voirie qui, ayant modifié le tracé de la route, a négligé de faire le nécessaire pour assurer que la position des madriers, placés entre les rails pour faciliter le passage des véhicules, soit elle-même modifiée pour correspondre à ce changement; ce qui eut pour résultat de laisser un espace vide entre les rails. Une des roues du camion tomba dans cet espace et le camion fut immobilisé. Il est plaidé contre les appelants que non seulement ils étaient au courant de la situation, mais qu'aux termes mêmes du contrat qu'ils avaient passé avec le ministère de la Voirie et en vertu duquel ils avaient assumé l'entretien des chemins d'hiver, l'obligation de remédier au danger retombait sur leurs épaules. Le juge au procès a conclu que les appelants n'avaient commis aucune faute et que le ministère devait payer tous les dommages. Ce jugement fut infirmé par la Cour d'Appel qui rejeta la pétition de droit. Les demandeurs en appelèrent devant cette Cour.

Arrêt: L'appel doit être maintenu et la responsabilité partagée, le Juge Abbott étant dissident.

Le Juge en Chef Taschereau et les Juges Cartwright, Fauteux et Martland: La faute du ministère qui avait créé cette condition dangereuse est manifeste. Cependant, les appelants doivent supporter en partie la responsabilité parce qu'ils ont été maladroits sinon imprudents et que leur conduite, avec la faute du ministère, a concouru à l'accident. La défense du ministère, fondée sur le contrat, ne peut pas être

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

1967

HUDON ET HUDON v. PROCUREUR GÉNÉRAL DE QUÉBEC

acceptée. Il en résulte que les dommages doivent être supportés dans une proportion d'un tiers par les appelants et de deux tiers par le ministère.

Le Juge Abbott, *dissident:* Les conclusions de faits qui ont été tirées par la Cour d'Appel n'étaient pas erronées.

Negligence—Roads Department—Contract for snow clearance—Dangerous level crossing—Knowledge and acceptance of risk—Contributory negligence—Civil Code, art. 1053.

By their petition of right, the appellants claimed the damages they suffered when their truck, which they were using to clear the snow pursuant to a contract with the Roads Department, became stuck in a hole at a level crossing and was hit by a train. They argued that when the Roads Department altered the location of the road at that point it failed to move the planks between the rails and thereby left a space between them. One of the wheels of the truck fell in that space and the truck was immobilized. It is argued against the appellants that not only were they aware of the situation but that by the very terms of their contract with the Department under which they assumed the maintenance of the winter roads, the obligation to remedy the danger fell on their shoulders. The trial judge came to the conclusion that the appellants had committed no fault and that the Department should pay all damages. This judgment was reversed by the Court of Appeal which rejected the petition of right. The plaintiffs appealed to this Court.

Held (Abbott J. dissenting): The appeal should be allowed and the liability apportioned between the appellants and the Department.

Per Taschereau C.J. and Cartwright, Fauteux and Martland JJ.: The fault of the Department which had created this dangerous situation was manifest. However, the appellants must support part of the liability because they were clumsy if not imprudent and because their conduct, together with the Department's fault, combined to cause the accident. The defence of the Department, based on the contract, could not be accepted. In the result, the damages must be apportioned, one third to be borne by the appellants and two thirds by the Department.

Per Abbott J., *dissenting*: The conclusions reached by the Court of Appeal were not erroneous.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Lizotte J. Appeal allowed, Abbott J. dissenting.

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[1] [1965] B.R. 886.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge Lizotte. Appel maintenu, le Juge Abbott étant dissident.

Gilles St-Hilaire et *Pierre De Bané,* pour les demandeurs, appelants.

Jean Turgeon, c.r., pour le défendeur, intimé.

Le jugement du Juge en Chef Taschereau et des Juges Cartwright, Fauteux et Martland a été rendu par

LE JUGE FAUTEUX:—Les appelants se pourvoient à l'encontre d'une décision de la Cour du banc de la reine[1] infirmant le jugement de la Cour supérieure qui avait maintenu leur pétition de droit dirigée contre le Procureur général de la province de Québec.

Il s'agit d'un accident survenu l'hiver, dans la soirée du 11 janvier 1961, à une traverse de chemins de fer, sur la route 2A, alors qu'un convoi de la *Compagnie des chemins de fer Nationaux du Canada* heurta et démolit le camion des appelants.

A l'endroit de cet accident, la route 2A croise la voie ferrée de façon perpendiculaire, et non pas oblique comme c'était le cas quelques mois avant la date de l'accident. Lorsque le ministère de la Voirie effectua ce changement au tracé de la route, il négligea de faire le nécessaire pour assurer que la position des madriers, placés entre les rails pour faciliter le passage des véhicules, soit elle-même modifiée pour correspondre à ce changement. Il en résulta que les madriers ne couvraient plus toute la croisée et que, du côté est, on laissait à découvert entre les rails, à un niveau d'environ huit pouces plus bas que le reste, un quadrilatère d'une longueur égale à la largeur de la voie ferrée et d'une largeur variant de deux à environ six pieds. En largeur, la route mesurait à peu près trente-six pieds et le pavage de la traverse, vis-à-vis la route, mesurait environ dix-huit pieds. Telle était la situation lorsque, à l'approche de l'hiver, on suspendit les travaux et telle demeura

[1] [1965] B.R. 886.

1967

HUDON ET HUDON v. PROCUREUR GÉNÉRAL DE QUÉBEC

Le juge Fauteux

la situation jusqu'à une quinzaine de jours après l'accident, alors qu'on y remédia en adaptant la position des madriers au changement du tracé de la route et en fixant sur celle-ci des poteaux de fer pour diriger la circulation.

Au moment de l'accident, les appelants, Gérard Hudon et son frère Fernand, procédaient à l'enlèvement de la neige, pour le compte du ministère de la Voirie, avec leur camion muni d'une charrue à l'avant et d'une aile à la droite. Il avait venté toute la journée et la neige s'était accumulée, particulièrement à la croisée, du côté est de la voie ferrée. Au cours de cette opération de déneigement, la roue arrière droite du camion s'est prise dans ce trou de huit pouces de profondeur qu'il y avait de ce côté, comme déjà indiqué. Notons incidemment que maintes fois avant ce jour-là, Hudon était passé à cet endroit, avec son camion, sans que jamais tel incident se produise, une neige durcie entre les rails comblait ce trou. Hudon fit plusieurs tentatives pour sortir le camion de cette impasse et y travaillait encore lorsque apercevant soudainement la venue d'un train, il dut abandonner son camion sur la voie ferrée, avec le résultat que l'on sait. De là la réclamation en dommages.

Voici, en substance, les reproches que se font mutuellement les parties. Les appelants, d'une part, reprochent au ministère de n'avoir pas pris les mesures nécessaires pour assurer que ce vide entre les rails soit comblé et que cette traverse à niveau ne soit pas dangereuse pour la circulation et de n'avoir placé aucune indication pour signaler cette absence de pavé entre les rails sur une certaine partie de la traverse. Le ministère, d'autre part, après avoir nié généralement les prétentions des appelants, plaida spécialement que, lors de la suspension des travaux en novembre, on avait placé sur le chemin, au côté sud-est du passage, un tréteau mobile rayé noir et blanc et ayant douze pieds de longueur, que ce tréteau constituait une indication appropriée pour mettre en garde les usagers de la route contre les risques possibles et qu'au surplus, les appelants qui avaient, par contrat avec le ministère, en date du 9 décembre 1960, assumé l'entretien des chemins d'hiver, étaient

non seulement au courant de la situation mais avaient, aux termes de ce contrat, l'obligation de voir à ce que ce tréteau demeure là où il avait été placé à la suspension des travaux. En somme, dit l'intimé, cet accident et les dommages en résultant sont dus à la faute, l'imprudence, la négligence ou la maladresse des appelants.

Le juge de première instance considéra que, d'après la preuve, le ministère pouvait bien avoir placé un tréteau, à la suspension des travaux, mais qu'il n'y en avait plus depuis l'hiver; qu'antérieurement aux tombées de neige, Hudon avait déjà fait remarquer aux ingénieurs de la Voirie le danger que présentait cette traverse à niveau, qu'on en avait rien fait, sauf de dire que la situation serait corrigée; que les ingénieurs semblaient dire qu'ils attendaient après ceux qui avaient autorité sur la question, soit la Compagnie des chemins de fer ou la Commission des transports, alors qu'en fait, on n'a même pas prouvé que ceux-ci avaient été avisés du changement apporté à ce passage à niveau par suite de la modification du tracé de la route. Le juge de première instance exprima aussi l'avis que le contrat d'entretien des chemins d'hiver n'avait pas pour objet ou effet d'obliger les appelants à faire les changements qui s'imposaient à la traverse ou à aviser la Compagnie des chemins de fer, ou à faire émettre une ordonnance par la Commission des transports; c'était là l'obligation du ministère. Le juge conclut que les appelants n'ont commis aucune faute et que le ministère, qui a créé lui-même cet état dangereux auquel l'accident doit être attribuable, doit, en conséquence, payer tous les dommages en résultant.

Porté en appel, ce jugement fut infirmé, la Cour du banc de la reine[2] se fondant sur les raisons qui apparaissent aux deux paragraphes ci-après des notes données par M. Le juge en chef Tremblay, avec l'accord de ses collègues:

> Avec respect, je crois que le premier juge a fait erreur en ignorant complètement le fait que l'intimé Gérard Hudon connaissait parfaitement l'existence du danger ...
>
> * * *

[2] [1965] B.R. 886.

1967

HUDON ET HUDON v. PROCUREUR GÉNÉRAL DE QUÉBEC

Le juge Fauteux

Le seul fait d'effectuer des réparations sur une route et d'y créer un danger n'est pas en soi une faute. Ce qui constitue une faute, c'est d'y permettre la circulation sans aviser les usagers du danger. On porte à leur connaissance ce danger et il est raisonnable de penser qu'ils l'éviteront. Mais si celui qui circule connaît déjà parfaitement le danger, le défaut d'avis ne saurait être la cause de l'accident. Il en serait tout autrement s'il s'agissait d'une personne ne passant qu'occasionnellement sur cette route. Il ne faut pas oublier que nous sommes en présence de l'une des personnes ayant assumé l'obligation d'enlever la neige sur cette route. Elle connaissait parfaitement l'existence du danger. Elle conduisait une machine dont elle connaissait ou devait connaître la puissance. Elle a cru pouvoir surmonter l'obstacle comme elle l'avait fait plusieurs fois auparavant. Malheureusement, elle a fait erreur. Elle est seule à blâmer.

De là l'appel à cette Cour.

Avec le plus grand respect pour ceux qui entretiennent l'opinion contraire, je ne puis concourir dans le jugement rendu en l'espèce.

Excluant de la considération, pour l'instant, la défense qu'on entend fonder sur le contrat, je dirais que Hudon, d'une part, connaissait la condition dangereuse dans laquelle le ministère avait laissé le passage à niveau lors de la suspension des travaux; en fait, il en avait averti les ingénieurs. Et je dirais que le ministère, d'autre part, connaissait aussi cette condition dangereuse; c'est lui qui l'avait créée et c'est lui qui avait fait placer un tréteau, à la suspension des travaux. Ce soir-là, Gérard Hudon, apprécia-t-il dans toute son étendue le risque qu'il allait courir et qui en fait s'est réalisé, et en accepta-t-il toutes les conséquences? L'erreur qu'il a commise en croyant qu'il pouvait, comme avant, passer sans difficulté, doit-elle être retenue comme faute causale de cet accident et cette faute doit-elle, en quelque sorte, absorber la négligence manifeste du ministère à remédier au danger qu'il créa à cette traverse, au point de dire que cette faute de négligence n'a pas concouru à l'accident? Les faits de cette cause ne manquent pas d'analogie avec ceux qui se présentaient dans celle de *Trust Général du Canada v. St-Jacques*[3]. St-Jacques était à l'emploi du Trust Général du Canada

[3] (1931), 50 B.R. 18.

comme gardien de nuit d'un édifice. Outre la surveillance qu'il devait en faire, l'un de ses devoirs était de voir au chauffage, l'enlèvement et le transport des cendres. Pour le transport des cendres, il utilisait une brouette et avait à gravir une passerelle inclinée et large de dix-huit pouces, afin d'atteindre la plate-forme d'où les cendres étaient déversées. A la date de l'accident, et déjà depuis quelques jours, la lumière électrique qui devait éclairer cette passerelle ne fonctionnait plus. St-Jacques en avait informé son supérieur immédiat, un nommé Lamothe, qui négligea d'y voir, de sorte que, dans cette situation, St-Jacques utilisait un fanal à l'huile dont l'éclairage était insuffisant. Cette nuit-là, jugeant mal sa position dans l'obscurité et croyant avoir atteint la plate-forme alors qu'en fait, il était encore sur la passerelle, il y déposa sa brouette avec le résultat que celle-ci chavira dans le vide et l'entraîna dans sa chute. Le juge de première instance jugea que l'accident était exclusivement dû au non fonctionnement de la lumière électrique et que la négligence du préposé de l'employeur à y remédier rendait celui-ci responsable des dommages subis. Ce jugement fut maintenu par une décision majoritaire de la Cour d'appel, alors composée de MM. les juges Galipeault, Tellier, Létourneau, Howard et Hall, ces deux derniers étant dissidents. Référant à la conduite de St-Jacques, M. le juge Galipeault note, à la page 22:

Il a cru qu'il pouvait en toute sûreté accomplir son travail, mais il a fait erreur.

et Sir Mathias Tellier, de son côté, dit, à la page 23:

Le demandeur a cru qu'il pourrait s'acquitter de cette tâche, en s'éclairant de son fanal à l'huile. L'événement a prouvé que cet éclairage était insuffisant.

Ces deux juges n'en ont pas moins tenu le Trust Général du Canada seul responsable de cet accident en raison de la négligence de Lamothe. Pour sa part, M. le juge Létourneau jugea que c'était sciemment et volontairement que St-Jacques s'était aventuré nonobstant l'obscurité dans un endroit dangereux et, pour cette raison, il aurait partagé la responsabilité n'eut-il pas considéré qu'il en était empêché

1967

HUDON ET HUDON v. PROCUREUR GÉNÉRAL DE QUÉBEC

Le juge Fauteux

par les plaidoiries écrites. Dissident, M. le juge Howard, avec l'accord de M. le juge Hall, trouva que la doctrine *volenti non fit injuria* devait recevoir son application et que l'action de St-Jacques aurait dû être renvoyée. Le Trust Général du Canada en appela à cette Cour[4] qui rejeta l'appel, tout en exprimant l'avis qu'il s'agissait là d'une cause où la responsabilité devait être partagée et où les dommages devaient être supportés dans une proportion de un cinquième par St-Jacques et de quatre cinquièmes par le Trust Général du Canada.

Dans le cas qui nous occupe, je suis d'opinion, comme le juge de première instance, que la faute du ministère est manifeste. Je ne crois pas, cependant, que Gérard Hudon soit exempt de tout reproche. A mon avis, il a été maladroit sinon imprudent et sa conduite, avec la faute du ministère, a concouru à l'accident. Il en résulte que, à moins que la défense que l'intimé fonde sur le contrat ne soit acceptée, la responsabilité doit être partagée et les dommages doivent être supportés selon la gravité des fautes respectives, soit dans une proportion d'un tiers par les appelants et deux tiers par l'intimé, du montant total estimé en première instance et non contesté en cet appel.

Tel que déjà indiqué, le juge de première instance a rejeté la défense qu'on a cherché à fonder sur le contrat. La Cour d'appel, de son côté, n'a référé au contrat que pour démontrer le fait que Gérard Hudon connaissait l'état dangereux de la traverse. L'objet de ce contrat est l'entretien des chemins d'hiver et, à l'instar du juge de première instance, il m'est impossible de voir, dans les dispositions invoquées par l'intimé, l'expression d'une intention commune aux parties, suivant laquelle les frères Hudon auraient fait leur l'obligation qu'avait le ministère de prendre les mesures pour remédier au danger qu'il avait créé ou auraient accepté comme leur la responsabilité découlant de la négligence du ministère à satisfaire à cette obligation.

Pour ces raisons, je maintiendrais l'appel, infirmerais le jugement de la Cour du banc de la reine et, modifiant le

[4] [1931] R.C.S. 711.

jugement de première instance pour partager la responsabilité dans la proportion ci-dessus indiquée, condamnerais l'intimé à payer aux appelants une somme de $8,533.34, avec intérêts à compter de la signification de la requête demandant l'autorisation d'exercer le présent recours en dommages; et recommanderais à l'intimé de payer les dépens d'une action de ce montant, dans toutes les Cours.

LE JUGE ABBOTT (*dissident*):—Les appelants interjettent appel d'un jugement de la Cour du banc de la reine[5] rejetant avec dépens leur pétition de droit. La Cour supérieure du district de Kamouraska, par un jugement en date du 4 juillet 1963, avait maintenu la pétition de droit et recommandé à l'intimé de payer aux appelants la somme de $12,800 avec intérêts et dépens.

Le 9 décembre 1960, par un contrat conclu entre le ministère de la Voirie de la province de Québec et les appelants, ceux-ci s'engageaient à exécuter «l'entreprise qui a pour objet le déneigement, l'enlèvement de neige durcie et de glace, etc.» sur la route numéro 2A, comprenant le passage à niveau où eut lieu l'accident dont se plaignent les appelants.

Avant l'année 1960, la route reliant St-Pacôme à Ste-Anne de la Pocatière était oblique par rapport à la voie ferrée qu'elle croisait. Pour permettre le passage des véhicules, on avait disposé des madriers entre les rails sur toute la largeur de la route. Vers la fin de 1960, le ministère de la Voirie modifiait le tracé de la route de façon que celle-ci soit perpendiculaire à la voie ferrée. Il en résulta que les madriers ne couvraient plus toute la croisée et laissaient à découvert à un niveau d'environ 8 pouces plus bas que le reste de la croisée un quadrilatère d'une largeur variant de deux pieds à environ six pieds.

Le 11 janvier 1961, vers 8 h. 30 du soir, l'appelant Gérard Hudon effectuait des travaux d'enlèvement de la neige avec un camion muni d'une charrue. Alors qu'il traversait la voie ferrée, la roue droite arrière du camion passa

[5] [1965] B.R. 886.

1967

HUDON ET HUDON v. PROCUREUR GÉNÉRAL DE QUÉBEC

Le juge Abbott

à côté des madriers et tomba dans la dépression décrite ci-dessus. Un train survint et l'appelant Gérard Hudon dut abandonner sur la voie le camion qui fut détruit.

La Cour supérieure a maintenu la pétition de droit des appelants pour le motif que les préposés de l'intimé avaient créé un état dangereux qui fut la cause de l'accident subi par les appelants.

Le jugement de la Cour supérieure fut cassé par un jugement unanime de la Cour du banc de la reine pour le motif que les appelants, et plus particulièrement Gérard Hudon, connaissaient parfaitement l'existence du danger et par conséquent Gérard Hudon est seul à blâmer. La Cour ajoute que Gérard Hudon qui conduisait le camion a cru pouvoir surmonter l'obstacle, comme il l'avait fait plusieurs fois auparavant.

Les appelants ne m'ont pas satisfait que ces conclusions de faits sont erronées et par conséquent je rejetterais l'appel avec dépens.

Appel maintenu, LE JUGE ABBOTT *étant dissident.*

Procureurs des demandeurs, appelants: Letarte, St-Hilaire, De Blois, De Bané, Proulx & Parent, Québec.

Procureur du défendeur, intimé: Louis Dugal, Rivière-du-Loup.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, FLIN FLON LODGE NO. 1848; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1405; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL UNION NO. 451; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION NO. 1614; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, LOCAL UNION NO. 1497; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 828

APPELLANTS;

1967

*Nov. 6, 7
Dec. 18

AND

HUDSON BAY MINING AND SMELTING CO., LIMITED .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Labour relations—Collective agreement—Provision whereby company agreed to continue support of welfare plans in accordance with terms of present agreements—Dispute arising from proposed integration of company pension plan with Canada Pension Plan—Arbitration award in favour of appellant unions—Motion to set aside award on basis board exceeded jurisdiction—Validity of award.

The respondent company proposed to "integrate" the benefits under its retirement pension plan with those under the Canada Pension Plan and this involved a change with respect to contributions. The appellant unions took exception to this proposal and submitted a grievance which was referred to an arbitration board. The appellants contended that the action by the respondent involved a breach by it of Art. XIV of the collective agreement made between the appellants and the respondent. They contended that, under this article, the respondent had agreed that it would not discontinue its support of the existing welfare plans, and that the phrase "in accordance with the terms of the present agreements" meant that the support of the plans as they existed when the collective agreement became effective would be continued. The respondent contended that the phrase meant in accordance with all of the terms of the present agreements, including the terms giving the right to change or discontinue the company plan.

The arbitration board, by a majority of two to one, upheld the appellants' interpretation of Art. XIV. The respondent was directed to reinstate the company plan and to make adjustment for the period since the plan had been changed. On a motion to set aside the award based on the submission that the board had exceeded its jurisdiction, it was

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

1967

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, FLIN FLON LODGE No. 1848 *et al.* *v.* HUDSON BAY MINING AND SMELTING CO. LTD.

held that the board had not exceeded its jurisdiction and the motion was dismissed. An appeal from this decision was allowed by the Court of Appeal. The majority of that Court was of the view that the arbitration board, by its decision, had amended the terms of the collective agreement, which, under s. 3 of Art. XXIII of the agreement they were precluded from doing. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be allowed and the order of the judge of first instance restored.

In reaching the conclusion which it did, the arbitration board was fulfilling its duty to interpret Art. XIV and it did not, by its decision, amend the collective agreement. When the respondent agreed to continue its support of the welfare plans in accordance with the terms of the present agreements that commitment could certainly be construed as an undertaking by it not to discontinue any of those plans, but to maintain them as they then existed. Such an interpretation of the article was not only a proper one, but was probably the right one. But whether right or wrong, the board interpreted and did not amend the agreement. This being so, it did not exceed its jurisdiction and its award was valid.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], reversing a judgment of Dickson J. dismissing a motion to set aside an award of an arbitration board. Appeal allowed.

S. Green and *L. Mitchell,* for the appellants.

Alan Sweatman, Q.C., and *W. L. Palk,* for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal of Manitoba[1], which, by a majority of two to one (Freedman J.A. dissenting), reversed the decision of Dickson J. (as he then was), who had dismissed a motion by the respondent for an order to declare that an award, dated August 16, 1966, by an arbitration board constituted pursuant to Art. XXIII of a collective agreement, dated September 16, 1965, made between the appellants and the respondent, exceeded the board's jurisdiction and was invalid.

The collective agreement contained provision for the determination of a grievance concerning its interpretation, and provided for a reference of any dispute, which could

[1] [1967], 59 W.W.R. 472, 61 D.L.R. (2d) 429.

not be settled by negotiation between the Company and the Unions, to an arbitration board constituted pursuant to Art. XXIII. Section 3 of that Article provided:

> The decision of a majority of the arbitration board shall be in writing and delivered to the parties hereto. It shall be final and binding upon the parties hereto, subject to the condition that the decision shall not, without the consent and approval of the parties hereto, rescind or amend any of the terms or conditions of this collective bargaining agreement, but shall be in general accord with the scope and terms thereof.

The dispute which was referred to the arbitration board in this case was as to the interpretation of Art. XIV of the collective agreement, which provided:

> WELFARE PLANS
>
> The Company agrees to continue, in accordance with the terms of the present agreements, its support of the welfare plans now available to the employees, namely:
>
> Apprentice Plan
> Vacations-with-Pay Plan
> Group Life Insurance
> Retirement Pension Plan
> Non-occupational Accident and Sickness Benefit Plan
> Hudson Bay Mining Employees' Health Association
> Hudson Bay Mining Employees' Death Benefit Plan.

At the time this Article came into effect there were in existence the welfare plans described in it. The dispute arose in relation to the Retirement Pension Plan, hereinafter referred to as "the Company Plan". This Plan became effective on May 1, 1940, and had undergone various revisions after its inception, the last of these being effected on January 1, 1964. The respondent's employees contributed 3 per cent of their earnings and the respondent contributed the balance necessary to purchase the amount of pension to which employees became entitled; namely, an annual pension equal to 45 per cent of the employee's total contributions.

The respondent's position in relation to this Plan is summarized in a booklet entitled "Welfare Plans", which the respondent issued to its employees, the relevant portion of which states:

> (a) The Company shall administer the Plan and have the power to decide all matters with respect thereto, insofar as there is no conflict with the rules, regulations and practices of the Canadian Government Annuities Branch and the North American Life Assurance Company.

1967

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, FLIN FLON LODGE No. 1848 *et al.* *v.* HUDSON BAY MINING AND SMELTING CO. LTD.

Martland J.

(b) The Company reserves the right to change or discontinue the Plan at any time if, in the sole opinion of the Company, conditions require. In the event of it being necessary to discontinue the Plan, contributions deposited up to such time by both employee and Company shall vest solely with the employees.

On December 3, 1965, the respondent advised its employees that the Canada Pension Plan would become effective January 1, 1966, requiring under its regulations contribution of 1.8 per cent of an employee's earnings; that instead of deducting extra contributions from employees, appropriate Canada Pension Plan contributions would be taken out of the contributions deducted for the Company Plan, *i.e.*, from the 3 per cent of earnings, and forwarded to the Canada Pension Plan at Ottawa. The effect of this was that instead of 3 per cent of the employee's salary going to the Company Plan, 1.2 per cent would go to the Company Plan and 1.8 per cent to the Canada Pension Plan. As the employee's pension under the Company Plan was directly related to his contributions to the Company Plan, he would receive a reduced pension under the Company Plan. He would, of course, also be contributing to the Canada Pension Plan and in due course receive a pension under the Canada Pension Plan.

In other words, the respondent proposed to "integrate" the pension benefits under the Company Plan with the pension benefits under the Canada Pension Plan.

The appellants contended that this action by the respondent involved a breach by it of Art. XIV of the collective agreement. They contended that, under this Article, the respondent had agreed that it would not discontinue its support of the existing welfare plans, and that the phrase "in accordance with the terms of the present agreements" meant that the support of the plans as they existed when the collective agreement became effective would be continued.

The respondent contended that that phrase meant in accordance with all of the terms of the present agreements, including the terms giving the right to change or discontinue the Company Plan.

The arbitration board, by a majority of two to one, upheld the appellants' interpretation of Art. XIV.

Dickson J., who heard the motion to set aside the award based on the submission that the board had exceeded its jurisdiction, held that the board had not exceeded its jurisdiction. His reasons appear in the following passage from his judgment:

> The Board of Arbitration was constituted by applicant and respondents. At the outset of the hearing before the Board, counsel for applicant agreed, according to the report of the applicant's nominee, Mr. Taylor, "that the grievance was properly before the Board". The Award makes it clear that the members of the Board of Arbitration directed their minds to the question of the construction to be placed upon Article XIV. This was the question put to the Board by applicant and respondents. The Award does not go beyond that question. The interpretation given by the Board is one which the language of Article XIV will reasonably bear. That is sufficient to defeat applicant's motion, which therefore fails.

The majority of the Court of Appeal was of the view that the arbitration board, by its decision, had amended the terms of the collective agreement, which, under s. 3 of Art. XXIII of the agreement they were precluded from doing. Guy J.A. states this view, as follows:

> The issue to be decided in the instant case is clear-cut and brief. It is simply this: Did the majority of the Arbitration Board exceed its jurisdiction by in fact amending the contract between the parties?
>
> With great respect, I am of the view that it did just that. When the collective bargaining agreement and the booklet outlining the Welfare Plans are read together (as they must be to determine the real *consensus ad idem* between the parties) it seems to me to be abundantly clear that the signatories to the collective bargaining agreement were fully aware of the fact that the welfare plans would have to be adjusted from time to time as conditions demand. This is shown by the portions of the Welfare Plans' booklet quoted above. Viewed in this light, it is apparent to me that when the new agreement became effective in 1965, the words quoted above: "The Company agrees to continue, in accordance with the terms of the present agreements, its support of the welfare plans now available to the employees . . .", did not in any way limit that support to the exact formulae which had been previously followed, but simply provided that the support of any particular Welfare Plan would not be withdrawn. As I have indicated, the proposed integration of the Pension Welfare Plan with the new Canada Pension Plan is certainly contemplated by the parties to the dispute.

With respect, I am unable to agree with these conclusions and I share the view expressed by Dickson J. that in reaching the conclusion which it did, the arbitration board was fulfilling its duty to interpret Art. XIV and it did not, by its decision, amend the collective agreement. When the respondent agreed to continue its support of the welfare

1967

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, FLIN FLON LODGE No. 1848 *et al.* *v.* HUDSON BAY MINING AND SMELTING CO. LTD.

Martland J.

plans in accordance with the terms of the present agreements that commitment can certainly be construed as an undertaking by it not to discontinue any of those plans, but to maintain them as they then existed. Such an interpretation of the Article is, in my opinion, not only a proper one, but is probably the right one. But whether right or wrong, in my view the board interpreted and did not amend the agreement. This being so, it did not exceed its jurisdiction and its award is valid.

I would allow the appeal and restore the order of the learned judge of first instance. The appellants should be entitled to their costs in this Court and in the Court below.

Appeal allowed with costs.

Solicitors for the appellants: Mitchell, Green & Minuk, Winnipeg.

Solicitors for the respondents: Pitblado, Hoskin & Company, Winnipeg.

1967

*Oct. 10, 11 Nov. 20

HER MAJESTY THE QUEEN in the Right of the Province of Ontario .... APPELLANT;

AND

BOARD OF TRANSPORT COMMISSIONERS ..... RESPONDENT.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS

Constitutional law—Jurisdiction—Railways—Commuter service operated by provincial government using own rolling stock—Tracks of Canadian National Railways used—Whether tolls charged by province subject to jurisdiction of Board of Transport Commissioners—Whether commuter service within legislative jurisdiction of Parliament of Canada—Desirable that Attorney General of Canada be represented whenever constitutional validity of federal legislation in issue—Commuter Services Act, 1965 (Ont.), c. 17—B.N.A. Act, 1867, s. 92(10)—Interpretation Act, R.S.C. 1952, c. 158, s. 16—Railway Act, R.S.C. 1952, c. 234.

The government of Ontario decided to operate a commuter train service, using its own rolling stock but utilizing the Canadian National Railways tracks. The train crews would be those of the Canadian

*PRESENT: Cartwright C.J. and Fauteux, Martland, Judson, Ritchie, Hall and Pigeon JJ.

National Railways performing services for the government of Ontario on an agency basis under terms and conditions to be provided for in a formal agreement to be entered into in the near future. The Board of Transport Commissioners, on an application by the Canadian National Railways to discontinue certain passenger trains on that line, declared that it had jurisdiction in respect of the tolls to be charged by the province in respect of the proposed services. On appeal to this Court by the province of Ontario against that declaration, two questions were raised: (1) Whether the Board of Transport Commissioners has jurisdiction to set the tolls, and (2) Whether the commuter service comes within the jurisdiction of the Parliament of Canada.

Held: The appeal should be dismissed.

As to the first question, the tolls to be charged by the province of Ontario are subject to the jurisdiction of the Board of Transport Commissioners.

The Board has jurisdiction over tolls within the meaning of the *Railway Act*, R.S.C. 1952, c. 234, and the question is whether the tolls to be charged by the province in this case are tolls within the definition of that word in the *Railway Act*. The answer to the contention that they will not be charged by the "company" but by Her Majesty is that the definition applies not only to tolls charged by the "company" but also to tolls charged "upon or in respect of a railway owned or operated by the company, or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers..." While it is true that the the rolling stock belongs to the province of Ontario, the railway on which this equipment runs is the "company's" railway. Therefore, the tolls cannot be said not to be "in respect of a railway owned" by the Canadian National Railways.

As to the second question, the commuter service comes within the legislative jurisdiction of the Parliament of Canada as being a local work or undertaking within the meaning of s. 92(10)(*a*) of the *B.N.A. Act, 1867*.

The Canadian National Railways, extending beyond the limits of the province of Ontario, is subject to the jurisdiction of the Parliament of Canada, and the question is whether the commuter service can be said not to form part of this railway. To come to this conclusion, it would be necessary to hold that federal jurisdiction over interprovincial railways extends only to interprovincial services provided on such railways. It is not possible to so hold. The constitutional jurisdiction depends on the character of the railway line and not on the character of a particular service provided on that railway line. The fact that for some purposes the commuter service should be considered as a distinct service does not make it a distinct line of railway. From a physical point of view, the commuter service trains are part of the overall operations of the line over which they run. Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction.

Droit constitutionnel—Juridiction—Chemins de fer—Service de trains de banlieue exploité par le gouvernement provincial en se servant de son matériel roulant—Utilisation de la voie des Chemins de Fer Natio-

1967

THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO v. BOARD OF TRANSPORT COMMISSIONERS

naux du Canada—Le tarif exigé par la province est-il sujet à la juridiction de la Commission des Transports du Canada—Le service de trains de banlieue tombe-t-il sous la juridiction législative du Parlement du Canada—Désirable que le procureur général du Canada soit représenté chaque fois qu'est soulevée la validité constitutionnelle d'une législation fédérale—Commuter Services Act, 1965 (Ont.), c. 17 —L'Acte de l'Amérique du Nord britannique, 1867, art. 92(10)—Loi d'interprétation, S.R.C. 1952, c. 158, art. 16—Loi sur les chemins de fer, S.R.C. 1952, c. 234.

Le gouvernement de l'Ontario a décidé d'exploiter un service de trains de banlieue, tout en se servant de son matériel roulant mais en utilisant la voie des Chemins de Fer Nationaux du Canada. Le personnel du train devait être celui des Chemins de Fer Nationaux en service auprès du gouvernement de l'Ontario, sur une base d'agence en vertu des termes et conditions devant faire partie d'un contrat formel à être passé tout prochainement. La Commission des Transports du Canada, sur une demande des Chemins de Fer Nationaux de discontinuer certains trains de voyageurs sur la ligne en question, a déclaré qu'elle avait juridiction sur les tarifs devant être exigés par la province relativement au service proposé. Sur appel devant cette Cour par la province de l'Ontario à l'encontre de cette déclaration, deux questions ont été soulevées: (1) La Commission des Transports du Canada a-t-elle juridiction pour établir le tarif, et (2) Le service de trains de banlieue tombe-t-il sous la juridiction du Parlement du Canada.

Arrêt: L'appel doit être rejeté.

Quant à la première question, le tarif devant être exigé par la province de l'Ontario est sujet à la juridiction de la Commission des Transports du Canada.

La Commission a juridiction sur les tarifs dans le sens de la *Loi sur les chemins de fer*, S.R.C. 1952, c. 234, et le problème est de savoir si le tarif devant être exigé par la province dans le cas présent est un tarif selon la définition de ce mot dans la *Loi sur les chemins de fer*. La réponse à la prétention que le tarif ne sera pas exigé par la «compagnie» mais par Sa Majesté est que la définition s'applique non seulement au tarif exigé par la «compagnie» mais aussi au tarif exigé «sur un chemin de fer que la compagnie possède ou tient en service, ou relativement à ce chemin de fer, ou pour toute personne agissant au nom de la compagnie ou avec son autorisation ou son consentement, pour le transport des voyageurs...» Il est vrai que le matériel roulant appartient à la province de l'Ontario, mais la voie ferrée sur laquelle ce matériel roule est la voie ferrée de la «compagnie». En conséquence, on ne peut pas dire que le tarif n'est pas «relativement à un chemin de fer possédé» par les Chemins de Fer Nationaux du Canada.

Quant à la seconde question, le service d'un train de banlieue tombe sous la juridiction législative du Parlement du Canada comme étant un travail ou une entreprise d'une nature locale dans le sens de l'art. 92(10)(*a*) de *L'Acte de l'Amérique du Nord britannique*, 1867.

Les Chemins de Fer Nationaux du Canada, s'étendant au-delà des limites de la province de l'Ontario, sont sujets à la juridiction du Parlement

du Canada, et le problème est de savoir si on peut dire que le service de trains de banlieue ne fait pas partie de ce chemin de fer. Pour en venir à une telle conclusion, il serait nécessaire de décider que la juridiction fédérale sur les chemins de fer interprovinciaux s'étend seulement aux services interprovinciaux fournis sur ces chemins de fer. Il n'est pas possible de décider de cette façon. La juridiction constitutionnelle dépend du caractère de la ligne de chemin de fer et non pas du caractère des services particuliers fournis sur cette ligne de chemin de fer. Le fait que pour certaines fins le service de trains de banlieue doit être considéré comme un service distinct n'en fait pas une ligne distincte de chemin de fer. Du point de vue physique, le service de trains de banlieue fait partie de l'exploitation entière de la ligne sur laquelle ces trains roulent. Le Parlement du Canada a juridiction sur tout ce qui fait partie physiquement des chemins de fer sujets à sa juridiction.

APPEL d'une décision de la Commission des Transports du Canada. Appel rejeté.

APPEAL from a decision of the Board of Transport Commissioners. Appeal dismissed.

C. F. H. Carson, Q.C., J. R. Houston and *D. A. Crosbie,* for the appellant.

J. M. Fortier, Q.C., and *L. Salembier,* for the respondent.

The JOINT OPINION OF THE COURT:—This case arose in the following way.

Under the authority of the *Commuter Services Act,* 1965, Statutes of Ontario 1965, c. 17, the Minister of Highways for Ontario decided to operate a Government of Ontario Commuter Service from Toronto westerly to Hamilton and easterly to Pickering utilizing Canadian National Railways' trackage in the entire area of its operation. Although no contract for that purpose has yet been signed, the Canadian National Railways, on July 16, 1965, made an application to the Board of Transport Commissioners for authority to discontinue four passenger trains operating between Toronto and Hamilton. It was stated in the application that the train crews on the Commuter Service would be those of the Canadian National Railways performing services for the Ontario Government on an agency basis under terms and conditions to be provided for in a formal agreement to be entered into in the near

1967

THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO v. BOARD OF TRANSPORT COMMISSIONERS

The joint opinion of the Court

future. By the order appealed from authority to discontinue the four trains was given and in addition the Board declared that:

It has jurisdiction in respect of the tolls to be charged by the Province of Ontario in respect of the proposed services.

The appeal by Ontario is against that declaration only and raises two points:

1. Whether the tolls to be charged by Ontario in respect of the Commuter Service are subject to the jurisdiction of the Board of Transport Commissioners;
2. Whether the Commuter Service comes within the legislative jurisdiction of the Parliament of Canada.

On the first question it is not disputed that the Board of Transport Commissioners has jurisdiction over tolls within the meaning of the *Railway Act*, R.S.C. 1952, c. 234. The issue is whether the tolls to be charged by Ontario in respect of the Commuter Service are tolls within the definition of this word in the *Railway Act*. The material part of this definition is as follows:

> (32) 'toll,' or 'rate,' when used with reference to a railway, means any toll, rate, charge or allowance charged or made either by the company, or upon or in respect of a railway owned or operated by the company, or by any person on behalf of or under authority or consent of the company, in connection with the carriage and transportation of passengers, or the carriage, shipment, transportation, care, handling or delivery of goods, or for any service incidental to the business of a carrier; and includes any toll, rate, charge or allowance so charged or made in connection with rolling stock, or the use thereof, or any instrumentality or facility of carriage, shipment or transportation, irrespective of ownership or of any contract, expressed or implied, with respect to the use thereof;...

Appellant points out that the tolls in question will not be charged by the "company" within the meaning of the definition since they will be charged by Her Majesty in the right of the Province of Ontario. The answer to this contention is that the definition applies not only to tolls charged by the "company" but also to tolls charged "upon or in respect of a railway owned or operated by the company, or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers . . .". While it is true that the rolling stock used in operating the Commuter Service belongs to Ontario, the railway on which this equipment runs is the "company's" railway. Therefore, the tolls

cannot be said not to be "in respect of a railway owned" by the Canadian National Railways; they are obviously a charge for the transportation of passengers over this railway by means of such equipment.

It is worth noting that under the *Railway Act* the rolling stock, is not considered an essential part of the railway. Although it is included in the definition of "railway" it is also included in the definition of "traffic":

> (33) "traffic" means the traffic of passengers, goods and rolling stock;

It should be further noted that under s. 315 of the *Railway Act*, a railway company is obliged to furnish "suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway". Therefore it cannot be said that the operation of a commuter service by means of rolling stock owned by the Government of Ontario is not an operation of the "railway" within the meaning of the *Railway Act*. On the contrary, to the extent that the tolls charged to the passengers can be said to be charged in connection with the use of the rolling stock they are expressly covered by the last quoted part of the definition: "and includes any toll ... so charged in connection with rolling stock, or the use thereof ... irrespective of ownership".

It is argued that, although the provisions of the *Railway Act* respecting tolls might be applicable in such a situation if the rolling stock was owned by and operated on the account of any other person or corporation, they cannot be applied to Her Majesty in right of the Province of Ontario by reason of s. 16 of the *Interpretation Act* that was in force at the time the order was made, R.S.C. 1952, c. 158. This section is as follows:

> 16. No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

It should be pointed out that this section does not provide that no enactment applies to Her Majesty unless it is expressly stated therein that Her Majesty is bound thereby but only that no enactment affects the rights of Her Majesty unless it is so stated. Therefore, in order to rely on the rule to exclude Her Majesty from the application of an enactment, it must be shown that Her rights are affected thereby.

1967

THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO v. BOARD OF TRANSPORT COMMISSIONERS

The joint opinion of the Court

It was held by the Privy Council in *Dominion Building Corporation, Limited v. The King*[1], with respect to a similar enactment of the Ontario Legislature that, at page 549:

> The expression "the rights of His Majesty" in this context means, in their Lordships' view, the accrued rights of His Majesty, and does not cover mere possibilities such as rights which, but for the alteration made in the general law by the enactment under consideration, might have thereafter accrued to His Majesty under some future contract.

This observation is applicable to the present case. Her Majesty in right of Ontario has, apart from an agreement in principle with the Canadian National Railways, no right to operate the Commuter Service and therefore no right to levy tolls for the carriage of passengers over part of the Canadian National Railways lines. Such rights as Ontario has are derived either from such agreement or from the *Railway Act* and therefore are subject to the conditions prescribed in that Act, one of these being that tolls are within the jurisdiction of the Board of Transport Commissioners.

It appears to us that Ontario can no more claim to be exempt in the operation of the Commuter Service from the application of the general provisions of the *Railway Act* respecting tolls than British Columbia could claim to be exempt from the general provisions of the *Customs and Excise Acts* in the operation of its Liquor Control Board, as was held in *Attorney-General of British Columbia v. Attorney-General of Canada*[2]. It is true that in that case, the claim to exemption was based on s. 125 of the *B.N.A. Act*, however, the decision also involves the application to a provincial government of the general provisions of the *Customs and Excise Acts*.

On the second question, it is urged that the Commuter Service is operated exclusively within the Province of Ontario and reference is made to the following sentence in the reasons for judgment of the Board:

> The service to be provided will be a service of the Government of Ontario and will not form part of the Canadian National Railway operations.

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[1] [1933] A.C. 533, 2 W.W.R. 417, 3 D.L.R. 577, 41 C.R.C. 117.

[2] [1922], 64 S.C.R. 377, 38 C.C.C. 283, [1923] 1 W.W.R. 241, 1 D.L.R. 223; [1924] A.C. 222, 42 C.C.C. 398, [1923] 3 W.W.R. 1249, 4 D.L.R. 669.

It must first be pointed out that this sentence comes immediately after the following: "It will use existing C.N.R. trackage". It is therefore apparent that, when the service is said not to "form part of the Canadian National Railways operations" this must be taken in a special sense in considering the operations from an accounting or financial point of view. It cannot be taken as meaning that the Commuter Service will not form part of the physical operations of the railway seeing that the equipment runs on the railway tracks. That this is of substantial importance in the physical operation of the railway appears in the record from uncontradicted evidence. John Howard Spicer, Manager of the Toronto area said:

> We are presently expanding the capacity of our plant to ensure that we can handle this new traffic adequately and also protect the existing traffic that moves on the line. This is one of our more important lines in Ontario and we must ensure that we can handle the traffic well. The new design for facilities will permit this.

How important "the trackage" is in the operation of the Commuter Service appears from what the same witness also said respecting the limited service provided to Hamilton.

> Q. Now, if this facility was constructed at Bayview, Mr. Spicer, would it in any way enable the Ontario Government utilizing C.N. facilities to operate more frequent commuter trains into Hamilton?
>
> A. Not without the expansion of the physical plant between Bayview and Burlington. The main problem we have at the present time is that the stretch of track between Burlington and Bayview is our highest traffic density portion of the entire line. Over that stretch of track we have all the traffic coming out of our hump yard, down the Halton Subdivision connecting into the Oakville Subdivision at Burlington. And of course we have all the trains going to London and Chicago and also down to Niagara Falls. So that over that short stretch of line we have an extreme density of trains. We don't feel that our existing plant has sufficient capacity to handle anything like the proposed commuter service. This is why we were forced to restrict our operations to two trains in each direction, the equivalent of our present commuter service to this area. To handle more trains than this or any significant more larger number of trains than this we would have to add lines, new rail lines, and of course they would have to be fully signalled, crossover networks would have to be put in to tie into the existing main lines that we have through here. So this would be a very expensive part of the entire project and I believe we made an estimate on it that the cost of extending the commuter service through this approximately three-mile stretch would equal the entire capital cost of installing the commuter service on the rest of the area,...

1967

THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO v. BOARD OF TRANSPORT COMMISSIONERS

The joint opinion of the Court

On the basis of what has just been said as to the nature of the Commuter Service it remains to be seen whether it can be said to be a local work or undertaking within the meaning of head 10 of s. 92 of *The British North America Act:*

> 10. Local Works and Undertakings other than such as are of the following Classes:—
>
> (*a*) Lines or 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.

It is, of course, admitted that the Canadian National Railways extends beyond the limits of the Province of Ontario. Therefore it is clear that this railway is subject to the jurisdiction of the Parliament of Canada. The only question is whether the Commuter Service can be said not to form part of this railway. To come to this conclusion, it would be necessary to hold that federal jurisdiction over interprovincial railways extends only to interprovincial services provided on such railways. This is clearly not possible. In *Winner v. S.M.T. (Eastern) Ltd.*[3], Rand J. said at p. 923:

> The analogy of railways and telegraphs was pressed upon us. These works are specifically named, and it is the clear implication that their total functioning was to be under a single legislature. But even they are limited to essential objects: *Attorney General for British Columbia v. C.P.R.* (1950 A.C. 122), in which a hotel operated by the company was held not to be part of the railway...

Kellock J. said at p. 929:

> The words, 'Lines of ships' and 'railways,' as used in the section, no doubt include all traffic carried by such means, but that is because these undertakings are specifically mentioned and, being mentioned, include everything normally understood by those words...

In the Privy Council the judgment of this Court was varied by taking a wider view of the operations included in an international or interprovincial bus service. No doubt

[3] [1951] S.C.R. 887, 4 D.L.R. 529, 68 C.R.T.C. 41.

was cast on the correctness of the views expressed in the passages just quoted (*Attorney-General for Ontario v. Winner*[4]):

> Their Lordships might, however, accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises, one within the province and the other of a connecting nature. Their Lordships, however, cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities.

In the present case, the constitutional jurisdiction depends on the character of the railway line not on the character of a particular service provided on that railway line. The fact that for some purposes the Commuter Service should be considered as a distinct service does not make it a distinct line of railway. From a physical point of view the Commuter Service trains are part of the overall operations of the line over which they run. It is clearly established that the Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction. In *Canadian Pacific Railway v. Notre-Dame de Bonsecours*[5], Lord Watson said at p. 372:

> ...the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management,...

In *Attorney General for Alberta v. Attorney-General for Canada*[6], Lord Moulton said at p. 370:

> By s. 8 of the Dominion Railway Act Parliament treats in a special manner the crossing of Dominion railways by provincial railways. These portions of the provincial railways are made subject to the clauses of the Dominion railway legislation, which deal also with the crossings of two Dominion railways, so that the provincial railways are in such matters treated administratively in precisely the same way as Dominion railways themselves. The Parliament of the Dominion is entitled to legislate as to these crossings because they are upon the right of way and track of the Dominion railway as to which the Dominion Parliament has exclusive rights of legislation, and moreover, as the provincial railways are there by permission and not of right, they can fairly be put under terms and regulations.

Hotels operated by railways were held to be separate undertakings only because they are not "a part of, or used

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[4] [1954] A.C. 541 at 580, 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225.

[5] [1899] A.C. 367.

[6] [1915] A.C. 363, 19 C.R.C. 153, 22 D.L.R. 501.

1967

THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO v. BOARD OF TRANSPORT COMMISSIONERS

The joint opinion of the Court

in connexion with the operation of a railway system". *Canadian Pacific Railway v. Attorney-General for British Columbia*[7].

Counsel for appellant did not contend that the Commuter Service wholly escaped federal legislative jurisdiction, he conceded that for such matters as signals and safety, the commuter trains would be subject to the same rules as other trains. It is, of course, obvious that no railway could be operated with trains on the same line not governed by the same set of rules; as Davies J. said in *City of Toronto v. Grand Trunk Railway Company*[8]:

> There cannot be two conflicting tribunals legislating at the same time upon such a vital subject as the public safety at railway crossings.

Counsel for appellant also felt obliged to concede that the train crews would be subject to federal labour laws not provincial. This cannot be true on any other basis than that the commuter service is not a distinct undertaking but part of the railway operations from the physical point of view. The criterion for the application of the labour laws as well as for the application of the safety rules is the same: whether the undertaking connects the province with any other.

The decision in *Luscar Collieries, Limited v. McDonald et al.*[9], shows that even a work which is of itself local, such as a provincial railway, may become a part of a federal undertaking by being put under the same management through an agreement with the latter. It thereby becomes part of a railway connecting the province with other provinces. There again the criterion of the jurisdiction is the fact that the operations are a part of the interprovincial system.

It must also be noted that in this last mentioned case, the order of the Railway Board which was affirmed on appeal to this Court was, as in the present case, an order declaring only that the Board had jurisdiction.

Before concluding, two observations should be made.

In his reasons for judgment, the dissenting Commissioner said: "I am of the opinion the requirements of the

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[7] [1950] A.C. 122 at 147, 1 W.W.R. 220, 64 C.R.T.C. 266, 1 D.L.R. 721.
[8] (1906), 37 S.C.R. 232 at 243.
[9] [1925] S.C.R. 460, 31 C.R.C. 267, 3 D.L.R. 225; [1927] A.C. 925, 3 W.W.R. 454, 4 D.L.R. 85.

Railway Act can be adequately and properly met by the simple process of the railway filing with the Board, as a tariff, the agreement which it has or will have with the Province and which must contain a full disclosure of the remuneration the railway will receive for the carriage and services it performs". It may well be that after considering all relevant circumstances the Board will come to the conclusion that it need not exercise its jurisdiction over the tolls charged to passengers and will find it sufficient to consider the adequacy of the charges made by the railway company to Ontario under the terms of the contemplated agreement. However, the question on this appeal is not whether the Board should in fact exercise its jurisdiction but whether it does have jurisdiction.

In the second place, it must be said that while at the hearing of this appeal the Court had the benefit of a thorough argument from both sides on the first question, no one appeared to oppose appellant on the constitutional issue. Counsel for the Board of Transport Commissioners declined to offer argument on that point in view of the Board's practice to refrain from dealing with such issues and the Attorney-General of Canada was not represented at the hearing. It is undesirable that this Court should be obliged to rule upon constitutional issues without the benefit of argument for both sides and the hope is expressed that, in the future, whenever the constitutional validity or application of federal legislation is in issue, this Court will always have the benefit of argument by counsel on behalf of the Attorney-General of Canada.

On the whole, we are of opinion that the appeal should be dismissed. There should be no order as to costs.

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Tilley, Carson, Findlay & Wedd, Toronto.

Solicitor for the respondent: J. M. Fortier, Ottawa.

1967
*Nov. 14
Dec. 18

DONNA MARIE HOLLAND, an infant under the age of twenty-one years by her next friend Frank Holland and the said FRANK HOLLAND *(Plaintiffs)* APPELLANTS;

AND

RICHARD HALLONQUIST *(Defendant)*..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Motor vehicles—Negligence—Injuries sustained by gratuitous passenger—Whether cause of action against owner for negligently operating motor vehicle which he knew, or should have known, was in unsafe condition—Necessity of establishing gross negligence—Motor-vehicle Act, R.S.B.C. 1960, c. 253, s. 71.

The appellant commenced an action against the respondent for damages in respect of injuries which she sustained while being driven as a passenger in an automobile owned and driven by the respondent. The statement of claim alleged that the appellant sustained her injuries as a result of:—(a) the grossly negligent driving of the respondent; (b) the negligence of the respondent in the maintenance and upkeep of his automobile. Before a statement of defence had been filed the parties jointly referred a point of law to the Court, as to whether "the plaintiff is entitled to maintain a claim against the defendant as owner for negligent maintenance of his motor vehicle notwithstanding the provisions of s. 71 of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253 and amendments thereto". The question was answered in the negative by the judge who heard the application and his judgment was sustained on appeal. From that decision the appellant, with leave, appealed to this Court.

Held: The appeal should be dismissed.

The statement of claim alleged that, at the time the appellant was injured, the respondent was the owner and driver of a motor vehicle. The appellant stated that she was carried as a passenger in that motor vehicle. Her claim was for injury sustained by reason of the operation of that vehicle by the respondent, the driver, while she was a passenger in it. These facts alleged in the statement of claim brought the action squarely within s. 71, and, that being so, gross negligence on the part of the respondent contributing to her injury had to be established if she was to succeed. It was unnecessary to consider what might be the position, under s. 71, of an owner of a motor vehicle against whom a claim is made by an injured passenger, where the owner is not the driver, and where some specific negligence of the owner is alleged to have caused the plaintiff's injuries.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Wootton J. Appeal dismissed.

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

[1] (1961), 59 W.W.R. 41, 61 D.L.R. (2d) 275.

B. A. Crane, for the plaintiffs, appellants.

R. Weddigen, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The appellant commenced an action against the respondent for damages in respect of injuries which she sustained on August 30, 1964, while being driven, as a passenger, in an automobile owned and driven by the respondent. Her statement of claim alleged, in para. 3, that she sustained her injuries as a result of the grossly negligent driving of the respondent. Particulars of the alleged gross negligence were given, including an allegation that the respondent drove his motor vehicle at an excessive rate of speed when he knew or ought to have known that his motor vehicle was in a bad state of repair and when he knew or ought to have known the front end was in a dangerous condition.

The statement of claim also contained, in para. 4, an allegation that the respondent, on or about the month of February 1964 had purchased a 1954 Oldsmobile motor vehicle, that he had negligently maintained it and was careless in its upkeep, so that, just prior to the accident, it had travelled across the highway, then parallel to the highway and collided with a railway embankment, causing the injuries to the appellant. Six particulars of negligence were given, three of which related to failure to keep the vehicle in good repair and three of which referred to the respondent's having permitted the vehicle to be driven while in an unsafe condition.

Before a statement of defence had been filed the parties jointly referred a point of law to the Court, as to whether

> the Plaintiff is entitled to maintain a claim against the Defendant as owner for negligent maintenance of his motor vehicle notwithstanding the provisions of Section 71 of the Motor-vehicle Act, R.S.B.C. 1960, Chapter 253 and amendments thereto.

Section 71, as it read at the relevant time, provided as follows:

> 71. No action shall lie against either the owner or the driver of a motor-vehicle or of a motor-vehicle with a trailer attached by a person who is carried as a passenger in that motor-vehicle or trailer, or by his executor or administrator or by any person who is entitled to sue under

1967

HOLLAND *et al.* *v.* HALLONQUIST

Martland J.

the Families Compensation Act, for any injury, loss, or damage sustained by such person or for the death of such person by reason of the operation of that motor-vehicle or of that motor-vehicle with trailer attached by the driver thereof while such person is a passenger on or is entering or alighting from that motor-vehicle or trailer, unless there has been gross negligence on the part of the driver of the vehicle and unless such gross negligence contributed to the injury, loss, or damage in respect of which the action is brought; but the provisions of this section shall not relieve

(*a*) any person transporting a passenger for hire or gain; or

(*b*) any person, to whose business the transportation of passengers is normally incidental, transporting a passenger in the ordinary course of the transporter's business

from liability for injury, loss, or damage to such passenger, or arising from the death of such passenger. No final judgment shall be entered in any such action until the Court is satisfied upon evidence adduced before it that the driver of the vehicle has been guilty of gross negligence.

The question was answered in the negative by the learned judge who heard the application and his judgment was sustained on appeal[2]. From that decision the appellant, with leave, has appealed.

In the Courts below the issue was dealt with in two stages. First, the question was considered as to whether an owner, *qua* owner, could be held liable for ordinary negligence in the maintenance and condition of his motor vehicle. As to this, both Courts held that he could, notwithstanding s. 71. Second, they went on to hold that where the owner was the driver of the car in which the passenger was riding, when injured, s. 71 did apply because the cause of action against the owner, *qua* owner, for negligent maintenance became fused into the character and nature of his operation of the motor vehicle. The learned judge of first instance puts the matter this way:

Here, however, the owner and the driver of the vehicle are one and the same person and consequently, as the facts pleaded in paragraph 3 of the statement of claim indicate that the defendant "was driving his 1954 Oldsmobile motor vehicle" and the infant plaintiff was his passenger, the defendant is entitled to the protection of the statute in its requirement that gross negligence must be established. The operation of the vehicle by the defendant in such circumstances includes in the field of negligence surrounding that operation the knowledge of the defendant as to the condition of his vehicle and the condition of the vehicle itself. The particulars indicated in paragraph 4 of the statement of claim are particulars which are relevant to the negligence in the operation of the vehicle itself. The pleadings clearly indicate that the defendant owned and operated the vehicle at the time of the accident.

[2] (1961), 59 W.W.R. 41, 61 D.L.R. (2d) 275.

With respect, while reaching the same conclusion as to the answer to be given to the question of law raised, I have adopted a somewhat different approach to the issue.

To the question of law, as framed, the answer had to be in the negative. Apart altogether from the application of s. 71, negligent maintenance of a motor vehicle, *per se*, could not give rise to a cause of action. Facts would have to be established to link the negligence alleged to the injuries sustained by the appellant. In the particulars given in para. 4 of the statement of claim, it is alleged that the respondent "permitted" his motor vehicle to be driven while it was in an unsafe condition, but it is clear, from para. 3, that the appellant alleges that the respondent was the driver. The cause of action alleged in the statement of claim is, in substance, that he negligently operated his motor vehicle which he knew, or should have known, was in an unsafe condition. The question which the parties sought to put in issue is whether, in such circumstances, s. 71 is applicable.

Eliminating from that section those words which are not relevant in this case, it provides:

> No action shall lie against either the owner or the driver of a motor-vehicle ... by a person who is carried as a passenger in that motor-vehicle ... for any injury ... sustained by such person ... by reason of the operation of that motor-vehicle ... by the driver thereof while such person is a passenger . . . unless there has been gross negligence on the part of the driver of the vehicle ...

The statement of claim alleges that, at the time the appellant was injured, the respondent was the owner and driver of a motor vehicle. The appellant states that she was carried as a passenger in that motor vehicle. Her claim is for injury sustained by reason of the operation of that vehicle by the respondent, the driver, while she was a passenger in it.

These facts alleged in the statement of claim bring the action squarely within the section, and, that being so, gross negligence on the part of the respondent contributing to her injury must be established if she is to succeed.

It is unnecessary to consider, and for that reason I express no opinion upon, what might be the position, under s. 71, of an owner of a motor vehicle against whom a claim is made by an injured passenger, where the owner is not

1967

HOLLAND *et al.* v. HALLONQUIST

Martland J.

the driver, and where some specific negligence of the owner is alleged to have caused the plaintiff's injuries. That question would have to be determined in relation to the circumstances proved in the particular case.

I would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Heath & Hutchison, Nanaimo.

Solicitors for the defendant, respondent: Harper, Gilmour, Grey & Company, Vancouver.

1967

*Oct. 12
Nov. 28

THE ROWNTREE COMPANY LIMITED ..... APPELLANT;

AND

PAULIN CHAMBERS COMPANY LIMITED ..... RESPONDENT;

AND

THE REGISTRAR OF TRADE MARKS

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade marks—Registration—Candy—"Smoothies" for candy—"Smarty" for biscuits and candy and "Smarties" for confections—Whether trade marks confusing—Trade Marks Act, 1952-53 (Can.), c. 49, ss. 6(2), (5), 12(1)(d), 55(5).

The respondent's application for registration of the trade mark "Smoothies" in respect of candy was refused by the Registrar of Trade Marks on the ground that the trade mark was "confusing" with the appellant's previously registered trade mark "Smartie" as applied to biscuits and candy and "Smarties" as applied to confections. The Registrar concluded that the use of both marks would lead to the inference that the wares emanate from the same source. It is admitted that the trade mark "Smarties" is inherently distinctive and has been in use for a much longer time than the mark "Smoothies", that the nature of the trade is the same for both and that the wares are the same. The Exchequer Court, on appeal from the Registrar's decision, found that there was no probability of confusion and ordered the registration. An appeal was launched to this Court.

Held: The appeal should be allowed and the registration refused.

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

In deciding whether or not an unregistered trade mark is "confusing" with a registered trade mark, it is enough if the words used in the registered and the unregistered trade marks respectively are likely to suggest the idea that the wares with which they are associated were produced or marketed by the same person. This was the approach adopted by the Registrar of Trade Marks and no grounds were established to justify the Exchequer Court to interfere with the conclusion reached by him.

Marques de commerce—Enregistrement—Bonbons—«Smoothies» pour des bonbons—«Smarty» pour des biscuits et des bonbons et «Smarties» pour des sucreries—Les marques de commerce créent-elles de la confusion—Loi sur les marques de commerce, 1952-53, (Can.), c. 49, arts. 6(2), (5), 12(1)(d), 55(5).

La demande présentée par la compagnie intimée pour obtenir l'enregistrement de la marque de commerce «Smoothies» concernant des bonbons fut rejetée par le registraire des marques de commerce pour le motif que la marque de commerce créait de la confusion avec la marque de commerce «Smartie» concernant des biscuits et des bonbons et «Smarties» concernant des sucreries, marque appartenant à la compagnie appelante et enregistrée antérieurement. Le registraire a conclu que l'emploi des deux marques serait susceptible de faire conclure que les marchandises émanaient de la même source. Il est admis que la marque de commerce «Smarties» a un caractère distinct inhérent et a été en usage pour une plus longue période de temps que la marque «Smoothies», que la nature du commerce est la même dans les deux cas et que les marchandises sont les mêmes. La Cour de l'Échiquier, sur appel à l'encontre de la décision du registraire, a conclu qu'il n'y avait aucune probabilité de confusion et a ordonné l'enregistrement. Un appel a été logé devant cette Cour.

Arrêt: L'appel doit être maintenu et l'enregistrement refusé.

Pour décider si une marque de commerce non enregistrée crée de la confusion ou non avec une marque de commerce enregistrée, il suffit que les mots employés dans les marques de commerce enregistrées et non enregistrées respectivement soient susceptibles de suggérer l'idée que les marchandises avec lesquelles ces marques sont en liaison ont été produites ou mises sur le marché par la même personne. C'est de cette manière que le registraire des marques de commerce a abordé la question et aucun motif a été établi pour justifier la Cour de l'Échiquier d'intervenir dans la décision du registraire.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1] en matière de marque de commerce. Appel maintenu.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in a trade mark matter. Appeal allowed.

Donald F. Sim, Q.C., for the appellant.

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[1] (1967), 34 Fox Pat. C. 158, 51 C.P.R. 153.

1967

ROWNTREE CO. LTD. v. PAULIN CHAMBERS CO. LTD. et al.

James D. Kokonis and *Norman R. Shapiro,* for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Gibson of the Exchequer Court of Canada[1] allowing the respondent's appeal from a decision by which the Registrar of Trade Marks had refused the respondent's application of September 13, 1961, for registration of the trade mark SMOOTHIES in respect of candy.

The Registrar's refusal was based on the ground that the trade mark applied for was "confusing" with the appellant's trade mark SMARTIE as applied to biscuits and candy and SMARTIES as applied to confections which had been registered on March 6, 1928, and March 7, 1940, respectively.

The effect of s. 12(1)(*d*) of the *Trade Marks Act,* 1952-53 (Can.), c. 49, (hereafter called "the Act") is that a trade mark is not registerable if it is "confusing with a registered trade mark" and the question of whether it is confusing or not is to be determined in accordance with the standard fixed by s. 6(2) of the Act which reads as follows:

> 6(2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

It will be seen from these provisions that the essential question to be determined in deciding whether or not a trade mark is confusing with a registered trade mark is whether its use would be likely to lead to the inference that the wares associated with it and those associated with the registered trade mark were produced or marketed by the same company.

In determining this issue, the Court or the Registrar is directed by s. 6(5) of the Act to "have regard to all the surrounding circumstances including

> (a) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;
>
> (b) the length of time the trade marks or trade names have been in use;
>
> (c) the nature of the wares, services or business;

[1] (1967), 34 Fox Pat. C. 158, 51 C.P.R. 153.

(d) the nature of the trade; and

(e) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

It is expressly admitted, and was found by the learned trial judge, that the trade mark SMARTIES is inherently distinctive and as of September 16, 1961, the date of the application, had been used for a very long time in comparison to the length of time that SMOOTHIES had been used, and it is further admitted, in accordance with the trial judge's finding, that the nature of the trade in which the wares SMOOTHIES and SMARTIES are sold is the same and for the purpose of this appeal the respondent admits also that the wares sold under the two marks are the same.

Under these circumstances, the learned Registrar of Trade Marks directed himself, in determining the question of confusion between the marks, in accordance with the provisions of s. 6(2) of the Act and concluded:

> I have considered the evidence on file and also the representations of counsel for both parties at a hearing held in my Office November 19th, 1963. The nature of the wares and the nature of the trade in both cases is identical and the wares are distributed through the same channels of trade. Both marks are slang terms commonly used to describe a 'smart aleck' or a 'smooth operator'. After carefully reviewing the evidence, I have arrived at the conclusion *that there is a strong possibility that the concurrent use of both marks would lead to the inference that the wares of the applicant and those of the opponent emanate from the same source.*

The italics are my own.

In reaching the opposite conclusion, it will be observed that the learned trial judge did not expressly apply the standards fixed by s. 6(2) and based his conclusion on his view of the meaning of the two words SMARTIES and SMOOTHIES. His finding reads as follows:

> . . . that there is no resemblance between the trade marks in appearance, sound or in the idea suggested by them. There was no dispute between the parties that there is no appearance or sound resemblance, but there was a dispute as to whether there was a degree of resemblance in the idea suggested by them. As to the latter, however, it is clear that the meaning of these words are entirely dissimilar. Webster's Third New International Dictionary defines 'smarties' and 'smoothies' as follows:
>
> *smart or smartie* . . . one that tries in a callow fashion to be witty or clever: smart aleck.
>
> *smoothy or smoothie* . . . 1a: a person with polished manners b: one who behaves or performs with deftness, assurance, easy competence . . .
>
> All of which, on balance, leads to the conclusion, in my view, that there is no probability of confusion within the meaning of section 6 of the *Trade Marks Act* of 'Smoothies' with 'Smarties'.

1967

ROWNTREE CO. LTD. v. PAULIN CHAMBERS CO. LTD. et al.

Ritchie J.

In the factum filed on behalf of the respondent, it is submitted that "It is the degree of resemblance between the two trade marks in appearance or sound or in the ideas suggested by them (s. 6(5)(*e*) of the *Trade Marks Act*) that is the essential question to be decided on the issue of confusion". As I have indicated, the learned trial judge determined this question by reference to the meaning attributed to the words in question by Webster's Third New International Dictionary and his conclusion is based on the finding that "the meaning of these words are entirely dissimilar".

On the other hand, I am, as I have stated, of opinion that the essential question to be determined is whether the use of the word SMOOTHIES by the respondent would be likely to lead to the inference that the wares associated with that word and those associated with the registered trade marks of the appellant were produced or marketed by the same company and I do not think that this necessarily involves a resemblance between the dictionary meaning of the word used in the trade mark applied for and those used in the registered trade marks. It is enough, in my view, if the words used in the registered and unregistered trade marks are likely to suggest the idea that the wares with which they are associated were produced or marketed by the same person. This is the approach which appears to me to have been adopted by the Registrar of Trade Marks.

It is contended on behalf of the respondent that the conclusion reached by the learned trial judge should not be disturbed having regard to the terms of s. 55(5) of the Act which provides that "on the appeal ... the Court may exercise any discretion vested in the Registrar". I do not, however, take this as meaning that the Court is entitled to substitute its view for that of the Registrar unless it can be shown that he proceeded on some wrong principle or that he failed to exercise his discretion judicially.

In this latter regard I would adopt the approach outlined by Lord Evershed *In the Matter of Broadhead's Application for Registration of a Trade Mark*[2], where he was speaking of a case in which the Court of first instance had overruled a finding of the Registrar of Trade Marks as

[2] (1950), 67 R.P.C. 209.

to whether a trade mark was distinctive or not and the Court of Appeal approved the Court's judgment. At the time of this decision the English *Trade Marks Act*, 1-2 Geo. 6, 1938, c. 22, was in force, s. 22 of which provides that "the Court shall have and exercise the same discretionary powers as under this Act are conferred upon the Registrar". Lord Evershed there said at page 213:

> It has been argued that, the question being one of the discretion of the Registrar, there is at any rate a strong case against interference with that discretion by the Court. Like all discretions, the Registrar's discretion must be judicially exercised; and such an exercise of discretion is, according to the principle recently laid down in the House of Lords in *Evans v. Bartlam* (1937) 53 Times L.R. (689), liable to review on grounds which are well understood. There can be added the further consideration that the subject matter in such a case as this is one with which the Registrar and his assistants are peculiarly well versed, and the greatest weight should, therefore, be attached to their experience in such matters. In the case of *Edward Hack's Trade Mark* (1941) 58 R.P.C. (91) Morton J., as he then was, referred to the well known statement of Lord Dunedin in the case of *George Banham & Coy. v. F. Reddaway & Coy. Ltd.* Lord Dunedin said: 'Now it is true that an appeal lies from the decision of the Registrar, but, in my opinion, unless he has gone clearly wrong, his decision ought not to be interfered with. The reason for that is that it seems to me that to settle whether a trade mark is distinctive or not—and that is the criterion laid down by the statute—is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case.'

In my view the Registrar of Trade Marks in the present case applied the test required of him by the statute and I do not think that grounds were established justifying the learned judge of the Exchequer Court in interfering with his conclusion. For all these reasons I would allow this appeal and restore the decision of the Registrar of Trade Marks refusing the respondent's application S.N. 264951.

The appellant will have the costs of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: McCarthy and McCarthy, Toronto.

Solicitor for the respondent: N. R. Shapiro, Ottawa.

1967

*Nov. 14, 15
Dec. 18

HER MAJESTY THE QUEEN .....APPELLANT;

AND

YORK MARBLE, TILE AND TERRAZZO LIMITED ....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Petition of right for refund—Imported slab marble—Polishing and cutting for installation by importer in buildings—Whether finished marble "goods produced or manufactured in Canada" and therefore liable for sale or consumption tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30(1)(a), 31(1)(d)—Old Age Security Act, R.S.C. 1952, c. 200, s. 10(1).

The respondent imported slabs of raw marble of varying thickness and size and after several finishing operations installed the finished product in the various buildings as to which it was a subcontractor. The work done at the respondent's plant on the raw marble consisted of book matching, grouting, rodding, gluing, grinding, rough and fine polishing, cutting and edge finishing. The sole issue to be determined was whether the work done by the respondent on the slabs resulted in such marble becoming "goods produced or manufactured in Canada" within the meaning of s. 30(1)(*a*) of the *Excise Tax Act*, R.S.C. 1952, c. 100. The trial judge found that the activities to which the slabs were subjected were not the application of an art or process so as to change the character of the imported natural product so as to come within the meaning of "produced or manufactured" in the *Excise Tax Act*. The Crown appealed to this Court.

Held: The Crown's appeal should be allowed.

The work done by the respondent on the marble slabs resulted in such marble becoming "goods produced or manufactured in Canada" within the meaning of s. 30(1)(*a*) of the *Excise Tax Act*. Adopting one of the definitions of "manufacture" in *M.N.R. v. Dominion Shuttle Co. Ltd.* (1933), 72 Que. S.C. 15, the finished marble slabs which left the respondent's plant had by work, both by hand and machinery, received new form, new quality and new properties. The words "produced" and "manufactured" as used in the present statute are not synonymous, and if there were any doubts that the various procedures taken by the respondent resulted in the manufacture of a piece of marble, there was no doubt that those procedures did result in the production of a piece of marble.

The fact that the respondent used the marble pieces in executing the building subcontracts did not exempt it from the liability of the tax since the *Excise Tax Act* imposes a consumption tax as well as a sales tax.

Revenu—Taxe de vente—Pétition de droit pour obtenir remboursement—Tranches de marbre importées—Polissage et sciage avant l'installation dans des édifices par l'importateur—Est-ce que le marbre fini est «une

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

marchandise produite ou fabriquée au Canada» et en conséquence sujet à la taxe de vente ou de consommation—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 30(1)(a), 31(1)(d)—Loi sur la sécurité de la vieillesse, S.R.C. 1952, c. 200, art. 10(1).

La compagnie intimée importe des tranches de marbre brut de différentes épaisseurs et grandeurs, et après les avoir travaillées installe le produit fini dans différents édifices pour lesquels elle agit comme sous-entrepreneur. Les travaux qui se font à l'atelier de l'intimée sur le marbre brut consistent en l'appariation ou l'appareillement, le masticage, l'insertion de baguettes de fer, le collage, le rodage, le polissage en gros et en fin, le sciage et la finition des bords. La seule question à décider était de savoir si les travaux faits par l'intimée sur les tranches de marbre avaient eu comme résultat de faire de ces marbres de la «marchandise produite ou fabriquée au Canada» dans le sens de l'art. 30(1)(*a*) de la *Loi sur la taxe d'accise*, S.R.C. 1952, c. 100. Le juge au procès a conclu que les activités auxquelles les tranches de marbre étaient soumises n'étaient pas l'application d'un art ou d'un procédé au point de changer le caractère du produit naturel importé de telle sorte qu'il tombe dans le sens de «produit ou manufacturé» de la *Loi sur la taxe d'accise*. La Couronne en appela devant cette Cour.

Arrêt: L'appel de la Couronne doit être maintenu.

Les travaux faits par la compagnie intimée sur les tranches de marbre ont eu comme résultat de faire de ces marbres des «marchandises produites ou fabriquées au Canada» dans le sens de l'art. 30(1)(*a*) de la *Loi sur la taxe d'accise*. Adoptant l'une des définitions de «fabriqué» dans *M.N.R. v. Dominion Shuttle Co. Ltd.* (1933), 72 Que. C.S. 15, les tranches de marbre finies qui sortent des ateliers de l'intimée ont reçu, par l'effet du travail manuel ou à la machine, une nouvelle forme, une nouvelle qualité et de nouveaux attributs. Les mots «produit» et «fabriqué» tels qu'employés dans le statut présent ne sont pas synonymes, et s'il y a le moindre doute que les différents procédés dont l'intimée fait usage ont eu comme résultat la fabrication d'une pièce de marbre, il n'y a aucun doute que ces procédés ont eu comme résultat la production d'une pièce de marbre.

Le fait que l'intimée a utilisé les pièces de marbre pour exécuter ses contrats de construction ne l'exempte pas de l'obligation de payer la taxe puisque la *Loi sur la taxe d'accise* impose une taxe de consommation aussi bien qu'une taxe de vente.

APPEL par la Couronne d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], concernant une pétition de droit pour obtenir un remboursement de la taxe de vente. Appel maintenu.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], concerning a petition of right for refund of sales tax. Appeal allowed.

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[1] [1966] Ex. C.R. 1039, [1966] C.T.C. 355, 66 D.T.C. 5210.

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

C. R. O. Munro, Q.C., and *N. A. Chalmers*, for the appellant.

W. D. Goodman and *B. A. Spiegel*, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of Mr. Justice Gibson of the Exchequer Court of Canada[1] delivered on May 11, 1966, whereby he allowed a petition of right brought by the respondent to recover moneys paid by it to the Receiver General of Canada pursuant to a demand made by the Minister of National Revenue for payment of the sales or consumption tax imposed by the *Excise Tax Act* and the *Old Age Security Act* on marble products. The provisions under which the taxes were claimed were ss. 30(1)(*a*) and 31(1)(*d*) of the *Excise Tax Act*, R.S.C. 1952, c. 100, and s. 10(1) of the *Old Age Security Act*, R.S.C. 1952, c. 200, as enacted by Statutes of Canada 1959, c. 14, s. 1. These sections read as follows:

Excise Tax Act:

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

(i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, and . . .

* * *

31. (1) Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

* * *

(*d*) such goods are for use by the manufacturer or producer and not for sale;

the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

Old Age Security Act:

10. (1) There shall be imposed, levied and collected an Old Age Security tax of three per cent on the sale price of all goods in respect of which tax is payable under section 30 of the *Excise Tax Act*, at the same time, by the same persons and subject to the same conditions as the tax payable under that section.

By agreement between the parties, the sole issue to be determined in the Exchequer Court was whether the work

[1] [1966] Ex. C.R. 1039, [1966] C.T.C. 355, 66 D.T.C. 5210.

done by the respondent on slab marble during the period in question resulted in such marble becoming "goods produced or manufactured in Canada" within the meaning of s. 30(1)(*a*) of the *Excise Tax Act*.

The respondent imported slabs of raw marble. At the time of their arrival at the respondent's plant these slabs had merely been cut from a large block. The slabs varied in thickness and in size both as to length and width. The surface was rough and greyish in colour and the slab edges were rough and unfinished. Exhibit 2 filed at the trial is a photograph of such rough marble slabs as they were stored in the respondent's warehouse and illustrates that the said slabs possessed none of the beauty of the finished product installed by the respondent in the various buildings as to which the company was sub-contractor.

The work done at the respondent's plant from the time the rough marble arrived there until the finished pieces left ready for installation in the various buildings was described by the vice-president, Alfred Peirol, C.A., in his evidence and may be summarized as follows:

(a) *Book Matching:* Each slab of marble is matched against other slabs which have been sawn from the same block so that the veining which appears in the marble will follow a pattern from piece to piece in a particular installation.

(b) *Grouting:* Certain slabs of marble such as Travertine marble have voids at their surfaces which are often filled with coloured cement material.

(c) *Rodding:* Certain slabs of marble are weak and must be reenforced with metal rods. This is done by cutting grooves in one surface of the slab of marble and by inserting and cementing metal rods into the grooves.

(d) *Gluing:* Certain slabs of marble often break in the course of being worked on and consequently are glued together with special materials.

(e) *Grinding:* The surface of a slab of marble is sometimes reduced and levelled by using a grinder.

(f) *Rough Polishing:* Marble is polished on polishing tables. The marble is laid flat on the table and a disc mounted on an electrically powered polishing head is caused to rotate on the surface of the marble. To the disc may be attached an abrasive such as carborundum segments or the disc may be left bare and an abrasive in the form of carborundum grain is placed on the marble itself. The rough polishing is usually done in two stages and the result thereby obtained is referred to as a honed finish.

(g) *Fine Polishing:* From time to time polishing is begun on the polishing table to the time the marble leaves the table, the marble may undergo five polishing stages. In each stage, finer abrasives or carborundum segments are used until in the final

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

Spence J.

stage the marble is polished with felt buffing pads and fine abrasive powders. The stages of polishing performed after the marble surface has been honed are referred to as fine polishing.

(h) *Cutting:* Once the marble is polished, it is cut to the desired dimension with a power diamond circular saw. The saw is mounted over a table on which the marble is placed and fastened. Sawing marble is a delicate operation as the edges of a piece of marble which will be exposed must not be damaged in the operation.

(i) *Edge Finishing:* The exposed edges of a piece of marble are polished with belt sanders or by hand and again several stages are used to obtain the desired finish.

The learned Exchequer Court Judge in his reasons for judgment found that the activities aforesaid were not the application of an art or process so as to change the character of the imported natural product dealt with so as to come within the meaning of "produced or manufactured" in the *Excise Tax Act,* and it is this finding which is contested by Her Majesty the Queen in this appeal.

Many authorities were cited but in my view few are enlightening. It must always be remembered that decisions in reference to other statutory provisions, and particularly decisions in other jurisdictions, are of only limited assistance in construing the exact provisions of a statute of Canada. In reference to the words "all goods (a) produced or manufactured in Canada", Duff C.J. noted in *His Majesty the King v. Vandeweghe Limited*[2]:

> The words "produced" and "manufactured" are not words of any very precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe.

Further reference shall be made to that judgment hereunder. It was delivered on March 6, 1934, and on December 2, 1933, Archambault J., in *Minister of National Revenue v. Dominion Shuttle Company Limited*[3], gave a very interesting judgment in the Superior Court of the Province of Quebec.

Both of these judgments considered the said ss. 85 ff. of the *Special War Revenue Act* in which the same words, "produced or manufactured in Canada" were used. Archambault J., outlined the facts as follows:

> The evidence shows that these lengths of lumber were sold and delivered by the saw-mill in British Columbia to defendants at Lachute, in lengths of 20', 16' and 25' and at so much per thousand feet.

[2] [1934] S.C.R. 244 at 248, 3 D.L.R. 57.

[3] (1933), 72 Que. S.C. 15.

The work done on these lengths by defendant was: first, to cut them in lengths of 10', or 8'; second, to creosote them, or dip them in creosoting oils to preserve them against the elements of the weather (for which defendants have a special plant); third, to round them or mill or dress the lumber to the rounded shape; fourth, to bore holes in them in order to insert the pin on which the insulator is placed, and after this work was done, they were sold to the Canadian Pacific Railway at the price, not based on so much a thousand feet, but based on so much per hundred "cross arms".

and he then continued:

The questions to be decided are: first, are the defendants the producers or manufacturers of these "cross arms"? second, should the cost of transportation from British Columbia to Lachute be included in the sale price?

First, what is a manufacturer? There is no definition of the word "manufacturer" in the Act and it is practically impossible to find a definition which will be absolutely accurate, but from all the definitions contained in leading dictionaries, Corpus Juris, Encyclopedias, etc., the Court gathers that to manufacture is to fabricate; it is the act or process of making articles for use; it is the operation of making goods or wares of any kind; it is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.

This is exactly what the defendant company did. They received the raw material or prepared raw material, or lengths of lumber, and put them through the processes already mentioned to make "cross arms" and sold them to the consumer.

For the present purposes, I wish to note and to adopt one of the definitions cited by the learned judge, i.e., that "manufacture is the production of articles for use from raw or prepared material by giving to these materials *new forms, qualities and properties or combinations* whether by hand or machinery". (The italics are my own.) If one were to apply the latter test to the question at issue in this appeal, in my view, the finished marble slabs which left the respondent's plant had by work, both by hand and machinery, received new form, new quality and new properties. The form differed in that what arrived were great slabs of raw marble sometimes as long as sixteen feet and of varying widths, and what left were exactly shaped pieces of polished marble much smaller in size cut with precision to fit the places into which they were to be installed. As to quality, what arrived was a greyish, non-descript slab of stone and what left was a highly polished marble facing whether it was to be installed in a wall, as a window sill, or as a post. As to properties, what arrived was in many cases a piece of unfilled stone and sometimes one which would be

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

Spence J.

too fragile for use and what left in most cases was a piece of marble in which the rough unevenness had been filled in by grouting and where necessary the weakness had been remedied by rodding.

In my view, the application of this test alone would be sufficient justification to find that the marble pieces which left the respondent's plant had been "produced" or "manufactured" there from the raw material of the rough slabs of marble which had arrived.

In *Gruen Watch Company of Canada Ltd. et al. v. Attorney General of Canada*[4], McRuer C.J.H.C. considered the same question in reference to the same statute. The facts may be briefly stated from the first paragraph of his judgment at p. 430:

> The plaintiffs in this action have been engaged for many years in the importation of watch movements from abroad. They import or purchase in Canada watch cases adapted to the particular movements imported, and by a very simple operation performed by unskilled labour, taking only a very few minutes at an expense of from 1.25 to 3.6 cents each, the watch movement is placed in the case and a watch ready for sale is produced. In some cases wrist-bands, bracelets or brooches are attached to the watch case for the personal convenience of the purchasers. The plaintiffs do not manufacture either watch movements or watch cases.

At p. 442, the learned Chief Justice said:

> I cannot find that the simple operation of putting a watch movement into a watch case is "manufacturing" a watch in the "ordinary, popular and natural sense" of the word, but I feel clear that the plaintiffs "produced" watches "adapted to household or personal use". It may well be that, as counsel for the plaintiffs argued, the movement as imported in the tin or aluminum case will keep time and could be used as a watch. It is not a watch "adapted to household or personal use" as the term is used in its ordinary and popular sense, and the movement in the aluminum case would be quite unsaleable as such.

It is to be noted that the learned Chief Justice used the firmly established principle that the taxing statute must be interpreted by the consideration of the words thereof in the ordinary, proper, and natural sense, and that doing so he found himself able to distinguish between the two words "produced" and "manufactured". It was the submission of counsel for the respondent before this Court that the two words must be considered as being practically synonymous and *Charles Marchand Co. v. Higgins*[5] was quoted as an authority therefor. That was a decision of

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[4] [1950] O.R. 429, [1950] C.T.C. 440, 4 D.L.R. 156.

[5] (1940), 36 F. Supp. 792.

Mandelbaum, District Judge in the District Court of the Southern District of New York, and the decision on this point may be taken from one sentence in the reasons of the learned District Court Judge, "I am of the opinion that the terms as used in the present taxing statute are synonymous". The learned District Court Judge reached that conclusion because Article 4 of Treasury Regulation 46 (1932 edition) provided:

> As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of the article, or produces a taxable article by combining or assembling two or more articles.

and then various authorities relied on by the learned District Court Judge held that "manufacture" implied a change into a new and different article.

For these reasons, I am not able to accept the decision in *Charles Marchand v. Higgins* as being an authority which should persuade this Court to hold that "produce" and "manufacture" as used in the statute presently considered in which neither is defined are synonymous, and I adopt the course of McRuer C.J.H.C., in *Gruen Watch Co. v. Attorney General of Canada* in holding that an article may be "produced" although it is not "manufactured". In that case, although he was unable to come to the conclusion that the mere insertion of the movement into the watch case was the manufacture of the watch, he found no difficulty in determining that such a process was the production of a watch.

Similarly, in the present case, if I had any doubt that the various procedures taken by the respondent in reference to the marble slabs resulted in the manufacture of a piece of marble, I would have no doubt that those procedures did result in the production of a piece of marble.

In *The King v. Vandeweghe Limited, supra,* Duff C.J., upon commenting that the words "produce" and "manufacture" were not words of any very precise meaning, sought an aid to construction in a consideration of the exemptions from the impositions which were listed in subs. (4) of s. 86 of the then statute. Amongst those exemptions were pulpwood, tan bark, wool no further prepared than washed and raw fur. The Chief Justice of this Court remarked at p. 248:

> Light is thrown upon the meaning of the word "produced" by the fact that pulpwood and tan bark and other articles the product of the forest

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

Spence J.

are contemplated as being produced within the meaning of the statute. We have further the item "wool no further prepared than washed" which seems to imply that wool still further prepared, by dyeing for example, if sold, comes within the incidence of the tax. Then we have "raw furs" which is not without its implication. It is not easy to see why a raw fur which is separated from the animal upon which it grew, when combed, "made pliable" and dyed and thereby turned into "merchantable stock-in-trade", has not become something which is "produced" if the term "produced" is properly applicable to such things as "pulpwood" and "tan bark".

To apply the same method of testing to the present situation, Schedule 3 to the *Excise Tax Act* contains a list of exemptions, including:

Building stone (exemption removed effective June 14, 1963)
Sand
Gravel
Rubble
Field Stone
Cut flowers
Straw
Forest products when produced and sold by the individual settler or farmer
Furs, raw
Logs and round unmanufactured timber
Sawdust and wood shavings
Wool not further prepared than washed

Of course, such goods as sand, gravel, rubble or field stone could not be considered either "manufactured" or "produced". Nor in all probability would they have been imported and so taxable under s. 30(1)(*b*). There have been, however, some very simple operations in the production of cut flowers, straw, raw furs and wool not further prepared than washed, and yet it is apparent that these items were regarded by Parliament as being "manufactured" or "produced".

In at least two recent decisions, the Court has considered the schedules to the Customs Act as being a revenue statute in *pari materia* and therefore an aid in the interpretation of words in the *Excise Tax Act*. In *Bradshaw v. Minister of Customs and Excise*[6], Duff C.J., when considering the phrase "nursery stock" as used in subs. (4) of s. 19BBB of c. 8 of the Statutes of Canada, 5 Geo. V, pointed out that in the Customs Tariff the words used were "trees,

[6] [1928] S.C.R. 54, [1927] 3 W.W.R. 85, 4 D.L.R. 278.

plants and shrubs, commonly known as nursery stock" and in *The King v. Planters Nut and Chocolate Company Ltd.*[7], Cameron J., at p. 130, said:

> It is of considerable interest, also, to note that in the tariff rates under *The Customs Act* (which, as a revenue Act, I consider to be in *pari materia*), separate items are set up for fruits, for vegetables, and also for "nuts of all kinds, not otherwise provided, including shelled peanuts". This would seem to indicate that in the minds of the legislators, nuts were not included in the categories of fruits or vegetables, and also that peanuts fell within the category of nuts.

When one calls in aid of the construction of the words "manufactured" and "produced" in s. 30(1)(*a*) of the *Excise Tax Act*, the provisions of the Customs Tariff, items 306(b) and 306(c), which read as follows:

> 306b. Building stone, other than marble or granite, planed, turned, cut or further manufactured than sawn on four sides.
>
> 306c. Marble, not further manufactured than sawn, when imported by manufacturers of tombstones to be used exclusively in the manufacture of such articles, in their own factories.

it would appear that the legislators regarded mere sawing of both building stone and marble as being the manufacture thereof. I view these considerations of both the exemptions in Schedule C of the *Excise Tax Act* and the items in the *Customs Act* as being confirmatory of my view that the legislators intended that the words "manufactured" or "produced" should encompass goods such as the polished marble slabs in question in this appeal.

Gibson J., in the penultimate paragraph of his reasons for judgment, stated:

> The activities of the suppliant in relation to the imported marble were done as part and parcel of executing building sub-contracts resulting in such marble becoming part of the realty and in doing so the suppliant did not at any material time produce or manufacture in Canada "goods" as meant in s. 30(1)(*a*) of the Excise Tax Act.

It should be noted that the *Excise Tax Act* in s. 30 imposes not only a sales tax but a consumption tax and that s. 31(1)(*d*) of the said *Excise Tax Act* makes specific provision for goods which although manufactured or produced in Canada were for use by the manufacturer or producer and not for sale. This Court, in *The King v. Fraser Companies Ltd*[8], held that a corporation which

[7] [1951] Ex. C.R. 122, [1951] C.T.C. 16.
[8] [1931] S.C.R. 490, 4 D.L.R. 145.

1967

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD.

Spence J.

produced lumber and used the same in the performance of a building contract was liable for the tax, and again, in *The King v. Dominion Bridge Co. Ltd.*[9], held that a company which produced steel members in order to fabricate them in the superstructure of a bridge was liable to the tax.

I am, therefore, of the opinion that the fact that the respondent used the marble pieces in executing the building sub-contracts does not exempt it from the liability of the tax.

I would allow the appeal with costs. Her Majesty should have the costs in the Exchequer Court.

Appeal allowed with costs.

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

Solicitors for the respondent: Goodman & Carr, Toronto.

1967

*Nov. 6

1968

Jan. 23

THE CITY OF BRANDON (*Defendant*) ...APPELLANT;

AND

KIMBELL RUSSELL ROY FARLEY (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Invitor and invitee—Plaintiff carrying on business of purchasing water from defendant for resale—Accumulation of ice at doorway of defendant's premises resulting from spillage of water in freezing temperatures—Plaintiff injured in fall—Whether an unusual danger—Knowledge of danger by plaintiff.

The plaintiff, an invitee, brought an action for damages for injuries he sustained when he fell on the ice covered sills of a doorway leading into the east side of the defendant city's fire hall. The plaintiff had for many years carried on the business, along with a number of others, of purchasing water from the city for resale to farmers in the outlying districts, and for this he used a truck with a 500-gallon tank on it which he brought to the east side of the fire hall stopping it with its back opposite the doorway just south of which there was a pipe with a hose extension through which the water was delivered. The accident occurred on a day when the weather was cold and snow was blowing. Shortly before 4 p.m. the plaintiff backed his truck up according to his practice, inserted the hose into the tank and then entered the building through the doorway. As he came in he noticed that the sills were covered with an accumulation of ice which had

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

[9] [1940] S.C.R. 487, 2 D.L.R. 545.

gathered there from the spillage of water while filling the tanks. A few minutes later the plaintiff left through the door by which he had entered and in so doing he slipped on the ice and fell approximately 42 inches to the ground below suffering serious injuries to his left shoulder and thigh.

The trial judge found that the danger presented by the ice at the doorway was not an unusual one and that the plaintiff knew and fully appreciated it, but the Court of Appeal found the danger to be an unusual one and held that the defendant was negligent in failing to remove the ice and apply sand at the entrance. The Court of Appeal further found the plaintiff guilty of contributory negligence and assessed the liability to the extent of one-third against the plaintiff and two-thirds against the defendant, as a result of which damages were awarded to the plaintiff in the amount of $19,076.10. An appeal by the defendant from the judgment of the Court of Appeal was brought to this Court.

Held: The appeal should be allowed and the action dismissed.

The plaintiff was a member of a class whose business in obtaining water from the city exposed them to the hazard in winter-time created by ice accumulating on the door sills from the spillage of water. This danger was not an unusual one for persons of that class and indeed it was one which was to be expected by those engaged in the transfer of water in freezing temperatures. The plaintiff had knowledge of the actual danger at the place where he fell because he had entered and left through the doorway twice on the very day of the accident and had entered over the ice only five or six minutes before his fall.

The duty owed by an occupier to an invitee as defined by Willes J. in *Indermaur v. Dames* (1866), L. R. 1 C.P. 274, is predicated upon the existence of an unusual danger on the occupier's premises and the finding that the damage in the present case was not caused by such a danger was a complete answer to the plaintiff's claim.

Campbell v. Royal Bank of Canada, [1964] S.C.R. 85, distinguished; *London Graving Dock Co. Ltd. v. Horton,* [1951] A.C. 737, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], setting aside a judgment rendered at trial by Hall J. Appeal allowed.

F. O. Meighen, Q.C., for the defendant, appellant.

A. C. Hamilton, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba[1] which set aside a judgment rendered at trial by Mr. Justice Hall whereby he dismissed the respondent's action claiming damages for injuries which he sustained when he fell on the ice covered sills of a

[1] (1966), 58 W.W.R. 538, 61 D.L.R. (2d) 155.

1968

CITY OF BRANDON v. FARLEY

Ritchie J.

doorway leading into the east side of the City of Brandon fire hall. The learned judge found that the danger presented by the ice at the doorway was not an unusual one and that the respondent knew and fully appreciated it, but the Court of Appeal found the danger to be an unusual one and held that the appellant was negligent in failing to remove the ice and apply sand at the entrance. The Court of Appeal further found the respondent guilty of contributory negligence and assessed the liability to the extent of one-third against the respondent and two-thirds against the appellant, as a result of which damages were awarded to the respondent in the amount of $19,076.10.

The respondent had for many years carried on the business, along with a number of others, of purchasing water from the City of Brandon for resale to farmers in the outlying districts, and for this purpose he used a truck with a 500-gallon tank on it which he brought to the east side of the fire hall stopping it with its back opposite the doorway just south of which there was a pipe with a hose extension through which the water was delivered. The accident occurred at approximately 4 p.m. on January 4, 1965, which was a cold day with the snow blowing. The respondent had made two previous visits to the fire hall on that day on each of which he had entered through the doorway in question and observed the icy condition, and shortly before 4 o'clock he backed his truck up according to his practice, removed the metal top from his tank, inserted the hose and then entered the building through the doorway stepping upon the concrete step and then on the concrete sill across the length of which on the inner side was a wooden sill measuring approximately 4 feet 1 inch. The distance from the top of the concrete sill to the ground below was approximately 42 inches and as he came in the respondent noticed that the sills were both covered with an accumulation of ice which had gathered there from the spillage of water while filling the tanks. Either the respondent or one of the firemen turned on the water from inside the building and in five or six minutes when the water would be nearing the capacity of the tank, the respondent left through the door by which he had entered and in so doing he slipped on the ice and fell to the ground below suffering serious injuries to his left shoulder and thigh.

The respondent knew that in winter-time there was always ice on the top step and sill of the doorway which he used, he recognized that the situation was a dangerous one and was aware of the fact that he could have entered and left the building by the front entrance and that this was in fact done by some purchasers of water because it was safer than using the east side door. It is to be observed also that the respondent had entered the building only a few minutes before his fall by going over the very ice on which he fell. It is true that icy conditions and the dangers which they create may vary considerably from time to time, particularly under conditions of blowing and drifting snow such as there were on the day in question, and it is also true that the respondent stated that there was more of a film of snow when he left than when he entered, but I am quite unable to accept the suggestion which appears to have carried some weight with the Court of Appeal that there could have been any material change in the icy condition of the doorway during the time which it took to fill the 500-gallon tank with water.

The relationship between the parties was correctly treated in both the Courts below as being that of an occupier and an invitee and the learned trial judge, in conformity with the decision of Mr. Justice Spence, speaking for the majority of this Court in *Campbell v. Royal Bank of Canada*[2], adopted the definition of the occupier's liability as it was stated by Willes J. in *Indermaur v. Dames*[3], and the definition of "unusual danger" which is contained in the judgment given by Lord Porter in the House of Lords in *London Graving Dock Co. Ltd. v. Horton*[4]. For greater clarity it appears to me to be desirable to restate these definitions. The outline of liability established by Mr. Justice Willes in his famous judgment is in the following terms:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know.

and Lord Porter's definition of unusual danger reads as follows:

> I think 'unusual' is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function

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[2] [1964] S.C.R. 85.
[3] (1866), L.R. 1 C.P. 274.
[4] [1951] A.C. 737 at 745.

1968

CITY OF BRANDON v. FARLEY

Ritchie J.

which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises. Indeed, I do not think Phillimore L.J., in *Norman v. Great Western Railway Co.*, [1915] 1 K.B. 584 at 596, is speaking of individuals as individuals but of individuals as members of a type, e.g. that class of persons such as stevedores or seamen who are accustomed to negotiate the difficulties which their occupation presents. A tall chimney is not an unusual difficulty for a steeplejack though it would be for a motor mechanic. But I do not think a lofty chimney presents a danger less unusual for the last-named because he is particularly active or untroubled by dizziness.

In the *Campbell* case, *supra,* at p. 93, Spence J. also made reference to Lord Normand's judgment in the *Horton* case, *supra,* at p. 752 where he said:

> I am of opinion that if the persons invited to the premises are a particular class of tradesman then the test is whether it is unusual danger for that class.

In the *Campbell* case Mr. Justice Spence was dealing with a situation where "the invitee was an ordinary customer of the bank but of no particular class" and he reaffirmed the finding of the trial judge that the condition of the bank floor around the tellers' wickets was "more than mere moisture or dampness; it may have been less than actual puddles; but certainly there was at least a dangerous glaze or film of water under foot near the tellers' wickets", and the further finding "that the plaintiff's knowledge was not knowledge of the dangerous condition around the tellers' wickets. The conditions were worse there".

Finally, Spence J. agreed with the dissenting opinion of Freedman J.A. in the Court of Appeal where he said:

> One does not normally expect that bank premises, to which members of the public customarily resort in large numbers, will be wet and therefore hazardous.

In the result, Mr. Justice Spence found that the state of the floor in the bank on the afternoon in question constituted "an unusual danger".

The facts which form the basis of the decision of this Court in the *Campbell* case are, in my opinion, clearly distinguishable from those with which we are here concerned.

The respondent in the present case was one of a particular class of customers who bought water from the fire hall premises and who filled their trucks by bringing them to the eastern entrance where icy conditions existed on the

door sills in winter-time occasioned in part by the fact that there was usually some spillage from the tanks in delivering water.

In holding that the icy condition constituted an "unusual danger", the Court of Appeal relied on a finding that the appellant's officials had been negligent in not having removed the ice and applied sand, and Mr. Justice Freedman, whose reasons were adopted by the other members of the Court, applied to the circumstances here disclosed the following language employed by Mr. Justice Spence in the *Campbell* case at pp. 96 and 97:

> It is perhaps a test of some value to determine whether a condition is one of unusual danger to investigate the ease by which the occupier might avoid it . . . If the danger could have been prevented by these economical and easy precautions then surely a member of the public . . . would have been entitled to expect such precautions or others equally effective, and their absence would tend to make the danger an 'unusual' one.

In making this statement, Mr. Justice Spence was commenting on the finding of the learned trial judge that a few strips of matting placed on the busy parts of the lobby of the bank "would have kept the floor nearly dry", and in dealing with the conditions which "a member of the public frequenting such a busy place as this bank would have been entitled to expect", he found that failure to take the "easy precautions" suggested by the trial judge "would tend to make the danger an 'unusual' one".

As has been indicated, the respondent in the present case was not "an ordinary customer ... of no particular class" like the plaintiff in the *Campbell* case. He was, on the other hand, a member of a class whose business in obtaining water from the city exposed them to the hazard in winter-time created by ice accumulating on the door sills from the spillage of water. This danger was not, in my opinion, an unusual one for persons of that class and indeed it was one which was to be expected by those engaged in the transfer of water in freezing temperatures and I do not think that under these circumstances the failure of the city to keep the doorway free of ice or to apply sand can be said to have made the danger "unusual". It is also clear that unlike the plaintiff in the *Campbell* case, the respondent here had knowledge of the actual danger at the place where he fell because he had entered

1968

CITY OF BRANDON v. FARLEY

Ritchie J.

and left through the doorway twice on the very day of the accident and had entered over the ice only five or six minutes before his fall.

I am in agreement with the learned trial judge when he says:

> I have come to the conclusion that the condition of the ice and snow was not an 'unusual danger'. The Plaintiff was one of many customers who purchased water from the defendant. The ice condition was incident to that operation and existed in varying degrees during the whole of the winter season of 1964-65. It was a condition known experienced and fully appreciated by plaintiff not only on three occasions the same day but on many other occasions during that winter season.

The duty owed by an occupier to an invitee as defined by Willes J. in *Indermaur v. Dames, supra,* is predicated upon the existence of an unusual danger on the occupier's premises and the finding that the damage in the present case was not caused by such a danger is in my view a complete answer to the respondent's claim. I would allow the present appeal on this ground.

I have not overlooked the fact that the learned trial judge also found that even if the danger had been an unusual one the appellant would have been protected from liability because the respondent, although not *volens,* had full knowledge and appreciation of it, but I do not find it necessary to embark on a consideration of the cases which he cited in support of this proposition or to express any opinion in this regard because the question does not appear to me to arise and I do not think it arose in the case of *Campbell v. The Royal Bank, supra,* which was expressly based on a finding that the plaintiff did not have full knowledge and appreciation of the danger at the place where he fell.

As I have indicated, I would allow this appeal and dismiss the respondent's action.

The appellant is entitled to its costs in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Meighen, Stordy, Haddad, Alder & Mitchell, Brandon.

Solicitors for the plaintiff, respondent: Hamilton, Hunt & Potter, Brandon.

PATRICIA PATTERSON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967
*Dec. 7, 8
Dec. 18

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Disorderly houses—Keeper of common bawdy house—No evidence of prior use of house as such—Whether accused properly convicted—Criminal Code, 1953-54 (Can.), c. 51, s. 168.

As a result of a sexual proposition by telephone made by a police agent provocateur, the appellant arranged to procure another girl who would make arrangements for a suitable place of assignation where both could entertain the caller and three male friends, also police officers. The appellant met the police officers at an agreed location and under her direction they drove to the home of her confederate. There, they were told that the confederate intended to take them to another house as soon as a telephone call, which she was expecting, confirmed the arrangements she had already made. Eventually, a telephone call came and the confederate was heard to say "leave the front door open". The men and the two girls then drove to a private home in a suburban residential area, the owner of which was not disclosed in the record. Money exchanged hands and after the girls had removed some of their clothing, they were arrested. There was no evidence in the record that the home had ever been used for the purpose of prostitution or the practice of acts of indecency. It had no such reputation nor was there any evidence of undue traffic to or from the premises. The appellant was convicted of keeping a common bawdy house, and her conviction was affirmed by a majority judgment in the Court of Appeal. An appeal was launched to this Court.

Held: The appeal should be allowed and a verdict of acquittal entered.

To obtain a conviction of keeping a common bawdy house, the Crown must prove that there had been a frequent or habitual use of a place for the purpose of prostitution. There was no such evidence in this case nor was there any evidence upon which the magistrate could properly base an inference that the place had been habitually so used.

Droit criminel—Maisons de désordre—Tenancier de maison de débauche—Aucune preuve que la maison utilisée antérieurement à ces fins—Verdict de culpabilité peut-il être soutenu—Code criminel, 1953-54 (Can.), c. 51, art. 168.

A la suite d'un appel téléphonique d'un officier de police, un agent provocateur, aux fins de rapports sexuels illicites, l'appelante a convenu d'embaucher une autre fille qui ferait des arrangements pour obtenir un local où les deux filles pourraient recevoir celui qui téléphonait ainsi que trois amis, aussi des officiers de police. L'appelante a rencontré les officiers de police à l'endroit convenu et, sous sa direction, ils se sont tous dirigés en automobile à la maison de l'autre fille. A cet endroit, on leur a dit que cette fille avait l'intention de les amener à une autre maison dès qu'elle aurait reçu un appel téléphonique confirmant les

*PRESENT: Cartwright C.J. and Fauteux, Ritchie, Spence and Pigeon JJ.

1967

PATTERSON v. THE QUEEN

arrangements qu'elle avait faits antérieurement. Éventuellement, l'appel téléphonique a été reçu et on entendit la fille demander de laisser la porte d'en avant ouverte. Les hommes et les deux filles se sont alors dirigés en automobile vers une maison privée dans un quartier résidentiel de banlieue. Le nom du propriétaire de cette maison n'apparaît pas au dossier. Les officiers ont donné de l'argent aux filles et après que ces dernières eurent enlevé quelques-uns de leurs vêtements, elles furent mises sous arrêt. Il n'y avait aucune preuve dans le dossier que la maison avait en aucun temps servi à des fins de prostitution ou pour la pratique d'actes d'indécence. La maison n'avait pas cette réputation et il n'y avait aucune preuve d'entrées ou de sorties inusitées. L'appelante a été trouvée coupable d'avoir été la tenancière d'une maison de débauche, et le verdict de culpabilité a été confirmé par un jugement majoritaire en Cour d'Appel. Un appel a été logé devant cette Cour.

Arrêt: L'appel doit être maintenu et une déclaration de non culpabilité doit être enregistrée.

Pour obtenir une déclaration de culpabilité d'avoir été le tenancier d'une maison de débauche, la Couronne doit prouver que le local a été employé fréquemment ou habituellement à des fins de prostitution. Il n'y avait aucune telle preuve dans le dossier et il n'y avait non plus aucune preuve sur laquelle le juge aurait pu baser à bon droit une inférence que le local avait été employé habituellement à de telles fins.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], confirmant une déclaration de culpabilité. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the conviction of the appellant. Appeal allowed.

John F. Hamilton, for the appellant.

C. J. Meinhardt, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] delivered on January 5, 1967, whereby that Court dismissed the appeal from the conviction of the accused on February 8, 1966, by a police magistrate. The accused was charged with unlawfully keeping a common bawdy house, situate and known as 43 Harding Boulevard.

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[1] [1967] 1 O.R. 429, 3 C.C.C. 39.

In the Court of Appeal for Ontario, MacKay J.A., with whom Porter C.J.O. concurred, gave reasons for dismissing the appeal and Schroeder J.A. gave reasons for allowing the appeal and quashing the conviction. The facts were accurately stated in considerable detail in the judgment of Schroeder J.A. as follows:

On December 2, 1966 (*sic* – a misprint for 1965) a morality squad officer of the Metropolitan Toronto Police Department, Detective John Leybourne, telephoned the appellant, using an assumed name, and made an instigative sexual proposition to her. In the result, it was arranged that she should procure another girl who would make arrangements for a suitable place of assignation where both could satisfy the sexual appetites of the agent provocateur and of three male friends (fellow officers of the morality squad but not so made known to the appellant).

Subsequently Detective Leybourne and two fellow detectives, all attired in plain clothes, met the appellant at an agreed location on Bloor Street, and under her direction they drove to the home of her confederate, one Beverley Dixon. Upon their arrival Dixon informed them that she intended to take them to another house and was awaiting a telephone call to confirm the plans which she had set afoot. A call eventually came and in responding to it Dixon was heard to say "leave the front door open".

The three detectives and the two girls then repaired to a suburban home in a quiet residential section of Richmond Hill, known and described for municipal purposes as 43 Harding Boulevard. The record discloses nothing as to the identity of the owner or occupant of that property.

Detective Leybourne had given the appellant $75 as compensation for the favours to be bestowed upon him and his two companions and an additional $10 to pay for the use of the premises. After their arrival the appellant and her female companion repaired to another part of the house, and later returned to the presence of the detectives wearing nothing but their under-garments. At this point the three police officers disclosed their identity and after Detective Leybourne had repossessed himself of the $85 previously paid to the appellant he charged her and her companion with the offence out of which the present appeal arises.

1967

PATTERSON v. THE QUEEN

Spence J.

Beverley Dixon, who had made the necessary arrangements for the use of the Harding Boulevard premises, was acquitted by the Magistrate and a conviction was entered against the appellant only.

There is not the remotest suggestion in the record that house number 43 Harding Boulevard in Richmond Hill, a private residence in a quiet and respectable residential subdivision, had ever been used by the appellant or any other person for the purpose of prostitution or the practice of acts of indecency. No evidence was adduced as to any undue traffic to and from the said premises which would reflect prejudicially upon the reputation of the house or its occupants. The only evidence offered was that of the three detectives which undoubtedly proved the intent of the appellant and her co-accused to commit an act of prostitution with these witnesses at the place in question.

The appellant has stated the points at issue in this appeal as follows:

1. Did the Court of Appeal for Ontario err in finding 43 Harding Boulevard was a common bawdy house?

2. Did the Court of Appeal for Ontario err in holding that the appellant was the keeper of a common bawdy house, pursuant to s. 168 of the *Criminal Code*?

The majority in the Court of Appeal found that the premises at 43 Harding Boulevard were a common bawdy house and that the appellant was the keeper thereof. Schroeder J.A., dissenting, was of the opinion that the premises were not a common bawdy house and that the appellant was not the keeper thereof. I am of the opinion that this appeal may be disposed of by considering the first question only and I have come to the conclusion for the reasons which I shall outline that the premises were not a common bawdy house within the meaning of those words as used in s. 168 of the *Criminal Code*. Therefore, as Roach J.A. said in giving judgment for the Court of Appeal for Ontario in *R. v. King*[2]:

> Since this place was not a common bawdy house, it is irrelevant who the keeper was.

[2] [1965] 2 C.C.C. 324 at 325, [1965] 1 O.R. 389.

Section 168 of the *Criminal Code* provides in subs. (1), paras. (*b*), (*h*), and (*i*):

168. (1) In this Part,

(*b*) "common bawdy house" means a place that is

(i) kept or occupied, or

(ii) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

* * *

(*h*) "keeper" includes a person who

(i) is an owner or occupier of a place,

(ii) assists or acts on behalf of an owner or occupier of a place,

(iii) appears to be, or to assist or act on behalf of an owner or occupier of a place,

(iv) has the care or management of a place,

or

(v) uses a place permanently or temporarily, with or without the consent of the owner or occupier; and

(*i*) "place" includes any place, whether or not

(i) it is covered or enclosed,

(ii) it is used permanently or temporarily,

or

(iii) any person has an exclusive right of user with respect to it.

Schroeder J.A. was of the opinion that the words "kept or occupied" and the words "resorted to" as used in s. 168(1)(*b*)(i) and (ii) connote a frequent or habitual use of the premises for the purposes of prostitution. I am in accord with that view. I have considered all the cases cited and I have noted that there has been evidence, in each case where conviction has resulted, of one of three types,

firstly, there has been actual evidence of the continued and habitual use of the premises for prostitution as in *The King v. Cohen*[3] and *Rex v. Miket*[4],

secondly, there has been evidence of the reputation in the neighbourhood of the premises as a common bawdy house, or

thirdly, there has been evidence of such circumstances as to make the inference that the premises were resorted to habitually as a place of prostitution, a proper inference for the court to draw from such evidence.

Examples of the latter are, particularly, *Rex v. Davidson*[5], where Stewart J.A. giving judgment for the majority of the Court said at p. 54:

It might very well happen that a clerk in a hotel who had become friendly with a man, a guest or inmate or a regular customer of the hotel,

[3] [1939] S.C.R. 212, 71 C.C.C. 142, 1 D.L.R. 396.

[4] [1938] 2 W.W.R. 459, 70 C.C.C. 202, 53 B.C.R. 37, 3 D.L.R. 710.

[5] (1917), 28 C.C.C. 44, 1 W.W.R. 160, 11 Alta. L.R. 9, 35 D.L.R. 82.

1967

PATTERSON v. THE QUEEN

Spence J.

might, on receiving a wink, shut his eyes to his friend's proposed escapade and allow him to take a woman to his room on one occasion without protest, and yet not be guilty at all of habitually allowing any casual guest to do so.

And at p. 55:

> The way in which the whole thing happened was such that the magistrate might quite properly infer that it was not an isolated instance but rather a matter of course and of custom or habit. Moreover, I think the decision in *Rex v. James*, 25 Can. Cr. Cas. 23, 25 D.L.R. 476, 9 A.L.R. 66, 9 W.W.R. 235, went upon the same principle, viz., that the existence of a habit or custom of doing a certain thing might be inferred from the circumstances surrounding the doing and the manner of doing or even of offering to do that thing on a single occasion.
>
> This is sufficient to sustain the conviction and the motion should, therefore, be dismissed with costs.
>
> It was admitted that though the accused was only a night clerk he came within the definition of a "keeper" given in sec. 228(2) of the Code.

Also, in *Rex v. Clay*[6], Bissonnette J. said at p. 40:

> As a general rule, proof of an isolated act of prostitution cannot suffice to establish the offence of keeping a disorderly house. But if, from circumstances surrounding the evidence of this isolated act, a certainty arises that this house is habitually used for purposes of prostitution, the magistrate is thereupon justified in not requiring direct proof of the bad reputation or delictual character of this house.

It would therefore appear that the element of habitual or frequent use of the place will remain the necessary interpretation of proof despite the amendment of the definition of "common bawdy house" to add the words "resorted to by one or more persons" and in fact that the word "resorted" itself has been relied upon to support the view that such habitual or frequent use of a place is required. (See *Rex v. Davidson, supra*). So in cases where the Crown has failed to prove a habitual or frequent use of a place for the purposes of prostitution, the conviction has not been upheld. In *Rex v. King, supra,* Roach J.A. said at p. 325:

> It was not a place kept or occupied or resorted to by one or more persons for the purposes of prostitution or the practice of acts of indecency. The authorities make it clear that to come within that definition the place must be one that is habitually so kept or resorted to.

I echo the words of Hanrahan P.M., in *Rex v. Martin*[7], when he said:

> It is true convictions have been registered and sustained on appeal on evidence of a single act of prostitution, but always in such cases the

[6] (1946), 88 C.C.C. 36, 1 C.R. 327.

[7] (1947), 89 C.C.C. 385 at 386.

surrounding circumstances established the premises had been habitually used for such a purpose and in most cases had acquired such a reputation in the community.

1967
PATTERSON
v.
THE QUEEN
Spence J.

As I have said, there was no evidence in the present case of any reputation in the community and there was no evidence of the use of the premises for prostitution on any other occasion than the one which was the subject of this prosecution. There was moreover no evidence upon which the learned magistrate properly could base an inference that the place had been habitually so used.

I would allow the appeal, quash the conviction, and direct a verdict of acquittal.

Appeal allowed, conviction quashed and verdict of acquittal directed.

Counsel for the appellant: John F. Hamilton, Toronto.

Counsel for the respondent: The Attorney-General for Ontario, Toronto.

STEINBERG'S LIMITÉE ..... APPLICANT;

AND

COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL ..... RESPONDENT;

AND

STEINBERG'S EMPLOYEES ASSOCIATION, RETAIL CLERKS INTERNATIONAL UNION, LOCAL 486 MIS-EN-CAUSE;

AND

THE ATTORNEY GENERAL FOR THE PROVINCE OF QUEBEC ..... MIS-EN-CAUSE.

1967
*Nov. 27
Dec. 18

MOTION FOR STAY OF EXECUTION OF INJUNCTION

Jurisdiction—Supreme Court of Canada—Injunction—Stay of execution pending appeal—Whether it should be granted—Supreme Court Act, R.S.C. 1952, c. 259, s. 44.

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1967

STEINBERG'S LTÉE
v.
COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*

The trial judge had refused to grant an injunction, the effect of which was to compel the appellant company to abide by the terms of a decree providing, among other things, for the closing of retail food stores on certain days and during certain hours. The Court of Appeal directed that the injunction should issue. The appellant company inscribed an appeal to this Court from that judgment and, after having unsuccessfully applied to the Court of Appeal for a stay of execution, applied to this Court for an order staying the operation of the injunction.

Held: The application for a stay of execution should be dismissed.

Assuming, without deciding, that this Court had jurisdiction to grant the stay of execution, and assuming that, should its appeal be successful, the appellant company would have no legal means to recover the monies which it had lost, the stay of execution ought not to be granted in the circumstances of this case as otherwise the appellant company would have an unfair advantage over its competitors.

Juridiction—Cour suprême du Canada—Injonction—Suspension durant l'appel—Doit-elle être accordée—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 44.

Le juge de première instance a refusé d'accorder une injonction dont l'effet aurait été de contraindre la compagnie appelante à se conformer aux termes d'un décret ordonnant, entre autres choses, la fermeture des établissements commerciaux où se fait la vente au détail de produits alimentaires, à certains jours et durant certaines heures. La Cour d'Appel a ordonné que l'injonction soit émise. La compagnie appelante a inscrit un appel devant cette Cour de ce jugement et, la suspension de l'injonction lui ayant été refusée par la Cour d'Appel, elle a présenté à cette Cour une requête pour faire suspendre la mise en vigueur de l'injonction.

Arrêt: La requête pour suspendre l'injonction doit être rejetée.

Assumant, sans le décider, que cette Cour a juridiction pour accorder la suspension de l'injonction, et assumant que si la compagnie appelante réussit dans son appel elle n'aura aucun moyen légal pour se faire rembourser les argents qu'elle aura perdus, la suspension de l'injonction ne doit pas être accordée dans les circonstances de cette cause parce qu'autrement la compagnie appelante obtiendrait un avantage injuste sur ses concurrents.

REQUÊTE pour suspendre une injonction durant l'appel. Requête rejetée.

APPLICATION for a stay of execution of an injunction pending the appeal. Application dismissed.

C. A. Geoffrion, Q.C., and *P. Lamontagne,* for the applicant.

C. Tellier, for the Comité Paritaire.

L. E. Bélanger, Q.C., for the Attorney General of Quebec.

Pierre Langlois, for the Employees Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an application for an Order staying the operation of an Injunction granted by the Court of Queen's Bench (Appeal Side), the effect of which, so far as the applicant is concerned, is to compel it to close its stores except during the hours of

1.00 p.m. to 6.00 p.m. on Mondays
9.00 a.m. to 6.00 p.m. on Tuesdays and Wednesdays
9.00 a.m. to 9.00 p.m. on Thursdays and Fridays
9.00 a.m. to 5.00 p.m. on Saturdays.

The application was argued on November 27 and 28, 1967, and judgment was reserved. On December 18, 1967, judgment was given as follows:

> The Court is unanimously of opinion that this application should be dismissed. It is ordered that the appeal be set down for the sittings of the Court commencing on January 23, 1968 and that the hearing of the appeal be expedited. The motion is dismissed and the costs of the motion are reserved to be dealt with by the Court which hears the appeal. Reasons for judgment will be delivered at a later date.
>
> Reasons are now being delivered.

The judge of first instance held that the Injunction should be refused on the ground that articles 3.02, 3.05, 3.06 and 3.07 of Section III of the *Decree Respecting the Retail Food Trade* published in the Quebec Official Gazette of May 15, 1965, were beyond the powers conferred on the Lieutenant-Governor in Council by the *Collective Agreement Act,* that they were not severable and that consequently the Decree was *ultra vires* in toto.

The Court of Queen's Bench (Appeal Side) held by a majority that the Order in question was valid and directed that the Injunction should issue. Tremblay C. J. P. Q., with whom Salvas J. agreed, dissenting, was of opinion that the Decree was invalid for reasons expressed differently from those of the judge of first instance.

In support of the application for a stay it was argued that compliance with the Order will cause a loss to the applicant of approximately $10,000 a week and that if this Court, when the appeal is heard on the merits, should allow the appeal, there would be no way in which the applicant could recover the monies which it had lost. For

1967

STEINBERG'S LTÉE v. COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL et al.

Cartwright C.J.

the purposes of this application I will assume, without deciding, that the applicant is right in its submission that such a loss could not be recovered; this would seem to follow from the judgment of Fauteux J. speaking for the Court in *La Ville Saint-Laurent v. Marien*[1], particularly at p. 586.

Counsel for the respondent objected to the granting of the Order sought on three grounds.

First, it was contended that the main appeal of the applicant is not properly before this Court as (i) it does not appear that more than $10,000 is involved in the appeal and (ii) an order for an Injunction made in the Province of Quebec is an order made in the exercise of judicial discretion within the meaning of s. 44 of the *Supreme Court Act* which deprives the Court of jurisdiction. As to (i), the uncontradicted affidavit evidence filed on behalf of the applicant states that the loss which it will suffer if the injunction is maintained will greatly exceed $10,000. As to (ii), it is my view that the order sought to be appealed was not one made in the exercise of judicial discretion within the meaning of s. 44. The order is not attacked on the ground that any discretion was wrongly exercised but on the ground that the Decree under which it purported to be made was invalid. However, all the Members of the Court were of opinion that, if leave to appeal were necessary because otherwise the appeal would not lie by reason of the terms of s. 44, the case was one in which leave to appeal should be granted *nunc pro tunc* if it were applied for Mr. Bélanger, on being asked by the Court, said that he would have no objection to leave being granted. Mr. Geoffrion applied for leave and leave to appeal *nunc pro tunc* was granted. Further consideration has brought me to the view that such leave was unnecessary.

The second objection raised by the respondent is that this Court has no jurisdiction to grant the stay asked for, that if jurisdiction to grant such a stay exists it is in either the Court of Queen's Bench (Appeal Side) or in the Superior Court. In this case an application for a stay was made to the Court of Queen's Bench but that Court in a unanimous judgment ruled that it had no power to grant a stay pending the disposition of the appeal to this Court.

[1] [1962] S.C.R. 580.

The question whether the Court of Queen's Bench was right in so deciding is not before us and I express no opinion in regard to it.

The question whether this Court has jurisdiction to grant the stay asked for was fully and ably argued but it becomes unnecessary to express an opinion upon it, because, assuming without deciding that we have jurisdiction, it is the view of all the Members of the Court that the stay ought not to be granted.

The third ground on which counsel for the respondent objected to the granting of the order was that in all the circumstances of the case the Court ought not to grant a stay. I agree with this submission. It is true that if the appellant's appeal is successful it will have suffered a financial loss for which, as indicated above, I am assuming that it will have no legal redress; on the other hand, if its appeal should fail the granting of the stay would have brought about the result that it would have obtained an unfair advantage over all of its competitors in the area covered by the Decree who have seen fit to obey the order which the judgment of the Court of Queen's Bench now in appeal has held to be valid. Balancing these two possibilities against each other I am of opinion that the stay should be refused.

These are my reasons for disposing of the application as was done on December 18, 1967.

Application dismissed.

Attorneys for the applicant: Geoffrion & Prud'homme, Montreal.

Attorneys for the Comité Paritaire: Blain, Piché, Bergeron, Godbout & Emery, Montreal.

Attorneys for the Attorney-General of Quebec: Ahern, Bélanger, de Brabant & Nuss, Montreal.

Attorneys for the Employees Association: Cutler, Lamer, Bellemare, Robert, Desaulniers, Proulx & Sylvestre, Montreal.

1967
*Nov. 23
Déc. 18

FRANÇOIS NOLIN LIMITÉE .....APPELANTE;

ET

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC ... INTIMÉE;

ET

FRANÇOIS ASSELIN .....MIS-EN-CAUSE.

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

Travail—Juridiction de la Commission des relations de travail du Québec —Congédiement en violation de la loi—Réintégration—Indemnité inférieure à celle prescrite par la loi—Erreur de droit—Juridiction pour reviser—Code du travail, S.R.Q. 1964, c. 141, arts. 14, 117.

La Commission des relations de travail du Québec a statué que le mis-en-cause avait été congédié en violation de la loi, qu'il devait être réintégré dans son emploi mais que l'indemnité payable en vertu de l'art. 14 du *Code du travail* devait être réduite. Subséquemment, une requête en revision lui ayant été présentée, la Commission a déclaré qu'elle avait juridiction pour entendre les parties sur cette requête. L'appelant a alors obtenu la délivrance d'un bref de prohibition par un jugement déclarant simplement que «le tribunal se croit justifié d'autoriser l'émission d'un bref de prohibition». Ce bref a été annulé par la Cour d'appel, et la compagnie appelante a obtenu la permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

Une erreur de droit commise par la Commission des relations de travail du Québec peut constituer, en vertu de l'art. 117 du *Code du travail,* une cause valable de revision d'une de ses décisions. Dans l'espèce, le fait d'avoir, contrairement au *Code du travail,* accordé pour un motif susceptible d'être jugé mal fondé en droit, une indemnité inférieure à celle que le Code prescrit, constitue une cause de revision, les décisions de la Commission étant sans appel.

Labour—Jurisdiction of the Quebec Labour Relations Board—Employee illegally dismissed—Order to reinstate—Indemnity lower than that prescribed by the statute—Error in law—Jurisdiction to revise—Labour Code, R.S.Q. 1964, c. 141, ss. 14, 117.

The Quebec Labour Relations Board found that the mis-en-cause had been illegally dismissed, that he should be reinstated in his employ but that the indemnity payable under s. 14 of the *Labour Code* should be reduced. Subsequently, the Board decided, on a petition for revision, that it had jurisdiction to hear the parties on the petition for revision. The appellant company then obtained the issuance of a writ of prohibition by a judgment which merely declared that the tribunal believed it was justified in authorizing the issuance of a writ of prohibition. The writ was set aside by the Court of Appeal, and the appellant company was granted leave to appeal to this Court.

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*CORAM: Les Juges Fauteux, Martland, Judson, Hall et Pigeon.

1967

FRANÇOIS NOLIN LTÉE v. COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC et al.

Held: The appeal should be dismissed.

An error in law committed by the Quebec Labour Relations Board can constitute, under s. 117 of the *Labour Code*, a valid cause for revision of one of its decisions. In the present case, the fact that the Board had, contrary to the *Labour Code*, awarded on a ground susceptible of being adjudged ill-founded in law, an indemnity lower than that prescribed by the Code, constituted a cause for revision, the decisions of the Board not being subject to appeal.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec, setting aside a writ of prohibition. Appeal dismissed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec, annulant un bref de prohibition. Appel rejeté.

Guy Letarte et *Jean-Claude Royer*, pour l'appelante.

Jean Turgeon, c.r., pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—Dans cette affaire, la Commission des relations de travail du Québec a tout d'abord statué, sur une plainte de congédiement, que le mis-en-cause avait été congédié le 22 janvier 1964 en violation de la loi et devait être réintégré dans son emploi. Quant à l'indemnité payable en vertu de l'art. 14 du *Code du travail*, ou du texte antérieur qu'il a remplacé, la décision rendue le 3 novembre 1964 comporte le passage suivant:

> En ce qui concerne l'indemnité, la Commission se croit justifiable, à raison des retards apportés à la rédaction de la présente décision, pour des motifs qui échappent aux parties en cause, de procéder à sa réduction.

Là-dessus le mis-en-cause adressa à la Commission une requête en revision, alléguant que la restriction apportée à l'indemnité payable en vertu de l'ordonnance de réintégration était contraire à une prescription de la loi, l'article précité prévoyant le paiement au salarié de «l'équivalent du salaire et des autres avantages dont l'a privé le congédiement».

Sur cette requête, la Commission entendit les parties à la suite d'une objection préliminaire formulée par l'appelante. Le 2 mai 1966, la Commission rendait une décision élabo-

1967

FRANÇOIS NOLIN LTÉE *v.* COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *et al.*

Le juge Pigeon

rée en conclusion de laquelle l'objection préliminaire était rejetée, et il était déclaré que la Commission a juridiction pour entendre les parties sur la requête en revision.

C'est à l'encontre de cette dernière décision que l'appelante a demandé à la Cour supérieure la délivrance d'un bref de prohibition. Cette demande lui a été accordée par un jugement du 26 mai 1966 dans lequel il est seulement déclaré «que le Tribunal se croit justifié d'autoriser l'émission d'un bref de prohibition». Ce jugement a été annulé sommairement par deux juges de la Cour du banc de la reine sur requête «Vu les articles 117, 121 et 122 du Code du Travail». C'est à l'encontre de ce dernier jugement que l'appelante s'est pourvue devant cette Cour.

Il convient tout d'abord de faire observer que par l'art. 847 du nouveau *Code de procédure civile,* on a consacré législativement la règle formulée dans *Ville de Montréal c. Benjamin News*[1], à l'effet qu'avant d'autoriser la délivrance d'un bref de prohibition le juge doit statuer sur le droit. Il ne suffit pas qu'il lui paraisse que les prétentions du requérant sont soutenables, il faut qu'il en vienne à la conclusion ferme qu'elles sont, à son avis, bien fondées en droit en regard des faits allégués. Et pour qu'on ne puisse obtenir la délivrance du bref par des allégations fantaisistes, le nouveau Code a permis de contre-interroger le requérant sur son affidavit (art. 93). C'est en regard de ces règles relatives à la délivrance du bref qu'il faut examiner l'arrêt qui l'a annulé.

Pour rendre la décision contestée, la Commission des relations de travail du Québec s'est fondée sur l'art. 117 du *Code du travail:*

> 117. La Commission peut, pour cause, reviser ou révoquer toute décision et tout ordre rendus par elle et tout certificat qu'elle a émis.

La première question à examiner est la suivante: le fait d'avoir, contrairement au *Code du travail,* accordé au requérant pour un motif susceptible d'être jugé mal fondé en droit, une indemnité inférieure à celle que ce Code prescrit, peut-il constituer une «cause» de revision?

Pour soutenir qu'il n'en est pas ainsi l'appelante prétend que le pouvoir de revision accordé à la Commission doit être interprété de la même manière que le pouvoir de revision accordé à la Cour de faillite (*Loi sur la faillite,* art.

[1] [1965] B.R. 376.

144, para. 5) et elle cite les arrêts où l'on a jugé que celui-ci ne peut s'exercer que lorsque des faits nouveaux sont invoqués. Le défaut de cet argument c'est que l'analogie entre la Cour de faillite et la Commission des relations de travail est inexacte: dans le premier cas il y a droit d'appel et non dans le second. En matière de faillite la restriction à l'exercice du pouvoir de revision découle du principe qu'un tel pouvoir ne doit pas être utilisé dans les cas où l'appel est le recours approprié. Or, l'appel est le recours tout indiqué au cas d'erreur de droit. Dans le cas de la Commission des relations de travail, comme ses décisions sont sans appel, rien ne permet de soutenir que l'erreur de droit ne saurait constituer une «cause» de revision. Il n'est peut-être pas sans intérêt d'observer que dans un cas où aucun pouvoir de revision n'était prévu par la loi, cette Cour a cependant reconnu à un organisme investi du pouvoir d'attribuer un prix, le droit de rectifier la décision du jury d'un concours afin de la rendre conforme au véritable résultat au lieu de laisser substituer une injustice fondée sur des erreurs de calcul. (*L'Académie de Musique c. Payment*[2]).

En étant venu à la conclusion qu'une erreur de droit peut constituer une cause valable de revision d'une décision de la Commission des relations de travail, il n'est pas indispensable d'examiner les autres questions qui ont été débattues. Cependant, il paraît utile de préciser que cela ne signifie pas que chaque fois que l'on voudra prétendre qu'il n'y a pas erreur de droit ou autre cause suffisante en droit pour motiver la revision d'une décision de la Commission, l'on pourra soutenir devant les tribunaux qu'elle a, en le faisant, excédé sa juridiction. En général, le pouvoir qui lui est attribué comprend le droit d'appliquer toutes les dispositions législatives touchant des matières de sa compétence.

Pour ces raisons, je suis d'avis que l'appel doit être rejeté avec dépens.

Appel rejeté avec dépens.

Procureur de l'appelante: Gagné, Trottier, Letarte, Larue & Royer, Québec.

Procureurs de l'intimée: Turgeon, Amyot, Choquette & Lesage, Québec.

[2] [1936] R.C.S. 323, 4 D.L.R. 279.

1967
*Nov. 23
Déc. 18

KOMO CONSTRUCTION INC. et LES CONSTRUCTIONS DU ST-LAURENT LIMITÉE ..... APPELANTES;

ET

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC ... INTIMÉE;

ET

LES MÉTALLURGISTES UNIS D'AMÉRIQUE LOCAL 6861 .... MISE-EN-CAUSE.

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

Travail—Compétence de la Commission des relations de travail du Québec—Demande d'accréditation—Bref de prohibition—Demande d'accréditation non accompagnée des pièces mentionnées à l'art. 23 du Code du travail—Violation de la règle audi alteram partem—Code du travail, S.R.Q. 1946, c. 141, art. 23.

La compagnie appelante a demandé le rejet d'une requête d'accréditation pour le motif que cette requête n'était pas accompagnée d'une copie certifiée de la constitution et des règlements de l'association ni d'un état des conditions d'admission, droits d'entrée et cotisations exigées de ses membres, tel que requis par l'art. 23 du *Code du travail*, S.R.Q. 1964, c. 141. La Commission a accordé l'accréditation, sans audition, pour le motif, entre autres, que la requérante avait satisfait aux conditions prévues par le *Code du travail* et par les règlements de la Commission. L'appelante a alors demandé l'émission d'un bref de prohibition en invoquant (1) l'inexécution de l'obligation imposée par le Code de produire avec la requête les pièces mentionnées à l'art. 23 du *Code du travail*; et (2) la violation de la règle *audi alteram partem*. Ce bref fut délivré par la Cour supérieure mais subséquemment annulé par la Cour d'appel. La compagnie a obtenu la permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

La Commission des relations de travail du Québec n'a pas outrepassé sa compétence en décidant qu'une disposition législative avait été observée. Une interprétation contraire irait à l'encontre d'un principe fondamental du *Code du travail* qui est de confier exclusivement à la Commission le soin de statuer sur les demandes d'accréditation, ce qui implique que c'est à elle qu'il appartient de juger dans chaque cas si l'on s'est conformé aux prescriptions du *Code du travail*. Dans l'espèce, l'application de l'art. 23 entre dans le domaine de la compétence de la Commission.

L'obligation imposée par la règle *audi alteram partem* est de fournir à la partie l'occasion de faire valoir ses moyens. Dans le cas présent, en face d'une contestation qui soulevait uniquement un moyen de droit, la Commission n'abusa pas de sa discrétion en décidant qu'elle n'avait pas besoin d'en entendre davantage avant de rendre sa décision.

*CORAM: Les Juges Fauteux, Martland, Judson, Hall et Pigeon.

1967

KOMO CONSTRUCTION INC. *et al.* v. COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *et al.*

Labour—Jurisdiction of the Quebec Labour Relations Board—Application for certification—Writ of prohibition—Application for certification not accompanied by the documents mentioned in s. 23 of the Labour Code —Breach of the rule audi alteram partem—Labour Code, R.S.Q. 1964, c. 141, s. 23.

The appellant company moved to quash an application for certification on the ground that the application was not accompanied by a certified copy of the constitution and by-laws of the association and a statement of the conditions of admission, entrance fees and assessments required of its members, as provided in s. 23 of the *Labour Code,* R.S.Q. 1964, c. 141. The Board granted the certification, without a hearing, on the ground, *inter alia,* that the applicant had satisfied the conditions provided in the *Labour Code* and in the rules of the Board. The appellant company then applied for the issuance of a writ of prohibition and invoked (1) the failure to file with the application the documents mentioned in s. 23 of the *Labour Code,* and (2) the breach of the rule *audi alteram partem.* The writ was issued by the Superior Court, but was subsequently set aside by the Court of Appeal. The appellant company was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

The Quebec Labour Relations Board did not exceed its jurisdiction when it decided that a legislative provision had been observed. A contrary interpretation would be against one of the fundamental principles of the *Labour Code* which is to clothe the Board with the exclusive jurisdiction to pass on applications for certification. This implies that it is part of the Board's functions to decide in each case whether the provisions of the *Labour Code* have been complied with. In the present case, the application of s. 23 fell within the jurisdiction of the Board.

The obligation imposed by the rule *audi alteram partem* is to give to the party the opportunity to present its case. In the present case, faced with a contestation raising a question of law only, the Board did not misuse its discretion in deciding that it did not need to hear further submissions before rendering its decision.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec, setting aside a writ of prohibition. Appeal dismissed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec, annulant un bref de prohibition. Appel rejeté.

Guy Letarte et *Jean-Claude Royer,* pour les appelantes.

Raynold Bélanger, c.r., pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—Dans cette affaire il s'agit d'une demande d'accréditation adressée par la mise-en-cause à

1967

KOMO CONSTRUCTION INC. *et al.* *v.* COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *et al.*

Le juge Pigeon

l'intimée. A l'encontre de cette demande dont elle a été dûment prévenue par l'intimée, l'appelante lui a transmis une contestation intitulée «inscription en droit» et par laquelle elle conclut au rejet pour l'unique motif que la requête de la mise-en-cause «n'était pas accompagnée d'une copie certifiée de sa constitution et de ses règlements ni d'un état des conditions d'admission, droits d'entrée et cotisations exigés de ses membres». Là-dessus l'intimée a accordé l'accréditation sans audition par les motifs suivants.

> CONSIDÉRANT que la Commission a pris connaissance de la contestation soumise par les procureurs de l'intimé, en date du 22 mars 1966;
>
> CONSIDÉRANT que la Commission a constaté que les faits allégués dans ladite contestation sont contredits par le rapport d'enquête de son service d'inspection;
>
> CONSIDÉRANT que l'association requérante a satisfait aux conditions prévues par le Code du Travail et par les règlements de la Commission pour avoir droit à l'accréditation.

A l'encontre de cette décision, l'appelante a demandé un bref de prohibition en invoquant deux moyens:

> 1° inexécution de l'obligation imposée par le Code du travail de produire avec la requête les pièces sus-mentionnées;
>
> 2° violation de la règle *audi alteram partem.*

La Cour supérieure a ordonné la délivrance du bref de prohibition comme suit:

> CONSIDÉRANT que, d'après les faits mentionnés dans la requête, le Tribunal se croit justifié d'autoriser l'émission d'un bref de prohibition.

En vertu de l'art. 122 du *Code du travail,* deux juges de la Cour du banc de la reine ont annulé le bref par les motifs suivants.

> CONSIDÉRANT que la Commission avait seule le pouvoir de prononcer sur le point soulevé par la K S L;
>
> CONSIDÉRANT que même si les affirmations contenues dans les considérants attaqués par la K S L étaient fausses,—ce qui n'est pas établi,—la décision de la Commission n'en resterait pas moins un acte se rapportant à «l'exercice de ses fonctions» (art. 121).

Les motifs de cet arrêt sont inattaquables. A moins de voir dans chacune des prescriptions législatives à l'adresse de la Commisssion des relations de travail une restriction à sa juridiction, on ne saurait prétendre qu'elle a outrepassé sa compétence en décidant qu'une disposition législative a

été observée. Une pareille interprétation irait à l'encontre d'un principe fondamental du *Code du travail* qui est de confier *exclusivement* à la Commission le soin de statuer sur les demandes d'accréditation ce qui implique que c'est à elle qu'il appartient de juger dans chaque cas si l'on s'est conformé aux prescriptions du *Code du travail* à cet égard.

Le principe qu'il faut appliquer est celui de l'arrêt *Bakery and Confectionery Workers v. White Lunch*[1], cette Cour y a refusé d'intervenir dans l'exercice du pouvoir de reviser ou annuler toute décision accordée par la loi à la Commission des relations de travail de la Colombie-Britannique. En son nom, M. le Juge Hall a dit:

> Nothing shows 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.

Un organisme comme la Commission ne perd pas sa compétence parce qu'il applique mal une disposition législative mais seulement lorsqu'il sort de son champ d'activité ou omet de se conformer aux conditions essentielles à l'exercice de sa juridiction. Il est tout à fait évident que l'article du *Code du travail* invoqué par l'appelante n'est pas destiné à circonscrire le champ d'activité de la Commission mais au contraire une disposition qu'elle est chargée d'appliquer par des décisions finales et sans appel. Comme cette Cour l'a décidé dans *Galloway Lumber c. La Commission des Relations de travail de la Colombie-Britannique*[2], l'exercice valable de la juridiction d'une telle commission ne dépend pas du bien ou mal fondé de sa décision. La seule question à examiner est de savoir si elle entre dans le domaine de sa compétence («the assigned area of the exercise of the power»).

Pour ce qui est de l'application de la règle *audi alteram partem,* il importe de noter qu'elle n'implique pas qu'il doit toujours être accordé une audition. L'obligation est de fournir à la partie l'occasion de faire valoir ses moyens. Dans le cas présent, en face d'une contestation qui soulève uniquement un moyen de droit, la Commission n'abusa pas de sa discrétion en décidant qu'elle n'avait pas besoin d'en entendre davantage avant de rendre sa décision. Comme cette Cour l'a décidé dans *Forest Industrial Relations Ltd.*

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[1] [1966] R.C.S. 282, 55 W.W.R. 129, 56 D.L.R. (2d) 193.
[2] [1965] R.C.S. 222, 51 W.W.R. 90, 48 D.L.R. (2d) 587.

1967

KOMO CONSTRUCTION INC. *et al.* *v.* COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *et al.*

Le juge Pigeon

c. International Union of Operating Engineers[3], une commission n'est pas obligée d'accorder une audition sur toutes les prétentions soulevées dans une affaire dont elle est saisie. Lorsqu'elle a eu un exposé qu'elle juge suffisant, elle a le pouvoir de statuer sans plus tarder. Il ne faut pas oublier que la Commission exerce sa juridiction dans une matière où généralement tout retard est susceptible de causer un préjudice grave et irrémédiable. Tout en maintenant le principe que les règles fondamentales de justice doivent être respectées, il faut se garder d'imposer un code de procédure à un organisme que la loi a voulu rendre maître de sa procédure.

Vu les conclusions ci-dessus sur les deux motifs invoqués par l'appelante, il n'est pas nécessaire de statuer sur le sens à donner à l'article qui interdit les recours aux tribunaux «en raison d'actes, procédures ou décisions se rapportant à l'exercice» des fonctions de la Commission. Lorsqu'il y aura lieu de le faire, on devra tenir compte non seulement de l'arrêt rendu dans *Jarvis c. Associated Medical Services*[4] et les autres causes qui y sont mentionnées, mais aussi de ce que dans *Board of Health of Saltfleet c. Knapman*[5] cette Cour a statué qu'elle n'était pas empêchée d'annuler pour violation de la règle *audi alteram partem* une décision rendue en exécution du *Public Health Act* d'Ontario (R.S.O. 1950, c. 306) par une disposition (art. 143) se lisant comme suit:

> No order or other proceeding, matter or thing, done or transacted in or relating to the execution of this Act, shall be vacated, quashed or set aside for want of form, or be removed or removable by *certiorari* or otherwise into the Supreme Court.

J'ai souligné les mots «relating to» parce qu'ils sont ceux-là mêmes que l'on trouve dans la version anglaise de l'art. 121 du *Code du travail*.

Je suis d'avis que l'appel doit être rejeté avec dépens.

Appel rejeté avec dépens.

Procureurs des appelantes: Gagné, Trottier, Letarte, Larue & Rioux, Québec.

Procureur de l'intimée: R. Bélanger, Québec.

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[3] [1962] R.C.S. 80, 37 W.W.R. 43, 31 D.L.R. (2d) 319.
[4] [1964] R.C.S. 497, 44 D.L.R. (2d) 407.
[5] [1956] R.C.S. 877, 6 D.L.R. (2d) 81.

MADAME OPAL E. WATT (*Demanderesse*) APPELANTE; 1967

*Nov. 28, 29
Déc. 18

ET

WILBROD SMITH (*Défendeur*) .....INTIMÉ.

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

Automobile—Collision—Automobile heurtée à l'arrière alors qu'elle reculait—Faute commune—Quantum des dommages—Étaient-ils excessifs—Code civil, art. 1056.

Le mari de la demanderesse a été tué lorsqu'une familiale de dimensions réduites qu'il conduisait a été heurtée à l'arrière par l'automobile du défendeur. L'accident est survenu après la tombée du jour. Le mari de la demanderesse venait de dépasser un terrain destiné au stationnement en face d'un petit magasin lorsqu'il s'est arrêté et s'est mis à reculer en zigzaguant. Le défendeur a admis qu'il avait aperçu les feux arrière de l'autre voiture devant lui à quelque 500 pieds et qu'ensuite il avait détourné son regard vers un piéton du côté gauche et dont il avait vainement tenté d'attirer l'attention. Lorsqu'il a regardé de nouveau devant lui, il n'a pas eu le temps d'éviter la collision. Le juge de première instance a statué que seul le défendeur était en faute. La Cour d'appel a fixé à un tiers la part de responsabilité imputable à la faute du mari de la demanderesse et a aussi réduit les montants accordés à la demanderesse en sa qualité de tutrice de son fils et de sa fille. La demanderesse en appela à cette Cour.

Arrêt: L'appel doit être maintenu en partie.

Sur la responsabilité. La Cour d'appel n'a pas fait erreur en modifiant le jugement de la Cour supérieure sur la responsabilité. C'est la combinaison de la manœuvre imprudente du mari de la demanderesse et de la faute d'inattention du défendeur qui a provoqué l'accident.

Quant aux dommages. La Cour d'appel n'était pas justifiée de substituer sa propre appréciation à celle du juge de première instance. On ne peut pas dire que le montant accordé par celui-ci était tellement excessif qu'il constituait une estimation entièrement erronée.

Motor vehicle—Collision—Automobile struck in the rear as it was backing up—Contributory negligence—Quantum of damages—Whether excessive—Civil Code, art. 1056.

The plaintiff's husband was killed when a small station wagon he was driving was struck in the rear by the defendant's automobile. The accident occurred at nightfall. After he had passed by a parking lot in front of a small store, the plaintiff's husband stopped his car and backed up in zigzags. The defendant admitted seeing the tail lights of the other vehicle in front of him at some 500 feet. He said that he looked away towards a pedestrian on his left whose attention he tried unsuccessfully to catch. When he looked again in front, it was too late to avoid the collision. The trial judge held that the defendant was solely to blame. The Court of Appeal assessed at one-third the

*CORAM: Les Juges Fauteux, Abbott, Hall, Spence et Pigeon.

1967

WATT v. SMITH

share of liability attributable to the fault committed by the plaintiff's husband and also reduced the amounts awarded to the plaintiff as tutrix to her son and daughter. The plaintiff appealed to this Court.

Held: The appeal should be allowed in part.

As to the liability. The Court of Appeal did not err in modifying the judgment of the Superior Court on the question of liability. The accident was caused by the combination of the plaintiff's husband's imprudent action with the defendant's inattention.

As to the damages. The Court of Appeal erred in substituting its own appreciation of the damages to the estimate made by the trial judge. It cannot be said that the amount awarded by the trial judge was so excessive as to constitute an entirely erroneous estimate.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], setting aside a judgment of Laliberté J. Appeal allowed in part.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], cassant un jugement du Juge Laliberté. Appel maintenu en partie.

Jules Deschênes, c.r., et *Louis Doiron, c.r.*, pour la demanderesse, appelante.

Perrault Casgrain, c.r., pour le défendeur, intimé.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—L'accident qui est à l'origine de ce litige est survenu après la tombée du jour à 8 h. 30 du soir, le 3 mai 1962, sur une route au pavage d'asphalte large de 20 pieds. Le mari de l'appelante circulait en direction ouest dans une familiale de dimensions réduites (Envoy 1961). Il venait de dépasser un terrain destiné au stationnement en face d'un petit magasin lorsqu'il s'est arrêté et s'est mis à reculer en zigzaguant. Sa voiture a alors été heurtée à l'arrière par celle de l'intimé. Celui-ci a admis qu'il avait aperçu les feux arrière de l'autre voiture devant lui à une assez bonne distance (400-500 pieds) et qu'ensuite il avait détourné son regard vers un piéton qui se trouvait au bord du chemin du côté gauche et dont il a vainement tenté d'attirer l'attention. Lorsqu'il a regardé de nouveau devant lui, il n'a pas eu le temps d'éviter la collision dans laquelle le mari de l'appelante a été tué sur le coup.

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[1] [1965] B.R. 885, *sub. nom. Smith v. Dame Le Maistre.*

En Cour supérieure le Juge Laliberté a statué que l'accident était uniquement dû à la faute de l'intimé. La Cour du banc de la reine[1] a, au contraire, décidé que le mari de l'appelante avait également commis une faute qui avait contribué à l'accident, en reculant sans s'assurer qu'il pouvait le faire sans risque. Elle a fixé à un tiers la part de responsabilité imputable à cette faute et réduit en conséquence de $30,107.94 à $20,172.32 le montant payable à l'appelante personnellement. Quant à l'indemnité payable à l'appelante en sa qualité de tutrice de son fils et de sa fille, elle a en outre réduit l'estimation du préjudice en ramenant de ce chef la condamnation de $23,713.04 à $8,710.

Sur la responsabilité, l'intimé ne conteste ni la faute qui lui est reprochée ni son importance relative. Quant à l'appelante, elle invoque certaines erreurs dans les motifs par lesquels la Cour d'appel en est venue à la conclusion qu'il y avait faute commune.

Elle signale en premier lieu que le terrain de stationnement n'a pas les dimensions considérables qu'on lui attribue. C'est exact, mais on ne voit pas quelle influence ce détail a pu avoir sur la décision. Ensuite, on relève qu'il n'est pas exact de dire qu'une boîte à claire-voie qui se trouvait dans la familiale, gênait la vue du conducteur vers l'arrière. Cette affirmation est fondée uniquement sur l'examen d'une photographie prise après l'accident où l'on voit cette boîte sur le côté. On a sûrement eu tort de présumer qu'elle était dans cette position lors de l'accident alors que tout indique qu'elle devait être à plat; dans cette position, elle ne gênait pas la vue du conducteur à l'arrière. Cette erreur également ne tire pas à conséquence parce que le conducteur est aussi fautif de ne pas avoir tenu compte de la présence de la voiture qu'il pouvait voir que de celle d'une voiture qu'il aurait été empêché de voir.

Enfin, on signale également que c'est une erreur de droit que de dire «L'accident prouve certainement qu'il y avait risque». Au sens statistique, cette affirmation est vraie, mais non au sens juridique. Quand le *Code de la route* prescrit, au para. 11 de l'art. 40, qu'on ne doit pas faire une manœuvre sans s'assurer qu'elle «peut s'effectuer sans risque», il ne faut pas prendre cette expression dans un

[1] [1965] B.R. 885, *sub. nom. Smith v. Dame Le Maistre.*

1967

WATT v. SMITH

Le juge Pigeon

sens absolu. Il est clair qu'il y a lieu d'interpréter cette expression de façon analogue à l'obligation de céder le passage à une intersection munie d'un signal d'arrêt. Comme cette Cour l'a jugé dans *Provincial Transport Co. c. Dozois*,[2] il faut s'en tenir à ce qui peut raisonnablement être prévu dans les circonstances.

Ici, cependant, on ne peut pas dire que, voyant ou pouvant voir dans son rétroviseur une voiture qui le suivait, le conducteur de la familiale ne devait pas prévoir un risque de collision s'il reculait. En effet, tout automobiliste doit savoir combien il est difficile dans l'obscurité d'apprécier la distance à laquelle se trouve un autre véhicule. Sa voiture n'étant pas munie de feux de recul, le conducteur devait savoir que sa manœuvre risquait fort de n'être pas perçue en temps utile par le conducteur du véhicule qui le suivait. Sa voiture étant au surplus de dimensions réduites, l'autre conducteur était encore plus exposé à être induit en erreur sur la distance l'en séparant.

Évidemment, l'infortuné conducteur ne pouvait pas être tenu de prévoir l'inattention de l'autre et c'est pourquoi sa responsabilité n'est pas totale. Cependant, il n'est pas possible de dire que la manœuvre imprudente de recul n'a joué aucun rôle dans l'accident. Au contraire, c'est la combinaison de cette manœuvre avec l'inattention qui l'a provoqué. L'intimé a été induit en erreur par la marche arrière. Il a cru que la distance entre les deux véhicules lui permettait de tourner la tête comme il l'a fait. La manœuvre de recul a aggravé son imprudence en réduisant considérablement le temps disponible pour éviter la collision alors que normalement, comme il ne venait pas de véhicules en sens inverse et que la familiale dépassait d'au plus deux pieds la ligne centrale, il aurait dû être facile pour celui qui la suivait de la dépasser en prenant la gauche du chemin.

Pour ces raisons, je conclus que la Cour d'appel n'a pas fait erreur en modifiant le jugement de la Cour supérieure sur la responsabilité. Elle était d'autant plus justifiée de le faire que la décision ne portait pas sur une question de crédibilité mais sur l'appréciation des conséquences à tirer de faits prouvés sans contradiction.

[2] [1954] R.C.S. 223.

1967

WATT v. SMITH

Le juge Pigeon

Quant à la liquidation des dommages-intérêts, le juge de première instance n'a pas indiqué de quelle manière il a calculé le montant très précis auquel il s'est arrêté. Il n'a pas davantage révélé d'après quel principe il a fait le partage entre la veuve et chacun de ses enfants mineurs. Il est regrettable que le jugement ne fournisse pas ces renseignements. On devrait les considérer comme une partie essentielle des motifs que l'art. 471 du *Code de procédure civile* prescrit d'insérer dans tout jugement quand il y a eu contestation et qu'il est rendu après délibéré.

En Cour d'appel, on s'est contenté de dire que les «montants accordés aux enfants dépassent ce à quoi en justice l'appelant aurait dû être condamné». Après avoir noté que le juge de première instance ne laissait aucunement «deviner sa façon de procéder», on déclare que «ces montants dépassent tout ce qui a été accordé . . . par les tribunaux dans des circonstances semblables». On cite après cela les sommes accordées dans certaines autres causes et l'on finit par réduire le montant payable à la tutrice à $4,690 pour son fils et $4,020 pour sa fille. Là encore on ne révèle pas les bases du calcul et il est clair que la Cour d'appel a substitué son appréciation à celle du juge de première instance.

En face de ces jugements, devons-nous procéder à une nouvelle estimation pour en apprécier le bien-fondé. Je ne le crois pas. A mon avis, nous devons nous demander si la Cour d'appel a appliqué le principe qu'un tribunal d'appel doit suivre en l'occurrence. Ce principe n'est pas de se demander si, siégeant en première instance on aurait accordé le même montant, ce qui est au fond la même chose que de se demander si ce qui a été accordé dépasse ce qui est dû en justice. Ce qu'il faut rechercher c'est si le montant accordé est tellement excessif ou tellement insuffisant qu'il constitue une estimation entièrement erronée.

Appliquant ce critère, il faut constater, comme il a été dit en Cour d'appel, que le revenu annuel du défunt était de $5,677.20. Le fils, lors de l'accident, avait près de 4 ans et la petite fille 7 ans. Le père avait 38 ans. Le montant accordé à la demanderesse personnellement pour dommages découlant de la mort de son époux s'élève à $28,146.34 et avec l'addition des $23,713.04 accordés aux enfants, cela fait un total de $51,859.38. C'est environ neuf fois le

1967

WATT v. SMITH

Le juge Pigeon

revenu annuel du défunt. Si l'on considère que l'on peut présumer que la moitié du revenu annuel d'un père de famille est susceptible d'être consacrée à faire vivre sa femme et ses enfants puisque son salaire est saisissable à cette fin dans cette proportion (C.P.C. art. 553, dernier alinéa), peut-on dire qu'en accordant environ dix-huit fois cette partie du revenu annuel du défunt comme compensation pour son décès, la Cour supérieure a accordé un montant tellement excessif, qu'il s'agit d'une estimation entièrement erronée du préjudice? Quoique l'on se trouve évidemment à l'extrême limite de ce qui est susceptible d'être justifié, je ne pense pas que l'on puisse dire qu'il s'agit d'un montant manifestement excessif.

Je suis donc d'avis que la Cour d'appel n'était pas justifiée de substituer sa propre appréciation des dommages à celle du juge de première instance. En conséquence, j'accueillerais l'appel aux fins de modifier le jugement de la Cour du banc de la reine de façon à fixer à $8,156.87 la somme accordée à la présente appelante en sa qualité de tutrice de son fils James et à $7,651.16 la somme accordée à la présente appelante en sa qualité de tutrice de sa fille Susan Joy. Je ne modifierais pas le jugement de la Cour d'appel en ce qu'il s'agit des dépens et, comme l'appelante ne réussit pas devant cette Cour sur le principal objet de son appel, je ne lui en accorderais que la moitié des dépens.

Appel maintenu en partie.

Procureur de la demanderesse, appelante: L. Doiron, Chandler.

Procureurs du défendeur, intimé: Casgrain, Casgrain & Crevier, Rimouski.

HEDWIDGE ST-GELAIS et
HAUVIETTE ST-GELAIS ..... } APPELANTES;

1967
*Juin 7, 8
Déc. 18

ET

LA BANQUE DE MONTRÉAL ..... INTIMÉE.

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

Décret—Requête en annulation—Titres de l'immeuble vendu—Acte de donation non enregistré—Irrégularités dans la saisie de l'immeuble —Loi du cadastre, S.R.Q. 1941, c. 320, arts. 14, 15—Loi relative aux titres de propriété dans la Gaspésie, 1948 (Qué.), c. 37, telle que modifiée—Code civil, art. 806, 2132, 2168, 2176a—Code de procédure civile, arts. 651, 699, 704, 784.

Par suite de la revision du cadastre officiel de l'endroit, un lot appartenant à la mère des deux appelantes et qui portait le numéro 17-A est devenu le numéro 17-A-2, et fut porté comme tel au nom de la mère au cadastre revisé. Subséquemment, la mère donnait, par acte de donation devant notaire, cet immeuble aux deux appelantes. Cependant, dans l'acte de donation l'immeuble fut désigné sous son ancien numéro 17-A, et, ayant été présenté pour enregistrement, fut inscrit au livre de présentation et à l'index des noms, mais ne put l'être à l'index des immeubles puisque le lot 17-A n'existait plus. Telle était la situation lorsque le lot portant le numéro 17-A-2 fut saisi et vendu par le shérif à la poursuite de l'intimée, en exécution d'un jugement obtenu contre la mère des deux appelantes. L'opposition que firent les appelantes, en s'appuyant sur leur acte de donation, n'était pas accompagnée d'un ordre de sursis, et il fut procédé à la vente. Les appelantes demandèrent alors l'annulation du décret. La Cour supérieure annula la vente. La Cour d'appel, rejetant les deux moyens invoqués au soutien de la demande en annulation, à savoir, que la saisie avait été pratiquée *super non domino* et qu'elle avait été pratiquée de façon irrégulière, renversa le jugement de première instance et maintint le décret. D'où l'appel devant cette Cour.

Arrêt: L'appel doit être rejeté.

Il est impossible, en face de la rigueur des dispositions de la loi visant les actes de donation d'immeubles, l'enregistrement des actes, leur inscription à l'index des immeubles, la revision du cadastre et les conséquences d'une telle revision, de conclure que le jugement de la Cour d'appel était erroné. Quant aux irrégularités invoquées à l'encontre de la saisie, rien ne justifie cette Cour d'adopter sur cette question de procédure une conclusion différente de celle de la Cour d'appel.

Sheriff's sale—Petition to vacate—Titles to the immoveable sold—Deed of donation not registered—Irregularities in the seizure of the immoveable—Cadastre Act, R.S.Q. 1941, c. 320, ss. 14, 15—Act respect-

*CORAM: Les Juges Fauteux, Abbott, Martland, Judson et Spence.

1967

ST-GELAIS et al. v. BANQUE DE MONTRÉAL

ing title-deeds in the Gaspesian area, 1948 (Que.), c. 37, as amended —Civil Code, arts. 806, 2132, 2168, 2176a—Code of Civil Procedure, arts. 651, 699, 704, 784.

Following the revision of the official cadastre in the area, a parcel of land belonging to the mother of the two appellants and designated as lot 17-A became lot 17-A-2, and was entered as such in the name of the mother in the revised cadastre. Subsequently, the mother executed before notary a deed of donation by which she gave this parcel of land to the two appellants. However, the immoveable was designated in the deed of donation under its old designation of lot 17-A, and, having been presented for registration, was entered in the entry-book and in the index of names, but could not be entered in the index of immoveables, since lot 17-A no longer existed. Such was the situation when lot 17-A-2 was seized and sold by the sheriff at the instance of the respondent, in the execution of a judgment obtained against the mother of the two appellants. The opposition made by the appellants to the sale, based upon their deed of donation, was not accompanied by an order to stay the proceedings, and the sheriff proceeded with the sale. The appellants petitioned to vacate the sale. The Superior Court annulled the sale. The Court of Appeal, setting aside the two grounds upon which the petition to vacate was based, *i.e.*, that the seizure had not been made *super non domino* and had been made in an irregular manner, reversed the judgment of first instance and maintained the sale. An appeal was launched to this Court.

Held: The appeal should be dismissed.

Faced with the strictness of the provisions relating to the deeds of donation of immoveables, the registration of deeds, their entry in the index of immoveables, the revision of the cadastre and the consequences of such a revision, it was impossible to conclude that the judgment of the Court of Appeal was wrong. As to the irregularities invoked against the seizure, there was nothing to justify this Court to adopt on this question of procedure a different conclusion than the one reached by the Court of Appeal.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Puddicombe J. Appeal dismissed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge Puddicombe. Appel rejeté.

Claude Picard, pour les appelantes.

Richard J. Riendeau, pour l'intimée.

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[1] [1966] B.R. 365.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Les appelantes se pourvoient à l'encontre d'un jugement de la Cour du banc de la reine[1] qui infirme un jugement de la Cour supérieure en ce que ce dernier faisait droit à une requête en nullité de décret, et qui rejette cette requête avec dépens des deux Cours. Pour l'audition de cet appel, la Cour du banc de la reine était composée de M. le Juge en chef Tremblay et de MM. les Juges Bissonnette, Pratte, Casey et Choquette. Présent lors de l'audition, M. le Juge Bissonnette décéda avant le prononcé du jugement.

Les faits donnant lieu à ce litige apparaissent aux raisons de jugement de M. le juge Pratte, auxquelles ses collègues ont donné leur accord:—En 1947, dame Aurore St-Gelais, mère des appelantes, Hedwidge et Hauviette St-Gelais, fit l'acquisition d'un terrain décrit par ses tenants et aboutissants, et désigné comme faisant partie du lot 17A au Plan et Livre de Renvoi du cadastre officiel pour le fief de Ste-Anne-des-Monts Notre-Dame. Quatre ans après, soit en 1951, le cadastre de cette localité fut revisé en vertu de la *Loi relative aux titres de propriété dans la Gaspésie,* 12 George VI, c. 37, modifiée par 14-15 George VI, c. 39. Par l'effet de cette revision (proclamée dans la Gazette officielle de Québec du 27 octobre 1951), l'immeuble, acquis par dame Aurore St-Gelais, est devenu le lot 17-A-2 et porté au nom de celle-ci au Livre de Renvoi du cadastre revisé. Le 25 janvier 1957, par acte passé devant Me Charles Gauthier, notaire, dame Aurore St-Gelais donnait l'immeuble en question à ses deux filles, les appelantes. Mais voilà que, plutôt que de désigner cet immeuble dans l'acte de donation par le numéro 17-A-2, comme il eût dû le faire pour se conformer à une disposition de l'art. 2168 du *Code civil,* le notaire ne fit que reproduire la désignation et la description contenues dans l'acte d'acquisition de dame Aurore St-Gelais, la donatrice, tout comme si le cadastre n'avait pas été revisé. Cet acte fut présenté pour enregistrement; mais comme, d'une part, il n'y était pas question du lot 17-A-2 et que, d'autre part, le numéro 17A (dont l'immeuble donné faisait partie avant

[1] [1966] B.R. 365.

1967

ST-GELAIS *et al.* *v.* BANQUE DE MONTRÉAL

Le juge Fauteux

la revision du cadastre) n'existait plus, l'acte fut inscrit au livre de présentation et à l'index des noms, mais ne put l'être à l'index des immeubles. Telle était la situation lorsque le lot portant le numéro 17-A-2 fut saisi et vendu par le shérif à la poursuite de l'intimée, la Banque de Montréal, en exécution d'un jugement que celle-ci avait obtenu contre dame Aurore St-Gelais. Les appelantes, d'une part, s'appuyant sur l'acte de donation, formèrent une opposition à la saisie et la Banque de Montréal, d'autre part, alléguant que cette procédure n'était pas faite dans les conditions voulues pour arrêter la vente, fit motion pour en obtenir le rejet. En fait, l'opposition n'était pas accompagnée d'un ordre de sursis et il fut procédé à la vente. Sitôt après celle-ci, les appelantes formèrent une demande en annulation de décret, demande que l'intimée contesta.

Saisie et disposant à la fois par un seul jugement et de la motion pour faire rejeter l'opposition et de la demande en annulation de décret, la Cour supérieure rejeta la première, accorda la seconde et annula le décret.

La Banque de Montréal appela de cette partie du jugement qui a trait à l'annulation du décret.

La Cour d'appel jugea que la décision de première instance en ce qu'elle refusait de faire droit à la motion pour rejet d'opposition à la saisie, n'était pas frappée d'appel et n'était pas d'ailleurs une décision susceptible d'appel. La Cour considéra ensuite les moyens invoqués par les appelantes au soutien de leur demande pour annulation du décret, savoir (i) que la saisie avait été pratiquée *super non domino*, que l'immeuble saisi leur appartenait en vertu de l'acte de donation du 25 janvier 1957 et (ii) que la saisie avait été pratiquée de façon irrégulière.

S'appuyant sur les dispositions des arts. 806, 2132, 2168 et 2176 (*a*) du *Code civil* et les articles 14 et 15 de la *Loi concernant la confection du cadastre,* S.R.Q. 1941, c. 320, la Cour d'appel jugea que l'immeuble saisi—qui, d'après les inscriptions au Bureau d'enregistrement, appartenait à dame Aurore St-Gelais,—n'avait pas été affecté par l'acte de donation invoqué et présenté à l'enregistrement par les appelantes, qu'il leur résultait de cet acte aucun droit opposable à la Banque et qu'en conséquence, il ne pouvait être question, en l'espèce, d'une vente *super non domino.* Ce premier moyen fut donc rejeté.

1967

ST-GELAIS et al. v. BANQUE DE MONTRÉAL

Le juge Fauteux

La Cour écarta aussi le second moyen, jugeant, en somme, qu'il n'y avait eu dans la procédure d'exécution aucune irrégularité qui, d'après les dispositions de l'art. 784 du *Code de procédure civile*, pouvait justifier d'annuler le décret.

Après avoir considéré les différents points soulevés par les appelantes, il m'est impossible de conclure, comme nous y avons été invités, que le jugement de la Cour d'appel est erroné. En somme, je dirais que ces points, qui ne diffèrent guère de ceux qu'on a soulevés en Cour d'appel ou en première instance, ne tiennent pas compte de la rigueur des dispositions de la loi, mentionnées au jugement de la Cour d'appel, visant les actes de donation d'immeubles, l'enregistrement des actes, leur inscription à l'index des immeubles, la revision du cadastre et les conséquences d'une telle revision. Quant aux irrégularités invoquées en ce qui concerne la saisie, je ne vois rien justifiant cette Cour d'adopter sur cette question de procédure, une conclusion différente de celle de la Cour d'appel.

Je renverrais l'appel avec dépens.

Appel rejeté avec dépens.

Procureur des appelantes: C. Picard, Montréal.

Procureurs de l'intimée: Holden, Hutchison, Cliff, McMaster, Meighen & Minnion, Montréal.

WORKMEN'S COMPENSATION BOARD (*Defendant*) ..... APPELLANT;

AND

BANK OF MONTREAL (*Plaintiff*) RESPONDENT.

1967

*Nov. 10

1968

Jan. 23

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Workmen's compensation—Employer indebted under assessment to Workmen's Compensation Board—Lien on property produced in or by the industry—Whether lien attaches to proceeds of property subject to lien—Workmen's Compensation Act, R.S.B.C. 1960, c. 413, s. 48.

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

1968

WORKMEN'S COMPENSATION BOARD v. BANK OF MONTREAL

H, a logging and sawmill operator, agreed to purchase certain standing timber and after having cut and removed the same he milled it into cants which he sold to A Co. On December 29, 1959, H obtained a loan from the plaintiff bank in the sum of $702.32 and as security for such advance he assigned to the bank all money due or to become due to him under the contract with A Co. H incurred indebtedness to the Workmen's Compensation Board in respect of assessments for 1958, 1959 and part of 1960. A Co., upon receiving conflicting claims from the Board and the bank for the money owing to H, took interpleader proceedings and paid the sum of $966.57 into Court. The trial judge held that the Board was entitled to enforce its lien, under s. 48 of the *Workmen's Compensation Act*, R.S.B.C. 1960, c. 413, to the amount of $918.15 being assessments for the years 1958 and 1959. The bank appealed to the Court of Appeal which reversed the trial judge and awarded $702.32 of the money to the bank. With leave, the Board then appealed to this Court to restore the judgment of the trial judge.

Held: The appeal should be dismissed.

In the absence of legislation specifically extending the lien to cover the proceeds of property that was subject to the lien, the Court agreed with the majority in the Court of Appeal that the proceeds of the sale of the cants did not constitute property, real or personal, within the meaning of s. 48 and that these proceeds were not impressed with a lien created in and by s. 48. *Re Clemenshaw (a Bankrupt), Workmen's Compensation Board v. Canadian Credit Men's Trust Association Ltd. (No. 1)* (1962), 40 W.W.R. 199, explained; *Royal Bank of Canada v. Workmen's Compensation Board of Nova Scotia*, [1936] S.C.R. 560, distinguished; *Dinning v. Workmen's Compensation Board*, [1932] 1 W.W.R. 136, applied.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing the judgment of Ruttan J. on the trial of an issue directed upon interpleader proceedings. Appeal dismissed.

C. C. Locke, Q.C., for the defendant, appellant.

P. B. C. Pepper, Q.C., and *R. I. A. Smith*, for the plaintiff, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal by leave of the Court of Appeal for British Columbia from a judgment of that Court[1] declaring that the Bank of Montreal was entitled to payment out of Court of the sum of $702.32 of the money paid into Court pursuant to the Order of Brown J. dated March 3, 1961, as the result of certain interpleader

[1] (1967), 58 W.W.R. 731, 60 D.L.R. (2d) 680.

proceedings to determine the question of priority to the money in Court between the parties under s. 48 of the *Workmen's Compensation Act* of British Columbia, R. S. B. C. 1960, c. 413. Section 48 reads as follows:

> Notwithstanding anything contained in any other Act, the amount due to the Board by an employer upon any assessment made under this Act, or in respect of any amount which the employer is required to pay to the Board under any of its provisions, or upon any judgment therefor, constitutes a lien in favour of the Board payable in priority over all liens, charges, or mortgages of every person, whenever created or to be created, with respect to the property, real, personal, or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workmen by their employer, and such lien for the amount due the Board is valid and in force with respect to each assessment for a period of three years from the end of the calendar year for which the assessment was levied.

The litigation was conducted upon an agreed statement of facts as follows:

1. Frank J. Huber agreed with one A. L. Bowes to purchase standing timber from Bowes, payment to be made as the timber was logged.
2. Huber cut and removed the timber and milled the same into cants which he sold to Ashcroft Lumber Co. Ltd. to deduct from the purchase price the amount owing to Mr. A. L. Bowes on the purchase of Timber as aforesaid and amounts due to the Forest Service of the Province of British Columbia in respect thereof.
3. Huber delivered the said cants to Ashcroft Lumber Co. Ltd. during the month of December, 1959 and the months of January and February, 1960, and in respect of such deliveries Ashcroft Lumber Co. Ltd. by March 1st, 1960 was indebted to Huber in the sum of $966.57.
4. On December 29th, 1959 Huber obtained a loan by way of overdraft from Bank of Montreal at Ashcroft in the sum of $702.32 and as security for such advance, Bank of Montreal obtained a valid assignment in writing from Huber whereby he assigned all his right, title and interest in and to all monies due or to become due to him from the Ashcroft Lumber Co. Ltd. under his contract with Ashcroft Lumber Co. Ltd. The whole of the said advance remains unpaid.
5. Ashcroft Lumber Co. Ltd. was given notice of the said assignment on December 30th, 1959.
6. Huber was registered with Workmen's Compensation Board as an employer in the industry of logging and sawmill operations at all times material.
7. Huber is liable to pay Workmen's Compensation Board the sum of $945.37 in respect of his said operations as set out in the Affidavit of James Alexander Downing sworn November 21st, 1962 and filed herein.
8. On April 6th, 1960 Workmen's Compensation Board filed a certificate under Section 39(2) of the Workmen's Compensation Act in

1968

WORKMEN'S COMPENSATION BOARD v. BANK OF MONTREAL

Hall J.

respect of the said indebtedness and issued a Warrant of Execution against Huber on April 17th, 1960 which was returned by the Sheriff nulla bona on April 20th, 1960.

9. Upon receiving conflicting claims from Workmen's Compensation Board and Bank of Montreal, Ashcroft Lumber Co. Ltd. took interpleader proceedings and paid the sum of $966.57 into Court pursuant to the said Order of the Honourable Mr. Justice Brown herein dated March 3rd, 1961.

The learned trial judge, Ruttan J., found one additional fact as follows:

> Huber was indebted to the Workmen's Compensation Board under assessment for the year 1958 in the sum of $678.12 and for the year 1959 in the sum of $240.03, and for the year 1960, $27.22.

and he held that the appellant Board was entitled to enforce its lien to the amount of $918.15 being assessments for the years 1958 and 1959 due under the *Workmen's Compensation Act*. The Bank appealed to the Court of Appeal which reversed the trial judge and awarded $702.32 of the money to the Bank. The Board now appeals to this Court to restore the judgment of Ruttan J.

The issue is whether, by said s. 48, the amount payable by Ashcroft to Huber as set out in item 3 of the agreed statement of facts is 'property... produced in or by, or used in connection with the industry...' The respondent Bank contends that the lien given by s. 48 of the Act is against 'property' so described and restricted; that the lien is not against all the property of the employer Huber, such as in this instance, accounts receivable.

The learned trial judge said: "If the lien would attach properly to the lumber I can see no reason why it cannot attach to the money which represents that lumber." and he relied on *Re Clemenshaw (a Bankrupt), Workmen's Compensation Board v. Canadian Credit Men's Trust Association Ltd. (No. 1)*[2]. The judgment in *Clemenshaw* was based on the fact that since it had not been established by the Board that the moneys in the hands of the trustee represented the proceeds of the sale of property used in or produced by any industry, the Board in that case failed to prove that it had a lien on the fund there in question, but the judgment suggests that the proceeds could represent property within the meaning of the section so as to allow the lien created by the section to attach to the proceeds,

[2] (1962), 40 W.W.R. 199.

and that if such proof had been forthcoming the result would have been different. It is of some importance, however, to note that in *Clemenshaw* the moneys said to be subject to the lien were from a sale of property made by the producer's trustee and the Board might on that basis have been entitled to receive the proceeds of the sale.

The appellant relied on *Royal Bank of Canada v. Workmen's Compensation Board of Nova Scotia*[3], but the statute under review in that case provided that the Board should have a first lien on all the property, real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed though not owned by the employer, subject only to municipal taxes.

The *Workmen's Compensation Act of Alberta,* R.S.A. 1955, c. 370, also reads differently from the British Columbia statute. Section 77(4) of the Alberta Act, reading in part, "... is a charge upon the property of the employer, including moneys payable to, for, or on account of the employer, within the Province".

Branca J.A., speaking for the majority in the Court of Appeal, said:

> The Act enacts some very extraordinary rights and remedies in favour of the Board and had the Legislature intended to impress the lien which might be created by s. 48 of the Act upon the proceeds of the sale of property produced in and by the industry and thus grant further extraordinary rights to the Board, one would have expected clear words to that effect. In the absence of such words in the statute I am unable to subscribe to that interpretation.

and after discussing the case of *Dinning v. Workmen's Compensation Board*[4], continued:

> I am of the opinion, therefore, that the learned trial judge was in error in his finding that the lien created by s. 48 attached to money which represented the lumber.
>
> I am of the opinion that the proceeds of the sale of the cants do not constitute property real or personal produced in and by the industry with respect to which Huber was assessed, and that the monies therefore are not impressed with a lien created in and by s. 48 of the Act.

In the *Dinning* case, Dinning was a trustee in bankruptcy of Campbell River Mills Limited. A quantity of logs belonging to Campbell River Mills Limited was destroyed

[3] [1936] S.C.R. 560, [1936] 4 D.L.R. 9.
[4] [1932] 1 W.W.R. 136, [1932] 1 D.L.R. 373.

1968

WORKMEN'S COMPENSATION BOARD v. BANK OF MONTREAL

Hall J.

by fire and the proceeds of an insurance policy were paid to the trustee. The Board contested against alleged prior rights of other creditors, claiming an amount owing to the Board by the bankrupt company by way of unpaid assessments. The trial judge held that by virtue of s. 46 of the *Workmen's Compensation Act*, the predecessor to the present s. 48, the Board had a lien upon the insurance money and was entitled, therefore, to the insurance funds. That judgment was reversed on appeal. Macdonald J.A., in construing s. 46 as it was, and which for practical purposes is almost identical in its language to s. 48 as it is at present, said:

> A lien or charge is created with respect to the property to which it attaches and extends no further unless moneys received from a defined source is mentioned. Priority under s. 46 is only given in respect to charges on the property or industry, not on other sources of income, e.g., an insurance contract. It is property "used in" or "produced by" the industry e.g. manufactured products. It would be possible to enlarge the section to include such a fund but even a liberal construction of the words used would not permit such an extension. It should not be so construed as to defeat a registered charge conveying an estate to another unless clear words were employed indicating such an intention.

In the absence of legislation specifically extending the lien to cover the proceeds of property that was subject to the lien, I agree with Branca J.A. that the proceeds of the sale of the cants did not constitute property, real or personal, within the meaning of s. 48 and that these proceeds are not impressed with a lien created in and by s. 48.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Ladner, Downs, Ladner, Locke, Clark & Lenox, Vancouver.

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

VINA-RUG (CANADA) LIMITED .....APPELLANT;

AND

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

1967
*Oct. 5, 6
1968
Jan. 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Associated corporations—Control by same group of persons—More than one group in position to control—Income Tax Act, R.S.C. 1952, c. 148, s. 39(4)(b).

The issue in this case was whether the appellant company was "associated" with a second company, Stradwick's Ltd., within the meaning of s. 39 of the *Income Tax Act*, R.S.C. 1952, c. 148, and, therefore, was not entitled to the benefit of the lower tax rate on part of its income, on the ground that both corporations were controlled by the same group of persons. All the shares of Stradwick's Ltd. were owned by a father, as to 12, his two sons, as to 10 each and a fourth party, as to 8. On the other hand, the principal shareholders of the appellant company were the two sons and the same fourth party. The Minister contended that Stradwick's Ltd. was controlled by a group consisting of the two sons and the fourth party (it is common ground that, if that is so, the same group also controlled the appellant company). However, it is contended by the appellant company that Stradwick's Ltd. was controlled by a group consisting of the father and the two sons—that group not being in a position to control the appellant company. The Exchequer Court upheld the Minister's contention that the two companies were associated. An appeal was launched to this Court.

Held: The appeal should be dismissed.

Applying the principles enunciated in *M.N.R. v. Dworkin Furs Ltd.*, [1967] S.C.R. 223, once it is established that a group of shareholders owns a majority of the voting shares of a company, and the same group a majority of the voting shares of a second company, that fact is sufficient to constitute the two companies associated within the meaning of s. 39 of the Act. Moreover, in determining *de jure* control more than one group of persons can be aptly described as a "group of persons" within the meaning of s. 39(4)(*b*) of the Act. It is immaterial whether or not other combinations of shareholders may own a majority of voting shares in either company, provided each combination is in a position to control at least a majority of votes to be cast at a general meeting of shareholders.

Revenu—Impôt sur le revenu—Corporations associées—Contrôle par le même groupe de personnes—Plus d'un groupe en état d'exercer le contrôle—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 39(4)(b).

Il s'agit dans cette cause de déterminer si la compagnie appelante était «associée» à une seconde compagnie, Stradwick's Ltd., dans le sens de l'art. 39 de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, et, en conséquence, n'ayant pas droit au bénéfice du taux d'impôt moindre

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

1968

VINA-RUG (CANADA) LTD. v. MINISTER OF NATIONAL REVENUE

sur une partie de son revenu, pour le motif que les deux corporations étaient contrôlées par le même groupe de personnes. Toutes les actions de la compagnie Stradwick's Ltd. étaient possédées par un père, qui en avait 12, ses deux fils, qui en avaient 10 chacun et une quatrième personne, qui en avait 8. D'un autre côté, les principaux actionnaires de la compagnie appelante étaient les deux fils et cette même quatrième personne. Le Ministre soutient que la compagnie Stradwick's Ltd. était contrôlée par un groupe formé des deux fils et de cette quatrième personne (les parties étant d'accord que, si telle était la situation, ce même groupe contrôlait aussi la compagnie appelante). Cependant, la compagnie appelante plaide que la compagnie Stradwick's Ltd. était contrôlée par un groupe formé du père et des deux fils—ce groupe n'étant pas en état de contrôler la compagnie appelante. La Cour de l'Échiquier a fait droit à la prétention du Ministre que les deux compagnies étaient associées. Un appel a été logé devant cette Cour.

Arrêt: L'appel doit être rejeté.

Mettant en application les principes énoncés dans *M.N.R. v. Dworkin Furs Ltd.*, [1967] R.C.S. 223, lorsqu'il est établi qu'un groupe d'actionnaires possède une majorité des parts comportant le droit de vote d'une compagnie, et que le même groupe détient une majorité des parts semblables d'une seconde compagnie, ce fait est suffisant pour rendre ces deux compagnies associées dans le sens de l'art. 39 de la loi. De plus, lorsqu'il s'agit de résoudre la question du contrôle *de jure*, plus d'un groupe de personnes peuvent être à bon droit décrits comme étant «un groupe de personnes» dans le sens de l'art. 39(4)(*b*) de la loi. Peu importe que d'autres groupements d'actionnaires puissent posséder une majorité des parts comportant le droit de vote dans l'une ou l'autre compagnie, en autant que chaque groupement est en état de contrôler au moins une majorité des votes devant être donnés à une assemblée générale des actionnaires.

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

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

P. N. Thorsteinsson, for the appellant.

G. W. Ainslie and *L. R. Olsson,* for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The issue in this appeal is whether the appellant company was "associated" during the 1961 and 1962 taxation years with a second company, Stradwick's

[1] [1967] 1 Ex. C.R. 390, [1966] C.T.C. 566, 66 D.T.C. 5373.

Limited, within the meaning of s. 39 of the *Income Tax Act*, and as such not entitled to the lower tax rate on the first $35,000 of taxable income provided for in the section. Paragraph (*b*) of subs. (4) of s. 39 provides that two corporations are associated with each other in a taxation year, if they are controlled by the same group of persons. That subsection reads as follows:

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

* * *

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

In the relevant periods, the shareholders of Stradwick's Limited and their respective shareholdings were:

John Stradwick, Sr.	12
John Stradwick, Jr.	10
W. L. Stradwick	10
H. D. McGilvery	8
Total issued shares	40

The shareholders of the appellant company and the respective shareholdings were:

John Stradwick, Jr.	6,133
W. L. Stradwick	6,133
H. D. McGilvery	6,133
Stradwick's Limited	5,250
Others	16,351
Total issued shares	40,000

The position of the respondent is that the group consisting of John Stradwick, Jr., W. L. Stradwick and H. D. McGilvery controlled Stradwick's Limited and it is common ground between the parties to the appeal that if this group controlled Stradwick's Limited, then it also controlled the appellant company. The appellant contends however that the said group did not control Stradwick's Limited and that Stradwick's Limited was controlled by a group consisting of John Stradwick, Sr., John Stradwick, Jr., and W. L. Stradwick.

1968

VINA-RUG (CANADA) LTD. v. MINISTER OF NATIONAL REVENUE

Abbott J.

John Stradwick, Sr., is the father of John Stradwick, Jr., and W. L. Stradwick; H. D. McGilvery is a stranger in the tax sense. McGilvery became a shareholder in Stradwick's Limited in 1950, but, prior to that time, had become a shareholder, with the Stradwicks, in two other companies—the tax status of which is not in issue in this appeal. All three companies were engaged in the manufacture, wholesaling or retailing of floor and wall tile.

In 1956, John Stradwick, Jr., W. L. Stradwick, H. D. McGilvery and Stradwick's Limited acquired control of a fourth company—the appellant Vina-Rug (Canada) Limited—which also manufactured floor coverings.

During the 1961 and 1962 taxation years, there was a common management and administration for all the four companies referred to, and in each of those years the appellant company paid Stradwick's Limited $5,000 for administrative services performed on its behalf.

John Stradwick, Jr., testified that the group of shareholders consisting of himself, his brother and his father in fact controlled Stradwick's Limited. It is perhaps not without significance that McGilvery attended and voted at all shareholders and directors' meetings of Stradwick's Limited, during the relevant periods, at which all resolutions were passed unanimously. However, in the view which I take of the issue in this appeal these facts are irrelevant.

The learned trial judge held that John Stradwick, Jr., W. L. Stradwick and H. D. McGilvery, who collectively owned more than 50 per cent of the shares of Stradwick's Limited, had at all material times a sufficient common connection as to be in a position to exercise control over Stradwick's Limited and therefore constituted a "group of persons" within the meaning of subs. (4) of s. 39 of the *Income Tax Act*. I am in agreement with that finding.

This Court considered the concept of "control" in *Minister of National Revenue v. Dworkin Furs Limited*[2]. Hall J. in delivering the judgment of the Court said at p. 227:

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

[2] [1967] S.C.R. 223, [1967] C.T.C. 50, 67 D.T.C. 5035, 60 D.L.R. (2d) 448.

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I.R.C.* (1943) 1 A.E.R. 13 where Viscount Simon L.C., at p. 15 says:
>
> > The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes.

Applying these principles, once it is established that a group of shareholders owns a majority of the voting shares of a company, and the same group a majority of the voting shares of a second company, that fact is sufficient, in my opinion, to constitute the two companies associated within the provisions of s. 39 of the *Income Tax Act*. Moreover, in determining *de jure* control more than one group of persons can be aptly described as a "group of persons" within the meaning of s. 39(4)(*b*). In my view, it is immaterial whether or not other combinations of shareholders may own a majority of voting shares in either company, provided each combination is in a position to control at least a majority of votes to be cast at a general meeting of shareholders.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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

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

1967
*June 14, 15, 16
1968
Jan. 23

CANADIAN MEMORIAL CHIROPRACTIC COLLEGE (*Claimant*) APPELLANT;

AND

THE CORPORATION OF THE MUNICIPALITY OF METROPOLITAN TORONTO (*Contestant*) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Fee simple in strip of land through claimant's property expropriated for subway construction—Subsequent agreement that only subsurface easement would be taken—Compensation award.

Costs—Cross-appeal on question of costs—Refusal by Supreme Court of Canada to interfere with disposition made in Court of Appeal—Matter one of discretion for Court of Appeal.

The respondent municipality expropriated a portion of the premises of the appellant college for purposes of subway construction. An arbitrator awarded the appellant the sum of $770,000, which amount included $70,000 for business disturbance. On appeal the award was reduced to $143,500. This sum was made up of $100,000 for the land, $8,500 for additional maintenance during the construction period and $35,000 to cover inconvenience and disruption over a long period of time, including the possible additional expense of subfootings for any buildings which the college might erect over the subway in the future.

The notice of expropriation expropriated the fee simple in a strip of land through the centre of the college property. However, the Court of Appeal found that, as a result of negotiations, an agreement was reached that the municipality would take not the fee simple but a subsurface easement.

From the order of the Court of Appeal the college appealed to this Court. The municipality cross-appealed on the award of $100,000 for the value of the land and also on the question of costs.

Held: The appeal and cross-appeal should be dismissed.

As held by the Court of Appeal, what was taken, pursuant to the agreement, was a permanent exclusive right under the surface of the land. The compensation to be awarded was for the value of what was taken and an amount to represent the diminution in value, if any, in the remaining lands. The Court of Appeal awarded $143,500 as full compensation for the lands taken, including all damage necessarily resulting from the expropriation of the land, plus interest. This Court was of opinion that it should not interfere with that award.

As to the cross-appeal on the question of costs, it was held that this Court should not interfere in a matter of costs with a disposition made in the Court of Appeal. The matter was one of discretion for them.

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

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from and varying an arbitrator's award of compensation for expropriation.

H. G. Chappell, Q.C., G. F. Henderson, Q.C., and *June M. Bushell,* for the appellant.

W. B. Williston, Q.C., George Mace and *R. J. Rolls,* for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—An arbitrator awarded the Canadian Memorial Chiropractic College the sum of $770,000 for the expropriation of a portion of its premises in the City of Toronto. The amount included $70,000 for business disturbance. On appeal the award was reduced to $143,500. This sum was made up of $100,000 for the land, $8,500 for additional maintenance cost during the construction period and $35,000 to cover inconvenience and disruption over a long period of time, including the possible additional expense of subfootings for any buildings which the college may erect over the subway in the future.

The by-law of the municipality was passed on April 21, 1959, for the purpose of the construction of an east-west subway by the Toronto Transit Commission. This subway runs through the middle of the college property.

A brief description of this property is necessary. It has a frontage of approximately 70 feet on Bloor Street, by a depth of 217 feet. This property was acquired in 1955 for $55,000. There was an old three-storey building on the property at that time containing 37 rooms. It had been used as a rooming-house. Immediately after the acquisition of this property, at a cost of $159,650, the college constructed a building of brick veneer construction 60 feet by 90 feet in dimensions. This building was referred to throughout the proceedings as the Henderson Building, and it was in this building that the teaching was done. The old building was used for administration purposes.

In 1957, 1958 and 1959 the college purchased three old houses on Prince Arthur Avenue. These houses backed upon the original purchase on Bloor Street. The purchase prices were $19,600, $22,500 and $22,000, a total of

1968

CANADIAN MEMORIAL CHIROPRACTIC COLLEGE v. MUNICIPALITY OF METROPOLITAN TORONTO

Judson J.

$64,100. The result of these acquisitions was that in 1959, when the by-law was passed, the college owned a block of land having a frontage on the north side of Bloor Street of approximately 70 feet and on the south side of Prince Arthur Avenue of 61 feet 3 inches, and having an approximate depth of 385 feet. The total cost of the acquisition of all the lands and the cost of constructing the Henderson Building was $278,650. At the time of expropriation the Prince Arthur Avenue houses were not being used by the college. They had been purchased with an eye to expansion and they were rented at this time. The land expropriated was a strip approximately 80 feet in width through the centre of the land. It included the northerly 37 feet of the Henderson Building and the balance of the strip was vacant land behind the houses fronting on Prince Arthur Avenue.

The notice of expropriation expropriated the fee simple in this strip. The Court of Appeal, however, has found that, as a result of negotiations, an agreement was reached that the municipality would take not the fee simple but a subsurface easement. By an agreement in writing dated November 6, 1961, the college agreed to convey to the municipality a permanent subsurface easement for an amount to be determined by agreement or arbitration. The following are the terms of the agreement:

By Indenture dated the 6th day of November, 1961, duly executed by the College under its corporate seal and the signatures of its President and Secretary-Treasurer, the College agreed to grant a permanent sub-surface easement under the lands more particularly described therein, and below a place more particularly described therein, for an amount to be determined either by mutual agreement or by arbitration. The said grant contained, inter alia, the following terms and provisions:

WHEREAS the Metropolitan Corporation requires a sub-surface easement under the lands hereinafter described; and

WHEREAS the Metropolitan Corporation has agreed to pay the sum of $10,000.00 to the Grantor as part payment on account of the ultimate compensation which may be found to be payable for the easement as hereinafter mentioned.

THEREFORE the Grantor agrees to grant a permanent sub-surface easement under the said lands more particularly described as follows:

. . . to The Municipality of Metropolitan Toronto for an amount to be determined either by mutual agreement between the parties or by arbitration;

The said sum of $10,000 is to be paid to the Grantor by the Metropolitan Corporation upon the delivery of this Agreement to the Metropolitan Corporation as part payment on account of the ultimate

compensation which may be found to be payable as aforesaid for the easement required by the Metropolitan Corporation under the said lands and the said sum of $10,000.00 shall be deducted from the ultimate compensation.

The balance of the said compensation shall be paid to the Grantor upon delivery to the Metropolitan Corporation of a transfer of the easement required including the consent of any parties who may have an interest in the said lands.

The municipality made payments on account from time to time totalling $50,000.

The Court of Appeal held, and with this I agree, that

Pursuant to the agreement what was taken was a permanent exclusive right under the surface of the land. The compensation to be awarded is for the value of what was taken and an amount to represent the diminution in value, if any, in the remaining lands.

The Court of Appeal put a value of $100,000 on the land taken and added to that the two items already mentioned totalling $43,500.

Three witnesses connected with the college in an official capacity gave evidence of the figures that they would have paid to avoid the expropriation and its attendant frustration. These figures were: $900,000, $1,000,000, $1,000,000. In the appellant's factum filed on this appeal, these figures were built up to $1,599,155.67. All these figures are meaningless. One big item in them is the claim for the demolition and rebuilding of the Henderson Building. Instead of the rear 37 feet of the Henderson Building being torn down, it was underpinned and the subway construction went on on that basis. The head of Cloke Construction Company, the firm that built the Henderson Building, said that the necessary repairs to the Henderson Building could be done at the cost of $9,029. Another contractor said it could be done for $9,780.

In any event, any claim for damage done during the course of construction of the subway was not before the arbitrator. This claim under the existing legislation could only be made against the Toronto Transit Commission. A writ was issued but no statement of claim was ever filed.

In spite of the length of the arbitration, on which I shall comment later, there was very little evidence given on the subject of the value of the lands expropriated. Mr. H. L. Croft, the appraiser called on behalf of the college, gave his opinion that the value of the lands expropriated by By-law

1968

CANADIAN MEMORIAL CHIROPRACTIC COLLEGE v. MUNICIPALITY OF METROPOLITAN TORONTO

Judson J.

No. 955 was $123,420 for the 82 foot strip. If the lands on either side of the subway were returned to the college after completion of the construction, Mr. Croft was of the opinion that the lands taken would have a value of $99,509. These amounts are based upon his definition of market value, and take into account the damage to the land from all causes including not only the value of the land actually taken but also injurious affection to the land remaining arising out of the expropriation.

It was argued by Metro that Mr. Croft's opinion was erroneous because he admitted that two of the comparable sales he used were in an area governed by zoning which permitted a greater use of the lands than the college's lands and further because he made no adjustments for depth in his comparables. He further assumed that the whole fee in the land was expropriated, whereas this was not the case, and he did not consider that the college could still enjoy the use of the lands over the subway structure.

Mr. P. J. Garton, an appraiser called by Metro, valued the loss of the permanent subsurface easement, including loss from all causes including damage to the remainder, at $44,100 plus the sum of $4,196 as the value of the temporary working easement, making a total of $48,296.

Based on this evidence, the municipality has cross-appealed on the award of $100,000 for the value of the land. The submission is that the Court of Appeal erred in awarding to the college the sum of $100,000 as the value of the subsurface easement based on the market value of the fee of the lands as determined by its highest and best use. It may be that the Court of Appeal took a somewhat generous view of the evidence in favour of the college. Its award is $143,500 as full compensation for the lands taken, including all damage necessarily resulting from the expropriation of the land, plus interest at 5 per cent per annum on the unpaid balance of compensation from December 15, 1959, until the date of payment. I do not think that this Court should interfere with this award.

There is also a cross-appeal on the question of costs. The arbitration took 55 days to complete. Thirty-seven days were taken up with a consideration of damage to the Henderson Building. There are 52 volumes of evidence, comprising 6,920 pages. According to the calculation of

counsel for Metro, 4,940 of these pages were taken up with this irrelevant evidence. Objections were made from time to time by counsel for Metro but were overruled. There are also eight volumes of exhibits, comprising 1,255 pages. The order of the Court of Appeal allows the appeal with costs but only allows Metro half the cost for the transcript of evidence and the preparation of the appeal books.

The college has been awarded its costs of the arbitration. It might well have been ordered to pay the costs for 37 days of this hearing or have been deprived of costs for those days. However, I do not think that we should interfere in a matter of costs with a disposition made in the Court of Appeal. The matter is one of discretion for them. But in view of the favourable disposition of costs in the Court of Appeal, I would not allow the college any costs of the cross-appeal, which, in any event, took but a short time in this Court.

I would dismiss the appeal with costs and I would also dismiss the cross-appeal but without costs.

Appeal dismissed with costs; cross-appeal dismissed without costs.

Solicitors for the appellant: Chappell, Walsh & Davidson, Toronto.

Solicitor for the respondent: A. P. G. Joy, Toronto.

1968
*Mar. 25

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 1-405, ARTHUR DAMSTROM and ELMER ATWOOD ..... APPLICANTS;

AND

FLANDERS INSTALLATIONS LTD. ..... RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeals—Interlocutory injunction—Motion for leave to appeal to Supreme Court of Canada—Application refused.

The applicant union was the legally certified bargaining agent for employees of Crestbrook Forest Industries Ltd. at the majority of its mills and logging operations. In the course of carrying on a legal strike against the company, the union picketed its property at Skookumchuck, British

*PRESENT: Cartwright C.J. and Martland and Hall JJ.

1968

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 1-405, *et al.* *v.* FLANDERS INSTALLATIONS LTD.

Columbia, whereon a pulp mill was being constructed by Crestbrook through contractors and subcontractors including Flanders Installations Ltd. The employees of Flanders and those of its subcontractors refused to cross the picket line. Flanders commenced an action against the union and two of its officers, claiming damages and an injunction restraining the defendants from picketing the construction site. The Chambers judge, who was of opinion that Crestbrook's Skookumchuck property fell within the phrase "the employer's place of business, operations, or employment" in s. 3(1) of the *Trade-unions Act*, R.S.B.C. 1960, c. 384, dismissed the application for an interim injunction. On appeal, the Court of Appeal, Davey C.J.B.C. dissenting, allowed the appeal and granted an injunction until the trial of the action or further order. An application was made to this Court on behalf of the defendants for leave to appeal from the judgment of the Court of Appeal.

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

APPLICATION for leave to appeal from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from an order of Kirke Smith L.J.S.C. and granting an interlocutory injunction. Application dismissed.

Maurice Wright, Q.C., and *J. B. Varcoe*, for the applicants.

G. F. Henderson, Q.C., and *M. Bray*, contra.

At the conclusion of the argument of counsel for the applicants the following judgment was delivered.

THE CHIEF JUSTICE (orally for the Court):—Mr. Henderson, we do not find it necessary to call upon you.

It is only under exceptional circumstances that we grant leave to appeal to this Court from an interlocutory order. It is said that a point of law of general importance is raised but it is seldom found satisfactory to attempt to deal with such a point until the facts have been ascertained at a trial.

In this case the writ was issued on November 20, 1967; the application for an interlocutory injunction was disposed of by His Honour Judge Smith on November 24, 1967, and by the Court of Appeal on December 15, 1967. The order of the Court of Appeal contains the following paragraphs:

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that either the Appellant or the Respondents be at liberty to apply to the Supreme Court of British Columbia.

[1] 68 C.L.L.C. para. 14,071.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that, without limiting the generality of the liberty to apply to the Supreme Court of British Columbia granted herein, the Respondents may apply to the Supreme Court of British Columbia to dissolve this injunction if the Appellant fails to proceed with diligence to bring the case to trial at the earliest date that is reasonably possible.

1968

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 1-405, *et al.* *v.* FLANDERS INSTALLATIONS LTD.

Cartwright C.J.

There is nothing in the material to indicate that diligence has been used to bring the action to trial. There appears to be no reason that the action should not be tried before, in the ordinary course, this appeal would be heard here, if leave were granted.

We are all of opinion that the application should be refused and it is accordingly dismissed with costs.

Application dismissed.

Solicitor for the applicants: John B. Varcoe, Trail.

Solicitors for the respondent: McMaster, Bray, Moir & Cameron, Vancouver.

BALSTONE FARMS LIMITED ..... APPELLANT;

AND

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

1967

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1968

Jan. 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital gain or income—Real estate transaction—Private company formed to dispose of farm land—Whether trading company or investing company—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

Mr. L and his wife had acquired several parcels of farm land and had them farmed under crop leases. In 1955, both being well in their seventies, they incorporated the appellant company by letters patent. The stated object of the company was to carry on the business of farming, and its shareholders were trustees for other members of the family and charities. The company then purchased the land from Mr. L and his wife at an appraised value of $144,000 in return for debentures and promissory notes. The company continued to have the lands farmed under crop leases. During the next few years, the company received the proceeds from the forfeiture of several options to purchase parts of the land and from the sale of part of the land. These monies were used to pay off the debentures and promissory notes. The Minister assessed all the monies received by the appellant

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

1968

BALSTONE FARMS LTD. v. MINISTER OF NATIONAL REVENUE

company as income. The appellant contended that the lands were acquired as a capital asset for the ultimate purpose of orderly and advantageous liquidation and that the receipts were capital gains. The Minister submitted that the profits were income from a business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148. The Exchequer Court upheld the Minister's assessment. The company appealed to this Court.

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

Per Martland, Judson, Ritchie and Hall JJ.: It was clear on the evidence that the real purpose of the company was not to carry on the business of farming but to acquire the farm lands with a view to selling them. The company was not realizing or selling these properties for the benefit of prior owners or creditors of prior owners, but was selling on its own behalf to make a profit. The only way the company could produce anything for the shareholders was to produce a profit. The company was in business for this purpose and the profits were correctly taxed.

Per Cartwright C.J., *dissenting:* On the evidence the appellant was not a trading company but a realization company. This realization was for the benefit of Mr. L and his wife and the relatives and charities. The company did not embark in a trade or a business. Its real function was simply to dispose of capital assets and to distribute the proceeds.

Revenu—Impôt sur le revenu—Gain de capital ou revenu—Transactions immobilières—Compagnie privée créée pour vendre une ferme—Compagnie de placement ou compagnie faisant le commerce—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(e).

Un monsieur L et sa femme avaient acquis plusieurs terres qu'ils faisaient cultiver par d'autres. En 1955, ayant 77 et 78 ans respectivement, ils ont formé, par lettres patentes, la compagnie appelante, dont l'objet déclaré était l'exploitation agricole et dont les actionnaires étaient des fiduciaires pour d'autres membres de la famille et pour des charités. La compagnie appelante a alors acheté la terre de monsieur L et de sa femme pour une somme de $144,000, valeur à laquelle la propriété avait été évaluée, en retour de titres d'obligations et de billets promissoires. La compagnie a continué de faire cultiver la terre par d'autres. Durant les quelques années suivantes, la compagnie a reçu des sommes d'argent provenant de l'abandon d'options d'acheter des parties de la terre et provenant aussi de la vente d'une partie de la terre. On s'est servi de ces argents pour acquitter les titres d'obligations et les billets promissoires. Le Ministre a cotisé les argents reçus par la compagnie appelante comme étant un revenu. La compagnie appelante prétend que les terres ont été acquises comme un bien en capital dans le but ultime d'en faire la liquidation d'une façon ordonnée et avantageuse, et que par conséquent les argents reçus étaient un gain de capital. Le Ministre prétend de son côté que les profits étaient un revenu provenant d'une entreprise dans le sens des arts. 3, 4 et 139(1)(*e*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148. La Cour de l'Échiquier a maintenu la cotisation du Ministre. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright étant dissident.

Les Juges Martland, Judson, Ritchie et Hall: La preuve démontre clairement que l'objet véritable de la compagnie n'était pas l'exploitation agricole mais bien l'acquisition de la terre dans l'intention de la revendre. La compagnie ne convertissait pas des biens en espèces ou ne vendait pas cette propriété pour le bénéfice des propriétaires antérieurs ou les créanciers de ces propriétaires, mais vendait à son compte dans le but de faire un profit. La seule manière que la compagnie pouvait rapporter quelque chose aux actionnaires était d'obtenir un profit. C'était là le but de l'entreprise de la compagnie et les profits avaient été à bon droit taxés.

Le Juge en Chef Cartwright, *dissident:* La preuve démontre que l'appelante n'était pas une compagnie faisant un commerce mais était une compagnie dont le but était de convertir des biens en espèces. Cette conversion était pour le bénéfice de monsieur L et de sa femme ainsi que pour les autres membres de la famille et pour les charités. La compagnie n'entreprenait pas un commerce. Sa fonction véritable était simplement de vendre des biens en capital et d'en distribuer le produit.

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

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

Stuart Thom, Q.C., and *T. E. J. McDonnell*, for the appellant.

M. A. Mogan and *M. J. Bonner*, for the respondent.

THE CHIEF JUSTICE (*dissenting*):—This is an appeal from the judgment[1] of Cattanach J. dismissing an appeal from the income tax assessments of the appellant for the taxation years 1957, 1958, 1959 and 1960.

While the record is voluminous the facts are not complicated and the question raised for decision is a narrow one.

The relevant facts are summarized in the reasons of my brother Judson and I shall endeavour to avoid repetition.

The sole question appears to me to be whether the appellant was a trading company or a realization company.

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[1] [1967] 2 Ex. C.R. 217, [1966] C.T.C. 738, 66 D.T.C. 5482.

1968

BALSTONE FARMS LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright C.J.

It is common ground that the farm lands which the late John and Minnie LePage transferred to the appellant in 1955 were capital assets in their hands. On the whole evidence the conclusion appears to me to be inescapable that the LePages decided to dispose of these assets as follows: (i) to have them sold in an orderly manner; (ii) out of the proceeds to retain for themselves $144,000 and (iii) to divide the balance of the proceeds among members of their family and certain charities. Had they carried out this intention without the intervention of the appellant there would be no basis for the suggestion that income tax would be payable. We are not concerned with the question whether the transactions would have attracted succession duty or gift tax. This, of course, does not dispose of the question. It is necessary to consider what the operations of the appellant in fact were.

If one looks at the Letters Patent the object of the appellant was to carry on the business of farming. If that were so the sale of its farm or farms would be the realization of a capital asset and would not attract income tax. However, the evidence makes it clear that it was intended to carry on farming operations for such a period only as would permit the orderly and advantageous sale of the farms. The mere fact that the sale of what is admittedly a capital asset is delayed in the expectation of obtaining a better price does not cause it to be transformed from an item of capital to one of inventory.

In *Commissioner of Taxes v. Melbourne Trust Limited*[2], Lord Dunedin said:

> . . . The argument for the respondents can be stated in a single sentence. They say they were not a trading company but a realization company; that the realization was truly for the benefit of the original creditors of the three banks; that all shareholders in the company are either such original creditors or the assignees of such original creditors. If that is the true view of the situation their Lordships do not doubt that the argument must prevail.

This passage may, I think, be adapted to the circumstances of the case at bar as follows:

> The appellant says that it is not a trading company but a realization company; that the realization was truly for the benefit of the LePages and the relatives and charities who were the objects of their bounty; that all shares in the company are held in trust for those relatives and charities.

[2] [1914] A.C. 1001 at 1009.

The argument so put is, in my view, in accordance with the evidence and is entitled to prevail. I do not find anything in the method used to give effect to the LePages' intention which requires or permits the Court to hold that the appellant was a company trading in lands.

I am unable to distinguish the case at bar from that of *C. H. Rand v. The Alberni Land Company, Limited*[3], in which, at p. 638, Rowlatt J. stated the question there raised as follows:

> Now the question is whether this Company has really only realised some property held as capital by those who became its shareholders, namely, the people entitled under the trust, or who started or founded the trust, or whether it has got to the point of embarking in a trade or business of which these receipts are the resulting profits.

The answer to such a question must depend on the facts of the particular case in which it arises. In the case at bar on the evidence taken as a whole it appears to me that it must be answered in favour of the appellant. The real function of the appellant was simply to dispose of capital assets and distribute the proceeds in accordance with the irrevocable direction of the original owners of those assets.

I would allow the appeal with costs in this Court and in the Exchequer Court and refer the assessments for the years in question to the respondent to be dealt with in accordance with these reasons.

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

JUDSON J.:—The issue in this appeal is whether the appellant, Balstone Farms Ltd., as a result of its sale of land and the granting and forfeiture of certain options for the sale of land, had taxable profits or whether the receipts were capital gains. The Exchequer Court[4] has held that the transactions give rise to taxable gains.

I begin with the statement of the acquisition of certain lands by an elderly couple, John and Minnie LePage, from the year 1944 to 1953. These lands were acquired in five

[3] (1920), 7 T.C. 629.

[4] [1967] 2 Ex. C.R. 217. [1966] C.T.C. 738, 66 D.T.C. 5482.

1968

BALSTONE FARMS LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

large parcels and they are just beyond the municipal boundary of the City of Winnipeg:

Date	*Acreage*	*Price*	*Location*	*Purchaser*
I. June 9, 1944	106	$ 4,500.00	Mun. of Assiniboia	John LePage
II. Dec. 14, 1944	154	$ 2,988.20	North Kildonan	John LePage
III. May 9, 1945	149.7	$ 6,680.00	Assiniboia	Minnie LePage
IV. Nov. 19, 1950	403	$12,896.00	North Kildonan	John LePage
V. Aug. 13, 1953	218	$15,000.00	Assiniboia	Minnie LePage
	1,030.7			

John LePage had been a broker and dealer in pulpwood. In 1954 he was 76 years of age and his wife was 77. In May of 1955, they incorporated Balstone Farms Ltd. Its objects as set out in Letters Patent were "to carry on in any capacity the business of farming and raising animals for any purpose". It is clear on the evidence that the real purpose was not to carry on the business of farming but to acquire these farm lands purchased by Mr. and Mrs. LePage with a view to selling them.

Immediately after incorporation, the company entered into an agreement with Mr. and Mrs. LePage to purchase the above listed land. The consideration received by John LePage was $83,000, made up of eight debentures of $10,000 each and a promissory note for $3,000. The consideration received by Minnie LePage was $61,000, made up of six debentures of $10,000 each and a promissory note for $1,000. To round out the acreage included in Parcel III above, the company purchased an additional 21.62 acres.

Mr. and Mrs. LePage received no shares in the company for the transfer of these lands. The sole consideration received by them was as above. They directed the shares of the company to be issued to four individuals in trust for members of the family and certain charities. The total share capital issued consisted of 100 fully paid common shares without par value. We are not concerned with the execution of these trusts. They were validly constituted and they do not affect the problem here.

Mr. and Mrs. LePage had no interest whatever in these shares either legal or equitable. They had parted with their land at an appraised value of $144,000 and they had no further interest in the company except as creditors for this amount. The cost of acquisition to the company was $144,000. The company continued the policy of Mr. and Mrs. LePage by having the lands farmed under crop leases.

In March of 1956 the company decided to sell sufficient land to pay off the debentures and promissory notes. In the same month it advertised for sale 496 acres in one district and 557 acres in another. The following is a list of the transactions in relation to these lands which give rise to this appeal:

(1) On April 13, 1956, it granted an option on 277 acres at $1,250 per acre. This option expired May 1, 1957 and the option payment of $15,000 was forfeited.

(2) On January 3, 1957, it granted an option on 557 acres at $1,250 per acre. The option expired on December 1, 1958, and the option payment of $5,000 was forfeited.

(3) On June 25, 1958, it entered into an agreement for the sale of 171 acres at a price of $1,700 per acre with a deposit of $5,000. The sale was not completed. Litigation followed and was eventually settled. As part of the settlement the company retained the deposit of $5,000.

(4) On June 30, 1959, it granted an option on 106 acres at $2,000 per acre with a deposit of $10,000. The option was renewed on January 2, 1960, with a further deposit of $5,000. This option expired on May 31, 1960. The two option payments of $10,000 and $5,000 were forfeited.

(5) On July 15, 1959, it granted an option to purchase 171 acres at $2,100 per acre. This option was exercised on May 30, 1960 and the purchase completed. The company realized a profit of $93,312.88 on this sale.

On reassessment, the Minister added Item I to the company's income for the 1957 taxation year; Items II and III to income for the 1958 taxation year; Items IV and V to income for the 1960 taxation year.

The first payments by the company to Mr. and Mrs. LePage on account of the debentures were made in September 1959 from the funds obtained from the forfeiture of the option payments above mentioned. The balance was paid in June 1961.

1968

BALSTONE FARMS LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

The finding of the learned trial judge on these facts was as follows:

> Here the lands were purchased by the appellant with a view to their resale and any income received during the interval prior to their sale was incidental to that principal and acknowledged purpose. The lands in the hands of the appellant were its inventory rather than capital assets which is the direct opposite to the facts as found in the Glasgow Heritable Trust case.

The company's submission before the Exchequer Court and on appeal to this Court was that the lands were acquired as a capital asset for the ultimate purpose of orderly and advantageous liquidation and that the receipts were capital gains. The Minister submitted that the company's profits from the above mentioned transactions were profits from business and therefore income within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

The appellant founded its argument essentially on three cases: *Rand v. The Alberni Land Company, Limited*[5]; *Glasgow Heritable Trust, Ltd. v. Commissioners of Inland Revenue*[6]; and *Commissioner of Taxes v. British Australia Wool Realization Association*[7]. These cases were concerned with the realization of assets and the incorporation of a company to serve as machinery for this purpose. Their ratio is to be found in the statement of Rowlatt J. in *Rand v. The Alberni Land Company Limited*, at p. 639:

> I think that in this case the company has done no more than provide the machinery by which the private landowners were enabled, under the peculiar circumstances of their divided title, to properly realise the capital of the property they held in the lands in question, and that is not income or proceeds of trade, ...

In none of these realization cases was there an out and out transfer by former owners for a cash consideration. When this company was formed, Mr. and Mrs. LePage transferred properties which had cost them approximately $42,000 for a consideration of $144,000. At that point they made a profit of $102,000 and their interest in the land ceased. The company was not "realizing" or selling these properties for the benefit of prior owners or the creditors of prior owners. The facts speak for themselves and fully

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[5] (1920), 7 T.C. 629.

[6] (1954), 35 T.C. 196.

[7] [1931] A.C. 224, 100 L.J.P.C. 28.

1968

BALSTONE FARMS LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

justify the finding of fact of the learned trial judge. The company was selling on its own behalf to make a profit and it is quite obvious from the facts and figures above quoted that the profit was there to be made. The only way the company could produce anything for those who were beneficially interested in the shares, i.e., the members of the family (excluding Mr. and Mrs. LePage) and charities, was to produce a profit. The company was in business for this purpose and the profits were correctly taxed by the Minister.

I attach no importance to the fact that this company was incorporated by Letters Patent. A company incorporated by Memorandum of Association would be in exactly the same position if it did what this company did.

I would dismiss the appeal with costs.

Appeal dismissed with costs, Cartwright C.J. dissenting.

Solicitors for the appellant: Newman & McLean, Winnipeg.

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

CAPITAL MANAGEMENT LIMITED ....APPELLANT;

AND

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

1967

*Nov. 29, 30

1968

Jan. 29

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital cost allowance—Acquisition of right to manage mutual fund for limited period—Whether "franchise, concession or licence"—Whether depreciable property—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(a)—Income Tax Regulations, s. 1100(1)(c), schedule B, class 14.

In 1959, the appellant company acquired for a substantial sum the right to manage two mutual funds for a period of ten years. The appellant was to be remunerated for its services by a commission. It was contended by the appellant that it was entitled to claim a capital cost allowance on the ground that it had acquired a depreciable property, *i.e.*, a "franchise, concession or licence for a limited period in respect of property" within the meaning of class 14 of schedule B of s. 1100(1)(*c*) of the Income Tax Regulations. The Exchequer Court

*PRESENT: Cartwright C.J. and Abbott, Hall, Spence and Pigeon JJ.

1968

CAPITAL MANAGEMENT LTD. v. MINISTER OF NATIONAL REVENUE

held that the rights acquired could not be described as a franchise, concession or licence in respect of property. The company appealed to this Court.

Held: The appeal should be dismissed.

The trial judge rightly adopted the view expressed in the *Investors Group v. M.N.R.*, [1965] 2 Ex. C.R. 520, that the words "franchise, concession or licence" in the statute were used to refer to some right, privilege or monopoly that enables the concessionnaire or franchise holder to carry on his business or that facilitates the carrying on of his business and that they were not used to refer to a contract under which a person was entitled to remuneration for the performance of specific services.

Revenu—Impôt sur le revenu—Coût en capital à titre d'allocation—Acquisition du droit de gérer un fonds mutuel pour une période déterminée—«Franchise, concession ou licence»—Bien susceptible de dépréciation—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(a)—Règlements de l'impôt sur le revenu, art. 1100(1)(c), cédule B, classe 14.

En 1959, la compagnie appelante a acquis pour un montant substantiel le droit de gérer deux fonds de placement mutuels pour une période de dix ans. L'appelante devait être rémunérée de ses services au moyen d'une commission. L'appelante prétend qu'elle a droit de réclamer une allocation du coût en capital pour le motif qu'elle avait acquis un bien susceptible de dépréciation, à savoir, une franchise, concession ou licence pour une période déterminée à l'égard d'un bien dans le sens de la classe 14 de la cédule B de l'art. 1100(1)(*c*) des Règlements de l'impôt sur le revenu. La Cour de l'Échiquier a statué que les droits en question ne pouvaient pas être décrits comme étant une franchise, une concession ou une licence à l'égard d'un bien. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le juge de première instance a eu raison d'adopter l'opinion exprimée dans la cause *Investors Group v. M.N.R.*, [1965] 2 R.C. de l'É. 520, à l'effet que dans le statut on se sert des mots franchise, concession ou licence en rapport avec un droit, un privilège ou un monopole permettant au concessionnaire ou au détenteur de la franchise d'exercer son commerce ou de lui en faciliter l'exercice, et que ces mots ne sont pas employés en rapport avec un contrat en vertu duquel une personne a droit d'être rémunérée pour des services spécifiques.

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

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[1] [1967] 2 Ex. C.R. 84, [1967] C.T.C. 150, 67 D.T.C. 5103.

1968

CAPITAL MANAGEMENT LTD. v. MINISTER OF NATIONAL REVENUE

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

R. de Wolfe MacKay, Q.C., and *C. C. Locke, Q.C.*, for the appellant.

G. W. Ainslie, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of Gibson J. in the Exchequer Court of Canada[1] pronounced on April 5, 1967, wherein he dismissed the appellant's appeal against its 1960 assessment. The Minister had refused to permit the appellant, in computing its income, to deduct the sum of $191,466.50.

By indentures dated October 1, 1954, between a corporation known as Capital Management Corporation Limited and the Montreal Trust Company, the All Canadian Dividend Trust Fund and The All Canadian Compound Fund mutual fund operations were established. These agreements designated the Capital Management Corporation as the manager of the trust funds and the Montreal Trust as the custodian of the assets thereof. Under that agreement, the Capital Management Corporation was entitled to a fee of not less than one-tenth of one per cent and not more than one-fifth of one per cent of the capital of the trust fund payable quarterly. There was no limitation on the period of time during which the Capital Management Corporation Limited was entitled to act as manager of the fund and receive the said fee although it might retire upon notice.

The appellant company was incorporated under the provisions of the British Columbia *Companies Act* on October 23, 1959. On October 31, 1959, the appellant entered into an agreement with Capital Management Corporation Limited, i.e., the existing manager under the trust deeds, whereby it purchased from the latter all its rights under the said trust deeds of October 1, 1954. The conveyance of

[1][1967] 2 Ex. C.R. 84, [1967] C.T.C. 150, 67 D.T.C. 5103.

1968

CAPITAL MANAGEMENT LTD. v. MINISTER OF NATIONAL REVENUE

Spence J.

such rights in the agreement of October 31, 1959, appears in para. 1 thereof as follows:

> 1. The Vendor hereby sells, transfers and assigns unto the Purchaser and the Purchaser hereby accepts the sale, transfer and assignment of all the vendor's exclusive right and concession under the Indentures for and in consideration of the price of one million, nine hundred and thirteen thousand and sixty dollars ($1,913,060) payable upon the execution hereof.

Immediately prior to that agreement of sale between Capital Management Corporation Limited and the appellant, the former had entered into amending agreements with the Montreal Trust Company which agreements were approved by the unit holders in both the All Canadian Dividend Fund and the All Canadian Compound Fund. By the agreements which were made on October 16, 1959, the manager, *i.e.*, at that time the Capital Management Corporation Limited, was given the exclusive right and concession to manage all moneys and securities held by the trustees subject to the terms of the trust agreement for the period from October 16, 1959, to October 15, 1969. Also by those agreements the fees which the manager was to receive from the trustees were fixed at one-eighth of one per cent of the capital, again payable quarterly. It is the contention of the appellant that it is entitled to claim a capital cost allowance of an amount equal to one-tenth of the purchase price of $1,913,060, as set out in para. 1 of the agreement quoted above under the provisions of the *Income Tax Act* and Regulations.

Section 11(1) of the *Income Tax Act* provides:

> 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 the taxation year:
>
> (*a*) such part of the capital cost to the taxpayer of property, or such amount in respect to the capital cost to the taxpayer of property, if any, as is allowed by regulation;

Regulation 1100(1) of the Income Tax Regulations provides:

> (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
>
> * * *

Patent, Franchise, Concession or Licence

(c) Such amount as he may claim in respect of property of class 14 in Schedule B not exceeding the lesser of

(i) the aggregate of the amounts for the year obtained by apportioning the capital cost to him of each property over the life of the property remaining at the time the cost was incurred, or

(ii) the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

* * *

Class 14 of Schedule B reads:

Property that is a patent, franchise, concession or licence for a limited period in respect of property but not including

(*the exclusions are irrelevant*).

The parties agree that Gibson J. correctly stated that the determination of the issue as to whether the appellant is entitled to such capital costs deduction is dependent upon the answer to the question:

Are the rights or obligations obtained and assumed by the appellant pursuant to the agreement between it and the Capital Management Corporation Ltd. dated October 31st, 1959, "property that is a patent, franchise, concession or licence for a limited period in respect of property"?

Of course, such rights are not a patent so the question narrows down to whether they were a franchise, concession or licence, and also whether they were "in respect of property".

Gibson J. held that the rights which the appellant received from its predecessor under the said agreement were essentially the right to act as a managing agent for a set fee and that such right could not be described as a franchise, concession or licence in relation to property, and he therefore dismissed the appellant's appeal from the assessment made by the Minister.

The appellant in its submission to Gibson J. and to this Court emphasized that its rights under the trust agreements which it purchased on October 31, 1959, were much more than the rights to act as manager for a fee, in that it had the sole right to designate the brokers who could sell the units in the two funds and was entitled to an acquisition fee of 2 per cent of the proceeds of the sale of any of those units. In addition, the broker or selling agent was

1968

CAPITAL MANAGEMENT LTD. v. MINISTER OF NATIONAL REVENUE

Spence J.

entitled to a commission of 6 per cent although sometimes less than 6 per cent was paid as discounts were given for large purchases.

Under the trust agreements, the appellant was entitled, in the words of article XVII, s. 5:

> 5. The Manager or any company in or with which it or its stockholders may be interested or affiliated or any officer or director of the Manager or of any such company may buy, sell, hold, own or deal in any of the certificates with the same rights as other holders thereof.

The appellant never did buy, sell, hold or deal in any of the certificates but it did purchase all the shares of an existing corporation known as General Mutual Funds Ltd. and that entity then sold a large number of units and obtained the 6 per cent commission aforesaid. The appellant obtained the 2 per cent acquisition fee on the units sold by General Mutual Funds Ltd. as well as on the units sold by a very large number of brokers all of whom it had chosen under its power in the trust deed. It is the appellant's submission that these rights are, therefore, a "franchise, concession or licence" within the aforesaid class 14 of regulation 1100.

The respondent submits that those words, "franchise, concession or licence in respect of the property" must be interpreted in the sense used by ordinary businessmen on this continent. Counsel for the respondent agrees that the words extend not only to certain kinds of privileges or monopolies conferred by virtue of statutory enactment but may also extend to rights created by contract between private parties. The respondent, however, submits that the English authorities dealing with similar words when used in contracts in reference to property are not helpful in interpreting the words used in income tax legislation on this continent. Counsel for the respondent, therefore, cites American dictionaries, and, particularly, Webster's International Dictionary, 3rd ed., which, at p. 902, defines "franchise" as:

> 3 a: a right or privilege conferred by grant from a sovereign or a government and vested in an individual or a group; specif; a right to do business conferred by a government—see FRANCHISE TAX b: a constitutional or statutory right or privilege; esp: the right to vote—usu. used with *the* c(1): the right granted to an individual or group to market a company's goods or services in a particular territory (2): the territory involved in such a right d: a contract for public works or public services granted by a government to an

individual or company e(1): the right of membership granted by certain professional sports leagues (2): such membership itself (3): a team and the professional organization operating it having such membership f: the right to present, broadcast, or televise the events put on by a sports league or organization ...

And at p. 470 where "concession" is defined as:

a: a grant of land or other property esp. from a government in return for services rendered or proposed or for a particular use; *specif:* a tract granted to a foreign power in a Chinese treaty port or other trading center and permitted rights of extraterritoriality and local self-government b: a usu. exclusive right to undertake and profit by a specified activity [a—to build a canal] [conflicting —s in the oil fields] c: a lease of premises or a portion of premises for a particular purpose, esp. for some purpose supplementary to another activity (as the storing of wraps of patrons of a theatre) or for providing entertainment; *often:* the premises covered by such a concession or the activities for which it is granted [it was reported that some of the —s at the fair were not honest] . . .

And at p. 1304, where "licence" is defined as:

3 a(1): a right or permission granted in accordance with law by a competent authority to engage in some business or occupation, to do some act, or to engage in some transaction which but for such licence would be unlawful [a—to sell liquor] [a marriage] —[a—to practice medicine] (2): a document evidencing a licence granted ...

There seems to have been only one decision in Courts in Canada which has any direct application to the present situation: *The Investors Group v. M.N.R.*[2], where Jackett P. considered a like appeal and expressed the view that the words "franchise, concession or licence" in the statute were used to refer to some right, privilege or monopoly that enables the concessionaire or franchise holder to carry on his business or that facilitates the carrying on of his business and that they were not used to refer to a contract under which a person was entitled to remuneration for the performance of specific services. Gibson J. adopted this view in dismissing the appellant's appeal. Counsel for the appellant submits that the present case should be distinguished from *Investors Group v. M.N.R.* on the ground that in that case all the taxpayer obtained under the agreement was a power to procure and recommend salesmen with a duty to finance their expenditures and that there was nothing to show that such power was an exclusive power. It is true that in the report of the case in 18 Dominion Tax Cases at page 457, Mr. St. Onge dealt with

[2] [1965] 2 Ex. C.R. 520, [1965] C.T.C. 192, 65 D.T.C. 5120.

1968

CAPITAL MANAGEMENT LTD. v. MINISTER OF NATIONAL REVENUE

Spence J.

those circumstances but I did not find that the learned President in considering the appeal in the Exchequer Court placed any reliance whatsoever upon them. On the other hand, he based his decision solely on a consideration of the proper interpretation to be given to the words "franchise, concession or licence" in business practice on this continent.

Counsel for the respondent submits that the appellant in relying on the power which it alleges it had to deal with the units and advancing that power as one reason in interpreting its rights as a franchise, is misconstruing the power granted to it in the two trust deeds. Counsel for the respondent points out that the trust deeds themselves carefully distinguished between shares and certificates for shares, so in the trust deed setting up the All Canadian Dividend Fund it is provided in article IV, para. 2, "shares may be purchased by or through persons authorized by the manager", and in para. 3, "upon receipt of the purchase price of a *share or shares* by the trustee, the trustee shall issue to each such purchaser of such *share or shares* a *certificate* representing the number of shares purchased by him", while in article XVII, para. 5, it is provided:

> 5. The Manager or any company in or with which it or its stockholders may be interested or affiliated or any officer or director of the Manager or of any such company may buy, sell, hold, own or deal in any of the certificates with the same rights as other holders thereof.

(The underlining is my own).

And by article XVI, para. 2, the same exact right is given to the trustee. I am in agreement with this submission of counsel for the respondent that the power given to the manager and, as I have said, also to the trustee, to deal in certificates is not a power by which it may purchase shares from treasury, but merely a power permitting it to buy and sell on the market certificates for such shares once they have been issued, a power which, of course, is a very frequent one in contracts appointing trustees of a fund or managing agents of a fund when those trustees or managing agents are in the business of dealing in securities and holding investments. Once this interpretation is accepted then the position of the appellant is reduced to that of a managing agent with a right to designate selling agents and to obtain a 2 per cent acquisition fee on sales of all

shares by such agents. It is difficult to distinguish between that position and the position of the appellant in *Investors Group v. M.N.R.*, and I have already expressed my agreement with the view of the learned President in that decision.

This is sufficient to dispose of the appeal. I, therefore, find it unnecessary to refer to another submission made by counsel for the respondent, *i.e.*, that whether the rights of the appellant are or are not a "franchise, concession or licence" they are not "in respect of property". I prefer to express no opinion on that submission.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Duquet, MacKay, Weldon, Bronstetter, Willis & Johnston, Montreal.

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

FURNESS, WITHY & COMPANY LIMITED ..... APPELLANT;

AND

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

1967
*Dec. 1, 4, 5

1968
Jan. 29

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Shipping company—Income from business carried on in Canada by non-resident—Operation of ships—Canada-U.K. Tax Agreement (1946), Articles II, III, IV, V—Income Tax Act, R.S.C. 1952, c. 148, ss. 2(2), (4), 10(1)(c), 31(1).

The appellant shipping company was incorporated in the United Kingdom and was a resident in that country but not in Canada, where it operated branch offices at various ports. In Canada, it carried on the business of a general agent or ship broker, and in relation to ships owned by it, performed the duties and functions which would normally be performed by a general agent or ship broker. It also carried on the business of stevedoring in Canada and, in relation to some ships owned by it, performed the duties and functions which would normally be performed by a stevedore. It also performed similar services as agent, ship broker or stevedore for ships owned by other companies, in many of which the appellant, as a shareholder, held either a majority or a minority interest. Two issues were raised in this case: (1) Whether the income earned in Canada by the appellant as

*PRESENT: Cartwright C.J. and Abbott, Judson, Ritchie and Pigeon JJ.

1968

FURNESS, WITHY & CO. LTD. v. MINISTER OF NATIONAL REVENUE

general agent or stevedore was income "earned in Canada from the operation of a ship" within the meaning of s. 10(1)(*c*) of the *Income Tax Act* and Article V of the Canada-U.K. Tax Agreement (1946), and (2) Whether income it earned in Canada in respect of servicing or stevedoring its own ships whilst in Canada was also that kind of income.

The Exchequer Court held: (1) that neither s. 10(1)(*c*) of the Act nor Article V of the Convention exempted earnings of the appellant from managing or agency or stevedoring services which it rendered in Canada to other corporations; (2) that the appellant was entitled to exemption under these provisions in respect of the portions of the amounts treated as income by the Minister which arose from entries of charges made by the branches for agency and stevedoring services to ships which were owned or chartered by the appellant and operated in its own service; (3) that the appellant was entitled to deduct, in computing its income from business carried on in Canada, that portion of general head office administration expenses properly chargeable to its operations in Canada.

The company appealed to this Court from the first finding and the Minister cross-appealed as to the second. The third finding was not in issue.

Held: The appeal and the cross-appeal should be dismissed.

Nothing needed be added to the reasons for judgment delivered by the trial judge. However, no reliance was placed upon the French text of the Canada-U.K. Tax Agreement.

Revenu—Impôt sur le revenu—Compagnie de navigation—Revenu provenant d'une entreprise exercée au Canada par une compagnie non résidante—Exploitation de navires—Convention entre le Canada et le Royaume-Uni relative à l'impôt (1946), Articles II, III, IV, V—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 2(2), (4), 10(1)(c), 31(1).

L'appelante, une compagnie de navigation, a reçu son incorporation au Royaume-Uni et était une résidenté de ce pays mais non pas du Canada, où elle opérait des succursales dans plusieurs ports. Au Canada, l'appelante agissait comme agent général ou courtier maritime, et accomplissait, par rapport aux navires lui appartenant, les devoirs et charges qui sont normalement accomplis par un agent général ou courtier maritime. Elle s'occupait aussi de l'arrimage des navires au Canada et accomplissait, par rapport à certains navires lui appartenant, les devoirs et charges qui sont normalement accomplis par un arrimeur. Elle agissait aussi comme agent, courtier maritime ou arrimeur pour des navires appartenant à d'autres compagnies et dont elle détenait, comme actionnaire, une majorité ou une minorité des actions. Deux questions se soulèvent dans cette cause: (1) Est-ce que le revenu gagné au Canada par l'appelante comme agent général ou arrimeur était un revenu «gagné au Canada par suite de l'exploitation d'un navire» dans le sens de l'art. 10(1)(*c*) de la *Loi de l'impôt sur le revenu* et de l'Article V de la Convention entre le Canada et le Royaume-Uni relative à l'impôt (1946), et (2) Est-ce que le revenu qu'elle a gagné au Canada par suite des services d'arrimage ou autres rendus à ses propres navires alors qu'ils étaient au Canada tombait aussi dans cette catégorie.

La Cour de l'Échiquier a statué: (1) que ni l'art. 10(1)(*c*) de la Loi et ni l'Article V de la Convention n'exemptaient les recettes provenant des services de gérant ou d'arrimeur que la compagnie a rendus au Canada à d'autres corporations; (2) que l'appelante avait droit à une exemption, en vertu de ces dispositions, quant à la partie des montants, considérés par le Ministre comme étant un revenu, provenant de charges soumises par les succursales pour des services d'agence et d'arrimage à des navires lui appartenant ou affrétés par elle et affectés à ses propres services; (3) que l'appelante avait droit de déduire, en calculant le revenu lui provenant d'une entreprise exercée au Canada, cette partie des dépenses générales provenant de l'administration du bureau-chef, qui était à bon droit à la charge des opérations au Canada.

La compagnie en appela devant cette Cour à l'encontre de la première conclusion de la Cour de l'Échiquier, et le Ministre produisit un contre-appel à l'encontre de la deuxième conclusion. La troisième conclusion de la Cour de l'Échiquier n'est pas en question.

Arrêt: L'appel et le contre-appel doivent être rejetés.

Il n'y a rien à ajouter aux motifs du jugement rendu par le juge de première instance. Cependant, le tribunal déclare ne pas s'appuyer sur le texte français de la Convention entre le Canada et le Royaume-Uni relative à l'impôt.

APPEL et CONTRE-APPEL d'un jugement du Juge Thurlow J. of the Exchequer Court of Canada[1], in an d'impôt sur le revenu. Appel et contre-appel rejetés.

APPEAL and CROSS-APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal and cross-appeal dismissed.

H. Heward Stikeman, Q.C., W. David Angus and *Peter F. Cumyn,* for the appellant.

G. W. Ainslie and *M. A. Mogan,* for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal and cross-appeal from a judgment of Mr. Justice Thurlow of the Exchequer Court of Canada[1], which allowed in part the appellant's appeal from income tax assessments made for its taxation years 1957 to 1963 inclusive.

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[1] [1967] 1 Ex. C.R. 353, [1966] C.T.C. 482, 66 D.T.C. 5358.

1968

FURNESS, WITHY & CO. LTD. v. MINISTER OF NATIONAL REVENUE

Abbott J.

The principal issue on both the appeal and cross-appeal is the meaning to be ascribed to the phrase, "income...earned in Canada from the operation of a ship" found in para. (*c*) of subs. (1) of s. 10 of the *Income Tax Act*, R.S.C. 1952, c. 148, and the phrase "profits which a resident...derives from operating ships" found in Article V of the Tax Convention of June 5, 1946, between Canada and the United Kingdom of Great Britain and Northern Ireland; Statutes of Canada 1946, c. 38.

This raises two questions, namely:

(1) Whether income which the appellant earned in Canada in its character as a general agent or stevedore is "income...earned in Canada from the operation of a ship" or "profits which...(the appellant) derives from operating ships"; and

(2) Whether income which the appellant earned in Canada in respect of servicing or stevedoring its own ships whilst in territorial waters in Canada is "income... earned in Canada from the operation of a ship" or "profits which ... (the appellant) derives from operating ships".

Section 10(1)(*c*) of the *Income Tax Act* provides:

10. (1) There shall not be included in computing the income of a taxpayer for a taxation year

(*c*) the income for the year of a non-resident person earned in Canada from the operation of a ship or aircraft owned or operated by him, if the country where that person resided grants substantially similar relief for the year to a person resident in Canada.

Article V of the Canada-U.K. Tax Convention provides:

Notwithstanding the provisions of Articles III and IV, profits which a resident of one of the territories derives from operating ships or aircraft shall be exempt from tax in the other territory.

There is no serious dispute between the parties as to the relevant facts. The appellant was incorporated under the laws of the United Kingdom and has its registered office in London. It operates branch offices at various Canadian ports and its chief Canadian office is at Montreal. It is common ground that appellant is resident in the United Kingdom and is not resident in Canada.

In Canada, the appellant carries on the business of a general agent or ship-broker and, in relation to ships owned by it, performs the duties and functions which

would normally be performed by a general agent or ship-broker. Also, the appellant carries on the business of stevedoring in Canada and, in relation to some ships owned by it, performs the duties and functions which would normally be performed by a stevedore. It also performs similar services as agent, ship-broker or stevedore for ships owned by other companies, in many of which appellant, as a shareholder, holds either a majority or minority interest.

The learned trial judge held:

1. That neither s. 10(1)(*c*) of the *Income Tax Act* nor Article V of the Tax Convention exempts earnings of the appellant from managing or agency or stevedoring services which it renders in Canada to other corporations.
2. That appellant is entitled to exemption under these provisions in respect of the portions of the amounts treated as income by the Minister, which arose from entries of charges made by the branches for "agency" and stevedoring services to ships which were owned or chartered by the appellant and were operated in its own service.
3. That appellant is entitled to deduct, in computing its income from business carried on in Canada, that portion of general head office administration expenses properly chargeable to its operations in Canada.

Appellant appealed to this Court from the first finding and the Minister cross-appealed as to the second. There is no cross-appeal from the third finding.

There is nothing that I can usefully add to the able and exhaustive reasons for judgment of Thurlow J., with which I am in agreement, and I am content to adopt them with one minor exception. In interpreting Article V of the Canada-U.K. Tax Convention, I do not rely upon the translation of the Convention, which appears as a Schedule to the French text of the Statutes of Canada 1946, c. 38.

I would therefore dismiss the appeal and the cross-appeal with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellant: Stikeman, Elliott, Tamaki, Mercier & Robb, Montreal.

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

90288—3

1967
*Dec. 13, 14
1968
Jan. 29

GUNNAR MINING LIMITED ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Mining company—New mine—Exemption for 3 years—Deduction of interest paid on debentures from interest received from investments—Whether interest on debentures to be considered in computation of depletion base—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(c), 12(1)(c), 83(5)—Income Tax Regulations, s. 1201(2), (4)(d).

In 1954, the appellant company borrowed $19,500,000 by way of a debenture issue and used the money to develop its uranium mine. The 36-month taxation exemption period under s. 83(5) of the *Income Tax Act*, R.S.C. 1952, c. 148, commenced on March 1, 1956, and ended on February 28, 1959. During that period the income derived from the operation of its mine was not included in computing the appellant's income for tax purposes. By 1957, the appellant was able to accumulate profits from the production of the mine at such a rate that they exceeded the requirements for the payment of interest on the debentures as well as the requirements for repayment of the said debentures. The company decided then to invest its profits in short term investments. In assessing the appellant, the Minister added to the taxable income of the appellant the income received from the short term investments for the years 1958, 1959 and 1960. The appellant submitted that, in accordance with recognized accounting practice, the interest paid on the debentures should be deducted from the interest received on the short term investments so as to report only the net amount as income. It argued that during the tax exempt period, the interest paid could be regarded as a cost of earning the non-exempt income received from the short term investments. It argued further that, following the tax exempt period, the interest paid on the debentures should not be deducted in computing its depletion base under s. 1201(2) of the Income Tax Regulations. The Exchequer Court affirmed the Minister's assessment. The company appealed to this Court.

Held: The appeal should be dismissed.

The income from the short term investments was not income derived from the operation of the mine within the meaning of s. 83(5) of the *Income Tax Act*, but was income derived from the investment of the profits of the mine. That income could not be claimed as exempt under the Act.

The Minister rightly refused to allow a depletion allowance upon the income received from the short term investments. Such income could not be considered as profits for the taxation year reasonably attributable to the production of prime metal or industrial minerals, within the meaning of s. 1201(2) of the Regulations.

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*PRESENT: Cartwright C.J. and Abbott, Hall, Spence and Pigeon JJ.

Revenu—Impôt sur le revenu—Compagnie minière—Nouvelle mine—Exemption pour 3 ans—Déduction des intérêts payés sur des titres d'obligations d'intérêts provenant d'investissements—L'intérêt sur les titres d'obligations doit-il être considéré dans le calcul de la base de déduction—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 11(1)(c), 12(1)(c), 83(5)—Règlements de l'impôt sur le revenu, art. 1201(2), (4)(d).

En 1954, la compagnie appelante a emprunté $19,500,000 sur émission de titres d'obligations et a utilisé cet argent pour développer une mine d'uranium lui appartenant. La période de 36 mois d'exemption de taxe sous l'art. 83(5) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, a commencé le 1er mars 1956 pour se terminer le 28 février 1959. Durant cette période le revenu provenant de l'exploitation de sa mine n'a pas été inclus dans le calcul du revenu de l'appelante pour fins de taxation. Dès l'année 1957, les profits provenant de la production de la mine s'accumulaient à un tel degré qu'ils excédaient les montants requis pour payer l'intérêt sur les titres d'obligations ainsi que pour faire les versements en vue du rachat de ces titres d'obligations. La compagnie a alors décidé d'investir ses profits dans des investissements à court terme. Dans la cotisation des revenus de l'appelante, le Ministre a ajouté au revenu taxable le revenu provenant des investissements à court terme pour les années 1958, 1959 et 1960. L'appelante soutient que selon la pratique reconnue en comptabilité, l'intérêt payé sur les titres d'obligations devait être déduit de l'intérêt provenant des investissements à court terme pour que seul le montant net soit déclaré comme revenu. Elle soutient que durant la période d'exemption de taxe, l'intérêt qu'elle payait pouvait être considéré comme étant une partie du coût requis pour gagner le revenu non exempt provenant des investissements à court terme. Elle soutient de plus qu'une fois la période d'exemption de taxe terminée, l'intérêt qu'elle payait sur les titres d'obligations ne devait pas être déduit dans le calcul de la base de déduction sous l'art. 1201(2) des Règlements de l'impôt sur le revenu. La Cour de l'Échiquier a confirmé la cotisation du Ministre. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le revenu provenant des investissements à court terme n'était pas un revenu provenant de l'exploitation de la mine dans le sens de l'art. 83(5) de la *Loi de l'impôt sur le revenu*, mais était un revenu provenant de l'investissement des profits de la mine. On ne peut pas dire que ce revenu était exempté sous la loi.

C'est avec raison que le Ministre a refusé de permettre une déduction sur le revenu provenant des investissements à court terme. Un tel revenu ne pouvait pas être considéré comme étant un profit pour l'année de taxation raisonnablement imputable à la production du métal brut ou de minéraux industriels dans le sens de l'art. 1201(2) des Règlements.

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

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[1] [1966] Ex. C.R. 310, [1965] C.T.C. 387, 65 D.T.C. 5241.

1968

GUNNAR MINING LTD. v. MINISTER OF NATIONAL REVENUE

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

R. M. Sedgewick, Q.C., and *J. A. Langford,* for the appellant.

D. G. H. Bowman and *Paul Dioguardi,* for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Exchequer Court[1] delivered on September 30, 1965, which dismissed the appeal from the decision of the Tax Appeal Board delivered on September 24, 1963. By that decision the Tax Appeal Board had confirmed the assessment of the Minister as to the 1958, 1959 and 1960 income tax payable by the appellant.

The Minister in his assessment had added to the taxable income of the appellant income from short term investments received in each of the said years. The following were the circumstances.

The appellant, or perhaps one might more correctly say the appellant's predecessor Gunnar Mines Limited, was developing a very large uranium ore open pit mine at Beaver Lodge in the Lake Athabasca area of Saskatchewan. The ore had been sold to Eldorado Mining & Refining Limited under a contract providing for total payments of nearly $77,000,000. Gunnar Mines Limited determined to borrow on debenture a capital sum of $19,500,000 and for such purposes issued 5 per cent debentures in that sum. The Canada Permanent Trust Company was the trustee for the debenture holders and as such received the net proceeds of the sale of the debentures in the sum of $18,700,000. The said proceeds were held by the said trust company and paid out to Gunnar Mines Limited from time to time upon the latter's certificates as to the payment of the costs of construction of the proposed mine. Those parts of the proceeds of the debentures issued which were not immediately required by Gunnar Mines Limited for the purpose of expenditure upon the construction of the mine

[1] [1966] Ex. C.R. 310, [1965] C.T.C. 387, 65 D.T.C. 5241.

were kept invested by the trustee in short term securities and the income therefrom in the amount of $104,000 was used by Gunnar for construction purposes. That item of $104,000 was charged againt the 5 per cent interest payable on the outstanding debentures. In making its 1954 and 1955 income tax returns, Gunnar divided the sum of $104,000 between these two taxation years and deducted the two amounts from the interest paid on the 5 per cent sinking fund debenture. That process was permitted by the Minister in the two years mentioned.

The mine was completed in October 1955 and all the proceeds of the debentures were paid out by the trustee to Gunnar on or before that time. The income tax authorities agreed to consider the period between October 1955 and February 28, 1956, as a run-in period and to take the following day, i.e., March 1, 1956, as the first day upon which production of the mine commenced. This was for the purpose of applying the 36-month taxation exemption under s. 83(5) of the *Income Tax Act* to which reference shall be made hereafter.

Production of uranium from the mine was so successful that the taxpayer was able to accumulate profits therefrom at such a rate that they exceeded the requirements for the payment of interest on the debentures and also the requirements for repayment in instalments of the said debentures. Under the trust deed, those debentures were to be redeemed as follows:

October 1, 1956	$ 2,500,000
October 1, 1957	4,250,000
October 1, 1958	4,250,000
October 1, 1959	4,250,000
October 1, 1960	4,250,000
Total	$19,500,000

The company, therefore, had to determine its course. It could use these funds to redeem the sinking fund debentures prior to their due date or the company could go out into the market and purchase for cancellation the said sinking fund debentures or it could invest its profits in such short term securities as would permit it to redeem the sinking fund debentures in accordance with the terms of

1968

GUNNAR MINING LTD. v. MINISTER OF NATIONAL REVENUE

Spence J.

the trust deed. Had the company called the sinking fund debentures for redemption prior to their due date it would have been required to pay a premium. It was informed by its financial advisers that if it sought to go into the market to purchase the said sinking fund debentures for cancellation the market would immediately react so that the price would increase to equal the premium for redemption prior to the due date and the company therefore determined to invest its profits in short term securities.

In the three years under consideration, i.e., 1958, 1959 and 1960, this resulted in the taxpayer receiving an income from the said short term securities as follows:

1958	$231,197.94
1959	412,852.85
1960	504,763.64 (as adjusted by the Minister in his reassessment)

During the same years, the liability for interest upon the 5 per cent sinking fund debentures of the taxpayer was in these amounts:

1958	$485,878.00
1959	263,092.00
1960	114,603.00

The 36-month exemption period allowed by s. 83(5) to which I have referred above having commenced on March 1, 1956, ended on that day in 1959, and therefore the 1959 figures must be divided so that the first two months showed an income from short term investments of $68,922.28 and the remaining ten months in the next exemption period showed an income from such short term investments of $343,930.57, while the interest payable on the 5 per cent sinking fund debentures in the first two months was $60,152 and in the remaining ten months, *i.e.*, the non-exempt period, was $175,940. That the financial advisers' opinion was a sound one is demonstrated by the fact that during those three years the interest payable on the 5 per cent sinking fund debentures totalled $836,572.90 while the income received on the short term investments made by the company out of its profits in the same three years totalled $1,148,814.20, a credit of $312,241.30.

Mr. Richard M. Parkinson, a chartered accountant, described before Gibson J. in the Exchequer Court the method used by the company in its accounting. His evidence is summarized by the learned Exchequer Court Judge as follows:

The evidence of Mr. Parkinson in brief was that it was proper from a commercial and business point of view for the Appellant, or indeed for any business, to differentiate in its statement of income and expenditures between what he refers to as "operating items" and "non-operating items".

The figure obtained by considering only operating items, this witness said, results in arriving at a figure of "operating income". This is done by first obtaining the figure of gross sales less returns, allowances, etc., and subtracting from that sum the cost of sales to arrive at a figure for gross profit. From this figure is then deducted selling expenses and general and administrative expenses from which the figure of operating income is obtained.

Then this witness said it is proper to consider the non-operating items in the business.

These non-operating items the witness said are categorized as "other income", and include interest and dividends and miscellaneous items on the receipt side and also on the disbursement side; and from which there is computed the figure of income before federal and other taxes. Then the witness said that it is proper to make a computation of federal and other taxes and subtract the figure so found from the figure of income above referred to, in order to obtain the figure of "net income" of the business for the fiscal year.

The learned Exchequer Court Judge in his reasons said:

I accept Mr. Parkinson's evidence in so far as it describes a method currently recommended as good practice and employed by many accountants in determining the profit or loss of a company from its business operations including miscellaneous revenues of investments of surplus cash. His method no doubt is not only good accounting practice, but is also acceptable as a method of determining the company's income for the purpose of the *Income Tax Act* for a fiscal year (when the company is taxable on its income from all sources) in that it is not contrary to any particular statutory direction.

In the matter under appeal, however, what is being considered is not income for the year from all sources but income from a source other than the company's mining business, namely, the income from its short term investments.

(The underlining is my own).

I am in agreement with that comment.

Section 83(5) of the *Income Tax Act* provides:

83. (5) Subject to prescribed conditions, there shall not be included in computing the income of a corporation income derived from the operation of a mine during the period of 36 months commencing with the day on which the mine came into production.

1968

GUNNAR MINING LTD. v. MINISTER OF NATIONAL REVENUE

Spence J.

Section 11(1)(*c*) of the said *Income Tax Act* provides:

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*c*) an amount paid in the year or payable in respect of the year (depending upon the method regularly followed by the taxpayer in computing his income), pursuant to a legal obligation to pay interest on
>
> (i) borrowed money used for the purpose of earning income from a business or property (other than borrowed money used to acquire property the income from which would be exempt),
>
> (ii) an amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business (other than property the income from which would be exempt), or
>
> (iii) an amount paid to the taxpayer under . . .

The appellant, therefore, was entitled under s. 11 of the *Income Tax Act* to deduct from its income the interest which it would be required by law to pay on the 5 per cent sinking fund debentures. That amount in the year 1958 was $485,878, in the year 1959 was $236,092, and in the year 1960 was $114,603.

The appellant did not deduct those amounts from its taxable income but in each year a smaller amount which resulted from crediting against that interest payable the income received from its short term investments. In fact in 1959 and 1960 that income far exceeded the interest payable. The result in the tax exempt period which covers the whole of the year 1958 and the first two months of 1959 was that those amounts of income from short term investments were thrown into the income from the operation of the mine and therefore claimed as exempt under s. 83(5) of the *Income Tax Act*. What is exempt under the latter section is "income derived from the operation of a mine". The income from the short term investments was not income derived from the operation of the mine but was income derived from the investment of the profits of the mine. This income from the short term investments cannot be regarded as incidental income in the operation of the mine any more than any other income gained from use of the profits of the mine could be so considered.

As the learned member of the Tax Appeal Board noted in his reasons:

> Even if Gunnar had held the surplus revenue from its mine on deposit, the bank interest could not be said to be derived from the operation of its mine.

Counsel of the appellant stressed the circumstance that in the tax exempt period the corporation also showed as incidental income rental which it received from the letting of certain houses at the mine property and argued that the income from the short term securities was just another form of income incidental to the mining operation. I do not think that the argument can be accepted. Those houses were built by the company so that its workers at the mine might reside therein. Certainly their construction and letting, and the receipt of rental therefrom, was incidental to the operation of the mine. To put it perhaps colloquially, during the tax exempt period the appellant was operating two businesses—firstly, a mining business, and secondly, an investment business, and the fact that its purpose in operating the second business was so that it might accumulate funds in a readily realizable form with which it could pay off the 5 per cent sinking fund debentures if they became due makes it nonetheless the operation of a second business.

In my view, this is sufficient to dispose of the appellant's appeal in reference to the tax exempt period ending on February 28, 1959.

The appellant's appeal as to the non-exempt period being the last ten months of the year 1959 and the last eleven months of the year 1960 (the fiscal year having been altered to end on November 30) deals with the Minister's refusal to allow the quantum of the depletion allowance claimed by the appellant as authorized by regulation 1201(2) made under the *Income Tax Act*. The said regulation provides:

> 1201. (2) Where a taxpayer operates one or more resources, the deduction allowed is 33⅓% of
>
> (*a*) the aggregate of his profits for the taxation year reasonably attributable to the production of oil, gas, prime metal or industrial minerals from all of the resources operated by him
>
> * * *

1968

GUNNAR MINING LTD. v. MINISTER OF NATIONAL REVENUE

Spence J.

The appellant claimed a depletion allowance upon its total income including income from these short term investments. As the learned Exchequer Court Judge remarked:

> In the matter under appeal, however, what is being considered is not income for the year from all sources but income from a source other than the company's mining business, namely, the income from its short term investments.

It would seem that the income from such short term investments could not possibly be considered as "profits for the taxation year reasonably attributable to the production of ...prime metal or industrial minerals...". I am, therefore, of the opinion, that the Minister's limitation on the depletion allowance as confirmed by the Income Tax Appeal Board and the Exchequer Court was a proper one.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Miller, Thomson, Hicks, Sedgewick, Lewis & Healey, Toronto.

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

1967

*Oct. 23

1968

Jan. 23

THOMAS WILLIAM HIND .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Criminal law—Appeals—Jurisdiction—Leave to appeal—Dismissal by Court of Appeal of application to extend time to appeal to that Court from a sentence—Whether Supreme Court of Canada has jurisdiction to grant leave to appeal—Penitentiary Act, R.S.C. 1952, c. 206, s. 49(3)—Supreme Court Act, R.S.C. 1952, c. 259, s. 41—Criminal Code, 1953-54 (Can.), c. 51, s. 597(1)(b).

The applicant pleaded guilty to a charge of robbery with violence and was sentenced to imprisonment for ten years. On the day he was sentenced and pursuant to s. 49(3) of the *Penitentiary Act*, he signed a written notice waiving all rights of appeal. Subsequently, he applied to the Court of Appeal for an extension of time to appeal to that Court from his sentence. His application was dismissed by the Court of Appeal. He then applied to this Court for leave to appeal from that refusal.

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

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*PRESENT: Cartwright C.J. and Fauteux and Hall JJ.

This would be a case to grant leave to appeal if this Court had jurisdiction to do so. However, such jurisdiction cannot be found either in the *Criminal Code* or in s. 41 of the *Supreme Court Act*. In *Paul v. The Queen*, [1960] S.C.R. 452, this Court reached the view that it had no jurisdiction to entertain an application for leave to appeal from a judgment of a Court of Appeal refusing leave to appeal in a criminal matter. *A fortiori* must a like view obtain in the case of an application for leave to appeal from a judgment of a Court of Appeal refusing an extension of time for appealing in a criminal matter and, more particularly so, when the true question, sought to be brought for review ultimately, relates to sentence.

Droit criminel—Appels—Juridiction—Permission d'appeler—Rejet par la Cour d'appel d'une requête pour étendre les délais pour appeler devant elle d'une sentence—La Cour suprême du Canada a-t-elle juridiction pour accorder la permission d'appeler—Loi sur les pénitenciers, S.R.C. 1952, c. 206, art. 49(3)—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41—Code criminel, 1953-54 (Can.), c. 51, art. 597(1)(b).

Le requérant a plaidé coupable sur une accusation de vol qualifié et a été condamné à l'emprisonnement pour dix ans. Le jour où la sentence fut prononcée, et en conformité avec l'art. 49(3) de la *Loi sur les pénitenciers*, il a signé un avis écrit en vertu duquel il se désistait de tous ses droits d'appel. Subséquemment, il a présenté à la Cour d'Appel une requête pour obtenir une extension des délais pour appeler devant elle de sa sentence. Sa requête a été rejetée par la Cour d'Appel. Il a alors présenté une requête devant cette Cour pour obtenir la permission d'en appeler de ce refus.

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

Il s'agit ici d'un cas où, si cette Cour avait juridiction de le faire, la permission d'appeler devrait être accordée. Cependant, on ne peut pas trouver une telle juridiction ni dans le *Code criminel* ni dans l'art. 41 de la *Loi sur la Cour suprême*. Dans la cause de *Paul v. The Queen*, [1960] R.C.S. 452, cette Cour a conclu qu'elle n'avait pas la juridiction pour accorder une requête demandant la permission d'appeler d'un jugement d'une Cour d'Appel ayant refusé la permission d'appeler dans une matière criminelle. Un point de vue semblable doit *a fortiori* prévaloir dans le cas d'une requête pour permission d'appeler d'un jugement d'une Cour d'Appel refusant d'étendre les délais pour appeler dans une matière criminelle et, encore plus, lorsque la question à débattre en définitive concerne une sentence.

REQUÊTE pour permission d'appeler d'un jugement de la Cour d'Appel de l'Ontario, refusant d'étendre les délais pour appeler d'une sentence. Requête rejetée.

APPLICATION for leave to appeal from a judgment of the Court of Appeal for Ontario, refusing an extension of time to appeal from a sentence. Application dismissed.

B. A. Crane, for the applicant.

C. Meinhardt, for the respondent.

1968

HIND
v.
THE QUEEN

The judgment of the Court was delivered by

FAUTEUX J.:—Thomas William Hind applies for leave to appeal from a judgment of the Court of Appeal for Ontario, which dismissed his application for an extension of time to appeal to that Court from a sentence of ten years' imprisonment, imposed upon him by His Honour Magistrate Kurata, upon a plea of guilty to a charge of robbery with violence.

In its reasons for judgment, the Court of Appeal relates the circumstances of this bank robbery, refers to the criminal record of the applicant and concludes that, having regard to his previous convictions and the nature of the offence of which he was convicted, there was no merit in the application. The Court also notes that the applicant had waived all rights of appeal. In fact, on the day he was sentenced, he gave a written notice to this effect, pursuant to s. 49(3) of the *Penitentiary Act,* R.S.C. 1952, c. 206, which provides, *inter alia,* that, upon such a notice, the time limited for appeal shall be deemed to have expired. With respect to this waiver, the circumstances attending its signature and the position taken by applicant in this regard, the Court of Appeal makes these observations:

> The accused had signed a waiver while imprisoned at the Don Gaol and in his application for extension of time for appealing he stated that he had signed the waiver *'without being informed of and without realizing I was signing away my rights. The signing of the waiver took place late at night and I was caught unawares (sic) of what I was doing.'* Mr. G. A. Taggart (an official of the Court of Appeal) communicated with the authorities at the Don Gaol and was advised that the accused had had his rights fully explained to him and that the waiver was signed not late at night but before six o'clock in the afternoon.

The grounds upon which the applicant is seeking leave to appeal to this Court are formulated as follows:

(1) Had the Court of Appeal jurisdiction to enter upon the hearing of the application in the absence of the accused, who was in custody, not represented by counsel, had submitted no written argument, had requested permission to argue his application in person, and was not notified of the date of the hearing of the application?

(2) Had the Court of Appeal jurisdiction to adjudicate the question of fact surrounding the signing by the Applicant of a waiver of his right to appeal in the absence of legally admissible evidence regarding this issue?

1968

HIND v. THE QUEEN

Fauteux J.

The criminal record of the applicant and the nature of the crime for which he was convicted may or may not justify, as a proper one, the sentence imposed upon him. This question is not before us and is not, furthermore, susceptible, in law, to be entertained by this Court: *Goldhar v. The Queen*[1]. We are here concerned with an application for leave to appeal from a judgment of a Court of Appeal *refusing an extension of time for appealing to that Court from a sentence.*

Having considered the grounds raised in support of the application and the material, in the record, which is relevant to these grounds, I would be disposed to grant leave to appeal had this Court jurisdiction to do so, having regard to the nature of the judgment *a quo*. It is obvious that this Court has no jurisdiction to exercise a jurisdiction, over a Court of Appeal, similar to that which the High Court exercises over inferior tribunals, in *certiorari* proceedings. It is also clear that this Court can only deal with a judgment of a Court of Appeal, by way of appeal, if jurisdiction to do so can be found in some statutory enactment. *Welch v. The King*[2]; *Okalta Oils Limited v. The Minister of National Revenue*[3]; *Chagnon v. Normand*[4]; *William Cully v. François* alias *Francis Ferdais*[5]. With respect to a judgment of the nature of the judgment *a quo*, such a jurisdiction cannot be found either in the *Criminal Code* or in s. 41 of the *Supreme Court Act*. The provisions of s. 597(1)(*b*) of the *Criminal Code*, upon which the application purports to be made, have particularly no application in the matter. In *Paul v. The Queen*[6], this Court, having to consider whether it had jurisdiction to entertain an application for leave to appeal from a judgment of a Court of Appeal *refusing leave to appeal in a criminal matter*, reached the view that it had none. *A fortiori*, in my opinion, must a like view obtain in the case of an application for leave to appeal from a judgment of a Court of Appeal *refusing an extension of time* for appealing in a criminal matter and, more particularly so,

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[1] [1960] S.C.R. 60, 125 C.C.C. 209, 31 C.R. 374.

[2] [1950] S.C.R. 412 at 428, 97 C.C.C. 177, 10 C.R. 97, 3 D.L.R. 641.

[3] [1955] S.C.R. 824 at 825, [1955] C.T.C. 271, 55 D.T.C. 1176, 5 D.L.R. 614.

[4] (1889), 16 S.C.R. 661 at 662.

[5] (1900), 30 S.C.R. 330 at 333.

[6] [1960] S.C.R. 452, 127 C.C.C. 129, 34 C.R. 110.

1968
HIND
v.
THE QUEEN

when the true question, sought to be brought for review ultimately, relates to sentence: *The Queen v. J. Alepin & Frères Ltée et al*[7].

Fauteux J.

I would refuse the application for lack of jurisdiction.

Application dismissed.

Solicitors for the applicant: Croll, Borins & Goldberg, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

1967
*June 12, 13
1968
Jan. 23

CARNATION COMPANY LIMITED ..... APPELLANT;

AND

THE QUEBEC AGRICULTURAL MARKETING BOARD and THE QUEBEC CARNATION COMPANY MILK PRODUCERS BOARD ..... RESPONDENTS;

AND

ROLAND CAMIRAND, ès-qualité, THE ATTORNEY GENERAL OF THE PROVINCE OF QUEBEC ..... MIS-EN-CAUSE;

AND

THE ATTORNEY GENERAL OF CANADA and THE ATTORNEY GENERAL FOR ALBERTA .... INTERVENANTS.

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

Constitutional law—Quebec Agricultural Marketing Board—Validity of decisions made by Board—Decision approving joint marketing plan with respect to an evaporated milk manufacturing company—Decision fixing purchase price of milk to be paid by company to producers—Major portion of product exported—Whether decisions ultra vires as regulating trade and commerce—Quebec Agricultural Marketing Act, 1955-56 (Que.), c. 37, as replaced by 1963 (Que.), c. 34—B.N.A. Act, 1867, s. 91(2).

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[7] [1965] S.C.R. 359 at 364, 3 C.C.C. 1, 46 C.R. 113, 49 D.L.R. (2d) 220.

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

The Quebec Agricultural Marketing Board was created as a corporation by the *Quebec Agricultural Marketing Act*, 1955-56 (Que.), c. 37, and was empowered, *inter alia*, to approve joint marketing plans. In 1957, it approved a joint marketing plan with respect to Carnation Company Limited and its suppliers of milk. The administration of the plan was entrusted to a Producers' Board which had power to negotiate with the buyer—the appellant company—for the marketing and sale to it of milk and dairy products from the farms of producers bound by the plan. The parties to the plan were unsuccessful in their attempts to reach agreement as to the purchase price of milk to be purchased by the appellant from the producers. The Quebec Agricultural Marketing Board, as it was authorized by law to do, intervened as arbitrator and determined the price that the appellant had to pay its producers for the milk it bought from them. The milk purchased by the appellant was processed by it and, as to a major portion of its product, exported from the province. The appellant company took the position that the orders of the Marketing Board—approving the plan and determining the price to be paid by the appellant—were invalid because they constituted the regulation of trade and commerce within the meaning of s. 91(2) of the *B.N.A. Act*, a field reserved to the Parliament of Canada. The validity of the orders in question was upheld by the Superior Court and by the Court of Appeal. The company was granted leave to appeal to this Court. The Attorney General of Canada and the Attorney General for Alberta were granted leave to intervene in the proceedings.

Held: The appeal should be dismissed.

In making these orders, the Quebec Agricultural Marketing Board did not infringe on the exclusive legislative powers of Parliament under s. 91(2) of the *B.N.A. Act* to regulate trade and commerce. The purpose of these orders was to regulate, on behalf of a particular group of Quebec producers, their trade with the appellant for the sale to it, in Quebec, of their milk. The orders were not directed at the regulation of interprovincial trade. They did not purport directly to control or to restrict such trade. There was no evidence that, in fact, they did control or restrict it. The most that can be said of them is that they had some effect upon the cost of doing business in Quebec of a company engaged in interprovincial trade, and that, by itself, is not sufficient to make them invalid.

Droit constitutionnel—Régie des marchés agricoles du Québec—Validité de décisions prises par la Régie—Décision approuvant un plan conjoint de mise en marché relativement à une compagnie de lait évaporé—Décision établissant le prix d'achat du lait devant être payé par la compagnie aux producteurs—La majeure partie des produits exportée—Les décisions sont-elles ultra vires comme étant la réglementation du trafic et du commerce—Loi des marchés agricoles du Québec, 1955-56 (Qué.), c. 37, telle que remplacée par 1963 (Qué.), c. 34—Acte de l'Amérique du Nord britannique, 1867, art. 91(2).

La Régie des marchés agricoles du Québec a été créée comme corporation par la *Loi des marchés agricoles du Québec*, 1955-56 (Qué.), c. 37, et a reçu les pouvoirs, *inter alia*, d'approuver des plans conjoints de mise en marché. En 1957, la Régie a approuvé un plan conjoint de mise en marché relativement à la Carnation Company Limited et à ses four-

1968

CARNATION COMPANY LTD. v. QUEBEC AGRICULTURAL MARKETING BOARD *et al.*

nisseurs de lait. L'administration du plan a été confiée à un office de producteurs qui avait le pouvoir de négocier avec l'acheteur—la compagnie appelante—relativement à la mise sur le marché et à la vente du lait et des produits laitiers provenant des fermes appartenant aux producteurs liés par le plan. Les producteurs et la compagnie n'ont pas réussi à s'entendre sur le prix d'achat du lait devant être acheté des producteurs par la compagnie appelante. La Régie des marchés agricoles du Québec, ainsi qu'elle était autorisée de le faire, est intervenue comme arbitre et a établi le prix que l'appelante devait payer aux producteurs pour le lait qu'elle achetait d'eux. Le lait acheté par l'appelante est transformé par elle et, quant à la majeure partie de ses produits, elle l'exportait en dehors de la province. La compagnie appelante prétend que les décisions de la Régie—approuvant le plan et établissant le prix devant être payé par l'appelante—étaient invalides parce qu'elles constituaient la réglementation du trafic et du commerce dans le sens de l'art. 91(2) de l'*Acte de l'Amérique du Nord britannique,* domaine qui est de la compétence du Parlement du Canada. La validité des décisions en question a été maintenue par la Cour supérieure et par la Cour d'Appel. La compagnie a obtenu la permission d'appeler devant cette Cour. Le procureur général du Canada et le procureur général de l'Alberta ont obtenu la permission d'intervenir dans l'appel.

Arrêt: L'appel doit être rejeté.

En rendant ces décisions, la Régie des marchés agricoles du Québec n'a pas empiété sur les pouvoirs législatifs exclusifs du Parlement en vertu de l'art. 91(2) de l'*Acte de l'Amérique du Nord britannique* de réglementer le trafic et le commerce. Le but de ces décisions était de réglementer, au profit d'un groupe particulier de producteurs québecois, leur commerce avec l'appelante pour la vente à cette dernière de leur lait dans le Québec. Les décisions ne visaient pas la réglementation du commerce interprovincial. Elles n'étaient pas censées contrôler ou restreindre directement un tel commerce. Il n'y avait aucune preuve que, en fait, elles contrôlaient ou restreignaient ce commerce. Le plus qu'on puisse dire est qu'elles affectaient en partie le coût de l'entreprise exercée dans Québec par une compagnie faisant le commerce interprovincial et que ceci n'était pas, *per se,* suffisant pour les rendre invalides.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], modifiant un jugement du Juge Tellier. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], modifying a judgment of Tellier J. Appeal dismissed.

Guy Desjardins, Q.C., for the appellant.

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[1] [1967] Que. Q.B. 122.

Yves Pratte, Q.C., and *Alphonse Barbeau, Q.C.*, for the Marketing Board.

Louis Lamontagne, for the Producers Board.

Rodrigue Bédard, Q.C., for the Attorney General of Canada.

B. A. Crane, for the Attorney General for Alberta.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from the Court of Queen's Bench for the Province of Quebec (Appeal Side)[1], which confirmed the judgment given in the Superior Court, upholding the validity of three decisions of the Quebec Agricultural Marketing Board, hereinafter referred to as "the Marketing Board". The question in issue before this Court is as to whether, in making these orders, the Marketing Board had infringed on the exclusive legislative powers of Parliament under s. 91(2) of the *British North America Act* to regulate trade and commerce. Submissions on this issue were made on behalf of the Attorney-General of Canada and the Attorney-General of Alberta, in addition to those presented by the parties to the litigation.

The Marketing Board was created as a corporation by the provisions of the *Quebec Agricultural Marketing Act*, 4-5 Eliz. II, 1955-56 (Que.), c. 37. It was empowered, inter alia, to approve joint marketing plans, and to arbitrate any dispute arising in the course of carrying out a joint marketing plan. The Act provided that ten or more producers of agricultural products in any territory in Quebec could apply to the Marketing Board for approval of a joint plan for the marketing of one or more classes of farm products in such territory, if such plan was supported by a vote of at least 75 per cent in number and value of all producers concerned.

On July 25, 1957, the Marketing Board approved The Quebec Carnation Company Milk Producers' Plan. The administration of the Plan was entrusted to The Quebec Carnation Company Milk Producers' Board. The Plan bound all bona fide milk producers shipping milk and dairy

[1] [1967] Que. Q.B. 122.

1968

CARNATION COMPANY LTD. v. QUEBEC AGRICULTURAL MARKETING BOARD *et al.*

Martland J.

products to any of the plants of the appellant in Quebec. The Producers' Board had power to negotiate with the buyer (the appellant) for the marketing and sale to it of milk and dairy products from the farms of producers bound by the Plan. The Plan provided for a board of arbitration, which might be the Marketing Board, to decide conflicts in the event of a failure to agree with the appellant in the negotiation or execution of a convention.

Agreement was not reached as to the purchase price of milk to be purchased by the appellant from the producers, pursuant to the Plan. The matter was arbitrated by the Marketing Board which, after hearing evidence for both sides, wrote extensive reasons, and determined a price of $3.07 per hundred pounds, on December 18, 1958. Subsequently, on June 11, 1962, after a further arbitration, the Marketing Board decided on a price of $2.78 per hundred pounds.

It is these three orders of the Marketing Board, which approved the Plan, and which determined the price to be paid by the appellant for milk purchased from producers subject to the Plan, which are the subject of the appellant's attack.

The appellant was incorporated under the Canadian *Companies Act*, and has its head office in Toronto. It operates, in Quebec, an evaporated milk plant at Sherbrooke and a receiving station at Waterloo.

During the period concerned, it purchased raw milk from approximately 2,000 farmers, situated mostly in the Eastern Townships. At the Sherbrooke plant it processes raw milk into evaporated milk. The major part of such production is shipped and sold outside Quebec. Milk received at the Waterloo receiving station, during the relevant period, was either sent to the Sherbrooke plant, for processing, or else, skimmed, the butterfat being sold to other manufacturers, and the skim milk being sent to appellant's plant at Alexandria, Ontario, to be processed into skim milk powder.

The appellant, during the relevant period, was the only evaporated milk manufacturer in Quebec, with the exception of the Granby Co-operative, which, as a co-operative, was not subject to the provisions of the *Quebec Agricultural Marketing Act*.

The evidence showed that, since December 18, 1958, the date of the first arbitration award, prices paid by the appellant were about 10 to 25 cents per hundred pounds higher than those paid by other purchasers of raw milk in the same area.

The *Quebec Agricultural Marketing Act* was repealed in 1963 and replaced by a new Act, with the same title, 11-12 Eliz. II, 1963 (Que.), c. 34. Section 54 of the new Act provides that:

> 54. The joint plans approved under the act 4-5 Elizabeth II, chapter 37, and in existence on the day of the coming into force of this act, as well as the agreements and decisions relating thereto, shall remain in force and shall be subject to the provisions of this act.
>
> Such plans and the agreements and decisions relating thereto shall not be invalid by reason of the fact that they contemplate the marketing of a farm product in a territory other than that of the origin of such product, or the marketing of a farm product intended for a specified purpose or purchaser. This provision shall apply to pending cases except as to costs.

This provision met the objection which had originally been made by the appellant that the Marketing Plan was invalid because it did not fix a minimum price for milk to be paid by all buyers in a given territory and because it applied only to the appellant as a buyer.

Section 18 of the first Act had provided:

> 18. Ten or more producers in any territory of the Province may apply to the Provincial Board for the approval of a joint plan for the marketing of one or more classes of farm products within such territory.

Section 19 of the new Act provides:

> 19. Ten or more interested producers may apply to the Board for the approval of a joint plan for the marketing in the Province of a farm product derived from a designated territory or intended for a specified purpose or a particular purchaser.

It is clear that both these provisions relate to the marketing of milk only in the Province of Quebec.

The position taken by the appellant is that the three orders of the Marketing Board are invalid because they enable it to set a price to be paid by the appellant for a product the major portion of which, after processing, will be used by it for export out of Quebec. This, it is contended, constitutes the regulation of trade and commerce within the meaning of s. 91(2) of the *British North America Act*, a field reserved to the Parliament of Canada.

1968

CARNATION COMPANY LTD. v. QUEBEC AGRICULTURAL MARKETING BOARD *et al.*

Martland J.

The appellant, in support of this submission, relies upon the reasons of four of the judges of this Court in the *Reference Respecting The Farm Products Marketing Act, R.S.O. 1950, Chapter 131, As Amended*[2], which case is hereinafter referred to as "the Ontario Reference".

This was a reference made to the Court by the Governor General in Council concerning: (i) the validity of s. 3(1)(*l*) of *The Farm Products Marketing Act,* (ii) of a regulation made by the Lieutenant-Governor in Council and three regulations made by the Farm Products Marketing Board, pursuant to the Act, (iii) of an order made by that Board, and (iv) of a proposed amendment to the Act, including the scope of authority of the Board under that amendment.

Fauteux J., at p. 248, summarized the provisions of the Act as follows:

> The scheme of the Act may be summarily described as follows: Ten per cent. of the producers engaged, within a given area, in the production of a farm product, may propose the adoption of a compulsory scheme for marketing or regulating the farm product. If the scheme is approved by a certain majority of producers, the Farm Products Marketing Board, whose members are appointed by the Lieutenant-Governor in council, may recommend its adoption to the latter who may approve it with such variations as deemed proper and declare it in force. Marketing operations under the scheme are conducted by a local board in accordance with the terms of the scheme but the Board may also designate marketing agencies. The scheme may include a system of licensing of persons engaged in producing, marketing or processing the regulated product. This licensing is done under the regulations made by the Board which may prohibit persons from engaging in such operations, except under the authority of a licence. Licence fees, to be used by the local board for the purpose of carrying out and enforcing the Act, the regulations and the scheme, may be authorized by the Board. The actual direction of the marketing is done by either the Board, a local board or a marketing agency which, appointed by and acting pursuant to the regulations of the Board, directs and controls the marketing of the product. The marketing agency may be authorized to conduct a pool for the distribution of all moneys received from sales of the product and having deducted its necessary and proper disbursements and expenses, to distribute the proceeds of sales in such a manner that each person receives a share in relation to the amount, variety, size, grade and class of the regulated product delivered by him. Violators of any provisions of the Act, of the regulations, of the schemes declared to be in force, or of any order or direction of the Board, local board or marketing agency, shall be guilty of an offence and liable to monetary penalties.

Section 3(1)(*l*) of the Act authorized the provincial Farm Products Marketing Board to:

> authorize any marketing agency appointed under a scheme to conduct a pool or pools for the distribution of all moneys received from the sale of

[2] [1957] S.C.R. 198, 7 D.L.R. (2d) 257.

the regulated product and requiring any such marketing agency, after deducting all necessary and proper disbursements and expenses, to distribute the proceeds of sale in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him and to make an initial payment on delivery of the product and subsequent payments until the total net proceeds are distributed.

The first question on the Reference was:

Assuming that the said Act applies only in the case of intra-provincial transactions, is clause (*l*) of subsection 1 of section 3 of *The Farm Products Marketing Act,* R.S.O. 1950 chapter 131 as amended by Ontario Statutes 1951, chapter 25, 1953, chapter 36, 1954, chapter 29, 1955, chapter 21 ultra vires the Ontario Legislature?

Four of the members of the Court, Kerwin C.J., Rand J., Locke J. and Nolan J., were of the view that a transaction might take place within a province and yet not constitute an "intra-provincial" transaction which would be subject to provincial control. They sought to define transactions of this kind. Thus, Kerwin C.J., at p. 204, had this to say:

It seems plain that the Province may regulate a transaction of sale and purchase in Ontario between a resident of the Province and one who resides outside its limits; that is, if an individual in Quebec comes to Ontario and there buys a hog, or vegetables, or peaches, the mere fact that he has the intention to take them from Ontario to Quebec does not deprive the Legislature of its power to regulate the transaction, as is evidenced by such enactments as *The Sale of Goods Act,* R.S.O. 1950, c. 345. That is a matter of the regulation of contracts and not of trade as trade and in that respect the intention of the purchaser is immaterial. However, if the hog be sold to a packing plant or the vegetables or peaches to a cannery, the products of those establishments in the course of trade may be dealt with by the Legislature or by Parliament depending, on the one hand, upon whether all the products are sold or intended for sale within the Province or, on the other, whether some of them are sold or intended for sale beyond Provincial limits. It is, I think, impossible to fix any minimum proportion of such last-mentioned sales or intended sales as determining the jurisdiction of Parliament. This applies to the sale by the original owner. Once a statute aims at "regulation of trade in matters of inter-provincial concern" (*The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons,* (1881) 7 App. Cas. 96 at 113), it is beyond the competence of a Provincial Legislature.

Rand J., at p. 209, says:

The definitive statement of the scope of Dominion and Provincial jurisdiction was made by Duff C.J. in *Re The Natural Products Marketing Act, 1934,* (1936) S.C.R. 398 at 414 et seq., (1936) 3 D.L.R. 622, 66 C.C.C. 180, affirmed sub nom. *Attorney-General for British Columbia v. Attorney-General for Canada et al.,* (1937) A.C. 377, (1937) 1 D.L.R. 691, (1937) 1 W.W.R. 328, 67 C.C.C. 337. The regulation of particular trades confined to the Province lies exclusively with the Legislature subject, it

1968

CARNATION COMPANY LTD. v. QUEBEC AGRICULTURAL MARKETING BOARD *et al.*

Martland J.

may be, to Dominion general regulation affecting all trade, and to such incidental intrusion by the Dominion as may be necessary to prevent the defeat of Dominion regulation; interprovincial and foreign trade are correspondingly the exclusive concern of Parliament. That statement is to be read with the judgment of this Court in *The King v. Eastern Terminal Elevator Company*, (1925) S.C.R. 434, (1925) 3 D.L.R. 1, approved by the Judicial Committee in *Attorney-General for British Columbia v. Attorney-General for Canada*, supra, at p. 387, to the effect that Dominion regulation cannot embrace local trade merely because in undifferentiated subject-matter the external interest is dominant. But neither the original statement nor its approval furnishes a clear guide to the demarcation of the two classes when we approach as here the origination, the first stages of trade, including certain aspects of manufacture and production.

That demarcation must observe this rule, that if in a trade activity, including manufacture or production, there is involved a matter of extra-provincial interest or concern its regulation thereafter in the aspect of trade is by that fact put beyond Provincial power. This is exemplified in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, (1931) S.C.R. 357, (1931) 2 D.L.R. 193, where the Province purported to regulate the time and quantity of shipment, the shippers, the price and the transportation of fruit and vegetables in both unsegregated and segregated local and interprovincial trade movements.

Locke J., with whom Nolan J. concurred, said, at p. 231, in dealing with the constitutional validity of s. 3(1)(*l*):

In answering this question I exclude sales of produce where the producer himself ships his product to other Provinces or countries for sale by any means of transport, or sells his product to a person who purchases the same for export. To illustrate, I exclude a shipment by a hog producer of his hogs, alive or dead, to the Province of Quebec and transactions between such producer and a buyer for a packing plant carrying on business in Hull who purchases the hog intending to ship it to Hull, either alive or dead, and transactions between a hog producer and a packing plant operating in Ontario purchasing the hog for the purpose of producing pork products from it and exporting them from the Province to the extent that the carcass is so used.

The passage from the judgment in *Lawson's Case* which is above quoted makes it clear that to attempt to control the manner in which traders in other Provinces will carry out their transactions with the Province, or to prohibit them from purchasing natural products for export, is not a matter of merely Provincial concern but also directly and substantially the concern of the other Provinces. I cannot think that from a constitutional standpoint the fact that the buyer for the packing house elects to have the hog killed before it is exported or cut up and, after treatment, exported as hams, bacon or other pork products, can affect the matter.

Fauteux J. was of the opinion that the regulation of the marketing of farm products within a province was within the legislative competence of the Provincial Legislature and not of Parliament. For this proposition he relied upon

Attorney-General of British Columbia v. Attorney-General of Canada et al.[3] and *Shannon et al. v. Lower Mainland Products Board*[4].

Abbott J. was of the opinion that it was impracticable to attempt an abstract logical definition of what constitutes interprovincial or export trade. At p. 265 he says:

> What is regulated under these schemes is not the farm product itself but certain transactions involving that product, and the transaction which is regulated is completed before the product is consumed either in its original or in some processed form. Processing may take many forms and the original product may be changed out of all recognition. The place where the resulting product may be consumed, therefore, is not in my opinion conclusive, as a test to determine by what legislative authority a particular transaction involving such farm product may validly be regulated.
>
> As I have stated, the fact that some, or all, of the resulting product, after processing, may subsequently enter into extraprovincial or export trade does not, in my view, alter the fact that the three schemes submitted in this reference, regulate particular businesses carried on entirely within Provincial legislative jurisdiction, and are therefore intra vires.

Taschereau J. (as he then was) agreed with Fauteux J. and with Abbott J.

Only eight members of the Court sat on this reference, and the reasons of Cartwright J. (as he then was) do not deal with this particular issue.

Counsel for the respondent points out that, as a result of the reference, there was no majority opinion as to what transactions, completed within a province, constituted interprovincial trade, and contends that the views expressed by the four judges were not in harmony with earlier decisions of this Court and of the Privy Council.

The meaning of the words "regulation of trade and commerce" was considered by the Privy Council in *Citizens Insurance Company of Canada v. Parsons*[5]. At p. 113, Sir Montague Smith says:

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion

[3] [1937] A.C. 377, 1 W.W.R. 328, 67 C.C.C. 337, 1 D.L.R. 691.
[4] [1938] A.C. 708, 2 W.W.R. 604, 4 D.L.R. 81.
[5] (1881), 7 App. Cas. 96.

1968

CARNATION COMPANY LTD. v. QUEBEC AGRICULTURAL MARKETING BOARD *et al.*

Martland J.

parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92.

The validity of provincial legislation governing the marketing of agricultural products was before this Court in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*[6] which concerned the *Produce Marketing Act of British Columbia*, 1926-27 (B.C.), c. 54. In holding that Act to be *ultra vires* of the Legislature of British Columbia, Duff J. (as he then was) said, at p. 364:

> Coming now to the first ground of attack, namely, that the statute constitutes an attempt to regulate trade within the meaning of head no. 2 of s. 91. To repeat the general language of s. 10(1), the functions of the Committee are
>
> for the purpose of controlling and regulating the marketing of any product within its authority,
>
> and for that purpose the Committee is empowered
>
> to determine whether or not and at what time, and in what quantity and from and to what places and at what price and on what terms the product may be marketed and delivered.
>
> As I have said, the respondent Committee has attempted (in professed exercise of this authority) and in this litigation asserts its right to do so—to regulate the marketing of products into parts of Canada outside British Columbia. It claims the right under the statute to control (as in fact it does), the sale of such products for shipment into the prairie provinces as well as the shipment of them into those provinces for sale or storage. The moment his product reaches a state in which it becomes a possible article of commerce, the shipper is (under the Committee's interpretation of its powers), subject to the Committee's dictation as to the quantity of it which he may dispose of, as to the places from which, and the places to which he may ship, as to the route of transport, as to the price, as to all the terms of sale. I ought to refer also to the provision of the statute which prohibits anybody becoming a licensed shipper who has not, for six months immediately preceding his application for a licence, been a resident of the province, unless he is the registered owner of the land on which he carries on business as shipper. In a statute which deals with trade that is largely interprovincial, this is a significant feature. It is an attempt to control the manner in which traders in other provinces, who send their agents into British Columbia to make arrangements for the shipment of goods to their principals, shall carry out their interprovincial transactions. I am unable to convince myself that these matters are all, or chiefly, matters of merely British Columbia concern, in the sense that they are not also directly and substantially the concern of the other provinces,

[6] [1931] S.C.R. 357, 2 D.L.R. 193.

which constitute in fact the most extensive market for these products. In dictating the routes of shipment, the places to which shipment is to be made, the quantities allotted to each terminus ad quem, the Committee does, altogether apart from dictating the terms of contracts, exercise a large measure of direct and immediate control over the movement of trade in these commodities between British Columbia and the other provinces.

In 1936 this Court, in the *Reference as to the Validity of The Natural Products Marketing Act, 1934, As Amended*[7], considered the validity of the federal *Natural Products Marketing Act, 1934*. The following passages, at pp. 404 and 411, from the judgment of this Court, delivered by Duff C.J., define the issues involved and the reasons for its conclusion that the Act was *ultra vires* of the Parliament of Canada:

> In substance, we are concerned with sections 3, 4 and 5 of the statute.
>
> By section 3, the Governor General is empowered to
>
> establish a Board to be known as the Dominion Marketing Board to regulate the marketing of natural products as hereinafter provided.
>
> By section 4(1) the Board is invested with power
>
> (*a*) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class;
>
> "Marketed" is used in an extended sense as embracing "buying and selling, shipping for sale or storage and offering for sale".
>
> The Board is also empowered,
>
> (*c*) to conduct a pool for the equalization of returns received from the sale of the regulated product; ...
>
> (*f*) to require any or all persons engaged in the production or marketing of the regulated product to register their names, addresses and occupations with the Board, or to obtain a licence from the Board, and such licence shall be subject to cancellation by the Board for violation of any provision of this Act or regulation made thereunder;
>
> Section 5 contains provisions for marketing schemes under which the marketing of a natural product, to which the scheme applies, is regulated by a local board under the supervision of the Dominion Board.
>
> * * *
>
> It does not seem to admit of serious dispute that, if, regards natural products, as defined by the Act, the provinces are destitute of the powers to regulate the dealing with natural products in respect of the matters designated in section 4(1)(*a*), the powers of the provinces are much more limited than they have generally been supposed to be. If this defect of power exists in relation to natural products it exists in relation to any-

[7] [1936] S.C.R. 398, 66 C.C.C. 180, 3 D.L.R. 622.

1968

CARNATION COMPANY LTD. v. QUEBEC AGRICULTURAL MARKETING BOARD *et al.*

Martland J.

thing that may be the subject of trade. Furthermore, if the Dominion has power to enact section 4(1)(*f*), as a provision falling strictly within "the regulation of trade and commerce," then the provinces are destitute of the power to regulate, by licensing persons engaged in the production, the buying and selling, the shipping for sale or storage and the offering for sale, in an exclusively local and provincial way of business of any commodity or commodities. The acceptance of this view of the powers of the provinces would seem to be inconsistent, not only with *Hodge v. The Queen*, (1883) 9 A.C. 117, but with the judgment in the *Montreal Street Railway* case, (1912) A.C. 33, as well as with the judgment in the *Board of Commerce* case, (1922) 1 A.C. 191. The judgment in this latter case seems very plainly to declare that in the absence of very special circumstances such as those indicated in the judgment of the Board, such matters as subjects of legislation fall within the jurisdiction of the provinces under section 92.

The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority (*King v. Eastern Terminal Elevators*, (1925) S.C.R. 434).

It should also be observed that these enactments operate by way of the regulation of dealings in particular commodities and classes of commodities. The regulations contemplated are not general regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in *Parsons* case.

The penultimate paragraph, above quoted, was adopted by the Privy Council[8]. Lord Atkin, at p. 396, before quoting this paragraph, said:

There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province, and have no connection with inter-Provincial or export trade. It is therefore plain that the Act purports to affect property and civil rights in the Province, and if not brought within one of the enumerated classes of subjects in s. 91 must be beyond the competence of the Dominion Legislature. It was sought to bring the Act within the class (2) of s. 91—namely, The Regulation of Trade and Commerce. Emphasis was laid upon those parts of the Act which deal with inter-Provincial and export trade. But the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province.

In 1938, the Privy Council dealt with the validity of a British Columbia statute, *The Natural Products Marketing*

[8] [1937] A.C. 377 at 387, 1 W.W.R. 328, 67 C.C.C. 337, 1 D.L.R. 691.

(British Columbia) Act, 1936, in *Shannon v. Lower Mainland Dairy Products Board*[9]. This Act enabled the Lieutenant-Governor in Council to set up a central British Columbia Marketing Board, to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, to constitute Marketing Boards to administer such schemes, and to vest in those Boards any powers considered necessary or advisable to exercise those functions.

It was held that this statute was, in pith and substance, an Act to regulate particular businesses, entirely within the Province, and was *intra vires* of the Provincial Legislature under s. 92(13) of the *British North America Act*. In dealing with the contention that this Act encroached upon s. 91(2) of the *British North America Act*, Lord Atkin said, at p. 718:

> It is sufficient to say upon the first ground that it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the Province, and are therefore within the sovereign powers granted to the Legislature in that respect by s. 92 of the *British North America Act*. Their Lordships do not accept the view that natural products as defined in the Act are confined to natural products produced in British Columbia. There is no such restriction in the Act, and the limited construction would probably cause difficulty if it were sought at some future time to co-operate with a valid Dominion scheme. But the Act is clearly confined to dealings with such products as are situate within the Province. It was suggested that "transportation" would cover the carriage of goods in transit from one Province to another, or overseas. The answer is that on the construction of the Act as a whole it is plain that "transportation" is confined to the passage of goods whose transport begins within the Province to a destination also within the Province. It is now well settled that the enumeration in s. 91 of "the regulation of trade and commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate Provincial purposes particular trades or businesses so far as the trade or business is confined to the Province: *Citizens Insurance Co. of Canada v. Parsons*, 7 App. Cas. 96; *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935*, (1936) Can. S.C.R. 398; (1937) A.C. 377. And it follows that to the extent that the Dominion is forbidden to regulate within the Province, the Province itself has the right under its legislative powers over property and civil rights within the Province.

It is now necessary to consider, in the light of these decisions, the validity of the three orders which are under attack in the present case. The first order, which created

[9] [1938] A.C. 708, 2 W.W.R. 604, 4 D.L.R. 81.

1968

CARNATION COMPANY LTD. v. QUEBEC AGRICULTURAL MARKETING BOARD *et al.*

Martland J.

The Quebec Carnation Company Milk Producers' Board and empowered it to negotiate, on behalf of the milk producers, for the sale of their products to the appellant, is somewhat analogous to the creation of a collective bargaining agency in the field of labour relations. The purpose of the order was to regulate, on behalf of a particular group of Quebec producers, their trade with the appellant for the sale to it, in Quebec, of their milk. Its object was to improve their bargaining position.

The Producers' Board then undertook, with the appellant, negotiations for the sale to it of that milk. The order provided a machinery whereby the price of milk could be determined by arbitration if agreement could not be reached. In this respect it differs from most provincial legislation governing labour disputes, but there would seem to be no doubt that provincial labour legislation incorporating compulsory arbitration of disputes would be constitutional, unless objectionable on some other ground.

The two subsequent orders of the Marketing Board, under attack, contained the decisions which it reached in determining the proper price to be paid to the producers for milk purchased by the appellant.

Are these orders invalid because the milk purchased by the appellant was processed by it and, as to a major portion of its product, exported from the province? Because of that fact, do they constitute an attempt to regulate trade in matters of interprovincial concern?

That the price determined by the orders may have a bearing upon the appellant's export trade is unquestionable. It affects the cost of doing business. But so, also, do labour costs affect the cost of doing business of any company which may be engaged in export trade and yet there would seem to be little doubt as to the power of a province to regulate wage rates payable within a province, save as to an undertaking falling within the exceptions listed in s. 92(10) of the *British North America Act*. It is not the possibility that these orders might "affect" the appellant's interprovincial trade which should determine their validity, but, rather, whether they were made "in relation to" the regulation of trade and commerce. This was a test applied, in

another connection, by Duff J. (as he then was) in *Gold Seal Limited v. Attorney-General for Alberta*[10].

Thus, as Kerwin C.J. said in the *Ontario Reference*, in the passage previously quoted: "Once a statute *aims* at 'regulation of trade in matters of inter-provincial concern' it is beyond the competence of a Provincial Legislature."

I am not prepared to agree that, in determining that aim, the fact that these orders may have some impact upon the appellant's interprovincial trade necessarily means that they constitute a regulation of trade and commerce within s. 91(2) and thus renders them invalid. The fact of such impact is a matter which may be relevant in determining their true aim and purpose, but it is not conclusive.

In the *Lawson* case, where the provincial legislation was found to be unconstitutional, the Committee created by the statute was enabled and purported to exercise a large measure of direct and immediate control over the movement of trade in commodities between a province and other provinces. That is not this case.

On the other hand, in the *Shannon* case the regulatory statute was upheld, as it was confined to the regulation of transactions taking place wholly within the province. It was held that s. 91(2) was not applicable to the regulation for legitimate provincial purposes of particular trades or businesses confined to the province.

The view of the four judges in the *Ontario Reference* was that the fact that a transaction took place wholly within a province did not necessarily mean that it was thereby subject solely to provincial control. The regulation of some such transactions relating to products destined for interprovincial trade could constitute a regulation of interprovincial trade and be beyond provincial control.

While I agree with the view of the four judges in the *Ontario Reference* that a trade transaction, completed in a province, is not necessarily, by that fact alone, subject only to provincial control, I also hold the view that the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control.

[10] (1921), 62 S.C.R. 424 at 460, 3 W.W.R. 710, 62 D.L.R. 62.

1968

CARNATION COMPANY LTD. v. QUEBEC AGRICULTURAL MARKETING BOARD *et al.*

Martland J.

I agree with the view of Abbott J., in the *Ontario Reference*, that each transaction and each regulation must be examined in relation to its own facts. In the present case, the orders under question were not, in my opinion, directed at the regulation of interprovincial trade. They did not purport directly to control or to restrict such trade. There was no evidence that, in fact, they did control or restrict it. The most that can be said of them is that they had some effect upon the cost of doing business in Quebec of a company engaged in interprovincial trade, and that, by itself, is not sufficient to make them invalid.

For these reasons, I would dismiss this appeal with costs. There should be no costs payable by or to the intervenants.

Appeal dismissed with costs.

Attorneys for the appellant: Desjardins, Ducharme, Desjardins & Cordeau, Montreal.

Attorneys for the Quebec Agricultural Marketing Board and the mis-en-cause: Paré, Ferland, MacKay, Barbeau, Holden & Steinberg, Montreal.

Attorneys for the Milk Producers' Board: Verschelden, Bourret, Lamontagne & L'Heureux, Montreal.

Attorney for the Attorney General of Canada: R. Bédard, Ottawa.

Attorneys for the Attorney General for Alberta: Gowling, MacTavish, Osborne & Henderson, Ottawa.

THE UNITED FISHERMEN & ALLIED WORKERS' UNION, H. (STEVE) STAVENES and HOMER STEVENS ..... APPLICANTS;

1968
*Feb. 19, 20
Feb. 22

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeals—Labour—Leave to appeal to Supreme Court of Canada—Injunction directing union officers to order cessation of strike—Vote to determine whether injunction to be obeyed—Conviction for contempt of court—Leave to appeal sought against conviction and sentence.

During the course of a legal strike, the applicants, the striking union and its executive officers, were found guilty of the criminal offence of contempt of court in that they had deliberately defied and challenged the Court in calling a vote of the members to determine whether an injunction should be obeyed, and by comments made in press releases and bulletins to the members. The union was fined $25,000 and each of the personal applicants was sentenced to imprisonment for twelve months. The Court of Appeal affirmed the convictions and the sentences. The applicants sought leave to appeal to this Court from their conviction and their respective sentence.

Held: The application should be dismissed.

Virtually all the grounds raised before this Court in support of the application to appeal from conviction were rightly rejected as ill-founded by the Court of Appeal. The other grounds raised were also devoid of merit.

As to the application for leave to appeal from sentence, it is settled law that this Court is not competent to entertain an appeal against a sentence imposed for a criminal offence.

Appels—Travail—Permission d'appeler à la Cour suprême du Canada—Injonction ordonnant aux officiers d'une union d'ordonner la suspension d'une grève—Vote des membres pour décider si on devait obéir à l'injonction—Condamnation pour mépris de cour—Demande de permission d'appeler du verdict de culpabilité et de la sentence.

Au cours d'une grève légale, les requérants—l'union en grève et ses officiers—ont été trouvés coupables de l'offense criminelle de mépris de cour parce qu'ils avaient délibérément défié et provoqué la Cour en ordonnant que le vote des membres soit pris pour décider si on devait obéir à une injonction qui avait été émise. On a reproché aussi certains commentaires qui avaient été faits à la presse et dans des bulletins adressés aux membres. L'union a été condamnée à une amende de $25,000 et chacun des requérants individuellement a reçu une sentence de douze mois d'emprisonnement. La Cour d'Appel a confirmé le ver-

*PRESENT: Fauteux, Judson and Ritchie JJ.

1968

UNITED FISHERMEN & ALLIED WORKERS' UNION *et al.* v. THE QUEEN

dict de culpabilité et les sentences. Les requérants ont présenté une requête pour obtenir la permission d'appeler devant cette Cour du verdict de culpabilité et des sentences.

Arrêt: La requête doit être rejetée.

Virtuellement, presque tous les motifs soulevés devant cette Cour au soutien de la requête pour en appeler du verdict de culpabilité ont été, à bon droit, rejetés par la Cour d'Appel comme étant mal fondés. Les autres motifs soulevés étaient aussi sans mérite.

Quant à la requête pour permission d'appeler de la sentence, il est bien établi que cette Cour n'a pas la compétence pour entendre un appel d'une sentence imposée pour une offense criminelle.

REQUÊTE pour permission d'appeler d'un verdict de culpabilité pour mépris de cour et d'une sentence, la Cour d'Appel de la Colombie-Britannique[1] ayant confirmé le verdict et la sentence. Requête rejetée.

APPLICATION for leave to appeal from a conviction for contempt of court and sentence as affirmed by the Court of Appeal for British Columbia[1]. Application dismissed.

John Stanton, Harry Rankin and *James Poyner,* for the applicants.

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

The judgment of the Court was delivered by

FAUTEUX J.:—By judgment rendered, in the Supreme Court of British Columbia, at the city of Vancouver, on June 19, 1967, Mr. Justice Dohm found the applicants, namely The United Fishermen & Allied Workers' Union and its executive officers, H. (Steve) Stavenes and Homer Stevens, guilty of the criminal offence of contempt of court in that they had deliberately defied and challenged the Court by their conduct and sought to bring it into contempt. Proceeding then to pronounce the sentence, the learned judge imposed on the Union a fine of $25,000 and on Stavenes and Stevens, a sentence of imprisonment for a term of twelve months.

The applicants appealed to the Court of Appeal for British Columbia[1] from their conviction and from their respective sentence. By a unanimous judgment rendered at

[1] (1967), 60 W.W.R. 370.

Victoria, on November 7, 1967, the Court of Appeal dismissed their appeal from conviction and by a unanimous judgment rendered on November 21, 1967, it dismissed their appeal from sentence.

The applicants now seek to obtain leave to appeal to this Court from these two judgments.

As to the application to appeal from conviction:—Virtually all the grounds, raised before us by applicants, are dealt with in the reasons for judgment of Chief Justice Davey who rejected them, and in our view properly so, as ill-founded. With respect to the other points submitted to us by applicants, we are also of opinion that they are devoid of merit. Hence, the application for leave to appeal from conviction should be dismissed.

As to the application for leave to appeal from sentence:—This application cannot be entertained, for, as decided in *Goldhar v. The Queen*[2], and consistently held ever since, as well as prior to that decision, this Court is not competent to entertain an appeal against a sentence imposed for a criminal offence. The application for leave to appeal from sentence should also be dismissed.

Application dismissed.

Solicitor for the applicants: J. Stanton, Vancouver.

Solicitor for the respondent: D. Sigler, Vancouver.

[2] [1960] S.C.R. 60, 125 C.C.C. 209, (1959), 31 C.R. 374.

1967
*Nov. 20, 21
1968
Feb. 8

JOHN BRUCE HADDEN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Whether accused leading consistently a criminal life—Criminal Code, 1953-54 (Can.), c. 51, s. 660(2)(a).

Following his conviction on a charge of theft of one can-opener, of a value not in excess of $50, committed on July 31, 1963, the appellant was found to be an habitual criminal and sentenced to preventive detention. The report of the magistrate to the Court of Appeal showed that of the 14 offences of which he found the appellant had been convicted previously, the first two were for vagrancy and the third, in 1947, was for breaking and entering and theft. All subsequent convictions were either for having possession of drugs (4 offences) or for petty theft (7 offences). The last conviction was in December 1962 and the punishment was a term of 6 months imprisonment. There had been a period of less than three months between the date of his release from prison, on May 5, 1963, and the commission of the substantive offence on July 31, 1963. The Court of Appeal found that it had not been shown that the magistrate had erred in principle in finding that the appellant was an habitual criminal. The appellant was granted leave to appeal to this Court.

Held (Fauteux, Abbott, Martland and Ritchie JJ. dissenting): The appeal should be allowed and the sentence of preventive detention quashed.

Per Cartwright C.J. and Judson, Hall, Spence and Pigeon JJ.: There was no evidence that since his release early in May 1963, the appellant was leading a criminal life, persistently or otherwise, except the commission of the substantive offence on July 31, 1963. This was not a case where the commission of the substantive offence could in itself furnish sufficient evidence that the appellant was leading persistently a criminal life.

Per Fauteux, Abbott, Martland and Ritchie JJ., *dissenting*: It has been established that the appellant was leading persistently a criminal life as required by s. 660(2)(*a*) of the *Criminal Code*. It is open to the Court to conclude that the accused is leading persistently a criminal life if he repeatedly commits the same kind of offence and if the time elapsing between the commission of the offence prior to the substantive offence and the commission of the substantive offence is short, without necessarily having to have evidence of criminal acts or associations during that short period. The pattern of conduct which has been established of the commission of thefts shortly after release from

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

custody, coupled with the short lapse of time after release and prior to the commission of the substantive offence, was good evidence of persistence in leading a criminal life.

Droit criminel—Repris de justice—L'accusé menait-il continûment une vie criminelle—Code criminel, 1953-54 (Can.), c. 51, art. 660(2)(a).

Ayant été trouvé coupable du vol, commis le 31 juillet 1963, d'un ouvre-boîtes d'une valeur n'excédant pas $50, l'appelant a été déclaré repris de justice et une sentence de détention préventive lui a été imposée. Le rapport fourni à la Cour d'Appel par le magistrat fait voir que des 14 infractions pour lesquelles le magistrat a trouvé que l'appelant avait été déclaré coupable antérieurement, les deux premières sont pour vagabondage et la troisième, en 1947, pour entrée par effraction et vol. Toutes les autres déclarations subséquentes de culpabilité sont soit pour possession de stupéfiants (4 infractions) ou pour larcin (7 infractions). La dernière déclaration de culpabilité a été enregistrée en décembre 1962 et l'appelant a été condamné à 6 mois d'emprisonnement. Il s'est écoulé moins de 3 mois entre la date de sa mise en liberté le 5 mai 1963 et celle de l'infraction dont il s'agit, le 31 juillet 1963. La Cour d'Appel a statué qu'il n'avait pas été démontré que le magistrat avait erré en principe en déclarant que l'appelant était un repris de justice. L'appelant a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être accueilli et la sentence de détention préventive doit être annulée, les Juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

Le Juge en Chef Cartwright et les Juges Judson, Hall, Spence et Pigeon: Sauf le fait d'avoir commis l'infraction du 31 juillet 1963, il n'y a aucune preuve que depuis sa mise en liberté au début du mois de mai 1963, l'appelant avait mené une vie criminelle, avec persistance ou autrement. Il ne s'agit pas ici d'un cas où l'infraction de l'offense substantive est en elle-même une preuve suffisante que l'appelant menait avec persistance une vie criminelle.

Les Juges Fauteux, Abbott, Martland et Ritchie, *dissidents*: Il a été établi que l'appelant menait avec persistance une vie criminelle au sens de l'art. 660(2)(*a*) du *Code Criminel*. La Cour peut conclure que l'accusé mène avec persistance une vie criminelle s'il a commis à maintes reprises le même genre d'infractions et si le temps écoulé entre la dernière infraction et celle qui donne lieu à la sentence, est de courte durée. La preuve d'actes criminels ou d'associations criminelles durant cette courte période n'est pas nécessaire. Le genre de vie révélé par une série de vols commis peu de temps après la remise en liberté suivis d'un bref intervalle de liberté avant l'infraction, est une bonne preuve de la persistance à mener une vie criminelle.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique[1], confirmant une sentence de détention préventive. Appel maintenu, les juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

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[1] (1965), 51 W.W.R. 693, [1966] 1 C.C.C. 133.

1968

HADDEN v. THE QUEEN

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a sentence of preventive detention. Appeal allowed, Fauteux, Abbott, Martland and Ritchie JJ. dissenting.

T. R. Berger, for the appellant.

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

The judgment of Cartwright C.J. and Judson, Hall and Spence JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal, brought pursuant to leave granted by this Court on October 10, 1967, from a judgment of the Court of Appeal for British Columbia[1] pronounced on April 20, 1965, dismissing an appeal against a sentence to preventive detention imposed on the appellant by His Worship Magistrate D. D. Hume at Vancouver on March 16, 1964, in lieu of the sentence of seven months imprisonment imposed on him by His Worship Magistrate Lorne H. Jackson on August 1, 1963, upon his conviction on that date on a charge that at the City of Vancouver on July 31, 1963, he committed theft of one can-opener, of a value not in excess of fifty dollars, the property of F. W. Woolworth Company Limited.

On October 23, 1963, while the appellant was in custody in Oakalla Prison Farm, he was served with a notice, pursuant to s. 662 of the *Criminal Code,* that an application to find him to be an habitual criminal and that it was therefore expedient for the protection of the public to sentence him to preventive detention would be made on Friday, November 8, 1963, to a magistrate other than Magistrate Lorne H. Jackson. This notice specified twenty-four convictions previous to the conviction on August 1, 1963, mentioned above and hereinafter referred to as "the substantive offence", and concluded as follows:

B. Other Circumstances

26) That you are an habitual associate of criminals.

27) That you are a drug addict and an habitual associate of drug addicts.

28) That during your periods of freedom you have not had regular gainful employment.

29) That after brief periods of freedom you have consistently returned to your criminal way of life.

[1] (1965), 51 W.W.R. 693, [1966] 1 C.C.C. 133.

The hearing before Magistrate Hume did not commence until March 13, 1964; by that time the appellant had been released from custody. It appeared that the appellant had received notice that the hearing would proceed on March 13, 1964, but he did not appear; counsel who had been representing him was given permission to withdraw and the hearing proceeded *ex parte*.

At the conclusion of the hearing the learned Magistrate gave a brief oral judgment as follows:

> I find the accused is a habitual criminal and I sentence him to preventive detention. Issue a warrant for his arrest.

An appeal having been taken, the Magistrate furnished a report to the Court of Appeal. In paragraph 10 of this report it was stated that convictions of the three indictable offences for which the accused was liable to a term of five years or more were proved, that they were on charges of having possession of drugs and were those specified in paras. 15, 16 and 19 of the notice of application. On reference to that notice it appears that those convictions were as follows:

(a) At Vancouver, on April 21, 1953; sentence, imprisonment for 3 years and a fine of $200.00 or a further term of 2 months;

(b) At Vancouver, On October 2, 1956; sentence, imprisonment for 2 years and 6 months;

(c) At Vancouver, on July 22, 1959; sentence, imprisonment for 2 years.

Paragraphs 11, 12 and 13 of the Magistrate's report are as follows:

> 11. The convictions which were proved against the accused since 1945 are as follows:—
>
> 1947 Vagrancy A
> 1947 Vagrancy A
> 1947 Breaking and entering and theft
> 1950 Drugs in possession
> 1953 Drugs in possession
> 1956 Drugs in possession
> 1958 Theft under fifty dollars
> 1959 Theft under fifty dollars
> 1959 Drugs in possession
> July 1961 Theft under $50.00—2 months
> September 1961 Theft under $50.00—2 months
> December 1961 Theft under $50.00—4 months
> May 1962 Theft under $50.00—6 months
> December 1962 Theft under $50.00—6 months

1968

HADDEN v. THE QUEEN

Cartwright C.J.

12. Evidence presented by the Crown to substantiate paragraph 'B' of the Notice of Application, that is other circumstances, was given as follows:—

June 1959	Seen with Charles Codd, George Harrop, known drug addicts, at which time the accused admitted he was unemployed and had no funds.
March 1961	Seen by Constable Monk with Violet Young and Papenak, known drug addicts, at which time the accused admitted six drug convictions.
June 1961	Seen by Constable Aitchison with Joseph Rawley, who admitted a criminal record.
September 16, 1961	He admitted to Constable Hoyle that he was at that time a drug addict.
November 1961	Seen by Constable Watt with Charles Allan, a person who admitted a criminal record and being a drug addict.
March 1963	Seen by Corporal Forgopa (RCMP) with Gordon Kravenia and Vance Lawson, known addicts.

(It appears from the transcript, and was agreed by counsel before us, that this last item is an error. The date should read March 1953, not March 1963.)

13. In view of the accused's lengthy record for drugs and his most recent convictions since 1961 for theft, I found that he was leading persistently a criminal life and was hence an habitual criminal, and that it was expedient for the protection of the public to sentence him to preventive detention; and as he was not present in court I instructed the prosecutor to issue and have exercised a warrant for his arrest.

In the Court of Appeal the question which is now before us was dealt with in one sentence as follows:

In our view it has not been shown that the learned magistrate in the court below erred in principle which had been applied by him and approved in this court in many cases, either in the matter of the finding that the appellant is a habitual criminal, nor the conclusion drawn by the Magistrate that it is expedient in the interests of the public that this appellant be sentenced to preventive detention.

The remainder of the reasons given by the Court of Appeal deals with the question, which was not raised before us, whether the learned magistrate had the right to proceed with the hearing and give his decision in the absence of the accused.

The report of the learned magistrate shows that of the fourteen offences of which he found the appellant had been convicted the first two were for vagrancy and the third, in 1947, was for breaking and entering and theft (of two

electric clippers and a quantity of cigarettes). All subsequent convictions were either for having possession of drugs (four offences) or for petty theft (seven offences). The last conviction was in December 1962 and the punishment was a term of 6 months imprisonment. According to the evidence of P. C. Needham the appellant was released about May 5, 1963. This witness testified that he "checked" the appellant on May 12, 1963. He says:

> I have here 5:35 p.m. on May the 12th which is Sunday, May 12, 1963, I checked this man in the 100 East Hastings. At this time he told me he was living at Room 15 at the Colonial Hotel by himself. He was on Social Assistance. He had Fifty Cents in his pockets. He said he had been on Social Assistance for three or more years and at this time he admitted having been released from prison one week earlier having served a six months sentence.

It will be observed from paragraph 12 of the magistrate's report, quoted above, that the evidence of circumstances other than previous convictions upon which the magistrate relied related to occasions the latest of which was November 1961.

It has been held in a unanimous judgment of this Court in *Kirkland v. The Queen*[2] that the time at which the Crown must show that an accused is leading persistently a criminal life is the time of the commission of the substantive offence.

In the case at bar there is no evidence that since his release early in May 1963 the appellant was leading a criminal life, persistently or otherwise, except the commission of the substantive offence on July 31, 1963. In some circumstances the commission of the substantive offence may in itself furnish sufficient evidence that the accused is leading persistently a criminal life, but this is not one of such cases.

P. C. Needham gave evidence in regard to the substantive offence. He told of going to the Manager's Office at F. W. Woolworth Company's store on West Hastings Street, at 5.10 p.m. on July 31, 1963, in response to a radio call and finding the accused there. The Manager charged the appellant with having stolen a can-opener of the value of

[2] [1957] S.C.R. 3 at 8, 117 C.C.C. 1, (1956), 25 C.R. 101.

1968

HADDEN v. THE QUEEN

Cartwright C.J.

two dollars and ninety-nine cents and the following day the appellant pleaded guilty to this charge. P. C. Needham testified as follows:

> At the time of this arrest, he had a appearance of being mildly intoxicated but there was no smell of liquor on his breath and when questioned about this he admitted being—having had goof balls earlier.
>
> * * *
>
> MR. MORRISON: Now, you said something about a goof ball, Constable, what do you mean by that?
>
> A. Well, this is the term that—well, we asked him if he had been drinking and—
>
> THE COURT: Who asked him?
>
> A. I did, your Worship, during the normal course of the primary investigation and he denied drinking and I suggested that—by way of suggestion on my part that he had taken goof balls and he agreed.
>
> MR. MORRISON: What do you understand by the term, goof balls?
>
> A. It is some chemical preparation taken by persons addicted to drugs which they can obtain more easily and a lot less expense and the effect is similar. This is what I am made to understand.

The picture is of a man "mildly intoxicated" by "goof balls" stealing a can-opener worth $2.99 rather than of one persisting in leading a criminal life. The facts are even more consistent with yielding to a sudden impulse than were those in *Kirkland's* case, *supra.*

No doubt the record shows that the appellant has for years been addicted to the use of drugs and from time to time commits petty thefts. In my opinion, the evidence accepted by the learned magistrate fails to establish that the appellant was, at the time of committing the substantive offence, leading persistently a criminal life and this is sufficient to dispose of the appeal.

As is pointed out in the reasons of my brother Martland, it was also contended on behalf of the appellant that even if he could properly be found to be an habitual criminal, it was not proper to impose a sentence of preventive detention upon him but it is unnecessary to deal with that submission in these reasons.

I would allow the appeal and quash the sentence of preventive detention.

The judgment of Fauteux, Abbott, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[3], which dis-

[3] (1965), 51 W.W.R. 693, [1966] 1 C.C.C. 133.

missed the appellant's appeal against a sentence for preventive detention which had been imposed upon him. The facts giving rise to this appeal are stated in the reasons of the Chief Justice. The Court of Appeal found that it had not been shown that the learned magistrate in the court below erred in principle in the matter of finding that the appellant was an habitual criminal.

On this issue, the main argument of the appellant was that it had not been established that he was "leading persistently a criminal life", as required by s. 660(2)(*a*) of the *Criminal Code*, which is one of the necessary elements contained in the definition of an habitual criminal.

The evidence at trial established the following:

1. A series of fifteen convictions (including that for the substantive offence on August 1, 1963) since the year 1945.
2. He had been convicted in 1950, 1953, 1956 and 1959 of having drugs in his possession.
3. Between 1958 and 1962 the appellant had been convicted seven times for theft of an article of a value of less than fifty dollars. The substantive offence, for which he was convicted on August 1, 1963, was of a similar nature.
4. There had been a period of less than three months between the date of his release from prison, about May 5, 1963, and the commission of the substantive offence. When interviewed by a police officer about a week after that release from detention the appellant said that he was on Social Assistance and had been on such assistance for three or more years.
5. Detective Devries, of the Vancouver City Police Force, who had observed the appellant, when he committed the last offence, prior to the substantive offence, on December 6, 1962, testified that he had known the appellant for ten years and that the appellant is a user of narcotics. Asked as to his character and reputation in the community, he said:

> Well, in my opinion, as far as he is concerned, he always hangs down around the 100 Block East Hastings and Skid Road and I have never known him to make any advance to employment or get out of the rut he is in.

1968

HADDEN v. THE QUEEN

Martland J.

In answer to another question, he said:

> Yes, I have been on the Drug Squad for a period of three years or more and also walk the beat in that area for a number of years and the 100 Block East Hastings is the main hangout for drug addicts and criminals.

The appellant contends that there was no evidence that the appellant was engaged in crime between the date of his release from custody and the commission of the substantive offence and submits that, without this, the appellant cannot be found to be an habitual criminal within the requirements of s. 660(2)(*a*).

In *Kirkland v. The Queen*[4], this Court agreed with the statement of Lord Reading L.C.J. in *R. v. Jones*[5], that:

> The legislature never intended that a man should be convicted of being a habitual criminal merely because he had a number of previous convictions against him.

That statement was made in a case which involved the adequacy of a summation to the jury by the Chairman of a Quarter Sessions, which contained the statement:

> If you think his record justifies this charge of being a habitual criminal it is your duty to find that he is a habitual criminal.

While it is true that a criminal record alone does not necessarily involve a finding that at the time the substantive offence was committed, the accused is leading persistently a criminal life, if the accused repeatedly commits the same kind of offence, and if the time elapsing between the commission of the offence prior to the substantive offence and the commission of the substantive offence is short, in my opinion it is open to the court, considering the matter, to conclude that the accused is leading persistently a criminal life, without necessarily having to have evidence of criminal acts or associations during that short period.

The evidence in the present case establishes a clear pattern of conduct. In each case noted below the charge involved was theft.

Date of Conviction	*Sentence*
July, 1961	2 months
September, 1961	4 months
May, 1962	6 months
December, 1962	6 months

[4] [1957] S.C.R. 3, 117 C.C.C. 1, (1956), 25 C.R. 101.

[5] (1920), 15 Cr. App. R. 20.

Within three months of his release after the last of the above sentences, the appellant committed theft once again.

In the *Kirkland* case, it was said that there had been cases in the Court of Criminal Appeal in which the nature of the substantive offence viewed in the light of the previous record of the accused was in itself evidence that he was leading a persistently criminal life, but that the cases of this kind cited by counsel were all cases in which the substantive offence was of a nature which showed premeditation and careful preparation.

The fact of premeditation and careful preparation in relation to the substantive offence may certainly be evidence of persistence in leading a criminal life. In my opinion it is not the only kind of evidence, in cases of this kind, which can establish such persistence, and I do not regard the *Kirkland* case as laying this down as a matter of law. That case was decided upon its own facts, as this one must be. In my view the pattern of conduct which has been established of the commission of thefts shortly after release from custody, coupled with the short lapse of time after release and prior to the commission of the substantive offence, is equally good evidence of persistence in leading a criminal life. The case of *R. v. Yates*[6] is an example of this kind.

Counsel for the appellant contended that Part XXI of the *Criminal Code* was not intended to apply in respect of the commission of the sort of crimes committed by the appellant in this case, which involved no violence and were not of a serious nature. In my opinion, if the application of Part XXI is to be restricted in this way, that is a matter for Parliament and not to be achieved by judicial decision. Section 660, in requiring, as a prerequisite of a person being found to be an habitual criminal, the commission of three indictable offences for which there is a liability to imprisonment for five years or more, has defined the nature of the crimes in respect of which Part XXI can apply.

[6] (1910), 5 Cr. App. R. 222.

1968

HADDEN v. THE QUEEN

Martland J.

It was also contended, on behalf of the appellant, in the alternative, that, even if he could properly be found to be an habitual criminal, it was not proper to impose a sentence of preventive detention upon him. In view of the fact that the majority of this Court have decided that the evidence in this case fails to establish that the appellant was persistently leading a criminal life, a necessary requirement to his being found to be an habitual criminal within para. (*a*) of subs. (2) of s. 660 of the *Criminal Code*, it is unnecessary for me to deal with those submissions in these reasons.

In my opinion the appeal should be dismissed.

PIGEON J.:—I have had the opportunity of reading the reasons for judgment of the Chief Justice in this appeal. I concur in his view that there is no evidence that the appellant, since his release early in May 1963, was leading a criminal life, persistently or otherwise, except the commission of the substantive offence on July 31, 1963, and that this is not of itself sufficient evidence in the circumstances of this case. Therefore, I would allow the appeal and quash the sentence of preventive detention.

Appeal allowed, FAUTEUX, ABBOTT, MARTLAND *and* RITCHIE JJ. *dissenting.*

Solicitor for the appellant: T. R. Berger, Vancouver.

Solicitor for the respondent: W. G. Burke-Robertson, Ottawa.

LABORATOIRE PENTAGONE LIMITÉE ..APPLICANT;

AND

PARKE, DAVIS & COMPANY .....RESPONDENT.

1967

*Nov. 27

Dec. 18

MOTION FOR STAY OF INJUNCTION

Injunction—Stay of execution of injunction pending appeal—Whether it should be granted—Balance of convenience—Supreme Court of Canada —Jurisdiction issue raised but not decided.

In an action for infringement of a patent which will expire on December 10, 1968, the Court of Appeal, reversing the judgment at trial which had declared the patent invalid, granted an injunction restraining the applicant from manufacturing, importing, producing, buying, delivering, selling or offering for sale a substance called chloramphenicol for the duration of the patent. The applicant inscribed an appeal to this Court from that judgment and, after having unsuccessfully applied to the Court of Appeal for a stay of the injunction, applied to this Court for an order staying the execution of and suspending the injunction until after judgment has been given by this Court on the merits of the appeal.

Held (Hall, Spence and Pigeon JJ. dissenting): The application for a stay of the injunction should be dismissed.

Per Cartwright C.J. and Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The material filed was not adequate to support an application of this kind for what is an unusual form of relief. This Court is being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the applicant would be greater than the impact of its suspension upon the respondent. The applicant elected to carry on a business on the assumption that the patent was invalid. The Court of Appeal held that this assumption was wrong. The applicant, in such circumstances, is not in a position to complain if it has to comply with that judgment until it has been reversed on appeal.

Per Hall, Spence and Pigeon JJ., *dissenting*: Equity calls for the suspension of the injunction. If the injunction remains in operation and the appeal succeeds, the applicant will, in the interval, suffer an important prejudice for which it shall never be indemnified. On the contrary, if the injunction is suspended and the appeal fails, the respondent will be entitled to an indemnity. The loss of the monopoly is not in question because other manufacturers can obtain the right to use the patent. In view of the judgment of the trial Court in its favour, the applicant was not required to establish that, *prima facie,* the appeal was well-founded.

Injonction—Suspension durant l'appel—Doit-elle être accordée—De quel côté est le plus grand préjudice—Cour suprême du Canada—Question de juridiction soulevée mais non décidée.

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*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1967

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & Co.

Dans une action concernant la violation d'un brevet devant expirer le 10 décembre 1968, la Cour d'appel a infirmé le jugement de première instance qui avait déclaré que le brevet était invalide et elle a accordé une injonction défendant à la requérante de fabriquer, importer, produire, acheter, livrer, vendre ou offrir en vente une substance dite chloramphenicol pendant la durée de ce brevet. La requérante a inscrit un appel devant cette Cour de ce jugement et, la suspension de l'injonction lui ayant été refusée par la Cour d'appel, a présenté à la Cour suprême une requête pour faire suspendre l'injonction jusqu'au prononcé du jugement sur son pourvoi devant cette Cour.

Arrêt: La requête demandant la suspension de l'injonction doit être rejetée, les Juges Hall, Spence et Pigeon étant dissidents.

Le Juge en Chef Cartwright et les Juges Fauteux, Abbott, Martland, Judson et Ritchie: Les documents produits ne sont pas suffisants pour justifier cette requête exceptionnelle. On demande à cette Cour de suspendre l'effet d'un jugement de la Cour d'appel qui a été rendu après un examen complet du litige. Pour justifier une telle ordonnance, il n'est pas suffisant d'alléguer que l'effet de l'injonction à l'égard de la requérante serait plus considérable que l'effet de la suspension à l'égard de l'intimée. La requérante a choisi d'exercer son entreprise en prenant pour acquis, ce que la Cour d'appel a déclaré être erroné, que le brevet était invalide. La requérante, dans de telles circonstances, ne peut pas se plaindre d'être obligée de se conformer au jugement rendu jusqu'au moment où il pourra être infirmé en appel.

Les Juges Hall, Spence et Pigeon, *dissidents*: L'équité paraît réclamer la suspension de l'injonction. Si elle reste en vigueur, la requérante au cas où son appel serait jugé bien fondé subira dans l'intervalle un important préjudice dont elle n'aura jamais droit d'être indemnisée. Au contraire, si l'injonction est suspendue, l'intimée, advenant le rejet de l'appel, aura droit à une indemnité. La question de la privation du monopole n'entre pas en jeu parce qu'il s'agit d'un brevet que d'autres manufacturiers peuvent obtenir le droit d'utiliser. Vu le jugement de première instance en sa faveur, la requérante n'avait pas à démontrer que, *prima facie*, l'appel était bien fondé.

REQUÊTE pour suspendre une injonction durant l'appel[1]. Requête rejetée, les Juges Hall, Spence et Pigeon étant dissidents.

APPLICATION for a stay of an injunction pending the appeal[1]. Application dismissed, Hall, Spence and Pigeon JJ. dissenting.

L. Y. Fortier, for the applicant.

Christopher Robinson, Q.C., for the respondent.

The judgment of Cartwright C.J. and of Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

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[1] [1967] Que. Q.B. 975.

1967

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & Co.

MARTLAND J.:—This is an application by the appellant for an order staying the execution of and suspending an injunction granted by the Court of Queen's Bench (Appeal Side) of the Province of Quebec[1], dated September 25, 1967. It was heard on November 27, 1967, and was dismissed on December 18, 1967, it being then stated that reasons for judgment would be delivered later.

This litigation involves a patent no. 479,333 granted to the respondent, bearing date December 11, 1951, relating to "a new chemical compound . . . called Chloramphenicol." The respondent sued the appellant for infringement of this patent, claiming a permanent injunction and damages. The defence was that the patent was invalid, and consequently could not be infringed.

At trial, the action was dismissed, the learned trial judge holding that the patent was invalid. This judgment was reversed, on appeal. A permanent injunction order was granted on September 25, 1967, restraining the appellant from manufacturing, importing, producing, buying, delivering, selling or offering for sale Chloramphenicol for the duration of the respondent's patent. The respondent's right to claim damages up to the amount of $10,000, with interest, was reserved.

From this judgment an appeal has been launched to this Court.

On October 27, 1967, the Court of Appeal rejected an application by the appellant to suspend the injunction until after judgment has been given by this Court on the appeal, holding that it was without jurisdiction in the proceedings after its final judgment had been rendered.[2]

This decision has not been appealed to this Court.

The question of the jurisdiction of this Court to entertain a motion made to it directly to suspend the operation of the injunction was argued before us, but, as I have reached the conclusion that, if jurisdiction does exist, the appellant's application should be dismissed, I do not find it necessary to state any opinion on the jurisdictional issue.

On the merits, the appellant's application was supported by an affidavit of the appellant's attorney, on information and belief, the relevant part of which reads:

I am informed by Messrs. Gérard Dufault and Claude Lafontaine, officers of Appellant company and I do believe that the maintaining in

[1] [1967] Que. Q.B. 975.

[2] [1968] Que. Q.B. 239.

1967

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & Co.

Martland J.

force of this injunction pending judgment of the Supreme Court of Canada on the merits of the appeal will cause Appellant, Laboratoire Pentagone Ltée, irreparable harm and injury which even a favourable judgment of the Supreme Court of Canada could never remedy.

In addition to this there was filed, as a part of the material before us, the petition made to the Court of Appeal for the suspension of the injunction, supported by the affidavit of Gérard Dufault, president of the appellant, stating that the facts alleged in the petition were true. One of the allegations in the petition was that the appellant is a relatively small pharmaceutical company for which Chloramphenicol represented in excess of 50 per cent of its annual volume of sales of pharmaceutical products. It also alleged that the appellant had an inventory of the product Chloramphenicol of about $20,000 which the injunction precluded it from selling, which was of a perishable nature, and the bulk of which could not be returned to the vendor thereof without considerable loss.

I do not think that this material is adequate to support an application of this kind for what is an unusual form of relief. The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

Even on the matter of balance of convenience I note that Puddicombe J., when dealing with an application by the respondent for an interlocutory injunction, had this to say:

> As to the latter, I must admit, taken by itself, to grave doubts respecting the efficacy of a plea of greater inconvenience made by one who knows or has had every opportunity of knowing, before engaging in an undertaking, of the existence of a patent which, if valid, and enforced, can destroy the commerce of such a one. Such a position is, at the least, incongruous.

With this view I agree. The appellant elected to carry on a business on the assumption that the patent duly issued to the respondent was invalid. The Court of Appeal has

held that this assumption was wrong. The appellant, in such circumstances, is not in a position to complain if it has to comply with that judgment until it has been reversed on appeal.

The patent which is in issue will expire on December 10, 1968. All that the respondent succeeded in obtaining, by virtue of the judgment of the Court of Appeal in its favour, was an injunction restraining the use of its patented product from September 25, 1967, to December 10, 1968. A suspension of that injunction until a decision of this Court on the appeal would further reduce that limited period.

The appellant will not be affected in its operations by the respondent's patent after December 10, 1968. In the meantime, it was properly conceded by the respondent's counsel that the appellant is not precluded by the injunction from dealing in Chloramphenicol purchased from any person or corporation holding from the respondent a licence to manufacture or sell the same. The appellant's petition to the Court of Appeal stated that approximately one-third of its sales of Chloramphenicol were represented by purchases from a company which obtained its supplies from a manufacturer, manufacturing under a compulsory licence under the respondent's patent granted by the Commissioner of Patents.

For these reasons, I am of the opinion that this application should be dismissed.

The judgment of Hall, Spence and Pigeon JJ. was delivered by

LE JUGE PIGEON (*dissident*):—A la demande de l'intimée, la Cour du banc de la reine de la Province de Québec[3] siégeant en appel a décerné contre la requérante, le 25 septembre 1967, par jugement sur le fond infirmant celui de la Cour supérieure, une injonction défendant à la requérante de fabriquer, importer, produire, acheter, livrer, vendre ou offrir en vente la substance dite chloramphénicol visée par le brevet canadien numéro 479,333 pendant la durée de ce brevet.

La requérante, qui avait contesté avec succès devant la Cour supérieure la validité du brevet, a interjeté appel à

[3] [1967] B.R. 975.

1967

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & Co.

Le Juge Pigeon

cette Cour. Elle a ensuite demandé à la Cour d'appel par requête la suspension de l'injonction jusqu'au prononcé du jugement sur son pourvoi dans cette Cour. Le 27 octobre, cette demande a été rejetée par le motif suivant.[4]

> Le Juge en chef Tremblay:
>
> Quand notre Cour a rendu son jugement final dans un appel, il me paraît clair qu'elle en est dessaisie et qu'elle ne peut s'en ressaisir que dans les cas prévus à la loi. Cela est encore plus évident quand le litige est pendant devant la Cour suprême du Canada.
>
> Or, l'article 760 C.p., placé dans son contexte, réfère manifestement à un jugement final de la Cour supérieure porté en appel devant notre Cour et non pas à un jugement final de notre Cour porté en appel devant la Cour suprême du Canada. Autrement, la Législature provinciale aurait prétendu déterminer la procédure à suivre devant un tribunal qui relève de la compétence législative du Parlement du Canada comme le reconnaît l'article 24 C.p.:
>
> > «Les tribunaux qui relèvent du Parlement du Canada et ont juridiction en matière civile dans la province sont la Cour suprême du Canada et la Cour d'échiquier du Canada.
> >
> > La compétence de ces tribunaux et la procédure qui doit y être suivie sont déterminées par les lois du Parlement du Canada.»

Ce jugement n'étant pas frappé d'appel, je m'abstiens d'examiner le bien-fondé de ce motif pour considérer d'abord le fond de la requête.

L'équité me paraît réclamer la suspension de l'injonction. En effet, si elle reste en vigueur, la requérante au cas où son appel serait jugé bien fondé subira dans l'intervalle un important préjudice dont elle n'aura jamais droit d'être indemnisée. Au contraire, si l'injonction est suspendue, l'intimée, advenant le rejet de l'appel, aura droit à une indemnité.

L'intimée fait valoir que cette indemnité ne la compensera pas intégralement parce qu'elle aura été privée du monopole que le brevet est destiné à lui assurer. Dans la présente cause, cet argument ne saurait être retenu parce qu'il s'agit d'un brevet que d'autres manufacturiers peuvent obtenir le droit d'utiliser à des conditions fixées par le Commissaire des brevets. De fait, il appert qu'un permis a été ainsi obtenu par un autre manufacturier de telle sorte que l'injonction, dans les termes où elle a été décernée, interdit à la requérante ce que l'intimée est obligée d'admettre qu'elle a le droit de faire, savoir: acheter et revendre le produit fabriqué par cet autre manufacturier.

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[4] [1968] B.R. 239.

1967

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & Co.

Le Juge Pigeon

Devant nous, l'intimée a prétendu que l'ordonnance d'injonction devait s'interpréter de façon à ne pas la rendre applicable en pareil cas. Tout en prenant acte de cette attitude pour l'avenir, il me faut dire que cette prétention paraît contestable. N'est-elle pas contraire au principe d'après lequel une injonction doit être appliquée comme elle est écrite puisque l'on ne saurait se défendre d'y avoir contrevenu en plaidant qu'elle est mal fondée?

Il me faut ajouter que le droit reconnu à l'appelante, lors de l'audition de la requête, d'acheter et revendre le produit fabriqué par un tiers, ne fait pas disparaître la difficulté car ce tiers ne fournit le produit que sous l'une de ses trois formes de telle sorte que l'injonction continue d'avoir des conséquences graves pour l'appelante dont elle paralyse une forte partie des opérations.

L'intimée a ensuite soutenu que, pour obtenir la suspension de l'ordonnance, la requérante devait démontrer que *prima facie* l'appel était bien fondé. Il est possible que dans certains cas l'on soit obligé d'examiner le fond du litige à cette fin. Dans le cas présent, cela ne paraît aucunement nécessaire. Il suffit de constater que non seulement le brevet a été jugé invalide par la Cour supérieure, mais que préalablement la Cour d'appel avait confirmé le refus d'injonction interlocutoire qui avait suivi la rescision de l'intérimaire.

Enfin, l'intimée a nié que cette Cour ait le pouvoir d'accorder la suspension sollicitée. Il est sûr que nous pourrions, en vertu de l'art. 41 de la *Loi sur la Cour suprême*, accorder l'autorisation d'interjeter appel du jugement qui l'a refusée et l'accorder ensuite sur un appel ainsi autorisé, si nous en venions à la conclusion que la Cour d'appel a le pouvoir de le faire comme un juge de la Cour d'appel d'Ontario semble l'avoir décidé dans des causes qui ont fait l'objet d'une décision de cette Cour sur le fond. *K.V.P. Co. c. McKie et al*[5]. Mais faut-il dire que notre juridiction ne peut être exercée que de cette façon? Ce n'est pas ainsi que le Conseil privé a statué sur une requête pour sursis d'exécution dans une affaire venant de la Haute Cour du Bengal où il avait accordé une permission spéciale d'appeler. *Srimati Nityamoni Dasi c. Madhu Sudan Sen*[6]. D'un autre

[5] [1949] S.C.R. 698, 4 D.L.R. 497.
[6] (1911), L.R. 38 Ind. App. 74.

1967

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & Co.

Le Juge Pigeon

côté une certaine jurisprudence voudrait qu'il appartienne à la Cour supérieure de première instance d'accorder la suspension de l'injonction. *Baldwin c. O'Brien*[7].

Vu que la majorité est d'avis qu'il ne s'agit pas d'une instance où il y ait lieu d'accorder la suspension de l'ordonnance d'injonction, il ne me paraît pas à propos d'étudier cette épineuse question de compétence. Je me borne donc à dire que, prenant pour acquis sans l'affirmer, que cette Cour ait le pouvoir de le faire, j'accorderais la suspension de l'injonction décernée par le jugement de la Cour d'appel du Québec en date du 27 octobre 1967 et ce, comme il a été suggéré à l'audition, aux conditions dont les parties pourraient convenir par écrit remis au Registraire dans les huit jours ou, à leur défaut de ce faire, aux conditions qui seraient fixées par un juge de cette Cour, le tout dépens réservés.

Application dismissed, HALL SPENCE *and* PIGEON JJ. *dissenting.*

Attorneys for the applicant: Cate, Ogilvy, Bishop, Cope, Porteous and Hansard, Montreal.

Attorneys for the respondent: Greenblatt, Godinsky and Resin, Montreal.

MAXWELL FREEDMAN (*Defendant*) ....APPELLANT;

1967

*Nov. 3

AND

1968

Jan. 23

D. THOMPSON LIMITED (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Agency—Contract for electrical renovations to buildings entered into with agent of unnamed owner—Agent at instigation of defendant requesting plaintiff not to file lien in respect of work—Defendant falsely represented as owner—Plaintiff acting on representation to its prejudice—Defendant estopped from denying that he was owner.

By identical offers to purchase, one K offered to purchase two apartment houses from the defendant F. Three days after the date of the said offers, which were accepted on the same day, K gave notice to F that he had assigned all his right in the offers to purchase to C Ltd. and on the following day F's solicitor, by letter to the solicitors for the said

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

[7] (1940), 40 O.L.R. 287.

C Ltd., acknowledged receipt of the notice of assignment. Under a term in the offers to purchase, K was entitled to immediately attend on the premises to execute repairs and renovations and he thereby agreed to indemnify and save harmless the vendor from any and all claims whatsoever and to provide the vendor with waivers of lien from all subcontractors and suppliers before any work was commenced.

K was the operator of a partnership (BJ&L) which appeared to act as the agents for a series of companies including C Ltd. So soon as the offers to purchase had been accepted, BJ&L under the direction of K proceeded to enter the two apartment buildings and to carry out very extensive renovations thereto. The office manager of BJ&L requested the plaintiff company to make an estimate of the renovations necessary to the electrical work in the buildings and upon receipt of the said estimates he authorized the work to proceed on a cost plus basis. It was arranged that the accounts would be paid from the proceeds of the rent. The plaintiff was requested not to file a lien in respect of its work. A written document was presented to it at the instigation of the defendant embodying this agreement, which stated that the plaintiff's agreement was being made at the request of a proposed mortgagee, and at the request of F, the registered owner.

In an action brought against K, BJ&L and F to recover the balance owing for work done on the buildings, the plaintiff obtained judgment against F. The action was dismissed against K and BJ&L although F was given judgment against K for such amount as he was required to pay to the plaintiff. An appeal by F was unanimously dismissed by the Court of Appeal. With leave, F then appealed to this Court.

Held (Cartwright C.J. and Hall J. dissenting): The appeal should be dismissed.

Per Martland J.: The plaintiff contracted with an agent to do the work for the owner. The defendant represented that he was the owner, and the plaintiff acted on that representation, to its own detriment. The defendant was estopped from denying that he was the owner.

Per Martland, Ritchie and Spence JJ.: Before agreeing to proceed with the work it was represented to the plaintiff that BJ&L were only acting as agents for an unnamed owner who would, of course, be liable for payment. The plaintiff proceeding in its ordinary course acted on that representation and entered into the contract. But before it had commenced work on the contract the defendant, through his solicitor, made the further representation that he was the registered owner and enabled BJ&L to obtain the plaintiff's waiver of the right to claim a lien on the properties for the amount which would become due to it. This representation was false and the defendant knew he had already sold the properties and that C Ltd. was entitled to become the registered owner. The solicitor demonstrated his knowledge of the falsity and of the importance of the representation in a letter written by him to the solicitors for C Ltd. His representation and his knowledge were attributable to his client the defendant. The plaintiff acted on that representation to its prejudice, and the defendant accordingly incurred liability.

Per Cartwright C.J. and Hall J., *dissenting*: It was not pleaded that K ordered the plaintiff's work and services as agent of F, or that F agreed to pay for them. Apart from the provisions of the *Mechanics Lien Act* an owner does not become liable to pay for work done on his premises

1968

FREEDMAN v. D. THOMPSON LTD.

which he has not ordered and for which he has not agreed to pay. The fact that F sought and obtained waivers of the right to file liens did not create a liability in contract on his part.

Quite apart from any question of the adequacy of the pleadings the plaintiff's claim based on estoppel could not succeed because the evidence of its responsible officer, read as a whole, negatived the suggestion that, assuming misrepresentations of fact were made by F, the plaintiff was induced thereby to alter its position.

APPEAL from a judgment of the Court of Appeal for Manitoba dismissing an appeal from a judgment of Bastin J. Appeal dismissed, Cartwright C.J. and Hall J. dissenting.

Walter C. Newman, Q.C., for the defendant, appellant.

H. Sokolov, Q.C., and *David Wolinsky*, for the plaintiff, respondent.

The judgment of Cartwright C.J. and of Hall J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—The circumstances out of which this appeal arises and the course of the proceedings in the Courts below are set out in the reasons of my brother Spence and, as far as possible, I shall refrain from repetition.

It is first necessary to consider the nature of the cause of action pleaded by the respondent. The amended statement of claim alleges that from October 1, 1963, until March 14, 1964, the appellant was the registered owner and in possession of the Rozel Apartments and that from October 3, 1963, to May 5, 1964, he was the registered owner and in possession of the Windsor Apartments. This allegation is admitted in the statement of defence of the appellant.

The statement of claim continues:

4. At all material times, the Defendant Paul Klass, in his personal capacity or as the representative of Baird, Johnson & Lee, was the manager of the afore-described properties, and with the knowledge and acquiescence of the Defendant Maxwell Freedman, caused extensive improvements to be made thereto. The reason and purpose for such improvements was to increase the market value of the said properties, and the Defendant Maxwell Freedman, after such improvements had been effected, did sell and transfer said properties at amounts greatly in excess of the purchase prices paid by him.

5. The Plaintiff contributed to such improvements by supplying electrical materials, work and services in the amount of $5,700.00 (later reduced to $4,275.00) to said Rozel Apartments, and in the amount of $990.00 to said Windsor Apartments.

6. The Plaintiff, also at the request of the Defendant Maxwell Freedman, while he was the registered owner, waived its rights to file Mechanics' Liens in respect of the improvements effected to the said properties and the Plaintiff claims and submits that said Defendant is estopped for denying his responsibility and liability to the Plaintiff for the payments of its accounts.

7. The Defendant, Maxwell Freedman, as the owner of the aforedescribed properties, obtained advantage and benefit from the goods, materials and services supplied by the Plaintiff.

8. The Plaintiff's accounts, as aforesaid, remain unpaid in whole or in part although demand for the same has been made by the Plaintiff.

It concludes with a claim for payment of the said sums of $4,275 and $990.

The allegations in the last sentence of para. 4 were not substantiated. The appellant sold both apartments to Klass on October 4, 1963, at profits of $4,750 and $4,000 respectively.

In my view, the statement of claim does not disclose any cause of action against the appellant. It is not pleaded that Klass ordered the respondent's work and services as agent of Freedman; it is not pleaded that Freedman agreed to pay for them. Apart from the provisions of the *Mechanics' Liens Act* an owner does not become liable to pay for work done on his premises which he has not ordered and for which he has not agreed to pay.

It is not necessary to consider whether the evidence supports the allegations in para. 7, of the statement of claim, since even if it does the fact of an owner being benefited by work done on his property does not, apart from some statutory provision, impose upon him a liability to pay for it in the absence of any agreement binding him to do so.

It may well be that Freedman would be estopped from denying that he was the owner of the two apartments at the time the respondent rendered its services but this in itself would not advance the respondent's case because simply *qua* owner, in the absence of contract, Freedman would not be liable.

The fact that Freedman sought and obtained waivers of the right to file liens does not create a liability in contract on his part. It would have been a simple matter for the respondent to exact from Freedman a personal promise to pay as a condition of signing the waivers.

With the greatest respect, it appears to me that in the judgments below the matter has been dealt with as if the

1968

FREEDMAN v. D. THOMPSON LTD.

Cartwright C.J.

action were one for damages for fraudulent misrepresentation or for conspiracy to defraud the respondent. It is well settled that in such actions fraud must be both pleaded and proved. It has not been pleaded in this case.

Quite apart from any question of the adequacy of the pleadings it appears to me that the respondent's claim based on estoppel could not succeed because the evidence of its responsible officer, Philip Kaplan, read as a whole, negatives the suggestion that, assuming misrepresentations of fact were made by Freedman, the respondent was induced thereby to alter its position.

I would allow the appeal and dismiss the action with costs throughout.

MARTLAND J.:—I am in agreement with the reasons of my brother Spence.

In my opinion, the evidence establishes that the respondent undertook to do work on the two apartment buildings at the request of an employee of the firm of Baird, Johnson & Lee. Both that firm and the respondent knew that the firm was not making this arrangement as principal, but as agent for some other person. The respondent reasonably presumed that it was doing the work for the registered owner.

The respondent was requested to agree not to file a lien in respect of its work. A written document was presented to it at the instigation of the appellant embodying this agreement, which stated that the respondent's agreement was being made at the request of Hathaway Investments Ltd., as proposed mortgagee, and at the request of Maxwell Freedman, the registered owner. The agreement was being requested

> for the purpose of inducing the mortgagee to advance moneys secured by a first mortgage on the said property; for the purpose of permitting the owner of the said property to pay the costs of constructing the building or buildings erected or now under construction . . . .

I am of the opinion that this was a representation by the appellant that the respondent's work was being done for him. The respondent agreed not to file a lien on the basis of the representations made in that document. That is the way the document itself reads.

In short, the respondent contracted with an agent to do the work for the owner. The appellant represented that he

was the owner, and the respondent acted on that representation, to its own detriment. The appellant is estopped from denying that he was the owner.

I think that this claim is sufficiently pleaded by paras. 4, 5 and 6 of the amended statement of claim. Paragraphs 5 and 6 are quoted in the reasons of the Chief Justice. The relevant portion of para. 4 reads as follows:

> 4. At all material times, the Defendant Paul Klass, in his personal capacity or as the representative of Baird, Johnson & Lee, was the manager of the aforedescribed properties, and with the knowledge and acquiescence of the Defendant Maxwell Freedman, caused extensive improvements to be made thereto ....

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

The judgment of Ritchie and Spence JJ. was delivered by

SPENCE J.:—This is an appeal by leave from the judgment of the Court of Appeal for Manitoba delivered on July 6, 1966, whereby that Court unanimously dismissed the appeal by the (defendant) appellant from the judgment of Mr. Justice Bastin pronounced on January 5, 1966. By the latter judgment the respondent was awarded judgment in the amount of $5,265 with costs.

The appellant had purchased an apartment house known as the Rozel Apartments in the City of Winnipeg from Messrs. Zlotnick and Goldin by means of an offer to purchase dated September 6, 1963, and had further purchased another apartment house in the City of Winnipeg known as the Windsor Apartments from a Mr. Popeski by an offer to purchase dated September 16, 1963.

By identical offers to purchase dated October 4, 1963, one Paul Klass offered to purchase these two apartments from the appellant Freedman. Paul Klass was a defendant in the action but the action of the respondent was dismissed against him and Messrs. Baird, Johnson and Lee at trial although the appellant was given judgment against the said Paul Klass for such amount as he was required to pay to the respondent.

The consideration in the agreement to purchase by the appellant as to the Rozel Apartments was $82,000, and the consideration in the agreement to purchase made by Paul Klass for the said apartment was $86,750. The considera-

1968

FREEDMAN v. D. THOMPSON LTD.

Spence J.

tion in the offer to purchase by the appellant as to the Windsor Apartments was $60,000 and the consideration in the offer to purchase the said apartment by Klass was $64,000. The two offers to purchase by Klass were made by him as an individual but he testified at trial that they were really made in his capacity as trustee of or agent for a limited company known as Confidence Enterprises Ltd.

Three days after the date of the said offers, which were accepted on the same day, Paul Klass gave notice to the appellant that he had assigned all his right in the offers to purchase to the said Confidence Enterprises Ltd. and on the following day the appellant's solicitor, Mr. A. M. Zivot, by letter to Messrs. Pollock, Nurgitz and Bromley, solicitors for the said Confidence Enterprises Ltd., acknowledged receipt of the notice of assignment. Both of the offers to purchase made by Klass and assigned to Confidence Enterprises Ltd. contained as para. 12 the following term:

> 12. The undersigned will be entitled to immediately attend on the premises to execute repairs and renovations and hereby agrees to indemnify and save harmless the vendor from any and all claims of any nature whatsoever and provide the vendor with Waivers of Lien and Building Declaration before commencement of any repairs and renovations. The Waivers of Lien shall be from all sub-trades and material suppliers. The undersigned agrees to reimburse the vendor for any loss of rental suffered by the vendor on account of tenants being caused inconvenience or disturbance as a result of such repairs and renovations; the said repairs and renovations shall be conducted with a minimum of inconvenience and disturbance to the tenants.

The evidence at trial revealed that the said Paul Klass operated a partnership under the name of Baird, Johnson & Lee, no persons of any of those names being with the partnership at that time. Baird, Johnson & Lee appeared to act as the agents for a series of companies including Confidence Enterprises Ltd., Pacific Leaseholds Ltd., and Hathaway Investments Ltd. All of those companies had been incorporated by various members of the law firm of Pollock, Nurgitz and Bromley and the partners of that firm were some of the officers in the said companies. So soon as the offers to purchase had been accepted, Baird, Johnson & Lee under the direction of the said Paul Klass proceeded to enter the two apartment buildings, the tenants of which remained in possession, and to carry out very extensive renovations thereto. When this work had commenced, Mr. A. M. Zivot, the solicitor for the appellant,

wrote in such capacity to Messrs. Pollock, Nurgitz & Bromley, his letter dated October 21, 1963, which reads as follows:

October 21, 1963

Messrs. Pollock, Nurgitz and Bromley,
Barristers and Solicitors,
209 Notre Dame Avenue,
Winnipeg 2, Manitoba.

Attention: Mr. G. Pollock

Dear Sirs:

Re: Sale of Rozel Apartments; Freedman to Klass

As per the terms of the offer to Purchase, Mr. Klass was to supply Mr. Freedman with Waivers of Lien from all sub-contractors and suppliers before any work was to be done.

Mr. Freedman has advised the writer that Mr. Klass is now in the process of putting in a gas unit and that the window man and plumbers have started or will be starting work. In addition, there has been some lumber supplied on the building.

We would, therefore, ask you to please contact your client and obtain waivers from all the above mentioned parties immediately or we shall have no alternative but to write to these people advising them to cease work and we shall consider the offer null and void and at an end.

We are returning to you building declarations in duplicate re the Rozel Apartments and the Windsor Court with one copy of the Waiver of Lien for your client.

There has been an arrangement between Mr. Klass and Mr. Freedman, whereby Mr. Freedman would leave two suites in the Rozel Apartments, probably Suite 21 and Suite 5, vacant for Mr. Klass to use as storage, etc. In consideration of same, Mr. Klass has agreed to pay $50.00 per month for each suite or a total of $100.00, commencing from October 15th, 1963. Freedman could have rented one of these suites. However, Klass insisted no more leases be signed.

We would appreciate it if you would send us a letter confirming these rental arrangements between Klass and Freedman.

Yours truly,

LAMONT, BURIAK & ZIVOT

AZ:PJ
Encls.

per: A. ZIVOT

The office manager of Baird, Johnson & Lee was one Harold Kaplan and the said Harold Kaplan approached his brother, one Philip Kaplan, who was the office manager of the respondent, and requested that the respondent company make an estimate of the renovations necessary to the electrical work in both these apartments. Upon receipt of the said estimates the said Harold Kaplan authorized the work to proceed. Although the only contemporaneous

1968

FREEDMAN v. D. THOMPSON LTD.

Spence J.

document as to the contents seems to be the letter from Messrs. Baird, Johnson & Lee to the respondent dated November 5, 1963, which reads:

> This is to verify the electrical work on the Rozel Apartments—105 Clark Street to pursue on a cost plus basis, as per our conversation.

Two invoices were delivered later by the respondent. These two invoices are dated, respectively, March 16, 1964, as to the "Rozelle" Apartments, and April 22, 1964, as to the Windsor Apartments. Both of those invoices show that the account was to be paid in twelve monthly instalments; that of the Rozel Apartments to commence on April 1, 1964, and that of the Windsor Apartments to commence on May 1, 1964.

Philip Kaplan testified at trial that these monthly payments were arranged so that the cost of the renovations to the electrical work could be paid out of the rentals received.

Mr. Zivot had written to Messrs. Pollock, Nurgitz & Bromley his letter of October 21, 1963, recited *supra,* demanding the waivers of lien. Prior to the respondent commencing any work on either of the apartments, the said Harold Kaplan had attended the respondent and requested such waivers of lien. The respondent had then prepared waivers of lien on its own forms as to one of the apartment buildings but upon submitting it to Messrs. Baird, Johnson & Lee, the document was said to be unsatisfactory; then waivers of lien were prepared by Messrs. Pollock, Nurgitz & Bromley. These waivers of lien were submitted to Mr. Zivot as solicitor for the appellant and in his aforesaid letter to Messrs. Pollock, Nurgitz & Bromley of October 21, 1963, he said:

> We are returning to you building declarations in duplicate re the Rozel Apartments and the Windsor Court *with one copy of the Waiver of Lien for your client.*

(The italicizing is my own.)

The learned trial judge, with whom I agree, held that Mr. Zivot, therefore, would be aware of the terms of the waiver of lien and that his knowledge would be the knowledge of his client. The said waivers of lien, produced at trial as exhibits, both purported to be "at the request of Hathaway Investments Ltd., the previous mortgagees, *and at the request of Maxwell Freedman. the registered owner*". (The italicizing is my own.)

In his evidence, Philip Kaplan, the office manager of the respondent, testified that he had been informed by his brother Harold Kaplan of Messrs. Baird, Johnson & Lee that the latter were not the owners of the premises and that, therefore, he presumed that they were acting only as agents for the owner. Philip Kaplan also testified that at the time the respondent agreed to proceed with the work on a cost plus basis he had not inquired further as to the identity of the owner and that he had caused no searches to be made in the registry office. When, however, the waivers of lien were presented for execution by the respondent they did show that the registered owner was Maxwell Freedman, and Philip Kaplan has testified and Paul Klass has admitted, that at no time from then until after the work was completed and the monthly payments fell into arrears was the respondent ever informed that anyone but the said Maxwell Freedman had any title or interest in the property. Again I agree with the learned trial judge in his finding that this conduct by Maxwell Freedman through his solicitor constituted not only silence but a representation that he the appellant was the owner of the property and would be responsible for the payment of the account which would become due to the respondent for the work to be performed by it.

It is true that Philip Kaplan in giving evidence at trial for the respondent admitted that he did not ask his brother for whom Baird, Johnson & Lee were agents and that he did not care as his brother had assured him that the respondent's account would be paid out of the rents. He further testified that he authorized the execution of the waivers of lien so that the owner whoever he might be could borrow money with which to do the renovations. Philip Kaplan described this as the ordinary course of the respondent's business. He admitted that the first time that it came to his knowledge that the registered owner was Maxwell Freedman was when the waivers of lien were presented to him for execution, and that not only had he not caused any searches to be made in the registry office but that he did not know any Maxwell Freedman prior to that time. But when a question was put to him:

> Q. So far as you were concerned, the Maxwell Freedman that appeared on the waiver of mechanic's lien was not of much consequence?

1968

FREEDMAN v. D. THOMPSON LTD.

Spence J.

he replied:

A. He was the registered owner.

And further, Kaplan was questioned:

Q. So you were really looking to the block as sort of a security were you?

to which he replied:

A. We were looking to the word of the agent of the owner that the moneys would be paid for the work done.

The view of the trial judge, with which I agree, would seem to be confirmed by several circumstances. *Firstly,* the arrangement that the accounts would be paid from the proceeds of the rent is a definite indication that the owner who would be in receipt of the said rents would be liable to pay the accounts and would pay them. *Secondly,* in his letter to Pollock, Nurgitz & Bromley of October 21, 1963, which I have quoted above, Mr. Zivot said, in part:

We would, therefore, ask you to please contact your client and obtain waivers from all the above mentioned parties immediately *or we shall have no alternative but to write to these people advising them to cease work and we shall consider the offer null and void and at an end.*

(The italicizing is my own.)

In my view, this constitutes an express statement of the solicitor that his client, the appellant, was responsible for the accounts and a threat that, unless he obtained the waivers of lien which he was demanding, the whole situation would be revealed to the contractors thereby making impossible Klass's method of operation. The waivers of lien, of course, would have no effect to discharge the owner's liability but would only prevent the contractor obtaining a security by registration of a lien in accordance with the provincial legislation.

It was the argument of the appellant before this Court that there could be no liability upon the appellant created by virtue of agency established by estoppel unless there had been a representation to the respondent upon which the respondent acted to its prejudice and further that the evidence did not establish any such estoppel because the respondent through its manager Philip Kaplan had agreed to proceed with the work without even knowing the identity of the owner or making any attempt to determine whether that owner were a responsible party. I think the answer to that contention is that although the respondent

had at first agreed to proceed with the work without knowing the identity of the owner and, therefore, of course, without in any way checking the owner's financial ability, the respondent did know that Baird, Johnson & Lee were acting for the owner, and not in their own right. Mr. Harold Kaplan had so informed Philip Kaplan. The respondent at that time could rely on the owner's liability to pay the accounts incurred by his agent and upon its lien rights. Then before it abandoned its right to claim security in the property by way of lien the representation was made to it that Maxwell Freedman was the owner and upon that basis it acted to its prejudice in executing the waivers of lien. There may well have been no representation in making the contract in the first place other than the verbal and that Baird, Johnson & Lee were only acting as agents for an unnamed owner who would, of course, be liable for payment. The respondent proceeding in its ordinary course acted on that representation and entered into the contract. But before it had commenced work on the contract the appellant, through his solicitor, made the further representation that he was the registered owner and enabled Baird, Johnson & Lee to obtain the respondent's waiver of the right to claim a lien on the properties for the amount which would become due to it. This representation was false and the appellant knew he had already sold the properties and that Confidence Enterprises Limited were entitled to become the registered owner. The solicitor demonstrated his knowledge of the falsity and of the importance of the representation in his letter of October 21, 1963. His representation and his knowledge are attributable to his client the appellant. As I have said, the respondent acted on that representation to its prejudice.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs, CARTWRIGHT C.J. *and* HALL J. *dissenting.*

Solicitors for the defendant, appellant: Newman, MacLean and Associates, Winnipeg.

Solicitors for the plaintiff, respondent: Sokolov, Wolinsky and Sokolov, Winnipeg.

1967
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1968
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ROGER DORVAL (*Demandeur*) ..... APPELANT;

ET

MARCEL BOUVIER (*Défendeur*) ..... INTIMÉ.

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

Automobile—Piéton heurté sur la chaussée—Versions contradictoires de l'accident—Cour d'appel substituant sa propre appréciation de la preuve—Justification—Règles à suivre par première et seconde Cour d'appel.

Le demandeur a été blessé lorsqu'il fut heurté par une automobile appartenant au défendeur et par lui conduite de l'est à l'ouest dans la ville de Montréal. Suivant le demandeur, il venait de stationner sa voiture, au côté nord, sur le bord du trottoir et alors que, étant sur la rue, face à son véhicule, il s'apprêtait à en mettre la porte avant gauche sous clef, il fut heurté par l'automobile du défendeur qui venait à sa droite. Suivant le défendeur, le demandeur déboucha subitement devant lui d'entre deux voitures stationnées sur le bord du trottoir et il ne put éviter de le frapper. Le juge de première instance a accepté la version du demandeur et a rejeté celle du défendeur pour la raison que celle-ci était contredite par celle-là. La Cour d'appel statua que le tribunal de première instance ne pouvait conclure à une erreur de la part de tous les témoins de la défense uniquement parce qu'ils étaient contredits par ceux de la poursuite, substitua sa propre appréciation de la preuve et jugea que le poids de la preuve et la balance des probabilités favorisaient la version de la défense. Le demandeur en appela à cette Cour.

Arrêt: L'appel doit être rejeté, le Juge Martland étant dissident.

Les Juges Fauteux, Abbott, Judson et Ritchie: La Cour d'appel a appliqué les principes en vertu desquels une première cour d'appel doit nécessairement intervenir, procéder à l'examen du dossier et former sa propre opinion sur la preuve. Ayant signalé l'erreur affectant le jugement de première instance et ayant fait un examen détaillé de la preuve, elle s'est formé sur la question de fait une opinion différente. Il est impossible d'être clairement satisfait que le jugement de la Cour d'appel est erroné.

Le Juge Martland, *dissident:* Il s'agit d'une cause où une cour d'appel n'aurait pas dû intervenir. Le défendeur avait le fardeau de démontrer une erreur manifeste, de montrer que le juge au procès était clairement dans l'erreur sur la question de fait. Il ne suffit pas pour le défendeur d'examiner minutieusement les témoignages, comme il l'a fait, en vue de trouver des raisons à l'appui de sa version. Rien ne permettait de conclure que le juge avait, dans ses raisons ou conclusions, commis une erreur manifeste ou que son jugement était clairement erroné.

Motor vehicle—Pedestrian struck while on the street—Contradictory versions of the accident—Court of Appeal substituting its own appreciation of the evidence—Justification—Principles to be followed by first and second Court of Appeal.

*CORAM: Les Juges Fauteux, Abbott, Martland, Judson et Ritchie.

The plaintiff was injured when he was struck by an automobile belonging to the defendant and driven by him in a westerly direction in the city of Montreal. The plaintiff says that, after parking his car on the north side of the street, he was struck by the defendant's automobile coming from his right as he was standing beside the left front door of his car, which he was in the process of locking. The defendant says that the plaintiff came out suddenly into the street from between two parked cars and that he could not avoid the accident. The trial judge accepted the plaintiff's version and rejected the one submitted by the defendant on the ground that the latter was contradicted by the former. The Court of Appeal held that the tribunal of first instance could not come to the conclusion that all the witnesses for the defence were mistaken for the sole reason that they were contradicted by the witnesses for the plaintiff, substituted its own appreciation of the evidence and came to the conclusion that the weight of the evidence and the balance of probabilities favoured the version of the defence. The plaintiff appealed to this Court.

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

Per Fauteux, Abbott, Judson and Ritchie JJ.: The Court of Appeal applied the principles pursuant to which a first Court of Appeal must necessarily interfere, examine the record and form its own opinion on the evidence. Having pointed out the error in the judgment at trial and having thoroughly examined the evidence, the Court of Appeal came to a different conclusion on the question of fact. It was impossible to be clearly satisfied that the judgment of the Court of Appeal was erroneous.

Per Martland J., *dissenting*: This case was one which an appellate tribunal should not have interfered. It was incumbent on the defendant to demonstrate manifest error, to show that the trial judge was plainly wrong in his finding of fact. It was not enough for the defendant to finecomb the depositions, as he did, in order to find reasons to support his own version. There was no basis for holding that there was manifest error in the reasons or conclusions of the trial judge nor for saying that the judge was plainly wrong.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Challies, Associate Chief Justice. Appeal dismissed, Martland J. dissenting.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge en Chef adjoint Challies. Appel rejeté, le Juge Martland étant dissident.

Bernard Bourdon, c.r., pour le demandeur, appelant.

John Bumbray, c.r., pour le défendeur, intimé.

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[1] [1966] B.R. 746.

1968

DORVAL v. BOUVIER

Le jugement des Juges Fauteux, Abbott, Judson et Ritchie fut rendu par

LE JUGE FAUTEUX:—L'appelant se pourvoit à l'encontre d'une décision unanime de la Cour du banc de la reine[2], infirmant un jugement de la Cour supérieure qui condamnait l'intimé à lui payer $23,201.79 à titre de dommages-intérêts et les dépens.

Cette action en dommages se fonde sur un accident survenu le 22 avril 1961, vers deux heures de l'après-midi, sur la rue Marie-Anne, à Montréal, alors que l'appelant fut heurté par une automobile appartenant à l'intimé et par lui conduite de l'est à l'ouest. Le fait de l'accident n'est pas contesté. La difficulté est de déterminer comment il se produisit. Suivant l'appelant, il venait de stationner sa voiture, au côté nord, sur le bord du trottoir et alors que, étant sur la rue, face à son véhicule, il s'apprêtait à en mettre la porte avant gauche sous clef, il fut heurté par l'automobile de l'intimé qui venait à sa droite; de ce moment à celui où il reprit connaissance dans l'ambulance, il ne se souvient de rien. Suivant l'intimé, l'appelant déboucha subitement devant lui d'entre deux voitures stationnées sur le bord du trottoir et bien qu'en freinant, il ait immobilisé son véhicule presque immédiatement, il ne put éviter de le frapper.

Dans un jugement clair et concis, le savant juge de première instance a considéré, d'une part, que la version de l'appelant est supportée par Gilles Paquin, témoin produit par l'appelant. Paquin n'était pas sur les lieux de l'accident mais il a témoigné qu'au temps de cet accident, il était employé au garage de l'appelant, qu'à la demande de ce dernier, il est allé, vers la fin de l'après-midi du jour même de l'accident, chercher l'automobile de son patron, demeurée stationnée sur la rue Marie-Anne et qu'il en trouva alors les clefs dans la serrure de la porte avant gauche. La Cour a considéré, d'autre part, que la version de l'intimé est elle-même confirmée par trois membres de sa famille qui étaient passagers dans son automobile. Il appert du témoignage de ces derniers que l'appelant déboucha subitement et en courant d'entre deux automobiles. Par ailleurs, la Cour a noté deux faits de nature à mettre en doute la

[2] [1966] B.R. 746.

version de l'appelant. Le premier de ces faits est que l'appelant fut blessé, par l'automobile qui venait à sa droite, à la jambe gauche, et plus précisément à la rotule, soit à l'avant du genou, et non à la jambe droite; ce qui indiquerait que l'accident s'est produit de la façon indiquée par l'automobiliste et ses trois passagers et non de la façon décrite par le piéton. La Cour dispose de cette question en disant qu'au moment de l'accident, l'appelant, *d'après son témoignage*, se tenait un peu de biais, sa jambe gauche se trouvant un peu à l'arrière de sa jambe droite. Le second fait est que les portes d'automobiles fabriquées par la compagnie General Motors,—telle l'automobile de l'appelant, —peuvent se verrouiller et se verrouillent habituellement de l'extérieur, sans l'utilisation d'une clef; ce qui rend un peu surprenante l'affirmation de l'appelant qu'il aurait utilisé ses clefs et que c'est en ce faisant qu'il a été frappé. La Cour dispose de la question en retenant l'explication *donnée par l'appelant* qui dit avoir été dans l'obligation d'utiliser ses clefs en raison d'une défectuosité de la serrure, causée par un accident antérieur. Le jugement, par ailleurs, ne fait aucune référence à la question de savoir si Paquin était vraiment l'employé de l'appelant comme lui-même et l'appelant en ont attesté, nonobstant l'importance que cette question avait prise au cours des interrogatoires visant à vérifier leur crédibilité, et le doute assez sérieux que jette sur le point le témoignage de Jean-Paul St-Charles, comptable qui s'occupait des affaires de l'appelant et que ce dernier appela comme témoin pour établir ses dommages. Enfin, appelé qu'il était à choisir entre deux versions irréconciliables dont l'une, celle de l'appelant, était de nature à imputer à l'intimé le fait de l'accident et dont l'autre, celle de l'intimé et de ses témoins, était de nature à repousser entièrement la présomption de responsabilité qui, suivant l'ancienne loi, pesait contre lui, le tribunal accueillit la première en s'exprimant comme suit:

> The Court accepts the version of Plaintiff supported as it is by the examination on discovery at page 6 when Plaintiff was Defendant's witness, and by the evidence of Paquin. The keys could only have been in the door if Plaintiff's version of the accident were correct.

Et, en ce qui concerne la seconde, la Cour ajouta:

> The Court does not believe that Defendant and his witnesses perjured themselves but that they were merely mistaken.

D'où la condamnation.

1968

DORVAL v. BOUVIER

Le Juge Fauteux

En appel, l'intimé, pour obtenir l'intervention de la Cour d'appel dans cette cause où le conflit porte sur une simple question de fait, plaida particulièrement qu'en présence des motifs sérieux qu'il y avait de douter de la vérité des témoignages de la poursuite, le tribunal de première instance ne pouvait, comme il l'a fait, conclure à une erreur de la part de tous les témoins de la défense, uniquement parce qu'ils étaient contredits par ceux de la poursuite, qu'il fallait d'autres motifs et que le jugement ou le dossier n'en révélait aucun. La Cour d'appel jugea que, dans l'espèce, cet argument était suffisamment bien fondé pour dépouiller le jugement de première instance de la présomption jurisprudentielle de plus grande crédibilité à accorder à la partie dont les témoignages ont été accueillis de préférence à ceux de l'autre partie, et lui permettre de substituer sa propre appréciation de la preuve à celle du juge de première instance.

Au mérite et dans des notes qui ont reçu l'accord de ses collègues, M. le Juge Brossard, après avoir fait une revue détaillée de toute la preuve au dossier, jugea que le poids de la preuve et la balance des probabilités favorisaient avec une prépondérance indéniable la version de la défense. En fait et pour arriver à cette conclusion, il considéra particulièrement que l'appelant avait été blessé à l'avant du genou de la jambe gauche et aucunement à la jambe droite; qu'à moins de reconnaître une erreur certaine d'appréciation de la part des témoins entendus sur la détermination de l'endroit précis de l'accident, il fallait conclure que l'appelant n'était pas devant son véhicule au moment où il a été heurté, mais qu'il se trouvait beaucoup plus à l'est, à un endroit où il n'avait manifestement pas pu être projeté par un véhicule voyageant vers l'ouest; qu'il y avait des divergences majeures entre le témoignage au préalable de l'appelant et son témoignage à l'enquête et celui de Paquin; qu'au cours de son examen à l'enquête, l'appelant avait affirmé qu'au moment de l'accident, il n'avait qu'un seul employé à son garage et qu'en l'occurrence, cet employé était Paquin alors que, suivant le témoignage du comptable St-Charles, l'appelant n'avait, à la date de l'accident, qu'un seul employé, soit Jean-Guy Audet. Le savant juge considéra, d'autre part, que les témoignages de la défense avaient été exprimés de bonne foi, de l'avis même du juge de première instance, et ne comportaient aucune contradic-

tion essentielle entre eux. Et le juge Brossard de conclure qu'il lui était impossible d'admettre que le juge de première instance ait été justifié d'accepter les témoignages de la poursuite de préférence à ceux de la défense quand l'unique motif le portant à croire que ces derniers s'étaient trompés, réside dans le fait que leurs témoignages n'étaient pas conformes à ceux de la poursuite. Le jugement de première instance fut donc infirmé. Et de là l'appel à cette Cour.

A ce stade de la procédure, comme au stade de l'appel en Cour du banc de la reine et celui du procès en Cour supérieure, la présente cause ne soulève qu'une pure et unique question de fait. Il s'agit de savoir laquelle de deux versions irréconciliables en fait et de conséquences diamétralement opposées en droit, doit être retenue: celle de l'appelant, version que le témoin Paquin—qui n'a rien vu de l'accident—fut appelé à soutenir, ou celle de l'intimé et de ses trois passagers, qui tous quatre ont vu l'accident se produire subitement sous leurs yeux. Comme déjà indiqué, la Cour supérieure, d'une part, accepta la première et écarta la seconde pour la raison que celle-ci était contredite par celle-là et la Cour d'appel, d'autre part, jugeant cette raison insuffisante en droit et n'en trouvant, au jugement, aucune autre suffisamment explicitée, intervint, avec le résultat que l'on sait.

Dans un cas comme celui qui nous occupe, les règles qui doivent guider une première et une seconde cour d'appel, sont bien connues. En raison de la position privilégiée du juge qui préside au procès, voit, entend les parties et les témoins et en apprécie la tenue, il est de principe que l'opinion de celui-ci doit être traitée avec le plus grand respect par la Cour d'appel et que le devoir de celle-ci n'est pas de refaire le procès, ni d'intervenir pour substituer son appréciation de la preuve à celle du juge de première instance à moins qu'une erreur manifeste n'apparaisse aux raisons ou conclusions du jugement frappé d'appel. Encore faut-il, cependant, comme l'a noté M. le juge Brossard après avoir cité les commentaires du juge Casey dans *Gagnon v. Gauthier*[3], que ces raisons soient en termes suffisamment explicites pour permettre à une Cour d'appel d'en apprécier la valeur au point de vue juridique. Aussi bien et si les raisons données n'ont pas ce caractère, ou si

[3] [1958] B.R. 401.

1968

DORVAL v. BOUVIER

Le Juge Fauteux

l'ayant, elles ne sont pas valides, la Cour doit nécessairement intervenir, procéder à l'examen du dossier et former sa propre opinion sur la preuve au dossier. Il est manifeste qu'en l'espèce, la Cour d'appel a tenu compte de ces principes et les a appliqués; elle a signalé l'erreur dont, à ses vues, le jugement de première instance était affecté et procédant à un examen détaillé de la preuve, elle s'est formé sur la question de fait une opinion différente de celle exprimée au jugement de première instance.

Quant au principe qui doit guider une seconde Cour d'appel appelée à reviser le jugement d'une première, il est aussi et depuis longtemps établi. On en trouve l'expression dans *Demers v. The Montreal Steam Laundry Company*[4]:

> . . . it is settled law upon which we have often acted here, that where a judgment upon facts has been rendered by a court of first instance, and a first court of appeal has reversed that judgment, a second court of appeal should interfere with the judgment of the first appeal, only if clearly satisfied that it is erroneous; *Symington v. Symington* L.R. 2 H.L. Sc. 415.

C'est là la règle suivie en cette Cour et récemment encore appliquée dans *Pelletier v. Shykofsky*[5]. Ainsi donc, pour intervenir dans cette cause, il faudrait être clairement satisfait que le jugement de la Cour d'appel est erroné, soit quant à la raison motivant son intervention ou quant à son appréciation de la preuve au dossier. Après anxieuse considération, il m'est impossible de former une telle opinion.

Je rejetterais l'appel avec dépens.

MARTLAND J. (*dissenting*):—The facts giving rise to this case have been stated in the reasons of my brother Fauteux. The versions of the accident given by the appellant and by the respondent are contradictory. The appellant says that he was struck by the respondent's automobile while standing beside the left front door of his car, which he was in the process of locking. The respondent describes the accident as follows:

> J'ai ralenti à Marquette, j'ai décidé de continuer. Comme je dépassais la première machine j'ai aperçu cet homme sortir le dos à moi entre deux chars. J'ai appliqué les freins, j'ai donné un coup de roue à ma gauche, il était trop tard.

* * *

[4] (1897), 27 R.C.S. 537 à 538. [5] [1957] R.C.S. 635.

D. Vous dites qu'il avait le dos à vous quand vous l'avez frappé?
R. Oui. Il a sorti en sifflant, il sortait entre deux machines.
D. Quand vous l'avez vu pour la première fois, vous l'avez vu de dos?
R. Oui, certainement.

The only issue before the learned trial judge was one of fact. He had to decide which version he accepted. He found as follows:

The Court accepts the version of Plaintiff supported as it is by the examination on discovery at page 6 when Plaintiff was Defendant's witness, and by the evidence of Paquin. The keys could only have been in the door if Plaintiff's version of the accident were correct. The Court does not believe that Defendant and his witnesses perjured themselves but that they were merely mistaken. The damage to the left leg is very light due to the fact that Plaintiff had his left leg slightly behind the right leg, being slightly sideways, and that the automobile struck him on that leg. There is no fault on the part of Plaintiff himself and it remains to assess the damages.

It is clear from this finding that he accepted the evidence of the appellant. He found the appellant's story to be corroborated by the evidence of Paquin as to his finding the keys in the car door, and, accordingly, it is clear that he believed Paquin.

On this basis, in my opinion, the case was one with which an appellate tribunal should not have interfered. In the judgment of the Court of Queen's Bench there is cited the statement of Casey J. on this point, in *Gagnon v. Gauthier*[6]:

The trial judge who sees and hears the witnesses is better able to assess their credibility and to determine the significance, and in many instances the meaning, of their evidence than are the members of this Court. For this reason his conclusions on the facts must be treated with great respect and his findings must not be interfered with lightly.

From this two things follow: because of the position that he enjoys and of the respect to which his opinion is entitled, the trial judge owes to the parties and to the Court of Appeal the duty of disclosing the reasons that impel him to the conclusions reached; and, when the trial judge renders this type of judgment, this Court will not intervene unless appellant is able to point out a manifest error either in the reasons or in the conclusions.

And here lies the difficulty; for while it is easy to state the rule of no interference without manifest error, it is extremely difficult and very risky to attempt a comprehensive definition of this term. But this much can be said; when an appellant submits evidence that contains contradictions or

[6] [1958] Que. Q.B. 401 at 403.

1968

DORVAL v. BOUVIER

Martland J.

ambiguities and when, to find reasons to support his version, he is obliged to finecomb the depositions, he is not demonstrating the manifest error that this Court requires.

An appellant who asks this Court to reverse a finding of fact must be able to put his fingers on a demonstrable error in the judgment a quo. He has not the right nor should he be permitted to invite this Court to retry the case and, as the result of a process of appreciation and balance, to come to a conclusion different from that of the trial judge.

After citing this passage, the judgment on appeal goes on as follows:

Telle est la ligne de conduite à suivre lorsque le premier juge a donné les raisons qui l'ont amené à conclure comme il l'a fait. Mais lorsqu'il ne donne pas ces raisons en termes suffisamment explicites pour permettre à cette Cour d'en connaître les fondements juridiques et de faits, cette Cour a le devoir de rechercher dans la preuve les raisons qui pouvaient justifier la décision du premier juge et, le cas échéant, celles qui eussent imposé une décision contraire; tel est plus particulièrement le cas lorsque, ainsi que cela se présente dans la cause actuelle, le premier juge ne donne pas les raisons ou donne des motifs purement subjectifs et arbitraires pour lesquels il accorde plus de crédibilité aux témoignages d'une partie de préférence à ceux de l'autre et ne dit pas, par ailleurs, sur quelles circonstances externes établies par la preuve il s'appuie pour choisir entre deux versions diamétralement opposées.

Dealing with the position of an appellate court in a case involving a conflict of evidence, this Court, in *Prudential Trust Company Limited v. Forseth*[7], adopted the statement of Sankey L.C. in *Powell v. Streatham Manor Nursing Home*[8]:

On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see *Clarke v. Edinburgh Tramways Co.*, per Lord Shaw, 1919 S.C. (H.L.) 35, 36, where he says: "When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their

[7] [1960] S.C.R. 210 at 217, 30 W.W.R. 241, 21 D.L.R. (2d) 587.
[8] [1935] A.C. 243 at 249, 104 L.J.K.B. 304.

expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

(The underlining is my own.)

In my opinion, in the present case, the learned trial judge did state reasons for accepting the appellant's version; i.e., his acceptance of Paquin's evidence. Even if he had not done so, however, having made his finding of fact, it was incumbent on the present respondent to demonstrate manifest error, to show that he was "plainly wrong." It was not enough for the present respondent "to finecomb the depositions" in order "to find reasons to support his version".

In my opinion that is what the respondent did. The Court below reversed the learned trial judge on the basis of four points, with which I will briefly deal:

1. The appellant's injury was to his left knee, and not his right. This point was considered by the learned trial judge, whose conclusion was that this occurred because the appellant was standing slightly sideways, with his left leg slightly behind the other.

2. There was a discrepancy between the appellant's estimate as to his distance from the intersection at Marquette Street and that of the police constables who investigated the accident. This distance was not material to the issues in this case. At most this shows an error on the appellant's part on a matter on which he had no reason, at the time, to have made any exact estimate.

3. The appellant described at trial how, on leaving hospital by taxi and while on his way home, he had stopped at the garage he owned, and had there seen Paquin. He had not mentioned this stop in his examination for discovery. It is suggested that there is a divergence between the two stories. When, however, one examines the

1968

DORVAL v. BOUVIER

Martland J.

examination for discovery, it is apparent that his departure from the hospital came up only incidentally in answer to a question as to how long he had been there:

D. Combien de temps avez-vous été à l'hôpital?
R. La première fois?

D. Oui. A quel hôpital avez-vous été transporté d'abord?
R. A l'Hôpital Notre-Dame.

D. Vous avez été là pendant combien de temps?
R. J'ai parti de l'hôpital pour chez moi à cinq (5) heures et demie, six (6) heures, si je ne me trompe pas. J'ai rentré de nouveau le lundi.

4. The appellant, at the trial, testified that at the garage he had asked one of his employees, Paquin, to go and get his car. He said that at the moment of the accident there was one employee at the garage.

Earlier at the trial a witness who had been the appellant's accountant, St-Charles, when asked how many employees the appellant had had prior to April 22, 1961 (the date of the accident), answered that he had one employee, Jean Guy Audet. This witness had been called by the appellant to testify as to the number of persons employed at the garage prior to and after the accident.

Paquin had testified that he was an employee of the appellant at the time of the accident and had worked for him for two or three months prior to that.

The appellant was not cross-examined as to any contradiction between his own and St-Charles' evidence.

Arguments based upon contradictions in the evidence are a proper basis for urging a trial judge to refuse to accept the version of one or other of the parties. The four points previously discussed were presumably submitted to the learned trial judge, if they were considered to have been of importance. The fact that a trial judge does not, in his reasons, review each point so raised is no ground for assuming that they were not considered. But in reaching his conclusion as to which version of this accident he accepted, the learned trial judge did have the advantage of having seen the witnesses who gave the evidence.

This case is very similar to *Maze v. Empson*[9], which involved a collision between two motor vehicles. The

[9] [1964] S.C.R. 576, 48 W.W.R. 59, 46 D.L.R. (2d) 9.

stories of the appellant and the respondent in that case were diametrically opposed. The Appellate Division of the Supreme Court of Alberta reversed the finding of the trial judge in the plaintiff's favour. After an analysis of the evidence it was concluded that the defendant's version of the collision was the more likely one. That judgment was reversed in this Court, and the statement of Lord Shaw of Dunfermline in *Clarke v. Edinburgh and District Tramways, & Co. Ltd.*, previously cited in these reasons, was applied.

With respect, I do not find in this case any basis for holding that there was "manifest error" in the reasons or conclusions of the learned trial judge, nor for saying that he was "plainly wrong", to adopt the wording of the passages which I have previously cited.

Accordingly, in my opinion, this appeal should be allowed and the judgment at trial restored, with costs to the appellant in this Court and in the Court below.

Appel rejeté avec dépens, LE JUGE MARTLAND *étant dissident.*

Procureurs du demandeur, appelant: Boisvert & Pickel, Montréal.

Procureurs du défendeur, intimé: Bumbray, Carroll, Cardinal & Dansereau, Montréal.

1967
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1968
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THE CANADA TRUST COMPANY appointed to represent the Estate of Mary C. Nash, deceased (*Defendant*) ..... APPELLANT;

AND

AMANDA LLOYD and ALBERT C. LLOYD as Administrators of the Estate of Reuban Lloyd, deceased (*Plaintiffs*) ..... RESPONDENTS;

AND

CANADA PERMANENT TRUST COMPANY, Executor of the Estate of Fred E. Roets, deceased, GLADYS WARREN WELLS and JOHN WARREN WELLS, Executors of the Estate of John Wells, deceased, and GUARANTY TRUST COMPANY OF CANADA, Administrator ad litem of the Estate of Edward C. Remick, deceased (*Defendants*) .....RESPONDENTS;

AND

THE ATTORNEY GENERAL FOR SASKATCHEWAN as representing Her Majesty the Queen in the right of the Province of Saskatchewan (*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Equity—Laches—Improper withdrawals of funds from company by directors—Liquidation of company some forty-three years later—No grounds for equitable relief—Contribution of directors' representatives must be amounts taken together with interest thereon—Period for which interest payable.

Remick, Lloyd & Co. was incorporated in 1911 under the laws of West Virginia and in the same year was registered in Saskatchewan as a foreign corporation. The company's capital was invested in farmlands in Saskatchewan. Its charter was forfeited in 1932 and in 1933 the company was struck off the register in Saskatchewan, but the lands remained in the name of the company and as time went on became valuable and a source of profit. These lands were managed by one of the directors until his death in 1942 as though the company was still in existence and thereafter by another director until the appointment on December 18, 1964, of an interim receiver.

Some time prior to December 6, 1921, three of the shareholders who were also directors of the company improperly withdrew from the company and converted to their own uses respectively funds which together totalled $73,082.21. The said directors later pledged their shares as security for the moneys so withdrawn.

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

In an action brought to secure (a) appointment of a receiver of the property of Remick, Lloyd & Co., (b) realization of the assets of the company and payment of debts, and (c) distribution of the residue amongst those entitled thereto, the trial judge confirmed the appointment of Montreal Trust Company as receiver but refused to order forfeiture or foreclosure of the pledged shares. He ordered that interest should be assessed against the directors' withdrawals at the rate of 6 per cent for a period of six years. On appeal, the Court of Appeal upheld the judgment of the trial judge in so far as it dealt with forfeiture of the shares, but varied the judgment by ordering that interest should be charged on the withdrawals at the rate of 5 per cent per annum, not compounded, from December 6, 1921, to the date of judgment.

On the present appeal, at the conclusion of the argument on behalf of the appellant, the Court directed that it was not necessary to hear from the respondents on the issue of forfeiture of the shares, the judgment of the Court of Appeal being upheld on this point. The appeal, accordingly, proceeded on the interest issue, the respondents contending that the judgment of the Court of Appeal should be varied to limit interest to the six-year period fixed by the trial judge. The appellant contended that interest should run from December 6, 1921, as ordered by the Court of Appeal.

Held: The cross-appeal on the interest issue should also be dismissed.

Although the delay here was of long duration, 43 years, that fact alone did not determine whether equitable relief should or should not be granted nor the extent to which in the instant case interest should be charged on the moneys improperly withdrawn in 1921. No colour of right, mistaken belief or other factors which might warrant some consideration in equity existed here. The three directors in question took the moneys and enjoyed the full benefits thereof since 1921. Their situation was analogous to that of a legatee who must bring into account even a statute barred debt before he can claim the legacy left to him in the testator's will.

Accordingly, the Court agreed with the judgment of the Court of Appeal that the contribution of the representatives of the three directors who improperly withdrew the moneys must be the amounts taken by each of them with interest thereon at 5 per cent per annum, not compounded, from December 6, 1921.

Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; *Harris v. Lindeborg* [1931] S.C.R. 235, applied.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], varying a judgment of MacPherson J. Appeal and cross-appeal dismissed.

S. J. Safian, Q.C., for the appellant.

Hon. C. H. Locke, Q.C., for Lloyd estate and Wells estate.

Hon. P. H. Gordon, Q.C., for Lloyd estate.

[1] (1967), 59 W.W.R. 340, 60 D.L.R. (2d) 559.

1968

CANADA TRUST CO. v. LLOYD et al.

E. C. Leslie, Q.C., for Roets estate.

M. W. Coxworth, Q.C., for Wells estate.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the Court of Appeal for Saskatchewan in an action brought to secure (a) appointment of a receiver of the property of Remick, Lloyd & Co., (b) realization of the assets of the company and payment of debts; and (c) distribution of the residue amongst those entitled thereto. The facts are set out *seriatim* in the judgment of Maguire J.A.[2] and may be summarized as follows:

Remick, Lloyd & Co. was incorporated in 1911 under the laws of West Virginia. The shareholders of the company were Reuban Lloyd, John Wells, Mary C. Nash, Fred E. Roets and Edward C. Remick and they contributed to the capital of the company the sum of $100,000 as follows:

Remick	325 shares	$ 32,500.00
Lloyd	325 shares	32,500.00
Roets	200 shares	20,000.00
Wells	100 shares	10,000.00
Nash	50 shares	5,000.00
		$100,000.00

The capital of the company was invested in farmlands in Saskatchewan where the company was until 1933 registered as a foreign corporation at which time it was struck off the register and never reinstated. The company's West Virginia charter provided that it should expire 50 years from the date of incorporation. The charter was forfeited by decree of the Court in West Virginia on May 27, 1932, for failure to pay its annual licence tax.

Some time prior to December 6, 1921, three of the shareholders who were also directors of the company improperly withdrew from the company all cash resources held by it at that time and converted to their own uses respectively the following amounts:

Remick	$61,329.46
Lloyd	7,838.97
Roets	3,913.68

For many years subsequent to 1921 and throughout the depression the affairs of the company were at a low ebb,

[2] (1967), 59 W.W.R. 340 at pp. 341-344, 60 D.L.R. (2d) 559 at pp. 560-563.

accounting, no doubt, for the forfeiture of the charter in 1932 and the company being struck off the register in Saskatchewan in 1933, but the lands remained in the name of the company and as time went on became valuable and a source of profit. These lands were managed by Lloyd until his death in 1942 as though the company was still in existence and thereafter by Roets until the appointment on December 18, 1964, of an interim receiver after the commencement of this action. Remick died in 1958, Roets in 1965. At the time of the trial the lands were said to have a value in excess of $300,000 and in addition there was some $80,000 in cash.

The Attorney General for Saskatchewan on behalf of the Crown in the right of the Province claimed all the assets of the company, real and personal, under the provisions of *The Escheats Act*, R.S.S. 1953, c. 81, or, alternatively, under the common law basing his claim on the fact that the company had been dissolved and had ceased to exist. The learned trial judge dismissed the claim of the Attorney General and no appeal was taken from that dismissal. The Attorney General has, therefore, no interest in the present appeal.

The appellant who was one of the defendants in the original proceeding contended that the shares of the three directors who had improperly withdrawn the funds of the company and who in 1928 had pledged their shares as security for the moneys so withdrawn should be deemed forfeited or foreclosed on the ground that the directors of the company as such were obligated to proceed against the three shareholders so improperly withdrawing moneys, and it also contended in the alternative that interest should be charged on the moneys so wrongfully taken from December 6, 1921.

The learned trial judge, MacPherson J.[3] confirmed the appointment of Montreal Trust Company as receiver but refused to order forfeiture or foreclosure of the shares in question. He ordered that interest should be assessed against the Remick, Lloyd and Roets withdrawals at the rate of 6 per cent for the period of six years. The appellant appealed to the Court of Appeal for Saskatchewan on both issues. No cross-appeal was filed.

[3] February 25, 1966, unreported.

1968

CANADA TRUST CO. v. LLOYD *et al.*

Hall J.

The Court of Appeal upheld the judgment of MacPherson J. in so far as it dealt with forfeiture of the shares, but varied the judgment by ordering that interest should be charged on the withdrawals at the rate of 5 per cent per annum, not compounded, from December 6, 1921, to the date of judgment.

The appellant in the present appeal contended that the judgment as to forfeiture of the shares should be reversed and that an order to that effect should be made.

The respondents Canada Permanent Trust Company and Guaranty Trust Company of Canada gave notice of intention to vary, claiming that no interest should be chargeable on the moneys so withdrawn or, alternatively, that if any interest should be allowed it should be for the period of six years only as directed by the learned trial judge. The respondents Amanda Lloyd and Albert C. Lloyd gave notice of intention to vary, claiming that interest should be allowed on the moneys improperly withdrawn to a period not later than April 4, 1940. However, by notice of motion for leave to amend the notice to vary, these respondents asked for and were given leave to amend the notice to vary by claiming that the judgment of the Court of Appeal should be varied by limiting recovery of interest to a period of six years.

At the conclusion of the argument on behalf of the appellant, the Court directed that it was not necessary to hear from the respondents on the issue of forfeiture of the shares, the judgment of the Court of Appeal being upheld on this point.

The appeal, accordingly, proceeded on the interest issue, the respondents contending that the judgment of the Court of Appeal should be varied to limit interest to the six-year period fixed by the learned trial judge. The appellant contended that interest should run from December 6, 1921, as ordered by the Court of Appeal. This issue was dealt with by MacPherson J. as follows:

> I think, in preparing my earlier judgment, I overlooked one factor which I should have considered. I decided to order no interest because the other parties had been guilty of laches. Laches does not start immediately upon the commencement of a cause of action. Laches is a defence only. Interest accrues from day to day and is therefore apportionable.
>
> It seems to me that equity and justice would be served if I were to order the estates of Messrs. Remick, Lloyd and Roets to be charged, on distribution, with interest at six percent for six years.

The law is clear that the awarding of full or only partial compensation by way of interest falls to be determined on the same equitable principles as govern a court in determining the just remedy to be granted in respect of the main claim. Lord Blackburn in *Erlanger v. New Sombrero Phosphate Company*[4] summarized the principles involved at pp. 1279-80 as follows:

> In *Lindsay Petroleum Company v. Hurd* [(1874), L.R. 5 P.C. 221, at 239, varying 17 Gr. 115], it is said: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

Rinfret J. (as he then was) dealt with the matter in *Harris v. Lindeborg*[5], as follows:

> . . . but the action is not barred by any statute of limitations and mere lapse of time is not sufficient to deprive the appellant of his equitable rights against the respondents. In order to decide whether the remedy should be granted or withheld, we must examine the nature of the acts done in the interval, the degree of change which has occurred, how far they have affected the parties and where lies the balance of justice and injustice.

I agree with Maguire J.A. that though the delay here is of long duration, 43 years, that fact alone does not determine whether equitable relief should or should not be granted nor the extent to which in the instant case interest should be charged on the moneys improperly withdrawn in 1921. No colour of right, mistaken belief or other factors

[4] (1878), 3 App. Cas. 1218.

[5] [1931] S.C.R. 235 at p. 248.

1968

CANADA TRUST CO. v. LLOYD *et al.*

Hall J.

which might warrant some consideration in equity exist here. The three directors in question took the moneys and enjoyed the full benefits thereof since 1921. Their situation is analogous to that of a legatee who must bring into account even a statute barred debt before he can claim the legacy left to him in the testator's will. Halsbury, 3rd ed., vol. 2 at pp. 484-5 puts the proposition as follows:

> . . . but the principle applicable is that a person who owes money which would swell the mass of the deceased's estate is bound to make his contribution to the estate before taking a part share out of it . . . . .

citing *Cherry v. Boultbee*[6] and *Courtnay v. Williams*[7].

The contribution which the representatives of the three directors who improperly withdrew the moneys must be the amounts taken by each of them with interest thereon at 5 per cent per annum, not compounded, from December 6, 1921. I agree with Maguire J.A. that the trial judgment should be varied by providing that in effecting distribution the receiver should add interest as aforesaid to the respective amounts chargeable against the Remick, Lloyd and Roets estates respectively. It follows that the cross-appeal on the interest issue should also be dismissed.

In the circumstances of this case and success in this Court being divided, the costs of all parties should be paid by the receiver out of funds in or coming into its hands.

Appeal and cross-appeal dismissed.

Solicitors for the defendant, appellant: S. J. Safian and Associates, Regina.

Solicitors for the plaintiffs, respondents: Embury, Molisky, Gritzfield & Embury, Regina.

Solicitors for the defendant, respondent, Guaranty Trust Company of Canada (Edward C. Remick Estate): Hill, Milliken, Rutherford & Hodges, Regina.

Solicitors for the defendant, respondent, Canada Permanent Trust Company (Fred E. Roets Estate): MacPherson, Leslie & Tyerman, Regina.

Solicitor for the defendants, respondents, Gladys Warren Wells and John Warren Wells (John Wells Estate): Morley W. Coxworth, Davidson, Saskatchewan.

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[6] (1839), 4 My. & Cr. 442.

[7] (1846), 15 L.J. Ch. 204.

LABORATOIRE PENTAGONE LIMITÉE (*Défenderesse*) .... APPELANTE;

ET

PARKE, DAVIS & COMPANY (*Demanderesse*) ..... INTIMÉE.

1968
*Fév. 2, 5
Fév. 20

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

Brevet—Contrefaçon—Validité—Injonction—Antibiotique—Substance préparée ou produite par procédé chimique—Inventeur—Loi sur les brevets, S.R.C. 1952, c. 203, art. 41(1).

La demanderesse a poursuivi la défenderesse pour violation d'un brevet relatif à un antibiotique connu sous le nom de chloramphénicol ou chloromycétine. Le brevet contient des revendications de la substance préparée autrement que par le procédé breveté. Cet antibiotique, sécrété par des micro-organismes dans une culture, s'y trouve dilué et inutilisable à cet état brut. Un procédé d'extraction est donc indispensable pour obtenir la substance utilisable à des fins thérapeutiques. En défense à l'action, on a soutenu que le procédé d'extraction, par solvant ou par adsorption, décrit dans le brevet est un procédé chimique et que, par conséquent, la revendication de la substance préparée autrement que par le procédé breveté est invalide en vertu de l'art. 41(1) de la *Loi sur les brevets*, S.R.C. 1952, c. 203. La demanderesse soutient au contraire que l'extraction est un procédé physique. La Cour supérieure a déclaré le brevet invalide. Ce jugement a été renversé par la Cour d'appel qui a statué que le brevet et la revendication de la substance étaient valides; l'injonction qui avait été demandée avec l'action a été en conséquence accordée. La défenderesse en a appelé à cette Cour.

Arrêt: L'appel doit être accueilli.

Selon le sens usuel de l'expression «procédé chimique», les procédés d'extraction décrits dans le brevet sont des procédés chimiques au sens de l'art. 41(1) de la *Loi sur les brevets* et, par conséquent, la revendication par la demanderesse de la substance préparée autrement que par le procédé breveté est invalide.

Patent—Infringement—Validity—Injunction—Antibiotic—Whether substance prepared or produced by chemical process—Inventor—Patent Act, R.S.C. 1952, c. 203, s. 41(1).

The plaintiff company sued the defendant company for infringement of a patent relating to an antibiotic known as chloramphenicol or chloromycetin. The patent contains claims for the product not limited to the drug prepared by the process described. The antibiotic secreted by micro-organisms grown in a culture medium is in a diluted state and not usable in that raw state. An isolation process is required in order

*CORAM: Les Juges Fauteux, Abbott, Judson, Hall et Pigeon.

1968

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & COMPANY

to obtain the substance capable of being used for therapeutic purposes. As a defence to the action, it was pleaded that the isolation process, by means of a solvent or by adsorption, described in the patent is a chemical process and, consequently, the claim of the substance prepared otherwise than by the patented process is invalid by virtue of s. 41(1) of the *Patent Act*, R.S.C. 1952, c. 203. The plaintiff contends that the isolation process is a physical process. The Superior Court held the patent to be invalid. This judgment was reversed by the Court of Appeal which held that the patent and the claim of the substance were valid. The injunction asked for with the action was granted. The defendant company appealed to this Court.

Held: The appeal should be allowed.

According to the usual meaning of the expression "chemical process", the isolation processes described in the patent are chemical processes within the meaning of s. 41(1) of the *Patent Act* and, consequently, the claim by the plaintiff of the substance prepared otherwise than by the patented processes is invalid.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Puddicombe J. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge Puddicombe. Appel accueilli.

Joan Clark et *Malcolm E. McLeod*, pour la défenderesse, appelante.

Christopher Robinson, c.r., et *Samuel Godinsky, c.r.*, pour la demanderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—La question à décider en cette cause est la validité d'un brevet relatif à un antibiotique connu sous le nom de chloramphénicol ou chloromycétine. Au procès, l'appelante a admis qu'elle faisait la vente de cette substance sous le nom de sopamycétine et l'obtenait de personnes auxquelles l'intimée n'avait pas délivré de permis de fabrication. De son côté, l'intimée a admis que le produit vendu par l'appelante n'était pas fabriqué selon son procédé breveté. Vu ces admissions le procès a été réduit aux deux moyens de défense suivants.

[1] [1967] B.R. 975.

Premièrement, Quentin Bartz qui a obtenu le brevet au bénéfice de l'intimée, est-il vraiment le seul inventeur comme il l'a déclaré dans sa demande de brevet? N'a-t-il pas plutôt parachevé une invention faite en partie par d'autres puisqu'il a fait seulement l'identification et l'extraction de l'antibiotique qui se trouvait dans un bouillon de culture (ou «bière») préparé par d'autres?

Deuxièmement, s'agit-il d'une substance préparée ou produite par des procédés chimiques? Si tel est le cas, la revendication de la substance préparée autrement que par le procédé breveté de l'intimée est invalide en vertu du para. 1 de l'art. 41 de la *Loi sur les brevets*.

En Cour supérieure, le Juge Puddicombe a accueilli les deux moyens de défense, rejeté la demande d'injonction et déclaré le brevet invalide. En Appel[2], au contraire, les juges Hyde, Rinfret et Choquette ont été unanimement d'avis que le brevet et la revendication de la substance étaient valides et ils ont décerné une injonction en conséquence pour le reste de la durée du brevet avec réserve du recours en dommages.

En résumé, l'historique de l'invention est le suivant. Au cours de recherches méthodiques ayant pour objet la découverte de substances bactéricides, on a préparé dans un milieu approprié une culture d'une espèce de moisissure provenant d'un sol du Vénézuéla et qu'on a subséquemment baptisée: «*streptomyces venezuelæ*». Par fermentation avec ce microorganisme dans un milieu nutritif approprié, on a obtenu un liquide («bière A-65») dans lequel on a constaté la présence d'une activité bactéricide. A ce point le produit a été confié à Bartz qui, par des procédés d'extraction connus, est parvenu à isoler la substance active à l'état pur, à vérifier qu'il s'agissait d'un nouvel antibiotique et à en déterminer la composition chimique.

Il est établi clairement que cet antibiotique, le chloramphénicol, est sécrété par les microorganismes dans le milieu de culture mais il s'y trouve dilué, mêlé à de nombreuses impuretés et inutilisable à cet état brut. Le procédé d'extraction est indispensable pour obtenir la substance utilisable à fins thérapeutiques, la preuve le démontre et l'intimée l'a admis devant nous. Par conséquent, tout le litige sur la

[2] [1967] B.R. 975.

1968

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & COMPANY

Le Juge Pigeon

deuxième question se ramène à décider si la fermentation et l'extraction sont des procédés chimiques au sens de la *Loi sur les brevets* comme l'appelante le prétend, alors que l'intimée et ses experts soutiennent que la fermentation est un procédé biologique et l'extraction, un procédé physique.

Pour disposer du litige il ne paraît pas nécessaire de trancher le débat sur la fermentation. Il suffit d'examiner le procédé d'extraction. Celui-ci comprend diverses alternatives. On peut dire que l'une des méthodes consiste à utiliser des solvants qui ne sont pas miscibles dans l'eau. Une autre consiste à utiliser de l'alumine activée ou du charbon activé pour séparer le produit des impuretés en adsorbant soit les impuretés, soit le produit lui-même. Dans certains cas, il est nécessaire de recourir à une acidification avec un acide minéral dilué, mais dans d'autres cela ne paraît pas nécessaire. Baer, témoin expert de l'intimée, a affirmé avoir fait l'extraction en provoquant l'adsorption sur le charbon de bois activé sans acidification et en dégageant la substance du charbon activé au moyen d'un solvant approprié qui est ensuite évaporé. Parce qu'au terme de ces manipulations qui comprennent jusqu'à dix étapes, la structure chimique du produit reste inchangée, les deux experts de l'intimée soutiennent qu'il s'agit d'un procédé physique. Peu importe, disent-ils, que la structure chimique des impuretés puisse être modifiée, celle de la substance recherchée ne l'est pas et par conséquent il s'agit, soutiennent-ils, d'un procédé physique et non d'un procédé chimique.

On peut constater que cette façon de raisonner a pour effet de restreindre le sens de l'expression «procédé chimique» à celui de procédé de synthèse chimique ou de décomposition chimique. Au contraire, les experts de l'appelante sont unanimes à classer les procédés d'extraction par solvant ou par adsorption comme des procédés chimiques parce qu'ils font appel à des substances chimiques et mettent en œuvre leurs propriétés.

Devant nous les deux parties ont été d'accord pour reconnaître que dans la *Loi sur les brevets* l'expression «procédé chimique» devait être prise dans son sens usuel et non pas dans un sens scientifique. C'est d'ailleurs ce qu'implique nécessairement la décision de cette Cour dans *Continental Soya Co. Ltd. c. J. R. Short Milling Co. Canada*

1968

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & COMPANY

Le Juge Pigeon

Ltd.[3]. On y a décidé en somme que ce n'était pas parce qu'une réaction chimique se produisait dans l'application d'un procédé qu'il fallait le caractériser comme un procédé chimique. En l'occurrence il s'agissait du blanchiment de la farine de blé par l'addition d'une poudre extraite de fèves soya par mouture. On a statué qu'il ne s'agissait pas d'un procédé chimique même si une réaction chimique se produisait comme il s'en produit dans toutes sortes d'opérations usuelles, tels que la fabrication du pain et les processus biologiques ordinaires que personne ne classe comme des procédés chimiques dans le langage usuel.

L'intimée, tout en admettant ainsi qu'une manipulation n'est pas un procédé chimique au sens de la loi du seul fait qu'une réaction chimique s'y produit, soutient cependant que s'il n'y a pas une réaction chimique modifiant la structure chimique du produit lui-même, il n'y a pas procédé chimique. A vrai dire, cette assertion repose uniquement sur l'opinion des deux experts de l'intimée, opinion que l'on a fait porter, tout comme celle de deux des experts de l'appelante, sur la question même qu'il appartient aux tribunaux de juger, savoir: qu'est-ce qu'un procédé chimique au sens de la *Loi sur les brevets*?

Cette question n'en étant pas une de vocabulaire scientifique ne peut pas être tranchée par la seule considération des opinions d'experts sur ce vocabulaire et les concepts qui s'y rattachent. Nous n'avons pas besoin de décider lesquels des experts de l'appelante ou de l'intimée ont raison, ceux qui affirment que scientifiquement c'est un procédé chimique ou ceux qui le nient. Celui-là seul qui des cinq experts ayant témoigné dans cette cause s'en est tenu au strict point de vue scientifique, le D[r] Spencer, a expliqué que suivant les conceptions actuelles, les procédés de fermentation sont du domaine de la biochimie et les procédés d'extraction par adsorption ou par solvant, du domaine de la chimie physique. D'après lui, le phénomène d'adsorption est non seulement un procédé chimique mais un procédé qui implique une réaction chimique. De même il considère les extractions par solvant comme des procédés chimiques même en l'absence de toute réaction chimique et cela pour le motif que, dans ce procédé, l'on utilise les propriétés chimiques d'un produit chimique.

[3] [1942] R.C.S. 187, 2 Fox Pat. C. 103, 2 C.P.R. 1, 2 D.L.R. 114.

1968

LABORATOIRE PENTAGONE LTÉE v. PARKE, DAVIS & COMPANY

Le Juge Pigeon

Il est un fait que les experts de l'intimée n'ont pu nier, c'est que les procédés dont il s'agit sont des procédés de laboratoire de chimie, des procédés de ce que Baer lui-même a appelé «preparative chemistry». Questionné sur ce que l'on devait entendre par «chemisorption», terme employé par ceux qui considèrent l'adsorption comme un phénomène chimique, il a répondu:

> The word chemisorption implies, as I understand it, a type of chemical bonding of some material to an adsorbing surface, but this term is applied rather rarely and I must say I never read it in ordinary laboratory practice in organic chemistry, in preparative chemistry when I make use of these physical methods.

Il n'est pas sans intérêt d'observer qu'en Grande-Bretagne le Solliciteur général siégeant en appel du Directeur des brevets a décidé que la distillation fractionnée était un procédé chimique tout comme un procédé de fabrication du charbon activé. *R.R.'s Application*[4]; *H.E.P.'s Application*[5].

Il convient aussi de noter qu'en Suisse, l'intimée a obtenu du bureau fédéral en 1950, sur sa demande déposée en août 1948, un brevet intitulé: «Procédé de préparation d'un nouvel antibiotique» et comportant la revendication suivante:

> Procédé de préparation d'un nouvel antibiotique, caractérisé en ce qu'on inocule un milieu nutritif avec le «Streptomyces venezuelae», en ce qu'on fait incuber le mélange en aérobiose et en ce qu'on sépare du milieu nutritif le produit antibiotique formé.

Or la loi fédérale suisse sur les brevets d'invention décrète à l'art. 2:

> Ne peuvent être brevetées:
>
> . . .
>
> 2° Les inventions de remèdes et les inventions de procédés non chimiques pour la fabrication de remèdes; . . .

L'intimée, en demandant le brevet suisse, se trouvait donc à soutenir qu'au sens de la loi fédérale suisse le procédé de fermentation et d'extraction est un *procédé chimique*. Cela n'est peut-être pas aussi décisif que l'admission d'utilité pratique découlant de la demande de brevet faite aux États-Unis qui a été considérée par cette Cour dans *Parke, Davis & Company c. Empire Laboratories Limited*[6]. En effet on peut supposer que l'intimée voulait se prémunir contre une décision adverse sur sa réclamation du produit

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[4] (1925), 42 R.P.C. 303.
[5] (1926), 43 R.P.C. 150.
[6] [1964] R.C.S. 351, 27 Fox Pat. C. 67, 43 C.P.R. 1, 45 D.L.R. (2d) 97.

dans d'autres pays; si, par malheur, on décidait contre elle que cette réclamation était invalide parce qu'il s'agit d'un procédé chimique, elle aurait intérêt à détenir au moins un brevet pour le procédé dans les pays où, en tout état de cause, un brevet pour le produit ne peut être obtenu. Il n'en reste pas moins que la demande de brevet suisse démontre que, là où il faut l'affirmer pour obtenir un brevet, l'intimée était prête à soutenir qu'il s'agit d'un procédé chimique. Cela n'est donc pas insoutenable comme ses experts l'ont affirmé.

Pour ces raisons il faut conclure que, selon le sens usuel de l'expression «procédé chimique», les procédés d'extraction décrits dans le brevet dont il s'agit sont des procédés chimiques au sens du para. 1 de l'art. 41 de la *Loi sur les brevets* et, par conséquent, la revendication numéro 7 du brevet canadien numéro 479,333 est invalide. Comme cela suffit à disposer de la cause, il ne paraît pas nécessaire de statuer sur l'autre moyen. Cela n'implique aucunement que la décision de la Cour d'appel sur cet autre moyen est tenue pour bien fondée.

Dans les circonstances, je suis d'avis qu'il y a lieu d'accorder à l'appelante tous les frais de l'appel y compris ceux de la motion pour suspension de l'ordonnance d'injonction. En conséquence, j'accueillerais l'appel à cette Cour avec dépens, frais de motion compris, j'infirmerais le jugement de la Cour d'appel de la Province de Québec et rétablirais le dispositif du jugement de la Cour supérieure avec dépens en Cour d'appel contre la présente intimée.

Appel accueilli avec dépens.

Procureurs de la défenderesse, appelante: Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montréal.

Procureurs de la demanderesse intimée: Greenblatt, Godinsky & Resin, Montréal.

1967
*Dec. 14, 15
1968
Feb. 9

GERMAINE ANNE CECILE BYRON, as Executrix of the Last Will and Testament of Basil Joseph Byron, deceased, and in her personal capacity (*Plaintiff*) APPELLANT;

ISOBEL MAY WILLIAMS and ROGER BARRY WILLIAMS (*Defendants*) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Collision at intersection—Jury's findings as to negligence—Whether trial judge misdirected jury on question of liability.

Damages—Negligence action—Charge to jury—Ceiling and floor amounts mentioned in relation to amount to be awarded—Whether misdirection requiring new trial on issue of damages.

As a result of a collision at an intersection between two automobiles the plaintiff suffered injuries and her husband, the driver of the car in which the plaintiff was a passenger, was killed. The other car was owned by the defendant IW and was being driven by the defendant RW. On the trial of the action subsequently brought by the plaintiff, the jury found that there was negligence on the part of the defendant RW, which caused or contributed to the accident. They gave the following particulars of his negligence: 1. driving too fast in an unfamiliar area; 2. in view of driving and road conditions—exercised poor judgment in passing a series of cars on a hill. The jury further found that there was no negligence on the part of the plaintiff's husband.

The plaintiff's damages for her own injury were assessed at $2,500 and her claim for the death of her husband was assessed at $27,000. Judgment was entered in favour of the plaintiff for the sums awarded together with costs. An appeal was taken by the defendants to the Court of Appeal. The whole Court found misdirection in the trial judge's charge with respect to damages. The majority of the Court found misdirection in the trial judge's charge with respect to the question of liability and a new trial was ordered with respect to both questions save only that the new trial directed as to damages was to be concerned only with the plaintiff's claim under *The Fatal Accidents Act* and there was to be no new assessment of her personal damages. The plaintiff appealed to this Court from the judgment of the Court of Appeal.

Held: The appeal should be allowed and the trial judgment restored.

The Court rejected the position taken by the defendants that the trial judge ". . . failed to direct the jury that having regard for all the evidence there must have been some negligence on the part of the deceased, Basil Byron, which caused or contributed to the damages

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

of the plaintiffs". The trial judge, in his charge to the jury, drew to the attention of the jury the obligations which the law imposes upon a driver entering a through street and no objection was taken to his charge in this respect, and having regard to the functions of an appellate court when dealing with the verdict of a jury which were stated by Duff C.J.C. in *Canadian National Railways v. Muller*, [1934] 1 D.L.R. 768, this Court was of the view that the Court of Appeal was in error in holding that there was misdirection in respect of liability.

As to the objection that the trial judge had mentioned amounts which might be called both a ceiling and a floor in relation to the amount to be awarded, it was held that, having regard to all the evidence that was before the jury and the judge's charge in relation to quantum as a whole, there was no substantial misdirection here and certainly no error constituting a miscarriage of justice within the meaning of *The Judicature Act*.

Gray v. Alanco Developments Ltd. et al., [1967] 1 O.R. 597, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario allowing an appeal from a judgment of Landreville J. and ordering a new trial in an action for damages for negligence. Appeal allowed.

D. J. MacLennan, for the plaintiff, appellant.

John J. Fitzpatrick, Q.C., for the defendants, respondents.

The judgment of the Chief Justice and of Judson, Hall and Spence JJ. was delivered by

HALL J.:—This is an appeal from the Court of Appeal of Ontario which directed a new trial both as to liability and quantum following a trial before Landreville J. with a jury. The action arose out of a collision between two automobiles at the intersection of Royal York Road and Lawrence Avenue West in the Municipality of Metropolitan Toronto at approximately 11:50 p.m. on the night of December 25, 1963, in which the driver of one of the cars, Basil Joseph Byron, was killed. The other car, a yellow Vauxhall Cresta model, was owned by Isobel May Williams and then being driven by Roger Barry Williams. The following questions relating to Roger Barry Williams were put to the jury and answered as stated:

1. Was there any negligence on the part of the defendant Roger Williams, which caused or contributed to the accident?
Answer "Yes" or "No"
Answer: Yes.

1968

BYRON
v.
WILLIAMS
et al.

Hall J.

2. If your answer to question 1 is "yes" of what did such negligence consist? Answer fully, specifying each act of negligence of the defendant, Roger Williams, which you find caused or contributed to the accident.
Answer: 1. Driving too fast in an unfamiliar area. 2. In view of driving and road conditions—exercised poor judgment in passing a series of cars on a hill.

A further question relating to the deceased, Basil Joseph Byron, was put to the jury to which the jury replied as shown:

3. Was there any negligence on the part of the late Basil Byron? Answer "Yes" or "No"
Answer: No.

There was abundant evidence to justify the negligence found by the jury. The jury had heard Constable Downton, a member of the Metropolitan Toronto Police Force who, on the night in question, was on car patrol in the area in question and who was in a marked police car observing traffic on Royal York Road south of Lawrence Avenue. He was parked in a position where he could observe traffic on Royal York Road, and as he sat there he saw the yellow Vauxhall Cresta model travelling northward on Royal York Road at a speed which he considered excessive and he immediately put his car in motion and took off after the Vauxhall. He describes the condition of Royal York Road at the time as being wet and greasy and the area somewhat poorly lighted. Royal York Road is hilly at this point, and as he proceeded to follow the Vauxhall he saw it overtake and pass four cars going in the same direction. He estimates the speed of the Vauxhall as it overtook and passed these four cars to be close to double the speed of the cars being overtaken and he estimates the speed of the cars being overtaken as being 30 to 35 miles per hour. The Vauxhall remained on the left side of the two-lane highway which was about 21 feet wide until it approached the crest of a hill in the road to the north of which lay the intersection with Lawrence Avenue. He did not actually see the collision as the intersection was over the crest of the hill. The constable also testified that south of the intersection and south of the crest of the hill there was a sign plainly visible on the east side of Royal York Road which said "Reduce Speed Dangerous Intersection".

The driver Williams in his testimony testified that he had been travelling at about 35 miles an hour. He admit-

ted having overtaken the cars referred to by Constable Downton and said that when he was about 250 feet from the Lawrence Avenue intersection a car emerged from that intersection and proceeded southward on Royal York Road, and when he was about 100 feet from the intersection the Byron car emerged. It was stationary when he first saw it. He said he slammed on his brakes and "the car skidded on the wet road and into the side of the Byron vehicle" which had reached the centre of the intersection. It is obvious that the jury did not accept Williams' testimony and disbelieved his statement that he was only going at 35 miles an hour and chose instead to accept the evidence of Constable Downton which indicated driving in a highly negligent manner.

The basis of the appeal in respect of liability was that the learned trial judge had

> . . . failed to direct the jury that having regard for all the evidence there must have been some negligence on the part of the deceased, Basil Byron, which caused or contributed to the damages of the plaintiffs.

and that was the position taken by the respondent in this Court.

The part of the learned trial judge's charge to which the respondent objected and which found favour in the Court of Appeal reads:

> Likewise, the plaintiff comes in with a reply and the plaintiff says, "Look, after all, you ran into the side of my car. I didn't run into you. I was broadside, and if I were in that intersection, and if you had good lights on your car, my car would have been visible to you, driver defendant, 200 feet away, for under the *Highway Traffic Act*, headlights must be able to light up an object at that distance, minimum. So either you had good lights, in which case you would have seen me, or else your lights were so weak and poor on the low beam, that you saw me through the lights of your car when you were 50-75 feet away, and too late because of your faulty lights." So, it is a dilemma that the plaintiff throws back to the defendant.

Immediately before the extract just quoted from the learned trial judge's charge, he had dealt with the defendant's (Williams') case as follows:

> The defendant says, "Well now, why did you not wait there allowing me to pass to go by on the through street, and obey that Section 64." He says, "There are two things. Surely, I did not come out of a blue sky, and I must have been visible." Here the argument is twisted around to the advantage of the defendant, "I must have been visible for 150 feet. If you

1968

BYRON v. WILLIAMS et al.

Hall J.

blame me for not applying my brakes 150 feet away, I can say that you must have seen me 150 feet away, or 200 feet away. And if you did, you did not see me or see the car." He says, "It is a reasonable inference that you must have seen the reflection of my lights coming up the hill and, thus, you were under an obligation of waiting and not starting across the intersection for I hit you a second or two after you moved."

The defendant says, "There was nothing I could do in that circumstance." Because you might argue, and that argument hasn't been advanced, but you might argue that it might be one of logic, "your lights—your car being sideways to me, I did not see your lights as they did not shine on me, but I was visible when you started moving sideways, and only my lights could pick up the side of your car, and when my lights picked them up, I did everything I could to avoid the accident and applied my brakes and skidded. It is your fault."

So there you have the strength, in essence, of the defendant's case. The defendant has a right, at law, to presume that other people will obey the law. And when you are driving down the street, and there is a stop sign, and you see a car approaching that stop sign and you are close to the intersection yourself, you don't have to stop. You have the right to presume that the other driver is going to stop, and if he disobeys that stop sign and comes in front of you, and that is clearly proven, then that other driver has failed in his duty.

Likewise, if the driver has stopped and he starts off in front of you, when you are in that vicinity clearly visible, then he has no business coming across your path of travel, and it is his fault. Those are arguments which fall on the side of the defence.

He said later, in dealing with the plea of contributory negligence:

I have entirely forgotten something in discussing the law. We were discussing the cause of this accident. Sometimes, in a given set of circumstances, while there may be a cause, another person has contributed to that as a cause to the accident, and this brings in the *Negligence Act* of Ontario.

The *Negligence Act* sets out that where you find an accident to have been caused by two persons, two drivers, and you say that one has contributed to the accident; in short, the analysis is of the question, first of all, to find out if the plaintiff, Basil Byron, was negligent—excuse me, was the defendant negligent. And if you arrive at the conclusion that he wasn't—let us assume that—if you say he was not negligent, then the plaintiff's action fails.

If you find that the defendant driver was negligent, you go one step more and you say, "Now, was the late Basil Byron also negligent? Was there something he could have done to avoid this accident? Was he alert? Was he cautious? Did he fail to advance sufficiently in the intersection to see if there were lights coming or cars, or anything?" You analyze all the acts of Basil Byron, and if you arrive at the conclusion that there was some negligence on his part, then the *Negligence Act* applies, and you have the right to apportion the liability between the plaintiff and the defendant.

In my view the extract referred to in the judgment of the Court of Appeal must be read in the light of what the

learned trial judge said immediately before, and when so read I am unable to see that there was any misdirection. McLennan J.A., in the Court of Appeal, while agreeing that there had been misdirection, went on to say:

> In view of the clear position put to the jury that he is just offering them arguments that might be put forward and had previously made it clear elsewhere in his charge that it is entirely a question for them to decide, I do not think that constitutes any error constituting a miscarriage of justice within the meaning of the *Judicature Act*. The findings of the jury with respect to the negligence of the defendant are—(1) driving too fast in an unfamiliar area, (2) in view of driving and road conditions, exercised poor judgment in passing a series of cars on a hill. There is nothing in the findings related to what is said to be misdirection.

The learned trial judge, in his charge to the jury, drew to the attention of the jury the obligations which the law imposes upon a driver entering a through street and no objection was taken to his charge in this respect, and having regard to the functions of an appellate court when dealing with the verdict of a jury which were succinctly stated by Duff C.J.C. in *Canadian National Railways v. Muller*[1] as follows:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal, to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially;

I am of the view that the Court of Appeal was in error in holding that there was misdirection and I would allow the appeal in respect of liability.

The appellant also appealed on the damage issue alleging misdirection and in this regard all three members of the Court of Appeal which heard the appeal were of opinion that a new trial should be had on the question of quantum and ordered a new trial accordingly.

It is a question of whether there was evidence upon which the jury, properly instructed, could arrive at the amount awarded or whether the amount awarded was such that twelve sensible men could not have reasonably arrived at that sum.

I think the amount awarded was reasonable in the circumstances and supported by the evidence.

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[1] [1934] 1 D.L.R. 768.

1968

BYRON v. WILLIAMS et al.

Hall J.

However, the respondents objected to the following statement by the learned trial judge in his charge to the jury:

> When the actuary gives us how much money would be required to purchase a five and a quarter annuity to produce $1,000.00 each year, and he gives us a sum of $13,364.00, and then you jump to the figure of $3,000.00. Let us say he makes $3,500 a year. You multiply that by $3,500.00 and you would arrive at an amount close to $45,000.00. So now I want to tell you that do not be misled by the figures of the actuary in that respect. They are intended as a guide; but a guide that is very far off because they do not take into account a multitude of contingencies that might arise, if the man had lived, and any amount in that area, in my opinion, would be overly generous. Just as much as if you award this lady $5,000.00 or $10,000.00, I would say you are starting to be cheap and picayune on that score. So that there is a limit, but that I give you a very wide margin, depending on your appraisal of those facts, of these contingencies of which I have spoken, and then you can determine what might be a financial security for this woman, to replace the financial security which she had in her husband.

It is to be noted, however, that the statement objected to was preceded by the following:

> The most important aspect of her claim is as of executrix of the estate. We have heard a considerable body of evidence as to her husband, Basil Byron. There is no doubt that starting with the basis of it, it is a shock for a woman to lose her husband, and it's the same matter for a man to lose his wife, but we are not here, and neither is it your function, to analyze and award damages for sentimentalities. You must not proceed out of sentiment for the plaintiff, or on sentiment of revenge against the defendant, if you find him liable.
>
> The amount that must be fixed is based on the pecuniary loss, expectation of life, economic gain, security and stability of life, which this woman had when she had her husband, and which she has not now.
>
> You are entitled to take into account the character of the man, and you must take into account that whether he was a good worker, because on that hinges stability, and also his habits, living habits, his relationship with his own wife.
>
> I can only summarize by saying that generally speaking, Basil Byron has been shown by the witnesses to be an ordinary, sound, good-living man, getting along reasonably well with his wife. There is a presumption that people, husband and wife, do get along, and not the contrary presumption that he was a man who carried certain complexes from his war service. That he appeared to be a good worker, according to the witnesses. I, unfortunately, and you might not view it with a great deal of understanding, those changes of jobs all the time. This may be explained that he wanted to improve his income and wanted to learn in a new field, but a rolling stone many times does not gather any moss. The man had been off work for some—one employer said one month, and there was some evidence about three months. But be that as it may, over all their married life it is not substantial. You may take that into account—the future of that man which would be reasonably expected.
>
> You must not be generous, and you must not be picayune in awarding that amount, because there are all sorts of contingencies that may arise.

Mrs. Byron might die, and we hope that that definitely isn't true. In a few years time, there may be a possibility that Mrs. Byron might marry, and that is a possibility, in the light of seeing her and how she has spoken to you, and how the medical reports are. These are things you are entitled to take into consideration.

The plaintiff has produced an actuary's testimony showing, on the basis of the average, on the given basis of the age of the wife, and on the basis of the age of the husband, what is the expectancy of life—the expectancy of life, and that is 22.5 years. That is, again, a probability on the average, but it does not mean that it will be an actual fact that he would have lived to 22.5 years. One or the other may have died—the male 28.1, and the female 29.5. You take it all into consideration, therefore, the probability and you have to analyze, and you are entitled to take and to consider that he was a man five feet, ten and 135 pounds in weight; his physical condition—his reported health, his energy, his living habits—these are the things to consider.

The objection is to the learned trial judge having mentioned amounts which might be called both a ceiling and a floor in relation to the amount to be awarded. It would have been better if the learned judge had not been as specific as he was in this instance, but the real question is whether what he did say was misdirection of a nature requiring a new trial on the issue of damages. Having regard to all the evidence that was before the jury and the judge's charge in relation to quantum as a whole, I am of opinion that there was no substantial misdirection here and certainly no error constituting a miscarriage of justice within the meaning of *The Judicature Act*.

I have decided this case without reference to the decision of the Court of Appeal of Ontario in *Gray v. Alanco Developments Ltd. et al*[2]. I have proceeded solely on the ground that in this particular case the assessment of the jury is, in my opinion, reasonable and one that ought to be supported. I would reserve *Gray v. Alanco Developments Ltd. et al.* for further consideration when the occasion arises.

I would, accordingly, allow the appeal and restore the trial judgment with costs here and below.

RITCHIE J.:—I have had the advantage of reading the reasons for judgment prepared by my brother Hall with which I am in full accord, but I would like to say also that this case is in my view clearly distinguishable from that of

[2] [1967] 1 O.R. 597, 61 D.L.R. (2d) 652.

1968

BYRON v. WILLIAMS et al.

Ritchie J.

Gray v. Alanco Developments Ltd. et al.[3], to which reference was made by counsel for the respondents. The unanimous decision of the Court of Appeal for Ontario in the latter case was rendered on the day after the decision was handed down in that Court in the present appeal and the Court there ordered a new trial limited to the assessment of general damages on the ground that the trial judge had expressed his personal view as to the upper and lower limits of damages to be awarded under this head in that case. I think it important to observe that the decision in that case was limited to precluding a trial judge from expressing his personal opinion based on figures awarded in other cases as to the proper quantum of damages to be awarded, for example, for pain and suffering or for loss of the amenities of life.

The limited effect of the decision in that case is disclosed in the following passage from the reasons for judgment at p. 603 where it is said:

> What has been stated is applicable to those headings of general damages where there can be no evidence as to the value in monetary terms of the loss sustained, for example damages, claimed for pain and suffering or the loss or diminution of the amenities of life.

In the present case the learned trial judge was commenting on the effect to be given to the evidence of an actuary as to life expectancy and the amount that would be required to purchase an annuity, and having pointed out to the jury that these figures were only intended as a guide, he went on to speak of the hazards of life which would have existed even if the husband had not been killed and which should be taken into consideration in making an award to the widow. In so doing he, in effect, indicated that the jury would be "overly generous" if they considered awarding an amount in the area of a figure based entirely on the actuarial tables and he also expressed the opinion that if they only awarded $5,000 or $10,000 they would, in his opinion, be starting to be "cheap and picayune on that score".

These remarks of the trial judge in the present case do not appear to me to come within the category referred to in *Gray v. Alanco Developments Ltd. et al., supra,* and I

[3] [1967] 1 O.R. 597, 61 D.L.R. (2d) 652.

1968

BYRON v. WILLIAMS et al.

Ritchie J.

agree with my brother Hall that reading the trial judge's charge as a whole, the mention of his opinion as to amounts to be awarded was in no way a fatal defect.

As I have indicated, I would dispose of this appeal as proposed by my brother Hall.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: MacMillan, Rooke, MacLennan & Avery, Toronto.

Solicitors for the defendants, respondents: Gardiner, Roberts, Anderson, Conlin, Fitzpatrick, O'Donohue & White, Toronto.

ROY A. HUNT, ALFRED M. HUNT, TORRENCE M. HUNT, ROY A. HUNT, JR., RICHARD McM. HUNT and MELLON NATIONAL BANK AND TRUST COMPANY ..... APPELLANTS;

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AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Situs of company shares—Unpaid tax on estate of deceased non resident—Seizure of shares by writ of fieri facias in Exchequer Court—Company incorporated in Canada—Situs of shares for purposes of judicial execution—Exchequer Court Act, R.S.C. 1952, c. 98, s. 74—Estate Tax Act, 1958 (Can.), c. 29, ss. 38(e), 47.

The estate of Mrs. H, who died in 1963 resident and domiciled in the United States, included a large number of shares of Aluminium Limited, a company incorporated under the *Companies Act* of Canada and having its head office and principal place of business in Montreal. The company maintained a register of transfers of shares in Montreal and also maintained branch registers in the United States, where the share certificates were physically situated. An assessment against the estate was not contested but the tax was not paid. A writ of *fieri facias* was issued out of the Exchequer Court, directed to the sheriff of the judicial district of Montreal. The seizure of the shares was then made. By a petition of right, the executors of the estate claimed that the seizure of the shares was invalid. The Exchequer Court dismissed the petition of right. The executors appealed to this Court where the sole question in issue was whether the shares were situated in Canada for the purposes of judicial execution.

Held: The appeal should be dismissed.

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

1968

HUNT *et al.* *v.* THE QUEEN

The shares were validly seized. The true principles to be applied in this case were those set out in *Braun v. The Custodian*, [1944] S.C.R. 339. There was no valid reason why the same considerations should not apply to determine the situs of shares for the purpose of judicial execution as for the purpose of a dispute as to ownership. In both cases, the dominant consideration was the jurisdiction of the court to which the company was ultimately subject.

Revenu—Impôt successoral—Situs des parts d'une compagnie—Non paiement de l'impôt successoral d'un non résident—Saisie des parts par un bref de fieri facias émanant de la Cour de l'Échiquier—Compagnie constituée en corporation au Canada—Situs des parts pour les fins de l'exécution en justice—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 74—Loi de l'impôt sur les biens transmis par décès, 1958 (Can.), c. 29, arts. 38(e), 47.

La succession d'une dame H, décédée en 1963 alors qu'elle avait son domicile aux États-Unis et y était une résidente, comprenait un grand nombre de parts de Aluminium Limited, une compagnie constituée en corporation en vertu de la *Loi sur les compagnies* du Canada et ayant son siège social et son principal établissement dans la cité de Montréal. La compagnie tenait un registre des transferts d'actions à Montréal et tenait aussi des registres annexes aux États-Unis, où les certificats des actions étaient physiquement situés. La cotisation du ministre n'a pas été contestée mais la taxe n'a pas été payée. Un bref de *fieri facias* a été délivré par la Cour de l'Échiquier, adressé au shérif du district judiciaire de Montréal. Les parts ont été alors saisies. Par une pétition de droit, les exécuteurs de la succession ont soutenu que la saisie des parts était invalide. La Cour de l'Échiquier a rejeté la pétition de droit. Les exécuteurs en appelèrent à cette Cour où la seule question à débattre était de savoir si les parts étaient situées au Canada pour les fins de l'exécution en justice.

Arrêt: L'appel doit être rejeté.

Les parts ont été validement saisies. Les principes que l'on doit appliquer dans cette cause sont ceux qui ont été énoncés dans *Braun v. The Custodian*, [1944] R.C.S. 339. Il n'y a aucune raison valable pour ne pas appliquer les mêmes considérations dans la détermination du situs des parts pour les fins d'une exécution en justice que pour les fins d'une dispute relativement à la propriété de ces parts. Dans les deux cas, la considération dominante est la juridiction de la cour à laquelle la compagnie est en fin de compte soumise.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1] sur une pétition de droit. Appel rejeté.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], on a petition of right. Appeal dismissed.

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[1] [1967] 1 Ex. C.R. 101, [1966] C.T.C. 474, 66 D.T.C. 5322.

John de M. Marler, Q.C., and *R. J. Cowling*, for the appellants.

D. S. Maxwell, Q.C., and *D. G. H. Bowman*, for the defendant.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a judgment of the President of the Exchequer Court[1], rendered August 18, 1966, whereby it was declared that certain shares of Aluminium Limited were validly seized under a writ of *fieri facias* issued out of the Exchequer Court of Canada.

The circumstances giving rise to the present dispute are set forth in a statement of facts, agreed to by the parties. The late Rachel McM. M. Hunt died in the City of Pittsburg, Pennsylvania, on February 22, 1963. At her death she was domiciled in, and a citizen of, the United States of America. The appellants were named as Executors under her will, and probate of her will was granted to them on March 18, 1963.

At the date of her death, the late Mrs. Hunt owned 43,560 shares in the capital stock of Aluminium Limited. Aluminium Limited is a company incorporated under the *Companies Act* of Canada, and at all relevant times had its head office and principal place of business in the City of Montreal. Almost all of the meetings of directors, and all meetings of shareholders of Aluminium Limited, are held at the company's head office in the City of Montreal and the central management of the company is located there. At the date of death of the deceased, the company maintained a register of transfers of shares in its capital stock and all books required to be kept by it pursuant to s. 107 of the *Companies Act* in the City of Montreal. It also maintained branch registers of transfers in Pittsburg, New York, London (England), Toronto and Vancouver. The shares of Aluminium Limited were listed on the Montreal, Toronto, Vancouver, New York, Midwest, Pacific Coast, London, Paris, Basle, Geneva, Lausanne and Zurich Stock Exchanges. At the date of death, the share certificates relating to the shares owned by the deceased were physically situated in the City of Pittsburg.

[1] [1967] 1 Ex. C.R. 101, [1966] C.T.C. 474, 66 D.T.C. 5322.

1968

HUNT *et al.* v. THE QUEEN

Abbott J.

On May 14, 1963, estate tax, in the amount of $156,620.73, was assessed pursuant to Part II of the *Estate Tax Act,* Statutes of Canada 1958, c. 29. Under that Part, there is imposed an estate tax of 15 per cent of the aggregate value of property situated in Canada of a person domiciled outside Canada. For the purposes of Part II of the Act, the situs of shares in a corporation is deemed by s. 38 of the Act to be the place where the corporation is incorporated. Accordingly for the purposes of Part II of the *Estate Tax Act,* the shares of Aluminium Limited were deemed to be situated in Canada. No objection to the assessment has been filed pursuant to s. 22 of the *Estate Tax Act.*

On May 14, 1963, the Deputy Minister of National Revenue issued a certificate, alleging that estate tax in the sum of $156,620.73 was due, owing and unpaid by the Mellon National Bank and Trust Company, Executor of the Estate of Rachel McM. M. Hunt. This certificate was registered in the Exchequer Court. No objection is taken in this appeal to the issuance or registration of the said certificate which, under s. 41 of the *Estate Tax Act,* has the same force and effect as a judgment obtained in the Exchequer Court.

On May 14, 1963, a writ of *fieri facias* was issued out of the Exchequer Court and directed to the Sheriff of the Judicial District of Montreal who is, by virtue of s. 74 of the *Exchequer Court Act, ex officio* an officer of the said Court. The Sheriff took the steps appropriate to the seizure of the Hunt shares in accordance with the requirements of the writ.

By petition of right filed on June 6, 1963, and amended on June 21, 1963, the appellants claimed, *inter alia,* that the seizure of the said shares was invalid, and it is from the judgment of the Exchequer Court of Canada, dismissing the appellants' action, that this appeal is brought.

Before the Exchequer Court, the sole issue was whether the shares of Aluminium Limited were situated in Canada for the purposes of judicial execution under the processes of the Exchequer Court.

Following the judgment of the Exchequer Court, counsel for appellants advised counsel for respondent of his intention to contend before this Court that, whatever might have

been the situs of the shares, the writ of execution issued out of the Exchequer Court was not in the appropriate form and that it was therefore ineffective to seize the shares. At the argument before us, counsel for appellants was informed that, in the circumstances of this case, and applying the principles enunciated by Duff C.J. in *Dominion Royalty Corporation Ltd. v. Goffatt*[2], this point, as to procedure, cannot be entertained in this Court.

The sole question in issue before this Court is, therefore, whether the shares in question were property in Canada for the purposes of judicial execution. Three possible conclusions are open for consideration; either for purposes of execution (1) the shares were situate only in Canada or (2) they were situate in both Canada and Pennsylvania or (3) they were situate only in Pennsylvania.

The appellants can succeed only if they establish that the learned trial judge ought to have rejected the first two alternatives and adopted the third.

Counsel for appellants put his case squarely on the familiar line of cases which established the rule that, for provincial succession duty purposes, shares have a situs where they can be effectively dealt with: *Brassard v. Smith*[3], *Rex v. Williams*[4] and *Treasurer of Ontario v. Aberdein*[5].

Appellants' contention was that the situs of Mrs. Hunt's shares, for present purposes, was in the United States and particularly in Pittsburg, either because of the rule of situs laid down in *Rex v. Williams* and *Ontario v. Aberdein* or simply by reason of the physical location there of her share certificates.

In *Brassard v. Smith,* the shares in question there could be effectively dealt with only in Quebec. In the *Williams* case, as in the present case, the Court was faced with a situation where the shares could be validly transferred in more than one place. In *Williams,* the shares were validly transferable on registries in Ontario and in Buffalo, New York, so the problem arose that, for the purposes of provincial succession duty, one, and only one, local situs had

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[2] [1935] S.C.R. 565, 4 D.L.R. 736.
[3] [1925] A.C. 371, 38 Que. K.B. 208, 1 W.W.R. 311, 1 D.L.R. 528.
[4] [1942] A.C. 541, 2 All E.R. 95, 2 W.W.R. 321, 3 D.L.R. 1.
[5] [1947] A.C. 24, [1946] 3 W.W.R. 683, 4 D.L.R. 785.

1968

HUNT *et al.* v. THE QUEEN

Abbott J.

to be chosen. At page 558, Viscount Maugham, referring to the decision of this Court in *R. v. National Trust*,[6] said:

> In what their Lordships take leave to describe as a very luminous judgment of the Supreme Court Chief Justice Duff formulated as the result of the authorities certain propositions pertinent to the question of situs of property with which their Lordships agree. First, property, whether movable or immovable, can, for the purposes of determining situs as among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation. Secondly, situs in respect of intangible property must be determined by reference to some principle or coherent system of principles, and the courts appear to have acted on the assumption that the legislature in defining in part at all events by reference to the local situation of such property the authority of the province in relation to taxation, must be supposed to have had in view the principles deducible from the common law. Thirdly, a provincial legislature is not competent to prescribe the conditions fixing the situs of intangible property for the purpose of defining the subjects in respect of which its powers of taxation under s. 92, sub-s. 2, of the British North America Act may be put into effect.

and at page 559,

> One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground.

The factor which impelled the Court to decide in favour of New York, rather than Ontario, was the existence in Buffalo, at the date of death, of certificates in the name of the testator endorsed in blank.

The passage which I have quoted makes it clear however that the rule followed to determine the situs of shares in issue in the *Williams* case does not necessarily apply to the situs of shares for the purposes of judicial execution. The Parliament of Canada can prescribe the situs of shares in federally incorporated companies. It has done so for estate tax purposes by the combined effect of s. 38(*e*), s. 47(1) and s. 47(4) of the *Estate Tax Act*.

In my opinion, the true principles to be applied in a case of the kind we are concerned with here are those set out in *Braun v. The Custodian*[7]. The question there was the situs of shares in the Canadian Pacific Railway Company, for the purpose of determining a dispute as to their ownership as between a purchaser from an alien enemy, and the Custodian of Enemy Property. The share certificates stood in the names of alien enemies, and were bought by Braun on the Berlin Exchange in October 1919. The shares were on the

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[6] [1933] S.C.R. 670, 4 D.L.R. 465.

[7] [1944] Ex. C.R. 30, 3 D.L.R. 412; [1944] S.C.R. 339, 4 D.L.R. 209.

New York register of the company and transfers were registrable only in New York. The certificates had transfers on the back endorsed in blank by the registered owners. In April 1919, the shares had been made the subject of a vesting order under the Consolidated Orders Respecting Trading with the Enemy. In November 1919, Braun presented the certificates for registration in his name at the New York office. Registration was refused on the ground that the vesting order of April 1919 vested them in the Canadian Custodian. It was contended that the vesting order was a nullity on the ground that the situs of the shares was New York and that therefore no Canadian court could validly deal with them.

The Exchequer Court and this Court rejected this contention and held the shares to be situate in Canada.

In this Court, Kerwin J., as he then was, speaking for the Court said at p. 345:

> While ordinarily (in the present instance) the law of Germany would determine the effect of the contract to transfer the certificates, "the distinction", as Professor Beale points out in volume 1 of his Conflict of Laws, page 446, "between the certificate of stock and the stock itself is an important one. The latter has its situs at the domicile of the corporation and there only".
>
> * * *
>
> Here the situs of the shares, as distinguished from that of the certificates, was in Canada and the New York Uniform Stock Transfer Law, relied upon by the appellant, has no bearing upon the question. The fact that the Railway Company was authorized to, and did in fact, establish a transfer office in the State of New York where, only, transfers of the shares in question were registrable, cannot make any difference. This was a mere matter of convenience and did not detract from the power of Canada to deal with the title to the shares of the Canadian company.
>
> The appellant also relied on the decision of the Privy Council in *Rex v. Williams* (2). There the Province of Ontario attempted to collect succession duty upon shares of a mining company incorporated by letters patent under the Ontario *Companies Act* and which had two transfer offices, one in Toronto and the other in Buffalo, New York, at either of which shareholders might have their shares registered and transferred in the books of the company. The shares in question were those of a testator who died domiciled in New York and the share certificates themselves were physically located there. Viscount Maugham pointed out that "One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground" (p. 559); and further: "In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario" (p. 560). The considerations which apply to a discussion as to the situs of shares for provincial succession duty purposes where a provincial legislature is restricted to direct taxation within the province cannot affect the matter at present under review.

1968

HUNT *et al.* v. THE QUEEN

Abbott J.

I can see no valid reason why the same considerations should not apply, to determine the situs of shares for the purpose of judicial execution, as for the purpose of a dispute as to ownership. In both cases, the dominant consideration is the jurisdiction of the court to which the company is ultimately subject.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

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

1967

*Oct. 16, 17

1968

Mar. 13

WILFRED M. POSLUNS (*Plaintiff*) ..... APPELLANT;

AND

THE TORONTO STOCK EXCHANGE (*Defendant*) ..... RESPONDENT;

AND

GEORGE GARDINER (*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law—Investigation by Board of Governors of Stock Exchange concerning certain option transactions by member company—Representative of company fined and Board's approval of appellant's association with company withdrawn—Whether Board in taking action against appellant exercised its jurisdiction legally and in accordance with rules of natural justice.

The Board of Governors of the Toronto Stock Exchange was informed that a member company was acting for both sides in certain option transactions and as a result four directors of the company, including the appellant, were interviewed by some members of the Board. In consequence of these discussions the Board decided to hold a meeting to investigate and consider the question of whether or not the member of the Exchange for the company was guilty of any offence under the by-laws or rulings of the Exchange. A notice was issued that an inquiry would be held to determine, *inter alia*, whether the member company, while acting as agent for a customer on one side of the transactions in question, had acted on the other side for a company in which the appellant had a one-sixth personal interest.

On the day before the meeting was to take place the appellant consulted the member firm's counsel as to whether he should have his own

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

counsel at the hearing. He was advised that the hearing was to be with reference to the company and that his position was not particularly different from that of the other directors. The appellant was present at the hearing and was given an opportunity to explain his role in the matter. The Board found that the company was guilty and the maximum fine was imposed. The Board then went on to deal independently and additionally with the appellant and after some discussion it was resolved to terminate all prior consents given to the appellant as a director, officer and shareholder of the company.

On the day following the hearing, representations were made to the Board that there should be a rehearing with respect to the appellant's personal position. The Board having acceded to this request a rehearing was held at which a statement was read reviewing what had transpired at the original hearing in so far as it related to the appellant. Appellant's counsel was asked whether he wished to call any additional evidence and replied that there was no dispute about the evidence but only as to the interpretation to be placed upon it. Appellant's counsel then made full representations to the Board, following which the Board considered the matter and concluded that appellant's conduct was such to warrant the withdrawal of the Board's approval of his association with the member company, but they agreed to give him ten days in which to resign and withheld official publication of the resolution passed against him until that period had expired. The appellant, however, declined to resign and a letter was accordingly forwarded from the Board to the company giving formal notice of the resolution. The appellant was subsequently removed as a director and was discharged from his association with the firm.

An action brought by the appellant against the Exchange for substantial damages and for a declaration that the Board of Governors of the Exchange had acted illegally and contrary to the rules of natural justice in terminating all prior consents given by it for the appellant to act as a director, officer, shareholder or employee of the member company was dismissed by the trial judge and an appeal from his judgment was dismissed by the Court of Appeal. The appellant then appealed to this Court.

Held: The appeal should be dismissed.

The Court found that neither the good faith nor the mode of procedure of the Board had been successfully impugned. The appellant had been fully informed of what was alleged against him and was given an opportunity to present his version and explanation of the allegations. *Russell v. Russell* (1880), 14 Ch. D. 471; *Board of Education v. Rice*, [1911] A.C. 179, applied; *Ridge v. Baldwin*, [1964] A.C. 40, distinguished; *Weinberger v. Inglis*, [1919] A.C. 606, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Gale J. (now C.J.O.). Appeal dismissed.

W. B. Williston, Q.C., and *R. B. Tuer*, for the plaintiff, appellant.

[1] [1966] 1 O.R. 285, 53 D.L.R. (2d) 193.

1968

POSLUNS v. TORONTO STOCK EXCHANGE et al.

A. S. Pattillo, Q.C., and *J. F. Howard, Q.C.*, 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 Ontario dismissing an appeal from the judgment rendered at trial by Mr. Justice Gale (as he then was) whereby he dismissed the action which the appellant had brought against the Toronto Stock Exchange (hereinafter called the "Exchange") for substantial damages and for a declaration that the Board of Governors of the Exchange had acted illegally and contrary to the rules of natural justice in terminating all prior consents given by it for the appellant to act as a director, officer, shareholder or employee of R. A. Daly and Company Limited (hereafter called the "Daly Company") a member corporation of the Exchange which was represented thereon by one of its directors, R. A. Daly, Jr. The result of the order which is challenged in these proceedings was that the appellant was removed as a director of the Daly Company and was discharged from his association with that firm where he had been an active partner and where the trial judge found that he had been engaged as a "customers' man" for the solicitation of commission business in securities listed on the Exchange.

The background of this case has been carefully and accurately described in the very full judgment of the learned trial judge which is reported in 46 D.L.R. (2d) at pp. 210 to 347 and which was confirmed by the Court of Appeal[1] so that I do not find it necessary to do more than present a summary of the circumstances which provided the immediate cause for the Board of Governors of the Exchange acting as they did.

When the appellant became associated with the Daly Company in the year 1960, he had already become interested in the somewhat specialized field of dealing in the buying and selling of options on shares and he had acquired a one-sixth interest in a partnership under the name of Lido Investments which engaged in that business. During 1960 one of the appellant's clients, a Mr. Lynch who was a Peter-

[1] [1966] 1 O.R. 285, 53 D.L.R. (2d) 193.

borough druggist, sold 570 options through the Daly Company acting as his agent and the Daly Company in turn purchased 313 of these options in its capacity as agent for Lido and in the same capacity sold most of these in New York at a price higher than the price received by Lynch. The Daly Company charged Lynch a commission of 5.5 per cent on the options sold to Lido and charged Lido 1.1 per cent on their purchase, but no commission charge was made to Lido on any of the sales made in New York. The appellant, as one of the owners of Lido, shared in the substantial profit which was made by that partnership through these transactions, and through his association with the Daly Company he also participated in the profits made on the other side of the transactions both through commissions and as a shareholder of that company.

Early in February 1961, it came to the attention of the Exchange that the Daly Company was acting for both sides in the Lynch-Lido option transactions and this was reported to the Board of Governors of the Exchange as a result of which four of the directors of the Daly Company, including the appellant, were interviewed by some members of the Board on February 15 when the appellant was questioned about the operations of Lido and his interest in it, and there was a discussion about the Daly Company's position in relation to the transactions. In consequence of these discussions the Board decided to hold a meeting on February 28 to investigate and consider the question of whether or not R. A. Daly, Jr., as a member of the Exchange and director of the Daly Company, was guilty of any offence under the by-laws or rules of the Exchange. Pursuant to the provisions of its by-laws, the Board of Governors issued a notice on February 22 addressed to R. A. Daly, Jr., as an individual member of the Exchange and to the President of the Daly Company. In this notice the purpose of the meeting to be held on February 28 was stated to be:

> ...in connection with transactions in 'put and call' options conducted between January 1st, 1960, and January 31st, 1961, with its customer John T. Lynch by R. A. Daly & Co. Limited (herein referred to as 'Daly'), a member corporation of which you are a shareholder and director, and through which you, as a member of the Toronto Stock Exchange, carry on business, and for the acts and omissions of the directors, officers and employees of which you as a member, are responsible:

1968

POSLUNS v. TORONTO STOCK EXCHANGE et al.

Ritchie J.

The first of the acts of omission into which the inquiry was to be held was specified in the notice in the following terms:

> (a) whether Daly, while acting as agent for the said Lynch on one side of such transactions, acted on the other side in such transactions, or some of them, for or with a company or partnership known as Lido Investments, in which Wilfred M. Posluns, a director of Daly, on his own admission, had a one-sixth personal interest.

As I have said, the appellant, as a director of the Daly Company, had been interviewed by members of the Board of Governors and discussed the subject-matter of the first act of omission and his role concerning it. On being advised of the notice for the February 28 meeting he postponed his holiday plans so as to be present there and on the day before it was to take place, he and his solicitor consulted Mr. Stapells, counsel for Daly and Company, as to whether he should have his own counsel at the hearing. It is true that Mr. Stapells advised him and his solicitor that the hearing was to be with reference to the Daly Company and that he did not think the appellant's position to be particularly different from that of the other directors, but in light of all the circumstances, it must I think, be accepted that he knew that his conduct was to be the subject of an inquiry which was to be held for the purpose of determining whether or not his firm should be penalized by the Exchange. I do not, however, think that the appellant was alerted to the fact that he might be personally penalized at the same meeting.

The appellant was present at the hearing of February 28 at which a statement was read reciting the facts known to the Board concerning the transactions in question and he was given an opportunity to explain his association with Lido. After considering the matter amongst themselves, the members of the Board called in the representatives of the Daly Company and announced that they were unanimously of the opinion that the Company was guilty of six of the seven acts of omission preferred against it, including the first. After representations had been made on the company's behalf with respect to penalty, the matter was again considered and it was decided to impose the maximum fine of $5,000 on R. A. Daly, Jr.

There then occurred what the trial judge referred to as "an unfortunate error" because the Board, instead of accepting the fact that it had completed the inquiry with respect

to the Daly Company upon which it had properly embarked, went on to deal independently and additionally with the appellant.

This new issue was introduced when the chairman said something to the effect "What about the directors of Daly individually?" and another governor then referred to Mr. Posluns as being the one who had caused all the trouble. After relatively little discussion, it was unanimously resolved that all prior consents given to the appellant as a director, officer and shareholder of the Daly Company be terminated forthwith and it was the general understanding that his association with the Daly firm was to be severed in all respects.

Although the president of the Daly Company was informed of the resolution withdrawing the appellant's approvals, no action was at that time taken by the Board to put the terms of the resolution into effect and on the following day representations were made to the Board that there should be a rehearing with respect to Posluns' personal position. The Board acceded to this request and a rehearing was set for March 2 on which date the same members of the Board were present who had conducted the February 28 meeting and a statement was read reviewing what had transpired at the meeting in so far as it related to the appellant. The appellant was represented at this meeting by counsel who was asked whether he wished to call any additional evidence and replied that there was no dispute about the evidence but only as to the interpretation to be placed upon it. The appellant's counsel then made full representations to the Board and concluded with a plea in mitigation urging that the publication of the resolution withdrawing the approvals would do irreparable damage to the appellant and his family. There being no dispute as to the facts, the members of the Board adjourned to consider the matter in light of the interpretation placed on them by the appellant's counsel and in light of the submissions which he had made concerning the penalty to be imposed; in the result they concluded that the appellant's conduct was such as to warrant the withdrawal of the Board's approvals of his association with the Daly Company, but they agreed that the resolution directing that withdrawal passed at the meeting of February 28 would not be acted upon or published if the appellant resigned

1968

POSLUNS v. TORONTO STOCK EXCHANGE et al.

Ritchie J.

by March 10. The appellant, however, decided not to tender his resignation and a letter was accordingly forwarded from the Board to the Daly Company giving formal notice of the resolution.

For the reasons stated by the learned trial judge and the Court of Appeal, I am satisfied that under the by-laws of the Exchange the Board of Governors had jurisdiction to take the action which they did against the appellant, but the question raised by this appeal is whether they exercised that jurisdiction legally and in accordance with the rules of natural justice.

I do not find it necessary to review the considerable number of cases which discuss the meaning and effect to be given to the rules of natural justice because the trial judge has dealt extensively with all the leading authorities in that regard and it would be redundant for me to retrace the ground which has been so thoroughly covered.

It does, however, appear to me to be desirable to mention the case of *Russell v. Russell*[2], in which Sir George Jessel M.R. made the following comment on the earlier case of *Wood v. Wood*[3]:

> . . . it contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than judges who have judicial functions to perform, . . . The passage I mean is this, referring to a committee:
>
> > They are bound, in the exercise of their functions, by the rule expressed in the maxim *audi alteram partem*, that no man should be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

This language was quoted with approval by the Privy Council in *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal*[4].

Although the case of *Board of Education v. Rice*[5] has been referred to in the Courts below, I think it desirable to reiterate what was there said by Lord Loreburn at p. 182 where, speaking of the duty of the Board of Education in considering a complaint against a local education authority, he said:

> In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law.

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[2] (1880), 14 Ch. D. 471.
[3] (1874), L.R. 9 Ex. 190.
[4] [1909] A.C. 535.
[5] [1911] A.C. 179.

It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either *they must act in good faith* and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial.

The italics are my own.

In light of the findings of the Courts below, I do not think that the good faith of the Board of Governors is open to question, but under the authorities they were also required, before taking any final action against the appellant, to inform him of what was alleged against him and to give him an opportunity to present his version and explanation of any such allegations.

The position as I interpret it, is that the appellant was fully informed at and before the meeting of February 28 that the Board of Governors disapproved of his conduct in relation to the Lynch-Lido-Daly transactions and he was given an opportunity to present and did present his explanation of that conduct at that meeting but, although he must have realized at that time that he was personally open to censure by the Board, he was not alerted to the fact that his own case was to be dealt with at the February meeting. It is now contended on behalf of the appellant that the February hearing was a nullity so far as he was concerned and that the second hearing of March 2 was in the nature of an appeal and did not afford him the new hearing to which he was entitled. The key submission made in the factum filed on behalf of the appellant is phrased as follows:

2. It is submitted that the Appellant could not have had a fair hearing on March 2nd by reason of the state of mind of the Governors on that occasion in:

(a) Failing to understand and accept the fact that the proceedings on February 28th had no legality and that they must consider the matter afresh;

(b) By their failure to exercise their proper function as members of a tribunal determining the propriety of the Appellant's conduct for the first time rather than as members of an appellate board prepared to be convinced that their earlier decision was wrong.

Counsel on behalf of the appellant relied in great measure on the decision of Lord Reid in the case of *Ridge v. Baldwin*[6], and particularly on the passage at p. 79 in which

[6] [1964] A.C. 40.

1968

POSLUNS v. TORONTO STOCK EXCHANGE *et al.*

Ritchie J.

he commented on the two meetings held in that case by the "watch committee" to consider the question of the dismissal of the Chief Constable of the Borough of Brighton. The passage in question reads as follows:

> Next comes the question whether the respondents' failure to follow the rules of natural justice on March 7 was made good by the meeting on March 18. I do not doubt that if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid. An example is *De Verteuil v. Knaggs,* [1918] A.C. 557. But here the appellant's solicitor was not fully informed of the charges against the appellant and the watch committee did not annul the decision which they had already published and proceed to make a new decision. In my judgment, what was done on that day was a very inadequate substitute for a full rehearing. Even so, three members of the committee changed their minds, and it is impossible to say what the decision of the committee would have been if there had been a full hearing after disclosure to the appellant of the whole case against him. I agree with those of your Lordships who hold that this meeting of March 18 cannot affect the result of this appeal.

Counsel for the appellant sought to apply this language directly to the circumstances of the present case and it therefore becomes necessary to examine the facts in *Ridge v. Baldwin* so as to fully understand Lord Reid's reference to the two meetings. In that case the Chief Constable of Brighton was dismissed from office by a resolution of the watch committee passed at a meeting of which he had no notice and at which he was given no opportunity to be heard in his own defence. Following his dismissal, the chief constable's solicitor asked to be allowed to appear before the watch committee saying that he wished to be informed about the case against his client so that he could deal with it and furthermore, he submitted that the best way of dealing with the situation would be to allow his client to resign and take his pension.

The distinction between the two cases is, in my view, clearly apparent from a description of the initial meeting at which the chief constable was dismissed as contained in the judgment of Lord Morris at p. 113:

> The watch committee were under a statutory obligation (see Police Act, 1919, s. 4(1)) to comply with the regulations made under the Act. They dismissed the appellant after finding that he had been negligent in the discharge of his duty. That was a finding of guilt of the offence of neglecting or omitting diligently to attend to or to carry out his duty. Yet they had preferred no charge against the appellant and gave him no notice. They gave him no opportunity to defend himself or to be heard. Though their good faith is in no way impugned, they completely disregarded the regulations and did not begin to comply with them.

The meeting of March 18 to which reference is made in Lord Reid's judgment is briefly described by Lord Hodson at p. 129 of the same report where he made the following comment on the reception given to the appellant's solicitor at that meeting:

> On March 18 Mr. Bosley was given not only a full but a courteous hearing by the watch committee but received no indication of the nature of the charges which his client had to answer, notwithstanding his repeated statements that he did not know what they were. It is plain, therefore, that if there were a failure on March 7 to give justice to the appellant this was not cured on March 18 when the watch committee confirmed their previous decision. At this hearing it was made plain by Mr. Bosley that his client was not seeking reinstatement but only his pension rights of which he had been deprived by his dismissal. This position is maintained by the appellant through his counsel before your Lordships.

I am in sympathy with the observations made by Lord Hodson later in his reasons for judgment at p. 133 where he said:

> It may be that I must retreat to that last refuge of one confronted with as difficult a problem as this, namely, that each case depends on its own facts, and that here the deprivation of a pension without a hearing is on the face of it a denial of justice which cannot be justified on the language of the section under consideration.

From the above recital of the facts it will be apparent that the circumstances in *Ridge v. Baldwin* were quite different from those in the present case. In *Ridge v. Baldwin* the appellant was never told of the case which he had to meet, whereas Mr. Posluns knew what was complained of in his conduct some days before the first hearing. In *Ridge v. Baldwin* the appellant was given no opportunity to be heard at either meeting, whereas Posluns gave evidence and had a full opportunity to explain himself at the first hearing and declined, through his counsel, to add anything at the second hearing to the evidence which had already been taken. In *Ridge v. Baldwin* the plea made by the chief constable's solicitor at the second hearing that his client should be permitted to resign was of no avail, whereas after listening to the submissions of Posluns' solicitor at the March 2 hearing, the Board of Governors gave him ten days in which to resign and withheld official publication of the resolution passed against him until that period had expired and Posluns had declined to resign.

In my opinion, the contention that the proceedings at the meeting of March 2 were in the nature of an appeal

1968

POSLUNS v. TORONTO STOCK EXCHANGE et al.

Ritchie J.

from the decision of February 28 rather than a rehearing, leaves out of account the fact that the Board gave the appellant's solicitor full opportunity to call any evidence he pleased at the second hearing and that it was he and not the Board who made the election to abide by the evidence taken in February. He then reviewed all the circumstances afresh and advanced at every turn the construction of the facts which was most favourable to his client. In the result, although the Board of Governors did not change their ruling, they offered to withdraw it altogether if the appellant would resign. In my view also it is inconsistent to speak of the March 2 hearing as an appeal when the disputed resolution was not formally published until March 10.

The learned trial judge expressed the view that it was "an unfortunate error" for the Board of Governors to have proceeded against the appellant personally at the first hearing. I do not find it necessary to express an opinion as to this because, in any event, the circumstances are governed by the general proposition stated in the paragraph above quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin* where he said:

> I do not doubt that if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid. An example is *De Verteuil v. Knaggs,* [1918] A.C. 557.

The case of *Weinberger v. Inglis*[7] was one in which the committee of the London Stock Exchange had refused re-election to a German member and their decision was challenged as having been reached without regard to the rules of natural justice. It appears to me that the language used by Lord Birkenhead in that case is directly applicable to the present appeal. He there said, at p. 617:

> The Committee formed their opinion. It is conceded that they formed it honestly. They formed it in my opinion upon grounds which were made known to the appellant and which he had a chance of answering. The short answer, therefore, to the appellant's case is that the Committee did not deem him eligible to be a member of the Stock Exchange, and that neither their good faith nor their mode of procedure has been successfully impugned.

I think that the Board of Governors in the present case is in the same position and I find, to use Lord Birkenhead's

[7] [1919] A.C. 606.

language, "that neither their good faith nor their mode of procedure has been successfully impugned".

For all these reasons, as well as for those contained in the reasons for judgment of the learned trial judge and the majority of the Court of Appeal, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Goodman & Goodman, Toronto.

Solicitors for the defendant, respondent: Blake, Cassels & Graydon, Toronto.

GEORGE MILTON PATON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967
*Oct. 12
1968
Mar. 13

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Preventive detention—Whether conviction recorded before enactment of habitual criminal provisions to be considered—Whether conviction subsequent to commission of substantive offence to be considered—Whether sentence imposed must have been served—Criminal Code, 1953-54 (Can.), c. 51, s. 660(2)(a).

On December 12, 1956, the appellant was convicted of an offence, committed on July 15, 1956, of breaking and entering and theft and was sentenced on that same day to preventive detention. He had been arrested on July 15, 1956. The three prior convictions upon which that sentence was founded were: (a) on November 8, 1946, for breaking and entering; (b) on February 13, 1952, for breaking and entering and (c) on October 16, 1956, for breaking and entering committed on July 1, 1956. The Court of Appeal affirmed the sentence of preventive detention and an application for leave to appeal to this Court was dismissed in October 1957. On an appeal from the refusal of a writ of *habeas corpus*, the appellant was granted leave to appeal to this Court in June 1967. Three questions of law were raised by the appellant: (1) whether a conviction recorded prior to the enactment in 1947 of the habitual criminal provisions should be considered in the application of s. 660(2)(*a*) of the Code; (2) whether a conviction entered after the commission of the primary offence should be considered as one of the three convictions contemplated in s. 660(2)(*a*) of the Code; and (3) whether the sentence imposed on the previous convictions must have been served when the habitual criminal proceedings are brought.

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*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1968

PATON v. THE QUEEN

Held (Cartwright C.J. and Hall, Spence and Pigeon JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The Court was entitled to consider the conviction recorded in 1946. The word "previously" in s. 660(2)(*a*) of the Code takes in convictions before the enactment of legislation in relation to habitual criminals and that includes the conviction of 1946. The convictions which the Court may consider are convictions which have occurred since the accused reached the age of 18 years without regard to the date when the habitual criminal legislation was first passed.

The Court was entitled to consider the conviction dated October 16, 1956, as one of the three convictions. There is no basis for the contention that the three convictions must occur previous to the commission of the primary offence. It is sufficient for the Crown to prove that the accused has been convicted on three occasions previous to the conviction on the primary offence. The word "previously" must apply to any conviction which in point of time has occurred before the date of the hearing of the application and before the date of the conviction on the primary offence. The word does not mean "previously to committing the substantive offence" but "previously to being convicted of the substantive offence". All that the Crown has to prove is that at the time of the conviction on the primary offence, there are three previous convictions and that at the time of the commission of the substantive offence, he was leading a "persistently criminal life".

There is no requirement that the sentence imposed must have been served in whole or in part. The statute in clear language requires only proof of a conviction of a certain kind. This language cannot be converted into a requirement that a sentence passed pursuant to such conviction must have been served. The serving of the sentence is not one of the conditions that must be met in order to establish that a person is an habitual criminal.

Per Cartwright C.J. and Hall and Spence JJ., *dissenting*: The Court was not entitled to consider the conviction, dated October 16, 1956, which was entered after the commission of the primary offence. The word "previously" in s. 660(2)(*a*) means previously to committing the substantive offence and not previously to being convicted of the substantive offence. The time at which the Crown must show that an accused is leading persistently a criminal life is the time of the commission of the substantive offence. The critical time contemplated by s. 660(2)(*a*) for the proof of the two matters required to be proved by the Crown must be the same for both. There is no evidence to suggest that after the date of the conviction for the third offence, he persistently led a criminal life as he had been in custody ever since. At the time the appellant committed the substantive offence he had been convicted of only two of the three offences set out in the notice given to him and consequently, the first of the conditions prescribed by s. 660(2)(*a*) had not been fulfilled.

Per Pigeon J., *dissenting*: In order to limit the effect of the word "previously" in s. 660, which by itself takes in all time past without any distinction, it would be necessary to introduce into the section something which is not there. On the proper construction of the

statute after consideration of the relevant authorities there was no reason in law for excluding from consideration the conviction recorded in 1946.

The trial judge was not entitled to consider the conviction entered after the commission of the primary offence. Grammatically the text of s. 660 does not support the contention that the word "previously" refers to the date of the commission of the primary offence. The word "occasions" means when an offender is apprehended, charged, convicted and sentenced. The word "persistently" implies "persistently after being convicted on the required three separate and independent occasions". Therefore, when the appellant was convicted of the primary offence, he could not be said to have been previously convicted "on at least three separate and independent occasions" when the last conviction was for an offence for which he was arrested and charged on the same occasion as the primary offence, and also because he could not be found to have been so convicted and to be leading persistently a criminal life when he had been convicted on the last occasion after being arrested for the primary offence.

Droit criminel—Repris de justice—Détention préventive—Doit-on considérer une déclaration de culpabilité enregistrée avant la promulgation des dispositions visant les repris de justice—Doit-on considérer une déclaration de culpabilité prononcée après la date de l'infraction sur laquelle la sentence est basée—Est-ce que la sentence imposée doit avoir été purgée—Code criminel, 1953-54 (Can.), c. 51, art. 660(2)(a).

Le 12 décembre 1956, l'appelant a été déclaré coupable d'une infraction, commise le 15 juillet 1956: entrée par effraction et vol. Une sentence de détention préventive lui a été imposée le même jour. Il avait été arrêté le 15 juillet 1956. Les trois déclarations antérieures de culpabilité sur lesquelles cette sentence est basée, sont: (a) le 8 novembre 1946: entrée par effraction; (b) le 13 février 1952: entrée par effraction et (c) le 16 octobre 1956: entrée par effraction le 1er juillet 1956. La Cour d'appel a confirmé la sentence de détention préventive et une requête pour permission d'en appeler à cette Cour a été rejetée au mois d'octobre 1957. Sur appel d'une décision refusant d'accorder un bref d'*habeas corpus*, cette Cour lui a accordé la permission d'appeler au mois de juin 1967. L'appelant a soulevé à l'audition trois questions de droit: (1) doit-on, dans l'application de l'art. 660(2)(*a*) du Code, considérer une déclaration de culpabilité enregistrée avant la promulgation en 1947 des dispositions visant les repris de justice; (2) doit-on considérer une déclaration de culpabilité enregistrée après la date de l'infraction sur laquelle la sentence est basée comme l'une des trois déclarations de culpabilité visées par l'art. 660(2)(*a*) du Code; et (3) la sentence imposée à la suite des déclarations antérieures de culpabilité doit-elle avoir été purgée avant que les procédures visant les repris de justice soient instituées contre l'accusé.

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright et les Juges Hall, Spence et Pigeon étant dissidents.

Les Juges Fauteux, Abbott, Martland, Judson et Ritchie: La Cour était justifiée de considérer la déclaration de culpabilité enregistrée en 1946. Le mot «antérieurement» dans l'art. 660(2)(*a*) du Code englobe les déclarations de culpabilité antérieures à la promulgation de la législa-

1968

PATON
v.
THE QUEEN

tion relative aux repris de justice et ceci inclut la déclaration de culpabilité de 1946. Les déclarations de culpabilité que la Cour peut considérer sont celles qui sont survenues depuis que l'accusé a atteint l'âge de 18 ans sans égard à la date de la promulgation de la première législation relative aux repris de justice.

La Cour était justifiée de considérer la déclaration de culpabilité du 16 octobre 1956, comme l'une des trois déclarations de culpabilité prévues par l'art. 660(2)(*a*). La prétention que les trois déclarations de culpabilité doivent survenir avant que l'accusé commette l'infraction sur laquelle la sentence est basée n'est pas fondée. Il suffit que la Couronne prouve que l'accusé a été déclaré coupable en trois occasions avant d'être déclaré coupable de cette infraction. Le mot «antérieurement» doit s'appliquer à toute déclaration de culpabilité qui au point de vue du temps est survenue avant la date de l'audition de la demande et avant la date de la déclaration de culpabilité de l'infraction base de la sentence. Ce mot ne veut pas dire «antérieurement à cette infraction» mais «antérieurement à la déclaration de culpabilité de cette infraction». Tout ce que la Couronne doit prouver est que lors de cette déclaration de culpabilité, il existait trois déclarations antérieures de culpabilité et que lorsque l'accusé a commis l'infraction, il menait avec persistance une vie criminelle.

Il n'est pas nécessaire que la sentence imposée ait été purgée en tout ou en partie. Dans un langage clair, le statut n'exige que la preuve d'une déclaration de culpabilité d'un certain genre. On ne peut pas transformer ce langage pour lui faire dire qu'une sentence prononcée en vertu d'une telle déclaration de culpabilité doit avoir été purgée. Le fait d'avoir purgé la sentence n'est pas une des conditions requises pour établir qu'une personne est un repris de justice.

Le Juge en Chef Cartwright et les Juges Hall et Spence, *dissidents*: La Cour n'était pas justifiée de considérer la déclaration de culpabilité du 16 octobre 1956, laquelle a été enregistrée après la date de l'infraction sur laquelle la sentence est basée. Le mot «antérieurement» dans l'art. 660(2)(*a*) signifie antérieurement à cette infraction et non pas antérieurement à la déclaration de culpabilité. Le moment auquel la Couronne doit démontrer que l'accusé mène avec persistance une vie criminelle est lorsque l'accusé commet cette infraction. Le moment critique prévu par l'art. 660(2)(*a*) où doit se faire la preuve des deux éléments que la Couronne doit établir, doit être le même pour les deux. Il n'y a aucune preuve suggérant qu'après la date de la déclaration de culpabilité pour la troisième infraction, il a mené avec persistance une vie criminelle puisqu'il était sous arrêt depuis ce jour-là. Au moment où l'appelant a commis l'infraction il avait été déclaré coupable de seulement deux des trois actes criminels mentionnés dans l'avis qui lui a été fourni et, en conséquence, la première des conditions prescrites par l'art. 660(2)(*a*) n'a pas été remplie.

Le Juge Pigeon, *dissident*: Pour qu'il soit permis de limiter l'effet du mot «antérieurement» dans l'art. 660, lequel englobe par lui-même tout le passé sans distinction, il serait nécessaire d'introduire dans l'article quelque chose qui n'y est pas. Donnant au statut l'interprétation appropriée et après examen de la jurisprudence, il n'y a aucune raison en droit de ne pas considérer la déclaration de culpabilité enregistrée en 1946.

Le juge au procès n'était pas justifié de considérer la déclaration de culpabilité enregistrée après l'infraction sur laquelle la sentence est basée.

Grammaticalement, le texte de l'art. 660 ne supporte pas la prétention que le mot «antérieurement» réfère à la date de cette infraction. Le mot «occasions» signifie le temps où le criminel est arrêté, inculpé, déclaré coupable et reçoit sa sentence. Le mot «persistently» signifie «avec persistance après avoir été déclaré coupable dans les trois occasions distinctives et indépendantes requises». En conséquence, lorsque l'appelant a été déclaré coupable de l'infraction, on ne pouvait pas dire qu'il avait été trouvé coupable antérieurement «dans au moins trois occasions distinctes et indépendantes» puisque la dernière déclaration de culpabilité était d'une infraction pour laquelle il avait été arrêté et inculpé en la même occasion, et aussi parce qu'on ne pouvait pas dire qu'il avait été ainsi déclaré coupable et menait ainsi une vie criminelle, dans un cas où la dernière des trois condamnations était subséquente à son arrestation.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique, confirmant une sentence de détention préventive. Appel rejeté, le Juge en Chef Cartwright et les Juges Hall, Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Appeal for British Columbia, affirming a sentence of preventive detention. Appeal dismissed, Cartwright C.J. and Hall, Spence and Pigeon JJ. dissenting.

T. R. Berger, for the appellant.

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

The judgment of Cartwright C.J. and of Hall and Spence JJ. was delivered by

THE CHIEF JUSTICE (*dissenting*):—This appeal is brought, pursuant to an order made by this Court on June 19, 1967, extending the time for appealing and granting leave to appeal, from a judgment of the Court of Appeal for British Columbia pronounced on September 20, 1957, dismissing an appeal from the imposition of a sentence of preventive detention upon the appellant by His Honour Judge Archibald on December 12, 1956.

The appeal comes before us under unusual circumstances.

On October 28, 1957, the appellant applied to this Court for leave to appeal from the judgment of the Court of Appeal mentioned above and his application was dismissed. The grounds of appeal on which counsel for the appellant chiefly relies in the appeal now before us were not raised

1968

PATON v. THE QUEEN

Cartwright C.J.

before His Honour Judge Archibald or the Court of Appeal for British Columbia on the appeal to it in 1957 or on the application to this Court for leave to appeal in the same year.

On July 23, 1963, an application by the appellant for the issue of a writ of *habeas corpus* was refused by Judson J. and an appeal to the Court from such refusal was dismissed on November 12, 1963. On April 4, 1967, a further application by the appellant for the issue of a writ of *habeas corpus* was refused by Judson J. These refusals were clearly right as it is plain that the appellant is detained under a warrant of committal valid on its face, issued by a Court of competent jurisdiction.

The appellant appealed to this Court from the last mentioned refusal and was notified that his appeal would be heard on Monday, June 19, 1967. Prior to the hearing of the appeal a telegram was received by the Registrar of the Court from Mr. Thomas Berger stating that he had been asked to make representations to the Court on behalf of the appellant and requesting that no determination be made of the appeal until these reached the Court. Prior to the date of hearing a letter was received from Mr. Berger setting out grounds, to be referred to hereinafter, on which he submitted that the sentence of preventive detention had been unlawfully imposed.

On the appeal coming on to be heard, the Court informed counsel for the Attorney General that the decision of Judson J. refusing the issue of a writ of *habeas corpus* was clearly right and that the appeal therefrom must be dismissed but that Mr. Berger's letter appeared to raise a question of difficulty and importance which had not been placed before the Court of Appeal or this Court on any previous application by the appellant. After some discussion, and counsel for the Attorney General not objecting, the Court made the order granting leave to appeal and giving the necessary extensions of time as set out in the opening paragraph of these reasons.

On December 12, 1956, following trial without a jury which commenced on the previous day, the appellant was convicted on the charge that he

> ...on or about Sunday July 15th, A.D. 1956, at the City of Kelowna, County of Yale, Province of British Columbia, did unlawfully break and enter a place, to wit, the building of Gordon's Master Market Ltd.

situated at 555 Bernard Avenue, Kelowna, British Columbia, and therein steal the sum of approximately $14,452.28 in cash and cheques, the property of Gordon's Master Market Ltd., contrary to the form of Statute in such case made and provided.

On November 28, 1956, the appellant had been served with a notice dated November 28, 1956, in accordance with the provisions of s. 662 of the *Criminal Code* stating that if he should be convicted of the substantive charge an application would be made to the Court to impose a sentence of preventive detention upon the ground, *inter alia,* that

since attaining the age of eighteen years, on at least three separate and independent occasions previous to the conviction of the crime charged and hereinbefore recited, you have been convicted of an indictable offence for which you were liable to imprisonment for five years or more, namely:—

The three prior convictions are set out in complete detail; the particulars given may be summarized as follows:

(*a*) Charge, breaking and entering at Victoria, on May 30, 1946; conviction, November 8, 1946; sentenced, November 25, 1946, to five years in B.C. Penitentiary.

(*b*) Charge, breaking and entering at Haney, B.C., on February 26, 1951; conviction, February 13, 1952; sentenced to five years in B.C. Penitentiary.

(*c*) Charge, breaking and entering at Vancouver on July 1, 1956; conviction, October 16, 1956; sentenced October 23, 1956, to five years in B.C. Penitentiary.

The hearing of the application for the imposition of a sentence of preventive detention proceeded immediately following the conviction of the substantive offence. It was proved that the appellant had been convicted on the three occasions as stated in the notice. It appears from the evidence of Acting-Sergeant Nuttall given at the hearing of the application that the appellant was arrested at Vancouver on July 15, 1956.

The grounds of appeal relied on by the appellant are set out in the appellant's factum as follows:

1. The first conviction made against the appellant, in 1946, could not be used against him as one of three essential previous convictions, because there were no provisions in the Criminal Code for preventive detention of habitual criminals then, and the legislation should not be given retroactive application.

2. At the time of the commission of the primary offence, the appellant had not previously been convicted on three separate and independent occasions of an indictable offence for which he was liable for imprisonment for five years or more.

1968

PATON v. THE QUEEN

Cartwright C.J.

3. There was no adequate legal foundation for a sentence of preventive detention, in view of the fact that although three previous convictions had been proved against the appellant, he had not served the sentence imposed on him on the third previous conviction when the proceedings were brought against him alleging that he was an habitual criminal and when the sentence of preventive detention was imposed on him.

I find it necessary to deal only with the second of these grounds. Both counsel advised us that they had been unable to find any reported decision in which the question raised in this ground had been considered.

On December 12, 1956, s. 660 of the *Criminal Code* read as follows:

660. (1) Where an accused is convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in addition to any sentence that is imposed for the offence of which he is convicted if

(*a*) the accused is found to be an habitual criminal, and

(*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(*a*) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(*b*) he has been previously sentenced to preventive detention.

The solution of the question before us depends primarily upon the true construction of s. 660, subs. (2)(*a*) and particularly upon the meaning of the word "previously" in the first line of clause (*a*). Does it mean previously to committing the substantive offence or previously to being convicted of the substantive offence? In my opinion it means the former. It has been held in a unanimous judgment of this Court that the time at which the Crown must show that an accused is leading persistently a criminal life is the time of the commission of the substantive offence: see *Kirkland v. The Queen*[1].

It appears to me that the critical time contemplated by clause (*a*) for the proof of the two matters required to be proved by the Crown must be the same for both. I arrive at this conclusion from a consideration of the words of

[1] [1957] S.C.R. 3 at 8, 25 C.R. 101, 117 C.C.C. 1.

the section. If the construction were doubtful it seems to me that the view which I think should be taken is greatly strengthened by a consideration of the history of the section and the judicial pronouncements on it and on the statutory provisions in England upon which it is, with some variations, modelled.

In *R. v. Churchill*[2], Lord Goddard L.C.J. said at p. 110:

> The object of preventive detention is to protect the public from men or women who have shown by their previous history that they are a menace to society while they are at large. There comes a time when it is not a question of punishment, for that has been shown to be of no use, but of a necessity to put these offenders in confinement so that they can no longer prey upon the public.

and at p. 112:

> It is not a question of severity. As we have already said, when such sentences have to be passed the time for punishment has gone by, because it has had no effect.

These passages indicate the view, which I think to be the right one, that Parliament intended the extraordinary sentence of preventive detention to be imposed only after it appeared that convictions on three separate and independent occasions had failed to deter the accused from committing the substantive offence.

To the same effect are the following words in the judgment of Lord Goddard in *R. v. Rogers*[3]:

> The Criminal Justice Act was intended to deal with people who showed by their conduct that previous sentences had had no effect upon them and that, therefore, they were fit subjects for long detention for the protection of the public.

at p. 207:

> The principle is that if the prisoner shows that the sentences he has received at a particular court and also at two subsequent courts do not deter him from committing crime, then he is to be liable to preventive detention.

and also at p. 207:

> I think on the whole that is giving effect to the intention of the Act, because it will then have shown that the three previous appearances in court and the sentences imposed on him on three separate occasions have not done the prisoner any good, and therefore the time has come to try a long sentence.

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[2] (1952), 36 Cr. App. R. 107, 2 Q.B. 637.
[3] (1952), 36 Cr. App. R. 203 at 206, 207.

1968

PATON v. THE QUEEN

Cartwright C.J.

Reference may also be made to the words of Sheppard J.A. in *R. v. Channing*[4]:

> The Code does not expressly require that the accused lead persistently a criminal life of offences for which he is liable to imprisonment for 5 years or more. It is sufficient if he has been convicted on three occasions for three such offences and *thereafter* persistently led a criminal life, which may be of lesser crimes.

The most significant word in this passage is "thereafter" which I have italicized. In the case at bar at the time of his conviction for the third offence, the appellant had been in custody for some three months and has continued in custody ever since. There is no evidence in the record to suggest that after the date of that conviction he persistently led a criminal life.

It may be of use to consider the possible results of construing the section in accordance with the submission of counsel for the respondent by suggesting the following example. A person on separate days during the same month breaks into four different houses and steals some of the contents. He is apprehended on the fourth occasion. If separately indicted and convicted for each of the first three offences, he could following conviction on the fourth be sentenced to preventive detention. That such a situation is unlikely to arise may be conceded; but it appears to me to be even more unlikely that Parliament should have intended to render possible such a result. To so construe the section because the literal meaning of the words used would seem capable of bearing such a meaning would, in my opinion, be to disregard the well settled rule of construction which is succinctly stated in *Halsbury,* 3rd ed., vol. 36, p. 416:

> For a penalty to be enforced it must be quite clear that the case is within both the letter and the spirit of the statute.

This statement is supported by the authorities cited by the learned authors and there is nothing in the *Interpretation Act,* as in force at the time this case was dealt with in the Courts below (R.S.C. 1952, c. 158), which abrogates the rule. Section 15 of that Act does require every Act to be deemed remedial but concludes with the words:

> . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

[4] [1966] 1 C.C.C. 99 at 108, (1965), 52 W.W.R. 99, 51 D.L.R. (2d) 223.

It is the commission of the substantive offence that creates the possibility of an inquiry as to whether the accused is an habitual criminal. It is, of course, necessary that he be convicted of that offence before it can be said judicially that he has committed it; but it is the commission and not the conviction which indicates what manner of man he is. The number of previous convictions chosen by Parliament as a condition precedent to the holding of an inquiry as to whether a person is an habitual criminal is three. Those convictions bring home to the convicted person on three separate occasions the knowledge of guilt and the punishment which it entails. It is the fact that he thereafter, with such knowledge, commits yet another indictable offence that Parliament has declared shall be a condition precedent to the inquiry as to whether he should be sentenced to preventive detention.

At the time the appellant in the case at bar committed the substantive offence he had been convicted of only two of the three offences set out in the notice given to him and, in my opinion, the first of the conditions prescribed by clause (*a*) of s. 660(2) had not been fulfilled; it follows that it was not open to the learned judge to impose a sentence of preventive detention.

It is obvious that for the reasons given above I would allow the appeal, but there remains for consideration a point raised by some members of the Court. It has been suggested that because this Court had, on October 28, 1957, refused the appellant's application for leave to appeal it had no jurisdiction to make the order granting leave which it did make on June 19, 1967, and which was duly signed and entered.

As this point was not put to counsel during the argument, counsel were invited to submit written argument dealing with it and they have done so.

It now appears that the majority of the Court have reached the conclusion that the appeal fails on the merits. It therefore becomes unnecessary to deal with the question of jurisdiction. I am dealing with the appeal on the assumption that we have jurisdiction but, following the example of my brother Judson, I express no opinion on that question.

1968

PATON v. THE QUEEN

Cartwright C.J.

I would allow the appeal and quash the sentence of preventive detention imposed upon the appellant.

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

JUDSON J.:—On December 12, 1956, the appellant, George Milton Paton, was sentenced to preventive detention. His appeal from this sentence to the British Columbia Court of Appeal was dismissed on September 20, 1957, and an application for leave to appeal to this Court was dismissed on October 28, 1957. Notwithstanding this last dismissal, in June of this year, at the same time that an application by way of appeal from the refusal of a writ of *habeas corpus* was dismissed, the Court granted leave to appeal from the above mentioned judgment of the Court of Appeal of British Columbia, dated September 20, 1957. The question of the Court's jurisdiction to hear this appeal has been raised but also the appeal has been heard on the merits. I express no opinion on the question of jurisdiction because the appeal must fail on the merits.

The convictions upon which the sentence for preventive detention was founded are as follows:

Date of Offence	Date of Conviction	Offence	Sentence
1. Not stated	November 8, 1946	Breaking and entering	5 years
2. Not stated	February 13, 1952	Breaking and entering	5 years
3. July 1, 1956	October 16, 1956	Breaking and entering	5 years
4. July 15, 1956	December 12, 1956	Breaking and entering	8 years
5. December 12, 1956—sentence of preventive detention.			

I will deal now with the three points of law which were submitted to the Court on the argument of the appeal.

I. Whether, under the provisions of Section 660(2)(*a*), the Court was entitled to consider a conviction in 1946 before the enactment of the Habitual Criminal provisions of the Criminal Code.

The submission is that if the Court does consider the conviction of 1946, it is giving a retroactive operation to the habitual criminal provisions of the Code. I do not

think that this is correct. The purpose of the habitual criminal legislation is not to create a new offence nor to increase the penalties for offences with respect to which sentences have already been imposed. The purpose is crime prevention. The habitual criminal is not imprisoned for doing something, but rather for being something. The finding is simply a declaration of his status as an habitual criminal which is a matter determined in part by reference to his past record. This was decided in *Brusch v. The King*[5].

Legislation in relation to habitual criminals was first enacted in Canada in 1947. (Statutes of Canada, 1947, 11 Geo. VI, vol. 1, c. 55, Part X(A)). Section 575c. (1) enacted under that part read:

575c. (1) A person shall not be found to be a habitual criminal unless the judge or jury as the case may be, finds on evidence,

(*a*) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part, and that he is leading persistently a criminal life.

On December 12, 1956, the date of Paton's sentence to preventive detention, s. 660 had taken the place of s. 575c. (1). Section 660 came in with the new *Criminal Code* enacted by 2-3 Eliz. II, c. 51, and came into force on April 1, 1955. It read:

660. (1) Where an accused is convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in addition to any sentence that is imposed for the offence of which he is convicted if

(*a*) the accused is found to be an habitual criminal, and

(*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(*a*) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(*b*) he has been previously sentenced to preventive detention.

[5] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.

1968

PATON v. THE QUEEN

Judson J.

In the original enactment of 1947, the words "whether any such previous conviction was before or after the commencement of this Part" make it clear that the Court was entitled to take into account the conviction in 1946, No. 1 on the above list.

On December 12, 1956, when the accused was found to be an habitual criminal, these words had been omitted and the arrangement of the words slightly altered. But there was no change in the meaning. "Previously" takes in convictions before the enactment of legislation in relation to habitual criminals. It includes the conviction of 1946. The convictions which the Court may consider are convictions which have occurred since the accused reached the age of eighteen years without regard to the date when the habitual criminal legislation was first passed.

The alternatives are the elimination of two classes of convictions

(*a*) those before April 1, 1955, when s. 660 came into force, or

(*b*) those before 1947, when s. 575c. (1) came into force.

In my opinion the use of the word "previously" shuts out these alternatives.

II. Whether the learned trial judge, in finding the appellant to be an habitual criminal, was entitled to consider the conviction dated October 16th, 1956, as one of the three convictions described in section 660(2)(*a*) of the *Criminal Code*.

On reference back to the above table, it will be seen that the conviction of October 16, 1956, based on the offence of July 1, 1956, was subsequent to the commission of the primary or substantive offence on July 15, 1956. The appellant's submission on this appeal is that the three convictions, in order to comply with s. 660, must occur previous to the commission of the primary or substantive offence. The Crown, on the other hand, submits that there is no basis for such a contention and that it is sufficient for the Crown to prove at the hearing of an application under s. 660 that the accused has been convicted on three occasions previous to the conviction on the primary or substantive offence. In this case, on December 12, 1956, when this accused was convicted of the primary or substantive offence which he had committed on July 15, 1956, there were three convictions against him: November 8,

1946, February 13, 1952, and October 16, 1956. When the application to have him sentenced to preventive detention was made on the same date, December 12, 1956, the Court was required to decide at that point of time whether previously, since attaining the age of eighteen years, on three separate and independent occasions, the appellant had been convicted. The word "previously" in such circumstances must apply to any conviction which in point of time has occurred before the date of the hearing of the application and before the date of the conviction on the primary or substantive offence.

To go back to s. 575c., the original enactment of 1947, the words read: "previously *to the conviction of the crime charged in the indictment*". In the present section, 660(2)(*a*), the words italicized in s. 575c. (1) have been omitted. The word "previously" is sufficient. The italicized words were redundant. The two sections mean exactly the same. It was a case of omitting in the revision redundant words. See: *C.P.R. v. The King*[6].

I cannot accept the conclusion of the Chief Justice that "previously" means "previously to committing the substantive offence" and not "previously to being convicted of the substantive offence". This is not what the section says. I do not think that it follows from *Kirkland v. The Queen*[7] that at the time of commission of the primary or substantive offence it must be shown that the accused had three previous convictions. One thing that *Kirkland v. The Queen* does decide is that it must be shown on the application to have the accused declared an habitual criminal that he is leading "persistently" a criminal life, and that on this branch of the case the date to be taken is the date of the commission of the primary or substantive offence.

I do not think that the history of the legislation in England or the dicta of Lord Goddard in *Rex v. Churchill*[8] and in *Rex v. Rogers*[9] have any bearing upon the interpretation of this section. In other words, all that the Crown has to prove is that at the time of the fourth conviction, i.e., on the primary or substantive offence, there are three previous convictions and that at the time of the commission of the

[6] (1906), 38 S.C.R. 137 at 143.
[7] [1957] S.C.R. 3, 25 C.R. 101, 117 C.C.C. 1.
[8] (1952), 36 Cr. App. R. 107, 2 Q.B. 637.
[9] (1952), 36 Cr. App. R. 203.

1968

PATON v. THE QUEEN

Judson J.

substantive offence, he was leading a "persistently criminal life". To prove the second point does not involve the necessity of holding that when he committed the third of these offences, it cannot be said that he was leading a persistently criminal life because he had not then been convicted.

Nor can I accept the illustration given in the reasons of the Chief Justice [ante p. 350] in the circumstances there outlined—four different offences on four consecutive days; four separate indictments and four convictions. An accused could not necessarily be found to be an habitual criminal after conviction on the fourth indictment. It would still have to be proved that he was leading a persistently criminal life and that terminology does not apply to the facts of the illustration. Without more, the illustration is one of a spasmodic outburst and not of a persistently criminal life.

Further, the *Interpretation Act,* which is appealed to in support of this view, cannot possibly apply when the meaning of the section to be interpreted is plain on its face. Our task is to give effect to the plain meaning of the section.

III. There was no adequate legal foundation for a sentence of preventive detention, in view of the fact that although three previous convictions had been proved against the appellant, he had not served the sentence imposed on him on the third previous conviction when the proceedings were brought against him alleging that he was an habitual criminal and when the sentence of preventive detention was imposed on him.

There is no merit in this submission. To repeat what I have already said, what must be proved is that at the time of the application there are three convictions against the accused "of an indictable offence for which he was liable to imprisonment of five years or more". The statute in clear language requires only proof of a conviction of a kind carrying a liability for a five-year sentence. This language cannot be converted into a requirement that a sentence passed pursuant to such conviction must have been served. The language is "convicted of an indictable offence for which he was liable to imprisonment for five years or more" and not "convicted of an indictable offence for which he was liable to imprisonment for five years or more *and which he has served*". The serving of the sentence is not one of the conditions that must be met in order to establish that a person is an habitual criminal.

The *King v. Robinson*[10] is against any such submission. See: Per Fauteux J. at p. 526:

> The offences are not identified by names or by references to sections describing them, but by the measure of punishment ... which the offender is exposed to suffer.

and per Cartwright J. at p. 534:

> The controversy is as to the proper construction of the words "been convicted of an offence for which he was liable to at least five years' imprisonment".
>
> * * *
>
> The solution of the question depends upon the meaning to be given to the words "liable to". Their ordinary and natural meaning is, I think, "exposed to". The intention of Parliament as disclosed in the words of the section seems to me to be to describe a class of indictable offences, and to require as one of the conditions of a person being found to be a habitual criminal that he shall at least three times have been convicted of an offence comprised in such class. The offences of which the class is composed are described by reference to the penalty which the law permits to be inflicted on a person convicted thereof, that is to say, the penalty to which he is exposed, which he runs the risk of suffering, which he is subject to the possibility of undergoing, not the penalty which he must suffer.

It is the measure of punishment that is referred to in the section. Conviction satisfies the condition imposed without any requirement that the sentence imposed be served in whole or in part.

I would dismiss the appeal.

PIGEON J. (*dissenting*):—The facts of this case are stated by the Chief Justice. Because, in the opinion of the majority, the appeal fails on the merit I will, as he does, deal with it without expressing any opinion on the question of jurisdiction.

The first question of law raised by the appellant is whether a conviction recorded prior to the enactment of habitual criminal provisions, is to be considered in the application of this legislation. Appellant's first conviction was entered in 1946 while the original enactment dates from 1947. In that first text (*Criminal Code* s. 575c) the words "whether any such previous conviction was before or after the commencement of this Part" were inserted to dispel any doubt, but they do not appear in the corresponding provision of the revised *Criminal Code* enacted in 1954

[10] [1951] S.C.R. 522, 12 C.R. 101, 100 C.C.C. 1.

1968

PATON v. THE QUEEN

Pigeon J.

(2-3 Eliz. II, c. 51, in force April 1, 1955). The question is therefore whether those words were surplusage or, on the contrary, necessary to prevent the application of the presumption against retrospective operation.

It must be stressed that, in Canada, this presumption is not a rule of law but a rule of construction only. There is therefore no requirement that the intention to displace it be explicit. It is sufficient that the wording of the enactment be such as not to leave it open fairly to any other construction. In s. 660 of the present *Criminal Code,* the word "previously" by itself takes in all time past without any distinction. In order to limit its effect, it would be necessary to introduce into the enactment something which is not there.

When the cases in which the rule against retrospective operation are reviewed, it becomes apparent that, usually, the real basis for its application is the explicit or implicit provision fixing the date of the commencement of the Act. This date is an essential part of every statute. It is by reference to it that the courts must decide what are the situations governed by the new enactment and what are those that are not. For instance, when an enactment deals with a right of appeal, the situations affected are future cases only, pending cases are not taken in: *Taylor v. The Queen*[11]; *William v. Irvine*[12]; *Hyde v. Lindsay*[13]; *Flemming v. Atkinson*[14]; *Ville de Jacques-Cartier v. Lamarre*[15]. The offence of which the appellant was convicted and following the conviction for which he was sentenced to preventive detention, was committed after the coming into force of the present *Criminal Code* and, therefore, that offence, as well as the proceedings leading up to the conviction and to the sentence of preventive detention, was governed by its provisions.

Appellant says that when a person is accused of an offence created by an Act of Parliament, all the ingredients of such offence must have taken place after the date on which the Act came into operation and, in support of this proposition,

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[11] (1876), 1 S.C.R. 65.
[12] (1893), 22 S.C.R. 108.
[13] (1898), 29 S.C.R. 99.
[14] [1956] S.C.R. 761, 5 D.L.R. (2d) 650.
[15] [1958] S.C.R. 108.

a dictum of Lord Coleridge in *Regina v. Griffiths*[16] is cited. The legislation in that case had made certain acts misdemeanours if committed by a debtor "within four months next before the presentation of a bankruptcy petition by or against him" while previously such result obtained only in the case of a bankruptcy petition *against him*. It was held that if the acts had been committed before the new law it did not apply although the bankruptcy was subsequent. This principle cannot have any application in the present case because the situation is entirely different. The *Criminal Code* does not by s. 660 create an offence of which past crimes are an ingredient. It provides, as it read originally at the material time, for "a sentence of preventive detention in addition to any sentence that is imposed for the offence ..." In this respect, s. 660 does not materially differ from s. 575B of the old code under which a majority of this Court held that being an habitual criminal is not an offence but a state of circumstances which enables the court to pass a further sentence: *Brusch v. The Queen*[17].

It is contended that this has the effect of increasing the penalty for offences already committed but it is clear that such is not the result of the statute nor what was said in this Court in the case just referred to. On the contrary it is obvious that the sentence of preventive detention is imposed in respect of the offence concerning which the application is made. Previous offences as well as the conduct of the accused are nothing else than what Lord Reading termed "circumstances" in dealing with a determination under the *Prevention of Crime Act 1908: Rex v. Hunter*[18]. The principle applicable to such legislation is that which is set forth as follows by Maxwell, On Interpretation of Statutes, 11th ed., p. 211:

> Nor is a statute retrospective, in the sense under consideration, because a part of the requisites for its action is drawn from a time antecedent to its passing.

In *The Queen v. St. Mary Whitechapel*[19], the statute under consideration provided that "no woman residing in any parish with her husband at the time of his death shall

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[16] [1891] 2 Q.B. 145.
[17] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.
[18] (1920), 15 Cr. App. R. 69, [1921] 1 K.B. 555.
[19] (1848), 12 Q.B. 120, 116 E.R. 811.

1968

PATON v. THE QUEEN

Pigeon J.

be removed ...". It was held applicable to a woman whose husband had died before the passing of the Act. Lord Denman said, at page 127:

> the statute is in its direct operation prospective, as it relates to future removals only, and ... it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing.

In *Ex parte Dawson*[20], the statute read:

> Any settlement of property made by a settlor shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, ... be void ...

It was held applicable to a settlement made before the commencement of the Act.

In *Re. A Solicitor's Clerk*[21], the Act provided that an order might be made by the Disciplinary Committee directing that no solicitor shall take or retain in his employment a person who "has been convicted of larceny, embezzlement, fraudulent conversion or any other criminal offence in respect of any money or property belonging to or held or controlled by the solicitor by whom he is or was employed or any client ...". This was amended to provide that the order might be made when the clerk had been convicted of any larceny, embezzlement or fraudulent conversion. It was held that the order could then validly be made in respect of a clerk convicted of larceny of property which belonged neither to his employer nor to a client of his, although such conviction was many years prior to the amendment. Lord Goddard said:

> In my opinion this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.

Counsel for the appellant has referred us to some passages of the judgments in *Rex v. Chandra Dharma*[22], *Rex*

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[20] (1875) L.R. 19 Eq. 433.

[21] [1957] 1 W.L.R. 1219, 3 All E.R. 617.

[22] [1905] 2 K.B. 335, 92 L.T. 700.

v. Oliver[23] and *Buckman v. Button*[24]. In none of those cases does the decision lend any support to appellant's contention. In the first mentioned it was held that a statute extending the time for commencing a prosecution applied to an offence previously committed. In the other two it was held that a regulation increasing the penalties for some offences applied to offences previously committed.

On the proper construction of the statute after consideration of all relevant authorities it must be said that there was no reason in law for excluding from consideration in passing upon the application for preventive detention, the conviction recorded in 1946 prior to the enactment of habitual criminal legislation in Canada.

The second question of law arising in this case is whether the trial judge was, in finding the appellant to be an habitual criminal, entitled to consider a conviction entered against the appellant after the commission of the primary offence as one of the three previous convictions contemplated in s. 660 of the *Criminal Code*.

Before a court may find an accused to be an habitual criminal it must be shown (unless he has previously been sentenced to preventive detention) that "he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life". In s. 575c of the old Code, the wording was "previously to the conviction of the crime charged in the indictment". As on the first question it is now necessary to ascertain the result of the change in wording.

On behalf of the appellant, it is contended that "previously" refers to the date of the commission of the primary or substantive offence, that is the offence in respect of which the application for a sentence of preventive detention is made. Grammatically, the text does not support that contention. The section does not open by the words "Where a person has committed an indictable offence and a conviction is entered against him ..." but "Where an accused has been convicted..." Therefore, when in para. 2 it is enacted that "for the purposes of sub-section (1) an accused

[23] [1943] 2 All E.R. 800, [1944] K.B. 68.
[24] [1943] K.B. 405, 2 All E.R. 82.

1968

PATON v. THE QUEEN

Pigeon J.

is an habitual criminal if he has previously ..." the word "previously" has reference to the time when the accused has been convicted of the offence, or possibly to the time when the application is made. There is nothing that renders grammatically possible a construction referring back to the date of the commission of the primary offence.

As we have already seen, being an habitual criminal is not an offence but a state of circumstances and the finding that an accused is an habitual criminal is only one of the elements involved in passing the sentence of preventive detention. There can be no doubt that in passing an ordinary sentence the court is entitled to take into consideration the conduct of the accused subsequent to the commission of the offence; provision is made for suspended sentences for that very purpose. Thus, there is no principle suggesting a different construction.

Concerning the unanimous decision of this Court in *Kirkland v. The Queen*[25] this appears to be a case for the application of the rule enunciated by Lord Halsbury in *Quinn v. Leathem*[26] and often referred to in this Court *v.g. Regina v. Snider*[27]; *The Queen v. Harder*[28]; *Robert v. Marquis*[29] "that a case is only an authority for what it actually decides". In the *Kirkland* case the determination of the period of time to be considered in making a finding that an accused is an habitual criminal was not in issue. The only question considered was what evidence is necessary to prove that an accused is "leading persistently a criminal life". In the reasons for judgment it was said (at p. 7) that "the Crown had failed to satisfy the onus of proving that at the time of the commission of the substantive offence, the appellant was leading persistently a criminal life". In that case the accused had been apprehended immediately after the commission of the primary offence and undoubtedly was afterwards in custody until the sentence was passed. Therefore, it was obvious that the fact of leading persistently a criminal life was to be proved to have existed at the time of the commission of the primary offence and

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[25] [1957] S.C.R. 3, 25 C.R. 101, 117 C.C.C. 1.

[26] [1901] A.C. 495 at 506.

[27] [1954] S.C.R. 479 at 496, [1954] C.T.C. 255, 54 D.T.C. 1129, 109 C.C.C. 193.

[28] [1956] S.C.R. 489 at 509, 23 C.R. 295, 114 C.C.C. 129, 4 D.L.R (2d) 150.

[29] [1958] S.C.R. 20 at 36.

not subsequently as must indeed be the case in practically every instance, seeing that accused with criminal records such as to render them apt to be declared habitual criminals are not usually let out on bail. Thus, it appears to me that what was said in *Kirkland v. The Queen* should be taken merely as a statement of what had to be proved in that case, not as an exposition of the meaning of the statute applicable to different circumstances.

It must also be pointed out that the case was decided under s. 575c of the old Code. As we have seen, that section expressly provided that the required three convictions had to be "previously to the conviction of the crime charged". There is nothing to indicate that any consideration was given to the question of whether the previous convictions and the persistently criminal life had to be proved to exist at the same time. Nothing indicates that there was any intention to decide against the clear words of the enactment that the three convictions had to be made previously to the commission of the crime, not previously to the conviction thereof. How then can this decision be considered as an authority on the construction to be given to a different enactment where the question is essentially whether the change in wording has effected any change in the substance of the enactment on this point. With the utmost deference for those who think otherwise, it does not appear to me that the judgment in the *Kirkland* case has any bearing on the question arising in the present case. In my view, it deals solely with the nature of the evidence required to prove that an accused is leading persistently a criminal life. It does not deal with the time during which this fact must be proved to exist, except that in that case it is said that this had to be shown to have existed at the time of the commission of the primary offence. The case has absolutely no reference to the time at which the previous convictions must have been made in order to be taken into account and it can have no application to the construction of a subsequent enactment that is differently worded in that respect.

This does not dispose of the second point because another change in wording between the old and the new *Criminal Code* remains to be considered. Under s. 575c it had to be proved that the accused had "at least three times previously . . . been convicted . . . ", while in s. 660 it is provided

1968

PATON v. THE QUEEN

Pigeon J.

that "an accused is an habitual criminal if he has previously ... on at least three separate and independent occasions been convicted ...". It will be noted that the requirement in respect to previous convictions is changed from "at least three times" to "on at least three separate and independent occasions". Bearing in mind that this is coupled with the other element, "leading persistently a criminal life", the change is quite important. It is obvious that the new wording was inspired by consideration of the decision of the New Zealand Court of Appeal in *Rex v. Tier*[30] cited and applied in *Rex v. Cindler*[31], because the new wording is precisely that which Cooper J. used (at p. 437) when he held that in the New Zealand enactment "four occasions" meant "four separate and independent occasions".

After anxious consideration, I have come to the conclusion that the change from "three times" to "three separate and independent occasions" has more than a formal significance irrespective of what may have been said in the New Zealand decision about several counts in the same indictment constituting but one "occasion" with the implication that separate indictments would constitute as many "occasions". It should not be supposed that Parliament intended in effecting this change of wording that the number of "separate and independent occasions" should depend on whether the prosecutor chose to proceed by several indictments instead of by several counts in the same indictment. The legal requirement is not "three separate and independent convictions" but convictions on "three separate and independent occasions".

It is therefore necessary to consider the meaning of the word "occasion" and this must be done bearing in mind that words in statutes are generally to be construed in the popular or usual sense, not in any technical sense. In the Oxford dictionary, the first meaning of "occasion" is as follows:

> 1. A falling together or juncture of circumstances favourable or suitable to an end or purpose, or admitting of something being done or effected, an opportunity ...

Applying this definition to the enactment under consideration, must it not be said that in the usual sense, an

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[30] (1912), 32 N.Z.L.R. 428.

[31] [1950] 2 W.W.R. 1088, 11 C.R. 34, 98 C.C.C. 303.

"occasion" when a criminal is convicted, is when he is apprehended, charged and convicted of whatever number of crimes he is found to have committed before being brought to justice and usually given concurrent sentences.

In requiring convictions previously on at least three separate and independent occasions, Parliament cannot have intended that if a man had committed four offences he could be said to be an habitual criminal if the prosecutor chose to proceed by as many separate indictments on different dates. This would turn a substantive requirement into a merely formal requirement and it would not be in accordance with the usual meaning of the word "occasion" which is clearly not technical. Such an offender cannot be said to be a "repris de justice" when caught by the law for the first time. If the requirement cannot be satisfied by proceeding successively on four different charges after a single arrest it cannot be satisfied by so proceeding after two or three where the statute calls for three previous "occasions".

It must also be considered that the accused has to be shown to be leading persistently a criminal life. In the Oxford dictionary, the first sense of "persistent" is as follows:

> Persisting or continuing firmly in some action, course or pursuit, esp. against opposition or remonstrance, or in spite of failure.

In my view, because "persistent" implies continuing in some action against opposition or remonstrance, the word "persistently" in the enactment implies "persistently after being convicted on the required three separate and independent occasions".

I do not think that it can properly be said that in thus construing "occasions" and "persistently" one is going beyond the wording of the Code and adding requirements that are not spelled out. While it is frequently deemed desirable in legal drafting to go into a great deal of minute detail, nothing prevents Parliament from resorting to language requiring elaboration by judicial construction. In the present case, the words "occasions" and "persistently" have obviously been selected to prescribe conditions the exact nature of which is left to the judgment of the courts.

For those reasons, I am of the opinion that the accused was not properly found to be an habitual criminal because,

1968
PATON
v.
THE QUEEN
Pigeon J.

when he was convicted of the primary offence, he could not be said to have been previously convicted "on at least three separate and independent occasions" when the last conviction was for an offence for which he was arrested and charged on the same occasion as the primary offence, and also because he could not be found to have been so convicted and to be leading persistently a criminal life when he had been convicted on the last occasion after being arrested for the primary offence.

The conclusion I have reached on the second question makes it unnecessary to consider the third question raised, namely that the appellant had not served the sentence imposed upon him on the third previous conviction.

Because in the opinion of the majority the appeal fails on the merit I do not deal with the question of jurisdiction but, assuming that we have jurisdiction, I would allow the appeal and quash the sentence of preventive detention imposed upon the appellant.

Appeal dismissed, CARTWRIGHT C.J. *and* HALL, SPENCE *and* PIGEON JJ. *dissenting.*

Solicitor for the appellant: T. R. Berger, Vancouver.

Solicitor for the respondent: W. G. Burke-Robertson, Ottawa.

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SAMUEL COCOMILE (*Claimant*) .....APPELLANT;

AND

THE MUNICIPALITY OF METROPOLITAN TORONTO (*Contestant*) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Compensation—Valuation—Claimant's case that highest and best use of land was for erection of apartment building—Arbitrator's opinion that proposed building although physically possible was not economically feasible—Award based on amount speculator would pay in hope of making future profit—Claimant's appeal dismissed by Court of Appeal—Further appeal dismissed by Supreme Court of Canada.

The Municipality of Metropolitan Toronto expropriated 2.4 acres of vacant land belonging to the claimant and an arbitrator awarded

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

$25,000 in compensation. The Court of Appeal dismissed the claimant's appeal from the award. On appeal to this Court the claimant submitted that the award should be increased to $243,500.

The lands expropriated consisted of an area of table land, then a rather steep slope down the side of a valley and finally an area of flat lands at the bottom of the valley. The claimant's case was that the highest and best use of the lands in question was for the erection of an apartment building. The arbitrator was of the opinion that evidence given on behalf of the claimant with regard to the prices of other properties in the near neighbourhood and in other districts could not be accepted as none of the properties he gave could be considered in any way comparable to the subject land. He was also of the opinion that the apartment scheme proposed by one of the claimant's witnesses although physically possible was not economically feasible. On the other hand, he accepted the appraisal put on the property by a valuator for the contestant who gave as his opinion that the only value on the land was an amount of $25,000 which would be paid by a speculator in the hope of making a profit on it in the future.

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

Per Cartwright C.J. and Martland, Judson and Hall JJ.: The majority of the Court agreed with the conclusions of the arbitrator.

Per Spence J., *dissenting*: The arbitrator was in error in his conclusion as to comparable properties and his conclusion that the scheme was not reasonably capable of realization did not seem to be in accordance with the evidence given at the trial. The arbitrator should have accepted the evidence given on behalf of the claimant and rejected that given on behalf of the contestant.

However, the proper course in considering an appeal in this Court was to consider whether the calculations and assessment of land valuations were made in accordance with the proper and well-recognized principles. In accepting the evidence given by the valuator for the contestant based on a land residual technique, the arbitrator did not proceed in accordance with proper and well-recognized principles and such evidence should have been rejected. The situation, therefore, was that the arbitrator was left with no proper evidence which he was willing to accept. In the circumstances, there was no solution other than to direct a new hearing of the arbitration.

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal by the claimant from an arbitrator's award fixing the compensation payable by the contestant to the claimant by reason of the expropriation of certain land. Appeal dismissed, Spence J. dissenting.

J. T. Weir, Q.C., and *M. J. McQuaid*, for the claimant, appellant.

G. M. Mace and *D. C. Ross*, for the contestant, respondent.

The judgment of Cartwright C.J. and of Martland, Judson and Hall JJ. was delivered by

1968

COCOMILE v. MUNICIPALITY OF METROPOLITAN TORONTO

JUDSON J.:—In December of 1958 the Municipality of Metropolitan Toronto expropriated 2.4 acres of vacant land belonging to the claimant, Samuel Cocomile. The arbitrator awarded $25,000 in compensation. The Court of Appeal dismissed the claimant's appeal from the award. In this Court the claimant submits that the award should be increased to $243,500.

In 1956, the claimant bought the property, together with the house on it, for $22,000. It was then in the hands of the Trust company as an asset of an estate under administration. It was listed for sale at $23,900 for some months and eventually sold to the claimant at $22,000. The real estate department of the Trust company had prepared a detailed report on the property. It contains a description of the land, of the building, the condition of the building, the assessment and the valuation. The following is a description of the land:

> The subject property is located on the North-East side of Donlands Avenue in the Township of East York adjoining the property whereon is standing the Leaside Bridge. This property is divided into 4 lots. The main lot, lot No. 1, 40 ft. by approx. 140 ft. has the building erected upon it. This lot has a level part extending back about 50 ft. and falls steeply into the ravine. Lot 2 approx. 30 ft. by 140 ft. is pie shaped, it's levelled back about 25 ft. and falls into the ravine. Lot 3, 105 ft. by 140 ft. is pie shaped with practically no level land. Lot 4 comprises approximately two acres of land in the Don Valley.
>
> Upon consultation with the Metropolitan Toronto Planning Department it appears according to the present plan, for the Don Valley Roadway, that part of this land will have to be expropriated for this purpose. The main land value in this property is a pie shaped portion with 70 ft. of frontage on Donlands Avenue extending back to a maximum depth of about 60 ft. The area is zoned for residential use and the remaining part of the lot has little commercial value.
>
> The lot is landscaped and there is an asphalt private driveway and domestic sidewalks.

The building was described as a two-storey brick house about 25 years old, structurally sound and well constructed. It was agreed for the purpose of this arbitration that the value of the lands and premises remaining to the claimant after expropriation was $15,000.

The claimant based his case on the suitability of the site for the building of an apartment house. One witness gave evidence that a 374-suite building could have been placed on the expropriated land. This witness did no more than say that it was physically possible to fit such a build-

ing into the site. He gave no consideration to the economic feasibility of such a scheme. Another witness did not think that the site could have been sold for a 374-suite building. He thought that a 250-suite building was more suitable to the site and the area. On this basis he arrived at a value of $243,500 for the land expropriated. He took a land value of $1,350 per suite, multiplied it by 250, then deducted two sums, one of $79,000 for the extra cost of construction on a valley site and $15,000 for the residual value of the land and buildings.

The arbitrator rejected these valuations of the land based upon the physical possibility of construction but in total disregard of economic commonsense. The conclusions of the learned arbitrator are stated in the following extract from his reasons:

> I have considered the evidence of the witnesses for the Claimant and I am of the opinion that the evidence of Mr. Strung with regard to the prices of other properties in the near neighbourhood and in other districts cannot be accepted as none of the properties he gave can be considered in any way comparable to the subject land. The great majority of the comparables are based on flat table land and the subject land is side-hill land, with very little table land except at the base of the ravine.
>
> The apartment scheme proposed by Mr. Bregman may be possible and according to the engineer's report could be built on the property, but in my opinion was not reasonably capable of realization and is altogether too remote, uncertain and improbable. No such apartment had been built on the side valley lands in or near the Don Valley up to the date of expropriation in 1958 and would not be, considering all the circumstances. To consider building a $3,000,000 or $4,000,000 apartment on the subject land and close up to the Leaside Viaduct with the base of the apartment on the valley floor and the entrance down seven floors below on the hill, appears to be nothing more than a dream that could not be realized and would not be economically feasible.
>
> I accept on the other hand, the appraisal put on the property by Mr. MacKenzie who gave as his considered opinion that the only value on this land was an amount of $25,000 which would be paid by a speculator in the hope of making a profit on it in the future.
>
> The Claimant stated the highest and best use of the subject property was for the purpose of building an apartment building, and their calculations of value for the land are based on a 250 suite apartment. I reject this opinion.
>
> The Arbitrator should not treat an advantage consisting of a chance as if it were a certainty, or consider that a hypothetical purchaser would be sure to be a purchaser in fact. The special adaptability as suggested by the Claimant's witnesses for a proposed apartment site cannot in any way be considered by me as anything more than a chance.
>
> I accept the evidence of Mr. MacKenzie that the highest and best use is its present existing use and that in his opinion no builder would build a 250 suite apartment or even a smaller apartment on this site.

1968

COCOMILE v. MUNICIPALITY OF METROPOLITAN TORONTO

Judson J.

I am therefore of opinion that the Claimant as a prudent man as of the date of the expropriation would not have paid more than $25,000 rather than be ejected from the property. This includes all potentialities.

I agree with these conclusions, as did a unanimous Court of Appeal.

I would dismiss the appeal with costs.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario delivered on April 7, 1965, whereby that Court dismissed without written reasons an appeal from the award of His Honour Judge F. J. McRae, as arbitrator under the provisions of *The Municipal Arbitrations Act,* R.S.O. 1960, c. 250, made November 26, 1963, by which the claimant was allowed the sum of $25,000.

The arbitration was to fix the compensation for the expropriation of 2.413 acres in the then Township of East York in the County of York. The claimant's case was that the highest and best use of these lands, upon which basis, of course, the valuation must be fixed, was for the erection of an apartment building. The claimant, therefore, adduced the evidence of one Joseph Strung to prove the value of the lands sold for such purposes in the immediate area in East York within the several years before the expropriation and upon such basis to give his opinion of the value for such purposes of the lands expropriated. There were, however, rather unusual problems as to site. The lands expropriated may be described as having certain table area on the level of Donlands Avenue upon which there was a detached brick residence, then a rather steep slope down the side of the Don Valley, and finally an area of flat lands at the bottom of the valley. There was 125 feet difference in elevation resulting from this slope of the side of the valley. Moreover, the lands at the top in the table area had a thick cover of very sandy soil. Therefore, the claimant had to demonstrate that this particular area did have its highest and best use as an apartment building. In order to do so, the claimant employed the services of one Sydney Bregman, an architect of some very considerable ability, who had to his credit the design of many modern buildings in Metropolitan Toronto, and a professional engineer, Peter A. Hertzberg, who had several years practice as a consulting

engineer with a large firm doing that work in Metropolitan Toronto, particularly in the designing of industrial buildings.

Mr. Bregman produced a series of plans to exhibit an apartment building which he testified could be erected on the site. These plans were marked as ex. 7 and delineated a 374-suite building the front of which at the west corner would be set back from the street line of Donlands Avenue about 280 feet, in T-shape and the leg of the T running to the north, *i.e.*, along the valley bottom lands. The design showed a driveway leaving Donlands Avenue and curving to the table lands and down the slope of the valley through a landscaped park at a grade of 13.7 per cent to a main entrance which was at the seventh floor of the building. The building would then continue a further nine floors above this main entrance. On the north front, *i.e.*, the front which looked across the valley, apartments ran all the way up the whole sixteen floors but on the south front, *i.e.*, the front which looked towards Donlands Avenue, the apartments faced out from the floors from the lobby up. Some of the apartments on the lower of those floors faced this long landscaped slope up to the table land and some were above the level of the table lands. A levelled parking space in front of the building was shown which resulted in the commencement of the slope being about 100 feet south of the building.

Mr. Hertzberg gave evidence that such a building could be constructed on those lands, the soil tests having been such as would permit it, and that the additional cost of construction of the building due to it being situated on such sloping lands would be $79,000. Mr. Strung gave evidence that there was a demand for apartment suites in that particular area of Metropolitan Toronto at the time of the expropriation in 1958. He was of the opinion that a 374-suite building would be so much larger than any nearby apartment building that a bidder would probably not erect a building of more than 250 suites.

Mr. Strung arrived at his opinion of the value of the lands expropriated by two different means. In his report marked at trial as ex. 11 he included a sales analysis chart of 26 properties which had been purchased for apartment buildings in the years 1956 to April and May 1959. Since

1968

COCOMILE v. MUNICIPALITY OF METROPOLITAN TORONTO

Spence J.

those dates represented the closing of the transactions of sales, he was of the opinion that the sales must have been negotiated either prior to or just at the time of this expropriation. Mr. Strung showed that the lands comprising these 26 locations had been purchased at such amounts, in view of the buildings later erected on them, that the sale price per suite in the completed buildings varied from $708 to $1,614. He also testified and, in my opinion, with much more relevance, that the sale price per square foot of the lands included in these 26 different apartment house sites purchased varied from $2.04 to $5.12. Mr. Strung gave it as his opinion, based on the aforesaid figures showing the price per suite paid for the land purchased, that the price per suite which a prudent purchaser would pay for the lands expropriated in order to erect a 250-suite apartment building was about $1,350 and therefore arrived at a valuation of the lands at $337,500 less the $79,000 additional necessary for the erection of the apartment building due to the sloping nature of the lands or a total of $258,500. This valuation was not accepted by the learned County Court Judge and I am of the opinion that the evidence is of no assistance in determining the award which should be made.

It will be seen that the price per suite differs with the number of suites which are contained in the building which the purchaser plans to erect. The building as delineated by Mr. Bregman contained 374 suites. Mr. Strung was of the opinion that a builder would only erect a structure to contain 250 suites. It may well be that any particular bidder for vacant lands upon which he intends to erect an apartment building will govern himself directly by the amount per suite which he feels he can afford to pay for the lands, but the award must be based not on what one particular bidder plans to build as a building but on what willing purchasers would agree to pay for the lands with the bidder free to use the lands as he deems fit.

I am of the opinion that a much more accurate gauge than this one of so-called cost per suite is Mr. Strung's second method. As I have said, he found that the sale price per square foot of the lands in those 26 purchases varied from $2.04 to $5.12. By arithmetical calculation they average $3.60. They are all buildings in the immediate East York area within a few short blocks of the edge of the Don Valley. Mr. Strung pointed out that the buildings

which were situated chiefly on Gamble Avenue and Cosburn Avenue, although a few were on Bayview Avenue in the then Town of Leaside, were in groups of rather commonplace apartment buildings often facing each other across a street in a middle class area, while the land expropriated was a little distance farther north and in a group of better class houses and in addition had what Mr. Strung regarded as a very considerable advantage, the unimpaired view free of nearby apartments across the Don Valley. It was pointed out to Mr. Strung that the Leaside Bridge ran parallel to the easterly limit of the lands expropriated and had its southern terminus on Donlands Avenue only 126.58 feet east of the said easterly limit of the lands expropriated, but Mr. Strung was of the opinion that the view nevertheless was most attractive. He did acknowledge that sloping lands always went for a lower price than flat lands and Mr. Daniels, another real estate agent called for the claimant, in reply, made the same admission.

It was Mr. Strung's opinion that the square foot value of the lands expropriated, by a weighted comparison with the sale price of the other lands in the 26 different apartment locations in the area, was $2.79 per square foot and acknowledged that this square foot rate would have to be reduced by the additional cost of construction on steeply sloped land. That cost, as I said, had already been established by Mr. Hertzberg at $79,000. The area of the lands expropriated was taken as being 121,010 square feet, so $79,000 spread over that area would work out at 65 or 66 cents per square foot. If that figure is deducted from the $2.79 it leaves $2.13 or $2.14 as being the value which Mr. Strung would give per square foot for the land expropriated. For the area of 121,010 square feet this would amount to $257,751.30 at $2.13, and $258,961.40 at $2.14, say $258,000. It will be seen that by this method Mr. Strung arrived at almost exactly the same amount as by the values per suite method, but for the reasons which I have outlined I am of the opinion that in the latter method he was proceeding in a much sounder fashion. Of course, the $258,000 valuation as submitted by Mr. Strung must be reduced as he suggested by the amount of $15,000, the agreed value of the small portion of the land upon which the residence was situated and which was excepted out of the expropriation.

1968

COCOMILE v. MUNICIPALITY OF METROPOLITAN TORONTO

Spence J.

It should be noted that in-chief the claimant adduced no evidence as to the cost of the erection of the building as outlined by Mr. Bregman nor the amount of the rentals which could be obtained per suite. This course was the logical one on the case as put forward by the claimant. The claimant's production of the building plans designed by Mr. Bregman was simply to answer the obvious objection to the use of the alleged comparables in the 26 sales that the lands expropriated because of their contours were not suitable for apartment house construction and that therefore such was not the highest and best use. It was in an attempt to demonstrate that the lands could be used advantageously for such apartment house construction that Mr. Bregman and Mr. Hertzberg did their work. Any figures as to cost of construction of the building as designed by Mr. Bregman and the rentals which one could hope to obtain from the suites were given by the claimant's witnesses only in cross-examination in the contestant's attempt to apply its "residual" method to the building designed by Mr. Bregman. There were certain errors in the evidence given in that cross-examination to which I shall refer and which had a very important effect upon the conclusions which the arbitrator arrived at when considering the evidence given on behalf of the claimant.

The contestant adduced the evidence of Mr. Arthur D. MacKenzie, who was an appraiser of some very considerable repute. His experience had been largely in the appraisal field rather than in the buying and selling of real estate and his appraisals had very often been for the purpose of advising financial enterprises such as insurance companies as to whether they should lend money on apartment buildings and the amounts which they should lend. I quote a question as to his method and his reply:

> Q. Would you give an outline of your method of appraisal and your valuation, please?
>
> A. Yes. Your Honour, as part of my qualification there I have stated that we do appraisal work for a large number of the insurance companies and that we have been doing this for myself now for seventeen years and in so doing we do make appraisals on a large proportion of the apartment houses in Toronto aside from working for many individual apartment builders and our procedure in appraising an apartment property is, first, to examine the site in detail and in many cases, as today, we have working drawings which we examine also in detail as part of the value of the whole to be completed. We estimate a fair market value for the site based on the comparison in general and our general knowledge of

the area and its acceptability for this particular type of development. We examine the plans with a view to the best layout of suites, best size and type of suite, number of bathrooms, room layout, elevators, heating, natural light and view, air conditioning, etcetera, all in relation to the area and the type of people who may rent in this particular area.

And further:

HIS HONOUR: Alright, go ahead.

A. With this done, Your Honour, we estimate a physical value of the cost or physical cost to complete this building on the site for which we have estimated a fair market value and as a check against this, and based also on the area, our knowledge of the area, we estimate the rents which we believe this building will draw in the area. We estimate the various expenses required to operate this building. These are taxes, real estate taxes, insurance, heating, janitor, hydro, water, maintenance and a vacancy allowance and a management allowance. This net or these expenses from the gross estimate diverge in net which we capitalize to get an economic value of this particular proposal. Now this is checked against our physical approach. It is also checked against market analysis of other apartment building sales as against the gross multiplier which is a very general rule. In other words, we use many guides to arrive at a final value of this completed property. Fully rented is our assumption.

HIS HONOUR: That is an economic value is it?

A. It is an economic value derived by using the gross, the expenses and the capitalization, but that again is checked against our physical value, etcetera, or the final value.

Mr. MacKenzie testified:

A. In this particular case, Your Honour, we had no comparable land prices, in my opinion, we must for that reason approach it from an economic direction to find out if there is any residual value of the land and this is part of my reason for this procedure.

I am of the opinion that this statement which Mr. MacKenzie advanced as his reason for his use of the so-called residual method, the method which the learned arbitrator accepted in making his award, illustrates the basic error in the contestant's case. There certainly were comparable properties in the immediate area. Mr. Strung had produced a list and a complete analysis of 26 apartment buildings within a short distance of the land expropriated. There were in Metropolitan Toronto literally thousands of apartment buildings which had been built on land purchased in the few years prior to this expropriation. All of these land sales were available and could properly have been used as comparables in considering the value of the lands expropriated. Of course, none of them were exactly the same, in site, in contour, or in size, as the lands

1968

COCOMILE v. MUNICIPALITY OF METROPOLITAN TORONTO

Spence J.

expropriated. That situation prevails on other occasions in which any piece of land is compared with any other. Sometimes the differences are great, sometimes they are small. The comparisons must all be considered and weighed. Mr. Strung testified as to these 26 different sales and from his testimony one arrives at an average sale price of $3.60 per square foot. Then Mr. Strung weighed that average by taking from it an amount to reflect the net disadvantage of the lands expropriated. When I use the term "net disadvantage", I am referring to admission that sloping or uneven lands always brought lower prices but his opinion was that the expropriated lands had other advantages of view and position not possessed by the lands with which they were compared. The net reduction he gave must have been 81 cents per square foot below the average because he valued the lands expropriated at $2.79 per square foot while, as I have said, the average of the 26 sales, which were all of flat lands, was $3.60 per square foot. Mr. Strung made a further reduction as I have pointed out of 65 cents per square foot to allow for the $79,000 in additional building costs which would be incurred because of the sloped land.

I am therefore of the opinion that the learned arbitrator was in error when he said:

> Mr. Strung did not make any distinction in the subject site between table land and side-hill land. Most of the land of the subject site was side-hill land.

I am of the opinion that Mr. Strung's evidence did weigh the comparables in view of the sloping conditions of the expropriated lands and it would appear that he allowed 25 per cent reduction based on that factor in addition to another allowance of 65 cents per square foot for the additional costs of construction.

To return to the evidence of Mr. MacKenzie for the contestants, there may be some significance in the fact that Mr. MacKenzie also chose to design an apartment building for the site although he had given it in his evidence that the highest and best use of the lands expropriated was that for which they were presently employed, *i.e.*, a detached private residence on a corner of the table lands and all the whole balance unused and running to waste. Mr. MacKenzie, however, designed a building contrasting strongly to that designed by Mr. Bregman and one which

contained only 51 suites. It was agreed by both the claimant and the contestants that the then by-law provisions applicable in East York permitted a building even as large as the 374-suite one designed by Mr. Bregman. Why then should Mr. MacKenzie have designed a 51-suite building? It is evident that he did so because he chose to use only the small area of table land adjoining Donlands Avenue. In view of Mr. Bregman's and Mr. Hertzberg's evidence, that the very large building designed by them was quite possible architecturally and from an engineering point of view, it would seem a very uneconomic use of the site to place on the south flat part thereof only a 51-suite building. It is true that of the 26 comparables analyzed by Mr. Strung the largest was only a 91-suite building but that apartment building had been erected on a lot only 180 feet by 150 feet, *i.e.*, 27,000 square feet, while the lands expropriated had an area of 121,010 square feet. It would seem inevitable that if you placed on that large lot, whether it be level or whether it be sloping, only a 51-suite building then you could only afford to pay a very small amount for the lands. Once it has been shown that the large building is architecturally and from an engineering standpoint possible, and once it is shown that there is an effective demand in the neighbourhood for that large number of apartments, then surely a 51-suite building as designed by Mr. MacKenzie could have no relationship whatsoever to the highest and best use of the lands. To compare with that most limited use of the land, even its present use would have been a higher and better use, as Mr. MacKenzie seems to have quite adequately proved that a 51-suite building would leave at the best only a pittance which the buyer could afford to pay for the land.

In his evidence, Mr. MacKenzie was asked to deal with two other things. Firstly, the economic feasibility of the building designed by Mr. Bregman using his "residual" method to which reference has been made and, secondly, in cross-examination, to use the same method for analyzing the 26 sales of what the appellant submitted were comparable properties in the immediate neighbourhood. It was Mr. MacKenzie's opinion that using his residual method the building designed by Mr. Bregman would not allow any value at all to be assessed to the land. As I have already

1968

COCOMILE v. MUNICIPALITY OF METROPOLITAN TORONTO

Spence J.

said, the claimant's witnesses had in examination-in-chief given neither the costs of construction of the Bregman designed building nor the rents to be expected therefrom, as these calculations were not part of the claimant's case.

In cross-examination, Mr. Bregman had been asked:

Q. Then would you tell us, roughly, what you think this project would cost?

A. Well, I would have to do some multiplication. I would perhaps give you a figure on a per suite basis and you can multiply it by three hundred and seventy-four if you wish.

Q. Is that the way you estimated your cost of this structure, the cost per suite?

A. Yes, keeping in mind the general design of the buildings we follow this cost up and down according to the type of construction and any inherent problems in the design.

Q. Perhaps you would give us that figure first then?

A. Well, I would—including the garage I would estimate it at approximately eleven thousand per suite. Roughly four million one hundred thousand, approximately.

Mr. MacKenzie, in his application of the "residual" technique to the Bregman design for a building, compared his capitalization of the income from such building at $7\frac{1}{4}$ per cent to that cost figure from Mr. Bregman's cross-examination and pointed out that it left no value for the land at all. Mr. Bregman was called in reply and gave evidence that his figure of $4,100,000 was a cost figure which he gave in the light of the costs at the time of the hearing upon arbitration, that is, in June of 1963, and that in his opinion the cost at the end of the year 1958 would have been about $9,625 per suite or $3,600,000 for a 374-suite apartment building. Mr. MacKenzie's capitalization at $7\frac{1}{4}$ per cent to which I have referred above was $3,670,000. Therefore, even if he had used the same rental figures but had taken a proper 1958 rather than a 1963 cost he would have found a $70,000 value in the lands expropriated. Moreover, if Mr. MacKenzie had taken the rentals as stated by Mr. Daniels who was called in reply, the value of the expropriated lands would have worked out at a much higher figure.

I have referred to this evidence to show that not only is the "residual" technique one which, in my opinion, is not in accordance with the "proper and well-recognized principle" of fixing values in expropriations but it was inaccurately done.

The learned arbitrator rejected the evidence called on behalf of the claimant for reasons which he set out as follows:

> I have considered the evidence of the witnesses for the claimant and I am of the opinion that the evidence of Mr. Strung with regard to the prices of other properties in the near neighbourhood and in other districts cannot be accepted as none of the properties he gave can be considered in any way comparable to the subject land. The great majority of the comparables are based on flat table land and the subject land is side-hill land, with very little table land except at the base of the ravine.
>
> The apartment scheme proposed by Mr. Bregman may be possible and according to the engineer's report could be built on the property, but in my opinion was not reasonably capable of realization and is altogether too remote, uncertain and improbable. No such apartment had been built on the side valley lands in or near the Don Valley up to the date of expropriation in 1958 and would not be, considering all the circumstances. To consider building a $3,000,000 or $4,000,000 apartment on the subject land and close up to the Leaside Viaduct with the base of the apartment on the valley floor and the entrance down seven floors below on the hill, appears to be nothing more than a dream that could not be realized and would not be economically feasible.

In these reasons, I have attempted to demonstrate that the learned arbitrator was in error in his conclusion as set out in the first paragraph above. His conclusion in the second paragraph, that the scheme was not reasonably capable of realization and so altogether too remote, uncertain and improbable, seems to be not in accordance with the evidence given at the trial where at least four other large side-hill apartments in various parts of Metropolitan Toronto were cited, since Mr. Bregman and Mr. Hertzberg gave evidence that a building with similar properties as that designed for this site would be physically feasible. As to the existence of effective demand, the learned arbitrator seems to have accepted the opinion of Mr. MacKenzie, but Mr. Strung showed that at the immediate time of the expropriation building of apartments was proceeding apace in the area and very shortly thereafter, and particularly in the area immediately north of the Don Valley, the subject property being on the south bank, many very large apartments were erected.

Had I been presiding as the arbitrator, for the reasons I have outlined, I would have accepted the evidence given on behalf of the claimant and rejected the evidence given on behalf of the contestant. I was not, however, sitting as an arbitrator and I think that the proper course in con-

1968

COCOMILE v. MUNICIPALITY OF METROPOLITAN TORONTO

Spence J.

sidering an appeal in this Court is that which I have outlined in *Kramer et al. v. Wascana Centre Authority*[1], at p. 248, and which was repeated in the unanimous judgment of the Court in *Florence Realty Co. Ltd. et al. v. The Queen*[2]:

> In my view, it is not the duty of this Court to engage in calculations or to exercise judgment as to land valuation in the Province of Saskatchewan. It is the duty of this Court to consider whether those calculations and assessment of land valuations were made in accordance with the proper and well-recognized principle.

For the reasons which I have outlined above, I have come to the conclusion that in accepting the evidence given by Mr. MacKenzie based on the "residual" technique, the learned arbitrator did not proceed in accordance with proper and well-recognized principles and that such evidence should have been rejected. The situation, therefore, is that the learned arbitrator was left with no proper evidence which he was willing to accept. Section 7 of *The Municipal Arbitrations Act*, R.S.O. 1960, c. 250, provides:

> The award may be appealed against to the Court of Appeal in the same manner as the decision of a judge of the Supreme Court sitting in Court is appealed from, ...

It is, of course, within the jurisdiction of the Court of Appeal for Ontario and of this Court on appeal from that Court to direct a new trial, and I can see no other solution other than to adopt such a course in this case.

I would, therefore, direct that the award be returned to the learned arbitrator to consider in accord with these reasons. The appellant should be entitled to the costs of this appeal and the appeal to the Court of Appeal for Ontario; the costs of the first arbitration, and of any subsequent hearing should be in the discretion of the arbitrator.

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

Solicitors for the claimant, appellant: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.

Solicitor for the contestant, respondent: A. P. G. Joy, Toronto.

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[1] [1967] S.C.R. 237.

[2] [1968] S.C.R. 42.

GERALD WILLIAM POOLE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967
*Dec. 11
1968
Mar. 13

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Jurisdiction—Sentence of preventive detention—Finding that accused an habitual criminal not disturbed—Whether expedient to impose sentence of preventive detention—Whether jurisdiction in Supreme Court of Canada to entertain appeal from imposition of such sentence—Supreme Court Act, R.S.C. 1952, c. 259 s. 41—Criminal Code, 1953-54 (Can.), c. 51, ss. 660(1), 667(1).

The appellant, who was then 34 years of age, was convicted on August 10, 1965, of two offences of obtaining goods by false pretences and two offences of attempting to obtain goods by false pretences. This was done by drawing cheques on non-existent bank accounts. The amount involved in each offence was under $100. He was subsequently found to be an habitual criminal and sentenced to preventive detention. His record of convictions commenced at age 16 and all but one included an element of theft. On June 25, 1965, the day of the expiration of a four-year sentence for theft of an automobile, he was given money to take him from New Brunswick to Vancouver. On his arrival in Vancouver the same day, he at once obtained a job as a labourer and appeared to have been continuously so employed until his conviction on August 10 of the substantive offences. The Court of Appeal, by a majority judgment, affirmed the sentence of preventive detention. The appellant was granted leave to appeal to this Court, where his appeal was dismissed on June 26, 1967. In this Court, [1967] S.C.R. 554, the majority came to the conclusion that the magistrate and the majority in the Court of Appeal had rightly found him to be an habitual criminal, and that this Court had no jurisdiction to substitute its opinion on the question as to whether or not it was expedient for the protection of the public to impose a sentence of preventive detention. The judgment rendered by the minority concluded that it was not expedient for the protection of the public to impose such a sentence. As the question of jurisdiction on which the decision of the majority was founded had not been argued at the hearing of that appeal, an application for a re-hearing was granted. At this re-hearing, which was argued on the assumption that the appellant had rightly been found to be an habitual criminal, counsel for the appellant and for the respondent both contended that this Court had jurisdiction to deal with the question whether or not it was expedient for the protection of the public to sentence the appellant to preventive detention.

Held (Fauteux, Abbott, Martland and Ritchie JJ. dissenting): The appeal should be allowed, the sentence of preventive detention quashed and the sentences imposed on the convictions of the substantive offences restored.

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*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1968

POOLE
v.
THE QUEEN

Per Cartwright C.J. and Judson and Hall JJ.: It has not been shown that it was expedient for the protection of the public to sentence the appellant to preventive detention. Section 660(1) of the Code, giving jurisdiction to impose a sentence of preventive detention, is worded permissively and is not mandatory. Since his convictions in 1959, the appellant had not been found guilty of any violent crime. For the crime of theft of an automobile in 1962 and the four substantive offences in 1965, he has been sentenced to severe punishment. There is some evidence of his trying to live a normal life. It has not been satisfactorily shown that his release at the expiration of the terms of imprisonment to which he has been sentenced for the substantive offences will constitute a menace to society or that the protection of the public renders it expedient that he should spend the rest of his life in custody.

The judgment in *The Queen v. MacDonald*, [1965] S.C.R. 831, does not bind this Court to hold that, unless it can say that the finding of the Courts below that the appellant was an habitual criminal should be set aside, this Court is without jurisdiction to interfere with the imposition of the sentence of preventive detention. On the plain meaning of the words of s. 41 of the *Supreme Court Act*, it seems clear that this Court has jurisdiction to deal with the appeal on the merits. This is an appeal for which leave was granted under s. 41 and which is not barred by subs. (3) thereof. The appeal given by s. 667(1) raises only one question for decision, that is whether the sentence of preventive detention is to be sustained or set aside. The answer to the question whether this Court has jurisdiction to hear and determine an appeal sought to be brought before it depends on the subject matter of the appeal and on the terms of the statute conferring jurisdiction.

Per Spence J.: Accepting the view that it was not expedient for the protection of the public to sentence the accused to preventive detention, an appeal lies to this Court from that finding.

This is an appeal from a decision which has resulted in the appellant being sentenced to preventive detention. The matters considered are not the matters considered in an ordinary appeal from sentence but resemble the consideration of an appeal from conviction. Under s. 667 of the Code, the provincial Court of Appeal must find affirmatively as to three elements before it may affirm the sentence of preventive detention. These elements are: (1) conviction on the substantive offence; (ii) that the accused is an habitual criminal; (iii) that it is expedient to sentence him to preventive detention. The leave to appeal to this Court, which was properly granted under s. 41 of the *Supreme Court Act*, brings forward for consideration the same three elements and it is the right and the duty of this Court acting within its jurisdiction to consider all three elements. In doing so, this Court would not be going beyond its jurisdiction.

Per Pigeon J.: It has not been shown that it was expedient for the protection of the public to sentence the appellant to preventive detention.

This Court has jurisdiction under s. 41 of the *Supreme Court Act* to hear appeals by leave in the case of persons sentenced to preventive detention, and this jurisdiction is not restricted to a review of the finding that the accused is an habitual criminal.

Per Fauteux, Abbott, Martland and Ritchie JJ., *dissenting*: Once the finding as to the status of the accused as an habitual criminal is not in issue, this Court has no jurisdiction to entertain an appeal against the sentence of preventive detention. There is a clear line of authority which establishes that this Court has no jurisdiction to entertain an appeal with respect to sentences for an indictable offence. No appeal lies to this Court from the determination that it is expedient for the protection of the public to sentence the accused to preventive detention. *Parkes v. The Queen*, [1955] S.C.R. 134, is not an authority for the submission that this Court has jurisdiction to entertain an appeal from the sentence of preventive detention in isolation from the finding as to status. The only reported case in this Court in which an appeal has been taken from a sentence of preventive detention when the finding as to status of the accused was not in issue is the case of *The Queen v. MacDonald*, [1965] S.C.R. 831. In that case the majority of the Court decided that there was no jurisdiction under s. 41 to entertain an appeal from a sentence of preventive detention alone. There is no distinction between the present case and the case of *The Queen v. MacDonald* in so far as the question of jurisdiction is concerned.

Droit criminel—Repris de justice—Juridiction—Sentence de détention préventive—Déclaration que l'accusé est un repris de justice—Opportunité de la condamnation à la détention préventive—La Cour suprême du Canada a-t-elle juridiction pour entendre un appel d'une telle sentence—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41—Code criminel, 1953-54 (Can.), c. 51, arts. 660(1), 667(1).

L'appelant, alors âgé de 34 ans, a été déclaré coupable le 10 août 1965, de deux infractions d'obtention de biens par faux semblant et de deux infractions de tentative de pareille obtention. Il s'agissait de chèques tirés sur un compte de banque qui n'existait pas. Le montant en jeu dans chaque infraction était de moins de $100. L'appelant a été subséquemment déclaré repris de justice et condamné à la détention préventive. Son dossier de condamnations commence à l'âge de 16 ans et toutes, sauf une, contiennent un élément de vol. Le 25 juin 1965, le jour de l'expiration d'une sentence de quatre ans pour vol d'automobile, il a reçu une somme d'argent pour se rendre du Nouveau-Brunswick à Vancouver. A son arrivée à Vancouver le même jour, il a immédiatement obtenu un emploi comme manœuvre et il paraît avoir été continuellement employé de la sorte jusqu'au jour de sa condamnation le 10 août pour les infractions sur lesquelles la sentence de détention préventive est basée. La Cour d'appel, par un jugement majoritaire, a confirmé cette sentence. L'appelant a obtenu permission d'appeler devant cette Cour, mais son appel a été rejeté le 26 juin 1967 par un jugement majoritaire statuant, [1967] R.C.S. 554, que le magistrat et les juges majoritaires en Cour d'appel avaient eu raison de déclarer qu'il était un repris de justice, et que cette Cour n'avait pas juridiction pour substituer son opinion sur la question de savoir s'il était opportun pour la protection du public de lui imposer une sentence de détention préventive. L'opinion de la minorité dans cette Cour était qu'il n'y avait pas lieu de juger opportun pour la protection du public d'imposer une telle sentence. Vu que la question de juridiction sur laquelle la décision majoritaire était basée n'avait

1968

POOLE
v.
THE QUEEN

pas été discutée lors de l'audition de l'appel, une requête pour nouvelle audition a été accordée. Lors de cette nouvelle audition, on a pris pour acquis que l'appelant avait été à bon droit déclaré repris de justice, et les avocats de l'appelant et de l'intimée ont tous deux soutenu que cette Cour avait juridiction pour considérer s'il était opportun pour la protection du public d'imposer à l'appelant une sentence de détention préventive.

Arrêt: L'appel doit être accueilli, la sentence de détention préventive doit être annulée et les sentences imposées pour les infractions sur lesquelles elle est basée doivent être rétablies, les Juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

Le Juge en Chef Cartwright et les Juges Judson et Hall: Il n'a pas été démontré qu'il était opportun pour la protection du public de condamner l'appelant à la détention préventive. Le texte de l'art. 660(1) du Code, qui confère la juridiction pour imposer une sentence de détention préventive, est permissif et non pas obligatoire. Depuis ses condamnations en 1959, l'appelant n'a été trouvé coupable d'aucun crime de violence. Pour le vol d'une automobile en 1962 et pour les quatre infractions en 1965 sur lesquelles la sentence est basée, il a reçu des punitions sévères. Il y a une certaine preuve qu'il essaie de vivre une vie normale. Il n'a pas été démontré d'une façon satisfaisante que sa mise en liberté à l'expiration de l'emprisonnement auquel il a été condamné pour les infractions dont il s'agit aurait pour effet de constituer une menace à la société ou que pour la protection du public il serait opportun qu'il passe le reste de sa vie en détention.

Le jugement dans *The Queen v. MacDonald,* [1965] R.C.S. 831, n'oblige pas cette Cour à décider que, à moins qu'elle puisse dire que la déclaration des Cours inférieures à l'effet que l'appelant est un repris de justice doit être mise de côté, elle n'a pas juridiction pour intervenir dans l'imposition de la sentence de détention préventive. Les mots de l'art. 41 de la *Loi sur la Cour suprême,* dans leur sens ordinaire, semblent indiquer clairement que cette Cour a juridiction pour juger l'appel sur le fond. Il s'agit d'un appel admis par permission sous l'art. 41 et qui n'est pas prohibé par l'alinéa (3) de cet article. L'appel visé par l'art. 667(1) requiert la solution d'une seule question, savoir si la sentence de détention préventive doit être confirmée ou mise de côté. La juridiction de cette Cour pour entendre et juger un appel que l'on tente de lui faire entendre dépend de la matière de l'appel et des termes du statut donnant la juridiction.

Le Juge Spence: S'il n'était pas opportun pour la protection du public de condamner l'appelant à la détention préventive, cette Cour a juridiction pour entendre un appel de cette décision.

Il s'agit d'un appel d'une décision qui a eu pour résultat d'imposer à l'appelant une sentence de détention préventive. Les questions à étudier ne sont pas les questions à considérer dans un appel ordinaire d'une sentence mais ressemblent à un appel d'une déclaration de culpabilité. Avant qu'elle puisse confirmer la sentence de détention préventive sous l'art. 667 du Code, la Cour provinciale d'appel doit en venir à une conclusion affirmative sur trois éléments qui sont: (i) la déclaration de culpabilité; (ii) le fait que l'accusé est un repris de

justice; (iii) l'opportunité de lui imposer une sentence de détention préventive. La permission d'appeler devant cette Cour, qui a été à bon droit accordée sous l'art. 41 de la *Loi sur la Cour suprême,* requiert la considération de ces mêmes trois éléments, et c'est le droit et le devoir de cette Cour agissant selon sa juridiction de considérer chacun d'eux. En ce faisant, cette Cour n'agit pas au-delà de sa juridiction.

Le Juge Pigeon: Il n'a pas été démontré qu'il était opportun pour la protection du public d'imposer à l'appelant une sentence de détention préventive.

Cette Cour a juridiction, en vertu de l'art. 41 de la *Loi sur la Cour suprême,* pour entendre, avec permission, un appel dans le cas de personnes condamnées à la détention préventive, et cette juridiction n'est pas limitée à des questions touchant la déclaration que l'accusé est un repris de justice.

Les Juges Fauteux, Abbott, Martland et Ritchie, *dissidents*: Lorsqu'il n'est pas question de l'état de l'accusé comme repris de justice, cette Cour n'a pas la juridiction pour entendre un appel de la sentence de détention préventive. Il est clairement établi par la jurisprudence que cette Cour n'a pas juridiction pour entendre un appel d'une sentence imposée pour un acte criminel. Aucun appel ne peut être entendu par cette Cour concernant la décision qu'il est opportun pour la protection du public d'imposer une sentence de détention préventive. La cause de *Parkes v. The Queen,* [1955] R.C.S. 134, ne démontre pas que cette Cour a juridiction pour entendre un appel d'une sentence de détention préventive autrement que sur la déclaration que l'accusé est un repris de justice. La cause de *The Queen v. MacDonald,* [1965] R.C.S. 831, est la seule décision rapportée où un appel d'une sentence de détention préventive a été porté devant cette Cour alors que la déclaration sur l'état de l'accusé n'était pas en litige. La majorité de la Cour a alors décidé qu'elle n'avait pas juridiction sous l'art. 41 pour entendre un appel d'une sentence de détention préventive. Il n'y a aucune distinction à faire entre le cas présent et la cause de *The Queen v. MacDonald* en autant que la question de juridiction est concernée.

AUDITION nouvelle d'un appel, rapporté à [1967] R.C.S. 554, 60 W.W.R. 641 [1968] 1 C.C.C. 242, d'un jugement de la Cour d'appel de la Colombie-Britannique confirmant une sentence de détention préventive. Appel accueilli, les Juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

RE-HEARING of an appeal, reported at [1967] S.C.R. 554, 60 W.W.R. 641, [1968] 1 C.C.C. 242, from a judgment of the Court of Appeal for British Columbia affirming a sentence of preventive detention. Appeal allowed, Fauteux, Abbott, Martland and Ritchie JJ. dissenting.

1968

POOLE v. THE QUEEN

Bryan H. Kershaw, for the appellant.

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

The judgment of Cartwright C.J. and of Judson and Hall JJ. was delivered by

THE CHIEF JUSTICE:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for British Columbia affirming, by a majority, a sentence of preventive detention imposed on the appellant by His Worship Magistrate G. L. Levey at Vancouver on June 14, 1966. Bull J.A., dissenting, would have allowed the appeal, quashed the sentence of preventive detention and restored the sentences imposed in respect of convictions of four substantive offences in lieu of which the sentence appealed against had been imposed.

The appeal was first argued on June 5, 1967, before a Court of five judges and on June 26, 1967, the appeal[1] was dismissed by a majority. My brothers Fauteux, Martland and Ritchie were of opinion (i) that the learned magistrate and the majority in the Court of Appeal were right in finding the appellant to be an habitual criminal and (ii) that this Court had no jurisdiction to substitute its opinion for that of the Court of Appeal on the question as to whether or not it was expedient for the protection of the public to sentence the appellant to preventive detention. My brother Judson and I were of opinion that it was unnecessary to decide whether the appellant was rightly found to be an habitual criminal because, on the assumption that he was, it was not expedient for the protection of the public to sentence him to preventive detention.

As the question of jurisdiction on which the decision of the majority was founded had not been raised by counsel or the Court at the hearing of the appeal, an application for a re-hearing was granted and the appeal was argued before the full Court on December 11, 1967. At this time counsel for the appellant and for the respondent both contended that, on the assumption that the appellant was rightly found to be an habitual criminal, this Court has jurisdiction to deal with the question whether or not it was expedient for the protection of the public to sentence the

[1] [1967] S.C.R. 554, 60 W.W.R. 641, [1968] 1 C.C.C. 242.

appellant to preventive detention; counsel for the respondent submitted that on the merits this question should be answered in the affirmative and the appeal dismissed.

The appellant was born on March 3, 1932.

The evidence as to his past record is accurately summarized by Bull J.A. as follows:

> Just after reaching 16 years of age, the appellant was convicted of a charge of taking an automobile without consent and stealing four pairs of shoes a day or so earlier, and was fined $20.00 and given a suspended sentence, respectively. Three years later, at the age of 19 years, he was convicted of breaking and entering a drug store and was sentenced to two years in the penitentiary. Upon being released from this imprisonment about 19 months later, he joined the Canadian Army and served with it in Canada and Korea for about 2 years until he was dishonourably discharged shortly after having been convicted in Montreal of two charges of robbery and sentenced to five years on each to run concurrently. On his release at expiration of sentence the appellant had odd jobs in and around his home area in New Brunswick for about five months, when he again fell foul of the law. This time he was convicted on four charges of breaking and entering business premises within the space of a few days, and was awarded various sentences to run concurrently, of which the longest was three years in the penitentiary. The appellant was released from imprisonment on November 19, 1961, and worked fairly steadily with some success and employer approval at labouring work for about ten months when he was convicted of theft of a U-Drive automobile which he had rented. For this offence he was sentenced to four years in the penitentiary. On his release from this sentence in June, 1965, the somewhat unusual events occurred which led to his commission of, and convictions on, the substantive offences. On the day of release and provided with funds and an airline ticket by his mother in the Maritimes, he flew to Vancouver claiming to be filled with the admirable resolution to there start a new honest life away from the associations which he claimed had always led him into trouble. Although there were many inconsistencies in his evidence as to exactly what the appellant did for the next few weeks, it does appear quite clear and uncontradicted that promptly after arrival he did get a job with a wrecking company, which lasted about two weeks, followed by a job with a salvage company commencing on July 12, 1965. On July 9, 1965, however, he purchased $41.85, and attempted to purchase a further $91.37, worth of goods from a department store with cheques signed in his own name but drawn on a non-existent account in a local bank. The appellant said the account number used was that of an account that he had in the same bank in Fredericton, N.B., but quite properly little credence was given to this excuse. It is clear that some at least of the goods in question were working clothes and gear needed by the appellant in the new job he was just starting. On the same day, allegedly to replace one stolen from his room, the appellant attempted to buy a watch from a jeweller with a cheque for $83.99 drawn on the same non-existent account. The appellant was released on bail, went back to work and about ten days later obtained a pipe and some tobacco from a tobacconist with a cheque for $12.74 drawn on a fictitious account. The appellant was convicted of these four depredations on August 10, 1965, and given concurrent sentences aggregating 3 years. Apparently, notwithstanding these shopping sprees, the appellant did have gainful employment for substantially the whole time from his release on June 25, 1965,

1968

POOLE v. THE QUEEN

Cartwright C.J.

to his conviction on August 10, 1965. There was no evidence adduced that during this last period of freedom the appellant associated with criminals or undesirable characters.

I do not find it necessary to choose between the conflicting views of Bull J.A. and of the majority in the Court of Appeal as to whether on the evidence the finding that the appellant is an habitual criminal can safely be upheld; for the purpose of these reasons I will assume that it can.

On the assumption that the finding that the appellant is an habitual criminal should not be disturbed, I have reached the conclusion that it has not been shewn that it is expedient for the protection of the public to sentence him to preventive detention.

Whether or not in any particular case it is expedient to so sentence a person found to be an habitual criminal is a question of fact or perhaps a question of mixed law and fact; it is certainly not a question of law alone. But, leave to appeal to this Court having been granted, it is clear that we have jurisdiction to deal with questions of fact.

In *Mulcahy v. The Queen*[2], this Court in a unanimous judgment expressly adopted the reasons of MacQuarrie J. who had dissented from the judgment of the majority in the Supreme Court of Nova Scotia (in banco) and set aside the sentence of preventive detention which had been imposed upon the appellant. The dissenting judgment of MacQuarrie J. is reported in 42 C.R. at page 1.

In that case the record shewed that, prior to being convicted of the substantive offence, the appellant had been convicted between 1941 and 1961 on nineteen occasions of offences, for which he had been sentenced to a total of fifteen years and six months in the penitentiary and twenty-six months in prison. None of his convictions were for crimes of violence; six were for breaking and entering and the remainder for theft or having possession of stolen goods.

MacQuarrie J. based his judgment on two distinct grounds. The first of these was that there was no evidence to support a finding that the appellant was leading persistently a criminal life. The second ground was expressed as follows:

While I do not attempt to minimize the record of the appellant, a perusal of it (apart from the lack of evidence to justify finding him to be

[2] (1963), 42 C.R. 8.

leading persistently a criminal life) indicates that he is not the type of person of whom it can properly be said "it is expedient for the protection of the public to sentence him to preventive detention". In my opinion the Crown has failed to prove that (even although the accused was leading persistently a criminal life) a sentence of preventive detention was expedient for the protection of the public.

In the case at bar no exception can be taken to the terms in which the learned Magistrate instructed himself as to the applicable principles of law. Following the judgment of the Court of Appeal for British Columbia in *Regina v. Channing*[3], he expressed the view that in order to impose a sentence of preventive detention he must be satisfied beyond a reasonable doubt that the appellant was leading persistently a criminal life, that the decision of each case must depend on its own particular facts, (i) as to whether the finding that a person is an habitual criminal should be made and, (ii) as to whether that finding having been made, a sentence of preventive detention should be imposed. It is, I think, implicit in the last sentence of his reasons, read in the light of his reference to *Regina v. Channing*, that he held it necessary that he should be satisfied beyond a reasonable doubt on the second of these points as well as on the first. The sentence to which I refer reads as follows:

> I find that the Crown has proved beyond all reasonable doubt, in my mind, that it is expedient for the protection of the public to sentence you to preventive detention, and I so do.

In the Court of Appeal Lord J.A., with whom McFarlane J.A. expressed substantial agreement, dealt with this branch of the matter as follows:

> Nor can I say that he reached the wrong opinion in finding it expedient for the protection of the public that the appellant be sentenced to preventive detention.

Bull J.A., having held that the finding that the appellant was an habitual criminal could not safely be upheld, did not find it necessary to deal with this question.

In *Regina v. Channing, supra,* Sheppard J.A., with whom Norris, Lord and MacLean JJ.A. agreed and Davey J.A. agreed "in general", said at page 110:

> In the case at bar, the crown must assume the onus of proving that it is expedient for the protection of the public that the accused be

[3] (1965), 52 W.W.R. 99, [1966] 1 C.C.C. 97, 51 D.L.R. (2d) 223.

1968

POOLE v. THE QUEEN

Cartwright C.J.

sentenced beyond that imprisonment for the substantive offence: *Mulcahy v. Reg.*, and that must be proven beyond a reasonable doubt: *Parkes v. Reg.* and *Kirkland v. Reg.*

In the same case at page 101, Davey J.A. said:

> Likewise it is undesirable for us to lay down detailed tests of the sufficiency of evidence to prove either that an accused is a habitual criminal or that it is expedient for the protection of the public that he be sentenced to preventive detention. All that is required is that the evidence be sufficient to prove both these essential matters beyond a reasonable doubt to the satisfaction of the magistrate or trial judge.

As already indicated, I am dealing with this appeal on the assumption that the finding that the appellant is an habitual criminal should not be disturbed and the question to be answered is therefore whether it can properly be said "that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention".

The answer to this question depends upon the application to the facts of the case of the words of s. 660(1) of the *Criminal Code* which reads as follows:

> 660.(1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if
>
> (*a*) the accused is found to be an habitual criminal, and
>
> (*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

It will be observed that the section is worded permissively. Even if both conditions (*a*) and (*b*) are fulfilled the Court is not bound to impose the sentence of preventive detention. The wording may be contrasted with that used by Parliament in s. 661(3):

> (3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention . . .

The wording of s. 660 may also be compared with that of the corresponding sub-section in the *Criminal Justice Act*, 1948, of the United Kingdom, 11 and 12 George VI, c. 58, s. 21(2) of which reads as follows:

> (2) Where a person who is not less than thirty years of age—
>
> (*a*) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and

(*b*) has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to Borstal training, imprisonment or corrective training;

then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of preventive detention for such term of not less than five or more than fourteen years as the court may determine.

I do not consider that the use of the words "The court is of the opinion" in s. 660(1)(*b*) of the *Criminal Code* prevents the Court of Appeal or this Court from substituting its opinon for that of the learned Magistrate. That course has been followed in *Mulcahy v. The Queen, supra.*

In *Regina v. Channing, supra,* after stating that what is expedient for the protection of the public is a question of fact in each case, Sheppard J.A. continued at page 109:

> Moreover, as the sentence for the substantive offence will have considered the protection of the public as one of the elements, it would follow that preventive detention should not be imposed unless the crown has proven that the protection of the public is not sufficiently safeguarded by sentence for the substantive offence, but does require some additional protection involved in a sentence of preventive detention: *Mulcahy v. Reg.*, supra; *Reg. v. Rose,* supra, to the extent of making that sentence expedient for the protection of the public.

and at page 110 he quoted with approval the following passage in the reasons of Currie J.A. in *Harnish v. The Queen*[4]:

> The real, essential principle of the preventive detention provisions of the *Criminal Code,* s. 660, and of the *Prevention of Crime Act,* 1908, 8 Edw. VII, ch. 59, is the protection of the public. It is not enough that the accused is merely anti-social, or is a nuisance, or that it is a convenience to the police to have a person removed to a penitentiary.

In *R. v. Churchill*[5], Lord Goddard, giving the judgment of the Court of Criminal Appeal, said at page 110:

> The object of preventive detention is to protect the public from men or women who have shown by their previous history that they are a menace to society while they are at large.

and at page 112:

> As we have already said, when such sentences have to be passed the time for punishment has gone by, because it has had no effect. It has become a matter of putting a man where he can no longer prey upon society even though his depredations may be of a comparatively small character, as in the case of habitual sneak thieves.

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[4] (1960), 129 C.C.C. 188 at 197, 34 C.R. 21, 45 M.P.R. 141.
[5] (1952), 36 Cr. App. R. 107, 2 Q.B. 637.

1968

POOLE v. THE QUEEN

Cartwright C.J.

In considering the decisions in England it must always be borne in mind that the maximum sentence of preventive detention which can be imposed there is fourteen years and that, as stated by Lord Goddard on the page last referred to, in the great majority of cases which had come before that Court the sentence passed had been one of eight years. In Canada if the sentence is passed at all it must decree imprisonment for the remainder of the prisoner's life subject to the possibility of his being allowed out on licence if so determined by the parole authorities, a licence which may be revoked without the intervention of any judicial tribunal.

Since his convictions in 1959, the appellant has been guilty of no violent crime. For the crime of theft of an automobile in 1962 and the four substantive offences in 1965, which involved comparatively trifling sums, he has been sentenced to severe punishment; there is some evidence of his trying to live a normal life; he is now 35 years of age. While I cannot say, in the words used by Currie J.A., that he is merely a nuisance I am not satisfied that his release at the expiration of the terms of imprisonment to which he has been sentenced for the substantive offences will, to use the words of Lord Goddard, constitute a menace to society or that the protection of the public renders it expedient that he should spend the rest of his life in custody. Any doubt that I feel in this case arises from the fact that I am differing from the learned Magistrate and the majority in the Court of Appeal. In a case in which the consequences of an adverse decision are so final and so disastrous for the man concerned I think that doubts should be resolved in his favour.

For the above reasons I have reached the conclusion that I would dispose of the appeal as Bull J.A. would have done unless the view suggested by some members of the Court, although neither put forward nor supported by either counsel, compels us to hold that we are without jurisdiction.

The suggestion, as I understand it, is that the reasons of Ritchie J. speaking for a majority of the Court in *The Queen v. MacDonald*[6], bind us to hold that, unless we can

[6] [1965] S.C.R. 831, 46 C.R. 399, [1966] 2 C.C.C. 1, 52 D.L.R. (2d) 701.

say that the finding of the Courts below that the appellant is an habitual criminal should be set aside, we are without jurisdiction to interfere with the imposition of the sentence of preventive detention.

When a question is raised as to the jurisdiction of this Court it is well to look first at the provisions of the Statute which confer the jurisdiction which the parties seek to invoke; in the case at bar these are contained in s. 41 of the *Supreme Court Act* which reads:

> 41.(1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.
>
> (2) Leave to appeal under this section may be granted during the period fixed by section 64 or within thirty days thereafter or within such further extended time as the Supreme Court or a judge may either before or after the expiry of the said thirty days fix or allow.
>
> (3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.
>
> (4) Whenever the Supreme Court has granted leave to appeal the Supreme Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.

On the plain meaning of the words of this section it seems clear that the Court has jurisdiction. The appeal is brought, pursuant to leave duly granted by this Court, from the judgment of the Court of Appeal for British Columbia affirming the imposition by the learned magistrate of a sentence of preventive detention. This is a final judgment of the highest court of final resort in the province in which judgment can be had in this particular case. This Court is not deprived of jurisdiction by the terms of subs. 3 of s. 41 for the judgment of the Court of Appeal is not one acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or of an offence other than an indictable offence. The jurisprudence in this Court on this point is settled and has been applied consistently since the decisions in *Brusch v. The Queen*[7] and *Parkes v. The Queen*[8].

[7] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.
[8] [1956] S.C.R. 134.

1968

POOLE v. THE QUEEN

Cartwright C.J.

The contrary view is said to be founded, as mentioned above, on the reasons of my brother Ritchie, concurred in by a majority of the Court in *The Queen v. MacDonald, supra*. In approaching a consideration of that decision it is well to bear in mind the rule, often stated, that a case is only an authority for what it actually decides; vide *Quinn v. Leatham*[9], per Lord Halsbury at 506.

While in *The Queen v. MacDonald, supra,* I agreed with the conclusion of the majority that the appeal should be quashed it was for reasons differently expressed. The sole question relating to our jurisdiction which was raised for decision in that appeal was whether the Attorney-General had a right of appeal to this Court from the order of a Court of Appeal expressly affirming a finding that an accused was an habitual criminal but deciding that the sentence of preventive detention imposed upon him should be set aside. No question arose as to the nature or extent of an accused's right of appeal.

The formal order of the Court of Appeal in that case read as follows:

> THIS COURT DOTH ORDER AND ADJUDGE that the appeal of the above-named Appellant from the finding that the Appellant is an habitual criminal be and the same is hereby dismissed, the Appeal of the above-named Appellant from the sentence of preventive detention imposed on him be and the same is hereby allowed, the sentence of preventive detention imposed on him as aforesaid be and the same is hereby set aside, and pursuant to section 667 of the Criminal Code, a sentence of imprisonment in Oakalla Prison Farm, Burnaby, British Columbia, for a term of one year be and the same is hereby imposed in respect of the said conviction by Magistrate L. H. Jackson entered on the 20th day of May 1964 on the above-described charge, such sentence to run from the 20th day of May, 1964.

This may be contrasted with the order of the Court of Appeal in the case at bar, the operative part of which reads:

> THIS COURT DOTH ORDER AND ADJUDGE THAT the said Appeal of the above-named Appellant from the sentence of preventive detention imposed on him be and the same is hereby dismissed;

With respect, I think that the formal order of the Court of Appeal in *The Queen v. MacDonald, supra,* was improperly drawn. The *Criminal Code* gives no right of appeal from the finding that the appellant is an habitual criminal.

[9] [1901] A.C. 495.

Such a finding unless followed by the imposition of a sentence of preventive detention is *brutum fulmen*. This is made plain by the reasons of Bird C.J.B.C. speaking for the Unanimous Court of Appeal in *Regina v. MacNeill*.[10] It is a misconception to regard the appeal given by s. 667(1) as raising two matters for decision. There is only one question to be answered, that is whether the sentence of preventive detention is to be sustained or set aside. It may be set aside for various reasons, for example (i) because the Crown has not satisfied the onus of proving that the appellant is an habitual criminal or (ii) because it has not satisfied the onus of proving that it is expedient for the protection of the public that a sentence of preventive detention be imposed or (iii) for both of these reasons or (iv) because of some technical defect or illegality in the proceedings; this list is not necessarily exhaustive. It appears to me to be a novel proposition that the answer to the question whether the Court has jurisdiction to entertain and decide an appeal may depend on the reasons which it assigns for allowing or dismissing it.

In my view the present case is distinguishable from *The Queen v. MacDonald, supra*. In the case at bar the appeal to the Court of Appeal was and the appeal to this Court is simply from the imposition of the sentence, and this is as it should be for, as pointed out above, the only right of appeal given to a person sentenced to preventive detention is that set out in s. 667(1) of the *Criminal Code*:

> 667.(1) A person who is sentenced to preventive detention under this Part may appeal to the Court of Appeal against that sentence on any ground of law or fact or mixed law and fact.

It is a trite observation that an appeal is from the judgment pronounced in the Court appealed from and not from its reasons. It appears to me that the existence of our jurisdiction cannot depend upon the grounds upon which we think the sentence should be upheld or set aside. Our jurisdiction to set aside the sentence in the case at bar upon the grounds set out in the reasons of Bull J.A. could not be questioned; in my opinion, it would be consistent with neither principle nor authority to hold that we cease to have jurisdiction because, as it appears to me, the same result should be reached by a different line of reasoning.

[10] [1966] 2 C.C.C. 268, 53 W.W.R. 244.

1968

POOLE v. THE QUEEN

Cartwright C.J.

At the risk of appearing repetitious, I wish to emphasize that the answer to the question whether we have jurisdiction to hear and determine an appeal sought to be brought before us depends on the subject matter of the appeal and on the terms of the Statute conferring jurisdiction. The question arises *in limine* and can and should be answered before we enter upon the merits of the appeal. Either we have or have not jurisdiction to decide the appeal; it is, in my view, a misconception to suggest that our jurisdiction, if we have it, can be lost because we would allow or dismiss the appeal for one reason rather than another. We have held often enough in dealing with the question whether an inferior tribunal has exceeded its jurisdiction that we cannot say it has jurisdiction to decide a question rightly but not to decide it wrongly.

I have reached the conclusion that the judgment of the majority in *The Queen v. MacDonald, supra,* does not bind us to say that we are without jurisdiction in the case at bar and I am satisfied that we have jurisdiction to deal with the appeal on the merits.

I would dispose of the appeal as Bull J.A. would have done, that is to say, I would allow the appeal, quash the sentence of preventive detention and restore the sentences imposed on the convictions of the four substantive offences.

The judgment of Fauteux, Abbott, Martland and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—I have had the advantage of reading the reasons for judgment prepared by the Chief Justice in which he has described the circumstances giving rise to the re-hearing of this appeal and concluded that this Court has jurisdiction to hear it and that is should be allowed, but I remain in agreement with the reasons for judgment rendered by Martland J. at the first hearing in which he says that:

> Once the finding as to the status of the accused as an habitual criminal is not an issue, this Court has no jurisdiction to entertain an appeal against sentence.

As has been pointed out by the Chief Justice, if there be jurisdiction in this Court to hear an appeal from the imposition of a sentence of preventive detention, imposed "in lieu of any other sentence that may be imposed" for an

indictable offence pursuant to the provisions of s. 660(1) of the *Criminal Code*, then that jurisdiction must be found in s. 41 of the *Supreme Court Act* (hereinafter called "the Act"), and it accordingly appears to me to be of first importance to consider the jurisprudence of this Court governing the interpretation of s. 41 in relation to appeals against sentence.

The first case in which it was contended that s. 41 of the Act gave the Court jurisdiction to consider an appeal against sentence was *Goldhar v. The Queen*[11], in which Mr. Justice Fauteux, after a detailed review of the provisions of the statute, concluded, at page 71 that:

> Under the former Code, appeals against sentence have always been left to the final determination of the provincial courts and there is nothing, under the new Code or s. 41 of the *Supreme Court Act*, indicating a change of policy in the matter, with respect to indictable offences.
>
> The Court is without jurisdiction to entertain the present application which I would dismiss.

These reasons for judgment were reaffirmed in *Paul v. The Queen*[12], where Taschereau J. (as he then was) said:

> It was held in *Goldhar v. The Queen* that if an appeal from a sentence was not given by 41(3), nor the *Criminal Code*, we could not find any authority in 41(1) to review the sentence imposed by the Courts below.

In that case it was stated by Fauteux J.:

> . . . that in order to determine if a convicted person could appeal against a sentence in a matter of indictable offence it was not permitted to look at s. 41(1) for authority to intervene but only to the Criminal Code which does not permit an appeal against sentence.

The effect of these decisions appears to me to have been accurately summarized by Mr. Justice Fauteux in rendering the judgment of the Court in *The Queen v. Alepin Freres Ltee. et al*[13], in which case the Crown had, *with leave granted under s. 41*, launched an appeal against the finding of the Court of Appeal on the question of whether the Court of Queen's Bench or the magistrate had jurisdiction to impose sentences, and after quoting ss. 41(1) and 41(3), Mr. Justice Fauteux went on to say:

> It is clear from the terms of subsection (3) that, unless the judgment sought to be appealed is a judgment 'acquitting or convicting or setting aside or affirming a conviction or acquittal' of either an indictable offence

[11] [1960] S.C.R. 60, 125 C.C.C. 209, 31 C.R. 374.
[12] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.
[13] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.

1968

POOLE
v.
THE QUEEN

Ritchie J.

or an offence other than an indictable offence, there is no jurisdiction in this Court under that subsection to entertain this appeal. The judgment here sought to be appealed does not come within that description. It is not a judgment related to an acquittal or a conviction of an offence and, while an important question of jurisdiction is involved therein, this question does not relate to an acquittal or a conviction within the meaning of subsection (3) but to sentence. Neither can jurisdiction of this Court be found in subsection (1). The general proposition that matters which are not mentioned in s. 41(3) must be held to be comprised in s. 41(1), with the consequence that this Court would have jurisdiction to entertain an appeal from a judgment of a nature similar to the one here considered, is ruled out by what was said by this Court in *Golhar v. The Queen* and *Paul v. The Queen*. It may be a matter of regret that this Court has no jurisdiction to decide the important question which gave rise to conflicting opinions in the Court below, but strong as my views may be with respect to that question, I am clearly of opinion that this Court has no jurisdiction to entertain this appeal.

There is accordingly a clear line of authority which establishes that this Court has no jurisdiction to entertain an appeal with respect to sentences for an indictable offence.

In the present case like the Chief Justice, I proceed on the assumption that the finding that the appellant is an habitual criminal should not be disturbed, and that the sole question to be determined is whether an appeal lies to this Court from the determination made by the Court of first instance, in conformity with the provisions of s. 660(1)(*b*) of the *Criminal Code*, that "The Court is of the opinion that because the accused is a habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention".

The concept of imposing preventive detention in the case of habitual criminals was first introduced into our *Criminal Code* by Chapter 55 of the Statutes of Canada, 1947, which enacted sections 575A to 575H under the heading "PART X(A) HABITUAL CRIMINALS", where it was provided that a statement that the accused was an habitual criminal was to be added to the indictment after the charge for the substantive offence and further provided that the offender should first be arraigned on the substantive offence and if found guilty the judge or jury were charged to inquire whether or not he was an habitual criminal. Section 575C(4) of the same statute provided, in part, that:

> (4) A person shall not be tried on a charge of being a habitual criminal unless
>
> (*a*) the Attorney General of the Province in which the accused is to be tried consents thereto; and

(*b*) not less than seven days' notice has been given by the proper officer of the court by which the offender is to be tried and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

It will thus be seen that in the 1947 statute the allegation that an offender was an habitual criminal was included in the indictment and was regarded as being in the nature of an additional charge. This is made clear by the case of *The King v. Robinson*[14] which was decided under the 1947 Code and is illustrative of the way in which s. 575c was applied by the Crown authorities. In that case, as Mr. Justice Fauteux said at page 523:

. . . Each of the respondents was separately indicted on two counts: one being that, at some definite time in 1950, in the province of British Columbia, he was found in unlawful possession of drugs, under the *Opium and Narcotic Drug Act*, 1929 as amended, and the second one charging him to be a habitual criminal within the meaning of the provisions of Part X(A) of the *Criminal Code of Canada*.

The appeal in the *Robinson* case, *supra*, raised a question of law as to the meaning to be attached to the provisions of s. 575c and the jurisdiction of this Court was not in question, the matter being treated in all respects and by all concerned as if it were an appeal from a conviction for an indictable offence. This is no doubt explained by the fact that s. 575E of the *Criminal Code* at that time provided that:

A person convicted and sentenced to preventive detention, may appeal against his conviction and sentence, *and the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto.*

The italics are my own.

This meant that the provisions of s. 1025 of the Code providing for an appeal to this Court from a conviction for an indictable offence were applicable to "a person convicted and sentenced to preventive detention" and accordingly that such an appeal would lie "on a question of law" if leave to appeal were granted by a judge of this Court. That this is the meaning which was attached to s. 575E is made plain from a further excerpt from the reasons for judgment of Mr. Justice Fauteux in the *Robinson* case, *supra*, at page 523 where he said:

. . . the judgment rests on the interpretation of the provisions of s. 575c 1(a) of Part X(A). On this point and under the authority of s. 1025 of the *Criminal Code* leave to appeal to this Court was granted to the appellant.

[14] [1951] S.C.R. 522, 12 C.R. 101, 100 C.C.C. 1.

1968

POOLE v. THE QUEEN

Ritchie J.

The next "HABITUAL CRIMINAL" case heard in this Court was *Brusch v. The Queen*[15] which was also decided under the 1947 Code and where there was a dissenting judgment so that the appeal came here under s. 1023 of the Code which provided that:

> Any person convicted of an indictable offence whose conviction has been affirmed on appeal taken under s. 1013 may appeal to the Supreme Court against the affirmance of such conviction *on any question of law on which there has been a dissent in the Court of Appeal.*

The italics are my own.

The question of law with which the appeal was concerned was whether the "charge" of being an habitual criminal was "a charge of a criminal offence" entitling the accused to make an election as to his mode of trial and the Court decided in the clearest terms that it was not such a charge and in so doing adopted the language of Lord Reading in *Rex v. Hunter*[16], where he said at page 74, speaking of s. 10 of the English Statute (*The Prevention of Crimes Act*, 1908, Ch. 59) upon which Part X(A) of the 1947 Code was based:

> . . . that to be a habitual criminal within the meaning of the statute is not a substantive offence, but is a state of circumstances affecting the prisoner which enables the court to pass a further or additional sentence to that which has been already imposed; . . .

Although it was clearly held in the *Brusch* case, *supra*, that "the charge" of being an habitual criminal was not a charge for a criminal offence, it was nevertheless recognized that the penalty of preventive detention attached to the habitual criminal finding as distinct from the crime which was charged. As Mr. Justice Estey said at page 382:

> Throughout the proceeding the offence or crime charged is treated in every respect, *even as to punishment,* as separate and distinct from being a habitual criminal.

The italics are my own.

The *Criminal Code* was, however, revised by Chapter 51 of the Statutes of Canada 1953-54 by which the provisions of Part X(A) were recast and appeared as Part XXI under the general heading of "PREVENTIVE DETENTION". The new statute adopted a completely different

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[15] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.

[16] (1920), 15 Cr. App. R. 69.

approach to the whole question and under the new Part XXI the practice of making "the charge" of being an habitual criminal a part of the indictment was abolished and a procedure for making of "an application for preventive detention" was substituted therefor. The new section 660(1) provided:

660(1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in addition to a sentence for the offence of which he is convicted if

(*a*) the accused is found to be an habitual criminal, and

(*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

It is important also to notice the changes in the section providing for appeals. The new s. 667 provided that:

667. (1) A person who is sentenced to preventive detention under this Part may appeal to the Court of Appeal against the sentence.

(2) The Attorney General may appeal to the Court of Appeal against the dismissal of an application for an order under this Part.

(3) The provisions of Part XVIII with respect to procedure on appeals apply, *mutatis mutandis,* to appeals under this section.

This is a far cry from the terms of the old s. 575E which, as I have said, provided that in appeals from convictions and sentence of preventive detention

. . . the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto. . . .

Under the new Code there was no provision for an appeal to this Court in habitual criminal cases and accordingly in *Parkes v. The Queen*[17], which was the next such case to come here, application for leave to appeal was not made under the *Criminal Code* but was made under s. 41 of the Act on the ground that the judgment of the Court of Appeal of Ontario finding the accused to be an habitual criminal was a final judgment of the highest Court of final resort in the Province within the meaning of s. 41(1) and that it was not a judgment affirming conviction of an indictable offence or indeed any offence. (See *Brusch v. The Queen, supra*).

In the *Parkes* case, *supra,* the application for leave to appeal was granted and the judgment granting leave was

[17] [1956] S.C.R. 134.

1968

POOLE v. THE QUEEN

Ritchie J.

delivered by the present Chief Justice who, at page 135, cited the decision in *Brusch v. The Queen, supra,* as authority for the proposition

> ...that the 'charge' of being an habitual criminal is not a charge of an offence or crime but is merely an assertion of the existence of a status or condition in the accused which enables the Court to deal with the accused in a certain manner,...

and who then continued:

> It follows from this that when His Honour Judge Grosch decided that the applicant was an habitual criminal he was not convicting him of an indictable offence but was deciding that his status or condition was that of an habitual criminal. It was this decision which was affirmed by the Court of Appeal. That such a decision is a 'judgment' within the meaning of that word in s. 41(1) does not appear to me to admit of doubt. It is indeed a 'final judgment' under the definition contained in s. 2(b). It is a 'decision which determined in whole ... a substantive right ... in controversy in a judicial proceeding'—i.e., the right of an accused to his liberty at the conclusion of whatever sentence might be imposed for the substantive offence of theft of which he was convicted prior to the trial and adjudication of the question whether his status was that of an habitual criminal, or, alternatively, *the right of the Crown to ask that he be sentenced to preventive detention.*

The italics are my own.

In my respectful opinion, the "substantive right... in controversy" in an appeal from a finding that the accused has the status of an habitual criminal is "the right of the Crown to ask that he be sentenced to preventive detention", because although such a sentence cannot be awarded unless the accused has been found to be an habitual criminal it by no means follows that the "habitual criminal" finding automatically carries with it a sentence of preventive detention. In order to fully understand what was decided on the motion for leave to appeal in the *Parkes* case, *supra,* it appears to me to be desirable to quote the last three paragraphs of the reasons for judgment where it was said:

> Mr. Common's argument that for the purpose of determining whether or not a right of appeal is given the adjudication that the applicant is an habitual criminal should be treated as a conviction of an indictable offence cannot in my view be reconciled with the decision in *Brusch v. The Queen.* I conclude that we have jurisdiction to grant leave under s. 41(1).
>
> As to the merits, it was intimated at the hearing that it was the view of the Court that leave should be granted if we have jurisdiction to grant it and accordingly counsel for the applicant was directed to confine his reply to the question of jurisdiction.

I would accordingly grant leave to appeal, pursuant to the terms of s. 41(1) of the *Supreme Court Act*, from the affirmation by the Court of Appeal of the decision of His Honour Judge Grosch that the applicant is an habitual criminal.

I have quoted at such length from this decision because it is the case which established the jurisdiction of this Court to hear appeals under s. 41 of the Act in habitual criminal cases, and because it limits the ground upon which leave was granted to the question of whether the accused had been properly found to have the status of an habitual criminal.

The *Parkes* case, *supra*, does not appear to me to afford any authority for the submission that this Court has jurisdiction to entertain an appeal from the sentence of preventive detention in isolation from the finding as to status, although it might perhaps have been contended that, as the sentence under the 1953-54 Code was specified as being "in addition to" any sentence for the indictable offence, it was a sentence for being an habitual criminal and was therefore not a sentence for a criminal charge so that the reasoning in *Goldhar v. The Queen, supra,* did not apply to it.

Any doubts in this latter regard have, however, been resolved by the enactment of s. 33(2) of Chapter 43 of the Statutes of Canada 1960-61 whereby s. 660 was amended so as to make it clear that the sentence of preventive detention is no longer to be treated as being "in addition to the sentence for the substantive offence", but that it is in lieu of such sentence. The new section reads:

660.(1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if

(*a*) the accused is found to be an habitual criminal, and

(*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(*a*) he has previously, since attaining the age of eighteen years, on at least three separate occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(*b*) he has been previously sentenced to preventive detention.

(3) At the hearing of an application under subsection (1), the accused is entitled to be present.

1968

POOLE v. THE QUEEN

Ritchie J.

In the case of *Gordon v. The Queen*[18], Judson J. had occasion to comment on this section and said, at page 316:

> ...the only sentence of preventive detention which could be imposed in the circumstances of this case was one *in lieu of the sentence that had been imposed.*

The italics are my own.

Had it not been for the decision on the application for leave to appeal in the *Parkes* case, *supra,* it would, I think, have been arguable that s. 660(1)(*a*) and (*b*) should be read together and that the section should be construed as dealing with sentence alone and raising no separate question of the finding as to status. This would perhaps have been more in line with s. 667(1) which now provides that:

> 667.(1) A person who is sentenced to preventive detention under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact.

This section appears to treat the whole matter as being one of sentence, but in view of the *Parkes* decision and the decisions subsequently delivered in this Court concerning the habitual criminal finding, I do not think that our jurisdiction under s. 41 in appeals from the findings as to status can be questioned.

I have read the habitual criminal cases which have come to this Court since the *Parkes* case and it appears to me that until the case of *The Queen v. MacDonald*[19], to which reference has been made by the Chief Justice, there was no case of an appeal against sentence when the question of the finding as to status was not in issue. In each case the appeal was treated as an appeal from the "habitual criminal" finding and was decided on that basis.

It is said, however, that the case of *Mulcahy v. The Queen*[20] was an exception and is to be treated as an appeal against the sentence of preventive detention *simpliciter.*

In the *Mulcahy* case, *supra,* Chief Justice Taschereau delivered the following oral judgment on behalf of this Court:

> We are all of opinion that the appeal against the sentence of preventive detention should be allowed for the reasons given by MacQuarrie J.

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[18] [1965] S.C.R. 312, 45 C.R. 98, 4 C.C.C. 1.
[19] [1965] S.C.R. 831, 46 C.R. 399, [1966] 2 C.C.C. 1, 52 D.L.R. (2d) 701.
[20] (1963), 42 C.R. 8.

and that the record should be returned to the Supreme Court of Nova Scotia *in banco* to impose a sentence for the substantive offence of which the appellant was convicted.

Any suggestion that this decision recognized the jurisdiction of this Court to entertain an appeal against a *sentence of preventive detention* as opposed to an appeal from a finding that the accused was an habitual criminal, must be considered in light of the dissenting judgment of Mr. Justice MacQuarrie, which this Court adopted, in which he said:

> I would allow the appeal, *quash the finding that the appellant was an habitual criminal* and the sentence that he be held in preventive detention and impose a sentence of three years...for the substantive offence.

The italics are my own.

With the greatest respect for those who hold a contrary view, I do not think that if the appeal presently before us is to be disposed of on the assumption that the finding that the appellant is an habitual criminal should not be disturbed, it can at the same time be said that the *Mulcahy* case, *supra,* is an applicable authority because in that case the finding that the accused was an habitual criminal was quashed and it therefore followed that the question of whether it was expedient for the protection of the public to sentence the accused to preventive detention could not arise. The fact that Mr. Justice MacQuarrie expressed the view that the accused's record indicated to him that he was not the type of person of whom it could properly be said "it is expedient for the protection of the public to sentence him to preventive detention", is, in my view, with the greatest respect, beside the point because once the habitual criminal finding had been quashed, the matter of sentence was no longer in issue.

The grounds of appeal considered in this Court in the *Mulcahy* case, *supra,* are made apparent from a consideration of the notice of appeal and of the factum of the appellant. The notice of appeal set forth the following grounds:

> (1) That the Supreme Court of Nova Scotia In Banco erred in failing to hold that the Crown did not prove beyond reasonable doubt that the accused was leading persistently a criminal life as required under Section 660(2)(*a*) of the Criminal Code.

1968

POOLE
v.
THE QUEEN

Ritchie J.

(2) That the Supreme Court of Nova Scotia In Banco erred in failing to hold that there was no evidence against the appellant to sustain a finding that the accused was leading persistently a criminal life as required by Section 660(2)(*a*).

(3) That the Supreme Court of Nova Scotia In Banco erred in failing to hold that even although the Crown proved the accused was leading persistently a criminal life a sentence of preventive detention was not necessary or expedient for the protection of the public.

This Court, having found, as Mr. Justice MacQuarrie did, in favour of the appellant on the first two grounds, it followed that the appeal against the sentence of preventive detention must be allowed.

It has been suggested that the fact that leave to appeal to this Court was granted in the present case should have some controlling effect on the decision to be made, after having heard the appeal, with respect to our jurisdiction to entertain it. In this regard it does not appear to me to have been the practice of this Court on hearing an appeal to consider itself in any way affected in deciding the question of whether or not it has jurisdiction, by the fact that leave to appeal has been granted. The matter arose in the case of *The Queen v. Warner*[21], where leave had been granted and where the Chief Justice, in the course of his reasons for judgment in the appeal, said:

> While it was announced that we had jurisdiction, further consideration has persuaded the majority of the Court that such is not the case.

Other illustrations which come to my mind are *The Queen v. Alepin Frères Ltée et al, supra,* and *The Queen v. MacDonald, supra,* in both of which cases leave to appeal had been granted and the Court subsequently held that it had no jurisdiction.

As I have indicated, in my view the only reported case in this Court in which an appeal has been taken from a sentence of preventive detention when the finding as to the status of the accused was not an issue, is the case of *The Queen v. MacDonald,* and in that case the majority of the Court decided that there was no jurisdiction under s. 41 to entertain an appeal from a sentence of preventive detention alone. The majority opinion was there expressed in the following terms:

> The sentence of preventive detention could only have been imposed on a man who had been found to have the status of an habitual criminal but it was the conviction of an indictable offence which afforded the

[21] [1961] S.C.R. 144, 34 C.R. 246, 128 C.C.C. 366.

occasion for its imposition and as this appeal is from the sentence and the finding as to status is not an issue it is in my opinion governed by the decision of this Court in *Goldhar v. The Queen, supra.*

As will be apparent from what I have said, I am unable to appreciate any distinction between the present case and the case of *The Queen v. MacDonald* in so far as the question of jurisdiction is concerned.

In my opinion the question is a fundamental one because when such an appeal is taken against the sentence in isolation from the finding as to status, it is nothing more than an appeal from a sentence imposed "in lieu" of a sentence for an indictable offence and I can see no logical distinction between the case of a man who has been sentenced to imprisonment for life for manslaughter, in which case we would have no jurisdiction under the *Goldhar* case, *supra,* and those which followed it, and the case of a man sentenced to preventive detention.

For all these reasons I would dismiss this appeal.

SPENCE J.:—I have had the advantage of reading the reasons for judgment prepared by the Chief Justice and by Ritchie J. It is my intention to follow the course which both of my learned brethren have adopted and consider this appeal on the basis that the appellant has been properly found to be an habitual criminal. I am also ready to accept the view of the Chief Justice that it is not expedient for the protection of the public to sentence the accused to preventive detention and I adopt the reasons outlined by the Chief Justice for such conclusion.

This leaves, therefore, only the question of whether this Court has any jurisdiction to allow the appeal for the latter reason. It is, in my opinion, unnecessary to analyze the various decisions of this Court referred to in the judgments of the Chief Justice and of Ritchie J. They have performed that task most adequately and repetition would add nothing. I propose to approach the problem in a different way and to attempt to determine just what is the appeal which now comes before this Court.

In this case, the accused was convicted on August 10, 1965, on four charges as outlined by the Chief Justice in his reasons and was sentenced to terms of three years' imprisonment upon two of them and two years' imprisonment on the other two, all to run concurrently. By notice

1968

POOLE
v.
THE QUEEN

Spence J.

of application dated November 5, 1965, properly served upon the accused, the prosecutor gave to the accused notice that he was applying to have the accused found to be an habitual criminal and that, therefore, it was expedient for the protection of the public to sentence him to protective detention.

On June 14, 1966, Magistrate Levey found that the accused was an habitual criminal and that it was expedient for the protection of the public to sentence him to protective detention, and, therefore, imposed a sentence of preventive detention upon the accused.

By notice of application for leave to appeal and notice of appeal to the Court of Appeal for British Columbia, the accused appealed "from the said finding (that he was an habitual criminal) and the said sentence (the sentence of preventive detention)" and by a judgment of the Court of Appeal for British Columbia pronounced on November 1, 1966:

> The appeal of the above named appellant from the sentence of preventive detention imposed on him by Magistrate G. L. Levey at Vancouver, B.C., on the 14th June 1966...
>
> THIS COURT DOTH ORDER AND ADJUDGE that the said appeal by the above named appellant from the sentence of preventive detention imposed on him be and the same is hereby dismissed.

The accused obtained leave to appeal to this Court and pursuant to such leave did appeal by notice of appeal dated January 27, 1967. That appeal purported to be "from the judgment of the Court of Appeal for British Columbia made on the 1st day of November 1966 whereby it was adjudged that the appeal of the above named appellant from the judgment of Magistrate G. L. Levey made on the 14th of June 1966 finding that the appellant was an habitual criminal and imposing the sentence of preventive detention was dismissed . . .".

As has been said by the Chief Justice, this is an appeal for which leave was granted under the provisions of s. 41 of the *Supreme Court Act* and is not one which is barred by the provisions of subs. (3) of that section as it is not an appeal "from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence . . .".

Despite the appearance of being an appeal from a sentence of preventive detention, what the appeal consisted of in the Court of Appeal for British Columbia and what, in my view, it consists of here, is an appeal from a decision which has resulted in the accused being sentenced to preventive detention. I say this despite the words of s. 667(1) of the *Criminal Code* which provides "a person who is sentenced to preventive detention under this Part may appeal to the Court of Appeal against that sentence on any ground of law or fact or mixed law and fact". However much those words may imply an ordinary appeal against sentence the matters considered in this case and in all the other cases in the provincial courts of appeal are not the matters considered in an ordinary appeal from sentence but on the other hand resemble the consideration of appeals from conviction. So in s. 583(*b*) of the *Criminal Code*:

> 583. A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> * * *
>
> (*b*) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

(The underlining is my own.)

In consideration of such appeals against sentence the court of appeal commences and should commence with the conviction and proceed to consider whether the form and length of sentence chosen by the trial court is appropriate to the particular circumstances of the case and the characteristics of the convicted person.

The task of the provincial Court of Appeal in considering an appeal under the provisions of s. 667 of the *Criminal Code* is quite different. There the Court must consider whether each element of the finding of the Court hearing the application is supportable. Those elements are as follows:

(a) the conviction of an indictable offence, i.e., the substantive offence;

(b) that the accused is an habitual criminal in that he has since attaining the age of 18 years on at least

1968

POOLE v. THE QUEEN

Spence J.

three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more, and that he is leading a persistently criminal life;

(c) that because the accused is an habitual criminal it is expedient for the protection of the public to sentence him to preventive detention.

If the Court hearing the application found that each of these three prerequisites was satisfied then the Court hearing the application may impose a sentence of preventive detention. The Court hearing the application had no alternative but to impose such sentence of preventive detention or refuse to do so. The court hearing the application, for instance, could not have imposed a sentence of eight years rather than the 2 or 3 years given for the substantive offences. It is an example of a sentence fixed by law in the words of s. 583(*b*) of the *Criminal Code*. So the provincial Court of Appeal when considering the appeal from the sentence of preventive detention must consider the same three questions which I have recited above. The provincial Court of Appeal must find affirmatively as to these three questions before it may affirm the sentence of preventive detention.

In my view, the leave to appeal to this Court, which was properly granted by this Court, brings forward for consideration the same three matters and it is the right and the duty of this Court acting within its jurisdiction as granted by s. 41 of the *Supreme Court Act* to consider all three matters. In doing so, this Court is not going beyond its jurisdiction as limited by the series of cases such as *Goldhar v. The Queen*[22], *Paul v. The Queen*[23] and *The Queen v. Alepin Frères Ltée, et al.*[24].

In each of these cases the Court refused to consider an appeal which concerned the propriety of a sentence imposed after a conviction. In the present case, it is proposed that this Court consider whether or not a sentence of preventive detention should be imposed upon the

[22] [1960] S.C.R. 60, 125 C.C.C. 209, 31 C.R. 374.
[23] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.
[24] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.

accused and determine that question upon its opinion as to whether he falls within the three categories in which it is necessary for him to fall before such sentence may be imposed.

For these reasons I concur with the opinion of the Chief Justice and would allow the appeal.

PIGEON J.:—Having had the advantage of reading the reasons for judgment prepared by the Chief Justice and by Ritchie and Spence JJ., I agree with the Chief Justice that, on the assumption that the finding that the appellant is an habitual criminal should not be disturbed, it has not been shown that it is expedient for the protection of the public to sentence him to preventive detention.

On the question of jurisdiction, all my brethren agree that this Court has jurisdiction under s. 41 of the *Supreme Court Act* to hear appeals by special leave in the case of persons sentenced to preventive detention. The only difference of opinion is whether this jurisdiction is limited to a review of the finding that the accused is an habitual criminal in the same way as in appeals from indictable offences under the provisions of the *Criminal Code*, it is restricted to questions pertaining to conviction as opposed to sentence.

After anxious consideration, I have come to the conclusion that no such restriction exists. The basis for the distinction in appeals under the *Criminal Code* is that its provisions for appeals to the Court of Appeal in ordinary cases contemplate separate and distinct rights of appeal against conviction and against sentence. (Sections 583, 584, 720, etc.). In the case of sentences of preventive detention passed upon habitual criminals, a single right of appeal is provided for embracing all grounds of law or fact or mixed law and fact (Section 667). This appeal is given against the sentence of preventive detention, not separately against the finding that the accused is an habitual criminal and the conclusion that it is expedient to sentence him to preventive detention. It does therefore contemplate a review of all the questions involved in passing this sentence, that is the question of whether this is expedient for the protection of the public as well as the finding that the

1968

POOLE v. THE QUEEN

Pigeon J.

accused is an habitual criminal. Seeing that no one doubts that s. 41 of the *Supreme Court Act* confers jurisdiction to hear appeals by special leave from the decision of the Court of Appeal in such cases, I can find no basis for deciding that this jurisdiction is limited to a consideration of a part only of the questions involved in the judgment appealed from.

The previous decisions of this Court concerning our jurisdiction over sentences of preventive detention are reviewed in the reasons for judgment of the Chief Justice and of my brother Ritchie. I agree with the Chief Justice that in considering them one should bear in mind the rule, often stated, that "a case is only an authority for what it actually decides". On that basis, I do not find that it was ever decided that our jurisdiction in dealing with appeals against sentences of preventive detention is limited to a review of the finding that the accused is an habitual criminal.

For those reasons, I concur in disposing of the appeal as proposed by the Chief Justice.

Appeal allowed, FAUTEUX, ABBOTT, MARTLAND *and* RITCHIE JJ. *dissenting.*

Solicitor for the appellant: B. H. Kershaw, Vancouver.

Solicitor for the respondent: R. D. Plommer, Vancouver.

NORMAN R. WHITTALL ..... APPELLANT;

AND

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

1967

*May 1, 2
Oct. 3

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

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

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

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

Held: The appeal should be dismissed.

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

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

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

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

1967

N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE

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

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

Arrêt: L'appel doit être rejeté.

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

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

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

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

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

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

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

1967

N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE

The judgment of the Court was delivered by

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

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

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

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

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

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

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

1967

N.R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Martland J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1967

N.R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Martland J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1967

N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Martland J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1967

N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Martland J.

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

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

Date	*Number Purchased*	*Price Per Share*	*Number Sold*	*Sales Price Per Share*
15 January 1954.....			16,500	2.48/2.70
13 May.....	500	3.19		
21 May.....	2,100	2.30/2.50		
1 June.....	2,000	2.57/2.62		
6 July.....	2,900	0.91/2.51½		
8 July.....	3,000	1.31/1.36		
19 July.....	1,000	1.16		
17 September.....	2.000	1.95		
27 September.....	2,000	2.02		
19 October.....			2,500	2.63
12 November.....	2,500	2.01½		
23 November.....			2,000	2.75/2.85
3 December.....			1,000	2.68½
6 December.....			8,000	2.78½/2.83
7 December.....			4,000	2.88½
Total.....	18,000		34,000	

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

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

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

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

Profit on sale of shares of Yankee Princess Oils Ltd. from 29th January, 1952, to 21st April, 1952, as per schedule filed with respondent	
105,250 shares	$110,157.34

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

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

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

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

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

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

The appellant	37½%
McQueen	37½%
Ross	25 %

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

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

1967

N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Martland J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1967

N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Martland J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1967

N.R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Martland J.

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

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

for 1953

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

for 1954

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

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

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

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

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

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

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

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

The appellant personally acquired 25,000 shares.

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

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

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

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

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

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

> (*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

1967

N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Martland J.

He reached the following conclusions:

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

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

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

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

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

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

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

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

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

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

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

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

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

1967
N. R. WHITTALL
v.
MINISTER OF NATIONAL REVENUE
Martland J.

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

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

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Russell & Dumoulin, Vancouver.

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

1967
*May 1, 2
Oct. 3

H. RICHARD WHITTALL .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

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

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1] in a case of income tax in which the facts and the circumstances surrounding the profit making transactions were substantially the same as those in the case of *Norman R. Whittall v. M.N.R.*, [1968] S.C.R. 413, the judgment of which was rendered at the same time as the present judgment.

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

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

[1] [1965] 1 Ex. C.R. 367, [1964] C.T.C. 440, 64 D.T.C. 5279.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1] dans une cause d'impôt sur le revenu où les faits et les circonstances se rapportant aux opérations qui ont permis au contribuable de réaliser un profit étaient substantiellement les mêmes que ceux que l'on trouve dans la cause de *Norman R. Whittall v. M.N.R.*, [1968] R.C.S. 413, dont le jugement a été rendu en même temps que le jugement actuel.

Douglas McK. Brown, Q.C., for the appellant.

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

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from judgments of the Exchequer Court of Canada[1], which dismissed the appellant's appeal from re-assessments, for income tax purposes, of his income in the taxation years 1952, 1953 and 1954.

The appeal to this Court was heard jointly with the appeal of Norman R. Whittall, the father of the appellant.

The issue for determination in this case is the same as in the case of *Norman R. Whittall*[2], that is as to whether profits realized by the appellant, in this case, a total of $88,128.08, on the acquisition and sale of units of the St. John's Trust, and of shares of Inland Natural Gas Co. Ltd., Yankee Princess Oils Ltd., and Canadian Collieries (Dunsmuir) Ltd., were income from a business within the meaning of ss. 3 and 4 and para. (*e*) of subs. (1) of s. 139 of the *Income Tax Act*, R.S.C. 1952, c. 148, or represented a realization upon the disposition of an investment so as to constitute a capital gain.

The essential facts of this case are substantially similar to those of the case of *Norman R. Whittall*, but the amounts involved are less. Also the appellant in this case was a director and officer of St. John Oil & Gas Co. Ltd. and of Yankee Princess Oils Ltd., but was not a director of the other companies of which his father was a director and which are referred to in my reasons in the *Norman R. Whittall* case.

The appellant was a shareholder and officer of Ross Whittall Limited from 1950 to 1954, when it was wound up, and

[1] [1965] 1 Ex. C.R. 367, [1964] C.T.C. 440, 64 D.T.C. 5279.
[2] [1968] S.C.R. 413, [1967] C.T.C. 377, 67 D.T.C. 5264.

1967

H. R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Martland J.

thereafter was an officer and director of Norman R. Whittall Limited, the successor company. He owned about 20 per cent of the equity capital of Ross Whittall Limited.

The development and acquisition of the appellant's interest in the St. John's Trust, Inland Natural Gas Co. Ltd., Yankee Princess Oils Ltd. and Canadian Collieries (Dunsmuir) Ltd. were similar to those detailed in my reasons in the *Norman R. Whittall* case.

The conclusions of the learned trial judge in this case were as follows:

> For the reasons given in the case of *Norman R. Whittall v. The Minister of National Revenue,* the general finding that these transactions were trading operations as part of the business is applicable in this case, and also because of the particular fiduciary relationships of the appellant with certain of these companies and their shareholders in his capacity as director thereof, I find that these transactions in these securities did not constitute "ordinary" investments, and therefore, I am of opinion that the profits realized from the sales of the securities more particularly set out in the reassessment notices for 1952, 1953 and 1954 were profits from a business within the meaning of section 3 of the *Income Tax Act,* and that the Minister was right in including it in the assessment.

What I said in the *Norman R. Whittall*[2] case regarding the ground based upon the appellant's fiduciary relationship to the companies of which he was a director applies also in this case. There is no evidence of any breach of the duty owed by the appellant as a director of those companies. There was, however, ample evidence to justify the conclusion that the transactions involved were trading operations as part of a business, within s. 139(1)(*e*) of the Act.

For that reason, in my opinion, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Russell & Dumoulin, Vancouver.

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

2 [1968] S.C.R. 413, [1967] C.T.C. 377, 67 D.T.C. 5264.

CANADIAN IMPERIAL BANK OF COMMERCE ..... APPELANTE;

ET

GENERAL FACTORS LIMITED ..... INTIMÉE;

ET

SAMUEL DRUKER ET LARRY SMITH ..... MIS-EN-CAUSE.

1967
*Déc. 6
1968
Mars 13

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

Banques—Avances faites par une banque et par une société faisant le commerce d'escompte—Transport général par le débiteur à la banque de tous ses comptes recevables—Transport particulier à la société de certains comptes recevables—Garantie de l'art. 88 de la Loi sur les banques—Mise en faillite du débiteur—Requête de la société pour être déclarée propriétaire d'une liste de comptes—Code civil, art. 1570 et seq.—Loi sur les banques, 1953-54 (Can.), c. 48, art. 88—Loi sur la faillite, S.R.C. 1952, c. 14.

En 1958, la débitrice a transporté à la banque appelante tous ses comptes recevables. Ce transport a été enregistré et publié conformément à l'art. 1571*d* du *Code civil* et un préavis a été donné et publié en vertu de l'art. 88 de la *Loi sur les banques*, 1953-54 (Can.), c. 48. L'intimée, une société faisant le commerce d'escompte, s'est fait consentir par la débitrice en diverses circonstances des transports particuliers de créances. La société payait le montant escompté des créances par chèque à l'ordre de la débitrice et de la banque conjointement. Il est en preuve que la débitrice a régulièrement fourni à la banque au moment où elle déposait chaque chèque une liste des comptes faisant l'objet de l'opération. Il est également en preuve que les préposés de la banque vérifiaient ces listes et retranchaient le montant des comptes qui y étaient inscrits du montant des comptes recevables déclarés par la débitrice. Subséquemment à la mise en faillite de la débitrice, l'intimée a demandé d'être déclarée propriétaire de certains comptes recevables décrits dans deux listes. Le syndic de la faillite ayant rejeté la réclamation, un appel fut logé à la Cour supérieure siégeant en matière de faillite. Seule la banque a produit une contestation. La Cour supérieure a fait droit à la requête de l'intimée, et la Cour d'appel, par un jugement majoritaire, a confirmé ce jugement. La banque en appela à cette Cour avec la permission prévue par la *Loi sur la faillite*.

Arrêt: L'appel doit être rejeté.

La banque ne pouvait pas envers l'intimée soutenir que les comptes en question lui appartenaient. En négociant les chèques de l'intimée, sachant pertinemment qu'ils étaient la considération du transport de créances de la débitrice, la banque, étant l'une des bénéficiaires des chèques, acceptait implicitement que ces créances soient cédées à

* CORAM: Les Juges Fauteux, Abbott, Martland, Judson et Pigeon.

1968

CANADIAN IMPERIAL BANK OF COMMERCE *v.* GENERAL FACTORS LTD. *et al.*

l'intimée. L'ensemble de la preuve démontre que la banque avait une connaissance parfaite de chacune des opérations et vérifiait au fur et à mesure le montant de chacune des créances transportées et en déduisait la somme du total des dettes actives de la débitrice. Rien dans la preuve ne saurait invalider l'effet de ce consentement implicitement donné.

Banks and banking—Moneys advanced by a bank and by a discount corporation—General assignment by the debtor to the bank of all accounts receivable—Specific assignment to the corporation of certain accounts receivable—Security under s. 88 of the Bank Act—Debtor in bankruptcy—Claim by the corporation that it is the owner of a list of accounts—Civil Code, arts. 1570 et seq.—Bank Act, 1953-54 (Can.), c. 48, s. 88—Bankruptcy Act, R.S.C. 1952, c. 14.

In 1958, the debtor assigned to the appellant bank all its accounts receivable. This assignment was registered and published pursuant to art. 1571*d* of the *Civil Code* and the notice as provided for in s. 88 of the *Bank Act*, 1953-54 (Can.), c. 48, was given and published. The respondent, a discount corporation, obtained from time to time from the debtor specific assignments of book debts. The payment of the discounted amount of the debts was made by the corporation by cheques to the order of the debtor and of the bank jointly. It is established that the bank was regularly furnished by the debtor with a list of accounts covered by the cheques. It is also established that the bank's employees verified these lists and substracted the amount of the accounts therein inscribed from the amount of the accounts receivable as declared by the debtor. After the debtor became bankrupt, the respondent corporation filed a claim for certain accounts receivable. The claim was rejected by the trustee, and an appeal was launched to the Superior Court sitting in bankruptcy. Only the bank filed a contestation. The Superior Court allowed the respondent's claim. This judgment was affirmed by a majority decision of the Court of Appeal. The bank appealed to this Court with leave as provided for in the *Bankruptcy Act*, R.S.C. 1952, c. 14.

Held: The appeal should be dismissed.

The Bank could not claim the ownership of these accounts as against the respondent corporation. By negotiating the respondent's cheques, knowing pertinently that they had been given as a consideration for the assignment of the debts, the bank, as one of the beneficiaries of the cheques, accepted implicitly that these debts be assigned to the respondent corporation. The whole of the evidence shows that the bank had a perfect knowledge of each of the transactions and verified the amount of each of these assigned debts and deducted that sum from the total of the active debts of the debtor. There was nothing in the evidence which could invalidate the effect of this consent implicitly given.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Meunier J. Appeal dismissed.

[1] [1966] B.R. 994.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Meunier. Appel rejeté.

L. P. De Grandpré, c.r., et *A. M. Boulton, c.r.,* pour l'appelante.

J. P. Bergeron, c.r., et *P. E. Blain,* pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—Dans cette affaire l'intimée, General Factors Ltd., (ci-après désignée «Factors») a réclamé du syndic de la faillite d'Aluminum Door and Window Co. Ltd. (ci-après désignée «Aldor») une série de comptes recevables décrits dans deux listes formant un total de $122,341.94 et $8,452.18 respectivement. Le syndic a donné un avis de rejet de la réclamation au motif que la débitrice avait, le 26 juillet 1958, cédé tous ses comptes recevables, présents et à venir, à la Banque Canadienne de Commerce, maintenant la Banque Canadienne Impériale de Commerce, (ci-après désignée «la Banque»).

Là-dessus, Factors a interjeté appel à la Cour supérieure siégeant en matière de faillite. Le syndic n'a pas contesté la requête par laquelle cet appel a été formé mais une contestation a été produite par la Banque qui était mise en cause. La Cour supérieure a fait droit à la requête et la Banque seule a interjeté appel à la Cour du banc de la reine[1]. Celle-ci ayant confirmé par un arrêt majoritaire, la Banque a formé le pourvoi devant cette Cour avec la permission prévue par la *Loi sur la faillite.* Les deux mis-en-cause sont le syndic et l'agent chargé de la perception des comptes en litige.

Il est constant que la débitrice a, dès 1958, transporté à la Banque tous ses comptes recevables et que ce transport a été fait, enregistré et publié conformément à l'art. 1571*d* du *Code civil.* De plus, le 30 novembre 1959, un préavis a été donné et publié en vertu de l'art. 88 de la *Loi sur les banques* et le 2 décembre un contrat relatif à ce genre de garantie a été signé, suivi ultérieurement de garanties visant toute la marchandise.

Quant à Factors, elle s'est fait consentir par Aldor en diverses circonstances des transports particuliers des

[1] [1966] B.R. 994.

1968

CANADIAN IMPERIAL BANK OF COMMERCE v. GENERAL FACTORS LTD. et al.

Le Juge Pigeon

créances en litige. Ces transports ont tous été faits moyennant le paiement comptant par Factors du montant des créances moins un escompte de 15 pour cent ou de 20 pour cent. Dans tous les cas, le paiement a été fait par chèque à l'ordre d'Aldor et de la Banque conjointement. La preuve démontre également qu'Aldor a régulièrement fourni à la Banque, en même temps qu'elle déposait chaque chèque de Factors ou peu après, une liste des comptes faisant l'objet de l'opération. Il est également démontré que les préposés de la Banque vérifiaient ces listes et retranchaient le montant des comptes qui y étaient inscrits du montant des comptes recevables déclarés par Aldor. Dans ces conditions, la Banque peut-elle envers Factors soutenir que les comptes lui appartiennent?

En premier lieu, on prétend que Factors n'a pas fait de paiement à la Banque parce que les chèques dont il s'agit ont été déposés au crédit du compte courant d'Aldor et non pas au crédit de son compte d'emprunt. Pour juger du bien fondé de cette prétention, il suffit de se demander si la Banque serait recevable à l'invoquer envers un débiteur d'Aldor qui aurait acquitté sa dette au moyen d'un chèque fait de cette façon. La Banque pourrait-elle dire à ce débiteur «la créance m'appartient et ce n'est pas à moi mais à Aldor que vous avez fait remise». Le procureur de l'appelante n'a pas osé le soutenir devant nous. En effet, il est évident que la Banque étant l'une des bénéficiaires du chèque celui-ci ne peut être valablement négocié sans son concours. En permettant qu'il soit déposé au crédit de l'autre bénéficiaire, elle en dispose tout aussi effectivement que si elle jugeait à propos de l'encaisser à son profit avec l'endossement de l'autre bénéficiaire. Autrement dit, lorsque les deux personnes à l'ordre desquelles un effet de commerce a été émis s'entendent pour l'endosser et en disposer, chacune d'elles participe à l'opération. Si ce principe doit recevoir son application dans le cas où le chèque est donné par le débiteur d'une créance qui a fait l'objet d'un transport en garantie, où est la raison d'en décider autrement dans le cas où l'effet de commerce est donné par le cessionnaire de la créance au lieu de l'être par le débiteur? En négociant les chèques de Factors sachant pertinemment qu'ils étaient la considération du transport de créances d'Aldor, la Banque acceptait implicitement qu'elles soient cédées à Factors, tout comme

dans *Hurly c. Bank of Nova Scotia*[2] cette banque prenant au crédit de son client le chèque donné en paiement d'un certain nombre de têtes de bétail à elle transportées, consentait implicitement que la vente lui en soit opposable.

En second lieu, on affirme que la Banque ne savait pas qu'il s'agissait du transport du prix de contrats obtenus par Aldor mais croyait qu'il s'agissait de créances reconnues par billet ou par chèque postdaté. Cette prétention est fondée sur le témoignage du gérant de la Banque, mais, ni la Cour supérieure, ni la majorité en Cour d'Appel, n'y ont ajouté foi. Rien ne saurait nous justifier d'en venir à une conclusion différente car l'ensemble de la preuve démontre que la Banque avait une connaissance parfaite de chacune des opérations et vérifiait au fur et à mesure le montant de chacune des créances transportées et en déduisait la somme du total des dettes actives d'Aldor. Le gérant prétend que l'on faisait cela uniquement pour déterminer la marge de crédit et qu'il n'entendait pas permettre à Aldor d'escompter des créances qui n'étaient pas reconnues par un effet de commerce. Cette distinction ne saurait tenir. Tout d'abord les droits de la Banque étaient les mêmes à l'égard des deux catégories de créances. Le transport de 1958 vise explicitement non seulement les créances, mais aussi les effets de commerce ou billets donnés pour ces créances. En supposant que le gérant de la Banque aurait cru erronément que les transports consentis à Factors visaient des créances reconnues par effets négociables alors qu'il n'en était pas ainsi, cette erreur ne saurait invalider l'effet du consentement implicitement donné à l'opération en permettant que les chèques de Factors soient encaissés.

Il faut faire une semblable observation en réponse à l'argument que l'on tire de la réponse adressée par le gérant de la Banque à une lettre de Factors en date du 25 juillet 1962. Dans cette lettre, on lui demandait de reconnaître qu'à la condition de faire les chèques à l'ordre d'Aldor et de la Banque conjointement, Factors obtenait un bon titre aux créances négociées, nonobstant le transport général de créances et la garantie sous l'art. 88 de la *Loi sur les banques* antérieurement consentis en faveur de la Banque. Dans sa réponse, le gérant tout en refusant de donner l'assurance sollicitée, déclare que ses conversations avec M.

[2] [1966] R.C.S. 83, 54 D.L.R. (2d) 1, (1965), 53 W.W.R. 627.

1968

CANADIAN IMPERIAL BANK OF COMMERCE v. GENERAL FACTORS LTD. et al.

Le Juge Pigeon

Galet, l'administrateur de Factors, avaient eu trait à la manière dont l'appui accordé par Factors à Aldor pouvait continuer à alléger les difficultés de cette dernière. Il est bien évident que Factors ne pouvait pas continuer à aider Aldor autrement qu'en continuant à escompter des créances; nulle part le gérant de la Banque ne suggère que Factors faisait d'autres opérations que celle-là. Malgré l'équivoque qu'implique le refus d'une réponse claire, la lettre implique une reconnaissance par le gérant de la Banque de son consentement à la poursuite d'opérations d'escompte entre Factors et Aldor. Du reste, comme on l'a vu, ce consentement s'infère nécessairement du fait capital qu'est la participation continuelle à la négociation des chèques.

On a ensuite invoqué l'invalidité du transport général de créances consenti à Factors par Aldor le 19 juillet 1962. Il est indubitable que l'une des publications requises par l'art. 1571*d* du *Code civil* n'a pas été faite. Toutefois, même si cela rend ce transport sans effet à l'égard des tiers, cela ne saurait avoir aucune influence sur la validité des transports particuliers. De toute façon, à l'égard de la Banque, le transport général est sans valeur puisqu'il est de plusieurs années postérieur au sien. Dans la présente cause, le transport général ne saurait présenter d'intérêt que pour des créances qui n'auraient pas fait l'objet d'un transport particulier mais ce cas ne se soulève pas; toutes les créances en litige sont réclamées en vertu de transports particuliers. Il est inutile de s'interroger sur la suffisance de la preuve de la signification de ces transports par des copies de lettres adressées par Factors aux débiteurs, ni sur la validité de ce mode de signification car le litige n'est pas entre le cessionnaire et un tiers, mais entre le cessionnaire et la véritable cédante, la Banque. (Art. 1570 et 1571 c.c.).

Cela dispose également du dernier moyen invoqué par la Banque, savoir le fait qu'après la faillite d'Aldor, des marchandises d'une valeur d'environ $9,000 ont servi à compléter l'exécution de contrats dont le prix avait été transporté à Factors. Évidemment ces marchandises appartenaient à la Banque en vertu de sa garantie sous l'art. 88 de la *Loi sur les banques* et elle soutient qu'elle doit avoir le bénéfice des créances découlant de leur utilisation à une époque où sa débitrice avait cessé d'en avoir la possession. La réponse à cet argument, c'est que la Banque étant, par

la négociation des chèques, devenue partie à la cession du prix des contrats avant leur exécution, devait subir la conséquence de la garantie de l'existence des créances envers Factors, si les marchandises n'avaient pas été utilisées pour parachever l'exécution des contrats, Factors aurait eu droit de réclamer de la Banque sinon le prix des contrats, du moins le remboursement du montant versé en considération du transport de créances inexistantes. (Art. 1510 et 1576 c.c.).

Pour ces motifs l'appel doit être rejeté avec dépens.

Appel rejeté avec dépens.

Procureurs de l'appelante: Lafleur & Brown, Montréal.

Procureurs de l'intimée: Blain, Piché, Bergeron, Godbout & Emery, Montréal.

1968
*Feb. 7, 8
Apr. 1

THE STANWARD CORPORATION (*Plaintiff*) ..... APPELLANT;

AND

STANROCK URANIUM MINES LIMITED (made a Party Appellant pursuant to Suggestion filed);

AND

DENISON MINES LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mines and minerals—Owner of mining claims purchasing additional claims —Royalty agreement—Subsequent amalgamation of purchaser with another company—Ore mined from claims formerly belonging to other company—Whether said claims "adjacent" to purchaser's original claims within meaning of that term as used in royalty agreement.

The plaintiff company brought an action to recover royalties claimed by it from D company in respect of uranium ore mined from certain claims pursuant to an agreement dated January 6, 1956. The plaintiff owned a block of 18 mining claims and the CM company owned a block of 14 claims lying immediately to the west of the plaintiff's block of claims. The CD company owned a block of 88 claims lying to the west of the CM claims. The distance between the most easterly claim of the CD block and the most westerly of the CM claims was approximately one-quarter of a mile.

By the agreement of January 6, 1956, the CM company purchased the plaintiff's 18 mining claims for $300,000 cash and 50,000 shares of CM

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

1968

STANWARD CORPORATION *et al.* *v.* DENISON MINES LTD.

stock. In addition, the agreement contained a royalty clause the meaning of which was that no royalties were to be paid on the first 4,000,000 tons of ore mined from the claims covered by the agreement (*i.e.*, the combined 32 claims and "any other claims which [CM] may acquire adjacent" to its original 14 claims), and that a $1 a ton royalty attached only to the next 750,000 tons mined.

By agreement dated January 4, 1960, CD and CM agreed to amalgamate under the provisions of *The Corporations Act,* 1953 (Ont.), c. 19, and to continue as D company. Up to the date of the amalgamation 1,996,856 tons of ore were mined by CM from the CM block of claims and the plaintiff's block of claims, and after the amalgamation and up to the date of the issue of the writ, February 14, 1962, no further ore was mined from those blocks of claims. Up to the date of the writ, 3,790,870 tons of ore were mined by D from the block of claims which, prior to the amalgamation, belonged to CD and by August 5, 1961, the combined production by CM before amalgamation and by D thereafter had reached a total of 4,750,000 tons. The ore mined after the amalgamation was taken from only 21 of the claims previously owned by CD and of these 21 claims the one which was closest to any of the CM claims was separated from it by a distance of approximately one and a quarter miles.

The basis of the plaintiff's claim was that the claims in the CD block were adjacent to the CM claims and were acquired by CM within the meaning of the royalty agreement. The trial judge dismissed the action and an appeal from his judgment was dismissed by the Court of Appeal. An appeal was then brought to this Court.

Held: The appeal should be dismissed.

As to the defence that the CD claims were not adjacent to the CM claims within the meaning of that term as used in the royalty agreement, the appellant's argument that the question to be decided was not whether the 21 claims from which the ore was actually mined were adjacent to the CM claims but rather whether the whole block of 88 claims should be regarded as so adjacent was rejected.

The Court agreed, as did the Court of Appeal, with the conclusion of the trial judge that the CD claims from which the ore was mined were not adjacent to those set out in the royalty agreement and also with his reasons for reaching that conclusion. *Mayor, etc., of the City of Wellington v. Mayor, etc., of the Borough of Lower Hutt,* [1904] A.C. 773, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Gale C.J.H.C., now C.J.O., whereby an action for royalties on ore mined from certain claims was dismissed. Appeal dismissed.

C. F. H. Carson, Q.C., and *J. R. Houston,* for the plaintiff, appellant.

John J. Robinette, Q.C., and *J. D. Arnup, Q.C.,* for the defendant, respondent.

[1] [1966] 2 O.R. 585, 57 D.L.R. (2d) 674.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from a unanimous judgment of the Court of Appeal for Ontario[1] dismissing an appeal from the judgment of Gale C.J.H.C., as he then was, whereby the action of the appellant The Stanward Corporation, hereinafter referred to as "Stanward", was dismissed with costs.

The facts are fully set out in the reasons for judgment of Gale C.J.H.C. and a comparatively brief summary will be sufficient to indicate the reasons for the conclusion at which I have arrived.

The action was brought by Stanward to recover royalties in the amount of $750,000 claimed by it from Denison Mines Limited, hereinafter referred to as "Denison", in respect of uranium ore mined from claims in the Blind River area of the Province of Ontario pursuant to an agreement under seal in the form of a letter dated January 6, 1956, from Stanward, then named Stancan Uranium Corporation, addressed to and accepted by Can-Met Explorations Limited, hereinafter referred to as "Can-Met".

Prior to the execution of this royalty agreement, Stancan owned a block of eighteen mining claims in the Blind River area and Can-Met owned a block of fourteen claims lying immediately to the west of the Stancan block of claims. Another company, Consolidated Denison Mines Limited, hereinafter referred to as "Consolidated Denison", owned a block of eighty-eight claims lying to the west of the Can-Met claims. The distance between the most easterly claim of the Consolidated Denison block and the most westerly of the Can-Met claims was approximately one-quarter of a mile.

All of the three blocks of claims mentioned above lie in part under the waters of Quirke Lake and the same ore body extends through the Consolidated Denison block into the northerly part of the Can-Met and Stancan blocks.

On June 13, 1956, Can-Met entered into a contract with Eldorado Mining and Refining Limited, hereinafter called "Eldorado", a Crown corporation, for the sale of 7,350,000 pounds of uranium oxide. This contract was referred to as the "Initial Contract".

[1] [1966] 2 O.R. 585, 57 D.L.R. (2d) 674.

1968

STANWARD CORPORATION *et al.* *v.* DENISON MINES LTD.

Cartwright C.J.

By the agreement of January 6, 1956, referred to above, Can-Met purchased the appellant's eighteen mining claims for $300,000 cash and 50,000 shares of Can-Met stock. It is admitted that this cash was paid and the stock issued. There was a further consideration set out in para. 3 of the agreement, which read as follows:

> 3. You '(Can-Met)' shall pay us a royalty equal to $1.00 per ton on each ton of ore mined from the ground covered by any of the claims listed in paragraph numbered 1 above, (the plaintiff's eighteen claims) or any of the claims listed below in this paragraph 3; *provided* that such royalties shall not exceed $750,000 in the aggregate; and *provided further* that such royalties shall not be payable until 4,000,000 tons of ore shall be mined from such claims, or until you shall have fulfilled deliveries of concentrates under your anticipated initial contract with Eldorado Mining and Refining Limited, whichever shall occur sooner:
>
> S.67832—67843, inclusive,
> S.82986,
> S.82987,
> or any other claims which you may acquire adjacent thereto.

The plaintiff's claim rests on the allegation that more than 4,000,000 tons of ore have been mined from the claims referred to in this royalty agreement. It is common ground that the meaning of the royalty clause was that no royalties were to be paid on the first 4,000,000 tons of ore mined from the claims covered by the agreement, and that the $1 a ton royalty attached only to the next 750,000 tons mined.

By agreement dated January 4, 1960, Consolidated Denison and Can-Met agreed to amalgamate, under the provisions of *The Corporations Act,* 1953 (Ont.), c. 19, under the name of Denison Mines Limited.

It is agreed that up to the date of the amalgamation 1,996,856 tons of ore had been mined by Can-Met from the Can-Met block of claims and the Stancan block of claims, that after the amalgamation and up to the date of the issue of the writ no further ore was mined from those blocks of claims and that all the rest of the ore required to fulfill the Initial Contract with Eldorado was mined from the block of claims which, before the amalgamation, belonged to Consolidated Denison. It is also agreed that up to February 14, 1962, the date of the issue of the writ, 3,790,870 tons of ore were mined by Denison from the block of claims which, prior to that amalgamation, belonged to Consolidated Denison and that by August 5, 1961, the

combined production by Can-Met before amalgamation and by Denison thereafter had reached a total of 4,750,000 tons.

The basis of the appellant's claim is that the claims in the Consolidated Denison block were adjacent to the Can-Met claims and were acquired by Can-Met within the meaning of the royalty agreement.

The claim was resisted on three grounds:

1. That the Consolidated Denison claims were not acquired either by Can-Met or by Denison within the meaning of that term as used in the royalty agreement;
2. That the claims from which the ore was mined following the amalgamation were not adjacent to the claims referred to in the royalty agreement within the meaning of that term as used in the agreement;
3. That even if the appellant was otherwise entitled to succeed on its claim, it had lost its right because prior to the amalgamation Can-Met made a proposal in bankruptcy under the *Bankruptcy Act* and Stanward failed to prove its claim in that proceeding although it had notice thereof.

Gale C.J.H.C. was of opinion that the eighty-eight Consolidated Denison claims were acquired by Can-Met or by Denison within the meaning of that term as used in the royalty agreement but that the claims from which the ore was mined were not adjacent to the Can-Met claims and consequently he found it unnecessary to deal with the defence founded on the provisions of the *Bankruptcy Act*.

The unanimous judgment of the Court of Appeal was delivered by Kelly J.A. who held that the Consolidated Denison claims were not acquired by either Can-Met or Denison and that on this ground the action failed. He also expressed his complete agreement with the reasons and conclusion of the learned trial Judge as to the claims from which the ore was mined not being adjacent to the Can-Met claims. Consequently he also refrained from dealing with the defence under the *Bankruptcy Act*.

I find it necessary to deal only with the defence that the Consolidated Denison claims were not adjacent to the Can-Met claims within the meaning of that term as used in the royalty agreement. As already mentioned, the most easterly

1968

STANWARD CORPORATION *et al.* *v.* DENISON MINES LTD.

Cartwright C.J.

of the Consolidated Denison claims was separated by approximately one-quarter of a mile from the most westerly of the Can-Met claims. The ore mined after the amalgamation was taken from only twenty-one of the claims previously owned by Consolidated Denison and of these twenty-one claims the one which was closest to any of the Can-Met claims was separated from it by a distance of approximately one and a quarter miles.

It was urged for the appellant that the question to be decided on this branch of the matter was not whether the twenty-one claims from which the ore was actually mined were adjacent to the Can-Met claims but rather whether the whole block of eighty-eight claims should be regarded as so adjacent. Gale C.J.H.C. rejected this argument and in my opinion rightly so.

I find myself, as did the Court of Appeal, in full agreement with the conclusion of Gale C.J.H.C. that the Consolidated Denison claims from which the ore was mined were not adjacent to those set out in the royalty agreement and also with his reasons for reaching that conclusion.

If I had been doubtful in the matter it would still have been my opinion that no sufficient ground has been shown to enable us to differ from the conclusion of Gale C.J.H.C. confirmed, as it has been, by the Court of Appeal. It appears to me that a passage in the judgment of the Judicial Committee in *Mayor, etc., of the City of Wellington v. Mayor, etc., of the Burrough of Lower Hutt*[2] is apposite. That case turned on the meaning of the word "adjacent" as used in a statute. After stating that the word is not one to which a precise and uniform meaning is attached by ordinary usage and that it is entirely a question of circumstances what degree of proximity would justify the application of the word, Sir Arthur Wilson, at p. 776, continued:

> . . . It is enough for the decision of this appeal to say that their Lordships could not properly advise His Majesty to interfere with the decision appealed against unless they were clearly satisfied that the view of the majority of the learned judges as to the meaning of the section and its application to the present case was wrong, and they are far from being so satisfied.

This applies *a fortiori* when, as in the case at bar, the Courts below have been unanimous.

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[2] [1904] A.C. 773.

1968

STANWARD CORPORATION *et al.* v. DENISON MINES LTD.

Cartwright C.J.

I do not find it necessary to have resort to the maxim, *Verba chartarum fortius accipiuntur contra proferentem* (Co. Litt. 36 a), but it does appear that the royalty agreement was prepared by the advisers of the appellant.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Cassels, Brock, Des Brisay, Guthrie & Genest, Toronto.

Solicitors for the defendant, respondent: Fraser, Beatty, Tucker, McIntosh & Stewart, Toronto.

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

1968

* Mar. 22
Apr. 1

AND

ALGOMA CENTRAL RAILWAY ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductible expense or capital outlay—Moneys paid by railway company for geological survey—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(b).

In order to improve its transportation business, the respondent company arranged for a geological survey of the mineral possibilities of a section of the unpopulated land through which its railway ran in the province of Ontario. The purpose was to make the information arising from the survey available to the public, in the hope and expectation that it would lead to development of the area and thus increase traffic over the transportation system. In the computation of the respondent's income for the years 1960, 1961 and 1962, the Minister refused to allow the deduction of the moneys paid for the survey on the ground that these expenditures were outlays "of capital" or payments "on account of capital" within the meaning of s. 12(1)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148. The Exchequer Court allowed the deduction and the Minister appealed to this Court.

Held: The Minister's appeal should be dismissed.

The application or non-application of the expressions "outlay ... of capital" or "payment on account of capital" to any particular expenditures must depend upon the facts of the particular case, and no single test applies in making that determination. The decision in *B.P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia.* [1966] A.C. 224, approved. The conclusion reached by the Exchequer Court that these expenditures were not of a capital nature was right.

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* PRESENT: Fauteux, Martland, Ritchie, Spence and Pigeon JJ.

1968

MINISTER OF NATIONAL REVENUE v. ALGOMA CENTRAL RAILWAY

Revenu—Impôt sur le revenu—Dépenses déductibles ou dépenses de capital—Montants payés par une compagnie de chemin de fer pour un relevé géologique—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(b).

Dans le but d'améliorer son entreprise de transport, la compagnie intimée a fait faire un relevé géologique des possibilités minérales d'un territoire en Ontario ayant peu de population et à travers lequel son chemin de fer circulait. Le but de ce relevé était d'informer le public des richesses du territoire dans l'espérance que la région serait développée, ce qui aurait pour résultat d'augmenter le trafic sur la voie ferrée. Dans le calcul du revenu de la compagnie pour les années 1960, 1961 et 1962, le Ministre a refusé de permettre la déduction des sommes payées pour le relevé pour le motif que ces dépenses étaient des dépenses «de capital» ou au paiement «à compte de capital» dans le sens de l'art. 12(1)(*b*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148. La Cour de l'Échiquier a permis la déduction et le Ministre en appela à cette Cour.

Arrêt: L'appel du Ministre doit être rejeté.

Que les expressions «somme déboursée ... de capital» ou «paiement à compte de capital» s'appliquent ou non à des dépenses particulières dépend des faits du cas particulier, et il n'existe pas un unique guide pour déterminer cette question. La décision dans *B.P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia,* [1966] A.C. 224 est approuvée. La Cour de l'Échiquier est arrivée à la bonne conclusion en déclarant que les dépenses en question n'avaient pas la nature d'une dépense de capital.

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

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1] in an income tax matter.

D. G. H. Bowman and *J. R. London,* for the appellant.

R. F. Wilson, Q.C., and *D. A. Berlis, Q.C.,* for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—This is an appeal from a judgment of the Exchequer Court of Canada[1], pronounced by the learned President of the Court, on March 16, 1966, whereby he allowed an appeal by respondent from assessments made under the *Income Tax Act,* for the 1960, 1961 and 1962 taxation years.

[1] [1967] 2 Ex. C.R. 88, [1967] C.T.C. 130, 67 D.T.C. 5091.

The circumstances giving rise to the question to be determined in this appeal can be summarized as follows: In July 1960, respondent, in order to improve its transportation business, arranged, with Franc. R. Joubin & Associates Mining Geologists Limited,—hereafter referred to as the Joubin company,—for a broad general geological survey, over a period of five years, of the mineral possibilities of a section of the unpopulated land through which respondent's railway ran in the province of Ontario, and which is, essentially, either crown land or respondent's property. This arrangement was made with the declared intention of making the information arising from the survey available to interested members of the public, in the hope and expectation that it would lead to development of the area (possible mines, secondary industry, etc.) that would produce traffic for respondent's transportation system. Consequent to this arrangement, the amounts admittedly paid by respondent to the Joubin company are $43,603.40 in respect of 1960, $85,189.06 in respect of 1961 and $138,369.41 in respect of 1962. The question is whether these amounts are deductible in computing respondent's profits from its business for those respective years. More precisely, the issue is whether, as contended for by appellant and successfully disputed by respondent, in the Court below, these expenditures are outlays "of capital" or payments "on account of capital", within the meaning of those expressions in s. 12(1)(*b*) of the *Income Tax Act* and, as such, not deductible in computing the profits of the respondent's business.

Parliament did not define the expressions "outlay ... of capital" or "payment on account of capital". There being no statutory criterion, the application or non-application of these expressions to any particular expenditures must depend upon the facts of the particular case. We do not think that any single test applies in making that determination and agree with the view expressed, in a recent decision of the Privy Council, *B.P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia*[2], by Lord Pearce. In referring to the matter of determining whether an expenditure was of a capital or an income nature, he said, at p. 264:

> The solution to the problem is not to be found by any rigid test or description. It has to be derived from many aspects of the whole set

[2] [1966] A.C. 224, [1965] 3 All E.R. 209.

1968

MINISTER OF NATIONAL REVENUE v. ALGOMA CENTRAL RAILWAY

Fauteux J.

of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction. It is a commonsense appreciation of all the guiding features which must provide the ultimate answer.

The learned President, after considering all the facts in the present case, decided that the expenditures in issue were not of a capital nature within the provisions of s. 12(1)(*b*) of the *Income Tax Act*. We agree with his conclusion. Hence, the appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: Edison, Aird & Berlis, Toronto.

1968

*May 28

VICTOR CHARLES COOPER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Trial—Indictable offence—Accused electing trial by judge and jury—Magistrate proceeding with preliminary inquiry—Accused re-electing trial by magistrate and pleading guilty—Whether magistrate had jurisdiction to permit change of election and thereupon to try accused—Criminal Code, 1953-54 (Can.), c. 51, s. 468.

The accused was charged under s. 79(1)(*a*) of the *Criminal Code* that he: "unlawfully did make or construct a home-made bomb with intent to cause an explosion of an explosive substance that is likely to cause serious bodily harm or death to persons or is likely to cause serious damage to property". He elected trial by judge and jury and the magistrate proceeded with a preliminary inquiry. After the Crown had adduced much of its evidence, the accused, through his counsel, addressed the Court and requested permission to re-elect to be tried by the magistrate, indicating that he wished to plead guilty to the charge. The magistrate assented to the request and the accused pleaded guilty. After further evidence was taken as to the circumstances of the offence charged, the accused was sentenced to six years' imprisonment. An appeal both as to conviction and sentence was dismissed by the Court of Appeal, one member of the Court dissenting. An appeal was then brought to this Court and the submission was made that the magistrate, once he had proceeded with the preliminary inquiry after the election by the accused against summary trial, had no jurisdiction to entertain a re-election and then proceed to convict the accused and sentence him.

Held: The appeal should be dismissed.

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*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

1968

COOPER v. THE QUEEN

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing appellant's appeal against his conviction by a magistrate following his re-election during the course of a preliminary inquiry.

G. A. Wootten, for the appellant.

C. J. Meinhardt, for the respondent.

At the conclusion of the argument of counsel for the appellant, the following judgment was delivered:

THE CHIEF JUSTICE (*orally for the Court*):—Mr. Meinhardt, we do not need to call upon you. We are all in agreement with the reasons of MacKay and McLennan JJ.A. in the Court of Appeal and accordingly the appeal is dismissed.

Droit criminel—Procès—Acte criminel—Prévenu ayant choisi d'être jugé par un juge et jury—Magistrat procédant à l'enquête préliminaire—Prévenu obtenant la permission d'avoir son procès devant le magistrat et plaidant coupable—Le magistrat a-t-il la juridiction pour permettre au prévenu de changer son option et pour le juger—Code criminel, 1953-54 (Can.), c. 51, art. 468.

L'appelant a été accusé d'avoir fabriqué de ses propres mains une bombe avec l'intention de causer l'explosion d'une substance explosive qui était susceptible de causer des lésions corporelles graves ou la mort à des personnes ou de causer des dommages graves à la propriété, le tout contrairement à l'art. 79(1)(*a*) du *Code criminel*. Il a choisi d'être jugé par un juge et un jury, et le magistrat a procédé à l'enquête préliminaire. Une grande partie de la preuve de la Couronne avait été présentée lorsque l'appelant, par l'entremise de son avocat, a demandé à la Cour la permission d'être jugé par le magistrat, laissant entendre qu'il avait l'intention de plaider coupable. Le magistrat a accordé cette requête et l'appelant a plaidé coupable. Après la présentation d'une preuve relative aux circonstances de l'infraction, l'appelant a été condamné à un emprisonnement de six ans. Un appel de la déclaration de culpabilité et de la sentence a été rejeté par un jugement majoritaire de la Cour d'appel. L'appelant en a appelé à cette Cour. Il soutient que le magistrat, ayant commencé l'enquête préliminaire après l'option faite par le prévenu à l'encontre d'un procès sommaire, n'avait pas la juridiction pour accorder le changement d'option et de juger le prévenu.

Arrêt: L'appel doit être rejeté.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], rejetant l'appel d'une déclaration de culpabilité prononcée par un magistrat après que l'appelant eut choisi d'être

[1] [1968] 1 O.R. 71, [1968] 2 C.C.C. 104, 2 C.R.N.S. 387.

1968

COOPER v. THE QUEEN

Cartwright C.J.

jugé par le magistrat durant le cours d'une enquête préliminaire qui avait été ordonnée lorsque l'appelant avait choisi d'être jugé par un juge et jury.

G. A. Wootten, pour l'appelant.

C. J. Meinhardt, pour l'intimée.

Lorsque le procureur de l'appelant eut terminé sa plaidoirie, la Cour a rendu le jugement suivant:

THE CHIEF JUSTICE (*orally for the Court*):—Mr. Meinhardt, we do not need to call upon you. We are all in agreement with the reasons of MacKay and McLennan JJ.A. in the Court of Appeal and accordingly the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Lee, Wootten & Dyson, Toronto.

Solicitor for the respondent: C. J. Meinhardt, Toronto.

1967

*Dec. 15, 18

1968

Apr. 1

ARNOLD ALKOK (*Plaintiff*) .....APPELLANT;

AND

ISSIE GRYMEK and YETTA GRYMEK (*Defendants*) ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Building contract providing for payment by instalments upon architect's certificate—Breach of term requiring builder to satisfy architect that subcontracts had been paid—Contract terminated by owners—Builder not in breach of term going to root of contract—Damages—Quantum meruit.

The plaintiff, a building contractor, entered into a contract in writing with the defendants to build a house for $57,500. It was provided that the defendants were to "make payment on account thereof upon the architect's certificate (when the architect is satisfied that the payments due to subcontractors have been made)" according to a schedule set out in the contract. The plaintiff proceeded with the contract and the defendants paid the first two instalments and one-half of the third, which amounts totalled $22,000, without requiring that the plaintiff satisfy

*PRESENT: Judson, Ritchie, Hall, Spence and Pigeon JJ.

the architect that the payments to the subcontractors had been made. Later when the plaintiff pressed for payment of the balance of the third instalment, the defendants required the plaintiff to comply with the provisions of the contract and to so satisfy the architect. After several conferences, the plaintiff failed to so satisfy the architect and in addition there were complaints from the defendants and the architect that there were defects in the construction and that the construction was delayed. Although the plaintiff was willing and anxious to continue the work, the defendants terminated the contract and engaged others to complete the building.

In an action brought by the plaintiff under the provisions of *The Mechanics Lien Act*, the Master dismissed the plaintiff's claim and allowed a counterclaim by the defendants in the amount of $6,075. On appeal, the Court of Appeal allowed the plaintiff's appeal in part, finding that the plaintiff was entitled to a lien and personal judgment against the defendants in the amount of $1,125 and dismissing the counterclaim of the defendants. The plaintiff further appealed to this Court and the defendants cross-appealed.

Held: The appeal should be allowed and the cross-appeal dismissed.

The Court agreed with the Court below that the defendants had not shown sufficient grounds to support their termination of the contract. The plaintiff was not in breach of a term going to the root of the contract. While it was true that he was in breach of the term requiring him to satisfy the defendants' architect that the subcontracts had been paid this was a mere ancillary term which could be enforced perfectly by the defendants simply refusing to make payments until they were satisfied, as indeed the defendants were refusing. As to the additional alleged breaches, *i.e.*, defective work and delay, the Master had found that these defects were minor, easily rectified and certainly not such as to go to the root of the contract, and that despite any delay the contract could have been completed substantially at the time completion was required by its provisions. These findings were accepted by the Court of Appeal.

On the matter of damages, the contractor's right to recover was what he could prove on a *quantum meruit* basis. Accepting that the plaintiff was entitled to the balance of the third draw and the whole of the fourth draw, less certain deductions, the Court found that the *quantum meruit* claim proved was $11,042.50. Adding thereto $2,495 for repair of storm damage and $950 for extras supplied at the request of the defendants, but deducting therefrom liens in the amount of $2,320 paid by the defendants, the total amount due to the plaintiff was $12,167.50. The defendants, however, were entitled to claim a reduction for the cost of correcting the defects in the work done by the plaintiff, such amount to be determined upon a reference to the Master.

Northern Lumber Mills Ltd. v. Rice (1917), 41 O.L.R. 201, referred to.

APPEAL by plaintiff and CROSS-APPEAL by defendants from a judgment of the Court of Appeal for Ontario[1], varying a report of D. W. Rose, Q.C., Master, in a mechanics' lien action. Appeal allowed and cross-appeal dismissed.

[1] [1966] 2 O.R. 235. 56 D.L.R. (2d) 393.

1968

ALKOK v. GRYMEK et al.

C. E. Woollcombe, for the plaintiff, appellant.

D. I. Bristow, for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] pronounced on February 21, 1966.

The Master of the Supreme Court of Ontario had tried this mechanics' lien action pursuant to a judgment of reference made by Morand J. on October 4, 1963. By his report made on June 24, 1964, the learned Master had dismissed the plaintiff's claim for lien and had allowed a counterclaim by the defendants in the amount of $6,075.

By the judgment of the Court of Appeal for Ontario this was varied to allow the plaintiff (there appellant) a lien on the premises owned by the defendants in the sum of $1,125 together with the costs of the action and dismissing the counterclaim of the defendants-respondents.

The plaintiff as appellant in the Court of Appeal further appealed to this Court and the defendants cross-appealed.

The appellant is a contractor in the City of Toronto. He entered into a contract with the respondents dated May 14, 1956, whereby he agreed to

(a) provide all the materials and perform all the work shown on the drawings and described in the specifications entitled "proposed residence for Mr. I. Grymek" which have been signed in duplicate by both the parties and which was prepared by Edward I. Richmond, M.R.A.I.C., acting as and hereinafter entitled "the architect" and

(b) do and fulfill everything indicated by this Agreement, the Specifications, and the Drawings.

The contract provided that the owner would pay to the contractor $57,500 and

(b) Make payment on account thereof upon the Architect's certificate (when the Architect is satisfied that payments due to Sub-Contractors have been made), as follows:

i) Upon completion of the sub-floor $6,000.00;

ii) Upon completion of the roof $12,000.00;

iii) Upon completion of the brown coat of plaster $8,000.00;

iv) Upon completion of the white coat of plaster, including all plumbing and electrical work $12,000.00;

v) Upon completion of trim $8,000.00;

vi) the sum of ELEVEN THOUSAND, FIVE HUNDRED DOLLARS ($11,500.00) . . .

[1] [1966] 2 O.R. 235, 56 D.L.R. (2d) 393.

The appellant commenced work of erecting the house in accordance with the said contract and from time to time the respondents required the addition of certain extras which the appellant added and which the Court of Appeal for Ontario found were of the value of $950. The respondents paid to the appellant the whole of the first two instalments of $6,000 and $12,000 respectively, and one-half of the third instalment, *i.e.*, $4,000, and did so without requiring that the appellant comply with the provisions of para. (b) aforesaid by satisfying the architect that the payments due to the subcontractors had been made.

Later when the appellant pressed for the payment of the balance of the third instalment, the respondents required the appellant to comply with the provisions of the contract and to so satisfy the architect. After several conferences, the appellant failed to so satisfy the architect and in addition there were complaints from the respondents and from their architect Mr. Richmond that there were defects in the construction and that the construction was delayed. The solicitor for the respondents who had drafted the original contract and who had been present at the various conferences when an attempt was made to satisfy the architect that the subcontractors had been paid, wrote to the appellant on November 10, 1956, complaining of the progress of the work and of certain defects expressing the fear that mechanics' liens would be registered against the property and concluded with this paragraph:

> Unless all of the building infractions, which are your responsibility, have been remedied, and the work carried on at a proper pace, my clients shall have no alternative than to employ their own specific trades to complete your portion of the uncompleted work, and any moneys or expenses incurred by my clients in employing tradesmen for either work done or materials supplied shall be deducted from the contract price herein.

Six days later, on November 16, 1956, the said solicitor wrote again to the appellants in which he said:

> Further to the above matter, in confirming my conversation with you yesterday, I hereby advise you on behalf of my clients Issie Grymek and Yetta Grymek that they are terminating their contract with you as of todays date.
>
> They intend to complete the lands and premises in the manner in which they believe the work should be done.

In accordance with that letter the appellant ceased work on the contract though Mr. Richmond, the architect for

1968

ALKOK v. GRYMEK et al.

Spence J.

the respondents, has testified that the appellant was willing and anxious to continue it. The respondents proceeded to complete the building themselves through the intervention of other contractors and material men.

It was the view of the learned Master that the respondents were entitled to terminate the contract at the time and in the fashion aforesaid.

The Court of Appeal for Ontario, however, came to the conclusion that sufficient grounds for the termination of the contract had not been established. McGillivray J.A., in his reasons for judgment, quoted Anson's Law of Contract, 21st ed., at p. 424, as follows:

> The question to be answered in all these cases of incomplete performance is one of fact; the answer must depend on the terms of the contract and the circumstances of each case. The question assumes one of two forms—Does the failure of performance amount in effect to a renunciation on his part who makes default? Does it go so far to the root of the contract as to entitle the other to say, "I have lost all that I cared to obtain under this contract; further performance cannot make good the prior default"?

That proposition needs no support by citation from judgments and I accept it as expressing the proper test which the Court must apply here. As pointed out by McGillivray J.A., in his reasons, the contract as between the parties was for the contractor to build a house and for the defendants to pay for it. The contractor had proceeded with the building although not in accordance with the pace which the owners believed he should be proceeding and had been guilty of what the Court of Appeal for Ontario has found were certain minor defects in construction. The owners having paid two instalments and part of the third were refusing to pay the balance of the third instalment or those which would become due thereafter, and in so doing were relying upon the provision of the contract which required the appellant as contractor to satisfy the respondents' architect that the payments to the subcontractors had been made. They were entitled to require that the appellant continue his work upon the contract and to refuse to pay him until he did satisfy that provision. If the appellant had refused to proceed on that basis then, of course, he would have been in breach of the provision of the contract going to the root thereof and the respondents would have been entitled to terminate the contract. The

appellant did not indicate by word or conduct an intention to so act or not to be bound in every way by the contract. The appellant, therefore, did not give to the respondents the opportunity to terminate the contract on the ground that the appellant had been in breach of a term going to the root of it. It was true that he was in breach of the term requiring him to satisfy the respondents' architect that the subcontracts had been paid, but, with respect, I agree with McGillivray J.A.'s view that this was a mere ancillary term which could be enforced perfectly by the respondents simply refusing to make payments until they were satisfied, as indeed the respondents were refusing. I am, therefore, in accord with the view of McGillivray J.A., that the respondents have not shown sufficient grounds to support their termination of the contract.

I should point out that while I have referred only to the alleged breach by the appellant in his failure to satisfy the architect as to payment of subcontractors, there were two additional breaches alleged: firstly, defective work, and secondly, delay. The learned Master found that the defects were minor, easily rectified and certainly not such as to go to the root of the contract, and that despite any delay the contract could have been completed substantially at the time completion was required by its provisions. The Court of Appeal for Ontario accepted these findings and they seem to be based on the evidence of Mr. Richmond, the architect called as a witness by the respondents, who testified as follows:

> Q. Are you saying that what you saw in November could not have been finished on the inside by the middle of February of the following year?
>
> A. It would be pretty close to it, if the builder would, say, have 3 or 4 groups on the job, and carried his work along at a reasonable pace. I would say about the latter part of February and he could have gotten out of there.

The contract between the parties provided in para. 4:

> Interior to be completed no later than February 15, 1957, so that owner can take possession thereof.

Once it is determined that the respondents' action in terminating the contract had not been justified, one must turn to the question of what, if any, damages the appellant is entitled to recover.

1968

ALKOK v. GRYMEK et al.

Spence J.

It was said in Macklem & Bristow on Mechanics' Liens in Canada, at p. 47:

> If the owner ceases to make payments under the contract, cancels it or, through some act of his own and without cause, makes it impossible for the contractor to complete then the contractor is justified in abandoning the work and is entitled at that time to enforce his claim for lien to the extent of the actual value of the work performed and materials supplied up until that time.

The contractor's right to recover therefore would seem to be what he could prove on a *quantum meruit* basis. In the present case, the Court of Appeal for Ontario was of the opinion that the plaintiff had quite failed to prove any *quantum meruit* basis. The plaintiff had attempted this by two alternative methods: firstly, the plaintiff proved the total amount due under the contract, *i.e.*, $57,500, and agreed to the deduction therefrom of the amounts already paid on account, *i.e.*, $22,000; the amounts which the respondents were required to pay in satisfying certain mechanics' liens registered against the property, and also the amount which he, the plaintiff, testified would have been required to complete the building, *i.e.*, $18,195.

As I have said, the defendants (here respondents) did proceed to complete the building at a cost of $48,231.21. Deducting therefrom the sum of $1,400 for an air conditioning unit which the Master found was not included in the original cost, the defendants' costs of completion, therefore, were $46,882.31. The learned Master found on the evidence of Mr. Richmond that those costs had represented about 15 per cent more than would have been required by an efficient builder and therefore, found that the proper cost of completion was $39,850.31. There is such a gross discrepancy between the plaintiff's estimated cost of completion and the defendants' actual cost of completion that neither the learned Master nor the Court of Appeal could place any reliance upon that method of proof. It should be noted in addition that this method fails to adduce the evidence necessary to establish a *quantum meruit* claim. The use in the calculation of the final contract price must include an element for a contractor's profit and what the plaintiff would be entitled to upon a *quantum meruit* proof in a mechanics' lien action is a payment for the work and materials provided up to the time of the termination not

such a profit as he might have contemplated making had the contract been completed: *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, s. 5.

The plaintiff's second method of calculation was this. The plaintiff alleged that at the time the contract had been terminated he had completed all the work which entitled him to the third draw, of which he had been paid only one-half, and substantially all the work which would have entitled him to the fourth draw. It was his submission that these draws were calculated to keep pace with the construction and that therefore the completion of the work which would entitle the plaintiff to demand the payment of the instalment would automatically demonstrate the proportion of the work which had been completed, and would, therefore, prove the amount of the *quantum meruit* to which, subject to adjustments, the plaintiff would be entitled. On this basis, the appellant submitted to the Court of Appeal and to this Court that it should be entitled to the balance of the third draw of $4,000, the whole of the fourth draw of $12,000 less deductions to which he agreed to submit in the following amounts:

Balance of plumbing	$2,262.50
Balance of electrical work	800.00
Repairs to plaster	910.00

In *Northern Lumber Mills Ltd. v. Rice*[2], an action was brought under the provisions of *The Mechanics' Lien Act* as here to enforce a lien for the material supplied for the erection of a house. The price of those materials was to be paid for in three payments. Before the action, the first two had become payable but the third had not. Meredith C.J.C.P. said at p. 202:

> A cause of action arose upon default in payment of each of these instalments; and so, apart from the provisions of the enactment, the action would have been properly brought as to the first two, but improperly as to the third...

The Court held that the action under the provisions of *The Mechanics' Lien Act* was not premature as to any of the three instalments.

At the trial, there was produced in cross-examination of Mr. Richmond, called as witness for the defendants, a

[2] (1917), 41 O.L.R. 201 (App. Div.).

1968

ALKOK
v.
GRYMEK
et al.

Spence J.

statement which he had drawn up in preparation of an answer to the evidence of the plaintiff (here appellant) as to the costs of completion, and the appellant is submitting to the deductions in the amounts set out by Mr. Richmond in his statement items 16, 17 and 18, *i.e.*,

16—Plumbing	$2,262.50
17—Plastering	910.00
18—Electrical	800.00

Mr. Richmond was cross-examined on these various items as well as all the others in the said statement. It is true that also to be completed before the plaintiff was entitled to the fourth draw were, of course, roofs, and Mr. Richmond had deducted that $228 for repair of roofs. He admitted, however, that if the roofs were in need of repair then, of course, the roofing contractor who had supplied the roofs only a short time before under guarantee should have been approached and required to make good his guarantee and that he had not done so.

As to item 16, Mr. Richmond testified that when the plaintiff left the job the rough plumbing was all done and that it represented about 50 per cent of the plumbing contract.

As to electrical work, about 65 per cent had been done at the time the plaintiff left the job.

As to plastering, all the white plaster had been completed but it was necessary to repair some. As I have pointed out, the appellant has accepted Mr. Richmond's amounts of these three items. The appellant, however, has not agreed to any deduction for heating. Heating, of course, would have had to have been installed before the white plaster was put on and that white plaster was required by the terms of the contract to have been completed before the fourth instalment was due.

Mr. Richmond in his statement gave a figure of $2,385 as being the amount necessary to complete the heating, but he agreed in his evidence that of that amount $1,400 was paid for an air conditioning unit not part of the original contract and he agreed also with the suggestion of counsel for the plaintiff at the trial that "a little less than $1,000 was charged in respect of heating". Deducting the $1,400 from $2,385 one finds a balance of $985 and I am of the

opinion that the appellant must also submit to a deduction of that sum. Therefore, I am of the opinion that the appellant has proved a *quantum meruit* as follows:

Balance of third draw		$ 4,000.00
Fourth draw		12,000.00
		$16,000.00
Deduct:		
Heating	$ 985.00	
Balance plumbing	2,262.50	
" plaster	910.00	
" electrical	800.00	
		4,957.50
		$11,042.50

Therefore, the *quantum meruit* claim proved was $11,042.50. In addition, the appellant is entitled to two amounts: Firstly, the amount of $2,495 for repair of storm damage, and secondly, $950 for extras supplied at the request of the respondents. The Court of Appeal found in favour of the appellant in both of these items and such a finding would seem to be in accordance with the evidence. The appellant admits that the respondents have paid mechanics' liens in the amount of $2,320 which sum must be deducted from any recovery of the appellant. Therefore, allowing to the appellant his *quantum meruit* proof of $11,042.50 and adding thereto the storm damage of $2,495 and the extras of $950 but deducting therefrom the liens paid by the respondents one reaches a total amount due to the appellant of $12,167.50.

This would appear to dispose of the issues in this appeal with one exception. As I have pointed out, the learned Master found that the defects in the work done by the appellant were minor and easily rectified, and McGillivray J.A., in the Court of Appeal adopted this finding. The respondents are, however, entitled to claim a reduction for the cost of correcting such defects. Therefore, I would allow the appeal and direct that the report of the Master be amended by the deletion of the sum of $1,125 appearing in the first paragraph of the report and replacing that sum with the sum of $12,167.50 unless within thirty days of the delivery of this judgment the respondents proceed with a reference before the Master of the Supreme Court of

1968

ALKOK v. GRYMEK et al.

Spence J.

Ontario to determine the costs of the correction of the said minor defects. In that event the sum to be inserted should be the said $12,167.50 less the cost of correcting the defects found by the Master upon such reference. The cost of the reference should be determined by the Master in his report.

The appellant is entitled to the costs granted to him by the order of the Court of Appeal for Ontario and to his costs in this Court. The cross-appeal is dismissed without costs.

Appeal allowed with costs; cross-appeal dismissed without costs.

Solicitors for the plaintiff, appellant: Day, Wilson, Campbell & Martin, Toronto.

Solicitors for the defendants, respondents: Timmins & Bristow, Toronto.

1968

*Feb. 15, 16
Apr. 29

MALCOLM IRWIN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Sale of drug to procure abortion—Whether intention to use drug for that purpose an essential ingredient of the offence—Criminal Code, 1953-54 (Can.), c. 51, s. 238.

The appellant was convicted of attempting to commit the offence of unlawfully supplying a drug knowing that it was intended to be used to procure the miscarriage of a female person, contrary to s. 238 of the *Criminal Code*. The female in question was a policewoman and had no intention of using the drug. It was argued by the appellant that he could not have supplied the drug in question "knowing" that it was intended to be used to procure a miscarriage because in fact it was not intended that it be so used or employed. The appellant's conviction was affirmed by the Court of Appeal and he was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

Section 238 of the Code is directed against the supplying or procuring of poison or noxious things for the purpose of procuring abortion with the intention that they shall be so employed, and knowing that it is intended that they shall be so employed. The intention of any other person besides the accused himself that the poison or noxious thing should be used to procure a miscarriage is not necessary to constitute

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* PRESENT: Judson, Ritchie, Hall, Spence and Pigeon JJ.

the offence. In the present case, the appellant intended that the substance procured by him should be used to procure a miscarriage. This case was therefore within the words of the statute.

Droit criminel—Vente d'une drogue pour obtenir l'avortement—Est-ce que l'intention d'employer la drogue pour cette fin est un élément essentiel de l'infraction—Code criminel, 1953-54 (Can.), c. 51, art. 238.

L'appelant a été déclaré coupable de la tentative de commettre l'infraction d'illégalement fournir une drogue sachant qu'elle est destinée à être employée pour obtenir l'avortement d'une personne du sexe féminin, contrairement à l'art. 238 du *Code criminel*. La personne en question était de la police et elle n'avait pas l'intention d'utiliser la drogue. L'appelant a soutenu qu'il ne peut pas avoir fourni la drogue en question «sachant» qu'elle était destinée à être employée pour obtenir l'avortement parce qu'en fait elle n'était pas destinée à être employée à cette fin. La déclaration de culpabilité a été confirmée par la Cour d'appel, et l'appelant a obtenu la permission d'appeler à cette Cour.

Arrêt: L'appel doit être rejeté.

L'article 238 du Code vise le cas d'une personne qui fournit ou procure un poison ou des substances délétères dont le but est d'obtenir l'avortement avec l'intention que ces substances soient employées à cette fin, et sachant qu'elles sont destinées à être employées à cette fin. L'intention de toute personne, autre que l'accusé lui-même, que le poison ou la substance délétère sera employé pour obtenir l'avortement n'est pas nécessaire pour constituer l'infraction. Dans le cas présent, l'appelant avait l'intention que la substance fournie par lui soit employée pour obtenir un avortement. Le cas tombe, par conséquent, sous les termes mêmes du statut.

APPEL d'un jugement de la Cour d'appel de l'Alberta[1], confirmant une déclaration de culpabilité. Appel rejeté.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming the appellant's conviction. Appeal dismissed.

S. J. Helman, Q.C., and R. Kambeitz, for the appellant.

E. L. Collins, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Appellate Division of

[1] (1967), 61 W.W.R. 103, [1968] 2 C.C.C. 50.

1968

IRWIN v. THE QUEEN

Ritchie J.

the Supreme Court of Alberta[1] affirming the appellant's conviction for attempting to commit the offence of unlawfully supplying a drug knowing that it was intended to be used to procure the miscarriage of a female person contrary to s. 238 of the *Criminal Code* which reads as follows:

> Every one who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to procure the miscarriage of a female person, whether or not she is pregnant, is guilty of an indictable offence and is liable to imprisonment for two years.

Leave to appeal was granted to this Court under the provisions of s. 591(1)(*b*) of the *Criminal Code* on the following question of law, namely:

> Whether in the circumstances of the charge the Appellate Division erred in the interpretation of the words "knowing that it is intended to be used or employed to procure the miscarriage of a female person", as those words are used in Section 238 of the *Criminal Code*.

In the reasons for judgment delivered by Mr. Justice McDermid on behalf of the Appellate Division, it was held that:

> ...if the person who supplied the drug believes that the person to whom he is supplying it intends to use it to procure a miscarriage that is sufficient for a conviction under the section. It does not matter that the person to whom the drug was supplied did not in fact intend to use it.

The appellant was charged as the result of a policeman and policewoman, dressed in civilian clothes, going to his drug store in Calgary where the policeman told the appellant that his girlfriend was pregnant and said: "We were wondering if we could get something to do something about it". The appellant then supplied them with a "bean bag" saying that that was what they needed and that it would cost $10.00. The "bean bag" consisted of 4 boxes of pills and a 2-ounce bottle of castor oil. Neither the policewoman nor any girlfriend of the policeman was pregnant and neither of them intended the pills to be used to procure a miscarriage.

At his trial before Chief Justice McLaurin, it was contended on behalf of the appellant that he could not have supplied the drug in question *"knowing"* that it was intended to be used to procure a miscarriage because it was not intended that it should be so used or employed. In

[1] (1967), 61 W.W.R. 103, [1968] 2 C.C.C. 50.

support of this contention, reliance was placed on the decision of the Supreme Court of Victoria in the case of *Reg. v. Hyland*[2], where it was decided on an equal division of the Court that "the words 'intended to be used' must apply to the person supplied and not to the supplier" and Madden C.J. said:

> Whatever difficulty there may be ... arriving at a knowledge of what another really "intends", it at least is possible; while the absurdity of asking a tribunal to be satisfied that a prisoner "knew", as a thing intended to be done, what admittedly no one ever did intend, has only to be stated to be manifest.

The *Hyland* case runs contrary to a line of authority starting with the case of *Reg. v. Hillman*[3], where Erle C.J., speaking of s. 59 of the *Offences Against the Person Act*, 1861, which was virtually the same as s. 238 of the *Criminal Code*, said:

> The question is, whether or not the intention of any other person besides the defendant himself, that the poison or noxious thing should be used to procure a miscarriage, is necessary to constitute the offence charged under the 24 and 25 Vict. c. 100, s. 59. We are all of opinion that that question must be answered in the negative. The statute is directed against the supplying or procuring of poison or noxious things for the purpose of procuring abortion with the intention that they shall be so employed, and knowing that it is intended that they shall be so employed. The defendant knew what his own intention was, and that was, that the substance procured by him should be employed with intent to procure miscarriage. The case is therefore within the words of the Act.

The *Hillman* case was followed seventeen years later in *R. v. Titley*[4], where Stephen J. rendered a decision which has been quoted at length and adopted by Mr. Justice McDermid in the reasons for judgment which he rendered on behalf of the Appellate Division of the Supreme Court of Alberta in the present case.

No Canadian case directly in point was cited to us and I have been unable to find one, but the authority of the *Hillman* and *Titley* cases is recognized by leading Canadian text writers (see Tremeear's Criminal Code, 6th ed., page 385, and Crankshaw's Criminal Code of Canada, 7th ed., pages 361 and 362). These cases also appear to have been widely followed in other parts of the Commonwealth as indicated by the case of *R. v. Neil*[5], which is a decision

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[2] (1898), 24 Vict. L.R. 101.
[3] (1863), 9 Cox C.C. 386, 169 E.R. 1424.
[4] (1880), 14 Cox C.C. 502.
[5] [1909] S.R.Q. 225.

1968

IRWIN
v.
THE QUEEN

Ritchie J.

of the Supreme Court of Queensland, and *Rex v. Noseworthy*[6], a decision of the Court of Appeal of New Zealand. The same reasoning appears to have been followed by the courts in South Africa; see *R. v. Freestone*[7].

In my view the reasoning of Erle C.J. in the *Hillman* case, *supra*, applies to the construction to be placed on s. 238 of the *Criminal Code* and I agree with the interpretation of that section adopted by the Appellate Division.

For these reasons, as well as for those expressed in the reasons for judgment delivered by Mr. Justice McDermid, I would dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant: Helman, Fleming & Neve, Calgary.

Solicitor for the respondent: The Attorney General of Alberta.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

1968

*Mar. 25
Apr. 29

LARRY PARISH .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Sexual intercourse with girl under 14 years of age—Whether corroboration of complainant's evidence—Criminal Code, 1953-54 (Can.), c. 51, s. 138(1).

The respondent was acquitted on a charge of having sexual intercourse with a female under the age of 14 years, contrary to s. 138(1) of the *Criminal Code*. The complainant, who was admittedly under 14 years of age, gave evidence that the offence was committed when the respondent took her, in company with another couple, to a room with twin beds in a motel. Each couple occupied one of the beds. The lights were turned out and the complainant says that the respondent lay on one of the beds with her for more than two hours during which time they had some drinks and were "necking", that he undid her clothes and had intercourse with her. The respondent admitted to "necking" but denied that intercourse took place. The

* PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Pigeon JJ.

[6] (1907), 26 N.Z.L.R. 536. [7] (1913), T.P.D. 758.

1968

THE QUEEN
v.
PARISH

second couple confirmed most of complainant's story, but they were unable to say whether or not sexual intercourse had actually taken place. The Court of Appeal, by a majority judgment, affirmed the dismissal of the charge on the ground that the evidence of the other couple was incapable of being corroborative. The Crown appealed to this Court.

Held: The appeal should be allowed and a new trial directed.

The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with it. In the present case, the evidence of the other couple was capable of being so construed. It was for the jury to say under all the circumstances whether or not that evidence in fact amounted to corroboration.

Droit criminel—Rapports sexuels avec fille de moins de 14 ans—Y a-t-il corroboration du témoignage de la plaignante—Code criminel, 1953-54 (Can.), c. 51, art. 138(1).

L'intimé a été acquitté de l'infraction d'avoir eu des rapports sexuels avec une personne du sexe féminin âgée de moins de 14 ans, contrairement à l'art. 138(1) du *Code criminel*. La plaignante qui, il fut admis, était âgée de moins de 14 ans, a témoigné que l'infraction a été commise lorsque l'intimé l'a emmenée, en compagnie d'un autre couple, à une chambre de motel où il y avait deux lits. Chaque couple a occupé un des lits. Les lumières étaient éteintes et la plaignante dit qu'elle et l'intimé se sont étendus sur un des lits durant plus de deux heures, qu'ils ont consommé de la boisson, qu'ils ont fait du «necking», que l'intimé a défait ses vêtements et qu'il a eu des rapports sexuels avec elle. L'intimé admet avoir fait du «necking» mais nie avoir eu des rapports sexuels avec la plaignante. Le second couple a confirmé en grande partie la version de la plaignante mais a été incapable de dire si en fait il y a eu des rapports sexuels. Par un jugement majoritaire, la Cour d'appel a confirmé l'acquittement pour le motif que le témoignage de l'autre couple ne pouvait pas servir de corroboration. La Couronne en a appelé à cette Cour.

Arrêt: L'appel doit être accueilli et un nouveau procès ordonné.

Il n'est pas nécessaire que la corroboration soit une preuve directe que l'accusé a commis l'infraction. Il suffit qu'elle soit simplement une preuve circonstancielle reliant le prévenu à l'infraction. Dans le cas présent, le témoignage de l'autre couple était capable d'être interprété de cette manière. Il appartenait au jury de dire si dans les circonstances cette preuve équivalait à une corroboration.

APPEL par la Couronne d'un jugement de la Cour d'appel de la Colombie-Britannique[1], confirmant l'acquittement de l'intimé. Appel accueilli.

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[1] (1967), 59 W.W.R. 577, [1967] 3 C.C.C. 360.

1968

THE QUEEN v. PARISH

APPEAL by the Crown from a judgment of the Court of Appeal for British Columbia[1], affirming the respondent's acquittal. Appeal allowed.

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

J. R. White, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought at the instance of the Attorney General of British Columbia pursuant to s. 598 of the *Criminal Code* of Canada from a judgment of the Court of Appeal for British Columbia[1] (McFarlane J.A. dissenting) whereby that Court dismissed the Attorney General's appeal from the acquittal of the respondent before Mr. Justice Ruttan sitting with a jury on a charge of having sexual intercourse with a female under the age of 14 years contrary to s. 138(1) of the *Criminal Code.*

The complainant, who was under 14 years of age, gave evidence that the offence was committed when the respondent took her, in company with another couple, (Loreen Fischer and Malcolm Gagnon) to a twin-bedded room in a motel. Each couple occupied one of the beds. The lights were turned out and the complainant says that the respondent lay on one of the beds with her for more than two hours during which time they had some drinks and were "necking", he undid her blouse, loosened her brassiere and later a bedspread was pulled over them and he removed her slacks and panties and had intercourse with her.

The respondent admits going to the motel under the circumstances described by the complainant but says that as they lay on the bed they only "started to neck a little bit", that the bedspread was not pulled over them, her brassiere was not loosened, her clothes were not removed and no intercourse took place. In fact, the respondent testified that the complainant had said she would do anything he wanted but that he replied "Thanks, no thanks" because he "didn't want to get into any trouble."

Fischer and Gagnon confirmed the complainant's story as to the drinking and the fact that she and the respondent

[1] (1967), 59 W.W.R. 577, [1967] 3 C.C.C. 360.

were lying "necking" in the dark for more than two hours and Fischer confirmed the fact that the complainant's brassiere was loosened, but they were unable to say whether or not sexual intercourse had actually taken place between the respondent and the complainant.

In charging the jury, the learned trial judge read the provisions of s. 134 of the *Criminal Code* respecting the danger of convicting on the uncorroborated evidence of the complainant and proceeded to say that:

> ...evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.

The learned trial judge then went on to tell the jury, in effect, that the evidence of Fischer and Gagnon did not fall within the definition of corroboration that he had given to them, and was not capable of being treated as corroborative because they "did not know whether the act of intercourse was taking place, or not". The learned judge appears to have regarded this evidence as corroborative only of the fact that there was opportunity to commit the offence and he clearly thought it necessary, in order to comply with the requirements of s. 134 of the *Criminal Code* that the corroborative evidence should be direct evidence of the commission of the offence. He expressed this view to the jury saying:

> Now I must tell you, in looking at the evidence in this case I am unable to point to evidence that falls within the definition of corroboration that I have given to you. That is, evidence that is entirely separate from the girl's story of sexual intercourse. The other persons in the motel didn't confirm it. They didn't know whether the act of intercourse was taking place, or not.

The only ground of appeal contained in the Crown's notice of appeal to the Court of Appeal for British Columbia was expressed in the allegation that:

> The learned trial judge failed to charge the jury that the evidence of Loreen Fischer and Malcolm James Gagnon was capable of corroborating the evidence of the Complainant.

This is the question upon which Mr. Justice McFarlane differed from the majority of the Court of Appeal and to which this Court is therefore limited under the provisions of s. 598(1)(*a*) of the *Criminal Code*.

1968

THE QUEEN v. PARISH

Ritchie J.

In the course of his reasons for judgment dismissing the appeal, Mr. Justice Bull agreed with the learned trial judge that the evidence of the couple in the other bed at the motel did nothing more than corroborate the fact that there was opportunity for sexual intercourse which was not denied by anyone and that as it did not amount to direct evidence of the act having taken place, it was not capable of being corroborative. His conclusion was expressed in the following terms:

> In the case at bar, I consider that the evidence of Miss Fischer and Gagnon could not possibly do more than support a mere opportunity for sexual intercourse, and that if it had been put to the jury as being capable of being corroborative of evidence of the commission of the crime alleged against the respondent, the jury would have been found wrong in making those corroborative inferences therefrom. The learned trial judge determined quite properly that the evidence was not so capable and hence it would have been an error to put it to the jury as being capable of being corroborative.

It is true that under certain circumstances corroboration of the existence of mere opportunity may be no corroboration at all, and in this regard the statement of Lord Reading made in the course of his reasons for judgment in *Burbury v. Jackson*[2] is often quoted. The Chief Justice there said:

> ...the question is whether where the parties by the nature of their employment have opportunity of intercourse that is of itself corroboration. In my opinion it is not.... The evidence here shows nothing more than that it was possible to have committed the misconduct at the material date. That is not enough. The evidence must show that the misconduct was probable.

In the case of *Rex v. Reardon*[3], McRuer J.A. makes reference to the reasons for judgment of Lord Dunedin in *Dawson v. M'Kenzie*[4] where, after saying that mere opportunity did not amount to corroboration, he went on to say:

> ...that the opportunity may be of such a character as to bring in an element of suspicion...

In my view evidence of the circumstances described by the witnesses Fischer and Gagnon and admitted by the respondent in this case was a great deal more than evidence of mere opportunity and was capable of being con-

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[2] [1917] 1 K.B. 16, 25 Cox C.C. 555.

[3] (1945), 83 C.C.C. 114 at 117, [1945] O.R. 85.

[4] [1908] S.C. 648.

strued as an account of preliminary activities calculated to culminate in the sexual intercourse which the complainant describes. Whether or not these circumstances amounted to corroboration of the complainant's whole story was a question which in my view should have been left to the jury.

Mr. Justice Norris, who agreed with Bull J.A. that the appeal should be dismissed, appears to have taken the view that because the evidence that the complainant and the respondent were lying on a bed in a darkened motel room "necking" for more than two hours was not denied by the respondent, it was therefore irrelevant. The learned judge said:

> Here the incidental matter, the so-called "necking" or love play was never in dispute. As it was not in issue, evidence of it was not "material" to the offence with which the respondent was charged. As it must "implicate" the respondent it must "involve" him in the offence. However reprehensible such action may seem, in the circumstances of this case and on a fair interpretation of a totality of the evidence of all the witnesses, it was an "innocent" act irrelevant to the issue.

This paragraph seems to be based on the assumption that the respondent admitted all "incidental matters" by which I take it that the learned judge means everything except the actual commission of the offence. The fact of the matter is, however, that the respondent categorically denied that the complainant's brassiere was loosened at all or that he ever had a bedspread or anything else over him. This was vital evidence and the complainant's statement that her brassiere was loosened was corroborated by Fischer whereas both Fischer and Gagnon testified that the bedspread was pulled over the complainant and the respondent.

It also appears to me that Mr. Justice Norris proceeded on the assumption that none of the matters admitted by the respondent were "in issue" and that it followed that corroboration of them "was not 'material' to the offence with which the respondent was charged". In this regard I agree with Mr. Justice McFarlane who, in the course of his dissenting reason for judgment, adopted the views expressed by Curran L.J. in *Regina v. Hodgett*[5], where he said, at page 8:

> ...we know of no authority for restricting the requisite corroboration to the part or parts of the accomplice's testimony that the accused

[5] [1957] L.R.N.I. 1, [1958] Cr. L.R. 225.

1968

THE QUEEN v. PARISH

Ritchie J.

chooses to put in issue. On the contrary, admissions have for long been held corroborative and it is hard to see how this could be so if the argument under consideration were sound.

If any other authority be needed to support the latter proposition, it is to be found in the leading case of *The King v. Baskerville*[6], where the accused was charged with having committed acts of gross indecency with two boys and it was argued that as they were accomplices their evidence required corroboration. In the course of his reasons for judgment in that case, Lord Reading, after pointing out that letters from the accused to the boys had been put in evidence, went on to say:

> The prisoner had admitted to the police that the boys had been at his flat, that he knew one as a page-boy at the Trocadero Restaurant, and that this boy had been to see him on several occasions with another boy, and the appellant suggested to the police that he belonged to a boys' club and, therefore, was entitled to invite any of the members to his place. The appellant was not a member of a boys' club. The appellant gave evidence at the trial and admitted that he had given money to the boys on various occasions, and that, on hearing a peculiar whistle outside his flat, he had gone downstairs to let the boys in. We entertained no doubt that this evidence afforded ample corroboration of the boys' testimony, even if we assumed that the corroboration required was corroboration "in some material particular implicating the accused".

I find myself in full agreement with the conclusion reached by Mr. Justice McFarlane and I would adopt the views which he expressed in the following paragraph:

> I think evidence which may be corroboration of the evidence of a female person in such a case is evidence which may, in law, be considered by the jury as evidence of a material particular implicating the accused in the commission of the crime alleged. A particular is material in this sense if it may, in the opinion of the jury, show or tend to show that the testimony of the female person that the offense was committed and committed by the accused is true, thus being relevant to the issue which the jury is called upon to decide. That issue in this case was simply whether or not there was an act of sexual intercourse. To be capable of being considered corroborative, evidence need not in itself prove the guilty act.

The last sentence of this paragraph is fully borne out by what was said in the following statement of Lord Reading in *Rex v. Baskerville, supra:*

> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

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[6] [1916] 2 K.B. 658, 12 Cr. App. R. 81.

1968

THE QUEEN
v.
PARISH

Ritchie J.

In my view, the evidence of Fischer and Gagnon was capable of being construed as circumstantial evidence of the respondent's connection with the crime of which he was charged. It was for the jury to say under all the circumstances whether or not it in fact amounted to corroboration.

For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and the verdict of the jury and direct that a new trial should be had.

Appeal allowed and new trial directed.

Solicitors for the appellant: Boyd, King and Toy, Vancouver.

Solicitor for the respondent: F. W. Elliott, Quesnel.

1968

SARKIS ALEXANIAN (*Defendant by Writ*) ..... APPELLANT;

*Jan. 23, 24
Apr. 1

AND

JOHN DOLINSKI (*Defendant by Order of Local Master*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Final order of foreclosure—Subsequent sale of property—Order of Local Master conditionally setting aside and vacating final order of foreclosure and extending time for redemption—Whether in the circumstances foreclosure should have been reopened.

The appellant (A) was the mortgagor of certain lands and premises in St. Catharines. The mortgagee (N) started foreclosure proceedings against the said property because of arrears, and judgment directing a reference was given on June 15, 1962. The report of the Local Master, issued on November 30, 1962, fixed the date for redemption at May 23, 1963. A did not redeem on or before that date and on June 17, 1963, N obtained a final order of foreclosure. The property was advertised for sale on June 28, July 3 and July 10. On August 6, 1963, N accepted an offer to purchase from one P and his wife, who were nominees for the respondent (D). The sale was to be completed on September 6, 1963. On that date, before the transaction was completed at the Registry Office, the Local Master made an order reopening the foreclosure on the following terms: (a) Payment in full on September 13, 1963, during banking hours. In default of such payment the application was to be dismissed. (b) That A provide a sufficient and appropriate bond, guarantee and indemnity to N in

* PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

1968

ALEXANIAN v. DOLINSKI

reference to any loss or claim which might arise against N as a result of the sale made of the property on August 6, 1963. The parties attended before the Local Master on September 13, 1963, when the mortgage account was fixed at $27,577.62. A certified cheque for $27,400 was delivered to N's solicitors and the balance of $177.62 was sent by letter dated September 16, 1963. No bond, however, was delivered.

In the meantime D had taken steps to set aside the order of the Local Master. On September 13, 1963, he took out a *praecipe* order to have himself made a party plaintiff in the action. On September 20, 1963, the Local Master set aside this *praecipe* order but made another order adding D as a party defendant. D then appealed. On October 16, 1963, Hughes J. set aside the order of the Local Master. After the time for appeal from the order of Hughes J. had expired, the firm of solicitors which had acted throughout for both N and D sent a cheque for $27,577.62 to A's solicitor. On November 9, 1963, N's sale to D was completed. Thereafter A made an application to extend the time for serving notice of appeal from the order of Hughes J., and such time for appeal was extended to December 17, 1963. The appeal was heard by the Court of Appeal on January 23, 1964, and was unanimously dismissed. The members of the Court agreed with the opinion of Hughes J. that the foreclosure should not have been reopened after the final order had been made where the mortgagor had made no serious effort to raise the money before the expiry of the time for redemption and that there were no special circumstances in the case that would require a Court of equity to interfere. The final order of foreclosure having been made, a sale had now been made to a *bona fide* purchaser who had paid his money.

Subsequently, an appeal from the judgment of the Court of Appeal was brought to this Court.

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

Per Cartwright C.J. and Martland, Judson and Hall JJ.: The review of this case before Hughes J. and the Court of Appeal was thorough and complete and in accordance with principle. There was no ground for interference by this Court.

Per Spence J., *dissenting:* Had the purchaser (respondent) been a stranger to the whole transaction and represented independently throughout the appellant could not have advanced a sufficiently strong reason to persuade the Court to take the most unusual step of vacating the final order of foreclosure after the owner, by virtue of that final order of foreclosure, had made a *bona fide* sale to such third party. However, the purchaser, a former employee of the appellant, was no stranger and had chosen to employ the same firm of solicitors, who were acting for the mortgagee. The knowledge of the firm, in the circumstances, was the knowledge of both their clients, the mortgagee and the respondent.

When the appeal proceeded before Hughes J., the order under appeal had been acted on by both parties—by the mortgagor's payment of the exact amount required and the mortgagee's acceptance of that amount, and the mortgagee's demand for and definition of the indemnity bond required in that order. The respondent was so affected by the knowledge of these circumstances that he could not succeed in separating his position from that of the mortgagee.

[*Boulton v. Don & Danforth Road Co.* (1865), 1 Ch. Chrs. 335, applied.]

1968

ALEXANIAN v. DOLINSKI

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Hughes J., reversing an order of the Local Master which conditionally set aside and vacated a final order of foreclosure and extended the time for redemption of a certain mortgage. Appeal dismissed, Spence J. dissenting.

Sarkis Alexanian, appellant, in person.

Ross A. Wilson, Q.C., for the respondent.

The judgment of the Chief Justice and Martland, Judson and Hall JJ. was delivered by

JUDSON J.:—This litigation results from the reopening of a final order of foreclosure by the Local Master at St. Catharines, Ontario. On October 16, 1963, on appeal to a judge of the High Court, this order was set aside by Hughes J. On January 23, 1964, the Court of Appeal[1] dismissed the appeal from the order of Hughes J. Notice of appeal was given to this Court on March 3, 1964. The appeal came on for hearing in December of 1967 and January of this year. It is necessary to set out step by step what happened in this action.

The action was between William C. Nickerson, as mortgagee, and Sarkis Alexanian, as mortgagor, to foreclose a mortgage given by Alexanian to Nickerson. There was serious default under the mortgage. Judgment directing a reference was given on June 15, 1962. The report of the Local Master was issued on November 30, 1962. In December of 1962, the mortgagee paid the 1959 taxes to save the property from a tax sale. May 23, 1963, was the last day for redemption and on June 27, 1963, the final order of foreclosure was granted and it was registered a few days later. Alexanian had served notice, early in the action, as required by the Rules of Court, that he desired an opportunity to redeem. He was personally present on the reference before the Local Master and thus had knowledge of the amount found due on the mortgage and the last day for redemption.

The property was advertised for sale on June 28, 1963, and two subsequent days, one week apart. On August 6,

[1] [1964] 1 O.R. 360, 42 D.L.R. (2d) 219, *Sub nom. Nickerson v. Alexanian.*

1968

ALEXANIAN v. DOLINSKI

Judson J.

1963, Nickerson accepted an offer to purchase from William and Shirley Patriquin. These people were nominees for the respondent John Dolinski. The sale was to be completed on September 6, 1963. On that date, before the transaction was actually closed at the Registry Office, the Local Master made the order in question reopening the foreclosure on terms. The terms were:

(a) Payment in full on Friday, September 13, 1963, during banking hours. In default of such payment the application was to be dismissed.

(b) That Alexanian provide a sufficient and appropriate bond, guarantee and indemnity to the plaintiff in reference to any loss or claim which might arise against the plaintiff as a result of a certain sale made of this property to William and Shirley Patriquin.

The evidence is that these possible claims were twofold:

(1) from the real estate agent who had brought in the offer for 5 per cent on the purchase price of $40,200—$2,010; and

(2) from the purchaser John Dolinski for approximately $1,000 for legal fees and costs in connection with a mortgage that he negotiated with the British Mortgage Company, and for his legal costs on the purchase.

The same firm of solicitors acted throughout for Nickerson and Dolinski. Originally, when Dolinski's offer was accepted, both Nickerson and he had the same interest in completing the sale. When the Local Master reopened the foreclosure on September 6, Nickerson took no strong stand. He was concerned with getting back his money and with the indemnity against the costs of the real estate agent and Dolinski. Dolinski, however, was interested in completing the sale.

On September 13, 1963, the parties attended before the Local Master when the mortgage account was fixed at $27,577.62. A certified cheque for $27,400 was delivered to Nickerson's solicitors and the balance of $177.62 was sent by letter dated September 16, 1963. Nothing turns on this and no one suggests that the sending of the balance of $177.62 on September 16 was not compliance with the Master's order as to payment in full by September 13. No

bond, however, was ever delivered. I will come back to this matter later. Nickerson did not appeal against the Local Master's order.

In the meantime, Dolinski had taken steps to set aside the order of the Local Master. On September 13, 1963, he took out a *praecipe* order to have himself made a party plaintiff in the action. On September 20, 1963, the Local Master set aside this *praecipe* order but made another order adding Dolinski as a party defendant. Dolinski then appealed. On October 16, 1963, Mr. Justice Hughes set aside the order of the Local Master. On November 4, 1963, Messrs. Miller, Fullerton and Martin, solicitors for both Nickerson and Dolinski, sent a cheque for $27,577.62 to Harold M. Smith of Toronto. Mr. Smith was the solicitor who had negotiated for the money to enable Alexanian to redeem. He was acting for the new proposed lender and for Alexanian. The time for appeal from the order of Hughes J. had expired. On November 9, 1963, Nickerson's sale to Dolinski was closed, tax arrears for the years 1960, 1961, 1962 and 1963 were allowed to the purchaser. These amounted to approximately $8,000. Nickerson paid the real estate agent's commission of $2,010, and the Sheriff's costs of obtaining possession of the premises—$1,847.97. On January 23, 1964, the Court of Appeal gave judgment dismissing the appeal from the order of Hughes J., and the notice of appeal to this Court followed on March 3, 1964. Then a period of almost four years elapsed before the appeal was heard.

I wish to make it clear at this point that this delay was entirely the fault of the parties. It was Alexanian's duty, as appellant, to proceed with despatch according to the rules. The respondent had the right to move for dismissal for delay if Alexanian did not proceed with due despatch to complete the appeal. This action was not taken until some time in 1967. The result was that the appeal was then completed and heard.

I will deal next with the terms of the contract of sale. The vendor, when he accepted the offer, had a final order of foreclosure. The price was $40,200, which, according to the real estate agent, was a good price at the time. Alexanian had different ideas of the value of the property but there is no evidence that could justify a Court in holding that this was a sale at an undervaluation. It realized in

1968

ALEXANIAN v. DOLINSKI

Judson J.

cash $32,274.44. The mortgage account at the time of closing was approximately $27,750. The surplus was approximately $4,500. From this has to be deducted the $2,010 payable to the real estate agent and the costs of obtaining possession. Mr. Justice Roach was right when he said in the Court of Appeal that there was, in fact, little or no surplus.

If this appeal is to succeed it must be on the ground that there was a redemption of this mortgage on September 13, 1963, pursuant to the Local Master's order. It is argued that there was such a redemption by the deposit of the two cheques in the trust account of Messrs. Miller, Fullerton and Martin, and the retention of the money in the trust account until November 4, 1963. There could be no redemption when the money was never turned over to Nickerson and when it was returned on November 4, 1963, to the solicitors for Alexanian, who were apparently glad to get it back although they did complain about a non-allowance of interest. Further, the requirement of the bond was never waived. Alexanian could not insist on an assignment of the mortgage to his nominee on the mere payment of the money. He had to produce this bond in addition. Alexanian made no attempt to comply with the order of the Local Master at this point.

It is suggested that the correspondence between the solicitors constitutes such a waiver. I now set out the correspondence in full and to me it is quite apparent that there was no such waiver:

September 16, 1963.

Messrs. Miller, Fullerton & Martin,
Barristers and Solicitors,
Box 176, 71 King St.,
ST. CATHARINES, Ontario.

Attn. F. L. Miller, Esq.

Re: Nickerson vs. Alexanian et al.

Dear Sirs:

In accordance with the writer's arrangement with your Mr. Miller on Friday last, I am pleased to enclose herewith the trust account cheque of Harold M. Smith, in the sum of $177.62, in favour of your firm. This amount represents the balance due to the plaintiff, in accordance with the findings of the local Master on Friday last; the sum of $27,400.00 having been delivered to you at the time of the reference.

It is understood and agreed that you will hold the enclosed funds, together with the funds delivered at the time of the reference in escrow

pending delivery to this office of duly executed documents assigning the plaintiff's mortgage and the judgment herein from the plaintiff to Caroline M. Stafford, of the Township of North York, Trustee.

I understand further that from the funds delivered to you, you will pay off the claim of William C. Nickerson in full and will attend payment of the Sheriff's account and the fire insurance premium referred to in your Statement of Account dated September 13th.

When delivering the required documents, will you also let me have the original order of His Honour Judge Darby dated September 6th.

Please let me also have a memorandum of your disbursements respecting the registration of the certificate of order re-opening the foreclosure proceedings and setting aside the final order of foreclosure and for any other disbursements you may have incurred on my behalf.

Your courtesy in attending these matters on the writer's behalf is very much appreciated.

Yours very truly,

(sgd) George E. Bell
GEORGE E. BELL.

GEB: J
Enclosure

September 18, 1963.

Harold M. Smith Esq.,
Barrister etc.,
80 Richmond Street West,
Toronto 1, Ontario.

Attention: George E. Bell Esq.,

Re: Nickerson vs. Alexanian et al.

Dear Mr. Bell:

I acknowledge and thank you for your letter of September 16th enclosing cheque in the sum of $177.62 representing the balance due to the Plaintiff in accordance with the findings of the Local Master at St. Catharines.

We agree that the total of the funds which you have delivered to us will be held in escrow pending delivery to you of the executed documents assigning the mortgage and judgment. These documents were prepared on Monday for execution by Mr. Nickerson but unfortunately due to the pressure of business the writer did not have them ready when Mr. Nickerson came into the office. Therefore we have made an appointment with Mr. Nickerson for this afternoon to have them executed and if he is able to get in in time to catch the afternoon mail we will forward them to you under separate cover.

We have obtained from the Registrar of the Supreme Court a Certificate of the original order made by the Local Master and will have it registered and return the duplicate original of the Certificate together with the original order to you.

We understand, of course, that out of the funds which were delivered to us we are to pay the Sheriff's account and the fire insurance premium.

There is one other matter which has not been mentioned and that is of course the bond to be provided to indemnify Mr. Nickerson against any claims which may be brought against him arising out of the agree-

1968

ALEXANIAN v. DOLINSKI

Judson J.

ment of purchase and sale which was entered into on August 6th, 1963. Would you please advise us as to what is proposed in this connection in accordance with the Judge's Order, and it seems to us that under the circumstances that if the bond is to be given by Alexanian it should be with at least two sureties. As far as I am able to estimate the total amount involved would be a maximum of $3,000.00 assuming that we were compelled to pay everybody in full. Please let me hear from you in connection with this as soon as possible.

Yours very truly,

MILLER, FULLERTON & MARTIN,

Per:

FLM: id

(F. L. Miller)

November 4th, 1963.

Harold M. Smith Esq.,
Barrister etc.,
Suite 2005,
80 Richmond Street West,
Toronto 1, Ontario.

Attention: George E. Bell Esq.

Re: Nickerson vs. Alexanian et al

Dear Sirs:

We enclose herewith our cheque in the sum of $27,577.62 being the funds which you paid to us pursuant to the Order made by His Honour Judge Darby. The other requirement of the said Order, namely that a bond be provided to indemnify Mr. Nickerson against any claims which may be brought against him arising out of the agreement of purchase and sale, was never complied with as referred to in our letter of September 18th and we therefore have no documents in that connection to return.

The Order of His Honour Judge Darby having been set aside and the time for appeal having expired we are returning the funds to you.

Yours very truly,

MILLER, FULLERTON & MARTIN,

Per:

(F. L. Miller)

FLM: id
Encl.

November 16th, 1963.

Messrs. Miller, Fullerton & Martin,
Barristers & Solicitors,
71 King Street,
ST. CATHARINES, Ontario.

Dear Sirs: Re: Alexanian

This will acknowledge your letter of November 13th.

When you returned to me the money which I paid to you for an Assignment of your client's original mortgage on the property, you did not include the accrued interest.

We feel that during the interval in question our client was entitled to the interest accruing on the mortgage, which I calculate at $245.88.

Upon receipt of this amount, I will obtain the Discharge for which you ask.

Yours truly,

(sgd) H. M. Smith

HMS: cs

The suggestion of waiver arises from the following sentence in the letter of Messrs. Miller, Fullerton & Martin:

> Therefore we have made an appointment with Mr. Nickerson to have them executed and if he is able to get in in time to catch the afternoon mail, we will forward them to you under separate cover.

Later in the letter the question of the bond was raised. The solicitors did not send the assignment of the mortgage; they did not turn over the money to their client. Dolinski was proceeding with his efforts to get himself joined in the action for the purpose of appeal. This was known to the other side. They appeared on the appeal to Hughes J. to oppose the appeal. Then after the time for appeal from the order of Hughes J. had expired, the money was returned and accepted.

Part of the trouble arises from the action of the Local Master in reopening the foreclosure without first making Dolinski a party defendant. He had a right to be heard on the motion to reopen and to be joined in the action: *Boulton v. Don & Danforth Road Co.*[2]

Messrs. Miller, Fullerton & Martin, solicitors for Nickerson, could not deliver an assignment of this mortgage without being assured of costs that Nickerson would have to meet amounting to nearly $3,000. They had the order of the Master requiring this and no waiver can be spelled out from the correspondence and the conduct of the parties. If they had delivered the assignment of the mortgage without the bond, they would undoubtedly have been liable to their client for the amount of his loss.

It was argued before us that if Hughes J. had known of the settlement of the mortgage account before the Local Master on September 13, 1963, and the delivery of the certified cheque for $27,400, and the subsequent delivery of the balance of $177.62, and the retention of these moneys

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[2] (1865), 1 Ch. Chrs. 335.

1968

ALEXANIAN v. DOLINSKI

Judson J.

until November 6, he would not have made the order that he did and reverse the Local Master. I do not agree with this submission for two reasons:

(a) Hughes J. was not trying a theoretical question. The order of the Local Master directed payment in full "by Friday, September 13, 1963, during banking hours" and that on default the application be dismissed with costs to be taxed. If payment had not been made in full, there would have been nothing to litigate before Hughes J.

(b) Both parties were represented on the motion before Hughes J., Dolinski by Mr. Fullerton and Alexanian by Mr. Bell, who was an associate of Harold M. Smith. It was he who had come to St. Catharines to attend the settlement of the account on September 13, 1963, and had personally delivered the certified cheque for $27,400.

Counsel for Alexanian now submits that what happened on September 13 and 16 was payment of the mortgage and that he is now entitled to a vesting order vesting the property in Alexanian free and clear of the mortgage without further payment.

I am therefore going to proceed on the assumption that Hughes J. knew that he was dealing with actualities and not theory and that there had been compliance with para. 3 of the Local Master's order. His reasons for judgment make it clear that he was of the opinion that in this case there had been an erroneous exercise of the Local Master's discretion in reopening this foreclosure. His opinion was that the foreclosure should not have been reopened after the final order had been made where the mortgagor had made no serious effort to raise the money before the expiry of the time for redemption and that there were no special circumstances in the case that would require a Court of equity to interfere.

The Court of Appeal was of the same opinion. Roach J.A. said:

> In this case there is no evidence of what has been referred to in a number of decisions as intrigue between the mortgagee plaintiff and the purchaser. There is no evidence of any effort or scheme by the mortgagee to freeze out the appellant from this property and to acquire the appellant's equity if there was one. The attitude of the plaintiff mortgagee

as disclosed in the material before us was not one in which he was attempting to overreach or take undue advantage of his position as a mortgagee. The mortgage was in arrears, taxes remained unpaid and the plaintiff mortgagee was required to pay some of those taxes in order to protect his mortgage interest. He offered to the mortgagor, who was then in possession, to accept the arrears of interest and the taxes which he, the mortgagee, had been required to pay, and enable the mortgagor to put the mortgage in good standing to that extent and permit him to remain in possession. The mortgagor did not comply with the offer that the mortgagee had thereby made.

Certain dates are significant. The interim judgment of foreclosure was dated June 15, 1962, and fixed the date for redemption as May 23, 1963. The final order of foreclosure was dated June 17, 1963. Now it is pertinent to enquire, having regard to the factors that are important in deciding this case, what efforts, if any, the mortgagor made, prior to the final order of foreclosure, to put this mortgage in good standing. He did not have the cash, apparently, with which to do it. He said he did two things; one, he had a claim of some sort against an employee based on an allegation of fraud and the farthest he is willing to go, apparently, in the material presented to us, in so far as that claim is concerned, is to say that he was hopeful that he might be able to recover something on that claim and use the amount that he thereby recovered to put this mortgage in good standing. He did not at any time seek the assistance of the Court in recovering on that allegation of fraud against that unnamed employee.

* * *

The final order of foreclosure having been made in the circumstances that I have only briefly outlined, we are not satisfied that there are any special circumstances that would require this Court as a Court of equity to interfere with the title acquired by Dolinski who in our opinion on the material before us was a *bona fide* purchaser who had not been guilty of any intrigue or conduct unworthy of a purchaser attempting to acquire a property in an open market. The equities, as it seems to us, are all in favour of the respondent. We agree with the Honourable Mr. Justice Hughes that the appellant did not show the diligence that was required of him in an effort, and I am now speaking particularly of the period before the final order of foreclosure was made, to obtain the money with which to redeem. The final order of foreclosure having been made, a sale has now been made to a *bona fide* purchaser who has paid his money.

In my respectful opinion the review of this case before Hughes J. and the Court of Appeal has been thorough and complete and in accordance with principle.

I can see no ground for interference by this Court and I would dismiss the appeal with costs.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario[3] pronounced on January 23, 1964, which dismissed the appeal from the

[3] [1964] 1 O.R. 360, 42 D.L.R. (2d) 219, *sub nom. Nickerson v. Alexanian.*

1968

ALEXANIAN v. DOLINSKI

Spence J.

judgment of Hughes J. pronounced on October 16, 1963. By the latter judgment, Hughes J. had allowed an appeal from the decision of the Local Master at St. Catharines of September 6, 1963. The Local Master had by that judgment conditionally set aside and vacated a final order of foreclosure dated June 17, 1963, and extended the time for redemption of the mortgage to September 13, 1963.

The said final order of foreclosure although pronounced on June 17, 1963, is erroneously referred to in the said order of Hughes J. as having been dated June 24, 1963, which was the date of the certificate thereof and the registration of that certificate.

The appellant had entered into a mortgage with William Nickerson as mortgagee on November 28, 1956, in the principal sum of $20,000. This mortgage having fallen very considerably into arrears, the said William Nickerson as mortgagee issued a writ of foreclosure and obtained a judgment in the action on June 15, 1962. That judgment in the ordinary form of mortgage action was for reference to the Local Master at St. Catharines. The report of the said Local Master at St. Catharines upon such reference was settled on November 30, 1962, and in that report the time for redemption was fixed as May 23, 1963. The mortgage was not redeemed on or before that date and no redeption had taken place thereafter so that the said William C. Nickerson as plaintiff in the mortgage action as I have said caused a final order of foreclosure to be issued on June 17, 1963. The said William C. Nickerson then proceeded to advertise the property for sale, advertisements being inserted in the St. Catharines Standard on June 28 and July 3 and 10, 1963. By this advertisement, the said William C. Nickerson called for sealed tenders for the sale of the mortgaged premises. The advertisement stated that further particulars might be obtained at the office of the solicitors who had acted for Mr. Nickerson in issuing the writ of foreclosure. One tender was received. The tenderers were William and Shirley Patriquin and the tender was for $40,200 of which sum $30,000 was to be paid by the vendor accepting a mortgage back. Mr. Nickerson refused this tender. Shortly thereafter, one Walker, a real estate agent in St. Catharines, delivered to Mr. Nickerson an offer to purchase in which the proposed purchasers, the same persons William and Shirley Patriquin, offered to purchase the

premises in question at the same price of $40,200 payable $4,000 upon acceptance of the offer and the balance in cash on the closing date subject to normal adjustments. This offer dated July 30, 1963, was accepted by Mr. Nickerson on August 6, 1963, and in his acceptance in the usual form he agreed to pay to the said Walker a commission of 5 per cent on the sale price. The offer originally required the transaction to be closed on August 30, 1963, but Mr. Nickerson and the proposed purchasers agreed to postpone the date for closing of the sale to September 6, 1963.

Mr. Nickerson has sworn that he instructed Walker to change the date of the closing of the transaction to September 6, 1963, in order to give the appellant an opportunity to vacate the premises. The respondent John Dolinski, a former employee of the appellant in his rug business, has sworn that the said offer to purchase made by William and Shirley Patriquin and accepted by Mr. Nickerson was made by them as his undisclosed agents, and the respondent's solicitor Charles William Fullerton in his affidavit sworn on January 22, 1968, has deposed that the respondent and his wife Ruby Dolinski brought to him the said agreement of purchase and sale.

On September 3, 1963, that is, only three days before the sale from Mr. Nickerson to the respondent was to be carried out, the appellant served upon the solicitor for Mr. Nickerson a notice of motion returnable on September 6, 1963, for an order vacating the final order of foreclosure together with the appellant's affidavit sworn on said September 3, 1963.

The ground upon which the order was sought was that the appellant has been able to obtain mortgage financing in an amount sufficient to pay off all the encumbrances and that the proceeds of the mortgage were to be available on September 13, 1963. On September 6, 1963, the Local Master considered the appellant's application in the presence of counsel for the plaintiff, *i.e.*, Mr. Nickerson, and for the appellant. The Local Master gave judgment that day setting aside the final order of foreclosure and extending the time for redemption to September 13, 1963. The Local Master gave reasons for this disposition in long and detailed form.

1968

ALEXANIAN v. DOLINSKI

Spence J.

It was quite evident that the Local Master had been informed of the offer to purchase by the Patriquins as agents for Dolinski accepted by Mr. Nickerson and that the transaction was to be closed on that same day. The Local Master said in part:

> I am advised by counsel for the respondent, that the sale which was to have been concluded has not, to this moment, as yet been concluded. I understand that a member of the same firm is also acting for the purchasers. I think, however, that this has no bearing on the matter, being a matter of choice. However, it is of interest, whether it is conceivable or not, that the counsel for the applicant produces an abstract from the Sheriff's Office showing that two people with the same names are also judgment creditors in the amount of over $1300 under a writ filed on January 27, 1963. Again this, of course, may not affect the purchasers' ability to conclude this purchase.
>
> I do not know what particular rights or obligations the purchasers have otherwise acquired or assumed, but exercising my discretion, and distinguishing this case from those cited, namely, that there has been a very short time since the issue of the final order of foreclosure, that the defendant is still in possession, that he has his job and his home in the premises, that he appears to have made every effort and to have finally succeeded in obtaining sufficient funds to more than pay off and redeem his property, I shall make an order setting aside the final order of foreclosure and reopening the reference and fixing Friday, September 13 at 2:00 o'clock to resume the reference. The applicant must be prepared to pay the plaintiff in full including all proper expenses, also including costs of $100 in connection with this application and to make other and suitable arrangements concerning the present circumstances having regard to whatever rights the purchasers may have as outlined in Marriott's textbook dealing with practice in mortgage actions in Ontario, second edition. I may say, however, in connection with this, it appears to me that the purchasers went into this transaction with their eyes wide open, undoubtedly Mr. Walker as their agent, no doubt explained to them the mortgage situation. In any event, the purchasers' solicitor knew of the mortgage situation and the knowledge of the solicitor must be imputed to the purchasers. The purchasers knew the mortgage had been but only recently foreclosed and it is hard to understand or believe that the purchasers would not have an accurate knowledge of the situation as it existed here. I also note there is a very substantial excess value alleged to be in the premises and there, for example, would appear to be no information as to the fact that the purchasers have even inspected the property as purchasers before making their offer.

As the Local Master points out, the solicitor for the respondent was throughout the partner of the solicitor for Mr. Nickerson and one must assume that the knowledge of one partner was the knowledge of both and the knowledge of each was the knowledge of the respective clients. Therefore, although the respondent Dolinski was not represented by counsel before the Local Master on September 6, 1963,

his solicitor's partner was present and was arguing strongly against the vacating of the final order of foreclosure and any extension of time for redemption.

The respondent's solicitor in his affidavit sworn only two weeks later has deposed that:

> Before I could register the deed to John Dolinski, I was advised by my office that the Vendor's solicitor had called and left a message that His Honour Thomas J. Darby had expressed the opinion that the deed to my client should not be registered if that had not already been done and that I was not to register the said deed if that was the case.

The formal order of the Master made on September 6, 1963, is in six paragraphs which I think should be repeated verbatim:

> 1. IT IS ORDERED that the Final Order of Foreclosure made hereon and dated the 17th day of June, 1963, and the Certificate hereof issued on the 24th day of June, 1963, and registered in the Registry Office for the Registry Division of the County of Lincoln as No. 92958 be and the same are hereby vacated and set aside.
>
> 2. AND IT IS FURTHER ORDERED that the time for redemption in the action herein on behalf of the Defendant, Sarkis Alexanian, be and it is hereby extended to Friday, September 13th, 1963, during banking hours.
>
> 3. AND IT IS FURTHER ORDERED that the Defendant, Sarkis Alexanian do pay in full the Claim of the plaintiff in the action on Friday, September 13th, 1963, during banking hours and that on default the application to be dismissed with costs to be taxed.
>
> 4. AND IT IS FURTHER ORDERED that the Defendant Sarkis Alexanian and the Plaintiff William C. Nickerson or their counsel do attend on September 13th, 1963, at the hour of 2 o'clock in the afternoon before the Local Master of the Supreme Court of Ontario at the Court House in the City of St. Catharines, in the County of Lincoln to determine the Plaintiff's claim.
>
> 5. AND IT IS FURTHER ORDERED that the costs of this application be and they are hereby fixed at $100.00 and to be paid to the Plaintiff as part of the Plaintiff's account on the 13th day of September, 1963.
>
> 6. AND IT IS FURTHER ORDERED that the Defendant, Sarkis Alexanian provide sufficient and appropriate bond guarantee and indemnity to the Plaintiff in reference to any loss of claim which may arise against the Plaintiff as a result of a certain sale made on this property to one William and Shirley Patriquin.

Thereafter, on September 13, 1963, the same solicitor for Mr. Nickerson, and the then solicitor for the appellant again attended the office of the Local Master and the mortgage account was settled at the sum of $27,577.62. The said solicitor for the appellant delivered at once to the solicitor for Mr. Nickerson a certified cheque payable to

1968

ALEXANIAN v. DOLINSKI

Spence J.

the solicitors' firm for $27,400. That cheque was dated September 13, 1963, and certified in Toronto on that day. It is quite evident that it was for an amount as closely as could be calculated beforehand to pay the mortgage account in full. As a matter of fact, it proved to be $177.62 too small an amount, and the then solicitor for the appellant promised to forward to the solicitor for Mr. Nickerson by mail the balance of the said moneys.

By a letter dated September 16, 1963, and addressed to the firm of solicitors who, as I have said, were then acting for both Mr. Nickerson and the respondent, the then solicitor for the appellant forwarded his firm cheque for $177.62. Paragraph 2 of that letter reads as follows:

> It is understood and agreed that you will hold the enclosed funds, together with the funds delivered at the time of the reference in escrow pending delivery to this office of duly executed documents assigning the plaintiff's mortgage and the judgment herein from the plaintiff to Caroline M. Stafford, of the Township of North York, Trustee.

There was no mention in that letter of any bond as referred to in para. 6 of the Local Master's order quoted above.

On September 18, the said firm of solicitors who had received the letter of the 16th replied to the then solicitor for the appellant as follows:

> Harold M. Smith, Esq.,
> Barrister, etc.,
> 80 Richmond St. West,
> Toronto 1, Ontario.
>
> Attention: George E. Bell Esq.
>
> Re: Nickerson vs. Alexanian et al.
>
> Dear Mr. Bell:
>
> I acknowledge and thank you for your letter of September 16th enclosing cheque in the sum of $177.62 representing the balance due to the Plaintiff in accordance with the findings of the Local Master at St. Catharines.
>
> We agree that the total of the funds which you have delivered to us will be held in escrow pending delivery to you of the executed documents assigning the mortgage and judgment. These documents were prepared on Monday for execution by Mr. Nickerson but unfortunately due to the pressure of business the writer did not have them ready when Mr. Nickerson came into the office. Therefore we have made an appointment with Mr. Nickerson for this afternoon to have them executed and if he is able to get in in time to catch the afternoon mail we will forward them to you under separate cover.

We have obtained from the Registrar of the Supreme Court a Certificate of the original order made by the Local Master and will have it registered and return the duplicate original of the Certificate together with the original order to you.

We understand, of course, that out of the funds which were delivered to us we are to pay the Sheriff's account and the fire insurance premium.

There is one other matter which has not been mentioned and that is of course the bond to be provided to indemnify Mr. Nickerson against any claims which may be brought against him arising out of the agreement of purchase and sale which was entered into on August 6th, 1963. Would you please advise us as to what is proposed in this connection in accordance with the Judge's Order, and it seems to us that under the circumstances that if the bond is to be given by Alexanian it should be with at least two sureties. As far as I am able to estimate the total amount involved would be a maximum of $3,000.00 assuming that we were compelled to pay everybody in full. Please let me hear from you in connection with this as soon as possible.

Yours very truly,
MILLER, FULLERTON & MARTIN
Per:
(G. L. Miller)

No reply was received by the solicitors who had forwarded that letter. However, on September 13, 1963, that same firm of solicitors acting for the respondent had filed a *praecipe* for "an order pursuant to Rule 300 joining John Dolinski as party plaintiff" and on the same day, the Local Registrar at St. Catharines acting on that *praecipe* made an order so adding the respondent as party plaintiff. On September 16, 1963, the respondent swore his affidavit in which he outlined the offer to purchase the premises to which I have referred and alleged that he had incurred certain liabilities in reference thereto.

By an order dated, in error, Friday, September 19, 1963, quite evidently made on Friday, September 20, 1963, the Local Master set aside the order of the Local Registrar adding the respondent as a party plaintiff and by another order of the same day designated the respondent as a party defendant.

I find some significance in the fact that there was an affidavit by the then solicitor for the appellant sworn on September 17, 1963, served upon the solicitors for the respondent together with a notice of application to set aside the aforesaid *praecipe* order and then filed in which the then solicitor for the appellant swore in part "payment of the plaintiff's claim has been made in full to the solicitors

1968

ALEXANIAN v. DOLINSKI

Spence J.

for the plaintiff and the plaintiff has been ordered and authorized to assign the mortgage to Caroline M. Stafford of the Township of North York, and the solicitors for the said plaintiff William C. Nickerson have undertaken to deliver a duly executed assignment of mortgage and an assignment of judgment prepared in accordance with a direction and authorization received by them". This affidavit was before the Local Master when he made the two orders on September 20, and should have been available at the time of the subsequent consideration of that order on appeal.

By the notice of appeal dated September 13, 1963, John Dolinski as plaintiff (on that day and until September 20, 1963, he was a plaintiff in the action by virtue of the *praecipe* order which was vacated on the latter date) appealed to the presiding judge in chambers at Osgoode Hall from the order pronounced by the Local Master at St. Catharines vacating the final order of foreclosure and extending the time for redemption to September 13, 1963. This is quite evidently a notice of appeal from the Local Master's order of September 6 which has been set out above. That notice of appeal was served on the then solicitors for the appellant herein on September 13, 1963, and service was admitted. The said appeal was to be heard on September 17, 1963, but there is an endorsement that on that day it was adjourned for one week.

By virtue of Rule 514 of the Ontario Rules of Practice an appeal may be taken by "a person affected by an order of the Master" on notice served within four days and returnable within ten days after the decision complained of. The appeal came on for hearing before Hughes J. on September 24, 1963, and in his reasons the learned judge noted that he had extended the time for service of the notice of appeal to September 21 and the time for return of the motion to September 27.

Hughes J. reserved judgment and gave carefully detailed reasons therefor on October 16, 1963. By his order, Hughes J. allowed the appeal and set aside the order of the Local Master made on September 6, 1963. The appellant here appealed from that order of Hughes J. and on January 23, 1964, the Court of Appeal for Ontario dismissed that appeal.

Although, as I have pointed out, the fact of the payment on September 13, 1963, by the then solicitors for the appellant to the firm of solicitors here acting for both Mr. Nickerson and the respondent was known to the Local Master at St. Catharines and was referred to by him in his disposition of the application which came before him on September 20, there seems to have been no mention of these circumstances to the Court of Appeal when that Court considered the appeal from the order of Hughes J. Although the members of this Court sought enlightenment on that astounding circumstance, we received no explanation from any counsel. In my view, it is the important circumstance which must be considered on this appeal. As the argument developed in this Court, no real attack was made on the reasoning of Hughes J. on which he based his reversal of the order of the Local Master nor upon the reasoning of the Court of Appeal when that judgment was confirmed. Nor, in my opinion, could any criticism be made of those reasons.

Had the purchaser been a stranger to the whole transaction and represented independently throughout then I am of the opinion that the appellant could not have advanced a sufficiently strong reason to persuade the Court to take the most unusual step of vacating the final order of foreclosure after the owner, by virtue of that final order of foreclosure, had made a *bona fide* sale to such third party. There may be circumstances in which a Court would not be justified in doing so on any circumstances which have been shown. The situation, however, is not that situation. As the appellant has sworn without contradiction, the respondent, the purchaser, was no stranger. Although he and his wife had been employees of the appellant and resulting from their employment there have been strenuous controversies as yet unsettled, the respondent chose not to reveal his identity until after he had made, through the use of an agent's name, first a tender and then when that was refused, an offer to purchase, and the latter had been accepted. The respondent chose to employ the same firm of solicitors who were acting for the mortgagee, Mr. Nickerson, and, as I have said, there can be no significance that one member of that firm conducted the business for Mr. Nickerson while another member of the firm conducted the business for the respondent, both doing so in the firm

1968

ALEXANIAN v. DOLINSKI

Spence J.

name. Under such circumstances, the knowledge of one member of the firm, as I have said, was the knowledge of the other, and the knowledge of the firm was the knowledge of both their clients, Mr. Nickerson and the respondent.

The Local Master made an order on September 6 which in exact terms required that the appellant "do pay in full the claim of the plaintiff in the action on Friday, September 13th, 1963, during banking hours..." and made a further order that the appellant and the plaintiff Nickerson or their counsel do attend on September 13 at two o'clock in the afternoon before him to determine the amount of the plaintiff's claim. When the parties acted on that order attending with their solicitors at that time and determining the exact amount due and then the appellant paying the exact amount in the fashion which I have outlined, both parties had complied with the order.

It is true that by para. 6 of the Master's order of September 6, 1963, "it is further ordered that the defendant Sarkis Alexanian provide sufficient and appropriate bond guarantee and indemnity to the Plaintiff in reference to any loss or claim which may arise against the plaintiff as a result of a certain sale made on this property to one William and Shirley Patriquin", but the provision of that bond was not required to be made on September 13. The solicitor for Mr. Nickerson realized this and in his letter to the then solicitor for the appellant dated September 18, 1963, which I have quoted above, he undertook to forward the assignment of the mortgage and judgment required by the solicitor for the appellant so soon as his client Mr. Nickerson could attend him to execute the same, and then merely asked for a bond in the amount of $3,000 with two sureties, without in any way making it a term of the escrow upon which he had received the sums totalling $27,577.62. By that date the same firm of solicitors were proceeding as solicitors for the respondent Dolinski to appeal from the decision of the Local Master which had directed the payment and required the bond. The payment had been made and for the first time the amount and terms of the bond, previously never defined, were suggested by the solicitors for Mr. Nickerson.

When the appeal proceeded before Hughes J., the order under appeal had been acted on by both parties—by the

appellant's payment of the exact amount required and the respondent's acceptance of that amount, and the respondent's demand for and definition of a bond required in that order.

Subsequently, when the appellant was evicted from the premises, the appellant and his family resisted and as a result were charged with obstructing the peace officer. They were convicted and appealed to the Court of Appeal for Ontario which Court composed of the same members who had dismissed the appellant's appeal against the order of Hughes J., with this additional information, remarked:

> In our opinion, in the circumstances as they then stood, Alexanian was entitled to resist the execution by the Sheriff and his assistants of the writ of possession on the strength of which the Sheriff and his assistants were purporting to act. It was as of that date a trespass upon the premises of Alexanian. It was more than a trespass, it was an effort to evict him from the mortgaged premises whereas of that date he was entitled to remain in peaceful possession *he having paid the mortgage in full.*

(The italicizing is my own.) With that comment I agree.

If Hughes J. were aware of these most important circumstances, and the material is utterly silent upon the point nor is there any reference thereto in the learned judge's reasons, then he failed to appreciate that when he considered the appeal the order from which the appeal had been taken had already been acted upon by this appellant and by Mr. Nickerson. I am of the opinion that the respondent was so affected by the knowledge of these circumstances that he could not succeed in separating his position from that of Mr. Nickerson. Therefore, I would allow the appeal.

The problem which the Court then faces is to determine a proper disposition of the appeal.

The respondent went into possession of the premises. The Registrar's abstract shows that he placed thereon three mortgages, the first two of which have been discharged but the third of which in favour of a company known as Bentex Limited is for the principal amount of $40,000 and that he has subsequently conveyed the lands for $1 and other valuable consideration (the details of which have not been revealed) to one Anthony Benedek who is said without denial to be "interested in Bentex Limited". This mortgage to Bentex and the conveyance to Anthony Benedek were both dated and both registered

1968

ALEXANIAN v. DOLINSKI

Spence J.

long after the registration on September 19, 1966, of a certificate of the appellant's appeal to this Court from the judgment of the Court of Appeal and therefore such transactions as they represent must have been carried out with notice of this appeal.

The said notice of appeal to this Court was dated March 3, 1964. That appeal was not completed for a very long time and no proceeding was taken on behalf of the respondent to cause the appeal to be dismissed for want of prosecution until 1967. The appeal first came on for argument in this Court at the end of the term in 1967 and for the first occasion after the appeal from the learned Local Master to Hughes J. an application was made to introduce the evidence as to payment on September 13, 1963. The Court considered such application, permitted the introduction of that evidence, and evidence in reply thereto, and put the appeal over until the month of January 1968. When the appeal was called at that time, the Court permitted additional evidence in the form of affidavits to be filed by both parties and also permitted the filing of the correspondence between the said solicitor for the appellant and the solicitor for the respondent during the months of September and November 1963 which in the latter consisted of a letter from the solicitor for the respondent speaking therein as solicitors for Mr. Nickerson dated November 4, 1963, enclosing the solicitor's cheque for $27,577.62, "being the funds which you paid to us pursuant to the order made by His Honour Judge Darby". The solicitor continued:

> The other requirement of the said order, namely, that a bond be provided to indemnify Mr. Nickerson against any claims which may be brought against him arising out of the agreement of purchase and sale was never complied with as referred to in our letter of September 18th and we therefore have no documents in that connection to return...
>
> The order of His Honour Judge Darby having been set aside and the time for appeal having expired we are returning the funds to you.

To that letter, the then solicitor purporting to act for the appellant replied requesting interest on the said sum during the interval in which it was held by the solicitors for the respondent. In his affidavit, the said solicitor for the appellant has stated that he returned the sum to his client, that is, not the appellant but the proposed mortgagee.

It is, in my view, significant that the firm of solicitors acting for both Mr. Nickerson and for the respondent held

these funds from September 13, 1963, to November 4, 1963, and only returned them after the time for appeal from the order of Hughes J. had expired. In other words, on one hand they were still acting under the order of the learned Local Master and on the other hand they were attempting to have that order vacated.

Under all of these circumstances, I am of the opinion that the reference must be continued. I can see no part that Mr. Nickerson should be required to play upon such reference. I am of the opinion that the respondent when he purchased from Mr. Nickerson with all the knowledge which must be attributed to him has simply stepped into the shoes of Mr. Nickerson and that therefore there must be an accounting between the appellant and the respondent proceeding from September 13, 1963, to the date of the reference, and that on the reference a new date of redemption must be set for the payment of the amount due on such reference. Upon the reference, of course, the respondent must be credited with any disbursements properly made in the acquiring and maintenance of the property including payments for such matters as taxes, and he must be debited with the rents received and other income from the property including some amount attributable to his own occupation. I would, therefore, so order.

Under the order of the Court of Appeal, the appellant is to pay the costs in that Court and the order of Hughes J. requiring the appellant to pay the costs of the appeal before him was confirmed. I believe that a proper disposition would be to leave those orders as to costs in effect but provide that the respondent should pay the costs of the appeal to this Court.

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

Solicitors for the appellant: O'Driscoll, Kelly & McRae, Toronto.

Solicitors for the respondent: Wilson, Miller, Fullerton, Wilson & Partington, St. Catharines.

1968

*Feb. 23
Apr. 1

METROPOLITAN TAXI LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital cost allowance—Depreciable property—Purchase of 14 licensed taxis—Whether amount attributable to purchase of licences depreciable property as part of automotive equipment or as licences for limited period—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(a)—Income Tax Regulations and Schedule B, Class 10 and Class 14.

In January 1961, the appellant taxicab company paid $104,664.04 to purchase 14 licensed taxis from a competitor. The purpose of this transaction was to acquire the 14 licences, which was the only means open to the appellant for expanding its business. These licences were to expire within a month but were ordinarily renewed annually. The agreement anticipated the renewal of the licences in the name of the purchaser; if this did not happen, the assets were to be reconveyed to the vendor. In its 1961 income tax return, the appellant allocated $72,000 of the purchase price to the licences and the balance to cars and equipment. It claimed a capital cost allowance on the ground that the $72,000 represented either automotive equipment within the meaning of Class 10, Schedule B of the Income Tax Regulations or a licence for a limited period in respect of property within the meaning of Class 14, Schedule B. The Minister contended that the $72,000 had not been paid for any depreciable property. The Exchequer Court ruled that the appellant was not entitled to capital cost allowance in respect of any part of the $72,000. The company appealed to this Court.

Held: The appeal should be dismissed.

The Exchequer Court rightly held that the appellant company was not entitled to capital cost allowance.

Revenu—Impôt sur le revenu—Allocation du coût en capital—Bien susceptible de dépréciation—Achat de 14 taxis licenciés—Le montant attribué à l'achat des licences est-il un bien susceptible de dépréciation comme représentant une automobile ou une licence pour une durée limitée—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(a) —Règlements de l'impôt sur le revenu et cédule B, classe 10 et classe 14.

Au mois de janvier 1961, la compagnie de taxis appelante a acheté d'un concurrent 14 taxis licenciés pour la somme de $104,664.04. Le but de l'achat était d'acquérir les 14 licences, le seul moyen dont disposait l'appelante pour agrandir son entreprise. Les licences devaient expirer dans un mois mais elles étaient ordinairement renouvelées chaque année. Le contrat prévoyait que les licences seraient renouvelées au

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*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland and Spence JJ.

nom de l'acheteur, mais si elles n'étaient pas ainsi renouvelées, les biens devaient être retransmis au vendeur. Dans le calcul de son impôt sur le revenu pour l'année 1961, la compagnie appelante a considéré que la somme de $72,000 représentait le prix d'achat des licences et que la balance du prix était représentée par les voitures et accessoires. La compagnie a réclamé une allocation du coût en capital sur ce $72,000 pour le motif que cette somme représentait soit des automobiles dans le sens de la classe 10, cédule B des Règlements de l'impôt sur le revenu ou une licence pour une durée limitée à l'égard d'un bien dans le sens de la classe 14, cédule B. Le Ministre a soutenu que la somme de $72,000 n'avait pas été payée pour un bien susceptible de dépréciation. La Cour de l'Échiquier a statué que la compagnie appelante n'avait droit à une allocation du coût en capital sur aucune partie de ce montant. La compagnie en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

La Cour de l'Échiquier a statué avec raison que la compagnie appelante n'avait pas droit à une allocation du coût en capital.

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

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

A. J. Irving, for the appellant.

G. W. Ainslie and *J. R. London,* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from a judgment of Cattanach J. pronounced on February 28, 1967, dismissing the appellant's appeal and allowing the respondent's cross-appeal from a decision of the Chairman of the Income Tax Appeal Board and restoring the assessment made by the respondent in respect of the appellant's 1961 taxation year.

The issue for determination is whether $72,031.65 of the total purchase price of $104,664.04 paid by the appellant to acquire the business of Adolph's Taxi Co. Ltd was, as contended by the respondent, for the acquisition of something other than depreciable property or, as contended by the appellant, for either automotive equipment within the

[1] [1967] 2 Ex. C.R. 32, [1967] C.T.C. 88, 67 D.T.C. 5073.

1968

METRO-POLITAN TAXI LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright C.J.

meaning of Class 10, Schedule B of the Income Tax Regulations or for a licence for a limited period in respect of property within the meaning of Class 14, Schedule B.

The relevant facts and the submissions of the parties are set out in the reasons of the learned Exchequer Court Judge.

After a consideration of the arguments of counsel and the authorities to which they made reference I find myself so fully in agreement, not only with the conclusion of the learned Exchequer Court Judge but also with his reasons, that I am content simply to adopt them.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Aikins, MacAulay and Company, Winnipeg.

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

1967
*Nov. 21, 22

1968
Apr. 1

INTERPROVINCIAL PIPE LINE COMPANY ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Calculation of foreign tax credit—Sources of income—Effect of 1960 amendments to Income Tax Act—Canada-U.S. Tax Convention, Article XV—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(c), 41, 139(1a), (1b).

The facts in this case are substantially the same as those in *Interprovincial Pipe Line Co. v. M.N.R.*, [1959] S.C.R. 763, which dealt with the appellant's taxation years 1950 to 1954. The question again is how the calculation of the foreign tax deduction under s. 41 of the *Income Tax Act* is to be made and the result depends upon the effect to be given to the amendment to the *Income Tax Act* enacted in the year 1960. The appellant company's pipelines were connected by a pipe running through the United States which was owned and operated by a wholly-owned U.S. subsidiary company. The appellant carried on no business there. All the capital needed for the construction of the pipeline was raised by the appellant largely through the issue

* PRESENT: Cartwright C.J. and Abbott, Martland, Judson and Ritchie JJ.

of bonds and debentures in Canada. The appellant also financed the construction of the U.S. section of the line and took from its subsidiary interest bearing demand notes and bonds. In the years 1960 and 1961, the appellant received substantial amounts of interests on the bonds of its U.S. subsidiary, on which it paid a withholding tax of 15 per cent to the U.S. government. In computing its income, the appellant deducted the total amount of the tax paid to the United States. The Minister granted the appellant a much smaller foreign tax credit, ruling that the appellant's income from U.S. sources for the purposes of s. 41, was the net interest from the bonds of the U.S. subsidiary, *i.e.*, the bond interest received less the interest paid on the money borrowed to acquire the bonds. The Exchequer Court upheld the Minister's assessment, and the company appealed to this Court.

Held: The appeal should be dismissed.

As decided by the Exchequer Court, the method followed by the Minister in computing the appellant's foreign tax credit was the correct one. The effect of s. 139(1a) and (1b) was to require that the total interest on borrowed money claimed by the appellant and allowed to it under s. 11(1)(*c*) of the Act as a deduction had to be broken up and related to the appellant's various sources of income.

The effect of Article XV of the Canada-U.S. Convention was to establish a mutual covenant to apply as between each country whatever foreign tax credit provision the respective domestic laws of each country may from time to time adopt. This covenant did not require any alteration in the appellant's rights as determined by the interaction of ss. 41 and 139(1a) and (1b) of the *Income Tax Act*.

Revenu—Impôt sur le revenu—Calcul du dégrèvement pour impôt étranger —Sources du revenu—Effet des amendements de 1960 à la Loi de l'impôt sur le revenu—Convention entre le Canada et les États-Unis, Article XV—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 11(1)(c), 41, 139(1a), (1b).

Les faits dans cette cause sont substantiellement les mêmes que dans la cause *Interprovincial Pipe Line Co. v. M.N.R.*, [1959] R.C.S. 763, qui a considéré les années d'imposition 1950 à 1954 de la compagnie appelante. La question est de savoir comment doit se faire le dégrèvement pour impôt étranger sous l'art. 41 de la *Loi de l'impôt sur le revenu* et le résultat dépend de l'effet que l'on doit donner à un amendement de 1960 à la *Loi de l'impôt sur le revenu*. Les pipelines de la compagnie appelante sont reliés par un pipe-line traversant les États-Unis et qui est possédé et exploité par une corporation filiale américaine entièrement possédée par l'appelante. Cette dernière ne fait pas affaires aux États-Unis. La compagnie appelante s'est procuré le capital nécessaire pour la construction du pipe-line en grande partie au moyen d'obligations et de débentures émises au Canada. Elle a aussi fourni les fonds nécessaires à la construction de la section américaine et en retour a reçu de sa filiale des billets promissoires et des obligations portant intérêt. En 1960 et en 1961, la compagnie appelante a reçu des montants substantiels d'intérêts sur les obligations de sa filiale américaine, et a payé sur ce montant une taxe de 15 pour-cent au gouvernement américain. Dans le calcul de son revenu, l'appelante a déduit le montant total des taxes payées

1968

INTER-PROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE

aux États-Unis. Le Ministre a permis un dégrèvement pour impôt étranger beaucoup moindre, statuant que le revenu de l'appelante provenant des sources américaines pour les fins de l'art. 41 était l'intérêt net provenant des obligations de la filiale américaine, *i.e.*, l'intérêt provenant des obligations moins l'intérêt encouru dans le prêt d'argent pour l'acquisition des obligations. La Cour de l'Échiquier a maintenu la cotisation du Ministre, et la compagnie en a appelé à cette Cour.

Arrêt: L'appel doit être rejeté.

Tel que décidé par la Cour de l'Échiquier, le Ministre a employé la bonne méthode pour calculer le dégrèvement pour impôt étranger de l'appelante. L'article 139(1a) et (1b) a pour effet d'exiger que le montant total de l'intérêt sur l'argent emprunté, dont la déduction a été réclamée par l'appelante et qui lui fut permise en vertu de l'art. 11(1)(*c*), doit être fractionné et attribué aux différentes sources de revenu de l'appelante.

L'article XV de la Convention entre le Canada et les États-Unis a pour effet d'établir une entente mutuelle entre chaque pays pour appliquer les dispositions relatives au dégrèvement pour impôt étranger que les lois domestiques de chaque pays peuvent adopter de temps à autre. Cette entente ne requiert aucune modification des droits de l'appelante, tels que déterminés par l'action réciproque des arts. 41 et 139(1a) et (1b) de la *Loi de l'impôt sur le revenu.*

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

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

Lazarus Phillips, Q.C., and *Philip F. Vineberg, Q.C.*, for the appellant.

G. W. Ainslie, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—We are concerned here with appeals of Interprovincial Pipe Line Company from reassessments made for its 1960 and 1961 taxation years. The Exchequer Court has affirmed these reassessments. The facts are substantially the same as those in *Interprovincial Pipe Line Company v. The Minister of National Revenue*[2]. The sole question again is how the calculation of the foreign tax

[1] [1967] C.T.C. 180, 67 D.T.C. 5125.

[2] [1959] S.C.R. 763, [1959] C.T.C. 339, 59 D.T.C. 1229, 20 D.L.R. (2d) 97.

deduction under s. 41 of the *Income Tax Act* is to be made and the result depends upon the effect to be given to the amendment to the *Income Tax Act* enacted in the year 1960 following the former decision.

The amendment is to be found in 8-9 Eliz. II, Statutes of Canada 1960, c. 43, s. 33. It repeals s. 139(1)(*az*) of the Act as it stood when the 1959 litigation was decided and substitutes for it a new section 139(1a) and 139(1b). I will put the old legislation and the new legislation in two parallel columns for the purpose of comparison. I am not reproducing the new legislation in full but only those parts that are relevant to this appeal:

Old Legislation
Section 139(1) (az)

139. (1) In this Act,

(*az*) a taxpayer's income from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources of income and was entitled to no deductions except those related to that source or those sources.

New Legislation 1960
Section 139(1a) and (1b)

(1a) For the purposes of this Act

(*a*) a taxpayer's income for a taxation year from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources, and was allowed no deductions in computing his income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that source or those sources and except such part of any other deductions as may reasonably be regarded as applicable to that source or those sources; and

(*b*) In applying subsection (*1a*) for the purposes of sections 31 and 41, all deductions allowed in computing the income of a taxpayer for a taxation year for the purposes of Part I... shall be deemed to be applicable either wholly or in part to a particular source or to sources in a particular place.

There is no substantial difference between s. 41(1) and (5) of the *Income Tax Act* applicable to this appeal and

1968

INTER-PROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE

Judson J.

the section as it read when the 1959 appeal was decided. This section deals with foreign tax deduction. The other sections of the Act are the same in both cases—s. 3 (world income); s. 4 (income from business or property); s. 6(1)(*b*) (interest), and s. 11(1)(*b*) (deduction allowed for interest paid on borrowed money for the purpose of computing income).

Interprovincial's method of financing is set out in the 1959 Report. Interprovincial owns and operates a pipe line in Canada with a connecting link in the United States. The connecting link is owned and operated by Lakehead Pipe Line Company Inc., a wholly owned subsidiary. Interprovincial raised all the money to construct these lines. It lent the necessary money to Lakehead and took bonds in return. In the year 1960 Interprovincial received interest on these bonds but it itself had to pay interest on its own bonds which it had issued to acquire the Lakehead bonds. These are the figures:

Interest received from Lakehead Bonds	$2,421,165.80
Cost of borrowed money used to acquire Lakehead Bonds	2,363,966.79
	$ 57,199.01

These figures can be broken down by taking the Lakehead bonds series by series and making the same calculation. The result is the same and there is no dispute about the figures.

During the 1960 taxation year, the item of $2,421,165.80 above shown was not an actual receipt in that the sum of $363,174.87 was remitted by Lakehead to the Government of the United States pursuant to the provisions of the Internal Revenue Code of that country. This was a 15 per cent withholding tax. But Interprovincial, in computing its income as required by s. 6 of the Act, included the full sum of $2,421,165.80. Lakehead, in computing its income, deducted as an expense the said sum of $2,421,165.80.

Interprovincial claimed and was allowed as a deduction for interest on borrowed money pursuant to s. 11(1)(*c*) of the *Income Tax Act* the sum of $4,549,355. This sum includes the sum of $2,363,966.79 referred to above under the heading "Cost of borrowed money used to acquire Lakehead Bonds".

The question is what is to be done about the $363,174.87 withholding tax paid to the United States? The 1959 decision held

> (1) that this was available as a tax credit in respect of foreign tax paid on a gross basis on receipts of an income nature whether or not those receipts, after deduction of expenses incurred to earn them, resulted in a net profit when brought into the computation of the taxpayer's overall taxable income;
>
> (2) that there was no authority for splitting up the income of the business of the taxpayer; and
>
> (3) that the income of the business to be determined in order to ascertain what was taxable income was the entire income of the appellant and not that income split up into parts according to the situs of the source of that income.

Interprovincial still submits that it is entitled to deduct under s. 41 of the Act the full amount of the United States withholding tax, $363,174.87. The Minister submits that subs. (1b) of s. 139 of the Act contains a mandatory direction that in computing income from various sources for the purpose of s. 41 of the Act, the deduction of $4,549,355, *i.e.*, the total interest on borrowed money claimed by Interprovincial and allowed to it pursuant to s. 11(1)(*c*) of the Act, is to be broken up and related to Interprovincial's various sources of income. If this is done, as I have shown above, Interprovincial's income for the year 1960 from United States sources was $57,199.01. In my opinion the Minister is right and the effect of the 1960 amendment (the new s. 139(1a) and (1b) above quoted) is to require this to be done. This is the conclusion also reached by the Exchequer Court and I would affirm it.

We now must start by segregating the income from United States sources. That income is not a gross amount of $2,421,165.80, but a net amount of $57,199.01 after deducting the cost of borrowed money used to acquire the Lakehead bonds. Interprovincial's submission that its income from sources in the United States for the purpose of computing the amount deductible under s. 41 was still

1968

INTER-PROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE

Judson J.

the gross amount of interest received from the United States without being reduced by its interest expense in Canada, is in error.

I cannot see that there is any substantial difference between s. 41(1) and (5) dealing with the foreign tax deduction as it stood when the 1959 case was decided and as it now stands. Briefly, it enables the taxpayer to deduct from the tax payable an amount equal to the lesser of two sums,

(a) any income or profits taxes paid to the government of a country other than Canada for the year, or

(b) that proportion of the tax that (i) the taxpayer's income from sources in that country is of (ii) the taxpayer's income for the year.

The lesser of these two sums is now the sum calculated in accordance with the provisions of s. 41(1)(*b*) and this is all that is allowable as a foreign tax credit when the provisions of the new s. 139(1a) and (1b) are applied.

Interprovincial also put forward an alternative argument that the provisions of the Canada-U.S. Reciprocal Tax Convention prevented the application of the *Income Tax Act* in the way above outlined and that the Minister could not deny the taxpayer the full deduction of foreign taxes paid.

Article XV of the Convention provides:

1. As far as may be in accordance with the provisions of the Income Tax Act, Canada agrees to allow as a deduction from the Dominion income and excess profits taxes on any income which was derived from sources within the United States of America and was there taxed, the appropriate amount of such taxes paid to the United States of America.

2. As far as may be in accordance with the provisions of the United States Internal Revenue Code, the United States of America agrees to allow as a deduction from the income and excess profits taxes imposed by the United States of America the appropriate amount of such taxes paid to Canada.

I agree with the judgment of the Exchequer Court that the effect of this Article was to establish a mutual covenant to apply as between each country whatever foreign tax credit provision the respective domestic laws of each country might from time to time adopt and that this

covenant does not require any alteration in the appellant's rights as determined by the interaction of s. 41 of the *Income Tax Act* and section 139(1a) and (1b).

I therefore agree with the judgment of the Exchequer Court on both grounds and I would affirm it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Phillips, Vineberg, Goodman, Phillips & Rothman, Montreal.

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

THE ROYAL TRUST COMPANY, JAMES REID SARE, JAMES GEMMILL WILSON, (Executors of the Estate of AGNES HENRY WILSON) ..... APPELLANTS;

AND

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

1967
*June 9
1968
Apr. 29

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Competency to dispose of property—Power to dispose of property by will—Whether general power to appoint or dispose —Estate Tax Act, 1958 (Can.), c. 29, ss. 3(1)(a), 3(2)(a), 58(1)(i).

In her will, the deceased disposed of her property which included a share of her father's estate. The father's will, under which she received that property, provided that, during her lifetime, she would receive the income, but that, at her death, if she was survived by children, as was actually the case, the capital of her share could be "disposed of after her death in such manner as she may direct by will". There was also included in the estate of the deceased a life interest in a trust property given to her by a deed of donation *inter vivos* made by her father. That deed stipulated that the deceased "shall have the absolute right to dispose of the said trust property by her will in such manner as she may deem advisable". The Minister assessed the two properties as "property passing on the death" of the deceased. The executors submitted that the deceased was never, within the meaning of ss. 3(1)(*a*), 3(2)(*a*) and 58(1)(*i*) of the *Estate Tax Act*, competent to dispose of this property. The Exchequer Court upheld the Minister's view and ruled that the deceased was vested with a general power to dispose, by

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

1968

ROYAL TRUST COMPANY *et al.* *v.* MINISTER OF NATIONAL REVENUE

will, of such property as she saw fit. The executors appealed to this Court and submitted: (1) that s. 3(1)(*a*) contemplates property which a deceased was competent to actually transfer immediately prior to his death, and not property which is only actually effectively transferred after death; (2) that the deceased did not have such a general power as met the definition of s. 58(1)(*i*), because her father did not intend her to have the power to dispose of the property by her will in any way and to any person; (3) that the deceased never had a general power within the meaning of s. 58(1)(*i*), since the property was donated or bequeathed to her for alimentary support and was immune from seizure; (4) that the deceased's father disposed of the property to the persons as the deceased might direct would receive it.

Held: The appeal should be dismissed.

(1) Section 3(1)(*a*) deals with the competency to transfer, and not with the transfer of property. The words "immediately prior to death" in s. 3(1)(*a*) refer to the point at which a person is competent to dispose of property and not to the point at which there is, consequent to the exercise of competency, an actual and effective transfer of property. The executors' interpretation is further conclusively defeated by the provisions of s. 58(1)(*i*) taken together with ss. 3(1)(*a*) and 3(2)(*a*).

(2) The rule stated in art. 1013 of the *Civil Code* is to the effect that common intention must be determined by interpretation rather than by adherence to the literal meaning of the words of the contract only if there is doubt as to what the parties intended. In view of the plain and unmistakable language of the will and the deed of donation, there was no need or justification to resort to interpretation.

(3) A disposition declaring that property donated or bequeathed is for alimentary support and is, for that reason, immune from attachment, has always been interpreted by the Courts as not limiting the right of the beneficiary to dispose of the property as he sees fit.

(4) The plain and unmistakable language of the direction rendered the deceased free to dispose as she saw fit of the property; those who benefitted as a result of her will received from her and not from her father.

Revenu—Impôt successoral—Capacité de disposer d'un bien—Pouvoir de disposer d'un bien par testament—Y a-t-il pouvoir général de distribuer ou de disposer—Loi de l'impôt sur les biens transmis par décès, 1958 (Can.), c. 29, arts. 3(1)(a), 3(2)(a), 58(1)(i).

La défunte a disposé par testament de tous ses biens y compris la part qu'elle avait reçue de la succession de son père. Le testament de son père, en vertu duquel elle avait reçu cette part, stipulait qu'elle aurait droit, durant sa vie, au revenu, mais qu'à sa mort, si elle laissait des enfants, comme ce fut le cas, elle pourrait disposer du capital de telle manière «as she may direct by will». Il y avait aussi dans la succession de la défunte un intérêt, pour la durée de sa vie, dans des biens que par acte de donation entre vifs son père avait donné en fiducie pour elle. Cet acte de donation stipulait que la défunte aurait le droit absolu de disposer de ces biens mis en fiducie par testament de telle manière «as she may deem advisable». Le Ministre a considéré ces biens comme étant «des biens transmis au décès» de la défunte. Les exécuteurs testamentaires ont soutenu que la défunte n'avait jamais été habile à disposer de ces biens, dans le sens des arts. 3(1)(*a*), 3(2)(*a*) et 58(1)(*i*)

de la *Loi de l'impôt sur les biens transmis par décès*. La Cour de l'Échiquier a maintenu le point de vue du Ministre et a statué que la défunte avait un pouvoir général de disposer, par testament, de ces biens selon qu'elle le jugeait opportun. Les exécuteurs testamentaires en appelèrent à cette Cour et ont soutenu: (1) que l'art. 3(1)(*a*) envisage un bien dont la défunte était habile à transmettre actuellement, immédiatement avant son décès, et non pas un bien qui ne pouvait être actuellement et effectivement transmis qu'après le décès; (2) que la défunte n'avait pas un pouvoir général tel que défini à l'art. 58(1)(*i*), parce que son père n'avait pas l'intention qu'elle ait le pouvoir de disposer de ces biens par testament de n'importe quelle manière et à n'importe qui; (3) que la défunte n'a jamais eu un pouvoir général dans le sens de l'art. 58(1)(*i*), puisque ces biens lui ont été donnés ou légués pour support alimentaire et étaient non saisissables; (4) que le père de la défunte a disposé de ces biens aux personnes désignées par la défunte.

Arrêt: L'appel doit être rejeté.

(1) L'article 3(1)(*a*) traite de la capacité de transmettre et non pas de la transmission de la propriété. Les mots «immédiatement avant son décès» dans l'art. 3(1)(*a*) se réfèrent au moment auquel une personne est habile à disposer d'un bien et non pas au moment auquel il y a, à la suite de l'exercice de cette capacité, une transmission actuelle et effective de la propriété. L'interprétation que les exécuteurs testamentaires soutiennent est, de plus, mise en échec par les dispositions de l'art. 58(1)(*i*) considérées avec les arts. 3(1)(*a*) et 3(2)(*a*).

(2) La règle énoncée à l'art. 1013 du *Code civil* est à l'effet que la commune intention des parties doit être déterminée par interprétation plutôt que par le sens littéral des termes du contrat seulement lorsqu'il y a un doute sur ce que les parties avaient l'intention de faire. Vu que le testament et l'acte de donation ont tous deux un langage clair et ne laissant aucun doute, il n'y a aucune nécessité ou justification pour avoir recours à l'interprétation.

(3) Une clause déclarant qu'une propriété donnée ou léguée l'est pour support alimentaire et est, pour cette raison, insaisissable, a toujours été interprétée par les Cours comme ne limitant pas les droits du bénéficiaire de disposer de la propriété selon qu'il le juge opportun.

(4) De par le langage clair et net des directives du testament et de l'acte de donation, la défunte était libre de disposer des biens dont il s'agit selon qu'elle le jugeait opportun; ceux qui ont bénéficié en vertu de son testament ont reçu d'elle et non pas de son père.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], en matière d'impôt successoral. Appel rejeté.

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

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[1] [1967] 1 Ex. C.R. 414, [1966] C.T.C. 662, 66 D.T.C. 5430.

1968

ROYAL TRUST COMPANY *et al.* v. MINISTER OF NATIONAL REVENUE

John de M. Marler, Q.C., and *D. J. A. MacSween,* for the appellants.

Alban Garon and *A. Peter F. Cumyn,* for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—This is an appeal from a judgment of the Exchequer Court of Canada[1], dismissing appellants' appeal from an estate tax reassessment made by the Minister of National Revenue and levying a tax in the net amount of $250,390.60 in respect of the estate of Agnes Henry Wilson.

Agnes Henry Wilson, hereafter also called the deceased, died, while domiciled in the province of Quebec, on January 26, 1963. She was survived by her husband, Robert George Sare, and three children of mature age. In her last will and testament, she made certain particular legacies, bequeathed the residue of her property including, *inter alia,* any property over which she *"may have the power of appointment or disposal"* and appointed as her executors the appellants and her husband; the latter died on September 24, 1965, and has not been replaced as an executor.

The present litigation concerns (i) the property being the share which, by his last will and testament, executed at the City of Montreal on December 11, 1912, James Reid Wilson, the father of Agnes Henry Wilson,—who himself died on May 11, 1914,—allotted to the latter as one of his universal residuary legatees and (ii) certain other property which, by deed of donation *inter vivos,* done at the City of Montreal on December 17, 1912, he gave, in trust, to the Royal Trust for her. At the date of the death of the deceased, the value of the property comprised in her share in the estate of her father was $986,593.11 and the value of the property given to the Royal Trust for her was $113,054.03.

The issue between the parties can be briefly stated. In computing,—as he is required to do by s. 3 of the *Estate Tax Act,* (1958), 7 Eliz. II, c. 29,—the aggregate value of the *property passing on the death of the deceased,* the Minister included the property mentioned above which he considered as property coming within that description. On appellants' view, such is not the case. Their submission is

[1] [1967] 1 Ex. C.R. 414, [1966] C.T.C. 662, 66 D.T.C. 5430.

that, in view of the terms of the will and of the deed of donation, executed by her father, the deceased was never, within the meaning of ss. 3(1)(*a*), 3(2)(*a*) and 58(1)(*i*) of the *Estate Tax Act*, competent to dispose of this property.

The Will:—After bequeathing numerous particular legacies, the father of the deceased left the residue of his estate to his children in equal shares, thereby instituting them as his universal residuary legatees. With respect to the share of his daughters, he directed that:

> The shares of each of my daughters shall be retained in the hands of my Executors during her lifetime, and only the revenues thereof paid to her.

and dealing particularly with the share of his daughter, Agnes Henry Wilson, the deceased, he further directed in the tenth clause:

> TENTH:—The capital of the share of my daughter AGNES HENRY WILSON (Mrs. R. G. SARE) shall be disposed of after her death in the following manner:—Should she die without leaving issue surviving her, one-fourth of her share shall belong to her husband, if living, and the remaining three-fourths shall belong to her brothers and sister, in equal shares. *Should she die leaving issue surviving her which live to be six months old, the capital of her share shall be disposed of after her death in such manner as she may direct by Will,* or should she die intestate it shall belong to her heirs-at-law. The donation to be made by me to THE ROYAL TRUST COMPANY for the benefit of my said daughter AGNES HENRY WILSON, shall be considered as a payment to my daughter in advance on account of her share in my estate & in the division of my estate the TRUST PROPERTY mentioned in said Deed, or the securities representing the same at the time of my death, shall be considered as of the value of FIFTY THOUSAND DOLLARS.

The Deed of Donation:—By the deed of donation to the Royal Trust Company, made six days after his will, the father of the deceased gave certain securities to the Trustee upon trust to pay the net revenues therefrom to his daughter, Agnes Henry Wilson, during her lifetime and provided in the fifth clause that:

> FIFTH:—*In the event of the said Dame Agnes Henry Wilson surviving said donor, she shall have the absolute right to dispose of the said Trust Property by her Will in such manner as she may deem advisable,* and, failing to doing, the same shall at her death pass to her heirs-at-law. In the event of the said Dame Agnes Henry Wilson predeceasing the said Donor, leaving issue her surviving, any of whom has attained or shall attain the age of six months, then the said Trust Property shall be governed by the Will of the said Dame Agnes Henry Wilson, and, failing a Will, the same shall become the property of her heirs-at-law. In the event of the said Dame Agnes Henry Wilson predeceasing the said Donor, without leaving issue, or, leaving issue, none of whom attains the age of six months, then the said Trust Property shall be divided between the said Robert George

1968

ROYAL TRUST COMPANY *et al.* v. MINISTER OF NATIONAL REVENUE

Fauteux J.

Sare and the Estate of the said Donor in the proportion of one-fourth to the said Robert George Sare and three-fourths to the Estate of the said Donor, but, in the event of the said Robert George Sare being not then living, then the whole of the said Trust Property shall revert to and form part of the Estate of the said Donor.

In these extracts of the will and of the deed of donation, I have indicated in italics the very event which, amongst others contemplated by the father of the deceased, did actually take place.

It is common ground that the provisions of the *Estate Tax Act* which are here relevant are to be found in the following sections:

3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

(*a*) all property of which the deceased was, immediately prior to his death, competent to dispose;

* * *

(2) For the purposes of this section,

(*a*) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein or such general power as would, if he were *sui juris*, have enabled him to dispose of that property;

* * *

58. (1) In this Act,

(*i*) "general power" includes any power or authority enabling the donee or other holder thereof to appoint, appropriate or dispose of property as he sees fit, whether exercisable by instrument *inter vivos* or by will, or both, but does not include any power exercisable in a fiduciary capacity under a disposition not made by him, or exercisable as a mortgagee;

The trial judge rejected as ill-founded appellants' fundamental contention that the deceased, Agnes Henry Wilson, was not competent to dispose of the above property. He considered that the latter had survived her father and left three children of mature age; that, in such event, her father had directed, in his will, that *the capital of her share shall be disposed of after her death in such manner as she may direct by Will* and had directed, by the deed of donation, that *she shall have the absolute right to dispose of the said trust property by her Will in such manner as she may deem advisable;* and the learned judge held that these were plain and unambiguous directives which vested the deceased with a general power to dispose, by will, of such property as she saw fit.

In support of their appeal from this decision, appellants' first submission is that, on a proper interpretation of s. 3(1)(*a*), it cannot be said,—as admittedly it has to be found in this case to sustain the assessment,—that the deceased was *immediately prior to her death, competent to dispose of the property.* They argue that since the property to be included, under s. 3(1)(*a*), is *all the property of which the deceased was, immediately prior to her death, competent to dispose,* and since a will has no disposing effect until the time of or after death, one must conclude that a person, whose estate or interest in property is such as to enable him to dispose of it only by will or whose general power over it is exercisable only by will, is not a person immediately prior to his death competent to dispose of it. Thus, on appellants' interpretation, s. 3(1)(*a*) contemplates property which a deceased was competent to actually and effectively transfer immediately prior to his death, and not property which is only actually and effectively transferred after death. In my opinion, s. 3(1)(*a*) deals with the competency to transfer and not with the transfer of property; and the words *immediately prior to death* in s. 3(1)(*a*) refer to the point at which a person is competent to dispose of property and not to the point at which there is, consequent to the exercise of competency, an actual and effective transfer of property.

Appellants' interpretation is further conclusively defeated, in my view, by the provisions of s. 58(1)(*i*) which, collectively with ss. 3(1)(*a*) and 3(2)(*a*), operate to provide that a person shall be deemed to have been competent immediately prior to his death to dispose of property if the general power enabling him to dispose of property is exercisable either by instrument *inter vivos* or *by Will,* or both.

Doubts were cast by appellants as to the applicability or effectiveness of s. 58(1)(*i*) for the reason that s. 58(1)(*i*) is in Part IV of the Act, while s. 3(1)(*a*), the taxing section, is in Part I thereof. Part IV, as its heading accurately indicates, deals exclusively with *Interpretation and Application* of the Act. Section 58 defines various expressions found in the Act. The opening words of the section leave no doubt that the meaning and effect which must be given

1968

ROYAL TRUST COMPANY *et al.* v. MINISTER OF NATIONAL REVENUE

Fauteux J.

to the expression *general power* appearing in s. 3(2)(*a*), is the meaning and effect that Parliament ascribed to that expression in s. 58(1)(*i*).

Appellants contended that their interpretation of s. 3(1)(*a*) is borne out by s. 3(2)(*e*) which relates to the legal system of community of property and which prescribes that:

> 3. (2)
>
> (*e*) notwithstanding anything in this section, the expression in paragraph (*a*) of subsection (1) 'property of which the deceased was, immediately prior to his death, competent to dispose' does not include the share of the spouse of the deceased in any community of property that existed between the deceased and such spouse immediately prior to his death.

It is said that, in effect, this section provides that when a deceased husband and his spouse were in community of property, the share of the surviving spouse is not to be included in the property of which the husband was, immediately prior to his death, competent to dispose. And it is then argued (i) that if, on the one hand, the expression *immediately prior to his death* means at the time of his death, then, these provisions are unnecessary, since, under art. 1293 of the *Civil Code* of the province of Quebec, the husband is not competent at the time of his death to dispose by will of anything more than his share in the community; and (ii) that if, on the other hand, the expression means a point during the lifetime of the husband, then, since the husband has the right to dispose of the community property, during his lifetime, these provisions are necessary to prevent that, on the death of the husband, tax be exigible on the whole and not merely on his half of the community property. Hence, the appellants conclude that the latter meaning must be given to the expression *immediately prior to his death*. The *Estate Tax Act*, enacted in 1958 and coming into force on January 1, 1959, governs the estate of persons who died on or after that date and is designed to replace the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, which continues to govern the estate of persons who died prior to that date. I agree that s. 3(2)(*e*) of the *Estate Tax Act* is not really necessary. Indeed, it had no counterpart in the *Dominion Succession Duty Act* and, in my opinion, was inserted in the *Estate Tax Act ex majore cautela* to ensure that, in cases of com-

munity of property, on the death of the husband, his estate would not be deemed to include the widow's community half. While, in a loose sense, it may be said that the husband is competent to dispose, in his lifetime, of community assets, under the general administrative power conferred on him by art. 1292 *et seq.* of the *Civil Code* of the province of Quebec, he is not free, not competent to dispose of such assets in any sense contemplated by ss. 3(1)(*a*), 3(2)(*a*) and 58(1)(*i*) quoted above. The premise, on which rests the second branch of the dilemma propounded by appellants, is not valid. In my opinion, these provisions of s. 3(2)(*e*) do not support appellants' interpretation of s. 3(1)(*a*).

Appellants' next proposition is that even if it can be said that the deceased was *immediately prior to her death competent to dispose,* she could not appoint or dispose as she saw fit, for, notwithstanding the unlimited language used in the will and in the deed of donation, her father did not intend, thereby, his daughter to have the power to dispose of the property by her will in any way and to any person. Accordingly, it is said, she has no such general power as meets the definition of s. 58(1)(*i*). This view, as to the intention of the father of the deceased, is formed by the appellants on a consideration of the directions appearing in the tenth clause of the will and of the provisions of the fifth clause of the deed of donation which they seek to interpret and rationalize in a manner consistent with the motives which, in their view, prompted the father of the deceased to so direct and provide. The legal principles applicable in the determination of intention are well-known. With respect to the determination of the intention of a testator, the rule is stated in *Auger v. Beaudry*[2], where Lord Buckmaster, delivering the judgment of the Board, said, at page 359:

> .... it is now recognised that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean.

With respect to the determination of the common intention of the parties to a contract, the rule, stated in art. 1013 of

[2] (1919), 48 D.L.R. 356, [1920] A.C. 1010, [1919] 3 W.W.R. 559.

1968

ROYAL TRUST COMPANY *et al.* v. MINISTER OF NATIONAL REVENUE

Fauteux J.

the *Civil Code* of the province of Quebec, is to the effect that the common intention must be determined by interpretation rather than by adherence to the literal meaning of the words of the contract only if there is doubt as to what the parties intended. In view of the plain and unmistakable language of the tenth clause of the will and of the fifth clause of the deed of donation quoted above, and particularly to the italicized part thereof, I find no need or justification to resort to interpretation. Nor am I able to agree with the further submission made in support of this second proposition, that the words *in such manner as she may direct by Will* and *in such manner as she may deem advisable,* respectively appearing in these clauses of the will and of the deed of donation, only mean that the deceased could by her will prescribe the manner in which her children would take. In the whole context of the clauses in which they are found, these words are only apt to describe the unfettered power which the deceased had to dispose of the property by will to any person.

Appellants then submitted that even if Mrs. Wilson, the deceased, could appoint or dispose to any person, nevertheless she never had a *general power* within the meaning of s. 58(1)(*i*), in view of the following provisions in the deed of donation and in the will:

In the Deed of Donation:

> THE PRESENT DONATION, being intended as an alimentary provision for the beneficiaries herein named, the said Trust Property shall be, in capital and revenues, so long as it remains in the hands of the Trustee, incapable of being taken in attachment for the debts of the said beneficiaries, nor shall the said annuity be capable of being assigned or anticipated in any way, any such assignment or anticipation to be treated as an absolute nullity.

In the Will:

> TWELFTH:—I declare that all the bequests herein contained are thus made on condition that the property bequeathed and the revenues thereof shall be exempt from seizure for any debts of the legatees named, the said bequests being intended for their alimentary support.

Thus, in both cases, the liberalities are declared to be intended for alimentary support and the property is made immune from seizure and, moreover, inalienable in the case of the property donated, for the debts of the beneficiary. Obviously, the provision of the deed of donation becomes emptied of any purpose and object, at the moment

at which Mrs. Wilson dies if, immediately prior to death, she disposed of the property by will. In my opinion, in no way could it affect her right to exercise the power enabling her to dispose, by will, of the property donated "in such manner as she may deem advisable". Nor could the provision of clause twelve of the will affect a similar power given to her with respect to the property bequeathed to her. A disposition, declaring that property, donated or bequeathed, is intended to be donated or bequeathed for alimentary support and is, for that reason, made immune from attachment, has always been interpreted by the courts as not limiting the right of the beneficiary to dispose of the same as he sees fit, but as having for sole object and effect to prevent third parties to acquire possession of the property by attachment, without the consent of the beneficiary. *Nolin v. Flibotte*[3]; *Delisle v. Vallières*[4]; *Caisse Populaire de Lévis v. Maranda*[5]. Hence, it cannot be said, in my opinion, that, because of these provisions, Mrs. Wilson never had a general power to appoint or to dispose within the meaning of s. 58(1)(*i*).

Appellants' last proposition is that the father created a fiduciary substitution, in his will, with respect to his daughter's share in his estate and that for this reason and also because he created a trust, in the deed of donation, with respect to the property donated, it is not his daughter, Mrs. Wilson, who disposed of the property at the time of her death, but the father himself. In the deed of donation, there is admittedly no fiduciary substitution. As expressed in their factum, appellants' submission is that when, by the deed of donation, the father of Mrs. Wilson disposed of the property to the trustee, he also disposed of it, on his daughter's death if she survived him, to the person or persons that she might direct would receive it. And because, it is said, the father disposed of the property on his daughter's death, she herself could not dispose of it at that time. In my view, this submission is, to say the least, repugnant to the unlimited grant, which the father made to his daughter in the deed of donation, of

> .... the absolute right to dispose of the said property by her Will in such manner as she may deem advisable ...

[3] (1934), 56 Que. K.B. 315.
[4] (1938), 77 Que. S.C. 277.
[5] [1950] Que. K.B. 249.

1968

ROYAL TRUST COMPANY *et al.* v. MINISTER OF NATIONAL REVENUE

Fauteux J.

As to the will, any fiduciary substitution, which it may be said to contain, would be related to and conditioned upon the happening of an event other than the one which actually happened and with which, only, the Minister was concerned. I am in respectful agreement with the learned judge of the Exchequer Court that, in the provision applicable to the event which did actually take place, there is no fiduciary substitution. The plain and unmistakable language of the direction, relevant in that case, rendered Mrs. Wilson free to dispose as she saw fit of the property; and those who benefited as a result of her will, received from her and not from her father. Even if there were in the will, as contended for by appellants, a fiduciary substitution with respect to the share of Mrs. Wilson in the estate of her father, there would still remain to be determined whether, by a fiction of the law,—which is open for Parliament to create for purposes of federal taxation,—that share was not property passing on the death of Mrs. Wilson within the meaning of the *Estate Tax Act*.

The cases of *Montreal Trust Co. et al. v. M.N.R.*[6] and *Wanklyn and others v. M.N.R.*[7], to which we were referred by appellants, differ, fundamentally and in more than one way, from the one here considered. Suffice it to say that in the first one, there was, in the will, an effective fiduciary substitution and that the second, governed by the *Dominion Succession Duty Act*, (1940-41), 4-5 Geo. VI, c. 14, was determined on consideration of certain provisions thereof which differ, in substance, from their counterparts in the *Estate Tax Act, supra*.

In my view, the appeal, from the judgment of the Exchequer Court dismissing the appellants' appeal from the estate tax reassessment made by the Minister, fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

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

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[6] [1964] S.C.R. 647, [1964] C.T.C. 367, 64 D.T.C. 5230, 47 D.L.R. (2d) 66.

[7] [1953] 2 S.C.R. 58, [1953] C.T.C. 263, 53 D.T.C. 1167, 3 D.L.R. 705.

PAUL DANIELS .....APPELLANT;

AND

RONALD ADDISON WHITE and HER MAJESTY THE QUEEN } RESPONDENTS.

1967
*Nov. 20
1968
Apr. 29

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Indians—Hunting rights of Manitoba Indians—Possession of game birds prohibited season contrary to statute—Whether exempt from compliance with statute by virtue of agreement between Canada and Manitoba—Indian Act, R.S.C. 1952, c. 149—Migratory Birds Convention Act, R.S.C. 1952, c. 179, s. 12(1)—Manitoba Natural Resources Act, 1930 (Can.), c. 29; 1930 (Man.), c. 30—B.N.A. Act, 1930, c. 26.

The appellant is an Indian from the Province of Manitoba and was convicted of having game birds in his possession, contrary to s. 12(1) of the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. On appeal by way of trial *de novo*, the conviction was quashed. On a further appeal to the Court of Appeal, the conviction was restored by a majority judgment. The appellant was granted leave to appeal to this Court. The issue in the appeal is whether para. 13 of an agreement made on December 14, 1929, between the government of Canada and the government of Manitoba (approved by statutes of the United Kingdom Parliament, the Parliament of Canada and the Legislature of Manitoba) exempts the appellant from compliance with the *Migratory Birds Convention Act* and the regulations made thereunder. Paragraph 13 provides that..."Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians might have a right of access".

Held (Cartwright C.J. and Ritchie, Hall and Spence JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott, Martland, Judson and Pigeon JJ.: Paragraph 13 of the agreement did not have the effect of exempting the appellant from compliance with the *Migratory Birds Convention Act* and the regulations made thereunder. The whole tenor of the agreement is that of a conveyance of land imposing specified obligations and restrictions on the transferee, not on the transferor. This applied particularly to para. 13 which made provincial game laws applicable to Indians in the province subject to the proviso contained therein. That only provincial game laws were in the contemplation of the parties, and not federal enactments, is underscored by the words "which the Province hereby assures to them" in para. 13. Care was taken in framing para. 13 that the legislature of the province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands. The agreement and the legislation confirm-

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1968

DANIELS v. WHITE AND THE QUEEN

ing it did no more than impose specified obligations and restrictions upon the transferee province. They did not repeal by implication a statute of Canada giving effect to an international convention.

Per Pigeon J.: This was a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. The words in para. 13 of the agreement "Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof" contemplate the laws of Manitoba. It is perfectly possible without doing violence to the language used to construe para. 13 as applicable solely to provincial laws and thus to avoid any conflict. Furthermore, it would not only be foreign to the declared object of the agreement but even inconsistent with it, to provide for an implied modification of the *Migratory Birds Convention Act*.

Per Cartwright C.J., *dissenting:* The words "which the Province hereby assures to them" do not cut down the right of hunting which in plain and unequivocal words para. 13 says the Indians shall have. The rights given to the Indians by the words of para. 13 have been, since 1930, enshrined in our Constitution and given the force of law "notwithstanding anything in...any Act of the Parliament of Canada". There is no rule which permits to add after the words "Canada" the words "except the *Migratory Birds Convention Act*".

Per Ritchie, Hall and Spence JJ., *dissenting:* The words in para. 13 of the agreement "which the Province hereby assures to them" do not have the effect of limiting the rights thereby accorded to the Indians, to provincial rights, but rather to constitute additional assurance of the general rights described in that paragraph.

In view of the words of s. 1 of the *B.N.A. Act*, 1930, giving the agreement the force of law "notwithstanding anything in...any Act of the Parliament of Canada", the agreement takes precedence over the *Migratory Birds Convention Act* and the regulations made thereunder, with the result that these enactments do not apply to Indians in Manitoba when engaged in hunting migratory birds for food in the areas set out in para. 13.

Droit criminel—Indiens—Droit de chasse des Indiens du Manitoba—Possession de gibier en temps prohibé contrairement au statut—Convention entre le Canada et le Manitoba dispense-t-elle d'obéir au statut —Loi sur les Indiens, S.R.C. 1952, c. 149—Loi sur la Convention concernant les oiseaux migrateurs, S.R.C. 1952, c. 179, art. 12(1)—Loi des ressources naturelles du Manitoba, 1930 (Can.), c. 29; 1930 (Man.), c. 30—Acte de l'Amérique du Nord britannique, 1930, c. 26.

L'appelant, un Indien du Manitoba, a été déclaré coupable d'avoir eu en sa possession du gibier contrairement à l'art. 12(1) de la *Loi sur la Convention concernant les oiseaux migrateurs*, S.R.C. 1952, c. 179. Sur appel par voie de procès *de novo*, la déclaration de culpabilité a été annulée. Sur appel subséquent à la Cour d'appel, la déclaration de culpabilité a été rétablie par un jugement majoritaire. L'appelant a obtenu la permission d'appeler à cette Cour. La question à débattre est de savoir si le para. 13 de la convention faite le 14 décembre 1929

entre le gouvernement du Canada et le gouvernement du Manitoba (ratifiée par les statuts du parlement du Royaume-Uni, du parlement du Canada et de la législature du Manitoba) dispense l'appelant d'obéir à la *Loi sur la Convention concernant les oiseaux migrateurs* et les règlements établis en vertu d'icelle. Le para. 13 stipule que...«le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès».

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright et les Juges Ritchie, Hall et Spence étant dissidents.

Les Juges Fauteux, Abbott, Martland, Judson et Pigeon: Le paragraphe 13 de la convention ne dispense pas l'appelant d'obéir à la *Loi sur la Convention concernant les oiseaux migrateurs* et aux règlements établis en vertu d'icelle. La convention est un acte de transmission de propriété imposant des obligations et des restrictions spécifiques au cessionnaire, mais non pas au cédant. Ceci s'applique particulièrement au para. 13 qui rend les lois de chasse provinciales applicables aux Indiens dans la province sous réserve de la condition y prévue. Les mots «que la province leur assure par les présentes» dans le para. 13 montrent bien que les parties n'avaient en vue que les lois de chasse provinciales et non pas les lois fédérales. On a pris soin de s'assurer que la province ne pourrait pas unilatéralement porter atteinte au droit des Indiens de chasser pour se nourrir sur les terres inoccupées de la Couronne. La convention ainsi que la législation la ratifiant n'ont pas d'autre effet que d'imposer des obligations et des restrictions spécifiques à la province cessionnaire. Elles n'ont pas eu pour effet d'abroger implicitement un statut du Canada qui donnait effet à une convention internationale.

Le Juge Pigeon: Il s'agit d'un cas où l'on doit appliquer la règle d'interprétation disant que le parlement n'est pas censé légiférer à l'encontre d'un traité ou d'une manière incompatible avec les convenances et les règles établies du droit international. Dans le para. 13 de la convention, les mots «le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province» visent les lois du Manitoba. Sans faire violence aux mots dont on s'est servi, il est parfaitement possible d'interpréter ce para. 13 comme s'appliquant uniquement aux lois provinciales et ainsi d'éviter tout conflit. Interpréter ce paragraphe comme une modification implicite de la *Loi sur la Convention concernant les oiseaux migrateurs* serait non seulement s'éloigner de l'objet de la convention mais aller à l'encontre.

Le Juge en Chef Cartwright, *dissident*: Les mots «que la province leur assure par les présentes» n'enlèvent rien au droit de chasser qu'en des termes clairs et non équivoques le para. 13 dit que les Indiens possèdent. Les droits donnés aux Indiens par le para. 13 ont été, depuis 1930, consacrés par notre constitution et sont devenus la loi «nonobstant tout ce qui est contenu...dans toute loi du Parle-

1968

DANIELS v. WHITE AND THE QUEEN

ment du Canada». Il n'y a aucune règle qui permette d'ajouter après les mots «Canada» les mots «excepté la *Loi sur la Convention concernant les oiseaux migrateurs*».

Les Juges Ritchie, Hall et Spence, *dissidents:* Dans le para. 13 de la convention, les mots «que la province leur assure par les présentes» n'ont pas l'effet de limiter aux seuls droits provinciaux les droits qui y sont accordés aux Indiens, mais au contraire constituent une garantie additionnelle des droits généraux décrits dans ce paragraphe.

Vu les termes de l'art. 1 de l'*Acte de l'Amérique du Nord britannique,* 1930, donnant à la convention force de loi «nonobstant tout ce qui est contenu...dans toute loi du Parlement du Canada», la convention a priorité sur la *Loi sur la Convention concernant les oiseaux migrateurs* et les règlements établis en vertu d'icelle. Il en résulte que cette législation ne s'applique pas aux Indiens du Manitoba lorsqu'ils chassent pour se nourrir les oiseaux migrateurs dans les endroits spécifiés au para. 13.

APPEL d'un jugement de la Cour d'appel du Manitoba[1], rétablissant une déclaration de culpabilité. Appel rejeté, le Juge en Chef Cartwright et les Juges Ritchie, Hall et Spence étant dissidents.

APPEAL from a judgment of the Court of Appeal of Manitoba[1], restoring the appellant's conviction. Appeal dismissed, Cartwright C.J. and Ritchie, Hall and Spence JJ. dissenting.

William R. Martin, for the appellant.

D. H. Christie, Q.C., for the respondents.

THE CHIEF JUSTICE (*dissenting*):—The question to be determined on this appeal, the relevant facts (all of which are undisputed) and the historical background in the light of which the controversy must be considered are set out in the reasons of other members of the Court.

That the problem is not free from difficulty is attested by the differences of opinion in the Courts below and in this Court.

Since the decisions of this Court in *Sikyea v. The Queen*[2] and *The Queen v. George*[3], it must be accepted

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[1] (1966), 56 W.W.R. 234, 49 C.R.1, 57 D.L.R. (2d) 365.

[2] [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80.

[3] [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386.

that, if it were not for the provisions contained in section 13 of the agreement between the Government of Canada and the Government of Manitoba which was approved and given the force of law by Statutes of the Imperial Parliament, the Parliament of Canada and the Legislature of Manitoba, the conviction of the appellant would have to be upheld.

Nothing would be gained by my repeating the reasons which I gave in *George*'s case for thinking that both it and *Sikyea*'s case should have been decided differently. I accept those decisions.

The first question before us is as to the meaning of the words used in section 13 of the agreement and particularly the following:

> ...provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians might have a right of access.

I share the view of my brothers Ritchie and Hall that the words "which the Province hereby assures to them" do not cut down "the right of hunting, trapping and fishing game and fish for food at all seasons of the year" which in plain and unequivocal words the clause says that the Indians shall have.

In *Sikyea*'s case and *George*'s case the Court decided that this right, secured to the Indians by treaty, could be, and as a matter of construction had been abrogated by the terms of the *Migratory Birds Convention Act* and the *Regulations* made thereunder. In *George*'s case the Court held that while s. 87 of the *Indian Act* preserved the treaty rights of the Indians against encroachment by laws within the competency of the Provincial Legislature it had no such effect in regard to an Act of Parliament.

The situation in the case at bar is different. The right of hunting, trapping and fishing given to the Indians by the words of section 13 quoted above has been, since 1930, enshrined in an amendment to our Constitution and given:

> ... the force of law notwithstanding anything in the *British North America Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

I find it impossible to uphold the conviction of the appellant unless we are able to say that, by the application

1968

DANIELS v. WHITE AND THE QUEEN

Cartwright C.J.

of some rule of construction, there should be inserted in s. 1 of the *British North America Act*, 1930, immediately after the words "Parliament of Canada" the words "except the *Migratory Birds Convention Act*". I know of no rule which permits us to take such a course.

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

The Judgment of Fauteux, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—The appellant is an Indian within the meaning of para. (*g*) of subs. (1) of s. 2 of the *Indian Act*, R.S.C. 1952, c. 149. He was convicted on December 7, 1964, of having in his possession

> Migratory Game Birds, during a time when the capturing, killing, or taking of such birds, is prohibited, contrary to the Regulations under the *Migratory Birds Convention Act*, thereby committing an offence under Section 12(1) of the said *Migratory Birds Convention Act*.

On an appeal by way of trial *de novo* his conviction was quashed. On a further appeal to the Court of Appeal of Manitoba[4], his conviction was restored and the sentence affirmed by a majority judgment. He appeals to this Court with leave.

The issue in this appeal is whether by operation of para. 13 of the agreement made on December 14, 1929, between the Government of the Dominion of Canada and the Government of the Province of Manitoba (hereinafter referred to as "the agreement") the appellant was exempted from compliance with the *Migratory Birds Convention Act* and *Regulations* made thereunder bearing in mind that at the relevant time and place he was an Indian who had hunted game for food on land to which he had a right of access.

There can be no doubt that apart from para. 13 of the agreement above quoted the appellant was, in the circumstances of this case, subject to the *Migratory Birds Convention Act and Regulations*. See: *Sikyea v. The Queen*[5]; *The Queen v. George*[6]; *Sigeareak v. The Queen*[7].

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[4] [1966], 56 W.W.R. 234, 49 C.R. 1, 57 D.L.R. (2d) 365.

[5] [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80.

[6] [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386.

[7] [1966] S.C.R. 645, 49 C.R. 271, 56 W.W.R. 478, [1966] 4 C.C.C. 393, 57 D.L.R. (2d) 536.

Paragraph 13 of the agreement provides:

13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Paragraph 13 is part of an agreement dated December 14, 1929, between the Government of Canada and the Government of the Province of Manitoba for the transfer to the province from the Dominion of all ungranted Crown lands. This agreement was approved by the Manitoba Legislature and by Parliament. (Statutes of Manitoba, 1930, c. 30; Statutes of Canada, 1930, c. 29.) It was subsequently affirmed by the *British North America Act,* 1930, 20-21 Geo. V., c. 26. Three similar agreements involving Alberta, Saskatchewan and British Columbia were subsequently affirmed.

Section 1 of the *British North America Act* 1930 provides:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *British North America Act, 1867,* or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

Prior to the coming into force of the agreement, title to all ungranted Crown lands in the Province of Manitoba was vested in the Dominion. Briefly, the relevant history is that by the *Rupert's Land Act,* 1868, 31-32 Vict., c. 105 (R.S.C. 1952, vol. VI, p. 99) provision was made for the surrender of Rupert's Land by the Hudson's Bay Company and for the acceptance thereof by Her Majesty. Section 3 of the said Act provided:

that such Surrender shall not be accepted by Her Majesty until the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty, and embodied in an address to Her Majesty from both the Houses of the Parliament of Canada in pursuance of the 146th Section of the *British North America Act* 1867.

By Imperial Order in Council of June 23, 1870, Rupert's Land was admitted into and became part of the Dominion of Canada effective July 15, 1870—R.S.C. 1952, vol. VI, p. 113. By operation of the *Manitoba Act* 1870, 33 Vict.,

1968

DANIELS v. WHITE AND THE QUEEN

Judson J.

c. 3 (Canada), subsequently affirmed with retrospective effect by the Parliament of the United Kingdom (*B.N.A. Act, 1871,* 34-35 Vict., c. 28, s. 5, R.S.C. 1952, vol. VI, p. 146), the Province of Manitoba was carved out of Rupert's Land and came into being on the same date Rupert's Land entered Confederation. By s. 30 of the *Manitoba Act, 1870,* all ungranted or waste lands in the Province vested in the Crown to be administered by the Government of Canada for the purposes of the Dominion.

The Crown in right of the Dominion being the owner of all Crown lands, including the mines and minerals therein, in the Province of Manitoba that Province, together with Alberta and Saskatchewan, was in a less favourable condition than the other Provinces who by operation of s. 109 of the *British North America Act, 1867,* retained Crown lands upon entering Confederation. The purpose of the agreement was to transfer these lands to Manitoba in order that it might be in the same position as the other provinces under s. 109 of the *British North America Act, 1867.* This is apparent from the preamble to and paragraph 1 of the agreement and from the following cases where the matter was under consideration:

Saskatchewan Natural Resources Reference[8]*:*

Reference concerning Refunds of Dues paid to the Dominion of Canada in respect of Timber Permits in the Western Provinces[9]*;*

Anthony v. Attorney General of Alberta[10]*;*

Attorney General of Alberta v. Huggard Assets Limited[11]*:*

Western Canadian Collieries Limited v. Attorney General of Alberta[12].

The whole tenor of the agreement is that of a conveyance of land imposing specified obligations and restrictions on the transferee, not on the transferor. This applies, in particular, to paragraph 13, which makes provincial game laws applicable to Indians in the province subject to the

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[8] [1931] S.C.R. 263, 1 D.L.R. 865; affirmed [1931] 3 W.W.R. 488, 4 D.L.R. 712, [1932] A.C. 28.

[9] [1933] S.C.R. 616; affirmed [1935] A.C. 184, 1 W.W.R. 607, 2 D.L.R. 1.

[10] [1943] S.C.R. 320, 3 D.L.R. 1.

[11] [1951] S.C.R. 427, 2 D.L.R. 305; reversed [1953] A.C. 420, 8 W.W.R. (N.S.) 561, 3 D.L.R. 225.

[12] [1953] A.C. 453.

proviso contained therein. That only provincial game laws were in the contemplation of the parties, and not federal enactments, is underscored by the words "which the Province hereby assures to them" in para. 13. As indicated by para. 11 of the agreement and para. 10 of the Alberta and Saskatchewan agreements, Canada, in negotiating these agreements, was mindful of the fact it had treaty obligations with Indians on the Prairies. These treaties, among other things, dealt with hunting by Indians on unoccupied lands. For example, treaties 5 and 6, which cover portions of Manitoba, Saskatchewan and Alberta, provide:

> Her Majesty further agrees with Her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

Treaty No. 8, which covers portions of Alberta and Saskatchewan, provides:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Treaty No. 7, which covers a portion of Alberta, is to the same effect.

It being the expectation of the parties that the agreement would be given the force of law by the Parliament of the United Kingdom (Paragraph 25) care was taken in framing para. 13 that the Legislature of the province could not unilaterally affect the right of Indians to hunt for food on unoccupied Crown lands. Under the agreement this could only be done by concurrent Statutes of the Parliament of Canada and the Legislature of the province, in accordance with para. 24 thereof.

The majority opinion in the Manitoba Court of Appeal held that the agreement, affirmed as it was by legislation of all interested governments, could not be reconciled with

1968

DANIELS v. WHITE AND THE QUEEN

Judson J.

the *Migratory Birds Convention Act* and that the latter Act must prevail. The *Migratory Birds Convention Act*, being of general application throughout Canada, ought not to be construed as circumscribed by the restricted legislation that is to be found in the *Manitoba Natural Resources Act*. It was desirable that a matter within the legislative responsibility of Parliament and governed by international treaty be uniform in application throughout the country unless specifically provided otherwise.

The dissenting opinion would have held that para. 13 of the agreement should prevail over the *Migratory Birds Convention Act* notwithstanding that such a result gives the Act a different effect in Manitoba from that which it has in other parts of Canada.

The *Migratory Birds Convention Act* was enacted in 1917. It confirms a treaty made between Canada and the United States. The regulations under the Act go back to 1918. (P.C. 871, April 23, 1918). In my opinion, the agreement and the legislation of 1930 confirming it did no more than impose specified obligations and restrictions upon the transferee province. They did not repeal by implication a statute of Canada giving effect to an international convention.

On this subject I adopt the law as stated in 36 Hals., 3rd ed., p. 465:

> Repeal by implication is not favoured by the courts for it is to be presumed that Parliament would not intend to effect so important a matter as the repeal of a law without expressing its intention to do so. If, however, provisions are enacted which cannot be reconciled with those of an existing statute, the only inference possible is that Parliament, unless it failed to address its mind to the question, intended that the provisions of the existing statute should cease to have effect, and an intention so evinced is as effective as one expressed in terms. The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together. If it is reasonably possible so to construe the provisions as to give effect to both, that must be done; and their reconciliation must in particular be attempted if the later statute provides for its construction as one with the earlier, thereby indicating that Parliament regarded them as compatible, or if the repeals expressly effected by the later statute are so detailed that failure to include the earlier provision amongst them must be regarded as such an indication.

I would dismiss the appeal.

RITCHIE J. (*dissenting*):—I have had the benefit of reading the reasons for judgment prepared by other members of the Court in which the circumstances giving rise to this appeal are fully recited.

I agree with Mr. Justice Hall that the words "which the Province hereby assures to them" as they occur in paragraph 13 of the agreement which is a schedule to the *Manitoba Natural Resources Act,* Statutes of Canada 1930, c. 29, do not have the effect of limiting the rights thereby accorded to Indians, to provincial rights, but rather that they constitute additional assurance of the general rights described in the said paragraph.

Like my brother Hall, I can only read the provisions of s. 1 of the *British North America Act,* 1930, as giving the agreement "the force of law notwithstanding anything in ... any Act of the Parliament of Canada..." and I am therefore of opinion that the agreement takes precedence over the *Migratory Birds Convention Act,* R.S.C. 1952, c. 179 and the regulations made thereunder, with the result that these enactments do not apply to Indians in Manitoba when engaged in hunting migratory birds for food in the areas set out in section 13.

I would accordingly dispose of this matter in the manner proposed by my brother Hall.

The judgment of Hall and Spence JJ. was delivered by

HALL J. (*dissenting*):—The facts in this appeal are not in dispute. The appellant, Paul Daniels, who is a Treaty Indian of the Chemahawin Indian Reserve in the Province of Manitoba, was convicted by Police Magistrate Neil McPhee, at The Pas, Manitoba, for an offence contrary to subs. (1) of s. 12 of the *Migratory Birds Convention Act,* R.S.C. 1952, c. 179. The charge on which he was convicted was that he, the said

> Paul Daniels, of Chemahawin Indian Reserve, Manitoba, on the 3rd day of July, A.D. 1964, at Chemahawin Indian Reserve, in the Province of Manitoba, did unlawfully and without lawful excuse have in his possession Migratory Game Birds, during a time when the capturing, killing or taking of such birds is prohibited, contrary to the regulations under the *Migratory Birds Convention Act,* thereby committing an offence under Section 12(1) of the said *Migratory Birds Convention Act.*

Against the conviction the accused appealed to the County Court by way of trial *de novo.* His Honour J. W. Thompson, sitting as a judge of the County Court of Manitoba,

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

allowed the appeal and acquitted the accused. The Crown then took an appeal to the Court of Appeal for Manitoba[13] which Court, Freedman J.A. dissenting, allowed the appeal and restored the conviction. The appellant then applied for and was given leave to appeal to this Court.

On July 3, 1964, the appellant had in his possession two wild ducks, one described as a redhead and the other a mallard or greenhead. At a point along the Saskatchewan River, within the Reserve, he had, on his own admission, shot and killed the birds for food and they were being cooked over a campfire when two constables of the R.C.M.P. entered the area. Section 6 of the *Migratory Birds Convention Act* provides:

> No person, without lawful excuse, the proof whereof shall lie on such person, shall buy, sell or have in his possession any migratory game bird, migratory insectivorous bird or migratory nongame bird, or the nest or egg of any such bird or any part of any such bird, nest or egg, during the time when the capturing, killing or taking of such bird, nest or egg is prohibited by this Act.

Under s. 3(*b*)(i) "Migratory Game Birds" includes wild ducks. Section 12(1) of the *Act* provides that every person who violates any provision of this *Act* or any regulation, is, for each offence, liable upon summary conviction to a fine of not more than three hundred dollars and not less than ten dollars, or to imprisonment for a term not exceeding six months or to both fine and imprisonment.

Section 5(1) of the *Regulations* provides:

> Unless otherwise permitted under these Regulations to do so, no person shall
>
> (*a*) in any area described in Schedule A, kill, hunt, capture, injure, or take or molest a migratory bird at any time except during an open season specified for that bird and that area in Schedule A...

Part VII of Schedule A to the *Regulations* defines the open season for ducks in Manitoba. In the area north of Parallel 53 which includes the Chemahawin Indian Reserve, the open season is from noon September 11 to November 28, inclusive of the closing date.

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[13] (1966), 56 W.W.R. 234, 49 C.R. 1, 57 D.L.R. (2d) 365.

It is further provided in s. 5(2) of the *Regulations:*

> Indians and Eskimos may take auks, auklets, guillemots, murres, puffins and scoters and their eggs at any time for human food or clothing, but they shall not sell or trade or offer to sell or trade birds or eggs so taken and they shall not take such birds or eggs within a bird sanctuary.

Unless the appellant's status as an Indian in Manitoba permits him to hunt and possess migratory game birds at all seasons of the year, he was properly convicted: *Sikyea v. The Queen*[14].

The appellant claimed immunity from the provisions of the *Migratory Birds Convention Act* by virtue of the *Manitoba Natural Resources Act,* Statutes of Canada 1930, c. 29, which he contends exempts him from the operations of the *Migratory Birds Convention Act* because he is an Indian residing in the Province of Manitoba.

In the year 1929, some twelve years after the enactment of the *Migratory Birds Convention Act,* the Government of Canada and the Government of Manitoba reached an agreement respecting the transfer to Manitoba of the unalienated natural resources within the Province. The agreement was approved by the Parliament of Canada in the *Manitoba Natural Resources Act, supra,* and by the Legislature of Manitoba by the *Manitoba Natural Resources Act,* R.S.M. 1954, c. 180. The schedule to both statutes contains the terms of the agreement, in which s. 13 reads as follows:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians might have a right of access.

This section of the agreement was dealt with by this Court in *Prince and Myron v. The Queen*[15], which held that Indians in Manitoba hunting for food on all unoccupied Crown lands and on any other lands to which they

[14] [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80.

[15] [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, 3 C.C.C. 1.

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

may have rights of access were not subject to any of the limitations which the *Game and Fisheries Act* of Manitoba, R.S.M. 1954, c. 94, imposes upon the non-Indian residents of Manitoba. Section 72(1) of *The Game and Fisheries Act*, R.S.M. 1954, c. 94, reads as follows:

> 72(1) Notwithstanding this Act, and in so far only as is necessary to implement The Manitoba Natural Resources Act, any Indian may hunt and take game for food for his own use at all seasons of the year on all unoccupied Crown lands and on any other lands to which the Indian may have the right of access.

The question which falls to be determined in this appeal is whether the terms of the agreement between the Government of Canada and the Government of Manitoba as ratified by Parliament and by the Legislature of Manitoba and confirmed at Westminster in the *British North America Act* 1930 take precedence over the provisions of the *Migratory Birds Convention Act* and the *Regulations* made thereunder. If full effect is to be given to s. 13 of the agreement in question, it must be held that the provisions of the *Migratory Birds Convention Act* and the *Regulations* made thereunder do not apply to Indians in Manitoba when engaged in hunting migratory birds for food in the areas set out in the section. On the other hand, if the provisions of the *Migratory Birds Convention Act* take precedence, the right of Indians in Manitoba to hunt game for food at all seasons of the year in accordance with said s. 13 is wiped out. Accordingly, the decision must be made as to which legislation is paramount.

Freedman J.A., in his dissenting judgment in the Court of Appeal, dealt with the problem as follows:

> At first blush it might be thought that the reference to Indians and their hunting rights both in the Convention and in the regulations of the *Migratory Birds Convention Act*—under which they are permitted to hunt scoters, auks, auklets, etc.—settles the matter. Obviously such rights are far smaller than the unrestricted right to hunt all game for food, which is provided by Sec. 13 of *"The Manitoba Natural Resources Act"*. The reference to Indians in the Convention and in the regulations is in general terms, no exception being made with regard to Indians of Manitoba or elsewhere. It might accordingly be plausibly argued that the Indians in Manitoba have only such rights with respect to migratory birds as are conferred by the *Migratory Birds Convention Act*. But this is not necessarily so. We must remember that when the Convention of 1917 was entered into, the agreement relating to the transfer of Manitoba's natural resources was not yet in existence nor even in contemplation. Hence no exception with regard to Manitoba Indians could have been expected in the Convention. As for the regulations of 1958, it is true that they were enacted subsequent to *The Manitoba Natural Resources Act* and that they contain no exception in favour of Indians of Manitoba. But the

regulations could not enlarge or go beyond the provisions of the statute pursuant to which they were enacted. Rather they would conform to the terms of that statute; so no such exception would be expected in the regulations either.

The parallel argument on the other side appears to me to be far more cogent. The terms of Sec. 13 contained in *The Manitoba Natural Resources Act* are comprehensive and permit the hunting by Indians of game for food at all seasons of the year. No exception is made with respect to migratory birds, even though the *Migratory Birds Convention Act* had been on the statute books since 1917. Instead of making the provisions of Sec. 13 subject to the terms of the *Migratory Birds Convention Act,* the legislators did quite the opposite. They enshrined the agreement within the Canadian constitutional framework by having it confirmed at Westminster in the *British North America Act, 1930,* and declared it should have the force of law "notwithstanding anything in... any Act of the Parliament of Canada". I believe it should be given that force and not be read as subject to the provisions of the *Migratory Birds Convention Act.*

I am conscious of the fact that this conclusion will give to the *Migratory Birds Convention Act* a different effect in Manitoba (and incidentally in Saskatchewan and Alberta, which have similar provisions to Sec. 13) from that which it has in other parts of Canada. The decision of the Supreme Court of Canada in *Reg. vs. Sikyea,* (1964) S.C.R. 642, upheld the application of the *Migratory Birds Convention Act* to an Indian of the Northwest Territories notwithstanding hunting rights contained in treaties. The decision of that Court in *The Queen vs. George,* (1966) 55 D.L.R. (2d) 386, came to the same conclusion as regards an Indian in Ontario. In neither case, of course, did Sec. 13 of *The Manitoba Natural Resources Act* apply. If the application of Sec. 13 gives to the *Migratory Birds Convention Act* a disparate result in different parts of Canada, that is simply an unfortunate but inevitable consequence of the conflicting legislation on the subject.

I am in full agreement with Freedman J.A. and the fact that the conclusion arrived at by him gives the Indians of Manitoba, Saskatchewan and Alberta a latitude while hunting for food on unoccupied crown lands and on other lands to which Indians might have a right of access greater than that possessed by other Indians in Canada is not of itself a reason for putting a strained interpretation on said s. 13 or for failing to give effect to the very plain language in the *British North America Act* 1930. The lamentable history of Canada's dealings with Indians in disregard of treaties made with them as spelt out in the judgment of Johnson J.A. in *Regina v. Sikyea*[16] and by McGillivray J.A. in *Rex v. Wesley*[17] ought in justice to allow the Indians to get the benefit of an unambiguous law which for

[16] [1964] 2 C.C.C. 325 at 327 to 336, 43 C.R. 83, 46 W.W.R. 65, 43 D.L.R. (2d) 150.

[17] [1932] 58 C.C.C. 269 at 274 to 285, 2 W.W.R. 337, 26 Alta. L.R. 433.

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

once appears to give them what the treaties and the Commissioners who were sent to negotiate those treaties promised.

I said at p. 646 of my reasons in *Sikyea* which were concurred in by the six other members of this Court who heard the appeal:

> On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal, (1964) 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

It should be noted that in *Sikyea* the *British North America Act* 1930 had no application because the offence there being dealt with had occurred in the Northwest Territories, an area wholly within the legislative jurisdiction of the Parliament of Canada. Parliament has the power to breach the Indian treaties if it so wills: *Regina v. Sikyea, supra.* That point is dealt with by Johnson J.A. at p. 330 as follows:

> Discussing the nature of the rights which the Indians obtained under the treaties, Lord Watson, speaking for the Judicial Committee in *A.-G. Can. v. A.-G. Ont., A.-G. Que. v. A.-G. Ont.*, (1897) A.C. 199 at p. 213, said:
>
> > "Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due..."
>
> While this refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing. It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement", like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the *B.N.A. Act,* from doing so.

However, parliament cannot legislate in contravention of the *British North America Act* and that is why the *British North America Act* 1930 is decisive in this case.

A reading of Johnson J.A.'s historical review in *Sikyea,* particularly at pp. 335-6, where he said:

> It is, I think, 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. The subsequent history of the Government's dealing with the Indians would seem to bear this out. When the treaty we are concerned with here was signed in 1921, only five years after the enactment of the *Migratory Birds Convention Act,* we find the Commissioners who negotiated the treaty reporting:

> "The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case, and the Government will expect them to support themselves in their own way, and, in fact, that more twine for nets and more ammunition were given under the terms of this treaty than under any of the preceding ones; this went a long way to calm their fears. I also pointed out that any game laws made were to their advantage, and, whether they took treaty or not, they were subject to the laws of the Dominion."

and there is nothing in this report which would indicate that the Indians were told that their right to shoot migratory birds had already been taken away from them. I have referred to Art. 12 of the agreement between the Government of Canada and the Province of Alberta signed in 1930 by which that Province was required to assure to the Indians the right of "hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands". (The amendment to the *B.N.A. Act* (1930 (U.K.), c. 26) that confirmed this agreement, declared that it should "have the force of law notwithstanding anything in the British North America Act... or any Act of the Parliament of Canada...") It is of some importance that while the Indians in the Northwest Territories continued to shoot ducks at all seasons for food, it is only recently that any attempt has been made to enforce the Act.

confirms what I said in *Sikyea* and I am fortified in that view by the judgment of McGillivray J.A. in *R. v. Wesley*, particularly at pp. 283-4 where, in dealing with s. 12 of the Alberta agreement, identical in effect with s. 13 of the Manitoba agreement, he said:

In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements. See *A.-G. Can. v. A.-G. Ont.* (Indian Annuities case), (1897) A.C. 199, at p. 213.

Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles which the Senate and the House of Commons declared in addressing Her Majesty in 1867, uniformly governed the British Crown in its dealings with the aborigines.

At the time of the making of this Indian Treaty it was of first class importance to Canada that the Indians who had become restless after the

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

sway of the Hudson's Bay Co. had come to an end, should become content and that such title or interest in land as they had should be peacefully surrendered to permit of settlement without hindrance of any kind. On the other hand it goes without saying that the Indians were greatly concerned with "their vocations of hunting" upon which they depended for their living.

In this connection it is of historical interest although of no assistance in the interpretation of the treaty, that Governor Laird who with Colonel Macleod negotiated this treaty, said to the Chiefs of the Indian tribes:—

"I expect to listen to what you have to say today, but first, I would explain that it is your privilege to hunt all over the prairies, and that should you desire to sell any portion of your land, or any coal or timber from off your reserves, the Government will see that you receive just and fair prices, and that you can rely on all the Queen's promises being fulfilled."

And again he said:—"The reserve will be given to you without depriving you of the privilege to hunt over the plains until the land be taken up."

It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land.

In the case *A.-G. v. Metropolitan Electric Supply Co.*, 74 L.J. Ch. 145, at p. 150, Farwell J., said:—

"I think it is germane to the subject to consider what the Legislature had in view in making the provisions which I find in the Act of Parliament itself. As Lord Halsbury said in *Eastman Photographic Materials Co. v. Comptroller General of Patents, Designs, and Trade Marks*, (1898) (A.C. 571) referring to *Heydon's Case* (1584), (3 Co. Rep. 7a) 'We are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy.' That is a very general way of stating it, but no doubt one is entitled to put one's self in the position in which the Legislature was at the time the Act was passed in order to see what was the state of knowledge as far as all the circumstances brought before the Legislature are concerned, for the purpose of seeing what it was the Legislature was aiming at."

If as Crown counsel contends, s. 12 taken as a whole gives rise to apparent inconsistency and is capable of two meanings then I still have no hesitation in saying in the light of all the external circumstances relative to Indian rights in this Dominion to which I have alluded, that the law makers in 1930 were in the making of this proviso, aiming at assuring to the Indians covered by the section, an unrestricted right to hunt for food in those unsettled places where game may be found, described in s. 12.

It was argued that para. 13 of the agreement in question is limited in its application solely to provincial laws because of the presence of the clause "which the Province hereby assures to them", in the sentence under consideration. That clause inserted parenthetically between commas

cannot derogate from the thrust of the principal clause which contains the specific declaration "that the said Indians shall have the right,... of hunting, trapping and fishing game and fish for food at all seasons of the year". In my view it adds emphasis to the declaration by making manifest the application of the declaration to the Province as though the clause read "which the Province *also* hereby assures to them".

If all that s. 13 of the agreement was intended to achieve in 1930 was a declaration by the Province that Indians were to have the right to fish, hunt and trap for food at all seasons of the year, it was, according to that interpretation, an empty, futile and misleading gesture. Either the Indians then had those rights or they did not have them for the *Migratory Birds Convention Act* had been on the statute books since 1917. The only interpretation that makes sense is the one that acknowledges that the right of hunting, trapping and fishing game and fish for food at all seasons of the year existed in 1930 regardless of the *Migratory Birds Convention Act* and the Federal Government wanted those rights to continue notwithstanding the transfer to the Provinces of Manitoba, Saskatchewan and Alberta of the unalienated natural resources withheld when the Provinces were formed. What logic could there have been in having the Provinces assure to Indians non-existing rights?

The Federal authority was already under treaty obligation contained in Treaties 5 and 6 which read:

> Her Majesty further agrees with Her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

to preserve the Indians' right to hunt and fish for food at all seasons of the year, and it was merely making certain that the Provinces would accord the same rights when they got control of the unalienated Crown lands. The obligation of Canada to preserve the right to hunt and fish for food at all seasons was an historical one arising out of the rights of Indians as original inhabitants of the territories from

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

which Manitoba, Saskatchewan and Alberta were carved and arising out of the treaties above mentioned. The subject of aboriginal rights as they apply to Indians of Western Canada and the effect of the treaties made with the Indians were dealt with by the Court of Appeal for British Columbia in *Regina v. White and Bob*[18]. This Court upheld that decision in an oral judgment[19] as follows:

> Mr. Justice Cartwright delivered the following oral judgment:
>
> "Mr. Berger, Mr. Sanders and Mr. Christie. We do not find it necessary to hear you. We are all of the opinion that the majority in the Court of appeal were right in their conclusion that the document, Exhibit 8, was a 'treaty' within the meaning of that term as used in s. 87 of the *Indian Act* (R.S.C. 1952, c. 149). We therefore think that in the circumstances of the case, the operation of s. 25 of the *Game Act* (R.S.B.C. 1960, c. 160) was excluded by reason of the existence of that treaty."

It follows that if Exhibit 8 in *White and Bob* which reads:

> Know all men that we the Chiefs and people of the Sanitch Tribe who have signed our names and made our marks to this Deed, on the 6th day of February 1852 do consent to surrender entirely and forever, to James Douglas the Agent of the Hudsons Bay Company, in Vancouver Island that is to say for the Governor Deputy Governor and Committee of the same, the whole of the lands situate and lying between Mount Douglas and Cowitchen Head on the Canal de Arro and extending thence to the line running through the centre of Vancouver Island north and south.
>
> The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people forewer; *it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.* We have received as payment—Forty one pounds thirteen shillings and four pence.—In token whereof we have signed our names, and made our marks at Fort Victoria, on the seventh day of February, One thousand eight hundred and fifty two.

(Emphasis added.)

was a treaty within s. 87 of the *Indian Act,* R.S.C. 1952, c. 149, so are Treaties 5 and 6 aforesaid.

Soon after the agreement in question was entered into, the Court of Appeal for Saskatchewan in *Rex v. Smith*[20],

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[18] (1964), 52 W.W.R. 193 at 210-250, 50 D.L.R. (2d) 613.

[19] (1965), 52 D.L.R. (2d) 481.

[20] [1935] 2 W.W.R. 433, 64 C.C.C. 131.

dealt with the effect of s. 12 of the Saskatchewan agreement which is identical with s. 13 now under review and in that case Turgeon J.A. (later C.J.S.) said:

> Although this case is of great interest and importance I do not think it will be necessary in disposing of it to examine minutely the state of the law existing prior to recent date, nor the Indian treaty or treaties referred to in the argument. If these treaties, or the various Dominion or provincial statutes referred to have any present bearing on the case it is only in so far as they may throw some light upon the interpretation of certain words in the instrument which, in my opinion, now governs the relations of these Indians with the game laws of Saskatchewan, and to which I am about to refer.
>
> The 24th enumeration of sec. 91 of the *British North America Act, 1867*, ch. 3, confers upon the parliament of Canada exclusive jurisdiction upon the subject of "Indians and Lands Reserved for the Indians," while, on the other hand, the provinces have power to make laws concerning the hunting, fishing, preservation, etc. of game in the province. As a result, controversies have arisen in the past as to the application of provincial game laws to Indians: *Rex v. Rodgers* (1923) 2 W.W.R. 353, 33 Man. R. 139, 40 C.C.C. 51.
>
> But in the years 1929 and 1930 something occurred which, in my opinion, had the effect of recasting the jurisdiction of the province of Saskatchewan in respect to the operation of its game laws upon our Indian population. In December, 1929, an agreement was entered into between the Dominion and the province having for its primary object the transfer from the one to the other of the natural resources within the province. This transfer was accompanied by many terms, some of which had to do with matters pertaining to the Indians. Among these is par. 12 of the agreement, which reads as follows (L.R. 1929-30, p. 293):
>
> > 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.
>
> It is admitted in this case that the accused was hunting for food.
>
> This agreement between the Dominion and the province was made "subject to its being approved by the Parliament of Canada and the Legislature of the Province" and also to confirmation by the Parliament of the United Kingdom. Ratification by the Imperial Parliament was necessary in so far at least as the agreement purported to make any change in the constitutional powers of the Dominion or of the province. In a recent decision of this Court, *Rex v. Zaslavsky, ante* p. 34, the learned Chief Justice quoted from the remarks of Lord Watson in the course of the argument in *C.P.R. v. Notre Dame de Bonsecours Parish* (1899) A.C. 367, 68 L.J.P.C. 54. The statement quoted by the learned Chief Justice may fittingly be repeated here:
>
> > The Dominion cannot give jurisdiction or leave jurisdiction with the province. The provincial Parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the

1968

DANIELS
v.
WHITE AND
THE QUEEN

Hall J.

other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or other can enlarge the jurisdiction of the other or surrender jurisdiction.

Consequently no legislative jurisdiction can be taken from the Dominion Parliament and bestowed upon a provincial Legislature, or *vice versa*, without the intervention of the parliament of the United Kingdom.

The Imperial statute confirming the agreement is 1930, 20 & 21 Geo. V., ch. 26, sec. 1 of which enacts that the agreement shall have the force of law "notwithstanding anything in the *British North America Act* of 1867 or any Act amending the same," etc. It follows therefore that, whatever the situation may have been in earlier years the extent to which Indians are now exempted from the operation of the game laws of Saskatchewan is to be determined by an interpretation of par. 12, *supra*, given force of law by this Imperial statute. This paragraph says that the Indians are to have the right to hunt, trap and fish for food in all seasons "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access".

For the purposes of the present inquiry we can confine ourselves to Crown lands (excluding lands owned by individuals as to which some other question might arise) because this game preserve is Crown land. The question then is (1) is it unoccupied Crown land, or (2) is it occupied Crown land to which the Indians have a right of access? If it is either of these no offence was committed by the accused.

(Emphasis added.)

Counsel for the accused, in proposing a test for the meaning which must be given to the word "occupied" and "unoccupied" referred to the treaty made between the Crown and certain tribes of Indians near Carlton, on August 23, 1876, whereby, on the one hand, these Indians consented to the surrender of their title of whatsoever nature in an area of which this game preserve forms part and, on the other hand, the Crown undertook certain obligations towards them and assured them certain rights and privileges. As I have said, it is proper to consult this treaty in order to glean from it whatever may throw some light on the meaning to be given to the words in question. *I would even say that we should endeavour, within the bounds of propriety, to give such meaning to these words as would establish the intention of the Crown and the Legislature to maintain the rights accorded to the Indians by the treaty.*

(Emphasis added.)

I have already dealt with the meaning of s. 13 of the Manitoba agreement. To me it is clear and unambiguous and by s. 1 of the *British North America Act* 1930 which reads:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *British North America Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

has the force of law, notwithstanding "any Act of the Parliament of Canada". The *Migratory Birds Convention Act* is an Act of the Parliament of Canada. One would suppose that that should end the matter, but it is urged

that s. 1 of the *British North America Act* 1930 does not necessarily refer to every provision of the agreement and, in particular, that s. 13 is outside the plain and unambiguous language of the *Act* in that Ottawa and Westminster could not conceivably have intended s. 13 to take precedence over the *Migratory Birds Convention Act* of 1917. One should, I think, be slow to accept the argument that the negotiators of the Manitoba agreement and Parliament at Ottawa were in 1929 and 1930 totally forgetful of the existence of the *Migratory Birds Convention Act* of 1917. Rather is it not more logical that knowing of the solemnity with which the Indian treaties had been negotiated and how highly they were regarded by the Indians, neither the negotiators of the agreement nor the Government at Ottawa had the slightest intention of breaching those treaties.

If it had been intended that the *Migratory Birds Convention Act* should take precedence, it would have been a simple matter to have said so in the agreement or in the *Manitoba Natural Resources Act*. Much would have to be read into s. 13 of the agreement to make it subject to the *Migratory Birds Convention Act*. I am not prepared to add exclusions which Parliament and Westminster did not see fit to do.

It is argued that this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. The rule does not, of course, come into operation if a statute is unambiguous for in that event its provisions must be followed even if they are contrary to the established rules of international law. The case of *Inland Revenue Commissioners v. Collco Dealings Ltd.*[21] is a case in which this very argument was made. In that case the Court was being asked to read into a section of the *Income Tax Act* 1952 additional words which would enlarge the meaning of the section so as to include persons not included by the precise words of the enactment but which were included under an agreement between the British Government and the Republic of Ireland providing for exemption

[21] [1962] A.C. 1, 39 Tax Cas. 526.

1968

DANIELS v. WHITE AND THE QUEEN

Hall J.

from tax where the claimant was a resident in the Republic of Ireland and was not a resident in the United Kingdom.

In dealing with the argument, Viscount Simonds said at pp. 18 and 19:

> It has been urged that the general words of the subsection should be so construed as not to have the effect of imposing or appearing to impose the will of Parliament upon persons not within its jurisdiction. This argument, which had influenced the special commissioners, was not advanced before this House. A somewhat similar argument was, however, pressed upon your Lordships and was perhaps more strongly than any other relied on by the appellant company. It was to the effect that to apply section 4(2) to the appellant company would create a breach of the 1926 and following agreements, and would be inconsistent with the comity of nations and the established rules of international law: the subsection must, accordingly, be so construed as to avoid this result.
>
> My Lords, the language that I have used is taken from a passage at p. 148 of the 10th edition of "Maxwell on the Interpretation of Statutes" which ends with the sentence: "But if the statute is unambiguous, its provisions must be followed even if they are contrary to international law." It would not, I think, be possible to state in clearer language and with less ambiguity the determination of the legislature to put an end in all and every case to a practice which was a gross misuse of a concession. What, after all, is involved in the argument of the appellant? It is nothing else than that, when Parliament said "under any enactment," it meant "any enactment except..." But it was not found easy to state precisely the terms of the exception. The best that I could get was "except an enactment which is part of a reciprocal arrangement with a sovereign foreign state." It is said that the plain words of the statute are to be disregarded and these words arbitrarily inserted in order to observe the comity of nations and the established rules of international law. I am not sure upon which of these high-sounding phrases the appellant company chiefly relies. But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear.

I would paraphrase the latter part of this statement as follows in applying it to the Indians of Manitoba, Saskatchewan and Alberta by saying: *But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state (Canada) from taking what steps it thinks fit to protect its own aboriginal population (Indians) from being deprived of their ancient rights to hunt and to fish for food assured to them in Treaties 5 and 6* made with them.

It took those steps when it included s. 13 of the Manitoba agreement, confirmed by the *Manitoba Natural Re-*

sources Act and petitioned Parliament at Westminster to enact s. 1 of the *British North America Act* 1930. If there is inconsistency or repugnancy between the *Migratory Birds Convention Act* and the *Manitoba Natural Resources Act* the later prevails over the earlier; *British Columbia Railway Co. v. Stewart* [22] and *Summers v. Holborn District Board of Works*[23]. It is difficult, I think, to find language more forthright and less ambiguous than s. 1 of the *British North America Act* 1930. To repeat, it reads:

> 1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *British North America Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

I would, accordingly, allow the appeal and quash the conviction. The appellant is entitled to his costs in this Court and in the Courts below.

PIGEON J.:—The facts are summarized in the reasons of my brother Judson with whom I am in agreement.

I wish to add that, in my view, this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. It is a rule that is not often applied, because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law, as was said recently in *Inland Revenue Commissioners v. Collco Dealings Ltd.*[24], where all relevant authorities are reviewed. In that case, the House of Lords came to the conclusion that the intent of Parliament was clear and unmistakable and, therefore, the plain words of a statute could not be disregarded in order to observe the comity of nations and the established rules of international law. However, the principle of construction was recognized as applicable in a proper case.

Here we must not be misled by the clear and unambiguous provision of section 1 of the *British North America Act* 1930 into believing that, because it is there said that

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[22] [1913] A.C. 816.
[23] [1893] 1 Q.B. 612 at 619, 68 L. T. 226, 57 J.P. 326.
[24] [1962] A.C. 1, 39 Tax Cas. 526.

1968

DANIELS v. WHITE AND THE QUEEN

Pigeon J.

the agreement shall have the force of law notwithstanding any act of the Parliament of Canada, every provision of the agreement was intended to override all federal legislation.

The question to be decided is whether in par. 13 of the agreement, the words "Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof" contemplate laws of Canada as well as laws of Manitoba. The language certainly is not that which one would normally use in referring to both classes of laws. It is rather the language one would be expected to use in a provision intended to subject the Indians to provincial game laws. This is further borne out by the fact that the proviso on which this appeal is based is in a form of an assurance by the province only. Can it be said that where Canada stipulates in the agreement: "that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year..." the intention was expressed in clear language and without ambiguity to amend the *Migratory Birds Convention Act* contrary to Canada's international obligations? In my view, the least that can be said is that the intention to derogate from the statute implementing the treaty is not clearly expressed. It is perfectly possible without doing violence to the language used to construe the provision under consideration as applicable solely to provincial laws and thus to avoid any conflict.

It must also be considered that an agreement is not to be construed as applying to anything beyond its stated scope unless the intention to do so is unmistakable. Here the purpose of the agreement is stated in its preamble to be that the Province be placed in a position of equality with the other provinces with respect to the administration and control of its natural resources. It is quite consistent with this declared object to provide that provincial laws respecting the use of some resources, namely fish and game, shall apply to Indians subject to a restriction the effect of which is to carry out Canada's treaty obligations towards the Indians in that respect. On the other hand, it would not only be foreign to this object but even inconsistent with it, to provide for an implied modification of the *Migratory Birds Convention Act*. The result would be to

enact a provision having no relation with the stated purpose of the agreement and also to create a lack of uniformity by establishing in favour of the Indians in one province an exception that does not exist in favour of the Indians in other provinces.

In *Danby v. Coutts & Co.*[25], it was held that a power of attorney granted in general terms for the purpose stated in the recitals, to act for the grantor during his absence from England, must be construed as limited to the duration of such absence. Concerning statutes, Maxwell says (The Interpretation of Statutes, 11th ed., p. 79): "General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act." and he adds quoting Lord Halsbury in *Leach v. Rex*[26], "It would be 'perfectly monstrous' to construe the general words of the Act so as to alter the previous policy of the law."

Appeal dismissed, CARTWRIGHT C.J. *and* RITCHIE, HALL *and* SPENCE JJ. *dissenting.*

Solicitor for the appellant: W. R. Martin, The Pas.

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

LOUIS MAYZEL (*Plaintiff by Counterclaim*) ..... APPELLANT;

AND

RUNNYMEDE INVESTMENT CORPORATION LIMITED and REXDALE INVESTMENTS LIMITED (*Defendants by Counterclaim*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Power of sale—Legislation with effective date September 1, 1964, respecting notice of exercising power—Sale on October 6, 1964—Whether proceedings under power of sale were commenced by notice given May 20, 1964, and were consequently outside legislation—The Mortgages Act, R.S.O. 1960, c. 245, s. 29 (rep. & sub. 1964, c. 64, ss. 4 and 5).

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Pigeon JJ.

[25] (1885), 29 Ch.D. 500, 54 L.J. Ch. 577, 52 L.T. 401.

[26] [1912] A.C. 305.

1968

MAYZEL v. RUNNYMEDE INVESTMENT CORPORATION LTD. *et al.*

An action brought by Runnymede Investment Corporation Ltd. for foreclosure of a mortgage against Louis Mayzel and City Parking Ltd. was discontinued by Runnymede, but prior to the discontinuance a counterclaim was commenced by Mayzel against Runnymede and Rexdale Investments Ltd. The aim of the counterclaim was to set aside the sale of an interest in certain lands, which interest had been sold to Rexdale by Runnymede on October 6, 1964, relying on a power of sale in a mortgage of that interest from Mayzel to Runnymede. The latter mortgage had been given to Runnymede to secure an extension of time on two other mortgages held by Runnymede on adjoining lands owned by Mayzel. All three mortgages were in default on May 20, 1964, when a notice of sale was given by Runnymede.

The Mortgages Act, R.S.O. 1960, c. 245, s. 29 (rep. & sub. 1964, c. 64, ss. 4 and 5) provides that a mortgagee shall not exercise a power of sale unless a notice of such exercise in the form prescribed has been given to certain persons enumerated by the Act. Mayzel would have been one of such persons. Section 8 of the same Act provides that the foregoing provision "applies where proceedings under a power of sale are commenced on or after the 1st day of September, 1964."

The exercise of the power was upheld by the trial judge and an appeal from his decision was dismissed by the Court of Appeal. Mayzel then appealed to this Court. Runnymede and Rexdale submitted that the proceedings under the power of sale were commenced by the notice given on May 20, 1964, and that they were consequently outside the legislation in question.

Held: The appeal should be dismissed.

The Court agreed with the conclusion of the Court of Appeal that the proceedings under the power of sale were commenced by the notice of May 20, 1964; that these proceedings were never abandoned and that the right subsisted and continued up to October 6, 1964; and that negotiations between Mayzel and Runnymede which were running concurrently with the sale proceedings did not constitute a withdrawal or an abandonment of the proceedings.

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of Haines J. Appeal dismissed.

Claude R. Thomson, for the appellant.

John J. Robinette, Q.C., for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—We are concerned in this appeal with the counterclaim of Louis Mayzel against Runnymede Investment Corporation Limited and Rexdale Investments Limited. In this counterclaim Mayzel asked for a declaration

that the exercise of the power of sale in a certain mortgage given by him to Runnymede Investment Corporation Limited was a nullity. Both the trial judge and the Court of Appeal have upheld the exercise of the power.

Mayzel says that the exercise of the power is a nullity because it offends s. 29 of *The Mortgages Act,* which was enacted by 1964 Statutes of Ontario, c. 64, s. 5. This legislation came into force on September 1, 1964. The new s. 29(1) provides:

> 29. (1) A mortagee shall not exercise a power of sale unless a notice of exercising the power of sale (Form 1) has been given by him to the following persons, other than the persons having an interest in the mortgaged property prior to that of the mortgagee and the persons subject to whose rights the mortgaged property is being sold:

There is a transitional provision in the 1964 legislation contained in s. 8, which reads as follows:

> 8. *The Mortgages Act,* as amended by this Act, applies where proceedings under a power of sale are commenced on or after the 1st day of September, 1964.

Mayzel's argument is that the proceedings under the power of sale were commenced on or after September 1, 1964. Runnymede and Rexdale submit that the proceedings were commenced by a notice given on May 20, 1964, and that they are consequently outside the new legislation. This is the only issue involved in this appeal.

Mayzel was the owner in fee of two parcels of land on University Avenue. These were subject to mortgages which were vested in Runnymede as mortgagee. There were encumbrances prior to these mortgages. Mayzel was also interested in land known as 137 Richmond Street West, which adjoined the two freehold parcels. His interest in 137 Richmond Street West was a right to acquire a leasehold interest from Principal Investments Limited. This leasehold enjoyed a right of perpetual renewal every twenty-one years at an agreed or arbitrated amount as ground rental. To secure an extension of time on the mortgages on the freehold lands on University Avenue, Mayzel gave a mortgage to Runnymede on his right to acquire the leasehold interest in 137 Richmond Street West. All three mortgages were in default on May 20, 1964, when Run-

1968

MAYZEL
v.
RUNNYMEDE INVESTMENT CORPORATION LTD. *et al.*

Judson J.

nymede Investment Corporation Limited gave the following notice of sale. It applied both to the freehold lands and the leasehold interest. It is in the following form:

May 20, 1964.

Mr. Norton Penturn,
John Penturn & Son Limited,
25 Adelaide Street West,
Toronto 1,
Ontario.

Mortgagee's sale of freehold and
leasehold land

We wish to inform you that written Offers to Purchase will be considered by us at the offices of Messrs. McDonald, Davies & Ward, 4 King Street West, Toronto 1, on Friday May 29, 1964 at 12:00 o'clock noon in respect of the lands described in the enclosed sketch. The lands are vacant except for a service station building located at the northeast corner of the property.

The portion of the property outlined in red is leasehold land subject to a perpetually renewable lease which provides for a current rental of $7,200 per annum. Such rental to be re-negotiated and if necessary settled by arbitration in 1970 for the ensuing twenty-one year term and so on from term to term. The balance of the property is freehold land which will be sold subject only to an existing first mortgage for $800,000 due as to the principal amount on October 1, 1971 with interest only payable during the term at the rate of $4,600.03 per month.

The area of the property is approximately 60,000 square feet; the 1963 real estate taxes were approximately $74,000 and we understand (without warranty thereof) that the net rental income derived from the property is approximately $55,000 per annum.

A deposit equal to 10% of the purchase price, in cash or by certified cheque, will be required upon the submission of any Offer to Purchase. The balance of the purchase price shall be payable in cash or by certified cheque on June 12, 1964. The freehold portion of this property is being sold by us as third mortgage under and by virtue of the power of sale without notice contained in a first mortgage upon the said leasehold interest.

In connection with this sale we refer you to our letter of October 24, 1963, which was mailed to you. The sale contemplated by that letter was abandoned because of the furnishing by the mortgagor of the adjoining leasehold property as additional security for us. As this additional mortgage is now in default and the original mortgage has continued in default we are now entitled to sell the two properties together.

Yours very truly,

RUNNYMEDE INVESTMENT CORP. LTD.
Louis Charles

LC/ej
Enc.

This notice was sent to forty of the leading real estate agents in Toronto and a copy was also sent to Mr. Mayzel and his solicitor.

Mayzel's right to acquire an assignment of the leasehold interest from Principal Investments was in serious jeopardy. The purchase price was $250,000 with a $10,000 deposit. The purchase should have been completed on December 17, 1962, but because of litigation concerning the validity of the right of perpetual renewal, there were extensions from time to time. The closing date was finally extended to October 6, 1964. On that date Mayzel required almost $250,000 to save the property.

There were continuous negotiations between Runnymede and Mayzel from the date of the notice, May 20, 1964, to the date of closing of the purchase of the leasehold interest, October 6, 1964. Mayzel's object in these negotiations was to come to some kind of agreement with Runnymede about the ultimate disposition of the property. It is admitted that no such agreement was made but on October 6, 1964, Mayzel consented to the sale from Runnymede to Rexdale of his right to acquire the leasehold interest in the hope that he would be able to come to a subsequent arrangement with the person who controlled both Runnymede and Rexdale. He signed a direction, dated October 5, 1964, to Principal Investments to assign the lease to Rexdale Investments Limited in the following terms:

TO: National Trust Company,
Receiver-Manager of
Principal Investments Limited.

RE: Principal Investments Limited sale to
Mayzel. Principal Investments Leaseholds

Please make the Assignment of the Lease between John Elias Gibson and Principal Investments Limited, dated December 15th, 1949, and registered in the Registry Office for the City of Toronto on December 4th, 1950, as Instrument Number 31971E.S. to REXDALE INVESTMENTS LIMITED, a Company incorporated under the laws of the Province of Ontario.

This shall be your good and sufficient authority for so doing.

DATED at Toronto this 5th day of October, 1964.

WITNESS:
(sgd)
Vera Christoff

(sgd)
Louis Mayzel
LOUIS MAYZEL

1968

MAYZEL v. RUNNYMEDE INVESTMENT CORPORATION LTD. *et al.*

Judson J.

On October 6, 1964, Runnymede, for a consideration of $65,000, assigned to Rexdale all the right, title and interest of Mayzel to purchase the leasehold interest in 137 Richmond Street West under the agreement of October 19, 1962, made between Mayzel and Principal Investments.

I have mentioned that both Runnymede and Rexdale were under the same control but Mayzel, as appellant, declined to attack the transaction on this ground. He could not very well do so. He had released his interest in the property in favour of Runnymede and Rexdale in the hope that he would be able to make a subsequent agreement with them. This is more than acquiescence. He confines his attack on the transaction to the legislation amending *The Mortgages Act* in 1964. This legislation came into force, as I have said, on September 1, 1964, over a month before the exercise of the power of sale on October 6, 1964.

The Court of Appeal has held that the proceedings under the power of sale were commenced by the notice of May 20, 1964; that these proceedings were never abandoned and that the right subsisted and continued up to October 6, 1964; and that the negotiations which were running concurrently with the sale proceedings did not constitute a withdrawal or an abandonment of the proceedings. With this conclusion I agree.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Claude R. Thomson, Toronto.*

Solicitors for the respondents: *Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.*

ORIOLE LUMBER LIMITED ..... APPELLANT;

AND

THE CORPORATION OF THE TOWNSHIP OF MARKHAM and F. J. FUDGE ..... RESPONDENTS.

1968

*Feb. 27, 28
Apr. 29

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Planning legislation—Subsidiary land use by-law—"Industrial" and "accessory" uses—Whether lumber warehouse and wholesale and retail outlet a permitted use.

The appellant carried on a wholesale and retail lumber business and having lost its premises through expropriation planned to continue the business at a new location. The appellant filed an application for the issuance of a permit for the erection of a building having a total floor area of approximately 16,000 square feet of which 3,000 square feet or approximately 18¾ per cent was to consist of "floor space to be used as a showroom and retail sales space". The respondent building inspector refused the application for a permit being of the opinion that the erection of the building was prevented by the provisions of a subsidiary land use by-law of the respondent township. The appellant then moved for an order by way of *mandamus* and the motion resulted in the granting of an order requiring the respondents to issue a building permit in the terms of the application made by the appellant. An appeal by the respondents from the order of the judge of first instance was allowed by the Court of Appeal. The appellant then appealed to this Court from the judgment of the Court of Appeal.

Held: The appeal should be dismissed.

The question to be determined was whether a lumber warehouse and wholesale and retail business came within the extended definition of the words "industrial" or "industrial use" in the by-law in question. It was significant that neither wholesaling nor retailing was mentioned in that extended definition so that the only way in which a wholesale or retail lumber outlet could come within the permitted use would be that it was an "accessory" use to "warehousing and storage within enclosed buildings". What was decisive, was that the wholesale and/or retail selling was not accessory to the warehousing or storage but, in fact, the warehousing or storage was incidental to the wholesale and retail selling. There could be no other purpose for the building than to sell lumber therefrom at either wholesale or retail, and for that purpose and that purpose only to store the lumber which was to be sold.

APPEAL from a judgment of the Court of Appeal for Ontario, whereby that Court allowed an appeal by the respondents from an order of Moorhouse J. granting the appellant a *mandamus* requiring the respondents to issue a building permit. Appeal dismissed.

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

1968

ORIOLE LUMBER LTD. v. TOWNSHIP OF MARKHAM et al.

Peter deC. Cory, Q.C., for the appellant.

W. B. Williston, Q.C., and *W. A. Kelly,* for the respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on October 17, 1966, whereby that Court allowed an appeal by the respondents from the order of Moorhouse J. pronounced on May 7, 1966. By the latter order, the learned judge of first instance had granted a *mandamus* requiring the respondents to issue a building permit upon an application made by the appellant.

The Corporation of the Township of Markham had enacted an official land use by-law with attached to and forming part thereof an official land use plan. This land use plan covered the whole of the Township of Markham except certain incorporated municipalities and was intended to be an over-all plan from which more detailed plans would be involved for the various areas and communities. One of those areas was subsequently covered by the enactment on October 9, 1962, of By-law 1957. That by-law affected, *inter alia,* lands on Woodbine Avenue in the said Township of Markham, a short distance north of Steeles Avenue, being part of lot 2, concession 4 in the Township of Markham. These lands were subsequently purchased by the appellant and the appellant proposed to erect thereon the building the subject of the application for permit.

The appellant had engaged in a wholesale and retail lumber business with premises on the north side of Sheppard Avenue at Leslie Street, and having lost those premises through expropriation planned to continue the business at the premises in question.

The appellant filed an application for the issuance of a permit for the erection of a building having a total floor area of approximately 16,000 square feet of which 3,000 square feet or approximately 18¾ per cent was to consist of "floor space to be used as a showroom and retail sales space". In the letter accompanying this application, the solicitors for the appellant stated:

> The proposed uses of the building comply with your By-law under Clause 8(ii)(a) as to the major portion of the building. However, you will see on the Plans that the building is to include a part at the front for retailing products of Oriole Lumber Limited.

The respondent Fudge, as building inspector of the respondent Corporation of the Township of Markham, refused the application for a permit being of the opinion that the erection of the building was prevented by the provisions of By-law 1957. The relevant portions of the said By-law 1957 are as follows:

DEFINITIONS

2. (i) "Accessory" when used to describe a use shall mean a use naturally and normally incidental, subordinate and exclusively devoted to a main use and located on the same lot.

. . .

(xxvi) "Use" shall mean the purpose for which land or a building is arranged, designed or intended or for which either land or a building or structure is, or may be, occupied or maintained.

* * *

PERMITTED
LAND USE

8. No person shall hereafter use any building, structure or land and no person shall erect any building or structure in the area defined as shown on Schedule "A", for any purpose other than one or more of the following uses, namely:

(i) A dwelling for a caretaker of a manufacturing or industrial undertaking permitted under Sub-section (ii) provided that the requirements of By-law Number 1442 of the Township of Markham are complied with or an apartment for a caretaker of a manufacturing or industrial undertaking permitted under Sub-section (ii), provided that the total ground floor area of the said manufacturing or industrial undertaking is not less than 30,000 square feet.

(ii) Industrial Uses which shall include:

(a) Warehousing and storage within enclosed buildings, and the assembly of manufactured products, such as textiles, wood, paper, light metal sections, radio and television equipment and other similar products, and also the manufacture within enclosed buildings of radio and television equipment, drugs, cosmetics, jewellry, and watches, toys, publishing and bookbinding, office equipment, sanitation products and any other light manufacturing operations which are not obnoxious by reason of the erosion or emittance of any noise, smoke, odour, dust, gas fumes, refuse or water carried waste;

(b) Shops for the repair or manufacturing within enclosed buildings, of small goods and wares, laundries and dry-cleaning plants, bakeries, printers, dyers, storage warehouses, chemical products, paper and paper boxes, electrical products, canning and food plants, aluminum products, and any other manufacturing or industrial establishment within an enclosed building

1968

ORIOLE LUMBER LTD. v. TOWNSHIP OF MARKHAM et al.

Spence J.

which is not obnoxious by reason of the emission of odour, dust, smoke, noise, gas fumes, cinders, vibration, refuse matter, water carried waste, or unsightly open storage;

Public Utilities

(iii) All public utilities and essential public services including railway trackage, industrial spurs and supporting tracks, but not including schools.

The learned judge of first instance granted the application for the *mandamus* without written reasons. Schroeder J.A., giving the judgment for the Court of Appeal, was of the opinion that the word "industrial" by ordinary definition intended a use which was primarily one involving the art of production or manufacture of some item, and that it involved activity or labour whereby a saleable commodity was created or produced. Of course, it is not intended that in this warehouse and wholesale and retail lumber outlet there should be activity or labour resulting in the creation of a product but merely the storing of such products and their sale at wholesale or retail. Schroeder J.A. continued to point out that the ordinary meaning of "industrial use" had been expanded by By-law 1957 in para. 8(ii)(a) to include matters well beyond the ordinary definitions of "industrial" or "industrial use" by including warehousing and storage "within enclosed buildings". He dealt with the proposition of the appellant that wholesaling and retailing of lumber was "an accessory use" of warehousing premises so as to bring it within para. 2(i) of the said by-law quoted above by pointing out that although the respondent had, without conceding, refrained from urging that a wholesale lumber business was not "an accessory" to a warehouse and storage business, nevertheless, a retail business could only be characterized as an accessory to a wholesale and that therefore to permit the building proposed was to engraft an accessory upon an accessory.

It was the basis of the official plan that there should be a series of categories of use of premises and to those categories the municipal council assigned various designations. It is these designations which are the vocabulary of the legislative scheme for use of lands within the township and which should govern the primary determination of whether a proposed building is in accordance with the various subsidiary land use by-laws such as By-law 1957. There was

produced as ex. "E" to the affidavit of Hein Cats filed upon the application for permit, a copy of the official plan of the township. That plan shows a designation of all lands within the township under various designations, *i.e.*, urban residential, rural residential, rural, major open space, institutional and transportation, highway frontage, industrial, and community commercial (the order of the naming is not significant). That such designations do not always accurately reflect ordinary definitions may be illustrated by noting that there are shown on the final plan several golf and country clubs which all bear the hatch marking indicating that they are for "institutional and transportation use". Therefore, without having to refer to the dictionary definitions of the word "industrial" it is sufficient to note that the legislators intended to distinguish between "industrial use" and "commercial use".

In my view, much of the argument before this Court as to whether a lumber warehouse and wholesale and retail business was industrial has become academic. That type of business would certainly have been commercial in the allocation of it to either a "commercial" or "industrial" classification. So it matters not whether it could ordinarily have been termed "industrial" as well as "commercial". The question therefore to be determined is whether this business comes within the extended definition of the words "industrial" or "industrial use" in s. 8, para. (ii) of the by-law. It is significant that neither wholesaling nor retailing is mentioned in that extended definition so that the only way in which a wholesale or retail lumber outlet could come within the permitted use in the said 8(ii)(a) would be that it was an accessory to "warehousing and storage within enclosed buildings".

Whether warehousing should be confined, as was argued by the respondent, to providing a building for the storage of goods of others consigned to one's care and custody for a fee, or whether it has a much wider connotation, need not, in my opinion, be decided, although the additional words "and storage within enclosed buildings" would seem to indicate the wider definition. What is decisive, is that the wholesale and/or retail selling is not accessory to the warehousing or storage but, in fact, the warehousing or storage is incidental to the wholesale and retail selling. There can be no other purpose for the building as illustrated graphi-

1968

ORIOLE LUMBER LTD. v. TOWNSHIP OF MARKHAM et al.

Spence J.

cally by the plan filed by the appellant than to sell lumber therefrom at either wholesale or retail, and for that purpose and that purpose only to store the lumber which is to be sold. It is the place where the stock-in-trade of the business is kept to be sold just as much as it is in the case of a retail hardware store. I am, therefore, of the opinion that there can be no inclusion within the permitted use of a wholesale and retail lumber outlet by any allegation that it is accessory to a warehousing business.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Rohmer, Cory & Haley, Toronto.

Solicitors for the respondents: Mingay & Shibley, Toronto.

1968

*Feb. 5, 6
Apr. 29

ARTHUR D. WILSON (*Defendant*) .....APPELLANT;

AND

JOAN DELANCEY JONES (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—By-law restricting use of lands—Interpretation—Designated area restricted to "private residences" or "duplex dwellings"—Whether building containing 17 apartments a permitted use.

Under By-law 1275 of the Town of Niagara, enacted in 1950, a defined area in the town was designated as a residential area and it was provided in s. 4(a) that all land within the said area "shall be used [subject to certain exceptions] for private residences...". By an amending by-law, enacted in 1951, the words "or duplex dwellings" were added after the words "private residences" in the said s. 4(a). In 1965 the building inspector for Niagara issued to the defendant a permit to erect a 2½-story building to contain 17 separate suites. The building was to have two entrances, one at the front and the other at the rear, and these were to open into corridors. Each apartment was to have its own private entrance into the corridors.

An action for an injunction restraining the construction of the proposed building was dismissed by the trial judge, who was of the view that the various apartments were "private residences" and that therefore the erection of the building was not prohibited by By-law 1275 as amended. The Court of Appeal allowed an appeal and directed the issuing of an injunction. An appeal by the defendant from the judgment of the Court of Appeal was then brought to this Court.

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

Held: The appeal should be dismissed.

The words to be construed were "private residences" or "duplex dwellings" and the standard to be used was to "construe in an ordinary or popular and not in a legal or technical sense". These were ordinary words which were easily understood by everyone in the business of building, buying, or selling housing accommodation.

What was contemplated in the erection of the proposed building was not private residences but many private residences under one roof plus communal accommodation, *i.e.*, in plain and ordinary terms, an apartment house. Such a building was not within the by-law.

Rogers v. Hosegood, [1900] 2 Ch. 388, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Grant J. Appeal dismissed.

B. James Thomson, Q.C., for the defendant, appellant.

John J. Robinette, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on November 2, 1966. That Court, by a majority judgment, allowed an appeal from the judgment of Grant J. pronounced on January 11, 1966. In the latter judgment, Grant J. had refused the respondent, a ratepayer, an injunction which she had sought under the provisions of s. 486 of *The Municipal Act,* R.S.O. 1960, c. 249, which reads as follows:

> 486. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.

The Town of Niagara, in the Province of Ontario, had on December 12, 1950, enacted By-law 1275 purporting to be a by-law to restrict the use of lands and to regulate and restrict the construction and use of buildings and structures within a defined area. Section 2 of that by-law provided:

> 2. THAT the use of land or the construction or use of buildings or structures within Zone "A", other than for such purposes as may be permitted by this by-law, is hereby prohibited.

[1] [1967] 1 O.R. 227, 60 D.L.R. (2d) 97.

1968

WILSON v. JONES

Spence J.

And in s. 4 provided, in part

4. THAT Zone "A" shall be and it is hereby designated as a residential area and the following provisions and restrictions shall apply:

(a) All land lying within Zone "A" shall be used except as hereinafter provided, for private residences and the use of such land for trade, business, commercial or industrial activity is prohibited.

(b) The erection or use of any building or structure within the said Zone, for any trade, business, commercial or industrial activity or purpose, except as hereinafter provided, is hereby prohibited and such buildings or structures shall be used for private residences only.

(c) Nothing in this paragraph shall be deemed to prohibit the erection or use of any residence in the said Zone by a physician, surgeon or dentist for the purpose of carrying on the practice of his profession, or the use of any residence in the said Zone as a boarding house, lodging house or house furnishing meals, or by a mortician as a funeral home.

The Town of Niagara amended that by-law by By-law 1294 enacted on June 5, 1951, and for the purpose of this decision the only portion of the amendment with which we are concerned is the addition of the words "or duplex dwellings" after the words "private residences" in s. 4, para. (a) of the said By-law 1275.

The appellant applied for the issuance of a building permit to allow him to build in Zone "A" a certain building which is outlined on floor plans produced and marked as an exhibit, and which is further delineated as being similar to the photograph of the building which he had built in another municipality also produced and marked as an exhibit.

The building inspector of the Town of Niagara on June 16, 1965, issued to the appellant a building permit to erect the said building in accordance with the plans filed and which had been approved by the said building inspector.

At the trial of the issue, counsel agreed that if By-law 1275 as amended were valid and prevented the erection and use of the building in question then the building permit was of no legal significance and it had been issued illegally.

Before the appellant could commence to build, the respondent applied for an injunction under the provisions of the aforesaid s. 486 of *The Municipal Act*. The building as delineated on the said plans and as illustrated in the said photograph is one of two and a half-storeys, that is, there is a ground floor which is partially below ground level and partially protruding above the ground, and there

are two storeys above that ground floor. The ground floor is to contain five apartments, some of one bedroom and some of two. Both upper floors are to contain six apartments each, that is, there will be a total of seventeen apartments. Each apartment, so far as the living-room, dining-room, kitchen and bedroom are concerned, is totally separated from the other apartments, but there is one entrance in about the centre of the front of the building and another entrance at the rear of the building. Both of these entrances open into corridors. Each apartment has its own private entrance into these corridors. There would seem to be no entrance whatsoever directly to any apartment whether on the first or other floors except from the corridors. In addition, at the rear of the ground floor, there is a large space which is to be occupied by lockers and another large space which is designated as a laundry, as well as space used for housing the heating plant.

It was the view of the learned trial judge upon a consideration of *Rogers v. Hosegood*[2] that the various apartments were "private residences" and that therefore the erection of the building was not prohibited by By-law 1275 as amended. The learned trial judge, therefore, dismissed the plaintiff's action for an injunction.

The Court of Appeal for Ontario[3] allowed the appeal and directed the issuing of the injunction which the respondent had claimed, interpreting By-law 1275 as amended as prohibiting the erection of the building outlined in the respondent's application for a permit.

The late Chief Justice of Ontario giving judgment for the majority also dealt with *Rogers v. Hosegood* pointing out that the part of that decision which governs this litigation was the finding in reference to the 1876 covenant between the parties and adopted the reasons of Collins L.J. at p. 409 as follows:

> We think that residential flats, involving the use of a public entrance and staircase, do not answer the description of private residences contemplated by the words quoted. The covenant must, we think, be construed in an ordinary or popular, and not in a legal and technical, sense; and we do not think that residential flats, though for many purposes separate dwelling-houses, come within the popular description of the class of buildings which it was intended to permit.

[2] [1900] 2 Ch. 388.
[3] [1967] 1 O.R. 227, 60 D.L.R. (2d) 97.

1968

WILSON v. JONES

Spence J.

The appeal from the majority judgment of the Court of Appeal for Ontario should be dismissed. I am of the opinion that the standard used by Collins L.J. in *Rogers v. Hosegood* for the interpretation of a covenant in a conveyance is equally proper in the interpretation of a by-law restricting the use of lands and that standard is as stated by the learned Lord Justice to "construe in an ordinary or popular and not in a legal or technical sense". The words to be construed are "private residences" or "duplex dwellings". With respect, I differ from the late Chief Justice of Ontario when he finds himself unable to utilize the amendment wrought in 1951 by By-law 1294 to construe By-law 1275 as enacted in 1950. I am of the opinion that when the council in 1951 enacted the amending By-law 1294 they must have had in consideration the by-law which they were amending and which had been enacted only the previous year and have considered the words I have quoted as they appeared after the amendment. Therefore the council believed that they had enacted a by-law which would permit only something which could be better described as a single, one-family residence, determined to widen the permitted use so that there could be erected a building which could consist of two one-family residences placed one on top of the other. In enacting the by-law first and its amendment later they have used ordinary words, *i.e.*, private residences, and duplex dwellings, which were easily understood by everyone in the business of building, buying, or selling housing accommodation.

I therefore regard it as an important aid to the construction of the words "private residences" that the council in their next year should have widened it only so far as to permit a building of two family residences one on top of the other, and in my view impliedly held fast to the determination that it would not permit a building of three, four, or, as in the present case, seventeen residences. It is to be noted that the apartment house in addition to containing the number of private residences far beyond the two which are contained in the duplex contained other accommodation which is for the communal use of the occupants of seventeen of the private residences, to wit, the corridors, the lockers and the laundry in the proposed building.

I am, therefore, of the view that what was contemplated in the erection of the proposed building was not private

residences but many private residences under one roof plus communal accommodation, *i.e.*, in plain and ordinary terms, an apartment house, and that an apartment house is not within the by-law any more than the apartment house was in *Rogers v. Hosegood.* I have come to this conclusion realizing that a by-law restricting the use of land must be strictly construed and that any doubt as to the application of the by-law to prevent the erection of a specific building should be resolved in favour of such proposed use. No authority need be cited for each of these propositions. These principles, however, need only be applied when upon the reading of the whole by-law there is an ambiguity or difficulty of construction. Reading the whole by-law, I have, for the reasons which I have outlined, come to the conclusion that there is no such ambiguity or difficulty in interpretation and therefore the two canons are not applicable. Both the learned trial judge and MacKay J.A. have pointed out that the municipal authorities issued a permit for the construction of the said building and MacKay J.A. remarks that this indicates the view of the municipal authorities that the building falls within those permitted by the by-law. As I have pointed out, the two by-laws were enacted by the council of the Town of Niagara in 1950 and 1951. The permit was issued by the building inspector in 1965. There is no indication that it was considered by council. The parties have agreed that if the erection of the building is prevented by the by-laws then the building permit was issued illegally. I can obtain little assistance in interpreting the by-laws enacted by council in the year 1950 and 1951 from the view of the building inspector in 1965.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Reid, McNaughton, Martin & Zabek, St. Catharines.

Solicitors for the plaintiff, respondent: Fleming, Harris, Barr, Hildebrand, Geiger & Daniel, St. Catharines.

1968

*Feb. 26, 27
Apr. 29

LEON EVERETT CHAPMAN and ROBERT JORDAN KEEN (*Defendants*) ..... APPELLANTS;

AND

BENJAMIN GEORGE GINTER (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Wrongful attempt by one party to repudiate agreement—Failure of other party to elect to accept repudiation and communicate acceptance within reasonable time—Agreement abandoned by both parties.

By an agreement dated September 17, 1959, the appellants agreed to purchase shares in A Co. from the respondent for the sum of $190,000 payable in monthly instalments and subject to certain terms and conditions. At the date of the agreement A Co. was indebted to G Co. (a company controlled by the respondent) in an amount exceeding $200,000. In accordance with a term of the agreement, A Co. executed and delivered to G Co. a chattel mortgage to secure payment of this indebtedness in monthly instalments. The agreement contained provisions respecting the termination of the purchasers' rights thereunder in the event of default of payments both in respect of the main agreement and the chattel mortgage. By a letter dated January 2, 1962, the respondent notified the appellants that A Co. having made default in the payment of an instalment under its chattel mortgage, he was electing, pursuant to the agreement, to declare the balance of the purchase price of the shares due and payable, and by a further letter dated January 23, 1962, he notified the appellants that all their rights under the said agreement had ceased and been determined. The evidence established that the respondent had no reasonable grounds for believing that he was entitled to give the notices of January 2 and January 23, 1962. However, the appellants did not accept these notices as constituting a repudiation of the contract. Negotiations looking to the formation of a new agreement were entered into but did not succeed.

The respondent sued the appellants for the amount outstanding under the agreement of September 17, 1959. The appellants filed a defence to the action and counterclaimed for return of payments that they had made to the respondent under the agreement and for return of certain shares held in escrow. Some months later the appellants amended their defence and counterclaim and, for the first time, alleged that the respondent had wrongfully revoked and terminated the agreement of September 17, 1959, and they elected to treat the

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

notice of January 23, 1962, as wrongfully and unlawfully terminating the said agreement and they claimed damages. The respondent in his reply to the appellants' amended pleadings abandoned his original claim and alleged instead that the agreement of September 17, 1959, had been justifiably terminated.

The trial judge gave judgment for the respondent, declaring the agreement of September 17, 1959, a valid and subsisting agreement and dismissing the appellants' counterclaim. On appeal, the Court of Appeal allowed the appeal and varied the judgment of the trial judge by striking out the declaration that the agreement of September 17, 1959, was a valid and subsisting agreement and substituting the direction that the respondent's action and claims in the action be dismissed. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be dismissed.

The Court agreed with the Court of Appeal that the respondent wrongfully attempted to repudiate the agreement and also that the appellants failed to elect to accept the repudiation and communicate their acceptance to the respondent within a reasonable time. Both parties "walked away from the agreement and abandoned it".

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of McFarlane J. Appeal dismissed.

K. F. Arkell and *L. Lewin,* for the defendants, appellants.

W. J. Wallace, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the Court of Appeal for British Columbia.[1] The litigation originated out of an agreement dated September 17, 1959, under which the appellants agreed to purchase from the respondent 325 shares of the capital stock of Arctic Construction Company Limited for the sum of $190,000 payable in monthly instalments and subject to certain terms and conditions. At the date of the agreement Arctic Construction was indebted to Ben Ginter Construction Company Limited (a company controlled by the respondent) in an amount exceeding $200,000. In accordance with a term of the agreement, Arctic Construction executed and delivered to the Ginter Company a chattel mortgage to secure payment

[1] (1967), 60 W.W.R. 385.

1968

CHAPMAN *et al.* v. GINTER

Hall J.

of this indebtedness in monthly instalments. Prior to entering into this agreement, the appellant Keen had a construction business doing oil field construction work in the Fort Nelson area of northern British Columbia, and requiring more equipment he approached the respondent who had a business at Prince George, British Columbia. The parties arrived at a point where they were ready to do business, and as a means of doing so an inactive company, Neals Lake Logging Limited, which the respondent controlled was reactivated and renamed "Arctic Construction Company Limited". 175 shares of Arctic were acquired by the appellants and 325 allotted to the respondent. It was these 325 shares of Arctic which the appellants agreed to purchase. The appellant Chapman, who was at this time General Manager of Ben Ginter Construction Company Limited, was to leave that company on January 1, 1959, and become Manager of Arctic Construction with the appellant Keen as Field Manager.

The agreement of September 17, 1959, contained the following clauses:

> 5. The time for payment of the said purchase price of said shares and interest thereon is material and of the essence of this agreement and if any payment is not made upon its due date and such default continues for 60 days the whole of the balance of the purchase price for the Vendor's Shares (and interest hereon) shall immediately become due and payable without notice and in default of immediate payment all the rights of the Purchasers hereunder shall immediately cease and be determined at the option of the Vendor, any rule of law or equity to the contrary notwithstanding, and any payments theretofore made by the Purchasers to the Vendor shall be then retained by the Vendor as liquidated damages for the failure of the Purchasers to complete the purchase of the Vendor's Shares and to pay the purchase price thereof but the Purchasers shall not be relieved of liability for any breach of any of the other covenants herein set forth.
>
> 6. In the event that the Arctic Company shall be in default for sixty days in the payment of any instalment of the principal and interest secured by said Chattel Mortgage to the Ginter Company the Vendor may elect to declare the balance of the purchase price of the Vendor's shares due and payable and in default of payment thereof by the Purchasers to the Vendor within ten (10) days of notice thereof in writing all the rights of the Purchasers hereunder shall immediately cease and be determined at the option of the Vendor in the same manner and with the like effect as in Clause 5 hereof preceding.

The agreement also provided that the appellants' 175 shares in Arctic should be held as collateral security for the due payment of the mortgage debt by Arctic to the Ginter Company.

Under the said agreement the appellants continued to operate Arctic from this date until November 3, 1961. There were some minor modifications in the arrangements, but these are of no consequence in this appeal. On November 3, 1961, Arctic's mortgage payments to Ben Ginter Construction Limited were up to date as of October 31, 1961, with the November 1, 1961, payment then due and payable. Ben Ginter Construction Limited held Arctic's postdated cheques for the mortgage payments of November 1, 1961, and December 1, 1961. The payments by the appellants on their share purchase agreement were in arrears for September, October and November, being three payments totalling $11,250.

The respondent Ginter on November 3, 1961, wrote the appellants and proposed an arrangement whereby Ben Ginter Construction Limited would withhold and not deposit Arctic's mortgage cheques until "such time as I consider you can adequately handle both commitments". By 'both commitments' Ginter meant Arctic's mortgage payments to Ben Ginter Construction Limited and the appellants' payments to the respondent on the share purchase agreement of September 17, 1959. Ginter's letter of November 3, 1961, contained a new schedule of the payments from the appellants to the respondent pursuant to the share purchase agreement whereby the three payments in arrears would be paid on November 15, 1961, and the monthly payments by the appellants thereafter increased to $4,000 per month for December 1, 1961, and January 1, 1962, and then to $4,200 per month. The $11,250 which was in arrears on November 3, 1961, and the December 1, 1961, payment were made, bringing the agreement of September 17, 1959, in good standing to December 31, 1961.

Meanwhile, on December 21, 1961, the respondent deposited Arctic's cheques dated November 1, 1961, and December 1, 1961, referred to in respondent's letter of November 3, 1961, and because Arctic did not have sufficient funds in its bank account to meet them, these cheques were returned N.S.F. on December 27, 1961.

1968

CHAPMAN *et al.* *v.* GINTER

Hall J.

The respondent, then purporting to act under clause 6 of the agreement of September 17, 1959, sent notices to the appellants as follows:

Prince George, B.C.
January 2, 1962

Messrs. Chapman & Keen
Box 55,
Dawson Creek, B.C.

Dear Sirs:

You are hereby given notice that Arctic Construction Co. Ltd. having made default for sixty days in the payment of an instalment of principal and interest under its chattel mortgage to Ben Ginter Construction Company Ltd. of Prince George, B.C., I do hereby, pursuant to Clause 6 of our agreement dated September 1959, elect to declare the balance of the purchase price of the shares in Arctic Construction Co. Ltd. which, by the said agreement dated September 17th 1959, I agreed to sell to you, due and payable, the said balance which is now due and payable in the sum of $101,293.88.

Yours truly,

Benjamin George Ginter.

and he followed this notice with a further letter dated January 23, 1962, as follows:

Messrs. Chapman & Keen,
Box 55,
Dawson Creek, B.C.

Dear Sirs:

Since the period of ten days has elapsed since I gave you notice under Clause 6 of our agreement dated November* 17, 1959, concerning your purchase from me of shares in Arctic Construction Company Limited, that I had elected to declare the balance of the purchase price of those shares due and payable and since you have not paid said balance to me, I hereby give you notice that all your rights under said agreement have ceased and been determined.

Yours truly,

Benjamin George Ginter.

*(The reference to November is obviously an error for September.)

The appeal proceeded upon the footing that, as held by the learned trial judge:

. . . there had not been a default under the chattel mortgage for sixty days, of which the plaintiff may take advantage when the notices of January 2nd and January 23rd 1962 were given. These notices were premature and the plaintiff was not entitled to declare the defendants' rights under the agreement terminated when he purported to do so.

and it was conceded by the respondent that the evidence established he had no reasonable grounds for believing that he was entitled to give the notices of January 2, 1962, and January 23, 1962.

However, the evidence is clear that the appellants did not accept these notices as constituting a repudiation of the contract, but instead, the appellant Keen and the respondent entered into negotiations looking to the formation of a new agreement whereby the appellant Keen would purchase the respondent's shares in Arctic and the appellant Keen, on behalf of himself and the appellant Chapman, thereafter negotiated with the respondent with the view of entering into a new agreement. No new agreement was arrived at. Relations between the parties deteriorated, the appellant Keen being dismissed by Ginter on April 11, 1962, as an employee and officer of Arctic. The appellant Chapman had earlier resigned. The appellant Keen took action against Ben Ginter Construction Company Limited for unlawful dismissal. That litigation has no bearing on the present appeal.

On May 10, 1962, the respondent sued the appellants for $100,983.66, being the balance owing for the shares under the agreement of September 17, 1959. The appellants thereupon demanded return of the money they had paid to Ginter under the said agreement and also requested return of the certificates for their 175 shares in Arctic. On June 14, 1962, the appellants filed a defence to the respondent's action and counterclaimed for return of the payments they had made to the respondent under the agreement and for the shares. The pleadings remained in this state until February 6, 1963, when the appellants amended their defence and counterclaim and, for the first time, alleged that the respondent had wrongfully revoked and terminated the agreement of September 17, 1959, and they elected to treat the notice of January 23, 1962, as wrongfully and unlawfully terminating the said agreement and they claimed damages. The respondent Ginter in his reply to the appellants' amended pleadings of Feburary 6, 1963, abandoned his claim for $100,983.66 for which he had sued on May 10, 1962, and alleged instead that the agreement of September 17, 1959, had been justifiably terminated. Subsequent

1968

CHAPMAN *et al.* *v.* GINTER

Hall J.

amendments were made to the pleadings in April 1963 and in September 1964. The action came on for trial at Vancouver on February 22, 1965.

In summary the learned trial judge, Mr. Justice McFarlane, in a judgment dated March 10, 1965, gave judgment declaring the agreement of September 17, 1959, a valid and subsisting agreement and dismissing the counterclaim with costs. An appeal was taken to the Court of Appeal for British Columbia. In a judgment dated April 17, 1967, that Court allowed the appeal of the appellants and varied the judgment of McFarlane J. by striking out the declaration that the agreement of September 17, 1959, was a valid and subsisting agreement and substituting the direction that the respondent's action and claims in the action be dismissed. The formal judgment in this respect reads as follows:

> THIS COURT DOTH ORDER AND ADJUDGE that the Appeal herein be allowed /in part/ and the Judgment aforesaid varied to the extent of striking out the declaration that the Agreement of 17th September, 1959 between the Appellants and the Respondent is a valid and subsisting contract, and substituting for the said declaration the following paragraph:—
>
> "THIS COURT DOTH ORDER AND ADJUDGE that the action and claims of the Plaintiff (Respondent), Benjamin George Ginter against the Defendants (Appellants), Leon Everett Chapman and Robert Jordan Keen, be and the same are hereby dismissed in their entirety."
>
> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the aforesaid Judgment appealed from be further varied by striking out the following paragraph thereof:—
>
> "AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendants do pay to the Plaintiff the costs of this action forthwith after taxation thereof."
>
> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that all parties to this action do bear their own costs in this Court and in the Court below.

The reasons for judgment in the Court of Appeal were delivered by Tysoe J.A. He came to the conclusion that the notices of January 2 and January 23, 1962, were premature and the respondent Ginter was not entitled to declare the appellants' rights under the agreement of September 17, 1959, terminated when he purported to do so. Tysoe J.A. continued as follows:

> I am of the opinion that it cannot reasonably be inferred from the proven circumstances, including the conduct of the parties, that the appellants elected to accept the repudiation and to hold the respondent

liable in damages and that, that election was communicated to or known to the respondent within a reasonable time. It is my view that the learned trial Judge was correct in his finding that "neither defendant did so elect or communicate his election within a reasonable time"—a time which was reasonable in all the circumstances. February 1963, over a year after the repudiation, was outside the limit of any reasonable time. It appears to me that the raising, by way of amendment to the pleadings, on that late date of a claim of repudiation by the respondent and acceptance thereof by the appellants and for damages was a mere afterthought.

It follows from what I have said that the appellants' claim that they are entitled, by reason of the wrongful repudiation of the agreement by the respondent, to damages against the respondent for breach of the agreement cannot be maintained. As the argument before this Court was directed to only this one point, in ordinary circumstances I would simply dismiss the appeal. But the circumstances here are unusual and, after all, it is the function and duty of the court to make such order as proper justice requires.

As I have earlier pointed out, this action was commenced by a specially endorsed writ and the claim was for the balance of the purchase price of shares of Arctic Construction payable under and by virtue of the agreement of September 17, 1959. The appellants' claim for damages based on the respondent's wrongful repudiation of that agreement was set up by way of counterclaim. In his reply to that counterclaim the respondent asked for a declaration that the agreement is a valid and subsisting agreement. That declaration was granted by the judgment appealed from. To set up such a cross-claim in a reply to a counterclaim is a somewhat unusual procedure. It can be so set up only if the plaintiff desires to use it merely as a shield against the counterclaim, otherwise he must amend his statement of claim. See: *Renton, Gibbs & Co. v. Neville and Co.* [1900] 2 Q.B. 181. No amendment to the statement of claim was made in the case at bar. In his opening at trial respondent's counsel drew the Court's attention to the fact that the plaintiff—respondent, in his reply to the counterclaim had expressly abandoned his claim for the balance of the purchase price of the shares as endorsed on the writ of summons. Thus the statement of claim in the action was in effect withdrawn and the trial proceeded as if the appellants were the plaintiff and the respondent was the defendant, the counterclaim was the statement of claim and the reply to the counterclaim was the statement of defence and counterclaim. In the result the appellants' counterclaim was dismissed and the respondent was given judgment declaring the agreement to be a valid and subsisting agreement. So long as that declaration stands the appellants remain liable to pay for the shares in accordance with the terms of the agreement even though the respondent had expressly abandoned his claim for the balance of the purchase price. Likewise, of course, the obligations of the respondent under the agreement remain in force. But the respondent, acting upon his wrongful repudiation took complete control of the affairs of Arctic Construction and dealt with the assets and business of the company as if they were his own. The evidence shows that at the time of trial there had been such a drastic change in the affairs of the company and in particular in its assets that

1968

CHAPMAN *et al.* v. GINTER

Hall J.

the equity behind the shares was completely different to what it had been at the time of the respondent's repudiation. It appears to me that in these circumstances it would be inequitable to leave the appellants with no recourse against the respondent and with an obligation to accept the shares and a liability to pay for them in accordance with the terms of the agreement. I express no opinion as to whether, if all the facts were known, it would be found that the respondent did or did not manage the affairs of the company and deal with its assets in a proper and business—like manner. I simply do not know what the situation is in this regard.

What order should be made so that proper justice may be done depends, in my view, on the interpretation which ought to be placed on the conduct of the parties. The respondent wrongfully repudiated the agreement but the appellants did not elect to accept the repudiation and to communicate the election to the respondent within a reasonable time. It is my opinion that the proper inference on the evidence is that both parties walked away from the agreement and abandoned it. They attempted to negotiate a new agreement but the apellants were unable to meet the requirements of the respondent and so the negotiations came to nothing.

Having arrived at this conclusion, I would allow the appeal and vary the judgment below to the extent of striking out the declaration that the agreement is a valid and subsisting agreement and substituting a direction that the respondent's action and claims in the action be dismissed.

I am fully in agreement with Tysoe J.A. on his findings that the respondent Ginter wrongfully attempted to repudiate the agreement and also that the appellants failed to elect to accept the repudiation and communicate their acceptance to the respondent within a reasonable time. In my view, the conclusion reached by Tysoe J.A. that both parties "walked away from the agreement and abandoned it" was the proper one and I think he was correct in the disposition he made of the appeal.

The appeal to this Court should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Lewin, Arkell & Callison, Dawson Creek.

Solicitors for the plaintiff, respondent: Bull, Housser & Tupper, Vancouver.

A motion to vary the judgment pronounced in the above appeal having been heard on June 17, 1968, by the same Bench that heard the appeal, the following judgment was delivered by

THE CHIEF JUSTICE (orally for the Court):—The formal pronouncement of the judgment of the Court made on April 29, 1968, is varied to read as follows:— 1968 CHAPMAN *et al.* *v.* GINTER

It is declared that the appellants are entitled to the 175 shares of Arctic Construction Limited which were placed in escrow to collaterally secure performance of the agreement of September 17, 1959, and that the said shares are released from escrow. It is further declared that the appellants are not entitled to the return of the moneys paid by them under the agreement of September 17, 1959, towards the purchase of the respondent's shares of Arctic Construction Limited. Subject to the making of the above declarations the appeal is dismissed with costs. The cross-appeal is dismissed with costs.

JOHN D. COUGHLIN ..... APPELLANT; 1967 *May 11, 12 1968 Apr. 29

AND

THE ONTARIO HIGHWAY TRANSPORT BOARD ..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL FOR ONTARIO, THE ATTORNEY GENERAL OF MANITOBA, THE ATTORNEY GENERAL FOR ALBERTA, THE ATTORNEY GENERAL OF QUEBEC ..... INTERVENANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Validity of legislation—Whether unconstitutional delegation by Parliament of power to legislate on interprovincial motor carriage—Motor Vehicle Transport Act, 1953-54(Can.), c. 59, s. 3(1), (2)—Ontario Highway Transport Board Act, R.S.O. 1960, c. 273—B.N.A. Act, ss. 91, 92.

In 1954, a licence permitting the inter-provincial transport of goods was issued to the appellant in Ontario, under the *Motor Vehicle Transport Act,* 1953-54 (Can.), c. 59. When informed that the respondent Board intended to hold a hearing to review the terms of the certificate which led to the issue of the licence, the appellant applied for an order prohibiting the Board from proceeding on the ground that the Board was without jurisdiction because the *Motor Vehicle Act,* which confers upon it the jurisdiction which it sought to exercise, was *ultra vires.* The trial judge dismissed the application, and this decision was affirmed by the Court of Appeal. The appellant was granted leave to

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

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

appeal to this Court. In support of the appeal, it was argued that the terms of the *Motor Vehicle Transport Act,* and particularly s. 3 thereof, constituted an unlawful delegation by Parliament to the provincial legislatures of the power to legislate in relation to the subject matter of inter-provincial motor vehicle carriage, a subject matter wholly within the legislative jurisdiction of Parliament. Counsel for each of the intervenants supported the constitutional validity of the Act.

Held (Martland and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Cartwright, Fauteux, Abbott, Judson and Spence JJ.: By the terms of s. 3 of the *Motor Vehicle Transport Act,* the question whether a person may operate the undertaking of an inter-provincial carrier of goods by motor vehicle within the limits of the province of Ontario is to be decided by a Board constituted by the provincial legislature and which must be guided in the making of its decision by the terms of the statutes of that legislature and the regulations passed thereunder as they may exist from time to time. There is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court in *A.G. for Ontario v. Scott,* [1956] S.C.R. 137, and by the Court of Appeal for Ontario in *R. v. Glibbery,* [1963] 1 O.R. 232. The respondent Board derives no power from the legislature of Ontario to regulate or deal with the inter-provincial carriage of goods. Its wide powers in that regard are conferred upon it by Parliament, which can at any time terminate them.

Per Martland and Ritchie JJ., *dissenting*: Section 3(2) of the *Motor Vehicle Transport Act* (Can.) is not valid federal legislation. This legislation constitutes an unconstitutional delegation from the federal to the provincial authority of a subject matter reserved to Parliament alone under the *B.N.A. Act.* In enacting the *Motor Vehicle Transport Act,* and particularly ss. 3(2) and 5 thereof, the Parliament of Canada purported to relinquish all control over that subject matter.

Droit constitutionnel—Validité d'un statut—S'agit-il d'une délégation inconstitutionelle par le Parlement du pouvoir de légiférer en matière de transport interprovincial par véhicule à moteur—Loi sur le transport par véhicule à moteur, 1953-54 (Can.), c. 59, art. 3(1), (2)—Ontario Highway Transport Board Act, R.S.O. 1960, c. 273—Acte de l'Amérique du Nord britannique, arts. 91, 92.

En 1954, un permis pour le transport interprovincial de marchandises a été accordé à l'appelant en Ontario en vertu de la *Loi sur le transport par véhicule à moteur,* 1953-54 (Can.), c. 59. Ayant été informé que la régie intimée avait l'intention de réexaminer les termes du certificat en vertu duquel le permis avait été accordé, l'appelant a demandé qu'il soit ordonné à la régie de ne pas procéder pour le motif que la régie était sans juridiction vu que la *Loi sur le transport par véhicule à moteur,* qui lui confère la juridiction qu'elle tente d'exercer, est *ultra vires.* Le juge de première instance a rejeté la requête, et sa décision fut confirmée par la Cour d'appel. L'appelant a obtenu la permission d'en appeler à cette Cour, et soutient que les termes de la

Loi sur le transport par véhicule à moteur, et particulièrement l'art. 3 d'icelle, constituent une délégation illégale par le Parlement aux législatures provinciales du pouvoir de légiférer en matière de transport interprovincial par véhicule à moteur, une matière relevant entièrement de la juridiction législative du Parlement. Les procureurs de chacun des intervenants ont affirmé la validité constitutionnelle de la loi.

Arrêt: L'appel doit être rejeté, les Juges Martland et Ritchie étant dissidents.

Les juges Cartwright, Fauteux, Abbott, Judson et Spence: De par les termes mêmes de l'art. 3 de la *Loi sur le transport par véhicule à moteur,* la question de savoir si une personne peut exploiter une entreprise interprovinciale pour le transport de marchandises par véhicule à moteur dans la province de l'Ontario doit être décidée par une régie créée par la législature provinciale et dont les décisions doivent être basées sur les termes des lois de cette législature et des règlements établis en vertu d'icelles, en vigueur de temps à autre. Il n'y a ici aucune délégation du pouvoir de légiférer. Il s'agit plutôt de l'adoption par le Parlement, dans l'exercice de son pouvoir exclusif, de la législation d'un autre corps telle qu'elle peut exister de temps à autre, ce qui a été jugé constitutionnellement valide par cette Cour dans *A.G. for Ontario v. Scott,* [1956] R.C.S. 137, et par la Cour d'appel de l'Ontario dans *R. v. Glibbery,* [1963] 1 O.R. 232. La régie intimée ne tire aucun pouvoir de la législature de l'Ontario pour réglementer le transport interprovincial de marchandises. Les pouvoirs étendus qu'elle détient à cette égard lui proviennent du Parlement qui peut en tout temps y mettre fin.

Les Juges Martland et Ritchie, *dissidents:* L'art. 3(2) de la *Loi sur le transport par véhicule à moteur* (Can.) n'est pas une législation fédérale valide. Cette législation constitue une délégation inconstitutionnelle de l'autorité fédérale à l'autorité provinciale d'une matière réservée exclusivement au Parlement par l'*Acte de l'Amérique du Nord britannique.* De par les termes mêmes de la loi, et particulièrement des arts. 3(2) et 5 d'icelle, le Parlement du Canada a abandonné tout contrôle sur cette matière.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], confirmant une décision rejetant une requête pour prohibition. Appel rejeté, les Juges Martland et Ritchie étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an application for prohibition. Appeal dismissed, Martland and Ritchie JJ. dissenting.

D. K. Laidlaw and *J. H. Francis,* for the appellant.

James J. Carthy, for the respondent.

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[1] [1966] 1 O.R. 183, 53 D.L.R. (2d) 30.

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

D. S. Maxwell, Q.C., and *D. H. Aylen*, for the Attorney General of Canada.

F. W. Callaghan, Q.C., for the Attorney General for Ontario.

D. W. Moylan, for the Attorney General of Manitoba.

Gerald LeDain, Q.C., for the Attorney General of Quebec.

Samuel A. Friedman, Q.C., for the Attorney General for Alberta.

The judgment of Cartwright, Fauteux, Abbott, Judson and Spence JJ. was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by this Court, from an order of the Court of Appeal for Ontario[1] made on October 14, 1965, affirming an order of Gale C.J.H.C., made on July 15, 1965, dismissing an application of the appellant for an order prohibiting the respondent from proceeding with a hearing to review the terms of the certificates which led to the issue of an extra-provincial operating licence to the appellant. The Court of Appeal gave no written reasons for its decision but we are informed by counsel that it stated its agreement with the reasons of Gale C.J.H.C.

There is no dispute as to any matter of fact. All of the business of the appellant consists of inter-provincial transport of goods and none of its operations involves transport entirely within one province so as to be of an intra-provincial nature. In 1954 a licence was issued to the appellant in Ontario under the *Motor Vehicle Transport Act* (Canada); this licence permits the inter-provincial movement of certain specific types of merchandise and is number X828. The respondent has informed the appellant of its intention to hold a hearing under *The Motor Vehicle Transport Act* (Canada) to review the terms of the certificate which led to the issue of the licence.

The application for prohibition was founded on the ground that the respondent was without jurisdiction because the Act which confers upon it the jurisdiction which it sought to exercise is *ultra vires* of Parliament. That Act is *The Motor Vehicle Transport Act*, Statutes of Canada, 2-3 Eliz. II, c. 59.

[1] [1966] 1 O.R. 183, 53 D.L.R. (2d) 30.

The relevant provisions of the Act are:

Section 2:

In this Act,

(a) "extra-provincial transport" means the transport of passengers or goods by means of an extra-provincial undertaking;

(b) "extra-provincial undertaking" means a work or undertaking for the transport of passengers or goods by motor vehicle, connecting a province with any other or others of the provinces, or extending beyond the limits of a province;

* * *

(g) "local undertaking" means a work or undertaking for the transport of passengers or goods by motor vehicle, not being an extra-provincial undertaking; and

(h) "provincial transport board" means a board, commission or other body or person having under the law of a province authority to control or regulate the operation of a local undertaking.

Section 3(1):

(1) Where in any province a licence is by the law of the province required for the operation of a local undertaking, no person shall operate an extra-provincial undertaking in that province unless he holds a licence issued under the authority of this Act.

(2) The provincial transport board in each province may in its discretion issue a licence to a person to operate an extra-provincial undertaking into or through the province upon the like terms and conditions and in the like manner as if the extra provincial undertaking operated in the province were a local undertaking.

Section 5:

The Governor in Council may exempt any person or the whole or any part of an extra-provincial undertaking or any extra-provincial transport from all or any of the provisions of this Act.

While an additional submission was made to Gale C.J.H.C., the only ground in support of the appeal relied upon before us was that the terms of the *Motor Vehicle Transport Act,* and particularly s. 3 thereof, constitute an unlawful delegation by Parliament to the provincial legislatures of the power to legislate in relation to the subject matter of inter-provincial motor vehicle carriage which subject matter was rightly conceded to be wholly within the legislative jurisdiction of Parliament.

Counsel for each of the intervenants supported the constitutional validity of the Act.

The Motor Vehicle Transport Act was assented to on June 26, 1954; pursuant to a proclamation of the Governor in Council issued under s. 7 of the Act it came into force in Ontario on September 15, 1954. At that date the powers as to the regulation of intra-provincial carriage of goods by motor vehicle now exercised by the respondent Board were

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

Cartwright J.

conferred upon the Ontario Municipal Board by *The Public Commercial Vehicles Act,* R.S.O. 1950, c. 304. The respondent Board was created by Statutes of Ontario, 1955, 4 Eliz. II, c. 54, by s. 25 of which the *Public Commercial Vehicles Act,* R.S.O. 1950, c. 304, was amended so that the powers as to the regulation of intra-provincial carriage of goods by motor vehicle theretofore exercised by the Ontario Municipal Board were transferred to the respondent Board.

The rules which guide the Board in the performance of its duties are now contained in the *Public Commercial Vehicles Act,* R.S.O. 1960, c. 139 and Regulations made by the Lieutenant-Governor in Council pursuant to s. 16 of that Act.

From the above brief review of the relevant legislation it will be seen that as matters stand at present the question whether a person may operate the undertaking of an inter-provincial carrier of goods by motor vehicle within the limits of the Province of Ontario is to be decided by a Board constituted by the provincial legislature and which must be guided in the making of its decision by the terms of the statutes of that legislature and the regulations passed thereunder as they may exist from time to time.

Mr. Laidlaw argues that in bringing about this result by the enactment of s. 3 of the *Motor Vehicle Transport Act* Parliament has in substance and reality abdicated its power to make laws in relation to the subject of inter-provincial motor vehicle carriage and unlawfully delegated that power to the provincial legislature.

It is made clear by the judgment of this Court in *Attorney General of Nova Scotia v. Attorney General of Canada*[2], and by the earlier decisions of the Judicial Committee and of this Court collected and discussed in the reasons delivered in that case, that neither Parliament nor a Provincial Legislature is capable of delegating to the other or of receiving from the other any of the powers to make laws conferred upon it by the *British North America Act.* Bill No. 136 of the Legislature of Nova Scotia which was under consideration in that case in terms provided that the Lieutenant-Governor of the Province might:

> by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter

[2] [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

relating to employment in any industry, work or undertaking in respect of which such matter is, by Section 92 of *The British North America Act*, 1867, exclusively within the legislative jurisdiction of this Legislature and any laws so made by the said Parliament shall, while such delegation is in force, have the same effect as if enacted by this Legislature.

The difference between such a bill and the Act which we are considering is too obvious to require emphasis.

It is well settled that Parliament may confer upon a provincially constituted board power to regulate a matter within the exclusive jurisdiction of Parliament. On this point it is sufficient to refer to the reasons delivered in the case of *P.E.I. Potato Marketing Board v. H. B. Willis Inc*[3].

In the case before us the respondent Board derives no power from the Legislature of Ontario to regulate or deal with the inter-provincial carriage of goods. Its wide powers in that regard are conferred upon it by Parliament. Parliament has seen fit to enact that in the exercise of those powers the Board shall proceed in the same manner as that prescribed from time to time by the Legislature for its dealings with intra-provincial carriage. Parliament can at any time terminate the powers of the Board in regard to inter-provincial carriage or alter the manner in which those powers are to be exercised. Should occasion for immediate action arise the Governor General in Council may act under s. 5 of the *Motor Vehicle Transport Act*.

In my opinion there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court in *Attorney General* for *Ontario v. Scott*[4] and by the Court of Appeal for Ontario in *Regina v. Glibbery*[5].

As has already been stated the point dealt with above was the only one argued before us. In regard to it I am in substantial agreement with the reasons of Gale C.J.H.C. It follows that I would dismiss the appeal.

Before parting with the matter I wish to call attention to the fact that in each of the proclamations whereby the *Motor Vehicle Transport Act* was brought into force in the

[3] [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.
[4] [1956] S.C.R. 137, 114 C.C.C. 224, 1 D.L.R. (2d) 433.
[5] [1963] 1 O.R. 232, [1963] 1 C.C.C. 101, 38 C.R. 5, 36 D.L.R. (2d) 548.

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

Cartwright J.

various provinces it is recited that this action had been requested by the Government of the Province concerned. It seems plain that the Government of Canada in co-operation with the Governments of the Provinces concerned has sought to achieve a satisfactory manner of regulating the transport of goods by motor vehicle. Our duty is simply to determine whether as a matter of law the Act of Parliament impugned by the appellant is valid; but it is satisfactory to find that there is nothing which compels us to hold that the object sought by this co-operative effort is constitutionally unattainable.

I would dismiss the appeal with costs but would make no order as to costs in regard to any of the intervenants.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[6] dismissing without reasons an appeal from a judgment rendered by Gale C.J.H.C. (as he then was) whereby he dismissed the application of the present appellant for an order prohibiting the Ontario Highway Transport Board from proceeding with a hearing to review the certificates of public necessity and convenience which led to the issuance of his Extra-Provincial Operating Licence for the Province of Ontario. I have had the benefit of reading the reasons for judgment prepared by the present Chief Justice in which he sets out the relevant statutory provisions and reviews the circumstances giving rise to this appeal, but I do not find it possible to agree with the conclusion which he has reached in confirming the judgments of the Courts below.

The "Extra-Provincial Operating Licence" here in question, which is numbered X828, appears to be signed by the Registrar of Motor Vehicles for the Province of Ontario. It bears the heading: "The Motor Vehicle Transport Act (Canada 1954)—Ontario Department of Transport—Extra-Provincial Operating Licence" and it authorizes the appellant "to operate an extra-provincial undertaking for the transportation of goods...subject to the terms and conditions printed on the back hereof..." The terms and conditions referred to read, in part, as follows:

[6] [1966] 1 O.R. 183, 53 D.L.R. (2d) 30.

THE MOTOR VEHICLE TRANSPORT ACT

Statutes of Canada 1954

1. This Act authorizes the Minister of Transport to licence inter-provincial and international undertakings for the transport of passengers and goods by motor vehicle upon like terms and conditions and in the like manner as if the extra-provincial undertaking were a local undertaking.

2. Licences issued under this Act for the transportation of goods between two or more provinces of Canada or between the province of Ontario and a state of the United States are designated 'extra-provincial operating licences' and the serial number of each licence shall commence with the letter 'X'. The terms and conditions are *that it shall be subject to the provisions of The Public Commercial Vehicles Act (Ontario) and the regulations made thereunder* with the following exceptions: ...

The italics are my own.

The exceptions are not strictly relevant for the purpose of this appeal.

The section of the *Motor Vehicle Transport Act* which is called in question in the present case is s. 3(2) which reads as follows:

3. (2) The provincial transport board in each province may in its discretion issue a licence to a person to operate an extra-provincial undertaking into or through the province under the like terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking.

The appellant contends that these provisions, when read in conjunction with the *Public Commercial Vehicles Act,* R.S.O. 1960, c. 319 and the regulations made thereunder, constitute a delegation by Parliament to the Provincial executive of the power to exercise control over a connecting undertaking by regulation, which power is expressly stated in the case of *A.G. (Ontario) v. Winner*[7], to be vested in the federal authority exclusively by reason of the provisions of s. 92(10)(*a*) of the *British North America Act.*

In the case of *A. G. (Ontario) v. Winner, supra,* the Privy Council had decided that it was beyond the legislative powers of a province (New Brunswick) to prohibit the operator of an interprovincial bus line from carrying passengers from points outside the province to points within the province and *vice versa* on the ground that no province had jurisdiction to legislate in relation to extra-provincial transport. The matter was succinctly stated by Lord Porter at page 580 where he said:

. . . it is for the Dominion alone to exercise, either by Act or by regulation, control over connecting undertakings.

[7] [1954] A.C. 541, 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225, 4 D.L.R. 657.

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

Ritchie J.

It appears to me to be of more than passing interest to note that the *Motor Vehicle Transport Act* (Canada) was assented to by Parliament almost exactly four months after the decision in the *Winner* case had been rendered by the Privy Council and that three months later, at the request of the Province of Ontario, a proclamation was issued "declaring the said act to be in force in the said province".

It seems to me that if it is to be held that s. 3(2) of the *Motor Vehicle Transport Act* is valid federal legislation, then the effect of the decision in the *Winner* case has been effectively nullified insofar as the Province of Ontario is concerned.

Before considering the question of whether or not this legislation constitutes a delegation from the federal to the provincial authority of subject matter reserved to Parliament alone under the *British North America Act,* it appears to me to be proper to re-state the proposition, that neither Parliament nor a provincial legislature is capable of delegating its powers to the other, in the language in which it was stated by Chief Justice Rinfret in *A. G. of Nova Scotia v. A. G. of Canada*[8]. The Chief Justice there said at page 34:

> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of the protection that Parliament can legislate only on the subject matters referred to it by section 91 and that each Province can legislate exclusively on the subject matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures. . .
>
> No power of delegation is expressed either in section 91 or in section 92, nor, indeed, is there to be found the power of accepting delegation from one body to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language.

Notwithstanding these observations, it has nevertheless been settled, at least since the case of the *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*[9] (hereinafter referred to as the *P.E.I.* case), that Parliament may

[8] [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

[9] [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

authorize the Governor-in-Council to empower a provincially-appointed board to regulate a matter which is within the exclusive jurisdiction of Parliament provided that ultimate control over the manner in which such power is to be exercised is retained by the federal authority. The impugned legislation considered in the *P.E.I.* case was section 2 of the *Agricultural Products Marketing Act,* 1949, which read as follows:

2(1) The Governor in Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.

(2) The Governor in Council may by order revoke any authority granted under subsection one.

The effect of this legislation was described by Chief Justice Rinfret at page 396 in the following terms:

The effect of that enactment is for the Governor-in-Council to adopt as its own a board, or agency already authorized under the law of a province, to exercise powers of regulation outside the province in interprovincial and export trade, and for such purposes to exercise all or any powers exercisable by such board, or agency, in relation to the marketing of such agricultural products locally within the province. I cannot see any objection to federal legislation of this nature. Ever since *Valin v. Langlois,* (1879) 5 A.C. 115, when the Privy Council refused leave to appeal from the decision of this Court, the principle has been consistently admitted that it was competent for Parliament to "employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated". The latter are the words of Lord Atkin, who delivered the judgment of the Judicial Committee in *Proprietary Articles Trade Association et al v. A.G. for Canada et al,* (1931 A.C. 310). The words just quoted are preceded in the judgment of Lord Atkin by these other words:—

'Nor is there any ground for suggesting that the Dominion may not...'

It will be seen, therefore, that on that point the Judicial Committee did not entertain the slightest doubt.

In *The Agricultural Products Marketing Act* of 1949 *that is precisely what Parliament has done.* Parliament has granted authority to the Governor-in-Council to employ as its own a board, or agency, for the purpose of carrying out its own legislation for the marketing of agricultural products outside the province in interprovincial and export trade, two subject-matters which are undoubtedly within its constitutional authority.

The italics are my own.

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

Ritchie J.

It will be seen also from a consideration of the Chief Justice's reasons for judgment, page 395, that he regarded the delegations of authority under the *Agricultural Products Marketing Act* as being "along the same lines" as those passed upon by this Court in the *War Measures Act* cases of *In re Gray*[10] and *The Chemical Reference*[11].

In comparing the *P.E.I.* case with the case of *Attorney General of Nova Scotia v. Attorney General of Canada, supra,* Mr. Justice Taschereau said, at pages 410 and 411:

> Here the issue is entirely different. The Federal legislation does not confer any additional powers to the legislature but vests in a group of persons certain powers to be exercised in the interprovincial and export field. It is immaterial that the same persons be empowered by the legislature to control and regulate the marketing of Natural Products within the Province. It is true that the Board is a creature of the Lieutenant-Governor-in-Council, but this does not prevent it from exercising duties imposed by the Parliament of Canada. (*Valin v. Langlois*).

In the same case, Mr. Justice Rand expressed himself rather more fully in the following terms at pages 414 and 415:

> What the law in this case has done has been to give legal significance called incidents to certain group actions of five men. That to the same men, acting in the same formality, another co-ordinate jurisdiction in a federal constitution cannot give other legal incidents to other joint actions is negated by the admission that the Dominion by appropriate words could create a similar board, composed of the same persons, bearing the same name, and with a similar formal organization, to execute the same Dominion functions. Twin phantoms of this nature must, for practical purposes, give way to realistic necessities. As related to courts, the matter was disposed of in *Valin v. Langlois*. No question of disruption of constitutive provincial features or frustration of provincial powers arises: *both legislatures have recognized the value of a single body to carry out one joint, though limited, administration of trade. At any time the Province could withdraw the whole or any part of its authority. The delegation was, then, effective.*

The italics are my own.

I am unable to conclude that the language of s. 3(2) of the *Motor Vehicle Transport Act* creates a situation in which the principle recognized in *Valin v. Langlois*[12] has any application.

In the *P.E.I.* case, Parliament did nothing more than to authorize the Governor-in-Council to select as an arm of the federal authority any board or agency already estab-

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[10] (1918), 57 S.C.R. 150, 3 W.W.R. 111, 42 D.L.R. 1.

[11] [1943] S.C.R. 1, 79 C.C.C. 1, [1943] 1 D.L.R. 248.

[12] (1879), 5 App. Cas. 115.

lished under provincial law for the regulation of Agricultural Marketing within the province and for the purpose of regulating such marketing extra provincially, to grant to it "any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural products locally within the province".

The *Agricultural Products Marketing Act*, and particularly s. 2 thereof and the order-in-council made by the Governor-in-Council thereunder, when read together with the provincial legislation, constitute an example of valid co-operation between federal and provincial authorities, and the whole question in the present case is whether the same thing has been achieved by the enactment of s. 3(2) and s. 5 of the *Motor Vehicle Transport Act*.

The difficulty which presents itself to Parliament and to the legislatures in such cases is exemplified in the reasons for judgment of Lord Atkin in *Attorney General for British Columbia v. Attorney General for Canada*[13], where he said:

> Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. *But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.*

The italics are my own.

In light of these observations, it is to be noted that in the case of the *Agricultural Products Marketing Act* the extent to which the provincial powers to regulate were adopted, to be exercised in the extra-provincial field, remained within the control of the Governor-in-Council and in fact the order-in-council granting such authority to the P.E.I. Potato Board was restricted by reference to a selected number of provincially authorized regulations. In my view, the important aspect of this legislation from the point of view of the present case is that the controlling authority under that statute remained at all times in federal hands, with the result that the powers exercisable by the Board in the regulation of extra-provincial marketing are such as may from time to time be authorized by the Governor-in-Council.

[13] [1937] A.C. 377 at 389, 1 W.W.R. 328, 67 C.C.C. 337, 1 D.L.R. 691.

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

Ritchie J.

In the case of the *Motor Vehicle Transport Act,* direct authority has been given to the local board in each province "in its discretion to issue a licence to a person to operate an extra-provincial undertaking into or through the province", and the manner in which that discretion is to be exercised is not limited to such provincial regulations as the Governor-in-Council may designate but is to be exactly the same as if the extra-provincial undertaking were a "local undertaking". In my view the effect of this legislation is that the control of the regulation of licensing of a "connecting undertaking", is turned over to the provincial authority, and in the Province of Ontario this means that the controlling legislation is the *Ontario Highway Transport Act,* R.S.O. 1960, c. 273, and the *Public Commercial Vehicles Act,* R.S.O. 1960, c. 319.

That this is in fact the effect of the legislation is made apparent from a consideration of the Notice of Review of the appellant's operating licence which is brought in question in the present case. It was published in the Ontario Gazette and read as follows:

The Ontario Highway Transport Board Act, 1960

The Ontario Highway Transport Board pursuant to Section 16 of The Ontario Highway Transport Board Act will review the terms of the certificates which led to the issuance of extra-provincial operating licence No. X-828, and has fixed Monday, the 14th day of September, 1964, at 10 a.m. (E.D.S.T.) at its Chambers, 67 College Street, Toronto, Ontario, for that purpose.

At the hearing the applicant will be required to show cause why these certificates should not be amended or revoked by reason of operations contrary to the public interest; the operations are, more specifically—continued disregard of The Motor Vehicle Transport Act (Canada) and The Highway Traffic Act and the regulations pursuant thereto.

The Board may amend or revoke the terms of these certificates.

Although reference is made in the Notice to "continued disregard of *The Motor Vehicle Transport Act* (Canada) and *The Highway Traffic Act*" it is nevertheless clear that the *Ontario Highway Transport Board Act* was the statute pursuant to which the Notice was issued and the hearing was to be held.

There can, in my view, be no objection to Parliament enacting a statute in which existing provincial legislation is incorporated by reference so as to obviate the necessity of re-enacting it verbatim, but in providing for the granting of licences to extra-provincial undertakings in the like

manner as if they were local undertakings, Parliament must, I think, be taken to have adopted the provisions of the provincial statutes in question as they may be amended from time to time. The result is that the granting of such licences is governed by the *Public Commercial Vehicles Act, supra,* pursuant to s. 16 of which the Lieutenant-Governor-in-Council may make regulations

> ...(q) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act,...

I can only read this as meaning that the licensing regulations for extra-provincial transport may be governed by decisions made from time to time by the Lieutenant-Governor-in-Council without any control by, or reference to, the federal authority. This is very different from adopting by reference the language used in a provincial statute and, in my opinion, it means that the control over the regulation of licensing in this field has been left in provincial hands.

It is, of course, true that Parliament can at any time terminate the powers of the provincial boards to licence extra-provincial undertakings, but it seems to me that this would entail repealing s. 3(2) of the *Motor Vehicle Transport Act* and it is the constitutionality of that subsection which is here impugned.

It is also suggested that the Governor-in-Council might exercise control by acting under s. 5 of the *Motor Vehicle Transport Act* which reads as follows:

> The Governor-in-Council may exempt any person or the whole or any part of an extra-provincial undertaking or any extra-provincial transport from all or any of the provisions of this Act.

With the greatest respect for those who hold a different view, I do not think that this provision vests any control in the Governor-in-Council of the kind with which he was clothed by the *Agricultural Products Marketing Act.* Under the latter statute control of the regulation of extra-provincial marketing was vested in the Governor-in-Council; whereas under s. 5 of the *Motor Vehicle Transport Act* the powers of the Governor-in-Council are limited to *exempting* any extra-provincial transport from all or any of the provisions of the Act. I do not read this latter section as reserving any power to the Governor-in-Council to nullify the effect of s. 3(2) of the Act by exempting all extra-provincial transport from its provisions, and I am

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

Ritchie J.

therefore of opinion that no control was retained by the federal authority over the unlimited legislative powers which it purported to transfer to the province by the language employed in s. 3(2) of the Act. Presumably, any person or undertaking exempted by the Governor-in-Council from the provisions of the Act, would be without authority to operate in the Province of Ontario, unless and until provision was made for the granting of a federal licence, but this would in no way effect the powers which s. 3(2) purported to confer on the Board to issue licences to persons or undertakings which had not been so exempted.

In my view, therefore, in enacting the *Motor Vehicle Transport Act,* and particularly s. 3(2) and 5 thereof, the Parliament of Canada purported to relinquish all control over a field in which Parliament has exclusive jurisdiction under the *British North America Act,* and left the power to exercise control of the licensing of extra-provincial undertakings to be regulated in such manner as the Province might from time to time determine.

The case of *A. G. for Ontario v. Scott*[14], has been cited in support of the validity of the legislation which is here in question, but in my view the question decided in that case was an entirely different one. The legislation there called in question was the *Reciprocal Enforcement of Maintenance Orders Act,* R.S.O. 1950, c. 334, which provided for registration in the Ontario court of a maintenance order made by a reciprocal state against a resident of Ontario. For the purpose of enforcement of the order, section 5(2) of the Act provided:

> At the hearing it shall be open to the person on whom the summons was served to raise any defence that he might have raised in the original proceedings had he been party thereto but no other defence;...

It was contended that this section amounted to a delegation by the legislature of its power to deal with the civil rights of its citizens, as the defences permitted under the law of England when the provincial act came into force might or might not have been extended or limited by subsequent English legislation. *No question of delegation between federal and provincial authorities of powers conferred by the British North America Act was at issue in this case* and the crux of the matter appears to me to have

[14] [1956] S.C.R. 137, 114 C.C.C. 224, 1 D.L.R. (2d) 433.

been stated by Rand J., speaking on behalf of himself, the Chief Justice, Kellock and Cartwright JJ. at page 141, where he said:

> That the legislation is within head 16, as a local or private matter, appears to me to be equally clear. No other part of the country nor any other of the several governments has the slightest interest in such a controversy and it concerns ultimately property, actual or potential, within Ontario in a local sense.
>
> Given, then, a right so created by the law of Ontario, the action taken in England is merely an initiating proceeding looking to effective juridical action in Ontario for the purposes of which it is a means of adducing a foundation in evidence. In the administration of justice the province is supreme in determining the procedure by which rights and duties shall be enforced and that it can act upon evidence taken abroad either before or after proceedings are begun locally I consider unquestionable.

To the same effect, Mr. Justice Abbott, speaking for himself, Taschereau and Fauteux JJ., said, at pages 147 and 148:

> As to s. 5, it is clearly competent to any province to determine for the purpose of a civil action brought in such province, what evidence is to be accepted and what defences may be set up to such an action. With the greatest respect for the learned judges in the Court below who have expressed the contrary view, the provision contained in s. 5(2) that 'it shall be open to the person on whom the summons was served to raise any defence that he might have raised in the original proceedings had he been a party thereto but no other defence' is not in my opinion a delegation of legislative power to another province or state. It is merely a recognition by the law of the province of the rights existing from time to time under the laws of another province or state, in accordance with the well recognized principles of private international law.

Notwithstanding certain *obiter dicta* in the reasons for judgment of Mr. Justice Rand and Mr. Justice Locke, I consider that the excerpts above quoted accurately reflect the *ratio decidendi* of the case of *A. G. for Ontario v. Scott, supra,* and with all respect for the opinion of others, I do not think that it constitutes an authority supporting the validity of the statute which is here called in question.

Reliance was placed also on the case of *Regina v. Glibbery*[15]. In that case it was contended that the provisions of the *Government Property Traffic Regulations* passed under the authority of the *Government Property Traffic Act,* R.S.C. 1952, c. 324, constituted an unconstitutional delegation of legislative authority by Parliament to the Province of Ontario.

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[15] [1963] 1 O.R. 232, [1963] 1 C.C.C. 101, 38 C.R. 5, 36 D.L.R. (2d) 548.

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

Ritchie J.

The accused, Glibbery, was charged with careless driving, contrary to the provisions of s. 60 of the *Highway Traffic Act*, R.S.O. 1960, c. 172, whilst driving his vehicle in the defence establishment of Camp Borden which was government property, and contrary also to the provisions of s. 6(1) of the *Government Property Traffic Regulations* which read as follows:

> No person shall operate a vehicle on a highway otherwise than in accordance with the laws of the province and the municipality in which the highway is situated.

The constitutional argument is referred to in the judgment rendered by Mr. Justice McGillivray on behalf of the Court of Appeal of Ontario where he says at page 235:

> It is submitted however, that this Regulation can only apply to the laws of the Provinces and municipalities as they were in 1952 when the *Government Property Traffic Act* and the Regulations thereunder became law. If "laws of the province" as used in s. 6 is to mean more than that and to mean laws of the Province as they may be amended from time to time then, it is contended, there exists an unconstitutional and invalid delegation of legislative authority by Parliament to the Province.

After observing that he had no doubt that it was intended that the traffic regulations regarding highways upon Dominion property should conform at all times with those on highways in the areas surrounding such property and that such was the intention of the present regulation, Mr. Justice McGillivray went on to say at page 236:

> There is not here any delegation by Parliament to a Province of legislative power vested in the Dominion alone by the *B.N.A. Act* and of a kind not vested by the Act in a Province. Delegation by Parliament of any such power would be clearly unconstitutional: *A.-G. N.S. et al v. A.-G. Can.* 1950 4 D.L.R. 369, 1951 S.C.R. 31. The power here sought to be delegated was not of such a type but was in relation to a matter in which the Province was independently competent. Parliament could validly have spelled out in its own regulations the equivalent of relevant sections of the *Highway Traffic Act* as they existed from time to time but it was more convenient to include them, as has been done, by reference to contemporary legislation in the Province.

It appears to me that as the federal property at Camp Borden was within the Province of Ontario, the *Highway Traffic Act* of that Province would have applied to the highways inside the Camp boundaries had no regulations been enacted by the federal authority, but the federal government, of course, had authority to exercise control by way of regulation over the movement of traffic on its own

property if it saw fit to do so and s. 6(2) of the *Government Property Traffic Act Regulations* makes it plain that the whole of the provincial law was not adopted and that the exercise of control by regulation over the movement of traffic within the Camp area was never relinquished by the federal authority. Section 6(2) reads as follows:

> In this section the expression 'laws of the province and the municipality' does not include laws that are inconsistent with or repugnant to any of the provisions of the Government Property Traffic Act or these regulations.

In my view, therefore, the case of *Regina v. Glibbery* is distinguishable from the present case on the ground that the federal legislation there placed in question related to property within the province in respect to which the province was independently competent to legislate, whereas the matter of extra-provincial transportation rests within the legislative competence of Parliament alone. Even if this were not so, and Parliament had exclusive power to regulate traffic within the boundaries of its own property, the regulations which were passed for that purpose do not constitute a delegation of that power to the provinces because control is clearly retained in the federal authority as is indicated by the last-quoted section of the regulations, whereas under the *Motor Vehicle Transport Act,* Parliament has, in my opinion, relinquished to the province all control over the licensing of extra-provincial transport.

I have no doubt that the legislation here impugned was enacted by the Parliament of Canada with a view to cooperating with the provinces in the field of interprovincial transportation, but in framing the provisions of s. 3(2) and 5 of the *Motor Vehicle Transport Act,* Parliament has, in my opinion, failed to achieve the end which it sought and the authority of the case of the *A.G. v. Winner, supra,* remains as it was before the statute was enacted.

I do not think that anyone would question the desirability and in some cases the necessity of co-operation between the federal and provincial authorities in the carrying out of their respective functions, but if this is to be done, as Lord Atkin said in *A.G. for B.C. v. A.G. for Canada, supra,* "the legislation will have to be carefully framed", and if it results in the federal authority relinquishing to a province

1968

COUGHLIN v. ONTARIO HIGHWAY TRANSPORT BOARD *et al.*

Ritchie J.

all control over a sphere allotted to "the exclusive legislative authority of the Parliament of Canada" under the *British North America Act*, then the legislation cannot stand.

The fact that Parliament can at any time repeal the offending sections of the *Motor Vehicle Transport Act* appears to me, with all respect, to be beside the point. The question here at issue is whether the language used by the framers of those sections, when read within the framework of the existing statute itself, has the effect of relinquishing all federal control over the licensing of "a connecting undertaking". I think that it does.

For all these reasons I would allow this appeal and direct that an order of prohibition be made prohibiting the Ontario Highway Transport Board from proceeding with any hearing with respect to the appellant's extra-provincial operating licence. In my opinion, the appellant should have his costs in this Court and in the courts below.

Appeal dismissed with costs, MARTLAND *and* RITCHIE JJ. *dissenting.*

Solicitor for the appellant: J. J. Robinette, Toronto.

Solicitors for the respondent: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.

Solicitor for the Attorney General of Canada: D. S. Maxwell, Ottawa.

Solicitor for the Attorney General for Ontario: F. W. Callaghan, Toronto.

Solicitor for the Attorney General of Manitoba: G. E. Pilkey, Winnipeg.

Solicitor for the Attorney General of Quebec: Gerald Le Dain, Montreal.

Solicitor for the Attorney General for Alberta: S. A. Friedman, Edmonton.

IAN McKAY, an infant, suing by his next friend and father, IVAN McKAY, and the said IVAN McKAY (*Plaintiffs*) .. APPELLANTS;

1968
*Feb. 20, 21, 22
Apr. 29

AND

THE BOARD OF THE GOVAN SCHOOL UNIT NO. 29 of SASKATCHEWAN and DONALD MOLESKY (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Standard of care—High school student injured as result of fall from parallel bars while practising for gymnastic display—Breach of duty to guard against risk that boy might fall—Teacher in charge exempted from liability by statute—Liability of school board—Damages.

The infant plaintiff sustained serious injuries, resulting in paraplegia, when he fell between parallel bars while practising for a gymnastic display which was to be staged at the high school, where he was a pupil, at a variety night performance arranged by the school. He was one of a group of 12 to 18 students who had volunteered to put on the gymnastic display under the supervision of a teacher, the second defendant. The action against the latter was dismissed by consent having regard to the provisions of s. 225a (added 1961, c. 29) of *The School Act* of Saskatchewan (now R.S.S. 1965, c. 184, s. 242) which provides that where the principal of a school approves or sponsors activities such as those here in question "the teacher responsible for the conduct of the pupils shall not be liable for damage . . . for personal injury suffered by pupils during such activities".

The jury found that the defendant school board failed in its duty of care to the plaintiff and that such failure resulted in the injuries sustained by him. The acts or omissions which constituted the failure in the duty of care were stated as follows: (i) Lack of competent instruction on parallel bars. (ii) Insufficient care and attention to spotting. (iii) Insufficient demonstration on parallel bars. (iv) Progressive steps on parallel bars rushed. (v) Instructor not sufficiently qualified. (vi) Insufficient safety precautions. The jury further found that the plaintiff had not contributed to his injuries by failure to exercise reasonable precautions for his own safety.

Damages for the infant plaintiff were assessed by the jury at $183,900. The defendant school board appealed to the Court of Appeal and that Court, by a majority judgment, allowed the appeal and ordered a new trial as to both liability and damages. An appeal by the plaintiffs was then brought to this Court.

Held: The appeal should be allowed.

While not satisfied that the principle which was first expressed in *Williams v. Eady* (1893), 10 T.L.R. 41, that a schoolmaster was bound to take such care of his pupils as a careful father would take of his children is

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

1968

McKAY *et al.* *v.* BOARD OF GOVAN SCHOOL UNIT No. 29 *et al.*

of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time, the Court was nevertheless of the opinion that a small group, such as that in this case, was one where the principle did apply.

The position here was that the teacher had accepted responsibility for the care and control of the infant plaintiff while he was engaged in the gymnastic practice and whatever analogy was involved in describing the standard by which his duty was to be tested, his supervisory duties required him to guard against forseeable risks to which this inexperienced boy was exposed in the performance of exercises on the parallel bars. There was a real risk that the boy might fall and there was a concomitant duty to guard against that risk eventuating. The jury found that there was a breach of that duty.

Also, it seemed that when Woods J.A., who delivered reasons for judgment on behalf of the majority of the Court of Appeal, held, in effect, that the trial judge was wrong in directing the jury that the defendant owed the boy the duty of "a careful parent" rather than the duty of a "physical training instructor", he was saying that the judge had invited the jury to determine the liability of the defendant school board according to a lower standard of care than that by which it should have been judged. If this were indeed the case, it was difficult to understand how the defendant had any cause for complaint. This appeared to be the ground upon which the majority of the Court of Appeal set aside the jury's verdict as to liability. This Court was of opinion that it could not be supported and accordingly the verdict of the jury should be restored in this regard.

As to the question of damages, R. 39 of the Saskatchewan Court of Appeal Rules meant that even if there was misdirection on the part of the trial judge, the Court of Appeal could not grant a new trial unless it were satisfied that the damage award was so high or so low as to constitute a substantial wrong or miscarriage of justice. Here there could be no doubt that the injuries sustained by the infant plaintiff were of such a massive and crippling character as to justify a substantial award of damages. In his charge to the jury as to the principles by which they should be guided in making the assessment there was no misdirection on the part of the trial judge that would warrant the granting of a new trial.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], setting aside a judgment of MacPherson J. in favour of the present appellants after a trial with a jury in an action for damages for personal injuries and ordering a new trial. Appeal allowed.

K. R. MacLeod and *W. J. Vancise,* for the plaintiffs, appellants.

D. G. McLeod, Q.C., and *R. H. Bertram,* for the defendant, respondent.

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[1] (1967), 60 W.W.R. 513, 62 D.L.R. (2d) 503.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan[1], Hall J.A. dissenting, setting aside a judgment rendered in favour of the present appellant after a trial with a jury before Mr. Justice MacPherson and ordering a new trial on the issues as to both liability and damages.

This action was brought by Ivan McKay as next friend of his infant son, Ian McKay and personally against the respondent school board and one of its teachers, Donald Molesky, for damages arising out of injuries sustained by Ian McKay when he fell between parallel bars while practising for a gymnastic display which was to be staged by the William Derby High School, where he was a pupil, at a variety night performance arranged by that school. As a result of the fall the boy developed paraplegia and after long hospitalization and treatment, he was, at the time of the trial (two years after the accident) paralyzed from the neck down except for some shoulder and bicep muscles.

The action against Molesky was dismissed by consent having regard to the provisions of s. 225a (added 1961, c. 29) of *The School Act* of Saskatchewan (now R.S.S. 1965, c. 184, s. 242) which provides that where the principal of a school approves or sponsors activities such as those here in question "the teacher responsible for the conduct of the pupils shall not be liable for damage . . . for personal injury suffered by pupils during such activities".

Ian McKay was athletically inclined and was one of a group of 12 to 18 students who had volunteered to put on the gymnastic display under the supervision of Molesky who had had some experience in gymnastics while at teachers' college but who was not a qualified instructor in gymnastic work on the parallel bars. In the early days of practice for this display, the activities of the boys were limited to "tumbling" on mats on the floor, but a few days before the accident some parallel bars were brought from the public school to the scientific laboratory in the high school which was being used as the scene of the gymnastic practice. The evidence does not disclose that McKay had

[1] (1967), 60 W.W.R. 513, 62 D.L.R. (2d) 503.

1968

McKAY *et al.* *v.* BOARD OF GOVAN SCHOOL UNIT No. 29 *et al.*

Ritchie J.

ever done any work on parallel bars before this time, but after a few days practice he assayed, under Molesky's charge and direction, the difficult feat which he describes as swinging his legs back and forth quite a few times with a view to gathering sufficient momentum to do a flip at the end of the bars and he says that his legs "were getting a little bit higher each time and when they were about level with my head, I guess about a foot above the bars, then I fell . . . in between the bars face down with my head turned a little to the left".

There is some difference between the witnesses as to the exact manoeuvre that the boy was trying to perform and Molesky described a simpler movement, but in any event, this untrained youth was in my opinion undoubtedly engaged in an exercise which was dangerous for him and which required close supervision. McKay says that Molesky had described the exercise but had not demonstrated it. Molesky and one of the other boys apparently were acting as what Molesky describes as "spotters" whose function was to help the performer on the parallel bars in his dismount, but it is clear that neither of them was at any time in a position to assist McKay in what he was doing or to prevent a fall in the area where it took place.

The following admissions were formally made by the respondent School Board:

1. That on or about the 12th day of February, A.D. 1963, the defendant, Donald Molesky, was employed by the Defendant, the Board of the Govan School Unit, as a teacher at the William Derby High School and that during the school hours on the said day, the defendant, Donald Molesky was acting in the course of his employment as such.
2. That the Plaintiff, Ian McKay, sustained injury to his person during school hours on the said day during activities then being supervised by the defendant, Donald Molesky, and approved or sponsored by the principal and teachers of the said High School, all duly appointed by the defendant, The Board of the Govan School Unit; and that the supervision of the said activities had been assigned to the defendant, Donald Molesky by the said principal of the said high school.
3. That the said defendant, Donald Molesky, was responsible for the conduct of the pupils, including the plaintiff, Ian McKay, taking part in the said activities, within the meaning of section 225a of The Schools Act.
4. That at the said time the defendant, Donald Molesky had the right of control of the said pupils including the plaintiff, Ian McKay.

After a lengthy trial, the jury gave the following answers to questions submitted by the learned trial judge:

1. Has the plaintiff satisfied you that the defendant failed in his duty of care to the plaintiff and that the said failure in whole or in part resulted in the injury to the plaintiff?

Answer: Yes.

2. If answer number 1 is "Yes" then please state fully the acts or omissions which constituted the failure in duty of care.

Answer:

(i) Lack of competent instruction on parallel bars.
(ii) Insufficient care and attention to spotting.
(iii) Insufficient demonstration on parallel bars.
(iv) Progressive steps on parallel bars rushed.
(v) Instructor not sufficiently qualified.
(vi) Insufficient safety precautions.

3. Has the defendant satisfied you that the injuries of the plaintiff were caused or contributed to by his failure to exercise reasonable precautions for his own safety?

Answer: No.

The jury assessed damages for the infant plaintiff at $183,900.

It appears to me to be desirable before considering the reasons for judgment of the Court of Appeal, for me to state that in my opinion the evidence is capable of supporting the answers which the jury gave to the first three questions which were submitted to them, but they did not necessarily have to reach the conclusion which they did and if, as the majority of the Court of Appeal has found, there was misdirection prejudicial to the respondent in the charge of the learned trial judge respecting the standard of care required of the school authorities, then there should, of course, be a new trial on the question of liability.

In his charge to the jury the learned trial judge repeatedly told them that the duty of care which Molesky owed to young McKay was that which a careful father of a large family owes to his children. This view, which has often been adopted, was first expressed many years ago by Lord Esher in *Williams v. Eady*[2], where he said at p. 42:

> As to the law on the subject there can be no doubt; and it was correctly laid down by the learned Judge, that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster.

[2] (1893), 10 T.L.R. 41.

1968

McKAY *et al.* *v.* BOARD OF GOVAN SCHOOL UNIT No. 29 *et al.*

Ritchie J.

While I am not satisfied that this definition is of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time, I am nevertheless of the opinion that a small group, such as that which Molesky had in his charge in the improvised gymnasium, is one to which Lord Esher's words do apply.

Mr. Justice Woods, however, in the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal, expressed the view that while the test of the "careful father" is readily applicable to students taking part in team games such as hockey or baseball, it did not apply to the facts of this case and he continued by saying:

> A physical training instructor in directing or supervising an evolution or exercise is bound to exercise the skill and competence of an ordinarily competent instructor in the field. The standard of the careful parent does not fit a responsibility which demands special training and expertise.

The learned judge later said:

> The standard of the person possessed of special training or expertise may well be higher than that of the careful parent and it may well be that on applying it to the present facts a jury might arrive at the same result. This, however, is conjectural and therefore cannot be assumed. The standard of care put before the jury was inappropriate and confusing. It amounts to misdirection.

I take the view that a reasonably careful parent would have been unlikely to permit his boy, almost totally inexperienced in gymnastics, to execute the manoeuvre which young McKay performed without exercising a great deal more care for his safety or ensuring that someone else did so on his behalf.

The position in the present case is that Molesky had accepted responsibility for the care and control of young McKay while he was engaged in the gymnastic practice and whatever analogy is involved in describing the standard by which Molesky's duty is to be tested, it is clear to me that his supervisory duties required him to guard against forseeable risks to which this inexperienced boy was exposed in the performance of exercises on the parallel bars. There was, in my opinion, a real risk that the boy might fall and there was a concomitant duty to guard

against that risk eventuating. The particulars specified in the jury's answer to question No. 2 constitute a finding that there was a breach of that duty.

With the greatest respect, it seems to me also that when Mr. Justice Woods held, in effect, that the learned trial judge was wrong in directing the jury that the respondent owed the boy the duty of "a careful parent" rather than the duty which would have been owed by a "physical training instructor", he was saying that the judge had invited the jury to determine the liability of the respondent school board according to a lower standard of care than that by which it should have been judged. If this were indeed the case, it is difficult to understand how the respondent has any cause for complaint. This appears to me to be the ground upon which the majority of the Court of Appeal set aside the jury's verdict as to liability, and with all respect, I do not think that it can be supported and I would accordingly restore the verdict of the jury in this regard.

Mr. Justice Woods also concluded that the learned trial judge had so misdirected the jury on the question of damages as to make a new trial necessary on this issue. This conclusion must, of course, be considered in light of the provisions of R. 39 of the Saskatchewan Court of Appeal Rules which read, in part, as follows:

> A new trial shall not be granted on the ground of misdirection . . . unless in the opinion of the Court, some substantial wrong or miscarriage of justice has been thereby occasioned in the trial . . .

When considering the jury's assessment of damages in isolation from the question of liability, it seems to me that this Rule must mean that even if there was misdirection on the part of the trial judge, the Court of Appeal could not grant a new trial unless it were satisfied that the damage award was so high or so low as to constitute a substantial wrong or miscarriage of justice.

There can, I think, be no doubt that the injuries sustained by Ian McKay were of such a massive and crippling character as to justify a very substantial award of damages. There does not appear to be any hope of his recovery and the only evidence of any possible improvement is highly speculative. The task of the jury was to endeavour to express the effect of his almost total physical disability in

1968

et al.
v.
McKAY
BOARD OF
GOVAN
SCHOOL
UNIT No. 29
et al.

Ritchie J.

terms of financial recompense. Involving as it did so many imponderables, this was not an easy problem for the jury who had to make the assessment or for the judge who had to direct them as to the principles by which they should be guided.

In an attempt to provide some yardstick by which to judge the loss, evidence was adduced from a member of the staff of the head office of an insurance company who testified by reference to certain statistical tables that the average life expectancy of a youth of McKay's age would be 53 years, and a doctor who was familiar with his case stated that although some insurance companies were now insuring paraplegics, he did not feel that a normal life expectancy, even of a paraplegic, could be expected in Ian's case.

Young McKay had apparently had some ambitions to become an architect and it was suggested that a figure of $500 per month would be a moderate one to represent his potential future earnings if he had not been injured; his father also gave evidence that without the constant care which he is now getting at his home, it would cost at least $150 to retain someone to look after him.

In the course of his reasons for judgment, Mr. Justice Woods singled out the following quotation from the learned trial judge's charge as constituting "misdirection on a vital factor":

> The damages which you calculate and which you award, gentlemen, as both Counsel have said, cannot be perfect. You heard evidence to the effect that to provide $500 a month for fifty-three years, requires $133,000. That is based upon 4%. But, of course, we have no way of knowing, you have no way of knowing, how long this chap will live, or how long he would have lived if he had not had the injury.

Mr. Justice Woods, in commenting on this statement said:

> The charge, when referring to this 53 years, if it does not in fact do so, comes close to stating that such is the expectation of life of this infant plaintiff, properly to be considered by the jury in its calculation of damages. Considering all that was said on this factor, I cannot but come to the conclusion, that the charge was much too favourable to the infant plaintiff. It failed to adequately place before the jury, the probable life expectancy of the infant plaintiff as the basis of its calculation for this portion of damages suffered. I am of the opinion that this constitutes misdirection on a vital factor.

With the greatest respect, it appears to me that the learned judges who formed the majority of the Court of

Appeal overlooked the fact that almost immediately after the excerpt quoted above from the trial judge's charge, he went on to say:

> I did not consider that Mr. Clark (the insurance man) said that fifty-three years was the life expectancy of an annuitant. It was the life expectancy on the average, established by various insurance companies as far ago as 1938, 1939. It was before the war in any event. You cannot, gentlemen, in calculating this thing, just add up what he might have earned, what he needs to maintain himself—add it all up and say that is what he is entitled to. This is perfect damages. The law says that you cannot make perfect damages. You cannot determine all the—you cannot add up all the income he might have made as an architect because you do not know whether he would have become an architect, whether he would have got through University, whether he would have gone back to his father's farm; ...

Notwithstanding this language, Mr. Justice Woods also found that the jury had been instructed "that earnings and cost of future care are to be cumulative, in the calculation of damages" and he based this on a passage earlier in the judge's charge where he had said of "the financial loss experienced by this plaintiff"—"I refer not only to prospective earnings for the balance of his life but to the financial loss resulting from constant care for the rest of his life . . ." With the greatest respect, I think that if there was any misdirection in this statement it was fully corrected and that there was no misdirection in this regard.

Mr. Justice Woods also criticized the charge of the learned trial judge on the ground that he had not warned the jury against letting sympathy affect their calculation of damages and in failing to state that the award "should not be punitive, exemplary, nor extravagant and oppressive". In so doing, Mr. Justice Woods discounted the fact that at the beginning of his charge the learned trial judge had said:

> . . . this is a Court of Law, and however profound your sympathy you must in this Court disregard it because sympathy is a poor guide in the search for legal principles.

and that before embarking on the main body of his charge, he had again said: " . . . you will rid yourselves of sympathy". In addition to this, immediately before addressing the jury on the subject of damages, the learned trial judge said:

> I repeat to you, gentlemen, what I said in opening. Sentiment is no guide in the search for legal principles. Do not be governed in your decision on liability by sympathy which undoubtedly you have for the plaintiff.

1968

McKAY *et al.* *v.* BOARD OF GOVAN SCHOOL UNIT No. 29 *et al.*

Ritchie J.

I cannot find that there was any misdirection in this regard.

Mr. Justice Woods further criticized the learned trial judge for failing to instruct the jury that some discount should be made for the present payment of that portion of the damages designed to cover McKay's future requirements. It may be that some direct reference should have been made to this element, but I do not think that it can be said that the absence of such a direction constituted substantial wrong or miscarriage of justice.

In conclusion, Mr. Justice Woods said:

> I am left with the strong conviction that in calculating the award, the jury has taken the annuity cost of $500 per month for 53 years, namely, $133,000 (which is not shown to have any direct relationship to the plaintiff's needs), and has added thereto a substantial sum for other elements of damages, to arrive at the total of $183,900. It cannot have allowed for all the contingencies of life which might have or may now happen. This indicates error, which, in substantial part, may have arisen from the matters referred to.

With the greatest respect, it appears to me that in this passage Mr. Justice Woods entered upon the dangerous field of attempting to delve into the minds of the jury and to interpret their verdict in terms of his own mental processes.

In relation to the last-quoted excerpt from the judgment of the Court of Appeal, it should be pointed out that in my view full instruction was given to the jury in relation to "the contingencies of life". The learned trial judge read to the jury a paragraph from the judgment of Sellers L.J. in *Warren and Another v. King and Others*[3], in which he said, in part:

> . . . damages must take into consideration, in varying degrees according to circumstances, the many contingencies of life, its misfortunes as well as its good fortunes.

With the greatest respect, I am unable to agree with the Court of Appeal that there was any such misdirection in the charge of the learned trial judge as to warrant the granting of a new trial.

[3] [1963] 3 All E.R. 521 at 527.

For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Court of Queen's Bench of Saskatchewan.

The appellant will have the costs of this appeal and of the appeal to the Court of Appeal of Saskatchewan.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Balfour, MacLeod, McDonald, Moss, Laschuk & Kyle, Regina.

Solicitors for the defendants, respondents: Pedersen, Norman, McLeod, Bertram & Todd, Regina.

THOMAS GORDON WALKER (*Plaintiff*) ..APPELLANT;

AND

SADIE COATES AND THE PUBLIC TRUSTEE OF ALBERTA, ADMINISTRATOR AD LITEM OF THE ESTATE OF BARRY ALAN COATES (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Negligence—Motor vehicle accident—Liability to gratuitous passenger—Res ipsa loquitur—Application of rule to proof of gross negligence—The Vehicles and Highway Traffic Act, R.S.A. 1955, c. 356, s. 132(1).

The plaintiff, a gratuitous passenger, was asleep in the back seat of an automobile which was being driven southerly along a straight portion of a two-lane paved highway 36½ ft. in width when it crossed the centre double traffic line and crashed into the stone base of a large direction sign 18 ins. off the eastern edge of the highway. As a result of the accident, which occurred late at night, the driver was killed and the plaintiff suffered serious injuries. The driver had had very little sleep for a considerable period prior to the accident. The force of the impact indicated a speed of 60 m.p.h., and the absence of skid marks where the car approached the sign showed that no attempt was made to stop. The car was a year old; there was no evidence of malfunction and the tires were good. The plaintiff's action for damages for the injuries which he sustained in the accident was dismissed at trial and an appeal from the trial judgment was dismissed by the Appellate Division. The plaintiff then appealed further to this Court.

Held: The appeal should be allowed.

If the rule of *res ipsa loquitur* is accepted in cases where proof of "negligence" is in issue, there was no logical reason why it should not apply

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*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Pigeon JJ.

1968

WALKER v. COATES et al.

with equal force when the issue is whether or not there was "very great negligence" provided, of course, that the facts of themselves afford "reasonable evidence, in the absence of explanation by the defendant, that the accident arose" as a result of "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves".

On the evidence as a whole, the probable cause of this accident was that the driver fell asleep. He had continued to drive when he was feeling tired and had had very little sleep for thirty-six hours before the accident. He should have foreseen the danger that he might go to sleep at the wheel and his doing so under these circumstances involved a breach of duty to his passenger which constituted gross negligence. Consequently, the plaintiff was entitled to succeed under the provisions of s. 132(1) of *The Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356.

McCulloch v. Murray, [1942] S.C.R. 141, applied; *Ottawa Electric Co. v. Crepin*, [1931] S.C.R. 407; *Parent v. Lapointe*, [1952] 1 S.C.R. 376; *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596; *Ball v. Kraft* (1967), 60 D.L.R. (2d) 35; *Kerr v. Cummings*, [1952] 2 D.L.R. 846, affirmed, [1953] 1 S.C.R. 147; *Ballard v. North British Railway Co.*, [1923] S.C. (H.L.) 43, referred to.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming a judgment of Farthing J. dismissing an action for damages for personal injuries. Appeal allowed.

W. K. Moore, Q.C., for the plaintiff, appellant.

W. R. Brennan, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta affirming the judgment rendered at trial by Mr. Justice Farthing whereby he dismissed the appellant's action for damages to compensate him for the injuries which he had sustained in an accident which occurred at 3:30 a.m. on September 22, 1963, when he was being driven as a gratuitous passenger in a Volkswagen motor vehicle owned by the respondent, Sadie Coates, and operated by the late Barry Alan Coates.

The driver Coates was killed in the accident and the appellant was asleep in the back seat of the car, but it is apparent from the evidence of Corporal Johnston of the R.C.M.P., which was recited by the trial judge, that the vehicle was being driven south towards Banff on a two-lane paved highway 36½ feet in width, and had crossed the centre double traffic line and struck a direction sign pointing to the entrance of Buffalo Paddock which was 18 inches

off the eastern edge of the highway. The wooden portion of the sign was 4 feet high and was set in a pile of Rocky Mountain stone which was mortared together and measured 6 feet 8 inches wide, 2 feet high and 4 feet 6 inches thick. In reviewing a portion of Corporal Johnston's evidence the learned trial judge said:

> Corporal Johnston said that there were no skid marks where the car approached the sign so no attempt was made to stop it. The force of impact was so great that it tore away three feet six inches from the stone base of the sign. He said that he thought the weight of the Volkswagen would be 1,700 pounds. It was a year old, the tires were good—one of them was damaged in the accident—and there was no evidence of malfunction in the car. The evidence of the force of the impact would indicate a speed of sixty miles an hour, though this estimate was admitted by the corporal to have been based partly on the speed at which he had seen Coates drive in the past. The damage to the front of the car was so extensive that the police couldn't tell much about it. North of the sign—whence the Volkswagen had come—the road is straight for half a mile.

As I have indicated, the appellant was being transported in the motor vehicle in question as the guest of the driver "without payment for transportation" and under the provisions of s. 132(1) of *The Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356, no such passenger "has any cause of action for damages against the owner or driver for injury, death or loss, in case of accident, unless the accident was caused by gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle, and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought".

In spite of many judicial efforts to define "gross negligence or wilful and wanton misconduct" in precise terms, it appears to me that the test remains that which was outlined by Sir Lyman Duff C.J.C. in *McCulloch v. Murray*[1], where he said, at p. 145:

> All these phrases, gross negligence, wilful misconduct, imply conduct in which, if there is not conscious wrongdoing, *there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves.*

The italics are my own.

It is contended on behalf of the appellant that the circumstances of the accident speak for themselves and constitute *prima facie* evidence of the fact that in driving his

[1] [1942] S.C.R. 141.

1968

WALKER v. COATES et al.

Ritchie J.

Volkswagen as he did, at a high rate of speed directly across the centre line of the highway so as to collide so forcefully with an obvious road sign, the driver, Barry Alan Coates showed a "very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves".

The application of the rule which is usually referred to as *res ipsa loquitur* to cases of negligence has been accepted in this Court in the cases of *Ottawa Electric Co. v. Crepin*[2], at p. 411 and *Parent v. Lapointe*[3], at p. 381, in the terms in which it was stated by the Exchequer Chamber in *Scott v. London and St. Katherine Docks Company*[4], where it was said:

> There must be reasonable evidence of negligence.
>
> But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

There can be no doubt in the present case that the motor vehicle was under the management of Coates and that the accident was one which in the ordinary course of things would not have happened if he had used proper care, but it is contended on behalf of the respondent that the rule does not extend to proof of gross negligence.

This proposition was advanced by Ruttan J. sitting at trial in the case of *Ball v. Kraft*[5], where he said, at p. 39:

> . . . *Kerr v. Cummings,* [1952] 2 D.L.R. 846, 6 W.W.R. (N.S.) 451 (affirmed on appeal to the Supreme Court of Canada, [1953] 2 D.L.R. 1, [1953] 1 S.C.R. 147) is authority for the principle that *res ipsa loquitur* does not apply to create a presumption of gross negligence. Negligence, as that authority holds, may be inferred when the circumstances "warrant the view that the fact of the accident is relevant to infer negligence". [[1952] 2 D.L.R. at p. 852]. But the plaintiff must still prove gross negligence. Robertson J.A. in our Court of Appeal in *Kerr v. Cummings,* [1952] 2 D.L.R. at p. 853, said:
>
> > "Unless the plaintiff in an action for gross negligence, when the cause of the accident is unknown, suggests a reason showing a greater probability that the accident may have happened from gross negligence than from the reason suggested by the defendant, the plaintiff must fail."

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[2] [1931] S.C.R. 407.

[3] [1952] 1 S.C.R. 376.

[4] (1865), 3 H. & C. 596, 159 E.R. 665.

[5] (1967), 60 D.L.R. (2d) 35.

And in the Supreme Court of Canada, [1953] 2 D.L.R. at p. 2, Kerwin J., in giving the judgment of the Court said:

> " . . . it is impossible, in my view, to say that the mere happening of the occurrence in the present case gives rise to a presumption that it was caused by very great negligence . . . "

It is, in my view, clear that Mr. Justice Kerwin intended his observations to be limited, as he says himself, to the facts of the case with which he was dealing, and although those facts were similar to the facts in the present case, there were marked differences amongst which was the fact that in the *Kerr* case, *supra,* there was "a governor on the car which precluded a speed exceeding 40 miles per hour". In the *Kerr* case Mr. Justice Kerwin also made an express finding to the effect that he could not read the evidence as indicating either that the driver had been without sleep during the previous night or that he had fallen asleep at the wheel.

The passage from the judgment of Robertson J.A. in the Court of Appeal of British Columbia in *Kerr v. Cummings* to which Ruttan J. referred in *Ball v. Kraft* is based on the authority of an English Admiralty case *The Kite*[6], where Langton J., sitting alone, approved the dissenting judgment of Lord Dunedin in the Scottish case of *Ballard v. North British Railway Co.*[7] The passage which he approved reads, in part, as follows:

> I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion.

If the rule of *res ipsa loquitur* is accepted in cases where proof of "negligence" is in issue, I can see no logical reason why it should not apply with equal force when the issue is whether or not there was "very great negligence" provided, of course, that the facts of themselves afford "reasonable evidence, in the absence of explanation by the defendant, that the accident arose" as a result of "a very marked departure from the standards" to which Sir Lyman Duff C.J.C. referred in the *McCulloch* case.

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[6] [1933] P. 154.

[7] [1923] S.C. (H.L.) 43 at 54.

1968

WALKER v. COATES et al.

Ritchie J.

In my view, the circumstances here disclosed "warrant the view that the fact of the accident is relevant to infer" "very great negligence". The driver himself was killed and there were no witnesses who could suggest a way in which the accident may have occurred without such negligence, but this is not the end of the matter if there are any other reasonable inferences which could be drawn from the circumstances themselves and which make it more probable than not that the accident occurred without gross negligence.

It is conceivable, as the respondent's counsel suggested, that an animal ran across the road and the car swerved to avoid it or that there was a blow-out in the damaged tire or the sudden appearance of another vehicle and it appears that the reasons for judgment of the Court of Appeal are based in large measure on an acceptance of these suggestions, but there is no evidence whatever of an animal having run in front of the car or of the car having swerved to avoid it and no witnesses related the severely damaged condition of the front wheel of the car which hit the road sign, to a blow-out, nor was there any evidence of another car. In my opinion, the evidence as a whole makes it more probable that this accident happened because the driver went to sleep and I am also of the opinion that he should have known that he was likely to be overcome by sleep having regard to the fact that he had had so little sleep for such a long time.

The activities of Barry Alan Coates from 12 noon on Friday, September 20 until the time of the accident at 3:30 a.m. on the following Sunday, are conveniently summarized in the factum compiled on behalf of the appellant and I think it convenient to reproduce that summary:

Friday, September 20, 1963.	
12:00 noon	Coates reports for work
1:00 p.m.	Coates at work
2:00 p.m.	"
3:00 p.m.	"
4:00 p.m.	"
5:00 p.m.	"
6:00 p.m. to 10:00 p.m.	No direct evidence
10:40 p.m.	Coates at work
11:00 p.m.	"
12:00 midnight	Coates out with Walter Royle

Saturday, September 21, 1963.	
1:00 a.m.	
2:00 a.m.	
3:00 a.m.	No direct evidence
4:00 a.m.	Coates arises from bed
4:45 a.m.	Coates reports for work
5:00 a.m.	Coates at work
6:00 a.m.	"
7:00 a.m.	"
8:00 a.m.	"
9:00 a.m.	"
10:00 a.m.	"
11:00 a.m.	"
12:00 noon	"
12:30 p.m.	Coates at Banff Pool Hall
1:00 p.m.	"
2:00 p.m.	"
3:00 p.m.	Coates still in Pool Hall Walker and Christou depart
4:00 p.m.	Time unaccounted for—but Coates did not
5:00 p.m.	go to bed
6:00 p.m.	Coates at Muskrat Street for dinner
7:00 p.m.	Coates at Muskrat Street watching football
8:00 p.m.	game on television
9:00 p.m.	Coates leaves Muskrat Street
9:30 p.m.	Coates at Christou's house
10:00 p.m.	Coates leaves for dance
11:00 p.m.	Coates at dance
12:00 midnight	
Sunday, September 22, 1963.	
12:30 a.m.	Coates seen at Christou's party
1:00 a.m.	
2:00 a.m.	Coates leaves party to drive to hospital
2:30 a.m.	Coates leaves hospital for Town of Canmore
3:30 a.m.	Collision on return trip from Canmore.

There is evidence that before leaving the hospital for his drive to Canmore at 2:30 a.m., Coates indicated by his words and actions that he was tired and in my view the whole record of his activities from noon on Friday, September 20 until the time of the accident, when taken together with the circumstances of the accident itself, justifies the inference that Coates fell asleep at the wheel.

The case of *Parent v. Lapointe, supra,* was one in which the driver of a vehicle had gone to sleep but it did not in-

1968

WALKER v. COATES et al.

Ritchie J.

volve proof of gross negligence. In the course of his reasons for judgment, Rand J., however, had occasion to say, at p. 387:

> Operating such a dangerous agency, an automobile moving at high speed, a speed which, judging from the position and condition of the car, was probably greater than that mentioned, with the lives of four sleeping men in his keeping, the driver was under the highest degree of duty toward them. There is nothing to qualify the simple fact of falling asleep at the steering wheel; and ordinarily, drowsiness sends out its premonitory signals, a warning which in such circumstances is disregarded by a driver at his peril.

I do not adopt this passage in its entirety because I am not prepared to found any inference of negligence on the basis that there is ordinarily a forewarning of the approach of sleep, but, as I have indicated, I do think that a driver like Coates who continued to drive when he was feeling tired and who had had very little sleep for thirty-six hours before the accident, should have foreseen the danger that he might go to sleep at the wheel and that his doing so under these circumstances involved a breach of duty to his passenger which constituted gross negligence.

In any event, I do not think that the inference of gross negligence to which the circumstances of the accident itself give rise is in any way weakened by the fact that the evidence as a whole makes it more probable than not that the driver went to sleep. It accordingly appears to me that even applying the test suggested by Mr. Justice Robertson in the *Kerr* case, *supra,* there are circumstances here "showing a greater probability that the accident may have happened from gross negligence than from the reasons suggested by the defendant".

I appreciate that this is an appeal in which neither the trial judge nor the Appellate Division of the Supreme Court of Alberta was prepared to draw an inference of gross negligence, but no question arises as to the veracity of the witnesses and this is accordingly a case which is governed by the language used by Lord Halsbury in *Montgomerie & Co. Ltd. v. Wallace-James*[8], at p. 75, which was affirmed by the Privy Council in *Dominion Trust Co. v. New York Life Insurance Co.*[9], at p. 257. Lord Halsbury said, in part:

> . . . where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.

[8] [1904] A.C. 73.

[9] [1919] A.C. 254.

1968

WALKER v. COATES et al.

Ritchie J.

In view of all the above, I would allow this appeal and direct that the appellant should have his costs throughout. The appeal being in *forma pauperis* the costs in this Court will be taxed in accordance with the provisions of Rule 142 of the Rules of the Supreme Court. The appellant is accordingly entitled to his special damages and general damages in the amount of $40,000 as assessed by the trial judge.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: MacDonald, Moore, Atkinson, McMahon & Tingle, Calgary.

Solicitors for the defendants, respondents: Fenerty, McGillivray, Robertson, Prowse, Brennan, Fraser, Bell & Code, Calgary.

1968

*Feb. 28, 29
May 13

JOHN BURROWS LTD. (*Plaintiff*) .....APPELLANT;

AND

SUBSURFACE SURVEYS LTD. and G. MURDOCH WHITCOMB (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Bills and notes—Unconditional promise in writing to pay principal at fixed and determinable future time—Option to make earlier payments from time to time—Whether promissory note—Acceleration clause on default of interest payments—Number of late payments accepted without penalty of default—Whether defence of equitable estoppel applicable—Bills of Exchange Act, R.S.C. 1952, c. 15, s. 176(1).

Under an agreement involving the sale of the plaintiff company to the defendant W, $42,000 of the purchase price was "...to be secured by a promissory note made by the Purchaser and endorsed by an endorser acceptable to the Vendor..." W caused the defendant company to be incorporated and the plaintiff agreed to accept a note signed by that company and endorsed by W. In furtherance of this arrangement, the defendants executed a document whereby the defendant company promised to pay the appellant or order the sum of $42,000 in nine years and ten months from April 1, 1963, together with interest at the rate of 6 per cent per annum on May 1, 1963, and on the first day of each month thereafter until payment, "provided that the maker may pay on account of principal from time to time the whole or any portion thereof upon giving thirty (30) days' notice of intention prior to such payment". In default

*PRESENT: Cartwright C.J. and Judson, Ritchie, Spence and Pigeon JJ.

1968

JOHN BURROWS LTD. v. SUBSURFACE SURVEYS LTD. *et al.*

of payment of any interest payment for a period of ten days after the same became due the whole amount payable under the note was to become immediately due.

By October 1, 1964, eleven payments had been accepted more than ten days after they were due. On December 7, the November 1 interest payment then being 36 days overdue, the president of the plaintiff addressed a registered letter to both defendants demanding immediate payment of the $42,000 and outstanding interest. W's reaction to this demand was to tender the sum of $420, being the amount of the November 1 and December 1 instalments of interest, but this offer was rejected. On January 14, 1965, an action was commenced whereby the plaintiff claimed against the defendants as maker and endorser of a promissory note the sum of $42,000, by reason of the default made in the interest payments due for the months of October and November, 1964, together with interest to date.

The trial judge, in giving judgment for the plaintiff, found that the instrument in question was a "promissory note" within the meaning of the *Bills of Exchange Act,* R.S.C. 1952, c. 15, and that the plaintiff was not estopped by its conduct from setting up the defendants' failure to make the interest payments in accordance with the note as entitling it to recover the whole amount payable thereon. On appeal, the Court of Appeal by a majority held that the appeal should be allowed in part and the judgment reduced to $420. The plaintiff then appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

The instrument in question was an unconditional promise in writing made by the defendant to pay the plaintiff or order the sum of $42,000 at a fixed and determinable future time, namely, nine years and ten months from April 1, 1963. This was a promise of the kind defined in s. 176(1) of the *Bills of Exchange Act,* R.S.C. 1952, c. 15, and the fact that the maker was accorded the privilege of making payments on account of principal from time to time did not alter the nature of his unconditional promise to pay at the time fixed by the instrument, but merely gave him an option to make earlier payment. Accordingly, the instrument in question was a promissory note, and there could be no doubt that the defendants were in default in their interest payments for more than ten days after the same became due. *Dagger v. Shepherd,* [1946] 1 All E.R. 133, applied; *Williamson et al. v. Rider,* [1962] 2 All E.R. 268; *Crouch v. Credit Foncier of England* (1873), L.R. 8 Q.B. 374, not followed.

The circumstances disclosed by the evidence were not such as to justify the majority of the Court of Appeal in concluding that this was a case to which the defence of equitable estoppel or estoppel by representation applied. This type of equitable defence could not be invoked unless there was some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and this implied there must be evidence from which it could be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations. It was not enough to show that one party had taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes

would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms. *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, [1955] 2 All E.R. 657, applied; *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439; *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130; *Conwest Exploration Co. Ltd. et al. v. Letain*, [1964] S.C.R. 20; *Combe v. Combe*, [1951] 1 All E.R. 767, considered.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], allowing in part an appeal from a judgment of Barry J. Appeal allowed and judgment at trial restored.

William L. Hoyt, for the plaintiff, appellant.

E. Neil McKelvey, Q.C., and *J. Ian M. Whitcomb*, for the defendants, respondents.

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 (Bridges C.J. dissenting)[1] setting aside the judgment rendered at trial by Barry J. whereby he had awarded the appellant the sum of $42,000 together with interest of $420 as the amount due to it on what he found to be a valid promissory note made in its favour which was signed by the respondent company and endorsed by the respondent Whitcomb.

For some time prior to the events which gave rise to this action, John M. Burrows, the beneficial owner of all the shares in the capital stock of the appellant company, had been on friendly terms with the respondent, Whitcomb, with whom he appears to have been engaged in various business ventures, and on March 22, 1963, he became a party to an agreement whereby the appellant company (which then operated under the name of Subsurface Survey Limited), agreed to sell its assets to Mr. Whitcomb as of the close of business on January 31, 1963, for a total price of $127,274.43. Under the agreement $42,000 of the purchase price was

...to be secured by a promissory note made by the Purchaser and endorsed by an endorser acceptable to the Vendor payable to the Vendor

[1] (1967), 53 M.P.R. 169, 62 D.L.R. (2d) 700.

1968

JOHN BURROWS LTD. v. SUBSURFACE SURVEYS LTD. *et al.*

Ritchie J.

within a period of ten years from the date of this Agreement, such promissory note to bear interest at the rate of 6% per annum with such interest being payable monthly and to provide for thirty days' notice by the Purchaser to the Vendor of any payments made on the principal thereof except the final payment payable on the date ten years from this Agreement.

For the purpose of carrying out this transaction, Whitcomb caused the respondent company to be incorporated under the name of Subsurface Surveys Limited and the appellant agreed to accept a note signed by that company and endorsed by Whitcomb. In furtherance of this arrangement, the respondents executed the following document upon which this action is now brought:

Fredericton, N.B.
March 28, 1963.

$42,000.00

FOR VALUE RECEIVED Subsurface Surveys Ltd. promises to pay to John Burrows Ltd. or order at the Royal Bank of Canada the sum of forty-two Thousand Dollars ($42,000.00) in nine (9) years and ten (10) months from April 1st, 1963, together with interest at the rate of six per cent (6%) per annum from April 1st, 1963, payable monthly on the first day of May, 1963, and on the first day of each and every month thereafter until payment, provided that the maker may pay on account of principal from time to time the whole or any portion thereof upon giving thirty (30) days' notice of intention prior to such payment.

In default of payment of any interest payment or instalment for a period of ten (10) days after the same became due the whole amount payable under this note is to become immediately due.

SUBSURFACE SURVEYS LTD.

(Sgd.) "G. Murdoch Whitcomb"
President

(Sgd.) "G. Murdoch Whitcomb"
Endorser

The makers, endorsers, and guarantors hereof waive presentment for payment, notice of nonpayment, protest and notice of protest.

SUBSURFACE SURVEYS LTD.

(Sgd.) "G. Murdoch Whitcomb"
President

(Sgd.) "G. Murdoch Whitcomb"
Endorser.

On March 28 the respondent, Whitcomb, also executed an agreement with the appellant company wherein he is described as "the debtor" and the appellant is described as "the company", whereby he acknowledged that he had

deposited 5,101 common shares of Subsurface Surveys Limited with John Burrows Limited "by way of pledge as security for payment of the said note", by which he clearly intended to refer to the document last hereinbefore recited. This agreement contains the following clause:

> That on default being made by both Subsurface Surveys Ltd. and the Debtor in paying any principal or interest due at any time according to the terms of the said note the Company may forthwith cause the pledged shares to be transferred to the name of the Company on the share register of Subsurface Surveys Ltd. and the pledged shares shall thereupon become the absolute property of the Company.

So long as Burrows remained on friendly terms with the respondent Whitcomb the appellant company does not appear to have insisted on enforcing the letter of this agreement, and continuing indulgences were granted to the respondent with respect to the making of interest payments on the due dates so that by October 1, 1964, eleven payments had been accepted more than ten days after they were due, but on November 23, 1964, there was a falling out between Burrows and Whitcomb and heated words were exchanged between them. On December 7, the November 1 interest payment then being 36 days overdue, Burrows addressed a registered letter to both respondents in the following terms:

> This letter will serve to inform you that, an interest payment due under the terms of the promissory note dated March 28, 1963 made by Subsurface Surveys Ltd. and endorsed by G. Murdoch Whitcomb being in default for more than 10 days, the whole amount payable under the note is now due.
>
> We hereby demand immediate payment of the principal amount of $42,000.00, and outstanding interest.
>
> If payment in full is not made by December 11, 1964 it is our intention to exercise our remedies under the agreement of March 28, 1963 between G. Murdoch Whitcomb and John Burrows Ltd.

The respondent Whitcomb's reaction to this demand was to tender the sum of $420, but things had gone too far and Mr. Burrows rejected the offer and made it plain that the matter would in future be handled by his solicitor. In due course, on January 14, 1965, this action was commenced whereby the appellant claimed against the respondents as maker and endorser of a promissory note, the sum of $42,000 by reason of the default made in the interest payments due for the months of October and November, 1964, together with interest to date.

1968

JOHN BURROWS LTD. v. SUBSURFACE SURVEYS LTD. *et al.*

Ritchie J.

The two defences raised by the respondents which form the subject of the appeal are:

(a) That the document referred to in paragraph 2 of the Statement of Claim is not a promissory note because it is not due at a fixed or determinable future time and is not for a sum certain as required by Section 176(1) of the Bills of Exchange Act. . . . (and)

(c) . . .(i) the Plaintiff is estopped from saying that the Defendants defaulted in the payment of such interest because by its conduct . . . it represented to the Defendants that late payment would be accepted without penalty of default which said representation was intended to affect the legal relations between the Plaintiff and the Defendants and which said representation was relied on and acted on by the Defendants.

As has been indicated, the appellant's action was originally framed as an action on a promissory note, but during the course of the trial, and at the suggestion of the learned trial judge, the statement of claim was amended to include alternative claims for the principal amount of $42,000 as the balance due by the respondent company on the purchase price of the business and also as the balance due by both respondents on an account stated between them and the appellant.

The learned trial judge however, in giving judgment for the present appellant, found that the instrument in question was a "promissory note" within the meaning of the *Bills of Exchange Act,* R.S.C. 1952, c. 15, and that the appellant was not estopped by its conduct from setting up the respondents' failure to make the interest payments in accordance with the note as entitling it to recover the whole amount payable thereon.

It was contended on behalf of the respondent that because the instrument in question contained the provision that:

. . . the maker may pay on account of principal from time to time the whole or any portion thereof upon giving thirty (30) days' notice of intention prior to such payment.

it was therefore not a promissory note within the definition contained in s. 176(1) of the *Bills of Exchange Act* which reads as follows:

(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

In acceding to this contention in the opinion which he delivered in the Appeal Division, Mr. Justice Ritchie, with

whom Limerick J.A. agreed in the result, relied in great measure on the case of *Williamson et al. v. Rider*[2], where the majority of the Court of Appeal in England held that a written promise to pay a sum certain "on or before" a given date was not a promissory note within the meaning of s. 83(1) of the *Bills of Exchange Act*, 1882 (which is identical with s. 176(1) of our own Act), because the words created an uncertainty as to the date of payment and introduced a contingency.

The opinion of the majority was most fully expressed in the judgment of Danckwerts L.J., who thought the case to be governed by the decision of Blackburn J. in *Crouch v. Credit Foncier of England*[3], in which it was held that debentures issued under a company's seal, repayable at a certain time but subject to a condition which permitted redemption by drawings by lot, "could not be promissory notes".

Danckwerts L.J. treated this case as decisive notwithstanding the authority of the judgment of the Court of Appeal in *Dagger v. Shepherd*[4], in which a notice by a landlord to quit "on or before" a fixed date was held to be an effective notice and in which Evershed J. had said:

> The use of the phrase "on or before" some fixed date is today by no means uncommon, particularly in covenants or demands for payment of money, and in such a context it cannot, in our judgment, be open to serious doubt that it means, and would be understood to mean that the covenantor or debtor is under obligation to pay the debt on (but not earlier than) the date fixed but has the option of discharging it at any earlier time selected by him.

We are not bound by the decision of the majority in the *Williamson* case and I prefer the reasoning in the dissenting judgment delivered by Ormerod L.J., in which he pointed out that the *Crouch* case was distinguishable on the ground that the payment there was dependent upon a very real contingency, namely a lottery, whereas in the *Williamson* case, as in the present case, there was no such contingency. Mr. Justice Ormerod cited with approval the judgment of Evershed J. in *Dagger v. Shepherd, supra,* and concluded by saying:

> . . . I have come to the view that, in spite of the words "on or before", there is no uncertainty about the date of payment under this promissory

[2] [1962] 2 All E.R. 268 (C.A.). [3] (1873), L.R. 8 Q.B. 374.
[4] [1946] 1 All E.R. 133.

1968

JOHN BURROWS LTD. v. SUBSURFACE SURVEYS LTD. et al.

Ritchie J.

note which would render this document other than that which it purports to be. I have come to the conclusion, therefore, that this is a promissory note within the meaning of s. 83(1) of the Bills of Exchange Act, 1882 ...

The instrument here in question is an unconditional promise in writing made by the respondent to pay the appellant or order the sum of $42,000 at a fixed and determinable future time, namely, nine years and ten months from April 1, 1963. This was a promise of the kind defined in s. 176(1) and the fact that the maker was accorded the privilege of making payments on account of principal from time to time did not alter the nature of his unconditional promise to pay at the time fixed by the instrument, but merely gave him an option to make earlier payment.

I am accordingly of opinion that the instrument in question was a promissory note, and there can be no doubt that the respondents were in default in their interest payments for more than ten days after the same became due.

It remains to be considered whether the circumstances disclosed by the evidence were such as to justify the majority of the Court of Appeal in concluding that this was a case to which the defence of equitable estoppel or estoppel by representation applied.

Since the decision of the present Lord Denning in the case of *Central London Property Trust Ltd. v. High Trees House Ltd.*[5], there has been a great deal of discussion, both academic and judicial, on the question of whether that decision extended the doctrine of estoppel beyond the limits which had been theretofore fixed, but in this Court in the case of *Conwest Exploration Co. Ltd. et al. v. Letain*[6], Mr. Justice Judson, speaking for the majority of the Court, expressed the view that Lord Denning's statement had not done anything more than restate the principle expressed by Lord Cairns in *Hughes v. Metropolitan Railway Co.*[7], in the following terms:

> It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms, involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will

[5] [1947] K.B. 130.

[6] [1964] S.C.R. 20 at 28.

[7] (1877), 2 App. Cas. 439.

be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties.

In the case of *Combe v. Combe*[8], Lord Denning recognized the fact that some people had treated his decision in the *High Trees* case as having extended the principle stated by Lord Cairns and he was careful to restate the matter in the following terms:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.

As Viscount Simonds said in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*[9]:

> . . . the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this, because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights ...

[8] [1951] 1 All E.R. 767.

[9] [1955]2 All E.R. 657.

1968

JOHN BURROWS LTD. v. SUBSURFACE SURVEYS LTD. et al.

Ritchie J.

The learned trial judge dealt with the rule of estoppel by representation as applied to the circumstances of the present case in the following brief paragraphs:

> It is my opinion, however, that for such a rule to apply, the plaintiff must have known or should have known that his action or inaction was being acted upon by the defendant and that the defendant thereby changed his legal position. I do not believe that John Burrows ever gave any consideration to the fact that in accepting late payments of interest on the note, he was thereby leading Mr. Whitcomb—as an officer of the defendant corporation—into thinking that strict compliance would not be required at any time.
>
> It is a matter of regret that Mr. Burrows did not see fit to advise Mr. Whitcomb by letter or verbally of his intention to require strict adherence to the terms of the note; but be that as it may, it is my opinion that both defendants were always aware of the terms of P.1 and knew that default in payment of interest exceeding 10 days could result in the plaintiff demanding full payment, as the plaintiff has now done.

Mr. Justice Ritchie, who did not agree with the learned trial judge's interpretation of the evidence, made the following observations in the course of his reasons for judgment:

> By its conduct in accepting payments of interest after they were more than ten days in default and, over a period of sixteen months, not proceeding to enforce payment of the principal amount owing under P-1, the plaintiff gave the defendants a promise, or assurance, which it intended would affect the legal relations between them. Thereby, the plaintiff lulled the defendants into a false sense of security and misled them into the belief its strict right to enforce immediate payment of the principal amount of $42,000 would be held in abeyance or be suspended until they were informed otherwise. It was reasonable for the defendants so to interpret the plaintiff's conduct. As a result, the position of each defendant was prejudiced. In my respectful opinion, the evidence supports that conclusion.

With the greatest respect for the reasoning of the majority of the Court of Appeal, I prefer the interpretation placed on the evidence by the learned trial judge and by Chief Justice Bridges in his dissenting reasons for judgment where he said:

> For estoppel to apply, I think we must be satisfied that the conduct of Burrows amounted to a promise or assurance, intended to affect the legal relations of the parties to the extent that if an interest instalment became in default for ten days the plaintiff would not claim the principal as due unless it had previously notified the defendants of its intention to do so or, if it had not so notified them, that notice would be given them the principal would be claimed if such instalment so in default were not paid. This is, I think, a great deal to infer.

I do not think that the evidence warrants the inference that the appellant entered into any negotiations with the respondents which had the effect of leading them to suppose

that the appellant had agreed to disregard or hold in suspense or abeyance that part of the contract which provided that:

> ...on default being made by both Subsurface Surveys Ltd. and the Debtor in paying any principal or interest due at any time according to the terms of the said note the Company may forthwith cause the pledged shares to be transferred to the name of the Company on the share register of Subsurface Surveys Ltd. and the pledged shares shall thereupon become the absolute property of the Company.

I am on the other hand of opinion that the behaviour of Mr. Burrows is much more consistent with his having granted friendly indulgences to an old associate while retaining his right to insist on the letter of the obligation, which he did when he and Whitcomb became estranged and when the respondents were in default in payment of an interest payment for a period of 36 days.

For all these reasons I would allow the appeal and restore the judgment of the learned trial judge. The appellant is entitled to its costs both here and in the Appeal Division.

Appeal allowed with costs and trial judgment restored.

Solicitors for the plaintiff, appellant: Hoyt, Mockler & Dixon, Fredericton.

Solicitors for the defendants, respondents: McKelvey, Macaulay, Machum & Fairweather, Saint John.

JUDITH BAILEY (*Complainant*) .....APPELLANT;

AND

KENNETH REX BAILEY (*Defendant*) ..RESPONDENT.

1968
*Feb. 22
May 13

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Husband and wife—Wife leaving matrimonial home in Winnipeg and taking up residence in Ontario—Husband continuing to reside in Manitoba—Provisional maintenance order made by Family Court in Toronto—Application to Winnipeg Family Court to confirm order—Jurisdiction of Ontario Court to make provisional order—The Deserted Wives' and Children's Maintenance Act, R.S.O. 1960, c. 105—The Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1960, c. 346—The Reciprocal Enforcement of Maintenance Orders Act, 1961 (Man.), c. 36.

The appellant wife and the respondent husband had their matrimonial home in Winnipeg. The appellant, taking the two infant children of

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

1968

BAILEY v. BAILEY

the marriage with her, left the said matrimonial home, without the knowledge or consent of the respondent, and moved to Ontario. Upon the complaint of the appellant, a provisional maintenance order was made against the respondent, under the provisions of *The Deserted Wives' and Children's Maintenance Act,* R.S.O. 1960, c. 105, and *The Reciprocal Enforcement of Maintenance Orders Act,* R.S.O. 1960, c. 346, by a judge of the Juvenile and Family Court of the Municipality of Metropolitan Toronto. On an application to the Winnipeg Juvenile and Family Court for confirmation, under *The Reciprocal Enforcement of Maintenance Orders Act,* 1961 (Man.), c. 36, of the aforementioned order, it was held that the Court in Metropolitan Toronto was without jurisdiction to make the said order, on the ground that the matrimonial disputes alleged by the appellant took place outside Ontario. An appeal by way of stated case from the decision of the judge of the Winnipeg Juvenile and Family Court was dismissed by the Court of Appeal. With leave, an appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be allowed and the matter remitted to the judge of the Winnipeg Juvenile and Family Court to be dealt with on the merits.

The object of the reciprocal enforcement of maintenance orders legislation was to enable a deserted wife, resident in a state or province the courts of which do not have jurisdiction over the husband who, allegedly, has deserted her and who is residing in a reciprocating state, to initiate proceedings in the province where she is and so to avoid the necessity of travelling to the province in which the husband is, a course which would often be a practical impossibility. To hold that a provisional order can be made only by a court which has jurisdiction to make a final and binding order of maintenance against the husband would be to defeat the whole purpose of this part of the legislative scheme. *Andrie v. Andrie* (1967), 60 W.W.R. 53, applied; *Smith v. Smith* (1953), 9 W.W.R. (N.S.) 144, distinguished.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal by way of stated case from a decision of N. M. Sanders, Judge of the Winnipeg Juvenile and Family Court, refusing to confirm a provisional maintenance order of the Juvenile and Family Court of the Municipality of Metropolitan Toronto. Appeal allowed.

L. R. Mitchell and *J. D. Raichura,* for the appellant.

Murray D. Zaslov, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Manitoba[1] pronounced on June 14,

[1] (1967), 60 W.W.R. 625, 63 D.L.R. (2d) 71.

1967, dismissing an appeal by way of stated case from a decision of Her Honour N. M. Sanders, Judge of the Winnipeg Juvenile and Family Court, given on February 1, 1967, refusing to confirm a provisional order of the Juvenile and Family Court of the Municipality of Metropolitan Toronto dated July 19, 1966.

The provisional order of July 19, 1966, recites that it was made under the provisions of *The Deserted Wives' and Children's Maintenance Act,* R.S.O. 1960, c. 105, and *The Reciprocal Enforcement of Maintenance Orders Act,* R.S.O. 1960, c. 346, and that it appears "that the said Judith Bailey is entitled to the benefit of the said Act". It is signed by N. K. Bennett, Judge of the Juvenile and Family Court of the Municipality of Metropolitan Toronto. The operative portion of the order reads as follows:

> I, the undersigned, do hereby Order that the said Kenneth Rex Bailey do pay hereafter to his said wife at The Juvenile and Family Court, 311 Jarvis Street in the City of Toronto, the sum of $40.00 a week for the support of wife and two children of the said Kenneth Rex Bailey.
>
> The first payment to be made on the day set by the Judge or Magistrate confirming this Provisional Order.
>
> THIS ORDER is provisional only and shall have no force and effect until confirmed by a Court of Competent Jurisdiction where the Defendant is residing.
>
> Given under my hand this 19th day of July, 1966.

The course followed in the Winnipeg Family Court is set out in the stated case submitted to the Court of Appeal for Manitoba by Her Honour Judge Sanders. The Court of Appeal, in dealing with the matter, confined itself to the facts as set out in the stated case and it will be convenient to set out the stated case in full. It is headed:

> IN THE MATTER OF AN APPEAL TO THE COURT OF APPEAL BY WAY OF STATED CASE FROM AN ORDER MADE UNDER SECTION 6 OF THE RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT, CHAPTER 36, STATUTES OF MANITOBA, 1961.

BETWEEN:

JUDITH BAILEY,

(Complainant) Appellant

—AND—

KENNETH REX BAILEY,

(Defendant) Respondent

1968

BAILEY v. BAILEY

Cartwright C.J.

It is signed by Judge Sanders and reads as follows:

1. On 19th day of July, 1966 upon the complaint of the Appellant, a Provisional Maintenance Order pursuant to the provisions contained in The Deserted Wives' and Children's Maintenance Act, Chapter 105 of the Revised Statutes of Ontario, 1960 and The Reciprocal Enforcement of Maintenance Orders Act, Chapter 346 of the Revised Statutes of Ontario, 1960 was made against the Respondent by N. K. Bennett, Esq., Judge of the Juvenile and Family Court of the Municipality of Metropolitan Toronto.

2. The said Provisional Order, together with the transcript of evidence heard in Toronto, was sent to this Court by the Department of the Attorney General of Manitoba for filing and confirmation, pursuant to Section 6 of The Reciprocal Enforcement of Maintenance Orders Act, Chapter 36, Statutes of Manitoba, 1961.

3. On the 24th day of October, 1966, the date set for the hearing of this matter, and without my calling the Respondent on the merits herein, counsel for Respondent raised a preliminary objection to the effect that on the evidence of the locus of the alleged matrimonial disputes contained in the said transcript of evidence, the said Juvenile Court and Family Court of the Municipality of Metropolitan Toronto was without jurisdiction to make the said Provisional Order, and asked me to refuse to confirm same.

4. The said transcript of evidence was read by me for the limited purposes of determining the preliminary question of jurisdiction and said transcript of evidence shows that:

(*a*) the Appellant and the Respondent are married and at all times material hereto had their matrimonial home in the City of Winnipeg, in Manitoba;

(*b*) on the 19th day of May, 1966, the Appellant, taking the two infant children of the marriage with her, left the said matrimonial home, without the knowledge or consent of the Respondent;

(*c*) at the time of the making of the said Provisional Order, the Appellant was residing in the City of Toronto, in Ontario.

5. On the 24th day of October, 1966, legal submissions on the question of jurisdiction were made to me by counsel for the Respondent and for the Crown. I reserved my ruling on this point, and I requested further submissions in writing which were subsequently provided by both counsel.

6. On the 23rd day of January, 1967, I orally delivered my reserved ruling on the preliminary objection as to jurisdiction raised by counsel for the Respondent, and held that the said Juvenile and Family Court of the Municipality of Metropolitan Toronto did not have jurisdiction to make the Provisional Maintenance Order hereinbefore referred to on the grounds that the matrimonial disputes alleged by the Appellant took place outside Ontario. I made no findings on the merits herein.

The Attorney General of Manitoba on behalf of the Appellant desires to question the validity of my said ruling on the ground that it is erroneous in point of law, and the points of the case being stated for the opinion and decision of the Court of Appeal for Manitoba are as follows:

(1) Did I err in law in holding that the Juvenile and Family Court of the Municipality of Metropolitan Toronto was without jurisdiction to make the Provisional Maintenance Order dated the 19th day of July, 1966, on the ground that the alleged matrimonial

disputes took place at the City of Winnipeg in Manitoba, and therefore the said Court in Ontario had no jurisdiction to make the said Provisional Order?

(2) Did I err in law in holding that the said Deserted Wives' and Children's Maintenance Act of Ontario, claims no extra-territorial jurisdiction?

(3) Did I err in holding that the matrimonial disputes between spouses should be adjudicated by the Courts of the Province of their matrimonial home, and one Province to which the wife may happen to go should not attempt to adjudicate such disputes particularly where the spouses were resident in another Province at the time of the break-up of the marriage?

(4) Did I err in law in holding that the facts herein present a clear example of the first ground found in the statement of grounds of defence upon which the making of the Order could have been opposed in Ontario, namely that the Court had no jurisdiction to make the Order?

The question for the determination of the Court of Appeal is whether or not the Summary Conviction Court came to the correct determination and decision on these points of law, and if not, the Court of Appeal is respectfully requested to revise or amend the decision of the Summary Conviction Court insofar as it relates to the question of jurisdiction.

Under *The Reciprocal Enforcement of Maintenance Orders Act,* 1961 (Man.), c. 36, Ontario has been declared to be a reciprocating State and under *The Recriprocal Enforcement of Maintenance Orders Act,* R.S.O. 1960, c. 346, Manitoba has been declared to be a reciprocating State.

Pursuant to s. 4(3) of *The Reciprocal Enforcement of Maintenance Orders Act* of Ontario, a statement showing the grounds on which the making of the order might have been opposed was sent to the Attorney-General for transmission to the proper officer of Manitoba. These grounds were stated to be as follows:

1. The Court had no jurisdiction to make the Order.
2. The matter of the Complaint is not true.
3. There is no valid marriage subsisting between the Complainant and the Defendant.
4. A degree of judicial separation, or an Order having the effect of such a decree, is in force.
5. The Complainant had deserted the Defendant.
6. The Complainant had committed adultery which the Defendant has not condoned, connived at, or by wilful neglect and misconduct conduced to.
7. The Defendant has reasonable cause to leave the Complainant.
8. Under a decree or Order of a competent court, the Complainant is already entitled to alimony, and that such decree is being complied with.

1968

BAILEY v. BAILEY

Cartwright C.J.

9. The Defendant is not of sufficient ability to maintain the Complainant.

10. That the children, namely, KEVIN BORN MARCH 17th, 1962 and KAREN BORN JANUARY 15th, 1965 being over the age of sixteen years, (sic) no provision in respect to can be included in the Order.

11. The Defendant is not of sufficient ability to support the children.

It will be observed that the learned judge of the Winnipeg Family Court proceeded:

> . . . on the ground that the alleged matrimonial disputes took place at the City of Winnipeg in Manitoba, and therefore the said Court in Ontario had no jurisdiction to make the said Provisional Order.

In the Court of Appeal, Guy J.A., who gave the unanimous reasons of the Court, contrasted the wording of s. 4(1) of *The Reciprocal Enforcement of Maintenance Orders Act* of Ontario with s. 5(1) the corresponding section of the Manitoba Act. In the Manitoba Act, s. 5(1) opens with the words: "Where an application is made to a court in Manitoba by a dependent who is resident in the province", while in Ontario the words of s. 4(1) are: "Where an application is made to a court in Ontario for a maintenance order". Guy J.A. took the view that the absence in the Ontario Act of the words "who is resident in the province" prevents the appellant from arguing that jurisdiction is specifically conferred on the Ontario Court by reason of her residence. With respect, this difference in wording does not appear to me to be of great significance; if a difference exists, the words of the Ontario statute are more general, not more restrictive, than those of the Manitoba Act. They are wide enough to include an applicant who is resident in Ontario as the appellant is.

The next matter with which Guy J.A. dealt was the English decision of *Re Wheat*[2], in which it was held that desertion was looked upon as a continuing offence, its local *situs* corresponding with the residence from time to time of the deserted spouse. Guy J.A. rejected the argument of the appellant that if a wife was deserted in Manitoba and went to live in Ontario, the desertion would be deemed to be continuing in her new place of residence so that the Courts of Ontario would be vested with jurisdiction to

[2] [1932] 2 K.B. 716.

entertain an application by her for maintenance. He phrased his reasons for rejecting this argument as follows:

> Concerning that submission we make two comments. In the first place, on the facts as found by the learned Family Court Judge, it is not open to us to say that the wife was deserted in Manitoba, or indeed deserted at all. We merely know that on May 19th, 1966, the appellant took the two infant children of the marriage and left the Winnipeg matrimonial home, without the knowledge or consent of the husband. Such a statement of facts cannot support a conclusion that the wife was deserted. Accordingly an argument based on the *Wheat* case can have no application here.
>
> In the second place this Court in *Smith v. Smith,* (1953), 9 W.W.R. (N.S.) 144, affirming a judgment of Tritschler J. (as he then was), held that the provisions of *The Wives' and Children's Maintenance Act* did not apply to persons resident in another province. "The offences of cruelty, desertion and non-support committed outside Manitoba are not acts 'over which the Legislature of the province has legislative authority'...", was the wording used in the Smith decision. Desertion in one province should not accordingly be regarded as giving a basis for jurisdiction of the courts of another province to which the deserted spouse may have gone.

I find myself unable to agree with this reasoning. The depositions which were taken in Ontario are not before us and we should limit ourselves, as did the Court of Appeal, to the facts stated in the stated case.

In so far as the question is whether or not desertion occurred, all we know is what is set out in para. 4(*b*) of the stated case quoted above and which reads as follows:

> (*b*) on the 19th day of May, 1966, the Appellant, taking the two infant children of the marriage with her, left the said matrimonial home, without the knowledge or consent of the Respondent;

Under *The Deserted Wives' Maintenance Act* of Ontario, a married woman may be deemed to have been deserted by her husband although it is she who has left him. This is set out in s. 1(2) and (3) of the Act which read as follows:

> 1(2) A married woman shall be deemed to have been deserted within the meaning of this section when she is living apart from her husband because of his acts of cruelty, or of his refusal or neglect, without sufficient cause, to supply her with food and other necessaries when able so to do, or of the husband having been guilty of adultery that has not been condoned and that is duly proved, notwithstanding the existence of a separation agreement where there has been default under it and whether or not it contains express provisions excluding the operation of this Act.
>
> (3) Without restricting in any way the generality of subsection 2, conduct causing reasonable apprehension of bodily injury, or of injury to health, without proof of actual personal violence, that renders the home an unfit place, either for a wife or a child, may be held to constitute acts of cruelty within the meaning of subsection 2.

1968

BAILEY v. BAILEY

Cartwright C.J.

In my opinion we are bound to assume that there was evidence before the judge of the Family Court in Ontario which made out a *prima facie* case of desertion. Otherwise he would not have made the provisional order. It will of course be open to the respondent to contend at the hearing in Manitoba that in fact he has not deserted the appellant.

Guy J.A. based his judgment to some extent on the earlier judgment of the Court of Appeal for Manitoba in *Smith v. Smith*[3], in which it was held that the Court in Manitoba had no jurisdiction to make an order for maintenance against a husband who was both resident and domiciled in British Columbia. With respect, I do not think this case, which dealt with a final order, is of assistance in deciding whether or not the Ontario Court had jurisdiction to make a provisional order.

Section 17 of the Manitoba *Reciprocal Enforcement of Maintenance Orders Act* directs that the Act shall be so interpreted as to effect its general purpose of making uniform the law of the provinces that enact it and, while there are minor differences in wording, the Ontario Act and the Manitoba Act are substantially the same. The purpose of the Acts appears to be to permit a dependent who is living in one jurisdiction to obtain a provisional order against her husband who is resident in another jurisdiction which is one of the reciprocating states referred to in the Acts. The order so made is expressly stated to be provisional only and the husband is given an opportunity to defend on any ground which would have been open to him in the state making the provisional order. It is clear that it is not in the contemplation of the legislative scheme that the provisional order shall be in any sense final or binding. It is in the nature of an *ex parte* proceeding to establish a *prima facie* case.

It is interesting to note that s. 6(2) of the Manitoba Act and the corresponding s. 5(2) of the Ontario Act both use the words "at a hearing under this section the person on whom the summons was served may raise any defence that he might have raised in the original proceedings *if he had been a party thereto* but no other defence". Here, particularly in the words I have italicized, is clear statutory recognition of the fact that the husband is not a party to the

[3] (1953), 9 W.W.R. (N.S.) 144, [1953] 3 D.L.R. 682.

proceedings for the granting of a provisional order; both statutes contemplate that this order may be made without any notice to him.

The question for the Manitoba Court under the first ground on which it is stated the husband can defend, is whether under the Ontario statute, the Ontario Court had jurisdiction to make the order which it made. In my view, it had that jurisdiction. It is scarcely necessary to repeat that all grounds of defence on the merits are open to the husband. It is difficult to think of any ground of defence which could be raised in any case which is not comprehended in the eleven grounds set out above and it has been held in *Re Wheat, supra,* at pp. 725 and 726, and appears from s. 6(2) of the Manitoba Act, that the list so furnished, while conclusive that the grounds specified exist, is not to be taken as excluding other proper grounds.

I agree with the reasoning and conclusion of Pope D.C.J. in *Andrie v. Andrie*[4], which is accurately summarized in the headnote as follows:

> The applicant was married in Saskatchewan and moved subsequently to Alberta where she was deserted by the respondent who then went to live in British Columbia. Applicant returned to live in Saskatchewan where she made the present application for an order under *The Deserted Wives' and Children's Maintenance Act,* R.S.S. 1965, ch. 341, and *The Maintenance Orders (Facilities for Enforcement) Act,* R.S.S. 1965, ch. 93.
>
> It was *held* that the applicant was entitled to an order, provisional and to be of no force or effect until confirmed by a court of competent jurisdiction in British Columbia. It was not necessary for the applicant to initiate the proceedings in the state where the desertion took place and the legislation was not to be construed as containing this requirement.

At the risk of appearing repetitious I will summarize my views. The primary object of that branch of the legislation providing for the reciprocal enforcement of maintenance orders with which we are concerned is to enable a deserted wife, resident in a state or province the courts of which do not have jurisdiction over the husband who has deserted her and is residing in a reciprocating state, to initiate proceedings in the province where she is and so to avoid the necessity of travelling to the province in which the husband is, a course which would often be a practical impossibility. To hold that a provisional order can be made only by a court which has jurisdiction to make a final and binding

[4] (1967), 60 W.W.R. 53.

1968
BAILEY
v.
BAILEY
Cartwright C.J.

order of maintenance against the husband would be to defeat the whole purpose of this part of the legislative scheme.

I would allow the appeal, set aside the judgment of the Court of Appeal, declare that the provisional order was made with jurisdiction and direct that the matter be remitted to the Judge of the Winnipeg Juvenile and Family Court to be dealt with on the merits. Pursuant to the terms of the order granting leave to appeal the respondent will recover from the appellant his costs in this Court including the costs of the motion for leave to appeal.

Appeal allowed; costs to respondent pursuant to terms of order granting leave to appeal.

Solicitor for the appellant: The Attorney-General of Manitoba.

Solicitor for the respondent: Murray D. Zaslov, Winnipeg.

1968
*Apr. 30
May 13

PETER DIAZ CURBELLO (*Plaintiff*) ..... APPELLANT;

AND

GEORGE RONALD THOMPSON (*Defendant*) ..... RESPONDENT.

LILLIAN FONTAINE (*Plaintiff*) ..... APPELLANT;

AND

GEORGE RONALD THOMPSON (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Motor vehicles—Negligence—Driver of truck travelling at night at approximately 50 m.p.h. applying brakes and turning slightly to avoid deer—Truck spinning counterclockwise and falling on car coming from opposite direction—Pavement wet and very slippery—Excessive speed in the circumstances.

While driving a heavy truck at night, at approximately 50 m.p.h., on a section of the Trans-Canada Highway where the posted speed was 60 m.p.h., the defendant noticed some deer on the shoulder of the road and applied his brakes moderately. Almost immediately, one of the deer bounded across the road. The defendant reacted by applying the brakes harder and turning slightly to the left. Sensing

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

that the truck was skidding to the right, he attempted to counteract this movement by turning the wheel slightly to the right. The truck continued to skid, spun counterclockwise more than 180 degrees and toppled over on top of a car which was coming from the opposite direction on its own side of the road. The driver of the car was killed and his passenger was injured. The truck, the rear tires of which were substantially worn, was carrying a near maximum load. The collision occurred on a straight stretch of road and the pavement at the time was wet and very slippery.

The deceased's widow brought action against the defendant in her capacity as executrix of her husband's estate and in her own right. The passenger brought action on his own behalf. These actions were consolidated and tried together. The trial judge, having found the defendant wholly to blame for the accident, gave judgments in favour of the plaintiffs. The defendant appealed these judgments to the Court of Appeal which, by a majority, allowed the appeals. An appeal by the plaintiffs, limited to the question of liability only, was then brought to this Court.

Held: The appeal should be allowed and the trial judgments restored.

The trial judge rightly decided that the defendant was driving at an excessive speed in the circumstances of this particular case and because of this could not keep control of his vehicle when he found it necessary to slow down.

Gauthier & Co. Ltd. v. The King, [1945)] S.C.R. 143, followed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing three judgments of Aikins J. in consolidated actions for damages for negligence. Appeal allowed and trial judgments restored.

Richard P. Anderson, for the plaintiffs, appellants.

Douglas McK. Brown, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia[1] which reversed (Davey C.J.B.C. dissenting) three judgments given in favour of the appellants by Aikins J. in the Supreme Court of British Columbia. The litigation arose out of a road accident in which one Clifford Alley Fontaine was killed and a passenger in his automobile, Peter Diaz Curbello, was injured. The appellant Lillian Fontaine brought action against the respondent in her capacity as administratrix of the estate of Clifford Alley Fontaine and in her own right. Curbello brought action on his own behalf. The

[1] (1967), 61 W.W.R. 321, 64 D.L.R. (2d) 611.

1968

CURBELLO v. THOMPSON

FONTAINE v. THOMPSON

Hall J.

actions were consolidated for trial by order of Ruttan J. and were tried together by Aikins J., who awarded the appellant Fontaine damages in the sum of $38,287.85 in her personal action and $1,295.60 in her capacity as administratrix and the sum of $19,134.85 to the appellant Curbello. This appeal is limited to the question of liability only. The amount of the damages are not now in issue.

The facts are not in dispute and shortly are that at about 1:30 a.m. on September 26, 1961, the deceased Fontaine was driving his 1956 Chevrolet station wagon with the appellant Curbello as a passenger. He was heading south on the Trans-Canada Highway from Yale to Hope en route to Vancouver. He was driving on his own side of the road at a reasonable speed of about 40 miles an hour. No allegation or suggestion of negligence on the part of Fontaine is put forward.

The respondent was driving a four-ton G.M.C. truck from Vancouver northwards. The truck was almost loaded to capacity, the total weight of truck and load being 28,000 lbs.

The two vehicles met on the highway approximately two miles south of Yale. As they met, the truck toppled over on to the Fontaine vehicle while it was wholly on its own side of the road, crushing it. Fontaine was killed and Curbello injured. The respondent was uninjured. This event occurred on a straight stretch of road some 700 feet in length. At the north end of this straight stretch the road curved to the west and at the south end it curved to the east. The road was level, paved and 23 feet, 6 inches wide with a 10-foot gravel shoulder on each side of the pavement. The posted speed was 60 miles an hour. The vehicles met at a point on the straightaway about 200 feet north of the south curve. It was a cloudy night but visibility was good. Rain had fallen earlier. The road surface was wet and very slippery.

As to the accident itself, the learned trial judge said:

> The two vehicles came to rest in these positions: the station wagon was upright, that is resting on its wheels, and facing south. The GMC truck had toppled over on its right side and the right side of the freight box (that is the enclosed box built on the deck of the truck for carrying freight) was resting on the top of the station wagon. The GMC truck was facing south-east. The truck, if righted from the position in which it lay resting on top of the station wagon, would have been brought upright with its wheels all on the east side of the centre line.

The evidence establishes that before and at the time of the collision the GMC truck was sliding and out of the driver's control and that the truck during the course of sliding turned something better than 180 degrees, so as to wind up at rest facing south-east.

These circumstances called for an explanation from the respondent: *Gauthier & Co. Ltd. v. The King*[2].

The explanation given by the respondent was that he was travelling at 48 miles an hour as he entered the straightaway, and seeing a vehicle coming towards him from the north he dimmed his lights. Then he saw some deer on the east shoulder at which moment he applied his brakes moderately. Almost immediately, one of the deer bounded across the road. The respondent reacted by applying the brakes harder and turning slightly to the left. Sensing that the truck was skidding to the right, he attempted to counteract this movement by turning the wheel slightly to the right. The left front corner of the truck struck the deer, propelling it towards the west shoulder. The respondent did not suggest that the impact with the deer had any effect on the movement of the truck. There was little damage, if any, to the left front corner of the truck. The truck continued northward, spinning counterclockwise until it was facing south-east, having spun slightly more than 180 degrees by the time it toppled over on top of the Fontaine vehicle. The respondent admitted that he knew the road was wet and slippery, but said that he was not aware that it was *very* slippery until after the accident. He testified that the truck was in excellent mechanical condition, including good power brakes. The front tires were relatively new but the tires on the rear dual wheels were about 80 per cent worn with minimal tread left in the centre. The tires were still roadworthy and good for some 8,000 more miles according to the evidence. Respecting these rear tires, the learned trial judge said:

The opinions of the witnesses that the rear tires, despite their worn condition, were safe for highway use must be considered as relative. These questions must be considered: At what speed are such tires safe? Under what road conditions are they safe? What weight are such tires capable of carrying with safety? These questions must be considered not just separately but in combination. What may be safe at one speed on a dry road may be unsafe at the same speed on a wet road. What may be a safe speed at one load weight may be unsafe at another load weight. Patently, in my opinion, tires which have practically no tread in the

[2] [1945] S.C.R. 143 at 149-50, [1945] 2 D.L.R. 48.

1968

CURBELLO v. THOMPSON

FONTAINE v. THOMPSON

Hall J.

centre are less efficient in stopping a vehicle without producing sliding than tires which have substantial tread on all the tire surface which comes in contact with the road surface. I think it probable, as I shall state later in these reasons, that the worn rear tires on the truck played a part in causing the skid which resulted in the collision with the station wagon.

The learned trial judge said that the respondent impressed him as a truthful witness. He found that the respondent was driving at a speed of approximately 50 miles an hour as he approached and rounded the curve immediately south of the straight stretch on which the collision occurred. Dealing with the actual impact, the learned trial judge said:

> The defendant said that while sliding the truck did not cross over the centre line; that his turning to the right to try to get out of the skid or slide had the effect of keeping the truck on his right hand side of the road. The over-all length of the truck was 24 feet. The wheel base was 11 feet. Theoretically it is no doubt possible that the truck with its wheel base of 11 feet could, as to its wheels, have made better than a 180 degree turn on the road, which was 23 feet 6 inches in width, without the wheels crossing the centre line. There were no marks on the shoulders indicating that the truck had gone on to either shoulder of the road. I think it improbable that no part of the truck crossed the centre line. I think it probable that some part of the truck crossed the centre line and hit the station wagon and the truck then toppled over, coming to rest on top of the station wagon. While it may be theoretically possible that the truck, wholly on its own side of the road, toppled over because it was skidding and fell on the station wagon which was entirely on its own side of the road, I think this unlikely, and that some part of the turning and sliding truck struck the station wagon while the latter was wholly on its proper side of the road, and that the truck then toppled over on top of the station wagon. In any event I do not think it makes any material difference whether the truck hit the station wagon and then fell over, or, if, on the other hand it was wholly on its proper side of the road and because of skidding and turning it upset and fell on the station wagon without colliding with it before it started to topple over.

Having considered all the evidence, the learned trial judge concluded:

> Separate aspects of the defendant's conduct should not, however, in my opinion, be taken and considered in isolation. All relevant aspects of the defendant's driving should be considered together and in relation to the existing relevant circumstances. The fact is that on braking the truck's speed in a quite ordinary way and on making a very slight turn to the left, and on braking again, harder, but still in an ordinary way, the truck went into a skid, and wholly out of control. It seems to me on a consideration of all the evidence that the truck skidding and going out of control in this case was due to a combination of circumstances which I summarize in this way:
>
> (a) The truck was being driven at a substantial although lawful speed: approximately fifty miles per hour.

(b) The truck was carrying a heavy load, and was in fact loaded close to its maximum capacity.

(c) The highway surface was wet and slippery.

(d) The rear tires were substantially worn so that there was minimal tread in the centre of the tires. Patently I think such tires to be less efficient than tires with substantial tread over all the tire surface in contact with the road. In my view it is probable that the worn rear tires contributed to the truck skidding.

The truck skidded and went out of control on the driver applying the brakes in a quite ordinary way, and on the driver making a slight turn to his left, which involved nothing more than a vehicle moving closer to the centre line, and on a further and harder application of the brakes. I think it apparent that the defendant Thompson was driving at an excessive speed in the circumstances: he was driving at a speed at which he could not keep control of his vehicle when he found it necessary to apply his brakes, turn slightly to his left, and apply his brakes harder to slow down more quickly. The defendant driver must be held to have been negligent. I am satisfied that his negligence was the cause of the collision between the two vehicles.

In the Court of Appeal, Davey C.J.B.C. agreed with the learned trial judge, saying:

He (the trial judge) found that the truck skidded and went out of control because of the combination of speed, its near maximum load, the slippery surface of the road, and the worn rear tires which had substantially less traction on the road than ones with the whole tread intact; that because of those factors Thompson could not keep control of the truck when he attempted to make an ordinary manoeuvre of a slight turn to the left and a quick reduction in speed. From that the learned trial Judge concluded that Thompson's speed, although not exceeding the speed limit, was excessive in the circumstances. Those were all circumstances within Thompson's knowledge. He knew that the road had been seal coated; he knew it was wet; he ought to have known it was slippery, and he knew his rear tires were somewhat worn.

It was his duty to drive his vehicle at a speed which would permit him, under those conditions, to keep it under proper control when meeting the ordinary exigencies of highway travel. His speed was too great to allow him to swerve slightly and to slow the truck down quickly without skidding and losing control. In that he was negligent. That is what I understand the learned Judge's reasoning to be, and on the evidence I am unable to say that he was wrong in drawing that inference.

Lord and Maclean JJ.A. disagreed with Davey C.J.B.C., but it is of great importance to note that both erroneously appear to have accepted the following paragraph in the judgment of Aikins J.:

As I understood counsel for the defendant's argument, he put it that there was no one thing which the defendant driver did nor any one thing which the defendant driver failed to do which could be considered as amounting to negligence. Taking various aspects of the defendant driver's conduct each in isolation I could not find negligence

1968

CURBELLO v. THOMPSON

FONTAINE v. THOMPSON

Hall J.

on the part of the defendant driver. Taken by itself the defendant driver's speed of approximately fifty miles an hour on a main highway was not excessive. The defendant driver was keeping a reasonably careful lookout. The defendant driver, before the skid, was certainly driving on his proper side of the highway. The GMC truck was properly loaded and was not loaded beyond its proper carrying capacity. The truck was in excellent mechanical condition. The rear tires of the truck were substantially worn so that there was little tread left in the centre of the tires, but the evidence supports the conclusion that they were safe for use, although, as I have said, I think this to be a wholly relative conclusion. The defendant driver's reaction on seeing the deer, in braking and turning slightly to the left and braking again, does not indicate any lack of reasonable care. Taking all these aspects of the defendant driver's conduct individually and in isolation one could not say that he was guilty of any negligence.

as conclusions arrived at by him. The paragraph just quoted is patently a recapitulation of counsel's argument. The learned trial judge rejected the argument that these several aspects of respondent's conduct should be considered in isolation because immediately after so summarizing counsel's argument he said:

> Separate aspects of the defendant's conduct should not, however, in my opinion, be taken and considered in isolation.

It was also argued on behalf of the respondent that the learned trial judge found liability by the application of the doctrine of *res ipsa loquitur* in his determination of the case. It is clear to me that he did not do so but that he rightly decided the case on the evidence that was before him, concluding that the respondent was driving at an excessive speed in the circumstances of this particular case and because of this could not keep control of his vehicle when he found it necessary to slow down in the circumstances described by the respondent himself.

The appeal should, accordingly, be allowed with costs here and in the Court of Appeal. The judgments of Aikins J. in the Supreme Court of British Columbia should be restored.

Appeal allowed and trial judgments restored.

Solicitors for the plaintiffs, appellants: Boughton, Anderson, Dunfee & Mortimer, Vancouver.

Solicitors for the defendant, respondent: Russell and DuMoulin, Vancouver.

SAINT JOHN HARBOUR BRIDGE AUTHORITY ..... APPELLANT;

AND

J. M. DRISCOLL LIMITED ..... RESPONDENT.

1968
*Feb. 29
Mar. 1
May 13

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Expropriation—Compensation—Valuation—Actual use not highest and best use of lands in question—Necessary to remove buildings before lands could be utilized for highest and best use—Valuation of buildings not to be added to potential value of lands—Damages allowed for business disturbance but not for special value of lands to owner.

The appellant, by registration on April 21, 1966, of a resolution dated March 14, 1966, expropriated certain land owned by the respondent on the west side of the mouth of the Saint John River at Saint John, New Brunswick, near the docks of the National Harbours Board on the west side of Saint John Harbour. The respondent was a firm heretofore supplying dunnage, bracing and other wooden materials to ships taking cargo in the Port of Saint John, particularly during the winter season. It remained in possession of the expropriated property until July 1, 1966.

By the provisions of the *Land Compensation Board Act*, 1964 (N.B.), c. 6, the compensation for such expropriation was to be fixed by the Land Compensation Board and the Chairman of the Board, after a hearing, fixed the compensation to be paid to the respondent by the appellant at $124,500 together with interest at 5 per cent from July 1, 1966. An appeal by the respondent to the Appeal Division of the Supreme Court of New Brunswick was allowed and that Court by its order increased the compensation to which the respondent was entitled to $197,565. An appeal from the judgment of the Appeal Division was then brought to this Court.

Held: The appeal should be allowed and the award amended as follows: for land value $135,565.00; for damages for business disturbance $7,710.69.

There was no error in the conclusion of the Appeal Division that the value of the land in question should be fixed at $1 per square foot. That figure represented the opinion of the respondent's appraiser as to the value of the land when put to its highest and best use, that is, for a large warehousing or manufacturing enterprise and did not represent the value of the land when used by a small business supplying lumber items to ships. Before any purchaser could utilize the land for that highest and best use, the purchaser would have to remove from the site the considerable number of frame buildings which existed at the time of the expropriation and which had been valuable and efficient for the use for which the owner was putting them at the time of expropriation.

Having adopted the rate of $1 per square foot as the value of the lands, it was an error in principle to add to that amount any valuation of the

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

1968

SAINT JOHN HARBOUR BRIDGE AUTHORITY v. J. M. DRISCOLL LTD.

buildings. Accordingly, the award of the Appeal Division should be reduced by the sum of $62,000 representing the value of the buildings included in the amount awarded.

No amount should be allowed for special use to the owner. The Appeal Division were not fixing the value of the lands upon the use to which they were being put at the time of expropriation but found upon the evidence of the owner's appraiser the potential value of the land based on a higher and better use and thereby increased the value of the lands from 35¢ per square foot to $1 per square foot. If there were an element added to the latter rate to compensate for the special value to the owner it would be in breach of the well-recognized principle that so far as the damages sustained as a result of expropriation are concerned, the owner is entitled to be fully compensated but not enriched thereby.

The respondent, having found it impossible to obtain other suitable premises and having had to wind up its business selling only the inventory and the personal property, which it had to accomplish in a very short time and in a disorderly fashion, was entitled to compensation for business disturbance.

Irving Oil Co. Ltd. v. The King, [1946] S.C.R. 551; *Jutras v. Minister of Highways for Quebec*, [1966] S.C.R. 732; *Drew v. The Queen*, [1961] S.C.R. 614, referred to.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, allowing an appeal from a decision of the Land Compensation Board. Appeal allowed.

E. Neil McKelvey, Q.C., and *Thomas B. Drummie*, for the appellant.

Donald M. Gillis, Q.C., for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick pronounced on July 12, 1967. By that judgment the said Appeal Division had allowed an appeal from the decision of the Land Compensation Board pronounced on September 22, 1966.

The respondent company owned a parcel of land in the City of Saint John containing 135,565 square feet. These lands were on the west side of the Saint John River at the point where the river flowed into Saint John Harbour and had frontages on Market Street, King Street and on the river. Near the centre of the river frontage, a parcel 105 feet in width along the river by a depth of 400 feet was owned by Connor Brothers Limited, and the respondent had granted to that company a right-of-way 18 feet in width

1968

SAINT JOHN HARBOUR BRIDGE AUTHORITY v. J. M. DRISCOLL LTD.

Spence J.

leading from the easterly end of this parcel of land to King Street, so that the respondent's lands were divided into two pieces, with, however, complete ease of access from one part to the other across the said right-of-way. The respondent was a firm heretofore supplying dunnage, bracing and other wooden materials to ships taking cargo in the Port of Saint John, particularly during the winter season. Before and after its incorporation, it has always been a business owned by the Driscoll family and operated by it for almost 100 years. Originally situate on the east side of the harbour in Saint John City proper, the business was moved to the west side after the fire of 1877. The property was enlarged by subsequent purchases over the years until about 1957 or 1958 it became possible to locate all its activities and its lumber yards in the one location under review.

The appellant, by registration on April 21, 1966, of a resolution dated March 14, 1966, expropriated the property; the respondent remained in possession only until July 1, 1966. By the provisions of the *Land Compensation Board Act*, 1964 (N.B.), c. 6, the compensation for such expropriation was to be fixed by the Land Compensation Board and Louis A. LeBel, Q.C., Chairman of the Board, after a hearing, fixed the compensation to be paid to the respondent by the appellant at $124,500 together with interest at 5 per cent from July 1, 1966.

The respondent appealed to the Appeal Division of the Supreme Court of New Brunswick and that Court by its order aforesaid increased the compensation to which the respondent here was entitled to $197,565. Each of the three honourable members of the Court gave written reasons. Ritchie J.A. would have allowed a compensation of $165,621.50 and also an amount of $62,000 for the value of the buildings which amounted to a total of $227,621.50. West J.A. would have allowed the sum of $197,565 in full compensation, and Limerick J.A. would have allowed only the sum of $135,565, also in full compensation.

In its appeal to this Court, the Saint John Harbour Bridge Authority asks that the award of $124,500 made by the Land Compensation Board be restored or, alternatively, that the award should not be increased to any greater amount than $135,565 which Limerick J.A. would have awarded.

1968

SAINT JOHN HARBOUR BRIDGE AUTHORITY v. J. M. DRISCOLL LTD.

Spence J.

The respondent J. M. Driscoll Limited asks that the award as made by the Appeal Division of the Supreme Court of New Brunswick at $197,565 be affirmed and that the respondent should be allowed further damages for business disturbance as found by Ritchie J.A. and for special value of the land to the owner as found by the Chairman of the Land Compensation Board as well as by Ritchie J.A. Of the amount of $227,621.50, Ritchie J.A. would have affirmed the allowance of $15,000 by the Chairman of the Land Compensation Board as being a proper amount to allow to the claimant for the special value to it of the land and he would also have awarded the sum of $15,056.50 as damages for business disturbance resulting from the expropriation.

In late years, the business of the respondent company was totally confined to the supplying of lumber and timber required by the cargo carrying vessels which from time to time docked in Saint John Harbour. The respondent's premises had at the river end several wharves and some years ago lumber was delivered to the respondent's premises from ships directly over these wharves, but in late years that had not been carried on and it would appear that silt had pretty well filled in the berths adjacent to the wharves. It was, however, quite possible by dredging to have restored deep water docking facilities on the respondent's river frontage, although the economic practicality of that step was a matter of some debate before the Land Compensation Board.

The entrance to the respondent's premises on King Street was said to be only 200 feet away from the entrance to the National Harbours Board's very extensive wharves, slips and railroad sidings, and the respondent made most of its sales to ships tied up at those wharves. The respondent carried on the only such business in west Saint John and its premises were excellently suited from the point of view of site and from the point of view of the buildings thereon to carry out the business of the company. The business, however, was not a particularly profitable one, the net profit for the six years preceding the expropriation having averaged only $13,189.

Although the two chief shareholders of the respondent were most anxious to continue in business and preserve

the firm for their sons, the respondent, after the expropriation, was not able to find a suitable location at which its business could continue. Therefore, the respondent was forced to sell not the business as a "going concern" but only its stock-in-trade and personal property to another company which operated from small nearby premises and delivered the supplies to the ships from its distant lumber yards. As I have pointed out, the respondent went out of possession of its premises on July 1, 1966, less than two and a half months after the registration of the resolution following the expropriation.

The task of an appellate court in considering the award made by an arbitrator upon an expropriation has been stated by this Court on frequent occasions and was summarized very shortly in *Winnipeg Fuel and Supply Company Ltd. v. Metropolitan Corporation of Greater Winnipeg*[1], at p. 338 as follows:

> 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.

It is the contention of the appellant in this Court that the arbitrator in fixing the sum of $124,500 as the total compensation payable to the claimant had not proceeded on any incorrect principle and had not overlooked or misapprehended material evidence of fact.

The arbitrator heard evidence of several persons upon the question of values. Dr. Peters, the chief shareholder and active managing head of the respondent, gave evidence in reference to its business. A Mr. Nevin Burnham gave evidence of an accounting character in an attempt to establish value for the lands by use of profit figures and other statistics. This evidence was not interpreted by the Chairman as having any probative value, nor did any member of the Appeal Division use it in coming to his conclusion. It was not urged in this Court.

The three persons who gave evidence of land values as experts upon the subject were Mr. Ross Corbett and Mr. J. L. Feeney for the respondent, and Mr. Walter Mitham for the appellant. Mr. Feeney attempted to ascertain the value of the lands by calculating the cost of building the lands up to their present contour. Such an approach did

[1] [1966] S.C.R. 336.

1968

SAINT JOHN HARBOUR BRIDGE AUTHORITY v. J. M. DRISCOLL LTD.

Spence J.

not find favour with the Courts below and it also was not urged in this Court. Therefore, this appeal revolves about the evidence given by Mr. Corbett for the respondent and Mr. Mitham for the appellant and the compensation which should be awarded based on a proper consideration of that evidence. As has been often repeated, the standard of valuation of compensation for expropriation of lands has been put concisely by Rand J. in *Diggon-Hibben Ltd. v. The King*[2], at p. 715 as follows:

> ...the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

It is to find the amount which should be fixed by that standard that is the task of the arbitrator. The arbitrator, of course, must consider the value of the land for its highest and best use. If that highest and best use is not the use to which the lands were put at the time of the expropriation then the potentiality of such highest and best use in the future gives to the lands their value and the present value of that potentiality must be considered. The highest and best use of the lands in question were given by Mr. Corbett in his report in these words:

> In my opinion, the present site of the subject property, located so strategically on the corner of King Street and Market Place, with a 384 foot Street frontage on King, plus the frontage on Market Place, plus the Harbour frontage would have its highest and Best Use development as a large warehouse or manufacturing plant, taking advantage of the benefits of this site.
>
> To arrive at the land value, several contributing factors must be taken into consideration. Harbour front property privately owned is at a premium in Saint John, at this time. In recent years, it has been generally accepted, that prices ranging from $1.00 to $1.85 per square foot have been paid depending on location, desirability, and consumer demand.

Both Mr. Corbett and Mr. Mitham agreed that it was very difficult to find lands comparable to those expropriated on the west side of Saint John Harbour. This situation may be easily explained when one examines the map of the area filed as an exhibit at the hearing and notes that by far the greatest part of the lands having access to the water in the immediate area of West Saint John were owned and occupied by the National Harbours Board. Under these circumstances, Mr. Mitham sought properties in West Saint

[2] [1949] S.C.R. 712.

John which had been the subject of recent sales. His method of obtaining this information was somewhat surprising and disturbed Ritchie J.A., as he seems merely to have discussed the size and sale price of these various properties with some solicitors. However, as Ritchie J.A. pointed out, it was said by this Court in *City of Saint John v. Irving Oil Co. Ltd.*[3], at p. 592:

> The nature of the source upon which such an opinion [the opinion of the real estate expert] 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.

As I shall point out hereafter in this case, it is not the credibility of the expert's opinion nor the soundness of the factual base therefor, but rather its applicability to the property expropriated which is the question before this Court.

Mr. Mitham cited five properties particularly, and his evidence thereon was dealt with by Ritchie J.A. in his reasons for judgment. Ritchie J.A. pointed out that four of the five were sales of small residential lots on Winslow and Tower Streets and Riverview Drive, all in west Saint John and some few blocks away from the subject property. The reported sale price of these four lots varied from 11 to 20.7¢ per square foot. None of these lots had any harbour frontage, none were wider than 100 feet and some only 50 feet. They were typical small residential lots and the value could have no relationship to a piece of property over three acres in area bounded by two main streets, and with considerable frontage on the harbour. The fifth property cited by Mr. Mitham was a tract of land on the east side of the harbour having an area of some 186,600 square feet. Very little evidence was given as to this property, except that the appellant's officers had told Mr. Mitham that the appellant had purchased it at a price of 29¢ per square foot. When Mr. Corbett was cross-examined in reference to this property, he replied, "I don't think there is any comparison between that piece of land and the subject property".

Mr. Corbett having testified, as I have pointed out, that there was no comparable property in west Saint John the

[3] [1966] S.C.R. 581.

1968

SAINT JOHN HARBOUR BRIDGE AUTHORITY v. J. M. DRISCOLL LTD.

Spence J.

sale of which he could examine and testify upon, referred to a series of properties on the east side of Saint John Harbour, and Ritchie J.A. also dealt with those properties in his reasons. One was a property known as the Thorne wharf, consisting of some 71,000 square feet which had been sold for $1.65 per square foot, the second, a parcel of land on Water and Prince William Streets in downtown Saint John which was sold at $4.11 per square foot, and which, of course, was in no way comparable. The third consisted of the various properties sold by the Eastern Coal Company to the National Harbours Board in 1947 at $1.70 per square foot. After a very careful analysis of all of the evidence given by these two experts, the members of the Court of Appeal were unanimous in their opinion that the evidence of Mr. Corbett should be accepted for the reason that he based his opinion on properties which had comparable advantages to that of the respondent's, while Mr. Mitham had, on the other hand, based his opinion on small residential lots lacking any of the advantages for commercial development possessed by the respondent's lands. That commercial development would, in the opinion of the appraiser as I have pointed out from his report, be for a large warehouse or manufacturing enterprise. Mr. Corbett had placed a value of $1 per square foot for that use upon the lands, and when such price is considered with the selling price of the various properties which he cited as comparable and which varied from $1.65 up, it will be seen that he appropriately discounted the value to make allowance only for the present potential.

It was the submission of counsel for the appellant that where experts' opinions vary the question of their competence, credibility and the weight to be given to their testimony is a matter to be determined by the tribunal which heard the witnesses and had an opportunity to weigh and compare the value of the various items given. In my opinion, in the present case, the Appeal Division has not trespassed upon that principle, despite some misgivings as to the weight of the evidence given by both experts, the Court of Appeal has considered them as being altogether creditable and as having the facts on which they might base their sometimes rather loosely expressed opinion. The Appeal Division, however, preferred to accept the opinion given by Mr. Corbett over that given by Mr. Mitham on

the ground that the comparable properties cited by the latter were, in truth, not comparable properties while those cited by the former, although not exactly comparable, were of considerably greater assistance in finding the value of the type of property which was in question in the expropriation. In doing so, I am of the view that the Appeal Division found that the tribunal of first instance had misapprehended material evidence of fact and therefore had the right and the duty to make other findings.

To summarize, the Appeal Division were unanimous in accepting the figure of $1 per square foot as being the proper value to be attached to the respondent's lands. For the reasons which I have outlined, I am of the opinion that there was no error in that conclusion. To adopt it would result in the value of the lands for the purpose of the award being fixed at $135,565 but the formal order of the Appeal Division fixed the compensation at $197,565. The difference of $62,000 is the amount found by the arbitrators as being the fair value of the buildings upon the lands and which valuation was not contested before the Appeal Division. As I have already pointed out, Limerick J.A. would not have allowed that amount of $62,000 in addition to the sum of $135,565 being of the opinion that the buildings added nothing to the value of the lands for the purpose of fixing the award upon expropriation.

The value of the buildings at $62,000 had been part of the award made by the Land Compensation Board but it must be remembered that in that award the value of the land was being assessed at the rate of 35¢ per square foot while as I have said the Appeal Division were unanimously of the opinion that it should be fixed at $1 per square foot. It must also be remembered that this latter figure of $1 per square foot represented the opinion of Mr. Corbett as to the value of the land when put to its highest and best use, that is, for a large warehousing or manufacturing enterprise and did not represent the value of the land when used by a small business supplying lumber items to ships. Before any purchaser could utilize the land for that highest and best use, the purchaser would have to remove from the site the considerable number of frame buildings which existed at the time of the expropriation and which had been valuable and efficient for the use for which the owner was putting them at the time of the expropriation.

1968

SAINT JOHN HARBOUR BRIDGE AUTHORITY v. J. M. DRISCOLL LTD.

Spence J.

In these circumstances, I agree with the comment of Limerick J.A. in his reasons for judgment:

> The test of this method of land valuation would be demonstrated if there were two identical lots side by side, one vacant and one with buildings such as were on the land expropriated; under such circumstances would a buyer wishing to establish a warehouse or manufacturing business pay more for the land with the buildings thereon which he would have to demolish than he would for the vacant land? The answer is obvious. It is possible that the cost of removal of the buildings should be deducted from the vacant land value, but as no evidence of what the cost would be was offered and it is possible that a purchaser might be prepared to absorb such cost, this Court would not be justified, in the circumstances, in making any allowance therefor.

Therefore, I am of the view that having adopted the rate of $1 per square foot as the value of the lands, it was an error of principle to add to that amount any valuation of the buildings and that the award of the Appeal Division should be reduced by the sum of $62,000 representing the value of the buildings included in the amount awarded.

Ritchie J.A. would have added two further amounts to the award. Firstly, a sum of $15,000 to represent the special value of the lands to the owner, and secondly, a sum of $15,056.50 to represent damages for business disturbance resulting from the expropriation. The propriety of awarding either of these sums must be considered. It is, of course, true that if the lands have a special value to the particular owner who was in possession of them at the time of the expropriation, then there must be an element of the award to reflect such special value: *Irving Oil Co. Ltd. v. The King*[4], *per* Hudson J. at p. 558 and cases therein cited.

It is also true that the lands in so far as site and equipment were concerned were excellently suited for the use put by the owner and had a special value to him for such purpose. It must, however, be remembered that the Appeal Division are not fixing the value of those lands when used for such purpose but found upon the evidence of Mr. Corbett the potential value of the land based on a higher and better use and thereby increased the value of the lands from 35¢ per square foot to $1 per square foot. I am of the opinion that if there were an element added to that latter rate to compensate for the special value to the owner it

[4] [1946] S.C.R. 551.

would be in breach of the well-recognized principle as stated by Abbott J. in *Jutras v. Minister of Highways for Quebec*[5], at p. 745:

> 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.*

(The italicizing is my own.) I would, therefore, not allow any amount for special value to the owner.

The respondent claimed a 10 per cent addition to the award for forcible taking. Ritchie J.A., citing *Drew v. The Queen*[6], concluded:

> Until such time as the *Drew* judgment is modified or varied, the allowance for compulsory taking is, for all practical purposes, abolished.

In so far as that decision ended the automatic addition of a 10 per cent amount to the award which had been arrived at by a careful consideration of the compensation to which the claimant was entitled, I agree with Ritchie J.A.'s comment. However, I am also in agreement with his view that a displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking. In the present case, the respondent having occupied its lands with this particular business then would expect to obtain a valuation of the lands by a sale on the open market at the amount found by the Appeal Division, *i.e.*, $1 per square foot. It would also expect to be able to terminate his use of those lands for the purpose of carrying on the trade which the respondent carried on in an orderly fashion and, in all probability, to move the site of the enterprise elsewhere. In the present case, the respondent found it impossible to obtain other suitable premises and had to wind up its business selling only the inventory and the personal property. This it had to accomplish in a very short time. As I have pointed out, it was less than two and one-half months from the date of the resolution expropriating the lands to the date on which possession was surrendered.

The evidence as to the realization of the respondent's assets was most unsatisfactory. It would appear that a company known as Murray & Gregory Limited made an agreement to purchase the inventory and all the equipment other than the land and the buildings, but the amount to be paid

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[5] [1966] S.C.R. 732.

[6] [1961] S.C.R. 614.

1968

SAINT JOHN HARBOUR BRIDGE AUTHORITY v. J. M. DRISCOLL LTD.

Spence J.

under that agreement was in no way specified and even at the date of the hearing seems to have been fixed as to each individual item at the time it was required by Murray & Gregory Limited. I am of the opinion that this disorderly realization of the respondent's assets other than land does constitute an element of damage which should be considered under the heading of "business disturbance". Ritchie J.A., with respect, accurately termed it "an amount covering the damage resulting to the company by reason of being forced out of business". The calculation of that amount may be made with some accuracy from the evidence. As I have pointed out above, the average net profit of the company for the last six years was $13,189. It is reasonable to allow one year for the orderly realization of the assets of the business and therefore to postulate that in the year following April 21, 1966, the date of the registration of the resolution expropriating, the company would have earned $13,189. The company yielded possession on July 1, 1966, and from that date on the award would earn interest at 5 per cent. The appellant, therefore, should be debited with the amount of $13,189 for business disturbance less 5 per cent on $135,565 from July 1, 1966, to the end of the year commencing April 21, 1966, or $5,478.31. The compensation for business disturbance therefore would be $7,710.69.

I would, therefore, allow the appeal and amend the award as follows:

For land value, 135,565 square feet at $1 per square foot	$135,565.00
For damages for business disturbance	7,710.69
Total	$143,275.69

The appellant is entitled to its costs in this Court but the costs in the Courts below should be disposed of as in the orders made by the Land Compensation Board and the Appeal Division of the Supreme Court of New Brunswick.

Appeal allowed with costs.

Solicitors for the appellant: Drummie & Drummie, Saint John.

Solicitors for the respondent: Gilbert, McGloan & Gillis, Saint John.

1968

JULIUS MAJORCSAK and AUDRY MAJORCSAK (*Plaintiffs*) ..... APPELLANTS;

*Mar. 13, 14, 15 May 13

AND

NA-CHURS PLANT FOOD COMPANY (CANADA) LTD. (*Defendant*) ..... RESPONDENT;

AND

SAMUEL LAMMENS (*Defendant*).

SAMUEL LAMMENS (*Defendant*) ..... APPELLANT;

AND

JULIUS MAJORCSAK and AUDRY MAJORCSAK (*Plaintiffs*) ..... RESPONDENTS;

AND

NA-CHURS PLANT FOOD COMPANY (CANADA) LTD. (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Liquid fertilizer purchased under contract whereby manufacturer was to arrange for application of product to purchaser's crop—Purchaser subsequently arranging with sprayer to add pesticide to fertilizer—Herbicide added instead of pesticide—Crop destroyed—Sprayer liable in negligence—No liability on part of manufacturer.

The plaintiffs, husband and wife, were the owners of a tobacco farm. Under a written contract the male plaintiff ordered, *inter alia*, 45 gallons of a liquid fertilizer from the defendant manufacturer. It was provided in the contract that the manufacturer would make arrangements to apply the fertilizer to the plaintiffs' crop at local rates, and payment for spraying was to be made by the grower direct to the spraying service company. The chemical was to be applied at the rate of 2 gallons per acre.

The co-defendant, a custom sprayer, was instructed by a representative of the manufacturer that the crop was ready for spraying and he thereupon sent two of his employees to the plaintiffs' farm to carry out the operation. Having learned from these employees that, in accordance with their instructions, the chemical was to be applied at the rate of 1½ rather than 2 gallons per acre, the plaintiff determined that with an additional 5 gallons of the product his entire crop could be sprayed instead of only part of it as he had originally intended. He asked the men if they could obtain from their employer additional fertilizer and upon being assured that they could do so asked if they would also spray endrin (a pesticide) at the same time as the

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*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

1968

MAJORCSAK *et al.* *v.* NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS *v.* MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

fertilizer. One of the men departed for the sprayer's warehouse and, according to his evidence and that of the sprayer, he there picked up a 5-gallon can of the fertilizer and a 5-gallon can of endrin. On his return the spraying commenced and on the completion thereof the men presented their account to the plaintiff and he paid them.

A few days later the tobacco plants, following an abnormal increase in their rate of growth, became wilted. The evidence established that the crop was destroyed by a hormone herbicide of the 2-4-D type. At trial, judgment was given against both defendants, and, on appeal, the Court of Appeal allowed the appeal of the defendant manufacturer but dismissed the appeal of the defendant sprayer. Appeals from the judgments of the Court of Appeal were then brought to this Court.

Held: The appeals should be dismissed.

From an examination of all the evidence it was concluded that the only possible source of the 2-4-D type of chemical which destroyed the plaintiffs' tobacco crop was the contents of the 5-gallon can which was supposed to have contained endrin. This can always was within the sole control of the sprayer and his employees. Having found, on the balance of probabilities, that the sprayer and his employees had sprayed the crop with such a deleterious substance they were liable in negligence.

It was unnecessary to decide the question as to whether or not the sprayer was the agent of the manufacturer for the purpose of applying the fertilizer to the crop. The arrangements made between the male plaintiff and the sprayer's employees were materially different from those that had been undertaken by the manufacturer, and were such as to absolve the manufacturer from responsibility for what later occurred. It was in the performance of the subsequent contract, to which the manufacturer was not a party, that the sprayer was negligent. That negligence could not be attributable to the manufacturer.

Landels v. Christie, [1923] S.C.R. 39; *British & Beningtons, Ltd. v. North Western Cachar Tea Co., Ltd.*, [1923] A.C. 48, referred to.

APPEALS from judgments of the Court of Appeal for Ontario[1], allowing an appeal by the defendant company and dismissing an appeal by the co-defendant from a judgment of Ferguson J. in favour of the plaintiffs in an action for damages for negligence. Appeals dismissed.

P. B. C. Pepper, Q.C., B. A. R. Taylor, and *P. S. A. Lamek,* for Julius and Audry Majorcsak.

C. A. Keith, for Na-Churs Plant Food Co. (Canada) Ltd.

I. W. Outerbridge, for Samuel Lammens.

The judgment of the Court was delivered by

[1] [1966] 2 O.R. 397, 57 D.L.R. (2d) 39.

1968

MAJORCSAK *et al.* *v.* NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS *v.* MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

SPENCE J.:—These are appeals from the judgments of the Court of Appeal for Ontario[1] pronounced on April 15, 1966. In those judgments, the said Court allowed an appeal by the defendant Na-Churs Plant Food Company (Canada) Ltd. from the judgment of Ferguson J. after trial which said judgment was pronounced on January 29 but dismissed the appeal from the judgment against the co-defendant Samuel Lammens. The plaintiffs appeal from the dismissal of the action against the defendant Na-Churs and the defendant Lammens appeals from the confirming of the trial Court judgment against him.

It is necessary to state the facts in some detail. The plaintiffs Julius and Audry Majorcsak, husband and wife, are the owners of a tobacco farm in the Township of Middleton and County of Norfolk.

In March 1962, two representatives of the defendant Na-Churs Plant Food Company Limited, which will be referred to hereafter as "Na-Churs", called on Majorcsak and after conferring with them Majorcsak placed an order as follows. This order was on a printed form supplied by the said representatives of Na-Churs and I repeat it completely:

NA-CHURS PLANT FOOD CO., LTD.
London Canada

CROP SERVICE ORDER

Date March 13th

Name Julius Majorcsak
P.O. Address R.R. 2, Delhi
Lot 48 Concession?
Township Middleton County Norfolk
Shipping Date April

Quantity	Size	Price	Total
45 Gls.	5-20-5		$ 438.75
45 "	10-20-10		2%
45 "	2-18-18		$ 429.98

It is understood that the 'Na-Churs' Plant Food Company will make arrangements to apply 'Na-Churs' Liquid Fertilizer to the crop at local rates.

[1] [1966] 2 O.R. 397, 57 D.L.R. (2d) 39.

1968

MAJORCSAK *et al.* *v.* NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS *v.* MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

Spence J.

Payment for spraying is to be made by the grower direct to the spraying service company at the time of spraying.

TERMS: Cash

Crops and Acres to be sprayed.

30 Acrs. Tob.

Method of applications

To be applied at the Rate of

2 gals/A

Aircraft _____

Own Equipment _____

Custom Spray V

This Order is not subject to cancellation—

No verbal agreements other than herein stated will be recognized.

'D. E. Gaddes'	'Julius Majorcsak'
Representative	Signed:

(Give Detailed Shipping Directions on Reverse Side).

Majorcsak had ordered the same type of spray on the previous year and the crop had been sprayed by a John Jakobi. In this action, we are concerned only with the second chemical in the list of three set out on the said order, *i.e.*, 45 gals. of 10-20-10. Majorcsak testified that he suggested to Na-Churs' representative that Mr. Jakobi, whose services had been satisfactory in the year 1961, should again be used to spray the said 10-20-10. On or about April 3, 1962, an employee of Na-Churs delivered to the premises of Majorcsak the three 45-gallon drums of chemicals and one Steve Vonga signed for their receipt. According to Majorcsak's evidence, those drums were then placed in what he described as his steam room, being one room in the pack barn on the tobacco farm. The building was not locked but, again according to Majorcsak's evidence, the drums were undisturbed until they were used. The first drum, *i.e.*, that of 5-20-5, was used at the time Majorcsak planted his tobacco crop and we are not further concerned with it. Some time about a week before July 17, 1962, a representative from Na-Churs came onto Majorcsak's farm and inspected it. He then went to one Samuel Lammens, who is a defendant in the action, and instructed him that Majorcsak's crop was ready for spraying with the 10-20-10. Majorcsak testified that no one told him when that spraying was to take place. On July 17, 1962, at about 5:30 p.m., two men arrived on Majorcsak's farm towing behind a truck an implement called a "hi-boy". This is a large, three-wheeled piece of equipment the drive being upon the large front wheel with the two wheels one at each side of the rear. It

contains, in addition to the motor which drives the machine, a pump, a large tank said to be of 200 gallon capacity, and three booms each of which held three nozzles. The full width of the vehicle when the booms were opened and the nozzles ready to operate was thirty feet. Majorcsak recognized the purpose for which the equipment was there and asked these men if they came from Jakobi. They replied that they had been sent there by Mr. Lammens and were there for the purpose of spraying the Na-Churs plant fertilizer.

In further conversation, Majorcsak ascertained that their instructions were to spray the fertilizer at the rate of only one and a half gallons per acre. An inspection of the order which I have set out above, shows that the chemical was to be spread at the rate of two gallons per acre. Majorcsak realized that at the rate of only one and a half gallons per acre, his 45-gallon drum would not be used up in spraying the 24 acres which he had intended originally to cover and determined that with only five gallons more of 10-20-10 he could spray his whole crop which he believed to be about 33¼ acres but which turned out at a later measurement to be very little less than 35 acres. Majorcsak asked these two men who were Fish and Lauwerier if they could obtain from their employer additional 10-20-10 and upon being assured that they could do so asked if they would also spray endrin at the same time as the 10-20-10. The latter chemical is one for the destruction of worms which Majorcsak had noticed appeared in his crop and in the previous year he had Jakobi spray a mixture of 10-20-10 and endrin. Again Fish and Lauwerier agreed that they could spray the two chemicals at the same time and stated that Mr. Lammens had in his warehouse a supply of endrin. Thereupon, Lammens' employee drove the hi-boy inside the pack barn, the three men rolled out the 45-gallon drum of 10-20-10 and the employee Lauwerier removed the bung which had sealed that drum. There is direct contradiction in the evidence as to what occurred when this bung was removed. According to Majorcsak, it could only be removed when the Lammens' employees obtained a larger wrench and when it did come free the movement was accompanied by a gushing or popping sound. On the other hand, according to Lammens' employees, the bung was so easily removed that Lauwerier who was operating the wrench fell backwards as it turned too freely.

1968

MAJORCSAK *et al.* v. NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS v. MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

Spence J.

For reasons to which I shall refer hereafter, neither the learned judge nor I regard such contradiction as important.

Upon the bung being removed, Majorcsak left for the fields intending to assist his men in removing the sprinkler heads of an irrigation system which were protruding above ground and which would have been in the way of the hi-boy as it proceeded down the rows of tobacco. Lammens' employee Lauwerier departed in the pick-up truck for Lammens' warehouse. According to the evidence given by that employee and by Lammens, he there picked up and put in the truck a five-gallon can of 10-20-10 and a five-gallon can of endrin and again, according to that evidence, both cans were sealed and the seal was removed by Lammens at his own warehouse. These employees of Lammens testified that in accordance with their usual practice, on the first occasion, they put into the tank on the hi-boy enough to do about one-half of the crop. This they did by inserting in the hole in the top of the drum of 10-20-10 a hose which ran from the pump on the hi-boy and then pumping from the drum into the tank in the machine, sufficient of the 10-20-10. They then took the hi-boy alongside the Majorcsak water tank and in the same fashion pumped from there sufficient water to make the mixture with the 10-20-10 the proper one for the purpose.

Lauwerier returned from Lammens' warehouse with the five-gallon can of endrin and the additional five-gallon can of 10-20-10. Although it is not definitely stated in the evidence, it appears to me a necessary conclusion that no spraying was done until Lauwerier had returned to the Majorcsak farm. Both men testified that they only filled the tank on the hi-boy twice; both testified that the chemical endrin was used in the mixture which covered the whole crop. Fish testified that for the first driving of the machine, he operated it while Lauwerier rode on the machine and watched the booms. Fish testified that they used the spray on the field close to the barn and south and east of it, and described in detail his course of operation up and down the rows of tobacco, including the folding of the three booms to permit the spraying of what he thought were the last two short rows close to the fence.

The spraying continued long after dark and was only completed about 1:00 a.m. At that time, the two men pre-

sented their account to Majorcsak and he paid them. The receipt for the payment was produced at trial and reads:

One five-gallon can 10-20-10	$ 19.75
Spraying 33 acres at $1.75	57.75
Endrin at $2.00	64.00
Julius Majorcsak	$141.50

Paid
Larry and Roger

During the two days which followed, Majorcsak observed what he believed to be a very abnormal increase in the growth of his tobacco plants, with the exception of the two rows close to the fence near the barn. By the 21st, the plants were definitely wilted and he went to Lammens warehouse to confer with Lammens. On the previous Thursday, July 19, in the forenoon, Majorcsak swore he telephoned to one Lelenko and asked Lelenko to get in touch with Mr. Geddes; Mr. Geddes was Na-Churs' representative who had attended Majorcsak and sold him the 10-20-10 chemical and his name appears on the order as a witness to Majorcsak's signature. Majorcsak swore that he knew Lelenko was also a representative of Na-Churs. He swore that he did not know Lammens and did not know how to contact the man who had done the spraying. Majorcsak's ability to read English is very limited.

On the 21st, Majorcsak complained to Lammens as to the state of his crop and asked Lammens to come to his farm and inspect it. When Lammens did so, a man named Wiggars, also an employee of Na-Churs, was present and together they went through the crop inspecting the damage. The condition of the crop is graphically illustrated in a photograph produced at trial as ex. 34 which, however, was not copied into the Appeal Case. The photograph, according to the evidence of the photographer, was taken on July 24 and it shows the two rows of tobacco plants in the foreground as appearing perfectly normal while all those from there to the far side of the field appear to be completely wilted. The damage to the crop need not be described in detail as I shall refer to the scientific evidence as to such damage and the cause thereof hereafter.

1968

MAJORCSAK *et al.* *v.* NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS *v.* MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

Spence J.

Lammens' employees had departed from Majorcsak's premises in the early morning of July 18. They left the 45-gallon drum of 10-20-10 which had an unused residue of one gallon or a little more therein. They also left an empty five-gallon can of 10-20-10. They took with them, however, the tin of endrin which had in it some residue of the chemical which it had contained. According to the evidence of Lammens and of his employee Fish, that residue was used in the same hi-boy the very next morning, *i.e.*, the morning of July 18, to spray about eight acres of Lammens' own crop with the pure endrin, *i.e.*, not mixed with 10-20-10, and Lammens' crop was utterly unaffected. The learned trial judge made a finding of fact in reference to this evidence to which I shall refer hereafter. It will also be necessary to refer to certain other evidence from time to time but it would be more convenient to do so when considering the actual point as to which such evidence has any relation.

At trial, the only scientific evidence was called on behalf of the plaintiff. Professor Clayton M. Switzer, the professor of botany and plant physiology at the Agricultural College, Guelph, Ontario, and the chairman of the Ontario Weed Committee, gave evidence as an expert. The trial judge described him in these words:

> He is perhaps, if not certainly, the person best qualified in this province to identify 2-4-D damage.

His opinion was corroborated by Norman Skeidow, B.Sc., a graduate of Macdonald College, McGill University, and then an employee of the Ontario Department of Agriculture at Delhi. That evidence was that the crop had been killed by a hormone herbicide of the 2-4-D type and that nothing else did so. The experts were in agreement that neither 10-20-10 nor endrin, no matter how inexpertly applied, would cause the type of damage which had occurred in the Majorcsaks' crop and which they refer to as systemic, *i.e.*, it was through the whole plant as distinguished from any spotting or curling of leaves. Hereafter my reference to 2-4-D should be understood as referring to any hormone herbicide of that general chemical nature.

After the trial, which lasted seven days, Ferguson J., the learned trial judge, reserved judgment, and subsequently, in very carefully detailed reasons, gave judgment against both the defendant Na-Churs and the defendant Lammens,

being of the opinion that by the contract which I have quoted above, Na-Churs not only agreed to sell and deliver the chemical 10-20-10 to Majorcsak but to spray it on the crop and that there was an implied term of the agreement that it should be done without negligence. He found that, as agent of Na-Churs, Lammens did spray the crop and due to negligence, either in his spraying or in the supplying of the chemical in the first place, the crop was ruined.

McGillivray J.A., giving reasons for the Court of Appeal, was of the opinion that Na-Churs' contract with Majorcsak was to supply him with chemical and to arrange that the fertilizer 10-20-10 be sprayed by some person who was chosen by them but who would be solely the agent of Majorcsak in carrying out his task. McGillivray J.A. therefore concluded:

> Upon these facts, with all deference to the learned trial judge who reached a contrary result, I must conclude that Na-Churs in its contract, did no more than agree to find for the plaintiff a custom sprayer to do the work and that neither in contract nor in tort had it any vicarious responsibility for the tortious act of Lammens.

McGillivray J.A. continued in his reasons to examine the case against the defendant Lammens and concluded that Lammens' liability in tort had been established and confirmed the judgment against this defendant.

I think we may well start with the proposition that from wherever it came, the chemical which ruined the plaintiffs' tobacco crop was a hormone herbicide such as 2-4-D. That is the uncontradicted evidence of the experts and all of the other evidence confirms their opinion. It, therefore, becomes necessary to determine what was the source of that 2-4-D type of chemical and whether its application to the plaintiffs' crop of tobacco results in any liability on either one of the defendants. Seven different possible sources of the hormone chemical have been suggested, as follows:

1. The creek from which the irrigation water was taken for Majorcsak's farm might have been contaminated with 2-4-D.

2. The water in Majorcsak's water tank standing in their barnyard might have been contaminated with 2-4-D.

3. There might have been minerals in the soil containing 2-4-D.

1968

MAJORCSAK *et al.* *v.* NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS *v.* MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

Spence J.

4. The tank on Lammens' hi-boy might have been contaminated through its previous use in application of 2-4-D to other crops.

5. The 45-gallon drum of 10-20-10 might have been so contaminated.

6. The five-gallon can of 10-20-10 which came from Lammens might have been so contaminated.

7. The five-gallon can of what was said to be endrin obtained from Lammens might have been contaminated, or it might have been a five-gallon can of 2-4-D.

The first three of these possibilities need only be mentioned. The complete answer to the possibility that the creek had been contaminated and that, therefore, the irrigation which had been done some three or four days before the plants were sprayed might have resulted in the destruction is the evidence that the whole crop was damaged well-nigh evenly while on Majorcsak's evidence his irrigation equipment only covered six of the roughly 34 to 35 acres of planting. As to the second possible source, the water used to mix with the chemical in the tank in the hi-boy came from Majorcsak's water storage tank standing in his barnyard. That water had been pumped there from a well in Majorcsak's cellar. The family all drank water from that well and the stock was watered from that tank. Moreover, the tank stood high—one witness, I think, said twenty feet above the ground, and it would simply be fantastic to consider that anyone had climbed to that height in order to contaminate the water tank with what would have been a very considerable dose of a noxious chemical such as 2-4-D. I might add here that there was not the slightest evidence throughout the trial of any person having enmity for Majorcsak. As to the third possible source, there was no evidence whatsoever that there was any mineralization of the soil such as could possibly cause the damage which occurred to Majorcsak's crop. As to the fourth possible source of 2-4-D, *i.e.*, the tank on the hi-boy being contaminated, a great deal of evidence was adduced in reference to this possibility. Lammens had owned and operated two different hi-boys—one, an older smaller model, and a second, what he called the big hi-boy, which was a larger model with a 4-cylinder motor and with a 200-gallon tank. He swore, and so did his employees that he had not

used the larger hi-boy in the whole of that season for the spraying of 2-4-D although he had used the smaller hi-boy for such purpose as late as July 12.

Of course, Majorcsak did not know whether the outfit which was used to spray his crop was the large hi-boy or the small, older piece of equipment. Although the evidence relied upon by Lammens to prove that the larger equipment alone has been used on Majorcsak's farm was somewhat confused and unconvincing, and although the fact that Lammens did not spray at all after the completion of the Majorcsak job at about 1:00 a.m. on the 18th until the 24th, while he had been busy using the same large hi-boy in spraying on the 12th, 13th, 14th, 15th and 17th, would seem to be rather suspicious, I am unable to come to the conclusion that there is any convincing evidence that the tank on the outfit used by Lammens' men when they arrived at Majorcsak's farm was contaminated with a 2-4-D like chemical before it arrived upon the premises. It is true that Mr. Shedow, upon being asked what was the power of 2-4-D as a herbicide, replied that it takes very minute quantities to cause injury, adding "I can't say in parts per million but it is very light". Dr. Switzer, on cross-examination, however, agreed that the particular damage to Majorcsak's crop as illustrated in the photographs would require 2-4-D in the proportions of a herbicidal weed spray and that it probably did represent about one pint per acre use.

Much more difficult is the consideration of the 5th, 6th and 7th possible sources of the 2-4-D contamination. The fifth dealt with a possibility that the 45-gallon drum of 10-20-10 purchased from the defendant Na-Churs was contaminated when it arrived at the farm of Majorcsaks or that it was contaminated by 2-4-D thereafter and prior to it being pumped into the tank of the hi-boy. It is significant that the defendant Na-Churs did not manufacture 2-4-D and had no 2-4-D around its plant. There seems not the slightest ground to even suspect that when the 45-gallon drum of 10-20-10 was delivered to Majorcsak it was anything but that same chemical and nothing else. As I have said, when the spraying work had been completed, there was still a small amount of chemical in that drum. A sample was taken from that residue by Klaus Mueller, an employee of

1968

MAJORCSAK *et al.* *v.* NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS *v.* MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

Spence J.

S. R. Bennett Limited, chemical analysts, with Majorcsak assisting him. At the time the sample was removed the drum smelled very strongly of ammonia which is the typical smell of the chemical 10-20-10 and not of the chemical 2-4-D. Mueller took that sample to his laboratory and analyzed it. He testified that it contained 10.17 per cent of nitrogen, no nitrate nitrogen, 19.15 per cent of phosphoric acid, and 9.92 per cent of water soluble potash, in other words, it was 10-20-10 for commercial purposes. There was on the label of the drum a statement that there were traces of certain other chemicals. Mueller did not attempt to separate out in his analysis these traces, nor did he test the sample for 2-4-D

I agree with McGillivray J.A. when he said:

> It is difficult to believe that an analyst close to it as he would be failed to recognize the presence of 2-4-D.

Of course, this evidence of analysis would rule out the presence of that 2-4-D contamination not only when the drum left Na-Churs plant but up to the time when the contents thereof had been used to fill the tank on the hi-boy. If the 45-gallon drum of 10-20-10 had been contaminated by a 2-4-D type of chemical after it left Na-Churs plant and before the contents were used to fill the tank on the hi-boy it would have had to have been done by either the plaintiff Majorcsak himself, by some of his hired men or by some stranger who had nefariously entered the plaintiffs' premises, probably by night, in order to contaminate the can. With deference, I agree with the learned trial judge when he said:

> No one suggested or said that any 2-4-D was found in it. It is incredible that the plaintiff would deliberately contaminate the barrel. It is improbable that his hired men did so, as there was no suggestion that there was any 2-4-D on the premises or that any had been used by the plaintiff, or if there were any why they would dispose of it by pouring it into a full drum of 10-20-10.

I add that it is equally incredible to picture some stranger with enmity toward the plaintiffs, and none was suggested, coming probably by night upon the plaintiffs' premises to put into a full barrel of 10-20-10 enough 2-4-D to cause the damage which was exhibited by the plaintiffs' crop. Therefore, in my view, whether the bung was removed on the 45-gallon drum with a pop or easily there is no evidence

whatever to suggest that the contents of that drum contained anything except the 10-20-10 which it was supposed to contain.

The remaining two possible sources of contamination were the two five-gallon cans which were brought upon the plaintiffs' premises from Lammens' warehouse by Lauwerier on the evening of July 17. One of those cans it was said contained 10-20-10 and the other it was said was a can of endrin. Lammens testified that he took both of these cans from his warehouse to give them to his employee Lauwerier and that before Lauwerier left the warehouse he, Lammens, broke the seal on the can which was said to contain endrin. There was no evidence as to when the seal on the can which was said to contain 10-20-10 was broken. The reasons given by Lauwerier for the breaking of the seal on the can of endrin at Lammens' warehouse were that it was realized that the whole of the can would not be used and therefore the balance would have to be returned and it was necessary to take care in breaking the seal so as not to damage the spout which was inside the seal, and that Lammens had a knife handy. It is rather unusual that a five-gallon can of a rather valuable liquid should be opened at Lammens' warehouse and then carried by truck in that condition six miles to the plaintiffs' farm. The evidence as to the use of the 45-gallon drum of 10-20-10, the five-gallon can of 10-20-10, and the five-gallon can which was said to contain endrin was given by the defendant Lammens' witnesses only as the plaintiff was not present when the contents of those cans were pumped or poured into the tank on the hi-boy. It was the evidence of these witnesses that the five-gallon can of 10-20-10 was used only for the second filling of that tank on the hi-boy. When the employees left the plaintiffs' premises that night, they left on the premises the 45-gallon drum and the five-gallon can of 10-20-10. As I have said, there was a residue in the 45-gallon drum but the five-gallon can was, on their evidence and on the evidence of both the plaintiff and the chemist Mueller, quite empty. On the other hand, the endrin had not been used up since it required only one pint per acre and since there were, at the most, nearly thirty-five acres to be sprayed, there would be not less than five pints of the chemical left in the five-gallon can. Therefore, the five-gallon can labelled

1968

MAJORCSAK *et al.* v. NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS v. MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

Spence J.

"endrin" with its small residue of contents was returned by Lammens employees to his warehouse. Lammens and his employee Fish swore that it was used on the very next morning to spray eight acres of tobacco on Lammens' own farm and that the tobacco suffered no ill effects whatsoever from the spraying.

As McGillivray J.A. pointed out in his reasons for judgment, the learned trial judge misunderstood the evidence which I have restated above, as he said:

> The empty can of 10-20-10 brought to the plaintiffs' farm by Lauwerier on his return trip from Lammens' warehouse, was taken back to Lammens. Why the empty 10-20-10 was not left on the plaintiffs' farm, if all of its contents had been used, was not explained. It is, of course, possible that the supposed five gallons of 10-20-10 was in fact 2-4-D and indeed this would seem to me to be the only reasonable explanation of the damage. The circumstances are such that they are, in my view, consistent only with that conclusion.

After referring to other evidence, the learned trial judge continued:

> There is some element of speculation in this, but it seems to me to be the only possible explanation of the two healthy rows and such a theory is consistent with the fresh can of supposed 10-20-10 being used after Lauwerier's return, and that it was not 10-20-10 but 2-4-D. It is also consistent with the fact that some 10-20-10 remained in the 45 gallon drum and, it is consistent with the two healthy rows being left unsprayed at one side of the field.

The learned trial judge then made this specific finding of fact based on credibility:

> By all the standards of tests for credibility I reject the evidence of Lammens and his witness (I observed them carefully) that they did not spray 2-4-D on the plaintiffs' crop. I also reject their evidence that they sprayed Lammens' own crop without damage. If they did so, it must have been after the Hi-Boy was decontaminated.

It is evident that the learned trial judge made this finding of fact believing that the can which was purported to contain 10-20-10 had been returned by Lammens' employees to the Lammens' warehouse and believing that it was the evidence of Lammens and his employee that the balance of the contents of that can had been used to spray Lammens' own field the next day. Such belief was, of course, in error. It was the five-gallon can which was said to have contained endrin which was returned partly used to Lammens' warehouse, while the five-gallon can which was said to contain

10-20-10 had been completely used and the empty can had been left on the plaintiffs' farm. In my view, the error does not destroy or render of any less importance the direct finding of fact by the learned trial judge based on his assessment of the credibility of the witnesses. He was of the opinion that it was the partly-used five-gallon can which had been returned by Lammens' employees to Lammens' warehouse, and which they said they had used on Lammens' own field the next morning, which had contained the deleterious substance, and on their evidence he was ready to reject their claim that they did not spray 2-4-D on the plaintiffs' crop and that they sprayed Lammens' own crop without damage. It is realized that to find that that five-gallon can contained not endrin, as it was supposed to contain, and as Lammens and his witness first swore that it did contain, but rather a 2-4-D type of chemical is to reject the evidence of Lammens and his witness Fish but, in my view, the trial judge has made an unassailable finding of fact based upon credibility on that topic.

There are, moreover, several most important factors tending to corroborate that view. The plaintiff had full title to both the 45-gallon drum of 10-20-10 which he had purchased from Na-Churs, and the five-gallon can of 10-20-10 which he had purchased from Lammens. It was, therefore, perfectly proper that both of those containers with any contents remaining in them should be left with the plaintiff on the plaintiffs' property. On the other hand, the plaintiff had no title to any endrin. According to the contract made between the plaintiff and Lammens' employees on the evening of July 17, these employees were to spray endrin on the plaintiffs' crop at the rate of one pint per acre and were to charge by the acre. The account rendered and paid so demonstrates. Lammens would, therefore, be entitled to have taken back to his own warehouse any unused part of the five-gallon can said to have been endrin. It is significant that Lammens ordinarily sprayed 2-4-D under exactly the same arrangement. Page 21 of ex. 53 is a book of Lammens' invoices which Lammens produced and to which he referred in his testimony. It is a copy of an invoice to a farmer August Verhegghe dated July 12, 1962, just five days before the plaintiffs' crop was sprayed and it reads: "19½ acres 2-4-D sprayed at $2.25 — $43.87". It would be inevitable

1968

MAJORCSAK *et al.* *v.* NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS *v.* MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

Spence J.

that with spraying sometimes endrin and sometimes 2-4-D in this fashion on fields of varying sizes there would be some small amounts left in the containers, and it matters not whether Lammens only received 2-4-D in the original containers of one-gallon size. The remains of both chemicals might well have been stored in odd empty five-gallon cans. In fact, the plaintiff testified that some two weeks after his crop was sprayed, he went to Lammens' warehouse and asked Lammens for a small quantity of endrin. Lammens took an empty five-gallon can and poured endrin from another open five-gallon can, which he had taken from amongst five in the back of his truck, in order to give to the plaintiff the small quantity of endrin required.

As I have said, the damage occurred over the whole crop with the exception of the two short rows in one corner where it would be most difficult to spray with such a large piece of equipment as the hi-boy. The five-gallon can of 10-20-10 was used only in the second spraying, and therefore if it had contained the deleterious substance it would not have covered the whole field. The so-called endrin, on the other hand, was used to spray the whole crop. Therefore, I have concluded from all of the evidence that the only possible source of the 2-4-D type of chemical which destroyed the plaintiffs' tobacco crop was the contents of the five-gallon can which was supposed to have contained endrin. This five-gallon can always was within the sole control of Lammens and his employees. The plaintiff never had possession of it or any property in it. One need not have recourse to the rule of evidence known as *res ipsa loquitur* to find that if Lammens and his employees sprayed the plaintiffs' crop with such a deleterious substance they are liable in negligence. That is a finding of fact based on the balance of probabilities. The balance of probabilities is the only standard which need be applied. To use the words of Duff J., as he then was, in *Landels v. Christie*[2], at p. 41:

> Other explanations were suggested but there was nothing in the facts pointing to any of them as an agency actually or probably operative and my conclusion is that there is sufficient preponderance of probability

[2] [1923] S.C.R. 39.

in the circumstances proved in favour of the trial judge's conclusion to cast the burden of explanation upon the appellants—a burden of which the trial judge held they have not acquitted themselves.

I would, therefore, dismiss Lammens' appeal with costs.

I turn next to consider Majorcsaks' appeal from the dismissal of the action as against the defendant Na-Churs.

The learned trial judge in his reasons for judgment found that Na-Churs were liable for the damages on the ground that Lammens was an agent of Na-Churs for the purpose of applying the 10-20-10 contained in the 45-gallon drum which had been purchased directly from Na-Churs and delivered by that defendant directly to the plaintiffs. In his reasons, the learned trial judge said:

> It is my view that the words of this contract amounted to an agreement by Na-Churs to do the spraying... The defendant company undertook to provide the spraying services, including the equipment and must accept whatever liability such an arrangement entails. I do not agree with counsel for the defendant company that their obligation ended with their nomination of Lammens as the person to do the spraying. The relationship turns on the proper interpretation to be given to the contract between the plaintiff and the defendant company. The defendant company agreed to supply the spraying service.

McGillivray J.A., giving judgment for the Court of Appeal for Ontario, said:

> The key words in this contract are "Company will make arrangements to apply 'Na-Churs' Liquid Fertilizer to the crop at local rates". An initial observation is that, if the agreement is, as submitted, one whereby the company undertakes to apply the fertilizer, the words "make arrangements for" are redundant.

McGillivray J.A. also said:

> ...I must conclude that Na-Churs in its contract, did no more than agree to find for the plaintiff a custom sprayer to do the work and that neither in contract nor in tort had it any vicarious responsibility for the tortious act of Lammens.

In this Court, counsel for both Majorcsaks and Na-Churs presented detailed and able argument on this question of the status of Lammens as an agent of Na-Churs. In my opinion, the appellants Majorcsaks' appeal may be disposed of without deciding that question. Although I am far from convinced that Lammens could be held to be, when his men arrived on Majorcsaks' farm on July 17, the agent not of Na-Churs with whom alone he had dealt but rather of Majorcsak who had never heard of him and who

1968

MAJORCSAK *et al.* *v.* NA-CHURS PLANT FOOD CO. (CANADA) LTD. *et al.*

LAMMENS *v.* MAJORCSAK *et al.* AND NA-CHURS PLANT FOOD CO. (CANADA) LTD.

Spence J.

had not arranged when or how his crop was to be sprayed. I find myself in agreement with McGillivray J.A. when he concluded his reasons by saying:

> Even had I reached a contrary conclusion to the above, I am of the opinion that the subsequent arrangements made between the male plaintiff and Lammens' employees on July 17th, were materially different from those found by the trial judge to have been undertaken by Na-Churs in its contract, and were such as to absolve Na-Churs from responsibility for what later occurred.
>
> Whatever obligation arose under the contract of March 13th, it was effectively terminated on July 17th when the male plaintiff authorized what was, in effect, another contract, namely, to spray a different acreage at a different rate per acre and with some additional different materials. Na-Churs can well assert that, had the original contract terms been observed, the contents of the 45-gallon drum having been declared free of contamination, no damage would have resulted to the crop.

For the reasons which I have already outlined, there seems to be no other possible conclusion than that the 2-4-D like chemical which caused the damage came from the five-gallon can which was labelled "endrin". This can was the property of the defendant Lammens and it was used by Lammens to spray the plaintiffs' crop of tobacco. It was no part of the contract between the plaintiffs and Na-Churs that endrin should be supplied. Endrin was not a product produced by the Na-Churs company. The chemical endrin is a product produced by the Chipman company. There is no way of determining whether if the Na-Churs representatives had had an opportunity they would have even agreed to the mixture of the chemical 10-20-10, which they supplied, with the chemical endrin. It is true that minor variations of a contract when made by an authorized agent, if Lammens might be considered an authorized agent, will result in a variation and not a rescission of the original contract: *British & Beningtons, Ltd. v. North Western Cachar Tea Co., Ltd.*[3], and many other cases may be cited in support of the same principle. In so far as the variation of the rate of application of the 10-20-10 from two gallons per acre, as set out in the original contract, to one and a half gallons per acre, such authority would apply to prevent the rescission of the contract. If Lammens were Na-Churs' agent, that variation was made by its agent on its instructions. The other variation, however, was not of any such inconsequential nature but was, in fact, a complete change

[3] [1923] A.C. 48.

in the contract and in the parties thereto. The original contract had been to spray the chemical sold by the Na-Churs company on, according to the contract, thirty acres of the plaintiffs' crop at the rate of two gallons per acre. It is difficult to understand how, under such circumstances, only 45 gallons of 10-20-10 were purchased, as that would permit spraying at the rate of only one and a half gallons per acre, the rate finally used. The contract as made between Lammens' agents and Majorcsak was for the spraying of about 35 acres of tobacco crop with a mixture of the 10-20-10, sold by the Na-Churs company, and endrin, which Lammens supplied and which had come from a different source. It was in the performance of the latter contract, to which Na-Churs was not a party, that Lammens was negligent. I cannot understand how that negligence can be attributable to the defendant Na-Churs. I would, therefore, affirm the judgment of the Court of Appeal in the dismissal of the action against the latter defendant.

In the result, I would dismiss both appeals. The respondent Na-Churs is entitled to its costs against the appellants Majorcsaks, and the respondents Majorcsaks are entitled to costs as against the appellant Lammens.

Appeals dismissed with costs.

Solicitor for Julius and Audry Majorcsak: Arnold Taylor, Delhi.

Solicitors for Na-Churs Plant Food Co. (Canada) Ltd.: Keith, Ganong, Mahoney & Keith, Toronto.

Solicitors for Samuel Lammens: Gibson & Linton, Tillsonburg.

1968
*Mar. 21
May 22

HELEN BELL, JAMES E. BELL and DAVID GREY BELL and MARJORIE BELL, infants under the age of twenty-one years, by their next friend, Kenneth Bell, and the said KENNETH BELL and THE ONTARIO HOSPITAL SERVICES COMMISSION (*Plaintiffs*) ..... APPELLANTS;

AND

WILLIAM SAMUEL SMITH and JOHN WILLIAM CHARLES SMITH (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence—Evidence given by plaintiffs' former solicitor on behalf of defendants—Duty of solicitor to refrain from disclosing confidential information unless client waives privilege—Impropriety of putting to solicitor questions involving disclosure of confidential information without evidence of proper waiver—Evidence in violation of privilege should not be received.

Trial—Plaintiffs interviewed by judge in chambers without counsel being present and without reporter—Interference with clients' rights to benefit of advice of counsel—Departure from rule of judicial conduct.

The defendants brought an application for judgment in accordance with an alleged settlement with the plaintiffs for claims made in an action arising out of a motor vehicle accident. The motion came on for hearing on February 10, 1966, and the proceedings continued throughout that day and again on May 27, 1966. Judgment for the adult plaintiffs was granted on May 27 in terms of the settlement alleged and judgment for an infant plaintiff was reserved. On appeal, the Court of Appeal dismissed the plaintiffs' appeal and an appeal was then brought to this Court.

At the hearing on February 10, 1966, the solicitor who had acted for the plaintiffs until February 8, 1966, appeared under subpoena and gave evidence on behalf of the defendants. Conflicting sworn statements as to whether the then counsel for the plaintiffs objected to the giving of evidence by the former counsel were subsequently made.

On May 27, 1966, after the plaintiffs had given evidence, the judge requested that he interview the plaintiffs in his chambers, and he asked counsel to consent that this be done without the presence of counsel. Such consent was given, and the interview was held but without a court reporter being present.

Held: The appeal should be allowed; new trial ordered.

It was improper for a client's former solicitor not to claim the privilege of refusing to disclose confidential information without showing that it had been properly waived. Also, doubt was expressed about the propriety of putting to a solicitor questions that involve the disclo-

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

sure of confidential information without first bringing in evidence of a proper waiver. In any case, because the client's privilege is a duty owed to the Court, no objection ought to be necessary and the evidence in violation of the privilege should not be received.

As to the plaintiffs having been interviewed by the judge of first instance in his chambers without counsel being present and without a reporter, this was a serious interference with the clients' rights to the benefit of advice of counsel and was also a departure from the rule of judicial conduct that a judge ought never to put himself in a situation where one of the parties is apt to be induced to look upon him as an adviser rather than an impartial arbitrator.

An acceptable record as to what happened in the judge's chambers was lacking, and in view of the state of confusion as to whether there had been consent on which to base the judgment of the first instance, this Court was of the opinion that the plaintiffs should have a right to have their action tried in open court.

Beer v. Ward (1821), Jacob 77, applied; *Majcenic v. Natale* [1968] 1 O.R. 189, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Richardson J. Appeal allowed.

R. N. Starr, Q.C., for the plaintiffs, appellants.

John J. Fitzpatrick, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on June 6, 1967. By that judgment, the Court dismissed an appeal from Richardson J. who had given judgment on May 27, 1966. The appeal was carried in the aforesaid style of cause but it appears that Marjorie Bell, one of the plaintiffs, attained the age of 21 years during the course of the litigation. It also appears that the proper name of the infant plaintiff is David Guy Bell. These changes should be reflected in the style of cause and the formal order of this Court should be issued showing the plaintiffs as HELEN BELL, JAMES E. BELL, MARJORIE BELL and DAVID GUY BELL, infant under the age of twenty-one years, by his next friend Kenneth Bell and the said KENNETH BELL and THE ONTARIO HOSPITAL SERVICES COMMISSION.

The circumstances involved are rather intricate and of the most unusual nature and it is, therefore, necessary to relate them in some detail. On August 27, 1962, the plain-

1968

BELL *et al.* v. SMITH *et al.*

Spence J.

tiff James Bell, was operating a motor vehicle owned by the plaintiff Kenneth Bell, his father, and with passengers the plaintiffs Helen Bell, his mother, and David Grey Bell (properly called David Guy Bell) and Marjorie Bell. The vehicle came into contact with one owned by the defendant John William Charles Smith due, to what was alleged by the plaintiffs, to be the negligence of the said defendant Smith. One Commiski, an employee of the Pilot Insurance Company, recommended that the plaintiffs consult either Mr. Henry Schreiber, Q.C., or Mr. John Agro, Q.C., to act on their behalf. The plaintiffs chose to consult Mr. Henry Schreiber. Due, it was said, to the continued serious physical conditions of the various plaintiffs, a statement of claim was not issued until November 12, 1965. A statement of defence was issued on December 21, 1965, and issue was joined on December 22, 1965.

On January 6, 1966, the various plaintiffs were examined for discovery, and on January 11, 1966, the solicitors for the defendants gave notice of motion of an application for leave to make a payment into court in full satisfaction of the claims of the plaintiffs. These examinations for discovery and this notice of application for leave to pay into court seem to have very much increased the tempo of the discussions for settlement of the action between the solicitors for the plaintiffs and for the defendants. The solicitor for the plaintiffs conferred with his client Mrs. Helen Bell by telephone almost immediately after the examinations for discovery and then the various plaintiffs attended his office on January 10 and on January 12. During these latter occasions there were telephone conversations between the solicitors for the plaintiffs and for the defendants, and the amounts of the settlements were discussed in great detail. The record contains many long memoranda setting out how various amounts were arrived at.

The plaintiff Helen Bell has testified that, after a very long conference on January 12, 1966, she and her co-plaintiffs agreed to the settlement which was proposed and which her then solicitor, Mr. Schreiber, said was the utmost he could obtain from the solicitor for the defendants. Mr. Schreiber seems to have been greatly concerned at the possible penalty in costs which the plaintiffs would have incurred had the application for leave to pay into court been

granted and then the payment made thereunder have exceeded what the plaintiffs would have recovered at trial.

So soon as the plaintiffs had, with great reluctance, expressed their agreement to settle in the amounts outlined by Mr. Schreiber in this conference, he telephoned at once to Mr. Agro, the solicitor for the defendants, to inform him of such agreement, and on the same day wrote a letter in which he set out the matter in these terms:

> This will confirm the settlement in the above action on the following terms:
>
> | | | |
> |---|---|---|
> | MARJORIE BELL | —inclusive of special and general— | $15,550.00 |
> | HELEN BELL | —inclusive of special and general— | 10,700.00 |
> | GUY BELL | —inclusive of special and general— | 6,900.00 |
> | JAMES BELL | —inclusive of special and general— | 4,250.00 |
> | COSTS | — | 3,740.00 |
> | | | $41,140.00 |

It will be noted that the figure of $3,740 for costs is 10 per cent of the total amount which was payable to the four different plaintiffs. That amount of $3,740 was to be paid by the defendants to Mr. Schreiber. It is the evidence of Mrs. Helen Bell, one of the plaintiffs, that having agreed to this settlement then for the first time Mr. Schreiber informed the plaintiffs that in addition to that amount of $3,740 which Mr. Schreiber was to receive from the defendants the plaintiffs would have to pay another 10 per cent to him on account of solicitor-and-client costs and further that since the court would not approve of the deduction of any amount from that which was to go to the infant Guy Bell the other plaintiffs would have to divide the 10 per cent deduction on his account from their shares. This evidence Mr. Schreiber denies, although he does admit that it was his ordinary practice to charge a solicitor-and-client bill if he had to prepare for trial and in this case he certainly would have had to prepare for trial very shortly as the conversation took place on January 12 and the trial was to take place within a couple of weeks thereafter. It was further the evidence of Mrs. Helen Bell, and this was also corroborated by the other plaintiffs, that the whole basis of the settlement was that it should be accepted and approved in complete form and in fact that one of them could not settle without the others settling. This was not denied by Mr. Schreiber and it becomes important when one considers the judgment of the learned judge of first instance.

1968

BELL *et al.* v. SMITH *et al.*

Spence J.

The plaintiff Helen Bell testified that having attempted on that very day, January 12, 1966, to telephone to Mr. Schreiber to say that the plaintiffs had recanted from their agreement to settle on the basis outlined, she succeeded, on January 13, 1966, in giving that message to Mr. Schreiber's secretary who undertook to pass it on to her employer. She continued that then they were telephoned by the said secretary on January 14 and asked to come down to Mr. Schreiber's office immediately. Helen Bell continued in her testimony to outline a conference in Mr. Schreiber's office on January 20 and her letter later of the same date to Mr. Schreiber in which she demanded an increase in her claim in the amount of $75,000 and then her reattendance on Mr. Schreiber on January 21. At that time, Mr. Schreiber asked her to sign and have her co-plaintiffs sign a document which I quote hereunder in full:

TO: HENRY L. SCHREIBER, Q.C.
288 OTTAWA STREET NORTH
HAMILTON, ONTARIO

RE: BELL vs SMITH S.C.O. ACTION #653/63

After having all matters of the settlement fully explained to us and we understanding the same; and after having all matters fully explained to us with reference to the matter of "Payment into Court" by the Defendants of the said sums herein, and also with reference to all matters pertaining to our non-acceptance of the same and we fully understand the same.

We now hereby authorize and instruct you to rescind our original instructions of acceptance of the offers of settlement in this action hereinbefore given to you and upon which you acted pursuant to our instructions.

We hereby authorize and instruct you not to accept the offers of settlement in this action which offers were as follows, namely

HELEN BELL KENNETH BELL	inclusive of general and special damages and including O.H.S.C. expenditure	$10,700.00
MARJORIE BELL	inclusive of general and special damages and including O.H.S.C. expenditure	15,550.00
JAMES E. BELL	inclusive of general and special damages and including O.H.S.C. expenditure	4,250.00
DAVID GREY BELL KENNETH BELL	inclusive of general and special damages and including O.H.S.C. expenditure	6,900.00
COSTS		3,740.00

We also authorize and instruct you to so advise John L. Agro Esq. Q.C., solicitor for the defendants of the aforementioned.

1968

BELL *et al.* v. SMITH *et al.*

Spence J.

We further authorize and instruct you that it the solicitor for the defendants shall pay the said sums of money hereinbefore set forth into Court in payment of the above claims, you are not to accept the same in settlement of this action and file the necessary documents to so indicate.

We further authorize and instruct you to proceed to trial with this action and this shall be your authority for carrying out the above-mentioned instructions.

Dated at Hamilton this 21st day of January, 1956.

Witness:

.....
Kenneth Bell

.....
Helen Bell

.....
Marjorie Bell

.....
James E. Bell

Mrs. Bell testified that she did not understand that document and that she refused to sign it. It was never signed by any plaintiff.

On February 4, 1966, Mr. Schreiber wrote to the plaintiff Mrs. Helen Bell in the following words:

Please be advised that your case is No. 10 on the peremptory list of the Supreme Court.

I have told you on numerous occasions the position you now find yourself in and have asked you on numerous occasions to sign the document of instruction which I have prepared and which you have had in your possession for the past two weeks. I must insist you give me your instructions not later than Monday afternoon, February 7th, 1966, at 4:00 p.m.

On February 7, 1966, a notice of motion was served on the various plaintiffs. This was for an application to be presented on February 10, 1966, at 10:00 a.m. for judgment in accordance with the settlement purported to have been made on January 12, 1966. So soon as the plaintiff Helen Bell received service of notice of that application, she wrote to Mr. Schreiber. The last two sentences of that letter read:

The notice of motion contains an affidavit of John L. Agro setting out certain facts we believe to be incorrect.

The matter is of serious interest and unless we receive a reply of your intentions by telephone (No. 772-3224) arrangements will be made to have counsel defend the motion and have you removed as solicitor on the record.

On February 8, 1966, that is, the next day, Mr. Schreiber served a notice of motion on the solicitor for the defendants

1968

BELL *et al.* v. SMITH *et al.*

Spence J.

to be heard at the same time as the motion for judgment. The relief asked in Mr. Schreiber's motion was for an order to set aside the settlement in the action and to restore the said action to the list of actions to be tried at this sitting of the Court. Also on that 8th day of February Helen Bell and the other plaintiffs signed a notice of change of solicitors from Mr. Schreiber to Messrs. Ballachey, Moore and Hart. I should add that by a document entitled "Notice of Dispute" and dated February 4, 1966, the various plaintiffs had given notice to both Mr. Schreiber and Mr. Agro that "out of court settlement offered in full satisfaction of each of their claims is not acceptable and is refused and further take notice that it is their desire to proceed to trial by judge and jury for proper and just assessment for specific and general damages". On February 10, 1966, the motion for judgment in accordance with the settlement came on for hearing before Richardson J., in Hamilton. Mr. Agro appeared for the applicants and Mr. Ballachey for the respondents.

It would appear that the first witness called by the applicants on the application was Henry L. Schreiber, the solicitor who had acted, until February 8, 1966, for the plaintiffs. It is Mr. Ballachey's recollection that he objected to Mr. Schreiber's giving evidence. Mr. Ballachey so testified on examination upon an affidavit which he had filed and to which reference will be made hereafter. The record in the appeal case shows no such objection but that record purports to be only "Extract from Proceedings viva voce evidence submitted on the motion". Mr. Agro executed an affidavit on June 2, 1967, and he states in para. 5 thereof:

> H. L Schreiber, Esq., the former counsel for the Plaintiffs, appeared under subpoena and gave evidence on behalf of the Defendants. Mr. Ballachey raised no objection to giving of evidence by Mr. Schreiber.

"Counsel should not give a proof of evidence of what occurred at a hearing in which he was professionally engaged." This quotation is from Halsbury's Laws of England, 3rd ed., vol. 3, p. 68, referring to the Annual Statement of the General Council of the Bar, 1937, p. 7. Under the circumstances of this case, counsel for both parties no doubt felt that they could not properly discharge their duty to their clients without submitting to the Court of Appeal evidence by affidavit followed on one side by cross-examination. I am not suggesting that this was improper under the

circumstances. However, this shows how important it is to have all court proceedings conducted in such way that there can be no justification for such a course of action. That this resulted in the Court being invited to choose between conflicting statements made under oath by distinguished members of the Bar clearly demonstrates the wisdom of the aforementioned rule and the desirability of taking every precaution to ensure that the paramount interests of the clients will not require it to be broken.

This regrettable occurrence was occasioned by insufficient concern for a fundamental rule, namely, the duty of a solicitor to refrain from disclosing confidential information unless his client waives the privilege.

It is rather astounding that Mr. Schreiber should be subpoenaed to give evidence on behalf of the defendants as against his former clients and that he should produce his complete file including many memoranda and other material all of which were privileged as against the plaintiffs and whether the plaintiffs' counsel objected or not that he should be permitted to so testify and so produce without the consent of the plaintiffs being requested and obtained.

Lord Chancellor Eldon said, in *Beer v. Ward*[1], at p. 80:

> ...it would be the duty of any Court to stop him if he was about to disclose confidential matters...the Court knows the privilege of the client, and it must be taken for granted that the attorney will act rightly, and claim that privilege; or that if he does not, the Court will make him claim it.

Because the solicitor owes to his former client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that it has been properly waived. Especially is this so when, as here, the circumstances are such as to make it most unlikely that a waiver would be given. Also, because it is improper to induce a breach of duty, I have serious doubts about the propriety of putting to a solicitor questions that involve the disclosure of confidential information without first bringing in evidence of a proper waiver. In any case, because the client's privilege is a duty owed to the Court, no objection ought to be necessary and the evidence in violation of the privilege should not be received.

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[1] (1821), Jacob 77, 37 E.R. 779.

1968

BELL *et al.* v. SMITH *et al.*

Spence J.

The proceedings continued throughout February 10 and again on May 27, 1966. Mr. Ballachey, in his affidavit, to which reference has been made above, has testified:

> 5. That the matter came on again on the 27th of May 1966 and after considerable evidence, had been given by the plaintiffs, the learned judge requested that he interview the plaintiffs, in His Chambers, and asked counsel to consent that this be done without counsel being present, and such interview did take place, but to the best of the writer's recollection, the infant, David Guy Bell, was not present at the said interview.
>
> 6. That to the best of my knowledge, information and belief, no Court reporter was present during the interview in the learned Judge's Chambers between the learned trial judge and the Plaintiffs.

In *Majcenic v. Natale*[2], Evans J.A., giving judgment for the Court of Appeal for Ontario, was dealing with a case where certain conversations with counsel had taken place in judge's chambers and were not recorded. At p. 200, he said:

> The necessity for filing in this Court the material to which I have referred would have been eliminated if the procedure recommended in *Berends et al. v. Taylor,* an unreported decision of this Court dated April 5, 1966, had been followed. The procedure recommended therein (in which the propriety of striking out the jury notice was in question) was that the trial Judge should either hear argument in open Court in the absence of the jury panel or have the reporter in Chambers to record the discussion on the question of whether or not he should dispense with the jury.

That injunction is even more applicable in such a case as the present where not the counsel but the clients themselves were interviewed by the learned judge in his chambers without counsel being present and without a reporter. Indeed it is difficult to understand why counsel should ever be excluded from the judge's chambers when their clients are being interviewed by the judge. Counsel is thereby put in an impossible situation. He cannot object without risk of offence to the Court and perhaps raising suspicion in the minds of his clients. Also such a request is apt to reflect adversely against him, or to be considered in this light by his clients. Even more serious is the fact that it makes it practically impossible for him to discharge his duty to advise his clients: how can he tell them that they should refuse the Court's invitation? On final analysis, this is nothing less than a serious interference with the clients' rights to the benefit of the advice of counsel besides being a depar-

[2] [1968] 1 O.R. 189, 66 D.L.R. (2d) 50.

ture from the rule of judicial conduct that a judge ought never to put himself in a situation where one of the parties is apt to be induced to look upon him as an adviser rather than an impartial arbitrator. Even if the trial judge was convinced that the proposed settlement was in the plaintiffs' best interests and they were apt to suffer great detriment by refusing it, a commendable concern for the interests of the infant plaintiff could not justify a departure from the rules of judicial behaviour with respect to the plaintiffs of full age. The importance of the regrettable lack of any acceptable record as to what occurred in the learned judge's chambers is made plain immediately hereafter.

From what appears in the record in the appeal case, upon such conference having been completed counsel for the defendants turned to the question of the quantum of damages of the infant. That was discussed for several pages and then the learned judge inquired "anything else?" to which Mr. Ballachey replied, "It is unnecessary to deal with the motion of the matter of the amendment to the statement of claim under these circumstances". His Lordship agreed and then Mr. Ballachey requested "Will Your Lordship give consideration to the carriage of the matter of the issue of the judgment?" The learned judge replied "I think the record is here, let Mr. Agro draft the judgment and send it to you ... and it is here in Hamilton ..."

It would appear therefore that at some time after the recess and conference to which I have referred the learned judge must have endorsed the record. That endorsement was in these words:

> On consent of parties and without prejudice to the right of the plaintiffs judgment to issue for the adult plaintiffs ...

The formal judgment dated May 27, 1966, but not issued until June 8, 1966, in para. 1 provides:

> 1. THIS COURT DOTH ORDER AND ADJUDGE that the action herein was settled by the solicitors for the parties so far as it respects the plaintiffs Helen Bell, James E. Bell and Marjorie Bell, who is now of the full age of twenty-one years, in accordance with the aforesaid minutes of settlement filed.

A search of the appeal case and also the original papers shows that the only consent minutes of settlement deal with the proposed judgment to be given in relation to the claim of the infant David Guy Bell which, of course, was subject

1968

BELL *et al.* v. SMITH *et al.*

Spence J.

to the approval of the Court and approval of which was reserved by Richardson J. in his judgment of May 27, 1966.

When one considers the wording of the formal judgment which I have recited above and compares it with the wording on the endorsement of the record signed by the learned trial judge, it seems quite plain that the formal judgment is simply an error. There were no consent minutes filed and the evidence plainly was that the plaintiffs had never signed any consent. The consent of the then plaintiffs' solicitor, Mr. Schreiber, had been in the form of his letter of January 12, 1966, which I have quoted above. I am of the view that that letter could not, on May 27, 1966, be accepted as a consent to judgment by the solicitors for the plaintiffs when counsel for the plaintiffs, who had come upon the record by a notice of change of solicitors as early as February 8th previous, was in court opposing any judgment on consent and insisting that the trial should go on. This is not one of the many cases where a solicitor, either acting without instructions or contrary to his instructions, had consented to an order which had been made and then his clients sought, in further proceedings, to have that order set aside. There had in this case been no judgment of the Court prior to the judgment of Richardson J. on May 27, 1966, and any consent to such a judgment as was given by that learned judge was being strongly opposed by the person who was then counsel, on the record, for the plaintiffs.

If one accepts as final the form of the endorsement made by the learned judge on the record then, as pointed out, that endorsement reads: "On consent of the parties..." The import of those words is not that it was on the consent of Mr. Schreiber but on the consent of the appellants here Helen Bell, James E. Bell and Marjorie Bell. So understood, those words avoid what, in my view, is the quite untenable inference that the learned judge purported to act on the consent of a solicitor when the clients were in court denying that they consented and doing so through the mouth of a different counsel. The difficulty is to find the consent of those parties to such settlement. There is not one word in the record as printed in the appeal case which would indicate that either the parties or the then counsel, Mr. Ballachey, made any consent whatsoever. If the consent occurred when the learned judge conferred with the clients in his chambers, neither counsel nor reporter being

present, then certainly the conduct of the plaintiffs in carrying an appeal, first to the Court of Appeal for Ontario and then to this Court, indicates that they do not understand that they consented before His Lordship in his chambers to any such judgment.

When the disposition in the Court of Appeal for Ontario is considered, there arises a similar difficulty in understanding what occurred. The Court gave no written reasons. Among the material filed in this Court was the appeal book used by McLennan J.A., and on the face of that appeal book there are written these words: "Appeal dismissed without costs on grounds that Mr. Ballachey was representing his clients in open court. 6th June 1967." If those words represent the ground upon which the appeal was dismissed, and there can be no certainty of this, then they give rise to another basis for understanding the judgment of the first instance. The inference from those words must be that the judgment of the learned judge was based not on any consent minutes signed by Mr. Schreiber, not on any consent made by the parties in the judge's chambers, but on Mr. Ballachey's consent in court. Mr. Ballachey, in his affidavit, has denied that he gave such consent. Mr. Agro, who appeared as counsel for the defendants, has testified in his affidavit that Mr. Ballachey did consent. In the "Extract from Proceedings viva voce evidence submitted on the motion", there appear no words of consent attributed to Mr. Ballachey and certainly he signed no such consent.

In view of this state of most regrettable confusion, I am of the opinion that the plaintiffs should have a right to have their action tried in open court and that the appeal must be allowed.

I would award to the appellants the costs in this Court and in the Court of Appeal for Ontario. The costs of the new trial and of the application for judgment from which this appeal arises should be reserved to the judge presiding at such new trial.

Appeal allowed with costs; new trial ordered.

Solicitors for the plaintiffs, appellants: Ballachey, Moore & Hart, Brantford.

Solicitors for the defendants, respondents: Agro, Cooper, Zaffiro, Parente & Orzel, Hamilton.

1967
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1968
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COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

CTV TELEVISION NETWORK LIMITED and THE BELL TELEPHONE COMPANY OF CANADA (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Television broadcasting—Television network supplying musical programs to affiliated stations by microwave—Whether radio communication of musical works—Copyright Act, R.S.C. 1952, c. 55, ss. 2(p), (q), 3(1)(f).

In the operation of its television network, the defendant CTV obtains television programs recorded on video tape and supplies them to private affiliated television stations by using, in most cases, the microwave facilities of the other defendant, the Bell Telephone Co. Basing its claim on s. 3(1)(*f*) of the *Copyright Act*, R.S.C. 1952, c. 55, the plaintiff complained that the defendants had infringed the *Copyright Act* in some seven named musical works by "communicating the same by radio communication throughout Canada, or by causing or authorizing the said musical works to be communicated by radio communication throughout Canada, without the licence or authority of the plaintiff". The Exchequer Court dismissed the action and held that there was no infringement for the reason that there was no transmission or communication of the musical works, and that since the affiliated stations were authorized by licence from the plaintiff to make use of the subject matter of the copyright it could not be an infringement for the defendant CTV to authorize the affiliated stations to do it. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The plaintiff's contention that the defendants had infringed s. 3(1)(*f*) of the *Copyright Act* by communicating the named musical works by radio communication could not be supported on the literal meaning of the statute because, in view of the statutory definitions, what was communicated was not "the works" but "a performance of the works". Nor could the action be supported on the construction of the enactment in the light of the intention revealed by the whole Act. This provision was obviously inspired by para. 1 of Article 11 *bis* of the Rome Convention which is set out in a schedule referred to in the Act (s. 53). That article clearly contemplates only public performances by radio broadcasting ("communication...au public

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Pigeon JJ.

par la radiodiffusion"). "Radiocommunication" in the statute was an obvious error carried from the English translation of the Convention which is in French only.

The action could not be supported on the contention that CTV "authorized" the television broadcasts because it only provided the means of doing that which CAPAC had authorized the affiliated stations to do.

Droit d'auteur—Violation—Télévision—Réseau de télévision fournissant par micro-ondes des programmes de musique à des stations affiliées—Y a-t-il transmission radiophonique d'une œuvre musicale—Loi sur le droit d'auteur, S.R.C. 1952, c. 55, arts. 2(p), (q), 3(1)(f).

Dans l'exploitation de son réseau de télévision, la défenderesse CTV obtient des programmes de télévision enregistrés sur ruban magnétique et les fournit à des stations privées de télévision qui lui sont affiliées. Dans la plupart des cas, ces programmes sont transmis au moyen de micro-ondes par l'autre défenderesse, la Bell Telephone Co. of Canada. Se basant sur l'art. 3(1)(*f*) de la *Loi sur le droit d'auteur*, S.R.C. 1952, c. 55, la demanderesse se plaint que les défenderesses ont violé la *Loi sur le droit d'auteur* à l'égard de sept œuvres musicales «en transmettant ces œuvres au moyen de la radiophonie à travers le Canada ou, en occasionnant ou autorisant la transmission de ces œuvres par radiophonie à travers le Canada, sans s'être procuré une licence ou la permission de la demanderesse». La Cour de l'Échiquier a rejeté l'action et a conclu qu'il n'y avait pas eu violation parce qu'il n'y avait pas eu de transmission des œuvres musicales, et que, puisque les stations affiliées avaient une licence de la demanderesse pour reproduire ces œuvres, la défenderesse CTV ne pouvait pas être coupable de violation de droit lorsqu'elle avait autorisé les stations affiliées à les reproduire. La demanderesse en appella à cette Cour.

Arrêt: L'appel doit être rejeté.

La prétention de la demanderesse que les défenderesses ont enfreint l'art. 3(1)(*f*) de la *Loi sur le droit d'auteur* en transmettant les œuvres musicales au moyen de la radiophonie ne peut être admise au sens littéral du statut parce que suivant les définitions statutaires, ce qui a été transmis n'était pas «l'œuvre» mais «une représentation de l'œuvre». L'action ne peut pas non plus être maintenue en se basant sur l'interprétation de la disposition en regard de l'ensemble de la loi. Cette disposition est évidemment inspirée du para. 1 de l'article 11 (bis) de la Convention de Rome reproduite dans l'annexe visée à l'article 53 de la loi. Il est clair que cet article ne vise que la représentation publique par la radio («communication...au public par la radiodiffusion»). «Radiophonie» dans la loi est une erreur évidente provenant de la traduction incorrecte de «radiodiffusion» par «radiocommunication» au lieu de «radiobroadcasting». La convention est en français seulement.

La prétention que CTV aurait enfreint les droits de CAPAC en autorisant les émissions de télévision ne peut pas être admise. C'est que CTV n'a pas fait autre chose que fournir un moyen de faire ce que CAPAC avait précédemment autorisé les stations affiliées à faire.

1968

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD. *v.* CTV TELEVISION NETWORK LTD. *et al.*

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1], en matière de contrefaçon de droit d'auteur. Appel rejeté.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], in an action for infringement of copyright. Appeal dismissed.

B. J. MacKinnon, Q.C., and *J. E. Sexton,* for the plaintiff, appellant.

W. Z. Estey, Q.C., and *F. E. Armstrong,* for the defendant, respondent, CTV Television Network Ltd.

A. S. Pattillo, Q.C., and *J. W. Garrow,* for the defendant, respondent, Bell Telephone Co. of Canada.

The judgment of the Court was delivered by

PIGEON J.:—The plaintiff appellant, Composers, Authors and Publishers Association of Canada Ltd. (hereinafter called "CAPAC") is a performing rights society contemplated in ss. 48 to 51 of the *Copyright Act,* R.S.C. 1952, c. 55 (hereinafter called the "Act"). In accordance with those provisions it has filed statements of fees which have been approved by the Copyright Appeal Board and published in the *Canada Gazette.* In those statements Tariff No. 3 entitled "Television Broadcasting" sets the fee payable for a general licence by an operator of television station other than the Canadian Broadcasting Corporation at 1½ per cent of the gross amount paid for the use of the operator's services or facilities.

Defendant CTV Television Network Ltd. (hereinafter called "CTV") has, since October 1, 1961, been operating a private television network in the following way. It acquires, or maybe produces, television programs recorded on videotape. It contracts with advertisers for payment in consideration of the addition of commercials. It also contracts with private affiliated television stations for having the programs broadcast at a proper time in consideration of stipulated payments. The programs are supplied to the affiliated stations in some cases by shipping a copy of the

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[1] [1966] Ex. C.R. 872, 33 Fox Pat. C. 69, 48 C.P.R. 246, 57 D.L.R. (2d) 5.

videotape but, in most cases, by using facilities provided by the defendant The Bell Telephone Company of Canada (hereinafter called "Bell"). These facilities over short distances include cable only but, over long distances, the transmission is effected mostly by microwave.

It is obvious that CTV's gross revenue from the operations above described must be very substantially larger than the amount that it pays to the affiliated stations, seeing that this revenue has to cover the cost of the programs and the cost of transmission to the affiliated stations in addition to what is paid for broadcasting same and also provide for general expenses and profit. CAPAC has been trying to obtain a 1½ per cent fee on the larger amount. With that end in view, it has filed in November 1962 a tariff providing under the heading of "Television Broadcasting", in addition to the general licence above mentioned, for a general licence to CTV "for all network television broadcast". The fee for such licence is 1½ per cent of the gross amount paid to CTV for the use of the network less the amount in turn paid by CTV to its affiliated stations.

CTV objected to the tariff and, after it was approved, refused to take a licence. Thereupon CAPAC brought action in May 1963 alleging in substance the facts above recited and complaining of infringement of copyright in some seven named musical works by "communicating the same by radio communication throughout Canada, or by causing or authorizing the said musical works to be communicated by radio communication throughout Canada, without the licence or authority of the Plaintiff".

It is admitted that CAPAC is the owner of the copyright in the musical works in question. It is also admitted that these "musical numbers" as they are called in the admission were included in the programs transmitted for broadcasting to the affiliated network stations and effectively broadcast by them. It is also admitted that the transmission in several cases was effected by means of cable and microwave facilities of Bell. The question is was this an infringement of CAPAC's copyright?

In the Exchequer Court[1] it was held that there was no infringement for the reason that there was no transmission nor communication of the musical "works" from CTV to

[1] [1966] Ex. C.R. 872, 33 Fox Pat. C. 69, 48 C.P.R. 246, 57 D.L.R. (2d) 5.

1968

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD. *v.* CTV TELEVISION NETWORK LTD. *et al.*

Pigeon J.

the affiliated stations and that the latter being authorized by licence from CAPAC to make use of the subject matter of the copyright, it could not be an infringement for CTV to authorize them to do it. As the learned President put it, "it cannot be a tort merely to authorize or cause a person to do something that that person has a right to do".

CAPAC's claim is based essentially on sub-para. (*f*) and the concluding words of subs. (1) of s. 3 of the Act, whereby it is enacted that "copyright" includes the sole right

> ...(*f*) in case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication;
> and to authorize any such acts as aforesaid.

In considering this provision, it is essential to note the following definitions in s. 2 of the Act:

> (*p*) "musical work" means any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced;
>
> (*q*) "performance" means any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication.

In the light of the above definitions, it is obvious that what was done on the occasion described in the action is not the communication of the "musical works". Leaving aside any technical considerations respecting the nature of the signals transmitted from CTV to the affiliated stations, these signals did not communicate the "musical works" as defined in the Act, that is graphic reproductions of melody and harmony. What was communicated was not the "works" but "a performance of the works". Thus, on a literal construction of the Act, CAPAC's case fails in so far as it rests on sub-para. (*f*).

The next question is: Should the enactment be read otherwise than literally? Counsel for CAPAC has drawn attention to the French version of the Act in which sub-para. (*f*) reads as follows:

> *f*) s'il s'agit d'une œuvre littéraire, dramatique, musicale ou artistique, de transmettre cette œuvre au moyen de la radiophonie. Le droit d'auteur comprend aussi le droit exclusif d'autoriser les actes mentionnés ci-dessus.

In this connection, the following facts should be noted. Section 53 of the Act refers to the Rome Convention which is set out in the Third Schedule. From this it appears that the Convention is in French only: the Schedule annexed

to the English version is expressly stated to be a translation. The history of the legislation further shows that sub-para. (*f*) as well as s. 53 and the Third Schedule were all added to the Act by the *Copyright Amendment Act* 1931, 21-22 Geo. V, c. 8. This makes it obvious that sub-para. (*f*) was inspired by para. 1 of Article 11*bis* of the Convention, which is in the following terms:

(1) Les auteurs d'œuvres littéraires et artistiques jouissent du droit exclusif d'autoriser la communication de leurs œuvres au public par la radiodiffusion.

In the Schedule this is translated as follows:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radiocommunication.

It will be noted that where the Convention speaks of "radiodiffusion" *i.e.* radio broadcasting, the unfortunate translation reads "radiocommunication". The error in translation of the Convention was obviously carried into the statute intended to implement it, and, as happened in the case of the Hague Rules annexed to the *Water Carriage of Goods Act*, the English text was translated into French.

It is apparent that the above cited article of the Convention contemplates public performances by radio broadcasting. Such is the clear meaning of "la communication de leurs œuvres au public par la radiodiffusion" (communication of their works to the public by radio broadcasting). In the Convention "œuvres" (works) is not defined, therefore, as applied to musical works, it is properly taken in the primary sense of the composition itself, not its graphic representation as in the Act. Also, while "communication" does not usually mean "a performance" it is apt to include performances in its meaning along with other modes of representation applicable to other kinds of artistic or literary works that are not "performed".

It must be noted that in the Convention it is doubly indicated by "au public" and by "radiodiffusion" that public performances or communications only are aimed at. This is consonant with the general definition of "copyright" which, as stated in subs. 1 of s. 3 of the Act, applies to any reproduction of the work but, as respect performances, applies

1968

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD. v. CTV TELEVISION NETWORK LTD. et al.

Pigeon J.

only to those that are "in public". Is it to be inferred that Parliament intended to depart from this principle in enacting subs. 2(*f*) simply because the words "to the public" are not found in it? Of course, if the provision was clear, if it could be applied literally to give this result, effect would have to be given to the intention. However, as previously noted, the material part of the provision does not read "to communicate a performance of such work by radio communication" but "to communicate such work by radio communication". In view of the statutory definitions of "musical work" and of "performance" the insertion of the word "performance" in the enactment is a very substantial departure from the text as written. Bearing in mind that the reproduction of a work as distinguished from a performance thereof is always within the definition of "copyright" while a performance is outside the scope of the definition if not in public, it is only through the insertion of the word "performance" without the words "in public" that a departure from principle would be effected.

On the assumption that the provision is not clear and that it must not be applied literally, it is not at all obvious that it must be read as suggested to give effect to CAPAC's contention. Once it is ascertained that interpretation has to be resorted to, the intention must be gathered from the statute as a whole and this certainly includes the Schedule that is referred to in the body of the Act and is printed with it. Upon such consideration it becomes apparent that sub-para. (*f*) is intended to achieve the result contemplated in paragraph 1 of article 11*bis*. Bearing in mind that the Rome Convention is in French no other conclusion is possible but that the intent is to provide that copyright includes the exclusive right of public performance or representation by radio broadcasting ("communication au public par la radiodiffusion").

The contention advanced by CAPAC would have the anomalous result that the extent of the copyright with respect to the communication or transmission of performances of musical works, would depend on the means employed for such communication or transmission. If it was by physical delivery of magnetic tape or by transmission of an electrical signal by cable, there would be no monopoly in favour of the owner of the copyright in the works per-

formed. However, such monopoly would exist if the transmission was by microwave, although such transmission would be as private as in the other cases.

I therefore come to the conclusion on the first point, that CAPAC's contention cannot be supported either on the literal meaning of the statute or on construction in the light of the intention revealed by the whole Act, including the Schedule.

As to the second point, it seems to me that the trial judge has effectively disposed of it. The authorization to make use of the copyright by performing the works through television broadcasts was given by CAPAC to the affiliated stations and it cannot be said to proceed from CTV. CTV effectively provided the means of doing that which CAPAC had authorized. In this connection it must be observed that the licences contemplated in ss. 48 and following of the *Copyright Act* are throughout described as performing licences or licences in respect of the "performance" of works.

It may well be that if CAPAC cannot collect fees from CTV under its tariff, it is because under the authority of legal provisions respecting fees for performances it is seeking to recover such fees from someone who does not effect performances. It may be significant in this respect that CAPAC is claiming infringement not by performance, but by radio communication of the work or by authorizing such communication.

CAPAC has pressed at the hearing the argument that if the law was not applied as it contends, it would be deprived of the economic advantage that the Act and the tariff were intended to provide to it. If such an argument could be considered, it would have to be observed that nothing in the Act appears to restrict the *quantum* and the modalities of the fees to be required under an approved tariff. If by reason of the setting-up of the CTV network the fee prescribed in the tariff applicable to television broadcasting stations has become inadequate, this is a matter for the Copyright Appeal Board on the submission of an appropriate tariff at which time it may have to be considered whether some special treatment should be provided to avoid a duplicate fee on the cost of programs recorded in the United States. It has not been shown that the Board could not approve a

1968

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD. v. CTV TELEVISION NETWORK LTD. et al.

Pigeon J.

tariff under which, if it appeared proper and just, the fee payable for a licence in respect of network broadcasts would be higher than the present 1½ per cent.

I conclude that the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: John V. Mills, Toronto.

Solicitors for the defendant, respondent, CTV Television Network Ltd.: Robertson, Lane, Perrett, Frankish & Estey, Toronto.

Solicitors for the defendant, respondent, Bell Telephone Co. of Canada: Blake, Cassels & Graydon, Toronto.

1968

Mar. 18, 19
Apr. 29

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

AND

RESEARCH-COTTRELL (CANADA) LIMITED and JOY MANUFACTURING COMPANY (CANADA) LIMITED ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Customs and excise—Imported and domestic fabricated components assembled and erected into precipitators—Whether precipitators "manufactured" in Canada—Customs Tariff, R.S.C. 1952, c. 60, s. 11(1).

In 1961, the respondent company contracted to design, furnish and erect eight electrostatic precipitators at a mining company's plant in Copper Cliff, Ontario. It imported some of the components made in the U.S.A. and these together with other components made in Canada were assembled and erected on its behalf by a third party into precipitators at the plant in question. Alleging that the precipitators were manufactured in Canada, the respondent claimed a drawback of customs duties paid on the importation of the components made in U.S.A. and based its claim on s. 11(1) of the *Customs Tariff*, R.S.C. 1952, c. 60, and drawback items 1056 and 1059 of the Schedule B. The Deputy Minister refused the claim on the ground that the

*PRESENT: Cartwright C.J. and Fauteux, Martland, Judson and Pigeon JJ.

respondent did not perform any manufacturing operation in connection with the precipitators and that, while the precipitators had been erected on its behalf, the components had been fabricated previously. An appeal to the Tariff Board was rejected on the ground that the work carried out at Copper Cliff was assembly and erection rather than manufacture. A further appeal to the Exchequer Court was allowed on the ground that the Board had erred in law. The Deputy Minister appealed to this Court.

Held (Cartwright C.J. and Pigeon J. dissenting): The appeal of the Deputy Minister should be allowed.

Per Fauteux, Martland and Judson JJ.: The Tariff Board did not misdirect itself as to the law. It could not be held, as a matter of law, that what was done on behalf of respondent at the site constituted manufacture by the respondent of eight precipitators. On the facts, it was open to the Board to find, as it did, that the assembly and erection of the fabricated components was not, in this case, manufacture within the meaning of the relevant tariff items.

Per Cartwright C.J. and Pigeon J., *dissenting*: The Exchequer Court rightly held that the Board had erred in law. Assembly is undoubtedly a part of the manufacturing process of any manufactured object made up of several component parts.

Furthermore, the Tariff Board did not find that the precipitators as such had been manufactured prior to importation. It follows that it should have come to the conclusion that they had been manufactured in Canada since, being manufactured objects, they could not have been manufactured elsewhere.

Revenu—Douane et accise—Pièces importées—Pièces fabriquées au pays—Assemblage de dépoussiéreurs—Ont-ils été fabriqués au Canada—Tarif des douanes, S.R.C. 1952, c. 60, art. 11(1).

En 1961, l'intimée Research-Cottrell (Canada) Ltd. s'est engagée à fournir et construire huit dépoussiéreurs électrostatiques à l'usine d'une compagnie minière à Copper Cliff, Ontario. A cette fin, une tierce compagnie a, pour le compte de l'intimée, assemblé des pièces fabriquées aux États-Unis ainsi que d'autres pièces fabriquées au Canada et a installé les dépoussiéreurs à l'usine en question. Alléguant que les appareils avaient été fabriqués au Canada, l'intimée a réclamé un drawback des droits de douane payés lors de l'importation des pièces fabriquées aux États-Unis et a fondé sa réclamation sur l'art. 11(1) du *Tarif des douanes*, S.R.C. 1952, c. 60, et les numéros de drawback 1056 et 1059 de la liste B. Le Sous-Ministre a refusé la réclamation pour le motif que l'intimée n'a fait aucune opération de fabrication et que, bien que les dépoussiéreurs aient été installés pour son compte, les parties constituantes en avaient été fabriquées antérieurement. Un appel à la Commission du tarif a été rejeté pour le motif que le travail qui s'est fait à Copper Cliff était un assemblage et une construction plutôt qu'une fabrication. Un appel subséquent à la Cour de l'Échiquier a été accueilli pour le motif que la Commission avait erré en droit. Le Sous-Ministre en appela à cette Cour.

Arrêt: L'appel du Sous-Ministre doit être accueilli, le Juge en Chef Cartwright et le Juge Pigeon étant dissidents.

1968

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE
v.
RESEARCH-COTTRELL (CANADA) LTD. *et al.*

Les Juges Fauteux, Martland et Judson: La Commission du tarif ne s'est pas trompée sur la loi. On ne peut pas conclure en droit que ce qui a été fait sur place pour le compte de l'intimée constituait une fabrication de huit dépoussiéreurs par l'intimée. Sur les faits, la Commission pouvait conclure, comme elle l'a fait, que l'assemblage et l'installation des pièces fabriquées ailleurs n'étaient pas dans le cas présent, une fabrication dans le sens des numéros visés du tarif.

Le Juge en Chef Cartwright et le Juge Pigeon, *dissidents:* La Cour de l'Échiquier a eu raison de conclure que la Commission du tarif avait erré en droit. L'assemblage est indubitablement une partie du processus de fabrication de tout objet fabriqué qui est composé de plusieurs pièces.

De plus, la Commission n'a pas conclu que les dépoussiéreurs comme tels avaient été fabriqués avant leur importation. Il s'ensuit que la Commission aurait dû conclure qu'ils avaient été fabriquées au Canada puisque, s'ils sont des objets manufacturés comme il faut le reconnaître, ils ne peuvent pas avoir été fabriqués ailleurs.

APPEL par le Sous-Ministre d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], accueillant un appel de la Commission du tarif. Appel accueilli, le Juge en Chef Cartwright et le Juge Pigeon étant dissidents.

APPEAL by the Deputy Minister from a judgment of Cattanach J. of the Exchequer Court of Canada[1], allowing an appeal from the Tariff Board. Appeal allowed, Cartwright C.J. and Pigeon J. dissenting.

C. R. O. Munro, Q.C. and *A. M. Garneau,* for the appellant.

G. F. Henderson, Q.C., and *B. A. Crane,* for the respondent, Research-Cottrell (Canada) Ltd.

R. Belfoi, for the respondent, Joy Manufacturing Co.

The judgment of Cartwright C.J. and Pigeon J. was delivered by

PIGEON J. (*dissenting*):—The facts of this case are really quite simple and undisputed. The respondent, Research-Cottrell (Canada) Ltd. in May 1961 contracted with International Nickel Company of Canada Ltd. to "design, furnish and erect" at the latter's plant in Copper

[1] [1967] 2 Ex. C.R. 3.

Cliff, Ontario, for a total cost of $1,000,000 eight electrical precipitators. The precipitators were designed in the United States by respondent's parent company. That company also supplied some of the component parts which were made in the United States. It ordered other parts from United States suppliers and some from Canadian suppliers. The erection was made by a Canadian company under contract for the lump sum of $94,000. The operations performed under that contract with respondent's parent company were said to include "cutting, fitting, welding, wiring, joining, bolting and fabricating".

Respondent claimed drawback of customs duty under Drawback Items 1056 and 1059. The items cover "materials", "when used in the manufacture of articles entitled to entry" under specified tariff items and it was contended that one of these tariff items, namely 410*z*, covered the precipitators in question. Appellant denied the claim for drawback and on an appeal from his decision to the Tariff Board only one question was considered, namely "whether or not the precipitators were 'manufactured' in Canada within the drawback items in issue". The Tariff Board held that:

> The intent of the drawback items 1056 and 1059 is clearly the encouragement of the manufacture in Canada of the goods or articles described in tariff item 410*z* as opposed to their acquisition abroad. In such a context it hardly seems a reasonable construction of the word manufacture to extend the benefits of the drawback items to imported goods which are simply assembled and erected on site.
>
> In referring to the making of blast furnaces, oxygen furnaces, blast furnace stoves, open hearth furnaces and soaking pit furnaces, the word used in drawback item 1044 (now item number 97044-1) is "construction"; similarly, the word used to describe the making of bridges is "construction" in tariff item 460 (now item number 46000-1). Nor do the contracts for the installation of the precipitators use the word "manufacture", rather they use the words "erect" and "install".
>
> In the present case, the Board finds the work carried out at Copper Cliff, Ontario, to be assembly and erection rather than manufacture.

On appeal to the Exchequer Court[1], Cattanach J. held that the Board had erred in law. After pointing out that there was no evidence before the Board upon which it could have concluded that the precipitators were in existence before ultimate assembly and erection, he said:

> In the absence of a finding by the Board either express or implied, that the precipitators had an existence outside Canada, then I am of the

[1] [1967] 2 Ex. C.R. 3.

1968

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE v. RESEARCH-COTTRELL (CANADA) LTD. *et al.*

Pigeon J.

opinion that a finding that the precipitators were not "manufactured" in Canada because they were merely "assembled and erected" in Canada, is wrong in law. I am of the opinion that the Board erred as a matter of law in concluding, as they did, that if what was done in Canada can properly be described as assembly and erection, it follows that the ultimate article was not manufactured in Canada. Where the article never existed until after the acts performed by the appellant on the site, then in my view, as a matter of law the article must be regarded as having been manufactured in Canada.

This conclusion was challenged essentially on the basis that the word "manufacture" in its ordinary meaning and as used in the relevant legislation does not embrace all the processes by which things come into existence. It was also contended that in the context of the relevant tariff item the word "manufacture" can hardly include mere assembly and erection of equipment which, because of its size, must be imported in pieces and erected at the purchaser's site.

In dealing first with the last mentioned contention it must be said that "assembly" is undoubtedly a part of the manufacturing process of any manufactured object made up of several component parts. The decision of the Tariff Board cannot be supported on the basis that assembly is not a part of the manufacturing process. No such finding was made.

As to the other point, it must be noted that the Tariff Board did not find that the precipitators as such had been manufactured prior to importation. There can be no doubt that in a proper case such a finding could be made and in such case the thing itself would be imported, not the materials for making it, although it might be imported in several pieces. Here the Tariff Board made no such finding. On the contrary, it proceeded to consider in effect whether assembly and erection were of sufficient importance to justify the benefit of the drawback. This is a factor which ought not to enter into consideration on the construction of the tariff item. Unless Parliament sees fit to specify the relative importance of the process carried on in Canada as opposed to the part carried on in producing the imported materials or parts, the only question to be considered in construing the enactment is whether what is done in Canada is substantially a part of the manufacturing process.

From this it follows that, on the basis of its finding of facts, the Tariff Board could not come to the conclusion that the precipitators were not manufactured in Canada unless it could find that they were not manufactured. If they were manufactured they cannot have been manufactured elsewhere, seeing that they were not imported, what was imported was materials and parts used in making them up.

In support of the contention that the precipitators were not manufactured, reference was made to the fact that with reference to furnaces and bridges the word used in the applicable items is "construction" not "manufacture". In my view, this means only that "construction" was considered as the appropriate word to describe the process whereby furnaces and bridges are brought into existence, while "manufacture" was considered the appropriate word for precipitators. Any other view would result in precipitators of such size that they can be shipped whole being considered as manufactured objects and larger precipitators as not manufactured. Nobody would contend that precipitators shipped in one piece are not manufactured items. It is hard to see how larger size articles of the same nature would have to be classified as constructions.

For those reasons I am of the opinion that the appeal fails and should be dismissed with costs.

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

MARTLAND J.:—Under the terms of a sub-contract, dated June 5, 1961, the respondent Research-Cottrell (Canada) Ltd., hereinafter referred to as "Cottrell (Canada)", agreed with The Foundation Company of Canada, Limited, to

> Supply all labour, materials, plant and tools necessary to supply and install "Eight Only Precipitators" on subject project...

The project was the subject-matter of a contract dated March 11, 1961, between The Foundation Company, as contractor, and The International Nickel Company of Canada Limited.

1968

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE v. RESEARCH-COTTRELL (CANADA) LTD. *et al.*

Martland J.

The sub-contract provided for a price of $1,000,000 to Cottrell (Canada). Each precipitator has an overall height and overall width of approximately 40 feet, and is about 17 feet across the end. The precipitators are known as electrostatic precipitators and their function is to remove solid or liquid particles from gases generated at the International Nickel Company plant at Copper Cliff.

Cottrell (Canada) maintains only a sales office in Canada, in Toronto, the only permanent employees being a manager and his secretary.

The precipitators were designed in the U.S.A. by Research-Cottrell Inc., hereinafter called "Cottrell Inc.", of which Cottrell (Canada) is a wholly owned subsidiary. Cottrell Inc. manufactured in the United States some of the essential components of the precipitators; namely, wire components, the electrical control system and transformers. Some of the components were ordered by Cottrell Inc. from manufacturers and suppliers in the United States. It also selected and ordered other components from manufacturers and suppliers in Canada.

All the various components were shipped to the site of the International Nickel Company plant at Copper Cliff. They were assembled and erected by Noront Steel Construction Co., Ltd., of Sudbury, Ontario, pursuant to an agreement between Noront and Cottrell Inc. dated March 29, 1962, whereby Noront was to "furnish all labor, tools and construction equipment to receive, unload and completely erect eight (8) precipitators." The price was $94,000.

After the contract between Cottrell (Canada) and the Foundation Company had been completed, Cottrell (Canada) claimed a drawback of customs duties paid on the importation of those components of the precipitators which had been supplied from the United States.

The claim was based upon s. 11(1) of the *Customs Tariff*, R.S.C. 1952, c. 60:

> 11. (1) On the materials set forth in Schedule B, when used for consumption in Canada for the purpose specified in that Schedule, there may be paid, out of the Consolidated Revenue Fund, the several rates of drawback of Customs duties set opposite to each item respectively in that Schedule, under regulations by the Governor in Council.

The relevant portions of Schedule B are as follows:

GOODS SUBJECT TO DRAWBACK FOR HOME CONSUMPTION

Item No.	Goods	When Subject to Drawback	Portion of Duty Payable as Drawback
1056	Materials, including all parts, wholly or in chief part of metal, of a class or kind not made in Canada.	When used in the manufacture of goods entitled to entry under tariff items 410*z*	99 p.c.
1059	Materials	When used in the manufacture of articles entitled to entry under tariff items 410*b* and 410*z*, when such articles are used as specified in said items	70 p.c.

The distinction between items 1056 and 1059 is that to fall in item 1056 the materials must be "of a class or kind not made in Canada" whereas that is not a requirement of item 1059.

Tariff item 410*z* appears in Schedule A to the *Customs Tariff*:

GOODS SUBJECT TO DUTY AND FREE GOODS

Tariff Item		British Preferential Tariff	Most-Favoured-Nation Tariff	General Tariff
410*z*	Machinery and apparatus, n.o.p., and parts thereof, for the recovery of solid or liquid particles from flue or other waste gases at metallurgical or industrial plants, not to include motive power, tanks for gas, nor pipes and valves 10½ inches or less in diameter	5 p.c.	10 p.c.	12½ p.c.

The contention of Cottrell (Canada) is that the components of the precipitator obtained from the United States were articles entitled to entry under Item 410*z* and that they had been used in the manufacture of articles entitled to entry under that item within the meaning of Items 1056 and 1059 of Schedule B.

The claim of Cottrell (Canada) for a drawback was refused by the Deputy Minister of National Revenue for Customs and Excise on the ground that Cottrell (Canada) did not perform any manufacturing operation in connec-

1968

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE *v.* RESEARCH-COTTRELL (CANADA) LTD. *et al.*

Martland J.

tion with the precipitators and that, while the precipitators were erected on its behalf by Noront, the components had been fabricated previously. Cottrell (Canada) appealed from his decision to the Tariff Board, and the respondent Joy Manufacturing Company (Canada) Limited entered an appearance.

The appeal was rejected by the Tariff Board, for the following reasons:

> The Board adopts the observation of Sir Lyman Duff, C.J.C., in *King v. Vandeweghe Ltd.* 1934 S.C.R. 244:
>
> > The words "produced" and "manufactured" are not words of any very precise meaning and consequently we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe.
>
> It will not, for the purposes of this appeal, seek to establish any definition of general application to all cases but rather to declare whether or not the actions performed in this case constituted manufacturing.
>
> The intent of tariff item 410*z* appears to be to benefit metallurgical or industrial plants in their acquisition of a certain type of machinery and apparatus by the imposition of lower rates of customs duties than would be levied were item 410*z* not in the Customs Tariff.
>
> The intent of the drawback items 1056 and 1059 is clearly the encouragement of the manufacture in Canada of the goods or articles described in tariff item 410*z* as opposed to their acquisition abroad. In such a context it hardly seems a reasonable construction of the word manufacture to extend the benefits of the drawback items to imported goods which are simply assembled and erected on site.
>
> In referring to the making of blast furnaces, oxygen furnaces, blast furnace stoves, open hearth furnaces and soaking pit furnaces, the word used in drawback item 1044 (now item number 97044-1) is "construction"; similarly, the word used to describe the making of bridges is "construction" in tariff item 460 (now item number 46000-1). Nor do the contracts for the installation of the precipitators use the word "manufacture", rather they use the words "erect" and "install".
>
> In the present case, the Board finds the work carried out at Copper Cliff, Ontario, to be assembly and erection rather than manufacture.

An appeal was then taken to the Exchequer Court. The right to appeal to that Court is limited, by s. 45(1) of the *Customs Act*, R.S.C. 1952, c. 58, as enacted by Statutes of Canada, 1958, c. 26, s. 2(1), to a question of law.

The appeal was allowed. The reason for this decision is stated as follows:

> In the absence of a finding by the Board either express or implied, that the precipitators had an existence outside Canada, then I am of the opinion that a finding that the precipitators were not "manufactured" in

Canada because they were merely "assembled and erected" in Canada, is wrong in law. I am of the opinion that the Board erred as a matter of law in concluding, as they did, that if what was done in Canada can properly be described as assembly and erection, it follows that the ultimate article was not manufactured in Canada. Where the article never existed until after the acts performed by the appellant on the site, then in my view, as a matter of law the article must be regarded as having been manufactured in Canada.

In *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[2], Kellock J., speaking for the Court, said, at p. 498:

> The question of law above propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly instructed in law as to the construction of the statutory items, and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.
>
> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate Court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination; *Edwards v. Bairstow*, (1955) 3 All E.R. 48.

The judgment of the Court below has held that the Tariff Board erred in construing the statutory items, because, as a matter of law, where the articles did not exist until after the acts performed at the site, they must be regarded as having been manufactured in Canada. It follows, from this proposition, that in every case, where fabricated parts are assembled in Canada into a whole, the article which then comes into existence must have been manufactured in Canada.

With respect, I am not prepared to accept this broad proposition when considering the meaning of the word "manufacture" in the relevant tariff items under consideration. The assembly of parts may, in certain circumstances, constitute manufacture, but I do not agree that this must be so in all circumstances.

The Tariff Board, in its reasons, stated:

> It will not, for the purposes of this appeal, seek to establish any definition of general application to all cases but rather to declare whether or not the actions performed in this case constituted manufacturing.

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[2] [1956] 1 D.L.R. (2d) 497.

1968

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE v. RESEARCH-COTTRELL (CANADA) LTD. *et al.*

Martland J.

For the respondent it was contended that the Tariff Board misdirected itself when it stated the issue to be whether what was done by Cottrell (Canada) constituted manufacture in Canada, and that the only issue was, in the words of the relevant tariff items, "were the materials used in the manufacture of" the precipitators? But the tariff items must be read with s. 11(1) which authorizes drawbacks on materials "when used for consumption in Canada for the purpose specified". In the light of that wording I think it was proper for the Tariff Board to decide whether the action of Cottrell (Canada) constituted manufacture of the precipitators in Canada.

The evidence before the Board showed that the agreement of Cottrell (Canada) with the Foundation Company was to supply and erect eight precipitators. They were designed and all components built or ordered by Cottrell Inc., to be delivered at the site. The erection was done by Noront, by agreement with Cottrell Inc.

In these circumstances I do not think it should be held, as a matter of law, that what Noront did at the site constituted manufacture by Cottrell (Canada) of eight precipitators. On the facts, it was open to the Board to find, as it did, that the assembly and erection of the fabricated components was not, in this case, manufacture within the meaning of the relevant tariff items.

My conclusion is that the Board did not misdirect itself as to the law, and that there was evidence on which its finding of fact could properly be made.

This being so, the appeal should be allowed, and the declaration of the Tariff Board restored, with costs to the appellant as against Cottrell (Canada), in this Court and in the Court below.

Appeal allowed with costs, CARTWRIGHT C.J. *and* PIGEON J. *dissenting.*

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

Solicitors for the respondent, Research-Cottrell (Canada) Ltd.: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondent, Joy Manufacturing Co. (Canada) Ltd.: Herridge, Tolmie, Gray, Coyne & Blair, Ottawa.

1968

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC ..... APPELANTE; *Mars 5, 6, 7 Avr. 29

ET

CANADIAN INGERSOLL-RAND COMPANY LIMITED ..... INTIMÉE;

ET

MÉTALLURGISTES UNIS D'AMÉRIQUE, LOCAL 6670 ..... MISE-EN-CAUSE.

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

Travail—Accréditation—Achat de l'actif d'une compagnie par une autre—Fusion des deux usines et de leurs employés—Commission substituant le nouvel employeur au certificat de reconnaissance syndicale—Requête par une seconde union pour représenter tous les autres employés—Bref de prohibition—S'agit-il d'un litige intersyndical—Séances et décisions de la Commission—Code du Travail, S.R.Q. 1964, c. 141, arts. 21, 36, 103, 107, 108, 115, 118.

A la suite de l'achat de l'actif d'une compagnie par la compagnie intimée, les deux usines furent fusionnées et les employés de l'ancienne compagnie—qui étaient groupés en association et représentés par une union détenant un certificat de reconnaissance syndicale—furent placés sous le contrôle du nouvel employeur, la compagnie intimée. La Commission des Relations de Travail a alors substitué le nom du nouvel employeur au certificat de reconnaissance syndicale. Trois jours après, une seconde union a demandé à la Commission d'être reconnue comme représentante de presque tous les autres employés de l'intimée. Cette dernière s'opposa à la requête et a prétendu que par l'effet de la loi et de la décision de substitution de la Commission tous ses employés, et non pas seulement ceux de la compagnie absorbée, étaient couverts par le même certificat de reconnaissance syndicale alors existant. La Commission, sous la signature de son vice-président, rejeta cette contestation et accorda l'accréditation. Alléguant que la Commission avait excédé sa juridiction, la compagnie intimée a demandé un bref de prohibition et a soulevé les trois points suivants: (i) violation de la règle *audi alteram partem;* (ii) revision ou modification illégale de la décision substituant le nom du nouvel employeur; et (iii) décision *ultra vires* parce que rendue par un vice-président agissant seul dans un cas où il ne s'agit pas d'un litige intersyndical. La Cour Supérieure a rejeté la requête de l'intimée, mais cette décision fut infirmée par la Cour d'appel. D'où le pourvoi de la Commission devant cette Cour.

Arrêt: L'appel doit être accueilli.

Sur le premier point. La règle *audi alteram partem* n'implique pas qu'il doit toujours être accordé une audition. L'obligation est de fournir aux parties l'occasion de faire valoir leurs moyens. Se trouvant

* CORAM: Les Juges Fauteux, Judson, Ritchie, Hall et Spence.

1968

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *v.* CANADIAN INGERSOLL-RAND CO. LTD. *et al.*

suffisamment renseignée par les plaidoiries écrites, les pièces produites et ses propres enquêtes, la Commission pouvait raisonnablement juger, dans les circonstances, qu'elle pouvait et devait, sans plus d'atermoiement, rendre sa décision.

Sur le second point. La décision de la Commission substituant le nom du nouvel employeur n'avait pas eu pour effet, comme l'a prétendu l'intimée, d'étendre le certificat alors existant à tous les autres employés de l'intimée. En conséquence, en accréditant la seconde union, la Commission n'a pas revisé ou révoqué sa décision antérieure. Même s'il fallait tenir pour erronées l'interprétation et la portée différentes que la Commission assigne à sa décision de substituer le nom du nouvel employeur, cette erreur ne saurait donner ouverture au recours par prohibition, ne serait-ce qu'en raison du fait que la Commission avait juridiction pour considérer et décider cette question particulière et qu'on ne perd pas la juridiction qu'on possède du fait qu'en l'exerçant, on puisse, de bonne foi, commettre une erreur.

Sur le troisième point. Manifestement, il n'y avait ici qu'un litige intersyndical puisque la question soumise à la Commission était de savoir laquelle des deux unions avait droit à l'accréditation. Le conflit devait alors être décidé en l'occurrence par le vice-président seul. On ne peut pas présumer qu'en exerçant cette juridiction, le vice-président s'est abstenu de faire ce que la loi l'obligeait de faire. Il est présumé s'y être conformé.

Labour—Certification—Purchase of assets of a company by another—Merger of the two plants and their employees—Board substituting the name of the purchaser on the certificate of recognition—Application by second union to represent all other employees—Writ of prohibition—Whether inter-union process—Sittings and decisions of the Board—Labour Code, R.S.Q. 1964, c. 141, ss. 21, 36, 103, 107, 108, 115, 118.

Following the purchase of the assets of a company by the respondent company, the two plants were merged and the employees of the purchased company—who had formed an association of employees and were represented by a union holding a certificate of recognition—became the employees of the purchaser, the respondent company. The name of the respondent company was substituted by the Labour Relations Board as the employer on the certificate. Three days later, a second union applied to the Board for recognition as representative of all the other employees of the respondent. The latter opposed the application and contended that by virtue of the Code and of the Board's substitution order all its employees, and not only those of the purchased company, were covered by the same certificate of recognition. The Board's decision, signed by its vice-president alone, rejected this contention and granted certification. Alleging that the Board had exceeded its jurisdiction, the respondent applied for a writ of prohibition and raised the following issues: (i) violation of the rule *audi alteram partem*; (ii) unlawful revision or modification of the Board's prior substitution order; (iii) the decision was *ultra vires* because it had been made by a vice-president alone in a case which was not an inter-union process. The Superior Court dismissed the respondent's application, but that judgment was reversed by the Court of Appeal. The Board appealed to this Court.

1968

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *v.* CANADIAN INGERSOLL-RAND CO. LTD. *et al.*

Held: The appeal should be allowed.

On the first issue. The rule *audi alteram partem* does not imply that a hearing must always be held. The obligation is to grant to the parties an opportunity to present their case. The Board was sufficiently informed by the written pleadings, the documents produced and its own inquiries to reasonably hold that, in the circumstances, it should render its decision without further delay.

On the second issue. The Board's substitution order did not, as contended by the respondent, have the effect of extending the existing certificate to all the other employees of the respondent. Consequently, by issuing the subsequent certificate, the Board did not revise or revoke its earlier decision. But even if the Board erred in so interpreting its substitution order, this error was not open to prohibition. The Board had jurisdiction to consider and decide the question and could not lose that jurisdiction because of a possible error committed in good faith.

On the third issue. Obviously, this was an inter-union process since the question submitted to the Board was as to which one of the two unions was entitled to certification. In the present case, this conflict had to be decided by the vice-president alone. It could not be presumed that in exercising that jurisdiction, the vice-president failed to comply with the law. The contrary must be presumed.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Chief Justice Dorion. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge en Chef Dorion. Appel accueilli.

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

Jean H. Gagné, c.r., et *J. Claude Royer,* pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—L'intimée a fait émettre un bref de prohibition pour faire déclarer illégale et nulle une décision de l'appelante accréditant le 30 mars 1965 l'Union mise en cause et pour obtenir une ordonnance enjoignant à celle-ci de cesser et se désister de tous actes, interventions et procédures découlant de cette décision. Après enquête et audition au mérite, la Cour supérieure rejeta la requête de l'intimée

[1] [1967] B.R. 794.

1968

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC
v.
CANADIAN INGERSOLL-RAND CO. LTD. *et al.*

Fauteux J.

et annula le bref émis. Portée en appel, cette décision fut infirmée et la Cour d'appel[1] accorda, en partie, la requête de l'intimée. D'où le présent pourvoi.

Voici, en résumé, les faits donnant lieu à ce litige entre l'appelante et l'intimée, ci-après aussi appelées la Commission et la compagnie-intimée respectivement.

En novembre 1964, il existait à Sherbrooke deux usines, situées tout près l'une de l'autre, dont l'une, celle de la compagnie-intimée, à 375, rue Courcelette et l'autre, celle de Sherbrooke Machineries Limited, à 880 Randrill. Le 21 novembre 1964, la compagnie-intimée se porta acquéreur de l'actif de Sherbrooke Machineries Ltd. Comme conséquence de cette transaction, les deux usines furent fusionnées, les employés de Sherbrooke Machineries Ltd. se trouvèrent placés sous le contrôle et la direction de la compagnie-intimée, ils en devinrent les employés et leurs noms furent portés à sa liste de paye; enfin, les bureaux de comptabilité et d'achats des deux usines furent fusionnés en un seul et leurs produits furent mis sur le marché par la compagnie-intimée. Avant la fusion, l'usine de celle-ci comprenait sept divisions et après la fusion, on désigna l'usine de Sherbrooke Machineries Ltd. comme division n° 8. A l'époque de cette transaction du 21 novembre, les employés de Sherbrooke Machineries Ltd., contrairement à ce qui était le cas pour les employés de la compagnie-intimée, étaient groupés en association et représentés, en fait, par l'Association Internationale des Machinistes, loge 866, ci-après appelée l'Union des Machinistes. Celle-ci détenait un certificat de reconnaissance syndicale qui lui avait été émis en octobre 1953 sous le nom de «Association Internationale des Machinistes» et qui, par la suite, fut modifié, en août 1957, pour y ajouter «loge 866». L'Union des Machinistes avait négocié et signé avec Sherbrooke Machineries Ltd. la convention collective qui était en vigueur lors de la fusion et qui devait le demeurer jusqu'au 4 novembre 1966. Deux jours après la fusion, la compagnie-intimée demanda à la Commission de substituer, au certificat de reconnaissance syndicale, son nom à celui de Sherbrooke Machineries Ltd. Ayant constaté le fait de la fusion et le fait que l'Union des Machinistes n'avait aucune objection à cette demande pourvu que les droits que lui assuraient le *Code du Travail*

[1] [1967] B.R. 794.

et la convention collective soient sauvegardés, la Commission fit droit à cette requête par une décision, rendue le 3 décembre 1964 en conformité avec les dispositions des arts. 36 et 37 du *Code du Travail,* dont le dispositif est en ces termes:

> La Commission décide de changer, partout où elle se trouve, au certificat et à ses amendements, la désignation de l'employeur, par la suivante:
>
> Canadian Ingersoll-Rand Co. Ltd.—corps politique et incorporé, ayant son siège social dans la cité de Montréal.

Trois jours après cette décision du 3 décembre 1964, soit le 7 décembre 1964, les Métallurgistes Unis d'Amérique, local 6670, ci-après appelés l'Union des Métallurgistes, demandaient à la Commission d'être reconnus comme représentants de presque tous les salariés de la compagnie-intimée dont l'adresse indiquée à la demande était 375, rue Courcelette, à Sherbrooke. La Commission informa la compagnie-intimée de cette requête, la pria de préparer un relevé détaillé de tous les salariés à son emploi depuis le 7 décembre 1964, l'avisa que sous peu ses enquêteurs se présenteraient pour vérifier ce relevé et l'invita à présenter, dans un délai de sept jours, toutes représentations qu'elle pouvait juger à propos de soumettre. La compagnie-intimée s'opposa à cette requête. Dans une contestation écrite, en date du 5 janvier 1965, elle soumit, en substance, que par l'effet de la loi et de la décision rendue le 3 décembre 1964 par la Commission, tous les employés de la compagnie-intimée et non pas seulement ceux qui, avant la fusion, travaillaient pour Sherbrooke Machineries Ltd., étaient désormais membres de la même unité de négociation et couverts par le même certificat de reconnaissance syndicale détenu par l'Union des Machinistes et qu'au surplus, l'Union des Métallurgistes ne représentait pas la majorité absolue de ses employés en date du 7 décembre 1964. A ceci, l'Union des Métallurgistes répondit par écrit, le 15 janvier 1965, que la décision du 3 décembre 1964, rendue par la Commission à l'égard du certificat détenu par l'Union des Machinistes, n'avait pas eu pour effet d'étendre la portée juridique de ce certificat, non plus que la portée juridique et la juridiction de la convention collective de travail intervenue entre l'Union des Machinistes et Sherbrooke Machineries Ltd. et que les droits et la situation des employés de la compagnie-intimée, travaillant

1968

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC v. CANADIAN INGERSOLL-RAND CO. LTD. *et al.*

Fauteux J.

aux établissements de la rue Courcelette, n'avaient pas été affectés par cette décision du 3 décembre. Après avoir considéré le dossier, tenu compte des pièces et de ses propres enquêtes, la Commission rendit le 30 mars 1965, sous la signature de son vice-président, le juge Gérard Vaillancourt, la décision qui donna lieu au présent litige. Dans cette décision, la Commission rappelle que les salariés que l'Union des Machinistes était autorisée à représenter, par le certificat de reconnaissance syndicale émis en sa faveur, étaient les salariés à l'emploi de Sherbrooke Machineries Ltd. et elle déclare que son ordonnance du 3 décembre 1964, rendue en vertu de l'art. 37 du *Code du Travail,* n'avait pour fins que de changer, au certificat, le nom de l'employeur et non d'étendre la juridiction de l'Union des Machinistes à tous les salariés des sept Divisions dont était formée l'usine de la compagnie-intimée avant la fusion. Elle ajoute qu'elle n'avait pas de juridiction, sur une simple requête présentée en vertu de l'art. 36 du *Code du Travail,* d'élargir ou d'augmenter le groupe visé au certificat et que si l'Union des Machinistes voulait couvrir, en plus des salariés y mentionnés, ceux de la compagnie-intimée à 375, rue Courcelette, elle devait, conformément aux prescriptions de la section II du *Code du Travail,* présenter une requête en accréditation. Quant au mérite de la demande en accréditation de l'Union des Métallurgistes, la Commission jugea (i) que le groupe de salariés envers lequel il y avait lieu, après enquête, de considérer cette demande, était ce groupe de salariés travaillant à l'usine de la compagnie-intimée à 375, rue Courcelette, à Sherbrooke, *excepté* les employés de bureau, les modeleurs (pattern makers), les gardiens (watchmen) *et les salariés travaillant à l'usine de l'intimée à 880, rue Randrill, Sherbrooke, et étant autrefois l'usine de Sherbrooke Machineries Limited et* (ii) que l'Union des Métallurgistes représentait la majorité de ce groupe. La Commission accueillit la requête de l'Union des Métallurgistes, lui accorda l'accréditation envers le groupe ci-haut défini et lui décerna un certificat à cet effet.

Au soutien de sa requête à la Cour supérieure pour faire déclarer qu'en rendant cette décision, la Commission a excédé sa juridiction, l'intimée a soulevé différentes questions que M. le juge en chef Dorion, saisi de l'affaire, a

résumées en trois points:—(i) violation de la règle *audi alteram partem;* (ii) revision ou modification illégale de la décision du 3 décembre 1964; et (iii) décision *ultra vires* parce que rendue par un vice-président agissant seul dans un cas où il ne s'agit pas d'un litige intersyndical.

Sur le premier point:—Le grief de la compagnie-intimée se fonde sur le fait qu'il n'y a pas eu d'audition formelle. Comme cette Cour l'a rappelé récemment dans *Komo Construction Inc. et les Constructions du St-Laurent Limitée v. Commission des Relations de Travail du Québec et les Métallurgistes Unis d'Amérique, Local 6861*[2], la règle *audi alteram partem* n'implique pas qu'il doit toujours être accordée une audition. L'obligation est de fournir aux parties l'occasion de faire valoir leurs moyens. A mon avis, rien dans les circonstances particulières à l'espèce ne permet d'affirmer que la Commission devait nécessairement juger que la compagnie-intimée ne pouvait faire valoir les deux points soulevés par elle au soutien de sa contestation de la requête de l'Union des Métallurgistes sans la tenue impérative d'une audition. D'autre part et à venir jusqu'au jour où la Commission rendit sa décision, ni la compagnie-intimée ou autre partie intéressée n'avait indiqué le désir d'une audition formelle. Ce n'est que dans une réplique portant la date même de la décision attaquée et produite plus de six semaines après le délai additionnel que la Commission lui avait accordé pour produire cette réplique, que la compagnie-intimée exprima ce désir. Manifestement, cette demande d'audition ne fut pas faite en temps utile. La diligence que la Commission doit, dans l'intérêt de la paix industrielle, des employeurs, des employés et du public, apporter à la solution des litiges qui lui sont soumis, ne doit pas être paralysée par le défaut ou la négligence des parties. Se trouvant suffisamment renseignée par les plaidoiries écrites, les pièces produites et ses propres enquêtes, la Commission pouvait raisonnablement juger, dans les circonstances, qu'en raison, d'une part, de son devoir de disposer diligemment des cas dont elle est saisie et en raison, d'autre part, de l'inaction de la compagnie-intimée, elle pouvait et devait, sans plus d'atermoiement, rendre sa décision. A mon avis, le Juge en chef de la Cour

[2] [1968] R.C.S. 172.

1968

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC
v.
CANADIAN INGERSOLL-RAND CO. LTD. *et al.*

Fauteux J.

supérieure était justifié de rejeter ce grief de la compagnie-intimée. Disons immédiatement qu'il n'est fait aucune mention de ce grief aux raisons de jugement de la Cour d'appel.

Sur le second point:—La compagnie-intimée prétend qu'en amendant, le 3 décembre 1964, le certificat de reconnaissance syndicale émis en faveur de l'Union des Machinistes afin d'y substituer le nom du nouvel employeur, la compagnie-intimée, à celui de l'ancien, Sherbrooke Machineries Ltd., la Commission avait étendu la juridiction que l'Union des Machinistes avait sur les salariés de Sherbrooke Machineries Ltd. à tous les salariés des sept divisions de l'usine de la compagnie-intimée. Et, poursuit-elle, en accréditant, par sa décision du 30 mars 1965, l'Union des Métallurgistes comme représentant les salariés de ses sept divisions, la Commission a revisé et renversé sa décision du 3 décembre 1964, ce que, dit-on, elle ne pouvait légalement faire sans permettre aux parties d'être entendues et leur donner un avis à ces fins, tel que l'exigent les dispositions de l'art. 118 du *Code du Travail,* auxquelles la Commission ne s'est pas conformée. Cet article 118 vise le cas où la Commission est appelée à reviser ou révoquer pour cause une décision ou un ordre rendu ou certificat émis par elle. Ceci n'est pas notre cas. En l'espèce, ce que la Commission avait à décider, c'était le mérite d'une requête déposée par l'Union des Métallurgistes pour être accréditée comme représentant les employés de la compagnie-intimée, en date du 7 décembre 1964. Celle-ci contesta cette requête et sa contestation est fondée, en partie, sur l'interprétation et la portée ci-dessus qu'elle attribue à la décision du 3 décembre et que la Commission et, subséquemment, la Cour supérieure ont, à bon droit, rejetées comme mal fondées. Même s'il fallait tenir pour erronées l'interprétation et la portée différentes que la Commission assigne à sa décision du 3 décembre, cette erreur ne saurait donner ouverture au recours par prohibition, ne serait-ce qu'en raison du fait que la Commission avait juridiction pour considérer et décider cette question particulière et qu'on ne perd pas la juridiction qu'on possède du fait qu'en l'exerçant, on puisse, de bonne foi, commettre une erreur. *Segal v. City of Montreal*[3]. La Cour supérieure était justifiée de ne pas

[3] [1931] R.C.S. 460, 56 C.C.C. 114, 4 D.L.R. 603.

retenir ce deuxième grief dont il n'est fait, comme c'est le cas pour le premier, aucune mention aux raisons de jugement de la Cour d'appel.

Sur le troisième point:—La compagnie-intimée a plaidé et précisé ce moyen comme suit au para. 33 de sa requête pour prohibition:

> 33.—Également, la décision de l'intimée, rendue le 30 mars 1965 et produite sous la cote R-12, est illégale, nulle et *ultra vires* parce qu'elle a été rendue par un vice-président de l'intimée agissant seul et par conséquent sans juridiction, *puisqu'un tel vice-président n'a ce pouvoir en vertu de la loi que dans le cas de litige inter-syndical, ce qui n'était aucunement le cas;*

J'ai mis en italique cette partie du paragraphe où apparaît la raison sur laquelle se fonde ce grief dont le bien ou malfondé dépend ainsi de la question de savoir si l'affaire dont fut saisie la Commission, est ou n'est pas un litige *inter-syndical,* tel que défini à l'art. 108 du *Code du Travail,* soit *une affaire où des associations de salariés sont parties opposées* ou, suivant le texte anglais, *a case in which associations of employees are opposed to one another.* En effet, tel que le prescrit le second para. de l'art. 107 du *Code du Travail,* les membres de la Commission qui représentent les employeurs et les salariés ne votent pas, s'il s'agit d'un litige intersyndical. Le conflit est alors décidé par celui qui préside les séances de la Commission, soit le président lui-même ou, comme ce fut le cas en l'espèce, l'un de ses vice-présidents, M. le juge Gérard Vaillancourt. Tenant compte de la contestation, des pièces produites et de ses propres enquêtes, la Commission a évidemment considéré qu'elle était saisie d'un litige intersyndical. Et M. le juge en chef Dorion, après un examen détaillé des faits révélés par le dossier, est arrivé à la même conclusion qu'il exprima en ces termes:

> Toute la question consistait à savoir si l'Association des Machinistes possédait déjà un certificat d'accréditation pour les employés de Canadian Ingersoll ou si les Métallurgistes Unis avaient le droit de demander un tel certificat. Y a-t-il dans ce conflit autre chose qu'un litige inter-syndical? Évidemment non. Surtout si l'on tient compte du texte anglais de l'article 108, on constate que la véracité de cette dénégation ne fait pas de doute, car il y avait certainement «dans l'affaire des associations d'employés qui étaient opposées l'une à l'autre». Dans les circonstances, le paragraphe 2 de l'article 107 devait recevoir son application.

On ne saurait, à mon avis, arriver à d'autre conclusion. Le fait que la compagnie-intimée ait, à la connaissance de l'Union des Machinistes, pris l'initiative de la contestation de la requête en accréditation de l'Union des Métallurgistes

1968

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *v.* CANADIAN INGERSOLL-RAND CO. LTD. *et al.*

Fauteux J.

et ait, à ces fins, invoqué les droits, pour le moins prioritaires sinon exclusifs, que pouvait avoir l'Union des Machinistes, n'est certes pas un critère valable pour déterminer la nature du litige soumis à la Commission. Comme employeur, la compagnie-intimée avait sans doute un intérêt dans la décision que pouvait prendre la Commission mais ceci ne détermine pas la nature du conflit que celle-ci avait à résoudre. La nature de ce conflit doit s'apprécier en fonction de la question fondamentale qu'on avait soumise à la Commission et que celle-ci devait décider. Et cette question était: laquelle des deux unions, agissant l'une directement et l'autre surtout par le truchement de la compagnie-intimée, avait droit, après l'acquisition de l'entreprise de Sherbrooke Machineries Ltd. par la compagnie-intimée, d'être accréditée pour représenter tous les salariés de celle-ci. Manifestement, il n'y avait là qu'un litige intersyndical. Aussi bien, ce troisième grief, tel que plaidé par la compagnie-intimée et considéré par le juge de première instance, fut-il, par celui-ci, justement écarté comme mal fondé.

La Cour supérieure rejeta la requête pour bref de prohibition, cassa et annula le bref émis.

Aux raisons de jugement de la Cour d'appel, on ne réfère aucunement aux griefs ci-dessus, non plus qu'à la question de savoir s'il s'agit d'un litige intersyndical. On reconnaît, par ailleurs, que si telle est la nature de l'affaire soumise à la Commission, le vice-président pouvait, comme il l'a fait, en décider seul. Distinguant, cependant, entre les séances de la Commission et ses décisions, la Cour d'appel a considéré que le vice-président ne pouvait, en droit, procéder seul aux séances requises pour la connaissance du litige et du délibéré et, tenant compte du fait que la décision de la Commission ne mentionne aucune séance avec d'autres membres de la Commission et trouvant la preuve au dossier suffisante pour établir que le vice-président avait connu seul du différend, la Cour conclut que la décision, ainsi rendue par ce dernier sans permettre à au moins deux de ses collègues d'exercer leur voix consultative, est illégale et nulle et que la Commission ne peut y donner effet. C'est là le motif et le seul sur lequel se fonde le jugement de la Cour d'appel. Et de là le pourvoi de la Commission à cette Cour.

Au seuil de l'audition devant nous, la compagnie-intimée a demandé la permission d'amender sa requête pour obten-

tion d'un bref de prohibition, afin d'y remplacer le para. 33, ci-haut reproduit, par le paragraphe suivant:

33.—Également, la décision de l'intimée rendue le 30 mars 1965, et produite sous la cote R-12, est illégale, nulle et *ultra vires,* parce qu'elle a été rendue par un vice-président de l'intimée agissant seul et par conséquent sans juridiction. En effet, non seulement la décision n'a été rendue et signée que par un vice-président de la commission, mais aussi ce vice-président n'a pas connu du litige et n'a pas délibéré avec les autres membres de la Commission.

L'appelante s'est fortement opposée à cette requête. Elle a soumis que, mis en contraste avec le texte actuel du para. 33, l'amendement proposé change fondamentalement le débat engagé entre les parties et établit manifestement que la compagnie-intimée cherche ainsi, injustement et illégalement, à bénéficier, devant cette Cour, d'un moyen qui n'avait pas été plaidé en première instance et sur lequel s'est appuyée la Cour d'appel pour motiver sa décision. La Cour réserva son jugement sur cette requête.

Ainsi donc, pour déclarer que le juge Vaillancourt a connu seul du différend et rendu sa décision sans permettre à au moins deux de ses collègues d'exercer leur voix consultative, la Cour d'appel s'est appuyée (i) sur le fait que la décision de la Commission ne mentionne aucune séance du juge Vaillancourt avec d'autres collègues et (ii) sur la preuve, soit sur la partie ci-après du témoignage de Me Alfred Bussières, secrétaire général de la Commission:

Q. Entre la réception de la requête en accréditation des Steel Workers—je vais les désigner comme ça: les Steel Workers of America, et la décision du trente (30) mars de votre Commission, dans ce dossier, y a-t-il eu audition des parties?

R. Il n'y a aucun procès-verbal qui apparaît, d'audition.

Q. Aucun procès-verbal d'audition. Et, y a-t-il eu procès-verbal de délibéré. Y a-t-il eu délibéré?

R. ..... je l'ignore.

Me LAURENT E. BÉLANGER, POUR L'INTIMÉE: Je m'objecte, votre Seigneurie, ce n'est pas allégué.

LE TÉMOIN:

R. C'est hors ma connaissance.

LA COUR: S'il n'y a pas de procès-verbal d'audition, je ne vois pas comment il va trouver un procès-verbal de délibéré.

Me JEAN GAGNÉ, C.R., POUR LA REQUÉRANTE: Parfois, ils délibèrent sans audition.

R. Parfois ils délibèrent hors notre présence, aussi.

Q. En tout cas, on a une décision.

LA COUR: Oui, c'est ce qui compte, la décision.

On notera d'abord que le procureur de la Commission, Me Bélanger, s'est objecté à cette partie du témoignage du

1968

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *v.* CANADIAN INGERSOLL-RAND CO. LTD. *et al.*

Fauteux J.

secrétaire général, parce que les faits que la compagnie-intimée croyait peut-être pouvoir établir, n'avaient pas été plaidés. De plus et ainsi que l'a soumis Me Bélanger devant nous, tout ce qui ressort de ce témoignage, c'est que Me Bussières affirme qu'il n'y a pas de procès-verbal d'audition des parties, qu'il ignore s'il y a eu délibéré et qu'il ajoute que les membres de la Commission délibèrent parfois sans audition des parties et parfois hors la présence du personnel. En toute déférence, il m'est impossible d'admettre, comme établi au dossier, le fait sur lequel la Cour d'appel s'est appuyée pour casser le jugement du juge de première instance. Le vice-président de la Commission avait juridiction pour décider de la question soumise à la Commission. On ne peut présumer qu'en exerçant cette juridiction, il s'est abstenu de faire ce que la loi l'obligeait de faire. Il est présumé s'y être conformé. La maxime *Omnia praesumuntur rite esse acta* reçoit ici son application. La volonté du législateur de rendre la Commission maîtresse de sa procédure, ainsi qu'en témoignent les dispositions de l'art. 115 du *Code du Travail*, n'implique sûrement pas que celle-ci doit, en matière de procédure, se conformer intégralement à la pratique prescrite ou suivie en ce qui concerne les causes mues devant les tribunaux de droit commun. La compagnie-intimée devait satisfaire à la règle *Actori incumbit probatio*. Elle a fait défaut de ce faire. Pour ces raisons, je rejetterais la motion pour amender la requête pour bref de prohibition; et, assumant que le texte non amendé du para. 33 de cette requête puisse, sans amendement, être validement interprété de façon à inclure comme plaidé le moyen motivant le jugement de la Cour d'appel, je dirais, en tout respect, qu'à mon avis, le dossier ne permet pas de tenir ce moyen comme fondé.

Je maintiendrais l'appel, infirmerais le jugement de la Cour d'appel, le tout avec dépens, y compris les dépens de la requête pour amender, et rétablirais le jugement de première instance.

Appel accueilli avec dépens.

Procureur de l'appelante: L. E. Bélanger, Montréal.

Procureurs de l'intimée: Gagné, Trotier, Letarte, Larue & Rioux, Québec.

Procureurs de la mise-en-cause: Trudel, Beaudry & Gamache, Montréal.

FRANK J. HEPPEL (*Proposed defendant*) . . APPELLANT;

AND

MARGARET STEWART (*Plaintiff*) . . . . . RESPONDENT;

AND

DIAS DOMINGOS and LEONARD CORDERY, both personally and as carrying on business under the firm name and style of GARDEN SPECIALTY COMPANY (*Defendants*) . . RESPONDENTS.

1968
*Feb. 9
June 3

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Limitation of actions—Motor vehicles—Collision—Alleged failure of brakes owing to faulty repair work—Application made to add repairer as party defendant—Whether plaintiff's damages were "occasioned by a motor vehicle"—Whether statutory limitation period applicable—The Highway Traffic Act, R.S.O. 1960, c. 172, s. 147(1).

This was an appeal from an order of the Court of Appeal for Ontario which allowed an appeal by the present respondent, S, and which added the appellant as a party defendant in an action in which S was the plaintiff. The action arose out of an automobile accident, which occurred on June 15, 1964, when a motor vehicle owned by the defendant C, and operated by the defendant D, ran into the back of the motor vehicle of S while it was stopped at a stop street, causing personal injuries to S and property damage to her vehicle. The defendants alleged that the brakes of C's vehicle had failed owing to faulty repair work. D stated that C's automobile had been taken to the appellant's service station two or three days before the accident with instructions to examine and, if necessary, repair the braking system. After the vehicle was returned D drove it without difficulty up to the time when the accident occurred, when the brakes failed completely.

An application made on June 3, 1966, to add the appellant as a party defendant was resisted on the ground that any claim against the appellant was barred by s. 147(1) of *The Highway Traffic Act*, R.S.O. 1960, c. 172, which provides that, subject to two provisoes not applicable here, "no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained". The judge of first instance was of the opinion that the subsection applied if the damages claimed were physically caused by the motor vehicle. The Court of Appeal held that the provision applied only if the legal basis of the claim is the use or operation of the motor vehicle.

Held (Judson J. dissenting): The appeal should be allowed and the order of the Court of Appeal reversed.

* PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

1968

HEPPEL v. STEWART et al.

Per Cartwright C.J. and Martland, Hall and Spence JJ.: The subsection did not purport to apply only to causes of action of a particular nature. It did not refer to the use or operation of a motor vehicle. It stated specifically that *no action* shall be brought to recover damages occasioned by a motor vehicle. If a motor vehicle was the occasion for the damage, *i.e.*, if it was the vehicle which brought it about, then the limitation period applied.

There could be no question in this case but that the motor vehicle was the occasion for the damage sustained by the plaintiff. Any claim against the appellant would have to allege that her damage was caused by her vehicle being struck by that motor vehicle. That the nature of the negligence which would be alleged against the appellant would be different from that alleged against the other two defendants had no bearing, in view of the way in which the subsection is worded.

Dufferin Paving & Crushed Stone Ltd. v. Anger and Derbyshire, [1940] S.C.R. 174, applied.

Per Judson J., dissenting: Agreement was expressed with the reasons delivered in the Court of Appeal.

APPEAL from an order of the Court of Appeal for Ontario[1], allowing an appeal from and reversing an order of Lyons Co.Ct.J. Appeal allowed, Judson J. dissenting.

W. L. N. Somerville, Q.C., and *D. J. S. McDowell*, for the appellant.

J. Douglas Walker, for the respondent, Margaret Stewart.

N. Douglas Coo, Q.C., for the respondents, Dias Domingos and Leonard Cordery.

The judgment of Cartwright C.J. and Martland, Hall and Spence JJ. was delivered by

MARTLAND J.:—This is an appeal from an order of the Court of Appeal for Ontario[1], which allowed an appeal by the present respondent, Margaret Stewart, and which added the appellant as a party defendant in an action in which she is the plaintiff. The other respondents are defendants in that action.

The action arises out of an automobile accident, which occurred on June 15, 1964, when a motor vehicle owned by the defendant Cordery, and operated by the defendant Domingos, ran into the back of the motor vehicle of the

[1] [1967] 2 O.R. 37, 62 D.L.R. (2d) 282, *sub nom. Stewart v. Domingos et al.*

plaintiff Stewart while it was stopped at a stop street, causing personal injuries to the plaintiff and property damage to her vehicle.

The writ of summons was issued on April 21, 1965, and was served on May 3, 1965. The statement of defence was delivered on June 17, 1965, alleging that the brakes of the defendant's vehicle had failed owing to faulty repair work.

On the examination for discovery of the defendant Domingos, held on March 21, 1966, he stated that the defendant's motor vehicle had been taken to the appellant's service station two or three days before the accident, with instructions to examine and, if necessary, repair the braking system. He also stated that, after the vehicle was returned, he drove it without difficulty up to the time the accident occurred, when the brakes failed completely.

Application to add the appellant as a party defendant was made on June 3, 1966. The application was resisted on the ground that any claim against the appellant was barred by s. 147(1) of *The Highway Traffic Act*, R.S.O. 1960, c. 172. Section 147 provides as follows:

> 147. (1) Subject to subsections 2 and 3, no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.
>
> (2) Where death is caused, the action may be brought within the time limited by *The Fatal Accidents Act*.
>
> (3) Notwithstanding subsections 1 and 2, when an action is brought within the time limited by this Act for the recovery of damages occasioned by a motor vehicle and a counterclaim is made or third party proceedings are instituted by a defendant in respect of damages occasioned in the same accident, the lapse of time herein limited is not a bar to the counterclaim or third party proceedings.

The only question in issue is whether the plaintiff's damages were "occasioned by a motor vehicle".

The learned judge of first instance was of the opinion that the subsection applied if the damages claimed were physically caused by the motor vehicle. The Court of Appeal held that the provision applied only if the legal basis of the claim is the use or operation of the motor vehicle.

With respect, I do not agree with this interpretation of the subsection. It does not purport to apply only to causes of action of a particular nature. It does not refer to the use

1968

HEPPEL v. STEWART et al.

Martland J.

or operation of a motor vehicle. It states specifically that *no action* shall be brought to recover damages occasioned by a motor vehicle. If a motor vehicle is the occasion for the damage, *i.e.*, if it is the vehicle which brings it about, then the limitation period applies.

There can be no question in this case but that the motor vehicle in question was the occasion for the damage sustained by the plaintiff. Any claim against the appellant would have to allege that her damage was caused by her vehicle being struck by that motor vehicle. That the nature of the negligence which would be alleged against the appellant would be different from that alleged against the other two defendants has no bearing, in view of the way in which the subsection is worded.

The meaning of the section of *The Highway Traffic Act* which preceded the present s. 147 (R.S.O. 1927, c. 251, s. 53, as amended by 1930, c. 48, s. 11) was considered by this Court in *Dufferin Paving & Crushed Stone Ltd. v. Anger and Derbyshire*[2]. The main question which had to be determined was as to whether the limitation section applied to a claim, founded in nuisance, for damage to a dwelling house through vibration caused by the operation of the defendant's cement mixing motor trucks in the street, in front of the house. It was held unanimously that the section applied.

The Court did not accept the contention that the section was not applicable to a claim at common law as distinct from a claim founded under the statute, or that it applied only to traffic accidents.

In holding that the section did apply, Davis J., with whom Duff C.J. and Hudson J. concurred, said, at p. 180:

> It is difficult for me, therefore, to accept the contention that the limitation section (now sec. 60) in the statute is not applicable to this action. It very plainly states that, subject to two provisoes which do not affect this action,
>
> > no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.
>
> The rule of construction is plain:
>
> > If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in

[2] [1940] S.C.R. 174.

their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

This is the rule declared by the Judges in advising the House of Lords in the *Sussex Peerage* case, (1844) 11 Cl. & F. 85, at 143, which was accepted by the Judicial Committee of the Privy Council in *Cargo ex "Argos"*, (1873) L.R. 5 P.C. 134, at 153, and recently referred to by Slesser, L.J., in *Birmingham Corporation v. Barnes*, [1934] 1 K.B. 484, at 500.

Crockett J. and Kerwin J., as he then was, applied similar reasoning. I would refer to what is said by the latter at p. 189:

Taken by themselves the words used in this subsection are clear and unambiguous. In terms they are not limited to circumstances where damages are occasioned by a motor vehicle on a highway; they are not restricted to cases where damages are caused by a motor vehicle coming in contact with a person or thing; they do not state that the damages must have been occasioned by negligence in the operation of a motor vehicle or by reason of the violation of any of the provisions of the Act. It is contended on behalf of the respondents that the subsection must be construed in a narrower sense and that such a claim as the present, based as it is on an alleged nuisance at common law, is not within its purview.

He then went on, at p. 190, to reject that contention.

I agree with this interpretation of the subsection and, in my opinion, in terms, it covers the circumstances in the present case. In fact, in the present case, the plaintiff's claim against the appellant clearly is founded upon the use and operation of a motor vehicle; *i.e.*, one with defective brakes. Even if the provision applied only to damage resulting from the use and operation of a motor vehicle, this case would be within it, for there is nothing to say that its benefits accrue solely to a negligent operator, and not to someone whose negligence may have rendered such operation unsafe.

I would allow the appeal, and reverse the order of the Court of Appeal, with costs to the appellant in this Court and in the Court below.

JUDSON J. (*dissenting*):—I agree with the reasons delivered in the Court of Appeal. My opinion is that there is a valid distinction between this case and *Dufferin Paving & Crushed Stone Ltd. v. Anger and Derbyshire*[3]. This was stated by the Court of Appeal in the following terms:

In dismissing the plaintiff's application to add Heppel as a party defendant, the learned County Judge relied on the case of *Dufferin*

[3] [1940] S.C.R. 174.

1968

HEPPEL v. STEWART et al.

Judson J.

Paving & Crushed Stone Ltd. v. Anger and Derbyshire, [1940] S.C.R. 174. In that case, the plaintiff's claim was that his house was damaged by vibrations caused by operation of the defendant's heavy trucks on the adjoining highway. In the present case, the plaintiff's cause of action against Heppel is not in relation to the use or operation of the motor car. It is for negligence in the repair of a car owned by the defendant Cordery and operated by the defendant Domingos, so that, in so far as the claim against Heppel is concerned, while the car in a physical sense was the instrument inflicting the damage, the cause of the damage in the legal sense was the negligence, if proved, of Heppel in repairing the car and delivering it to the defendant Cordery in a state in which it might cause damage or injury not only to the defendants, but to other users of the highway.

A motor car is an inanimate object that cannot cause damage unless it is used or operated. *The Highway Traffic Act* regulates the use and operation of motor vehicles and I think that the scope of s. 147(1) consistently with its setting in the Act, is limited to cases in which damage is occasioned as a result of the use or operation of a motor car and is not available to a defendant in a case such as the present one, where the allegation is that the accident was caused by the antecedent negligence of a repairer, who was neither the owner nor the operator of the motor car, any more than it would be available to a person sued for negligently shooting a motorist, whose car, as a result, caused damage to the person or property of another.

I would dismiss the appeal with costs.

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

Solicitors for the appellant: Borden, Elliot, Kelley & Palmer, Toronto.

Solicitors for the respondent, Margaret Stewart: Thompson, Brown, Proudfoot & Walker, London.

Solicitors for the respondents, D. Domingos and L. Cordery: Shearer & Coo, Toronto.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

URGEL R. BRUNET .....RESPONDENT.

1968

*May 10
May 10

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Care and control of motor vehicle while intoxicated or under influence of narcotic drug—Whether two offences—Whether charge bad for duplicity—Criminal Code, 1953-54 (Can.), c. 51, ss. 222, 492, 703, 704, 727.

The respondent was convicted on a charge of having had the care and control of a motor vehicle while intoxicated or under the influence of a narcotic drug, contrary to s. 222 of the *Criminal Code*. His appeal by trial *de novo* was dismissed. He then appealed to the Court of Appeal where his submission that the information charged two offences was accepted. The Court of Appeal held that the information was bad for duplicity and that ss. 704(1) and 727(4) of the Code were not applicable. The Crown was granted leave to appeal to this Court.

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

Section 222 of the *Criminal Code* does not create one offence of driving while intoxicated and another offence of driving while under the influence of a narcotic drug. The essence of the offence is driving while in a certain condition, there being two different ways in which the prohibited condition may be brought about. Consequently, there was no duplicity in the information.

Droit criminel—Conduire un véhicule à moteur ou en avoir la garde, étant en état d'ivresse ou sous l'influence d'un narcotique—S'agit-il de deux infractions—L'acte d'accusation est-il défectueux parce qu'il est double—Code criminel, 1953-54 (Can.), c. 51, arts. 222, 492, 703, 704, 727.

L'intimé a été trouvé coupable sur un acte d'accusation l'accusant d'avoir conduit un véhicule à moteur ou d'en avoir eu la garde alors qu'il était en état d'ivresse ou sous l'influence d'un narcotique, contrairement à l'art. 222 du *Code criminel*. Son appel au moyen d'un procès *de novo* a été rejeté. Il en a alors appelé à la Cour d'Appel où on a accepté sa prétention que l'acte d'accusation imputait deux infractions. La Cour d'Appel a statué que l'acte d'accusation était défectueux parce qu'il était double et que les dispositions des arts. 704(1) et 727(4) du Code ne s'appliquaient pas. La Couronne a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être accueilli et la déclaration de culpabilité rétablie.

L'article 222 du *Code criminel* ne crée pas une infraction de conduire, étant en état d'ivresse et une autre infraction de conduire, étant sous l'influence d'un narcotique. L'essence de l'infraction est de con-

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*PRESENT: Cartwright C.J. and Fauteux, Judson, Ritchie and Hall JJ.

1968

THE QUEEN
v.
BRUNET

duire alors que la personne est dans un certain état. Il y a deux différentes manières de provoquer cet état prohibé. Conséquemment, l'acte d'accusation n'était pas double.

APPEL par la Couronne d'un jugement de la Cour d'Appel de Saskatchewan mettant de côté une déclaration de culpabilité. Appel accueilli.

APPEAL by the Crown from a judgment of the Court of Appeal for Saskatchewan setting aside the respondent's conviction. Appeal allowed.

Serge Kujawa, for the appellant.

Leslie R. Meiklejohn, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—Urgel R. Brunet was convicted by a magistrate on the charge that he

on the 15th day of October, A.D. 1965, at Prince Albert, in the said Province, while intoxicated or under the influence of a narcotic drug, did unlawfully have the care and control of a motor vehicle, to wit, a 1960 station wagon, on 6th Avenue East, Prince Albert, Saskatchewan, contrary to the provisions of section 222 of the *Criminal Code* of Canada.

His appeal by trial *de novo* was dismissed and he appealed to the Court of Appeal for Saskatchewan where the only point raised was that the conviction could not stand because the information charged two offences.

The Court of Appeal for Saskatchewan accepted this submission and held that the information was bad for duplicity, and that ss. 704(1) and 727(4) of the *Criminal Code* were not applicable. The appeal was accordingly allowed.

This Court granted leave to appeal on the following grounds:

(a) That the Court of Appeal for Saskatchewan erred in law in holding that duplicity is not a defect as contemplated by s. 727(4) and s. 704(1) of the *Criminal Code*;

(b) That the Court of Appeal for Saskatchewan erred in law in quashing the conviction herein on the basis that the information is bad in law there being no such concept in criminal law;

(c) That the said Court of Appeal for Saskatchewan erred in law in holding that there was in fact duplicity in the information herein.

The only question that arises on this appeal is whether there was, in fact, duplicity in this information. In my opinion there was not. This information follows the wording in s. 222 of the *Criminal Code*. That section does not create one offence of driving while intoxicated and another offence of driving while under the influence of a narcotic drug. The essence of the offence is driving while in a certain condition, there being two different ways in which the prohibited condition may be brought about. The relevant provisions of the *Criminal Code* are:

492. (1) Each count in an indictment shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the accused committed an indictable offence therein specified.

(2) The statement referred to in subsection (1) may be

(*b*) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence, or...

703. No information, summons, conviction, order or process shall be deemed to charge two offences or to be uncertain by reason only that it states that the alleged offence was committed

(*a*) in different modes, or

(*b*) in respect of one or other of several articles, either conjunctively or disjunctively.

Recent illustrations of the application of this principle are *R. v. Schultz*[1]; *Cox and Paton v. The Queen*[2]; and *Kipp v. Attorney General for Ontario*[3]. The case is distinct from *Rex v. Archer*[4].

I would allow the appeal and restore the conviction. There is provision for the respondent's costs in the order granting leave to appeal.

Appeal allowed.

Solicitor for the appellant: The Attorney General for Saskatchewan, Regina.

Socilitor for the respondent: Koch, Meiklejohn & Scrivens, Regina.

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1 (1962), 133 C.C.C. 174 at 182, 38 C.R. 76.
2 [1963] S.C.R. 500, 40 C.R. 52, 2 C.C.C. 148.
3 [1965] S.C.R. 57, 45 C.R. 1, 2 C.C.C. 133.
4 [1955] S.C.R. 33, 20 C.R. 181, 110 C.C.C. 321, 2 D.L.R. 621.

1968

*Mars 4, 5
Mai 22

CARL F. NAPPER (*Demandeur*) .....APPELANT;

ET

LA CITÉ DE SHERBROOKE (*Défenderesse*)...INTIMÉE.

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

Faute—Responsabilité—Course de cyclistes—Concurrent heurtant une automobile stationnée au-delà de la ligne d'arrivée—Dommages-intérêts réclamés à la ville—Accident attribuable à la faute des constables municipaux ou de la victime—Déclaration extra-judiciaire d'un tiers irrecevable comme preuve—Erreur dans l'appréciation des faits—Quantum des dommages—Prime d'échange—Code civil, arts. 1053, 1054.

Le demandeur était un concurrent dans une course cycliste dite «Le Tour du Saint-Laurent», et dont l'étape ce jour-là était de Granby à Sherbrooke où la ligne d'arrivée avait été tracée dans une des rues. La chaussée d'environ 38 pieds de largeur était libre de véhicules à cet endroit, mais à une quarantaine de pieds plus loin il y avait, du côté droit et faisant face à la ligne d'arrivée, deux véhicules de front: au bord du chemin, une voiture utilisée par les constables municipaux et parallèlement, à une distance d'environ deux pieds de celle-ci, l'automobile d'un touriste américain qui s'était arrêté là sur l'ordre d'un constable municipal. Le demandeur était dans le deuxième groupe de concurrents à franchir la ligne d'arrivée. Ils étaient sept dans ce groupe à arriver de front et le demandeur se trouvait à l'extrême gauche. Incapable de faire un arrêt brusque et de passer à droite de l'automobile arrêtée, le demandeur a cherché à passer entre les deux véhicules. L'espace étant insuffisant, il est tombé et s'est blessé grièvement. L'action qu'il a instituée contre la municipalité a été rejetée par le Juge de première instance dont le jugement a été confirmé en appel par un arrêt majoritaire. Le demandeur en a appelé à cette Cour.

Arrêt: L'appel doit être accueilli.

La responsabilité de l'accident doit être imputée en entier à la municipalité du chef de la faute commise par ses constables dans l'exécution de leurs fonctions. Cette faute consiste en ce que ces derniers, ayant été chargés par l'autorité municipale compétente de faciliter l'arrivée de la course cycliste et de fournir à cette fin une escorte sur motocyclettes pour faciliter le libre passage aux coureurs, ont, au mépris des règles de la prudence, créé un obstacle dangereux à une faible distance de la ligne d'arrivée: premièrement, en stationnant dans la rue une automobile à leur usage; et, deuxièmement, en laissant avancer une autre voiture à côté de cette automobile au moment où un groupe de coureurs s'approchaient.

Il faut reviser les conclusions du Juge de première instance sur les faits, quoique confirmées en appel, parce qu'une déclaration extra-judiciaire d'un tiers a été erronément reçue en preuve et d'autres erreurs ont été commises.

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*CORAM: Les Juges Fauteux, Martland, Judson, Hall et Pigeon.

Dans l'estimation des dommages, il n'y a pas lieu d'accorder la prime d'échange sur les sommes allouées pour souffrances et perte des joies de la vie pas plus que sur les déboursés faits au Canada.

Negligence—Liability—Bicycle race—Collision of cyclist with car parked beyond finish line—Damages claimed from municipality—Whether accident caused by fault of municipal police or by victim—Extra-judicial statement by third party improperly received in evidence—Error vitiating findings of fact—Quantum of damages—Exchange premium—Civil Code, arts. 1053, 1054.

The plaintiff was a competitor in a bicycle race called "Le Tour du Saint-Laurent", a lap of which was on that day between Granby and Sherbrooke where the finish line had been set up on one of the streets. The pavement was approximately 38 feet wide and was free of vehicles. However, some forty feet further, two vehicles were stopped abreast on the right hand side of the street facing the finish line: at the curb, a car used by the municipal police and parallel to and some two feet from it, a car driven by an american tourist which had been stopped. The plaintiff was in the second group to cross the finish line. They were seven in that group riding abreast and the plaintiff was at the extreme left. Being unable to stop or to pass to the right of the american's car, the plaintiff tried to pass between the two vehicles. The space being insufficient, he fell and was grievously injured. His action against the municipality was dismissed by the trial judge whose decision was affirmed by a majority judgment in the Court of Appeal. He appealed to this Court.

Held: The appeal should be allowed.

The liability for the accident must fall entirely on the municipality as a result of the fault committed by its police officers in the performance of their work. This fault consisted in the fact that the officers, having been charged with the duty to facilitate the arrival of the race and to furnish for this purpose a motor cycle escort in order to facilitate the racers' right of way, created, in defiance of the rules of prudence, a dangerous obstacle at a short distance from the finish line: firstly, by parking their own car in the street; and secondly, by permitting a second vehicle to advance opposite their own car at the moment when a group of competitors was approaching.

The findings of fact of the trial judge must be reversed, although upheld in the Court of Appeal, because an extra-judicial statement of a third party was improperly received in evidence and other errors were committed.

Concerning the quantum of damages, exchange premium should not be added to amounts allowed for suffering and loss of enjoyment of life any more than on expenses incurred in Canada.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Mitchell J. Appeal allowed.

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[1] [1968] B.R. 81.

1968

NAPPER v. CITÉ DE SHERBROOKE

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Mitchell. Appel accueilli.

Yvon Roberge, pour le demandeur, appelant.

Albert Rivard, c.r., pour la défenderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—L'accident qui est à l'origine du présent litige est survenu pendant une course cycliste dite «Le Tour du Saint-Laurent», le 3 août 1961. L'étape du matin ce jour-là était de Granby à Sherbrooke. La ligne d'arrivée avait été tracée dans la rue Wellington Sud, en face de l'établissement commercial d'un nommé Munkittrick. Le demandeur était dans le deuxième groupe de concurrents à franchir la ligne. Ils étaient sept dans ce groupe à arriver de front et le demandeur se trouvait à l'extrême gauche. La chaussée d'environ 38 pieds de largeur était libre de véhicules à la ligne d'arrivée mais à une quarantaine de pieds plus loin il y avait, du côté gauche, deux véhicules de front: au bord du chemin une voiture utilisée par les constables municipaux et parallèlement, à une distance d'environ deux pieds de celle-ci, l'automobile d'un touriste américain, un nommé Wheeler, qui s'était arrêté là sur l'ordre d'un constable municipal. L'appelant, incapable de faire un arrêt brusque et de passer à droite de l'automobile arrêtée, a cherché à passer entre les deux véhicules. L'espace étant insuffisant, il est tombé et s'est blessé grièvement subissant une fracture de la cuisse droite et une fracture ouverte de la jambe droite qui n'ont pas nécessité moins de cinq interventions chirurgicales.

Il convient de signaler dès maintenant que deux jours auparavant l'officier en charge du service municipal de police, le capitaine Armand Genest, avait donné des instructions par écrit intitulées «Service d'ordre». Ces instructions comportaient relativement à l'arrivée des cyclistes ce qui suit:

> LE TOUR DU ST-LAURENT
>
> Jeudi le 3 août 1961
>
> Arrivée à Sherbrooke, par la rue Wellington sud, chez Munkittrick aux environs de 12.00 hres P.M.

[1] [1968] B.R. 81.

DEVOIR: à 11.30 hres A.M.

A partir des limites de la ville, deux motocyclistes et un constable sur la rue Wellington sud, près de chez Munkittrick, détaillé par l'officier en charge.

Le juge de première instance a rejeté l'action et la Cour d'Appel[1] a confirmé par un arrêt majoritaire. La majorité en Cour d'Appel a essentiellement endossé les motifs du juge de première instance. Ceux-ci peuvent se ramener à trois.

En premier lieu, on dit que la municipalité n'a pas contracté l'engagement de fournir une protection spéciale par les membres de son corps de police à ceux qui participaient à la course. Il n'y a rien à redire sur ce premier point. La preuve démontre bien que les organisateurs du Tour du Saint-Laurent ont adressé des communications à l'autorité municipale et aussi que des dispositions spéciales ont été prises mais il est évident qu'aucun engagement n'a été contracté.

En second lieu, le juge de première instance considère que les constables n'ont commis aucune faute. Il est d'avis qu'ils n'avaient pas le devoir de détourner la circulation ni de libérer la rue de véhicules stationnés aux environs de la ligne d'arrivée. Les constables, dit-il de plus, ne doivent pas être considérés comme des experts en course cycliste et ce qui peut être évident pour un expert ne l'est pas nécessairement pour eux. Ensuite il accepte leur version de l'affaire à l'encontre de celle de tous les autres témoins. Il ne trouve pas que la preuve démontre que le constable posté près de la ligne d'arrivée ait fait signe à Wheeler d'avancer. Il dit que lorsque le constable l'a vu il l'a fait arrêter et il affirme que c'était la seule chose à faire dans les circonstances.

Ces conclusions du juge de première instance sur les faits ayant été acceptées par la majorité en Cour d'Appel, un motif spécial est nécessaire pour s'en écarter. Ici, il y en a plus d'un.

Tout d'abord, le dossier fait voir que le juge de première instance a permis au constable de rapporter ce que Wheeler lui avait déclaré. Objection a été faite à cette preuve et n'a pas été accueillie. De la part de l'intimée, on a soutenu que cette déclaration était admissible parce qu'elle avait été spécialement alléguée. Cette prétention est doublement

[1] [1968] B.R. 81.

1968

NAPPER v. CITÉ DE SHERBROOKE

Le Juge Pigeon

erronée. L'allégation ne suffit pas à rendre une preuve recevable. *Léon c. Dominion Square Corporation*[2]. De plus, jamais, elle ne peut avoir pour effet de permettre de faire la preuve autrement que de la manière prévue par la loi. Or, il n'est pas de preuve plus irrecevable que celle de déclarations extra-judiciaires faites par un tiers. *Marchand c. Héritiers Begnoche*[3]. Dans le cas présent, il était particulièrement contre-indiqué de recevoir à la décharge du constable impliqué dans l'affaire la déclaration qu'il avait lui-même recueillie. Il est évident que si la municipalité voulait se prévaloir de la version de l'automobiliste Wheeler, elle devait recourir à une commission rogatoire faute de pouvoir le citer comme témoin au procès.

Ensuite le juge soutient que les constables ne doivent pas être considérés comme des experts en course cycliste et que, par conséquent, il n'y a pas faute de leur part d'avoir omis de faire ce qui peut être évident pour un expert mais pas nécessairement pour un constable. L'erreur dans ce raisonnement c'est de prendre pour acquis qu'il fallait être expert en course cycliste pour se rendre compte qu'il était souverainement imprudent et dangereux d'agir comme on l'a fait en l'occurrence. Sans demander aux constables d'être experts en la matière, on doit cependant exiger d'eux non seulement qu'ils possèdent les connaissances de citoyens ordinaires mais aussi qu'ils obtiennent les renseignements indispensables à l'exercice de leurs fonctions. Il y avait sur place plusieurs personnes auprès desquelles ils pouvaient facilement se renseigner et qui d'ailleurs leur ont spontanément offert des renseignements et des conseils dont ils ne paraissent pas avoir fait grand cas.

En effet, le juge de première instance a pour ainsi dire écarté tout ce que le commissaire de la course, Jean-Paul Hamel, un directeur, Octave Desharnais, l'organisateur, Yvon Guillou, l'épouse de celui-ci et un nommé Eugène Lapointe ont relaté des avis précis donnés aux constables pour ne retenir que le témoignage du sergent Martin et du constable Cliche, lesquels ont prétendu ne pas avoir reçu d'indications précises. Pour apprécier ainsi le preuve, il dit ne pas

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[2] [1956] B.R. 623, [1956] R.P. 64.

[3] [1964] C.S. 369.

avoir de raison de ne pas ajouter foi aux constables. Il y a là une erreur manifeste. Ces constables sont les personnes accusées d'avoir commis la faute en raison de laquelle la municipalité est poursuivie. Ils seront légalement responsables de toute condamnation prononcée contre elle de ce chef. On ne peut pas prendre pour acquis qu'ils n'en subiront pas de conséquences et ne seront pas l'objet de sanctions, au contraire. Ce ne sont donc pas des témoins désintéressés. Même si l'on doit reconnaître chez les organisateurs du Tour une tendance à se disculper, leur intérêt est moins direct. De plus, il n'y a aucune cause de reproche contre ces cinq témoins. Le choix fait par le juge entre leur version et celle des constables semble essentiellement fondé sur son omission de considérer que les deux constables ne sont nullement en l'occurrence des témoins désintéressés.

Ensuite il faut dire qu'on ne voit pas pour quelle raison le juge de première instance refuse de tenir pour prouvé que c'est sur un signe fait par le constable Cliche que l'automobiliste Wheeler s'est avancé en se plaçant en position pour dépasser la voiture des constables, ainsi que les témoins Munkittrick et Medeiros l'affirment catégoriquement. De la part de la municipalité, on a suggéré que ce serait sur un ordre donné par haut-parleurs que cela se serait produit. Cette théorie est tout à fait invraisemblable. Le préposé aux haut-parleurs se préoccupait de libérer la rue pour faciliter la circulation des cyclistes. D'après Medeiros, un spectateur témoin complètement désintéressé, ce que l'on a annoncé à ce moment-là c'est l'arrivée d'un groupe de coureurs. Au surplus, les paroles que l'on rapporte sont en français. Rien ne permet de présumer que Wheeler ait compris cette langue. De plus, quand un constable en uniforme est dans la rue pour diriger la circulation, la règle universelle c'est qu'un automobiliste ne doit pas s'avancer autrement que sur son ordre. Il est tout à fait invraisemblable que l'on ne s'y soit pas conformé et c'est une raison de plus pour accepter la version des témoins désintéressés contre la dénégation imprécise du constable Cliche. De toute façon, celui-ci admet que c'est sur son ordre que l'automobiliste s'est immobilisé dans la position qui a causé l'accident. Le juge de première instance dit qu'il n'y avait pas autre chose à faire dans les circonstances. C'est ce qui n'est aucunement

1968

NAPPER
v.
CITÉ DE SHERBROOKE

Le Juge Pigeon

démontré car on ne voit pas pourquoi le constable n'a pas fait signe à l'automobiliste de se ranger au bord de la rue en avant de la voiture de police.

Il faut noter qu'une photographie prise presque immédiatement après l'accident fait voir que cette voiture qui était le premier véhicule à la gauche de la rue passé la ligne d'arrivée, se trouvait beaucoup moins à gauche que les autres véhicules. Elle était entièrement sur le pavage alors que l'on avait fait garer les autres voitures presque complètement en dehors de la chaussée. On comprend pourquoi lorsque l'on a permis aux automobilistes de s'avancer, Wheeler a dû se rapprocher du centre de la rue pour doubler la voiture encombrante que les constables avaient garée là. Le sergent Martin a soutenu que l'on avait été obligé d'agir ainsi par suite du manque de coopération des camionneurs qui accompagnaient le Tour. Cette excuse est on ne peut plus boiteuse. Les photographies font voir que les camionneurs n'ont pas encombré la chaussée. Elles font voir également qu'il y avait à proximité de la ligne d'arrivée au moins une voiture garée sur le trottoir du côté opposé, rien n'empêchait que celle des constables fût placée de cette manière tout comme rien n'empêchait qu'elle fût garée aussi à gauche que celles des particuliers garées de ce côté-là. Il y a plus, le Colonel Cliche, qui suivait le Tour en qualité de trésorier et est arrivé sur les lieux un instant avant l'accident, a pu garer sa voiture en dehors du chemin à moins de 300 pieds au-delà de la ligne d'arrivée. L'accident s'est malheureusement produit avant qu'il ait pu intervenir pour supprimer le danger auquel les coureurs étaient exposés.

Les constables ne devaient pas ignorer qu'il y aurait un sprint à la ligne d'arrivée et que, par conséquent, il fallait éviter soigneusement que les coureurs se trouvent en face d'un obstacle constitué par des véhicules dans la rue au-delà de cette ligne. A cette fin, en outre de libérer la chaussée aux abords immédiats de la ligne, on avait fait garer les véhicules en dehors de la chaussée le plus possible. Dans ces conditions, c'était une faute caractérisée de la part des constables que de placer leur voiture à l'endroit où elle se trouvait lors de l'accident. C'était également une faute après l'arrivée des premiers cyclistes et alors que les haut-parleurs annonçaient l'arrivée d'un autre groupe, que de diriger la

circulation de façon à immobiliser la voiture de Wheeler dans une position où elle constituait un obstacle à une très faible distance de la ligne d'arrivée.

Le juge de première instance soutient que le demandeur a accepté le risque de ce qui est arrivé. Pour admettre cette conclusion il faudrait dire que l'obstacle constitué par la voiture de la police et celle de Wheeler placées de front était à prévoir et constituait l'un des risques inhérents au sport d'une course cycliste dans un chemin public. Voilà ce qui n'est aucunement démontré. Au contraire, tout fait voir que dans le cours normal des choses, les abords de la ligne d'arrivée sont libérés d'obstacles sur une distance suffisante pour que le sprint final n'implique pas de risque de collision avec une automobile.

En troisième lieu, on dit que le demandeur circulait sur un chemin public et était tenu d'observer le Code de la route. Cette affirmation ne tient pas compte du fait que la municipalité, par son service de police, avait prévu une escorte policière pour faciliter l'arrivée des coureurs. Ceux-ci, depuis les limites de la ville, étaient précédés d'un motocycliste qui leur ouvrait le chemin. En matière de responsabilité civile on n'a pas à rechercher si en agissant ainsi les préposés de la municipalité se conformaient aux règlements municipaux et s'ils étaient légalement autorisés à mettre de côté les règles ordinaires de la circulation pour favoriser la course cycliste. Le demandeur avait droit de prendre pour acquis que les constables en uniforme avaient le droit de faire ce qu'ils faisaient. Ce qu'ils faisaient avec une motocyclette munie de feux spéciaux impliquait qu'ils mettaient de côté l'application des règles ordinaires de circulation pour rendre possible la compétition sportive. Celle-ci exigeait en l'occurrence que le demandeur se préoccupe uniquement de donner l'effort maximum et de respecter le règlement qui lui prescrit de ne pas nuire aux autres concurrents. Il était en droit de compter que puisque le service de police lui ouvrait le chemin, ce service verrait également à lui assurer le chemin libre jusqu'à une distance raisonnable au-delà de la ligne d'arrivée. La situation n'était pas la même qu'en dehors de la ville où, en l'absence d'une escorte policière, les coureurs se trouvaient obligés de se prémunir contre la circulation en sens inverse. A l'arrivée,

1968

NAPPER v. CITÉ DE SHERBROOKE

Le Juge Pigeon

l'escorte policière leur signifiait que des précautions suffisantes étaient prises pour leur permettre de faire la course et le sprint final de la façon usuelle.

Il ne paraît pas nécessaire de décider si, dans les circonstances, les représentants de la municipalité sont en faute de ne pas avoir détourné la circulation venant à la rencontre des coureurs. Quoi qu'on ait pu dire des difficultés que cela présentait, il est sûr que ce n'était pas impossible puisqu'on l'a fait après l'accident. Si l'on choisissait de ne pas le faire tout en tolérant et facilitant la course de la façon déjà décrite, on se devait au moins de ne pas créer une situation dangereuse pour les coureurs en stationnant une voiture du service de la police et en dirigeant la circulation comme on l'a fait.

On a continué de prétendre de la part de la municipalité que le parcours et, en particulier, la ligne d'arrivée, avaient été mal choisis par les organisateurs. C'est là une question qui ne saurait influer sur la décision du litige. Le demandeur était obligé de prendre la situation comme elle se présentait à lui. Quant à la municipalité, ses préposés n'étaient aucunement tenus de tolérer la course et de la faciliter s'ils considéraient l'emplacement de la ligne d'arrivée mal choisi. Ce n'est pas ce qu'ils ont fait. Deux jours avant l'événement, des ordres ont été donnés par celui qui exerçait les fonctions de chef de police dans le but de faciliter la course et l'arrivée à l'endroit où le tout a effectivement eu lieu. Les coureurs auxquels on a fourni une escorte policière avaient droit de compter que les constables en charge de la circulation agiraient en conséquence avec un soin raisonnable, ce qui implique que s'ils n'étaient pas suffisamment au courant des exigences de la manifestation sportive à laquelle ils prêtaient leur concours, il leur fallait se renseigner de façon à faire ce que l'on était en droit d'attendre d'eux. Ils sont d'autant moins recevables à plaider ignorance qu'une semblable course avait eu lieu au cours de chacune de plusieurs années précédentes.

Dans les circonstances de la présente cause le demandeur ne peut être considéré en faute pour n'avoir pas regardé assez loin devant lui de façon à être en mesure d'éviter l'accident. Il ne faut pas oublier qu'il ne s'agit pas ici d'un usage ordinaire de la voie publique mais du sprint à la fin

d'une étape d'une course cycliste. Chaque coureur doit s'efforcer de ne pas se laisser dépasser et, si possible, de dépasser les autres. Il en résulte que ce qui serait souverainement imprudent dans la circulation normale devient la règle à suivre, la preuve le démontre clairement et sans contredit. Le demandeur avait le droit de présumer qu'il n'y avait pas d'obstacle au-delà de la ligne d'arrivée jusqu'à une distance suffisante pour lui permettre de s'arrêter. Dans des circonstances ordinaires, la prudence lui aurait commandé de ne pas rester en ligne ce qui l'aurait obligé à se laisser dépasser, de même il lui aurait fallu regarder au loin ce qui l'aurait empêché momentanément de garder la position d'effort maximum, chose incompatible avec la façon dont il devait courir à ce moment-là.

Pour ces raisons, la responsabilité de l'accident doit être imputée en entier à la municipalité du chef de la faute commise par ses constables dans l'exécution de leurs fonctions. Cette faute consiste en ce que ces derniers ayant été chargés par l'autorité municipale compétente de faciliter l'arrivée de la course cycliste et fournir à cette fin une escorte sur motocyclette pour faciliter le libre passage aux coureurs ont, au mépris des règles de la prudence, créé un obstacle dangereux à une faible distance au-delà de la ligne d'arrivée: premièrement, en stationnant dans la rue une automobile à leur usage; deuxièmement, en laissant avancer une autre voiture à côté de cette automobile au moment où un groupe de coureurs s'approchaient.

Comme le fait observer le juge Taschereau en Cour d'Appel:

> Il n'est pas contesté que les officiers de police agissaient ici comme sergents de ville pour l'exécution de règlements municipaux et non comme agents de la paix. Il s'ensuit qu'ils étaient les préposés de la défenderesse et que celle-ci doit être tenue responsable de toute faute qu'ils auraient pu commettre dans l'exercice de leurs fonctions.

On peut ajouter qu'en l'occurrence il n'y a pas lieu de rechercher si l'officier en charge du service de police était dûment autorisé à donner les ordres qu'il a transmis aux constables. Cette autorisation doit se présumer. Si la municipalité voulait soutenir qu'il en était autrement, il lui incombait d'en fournir la preuve. Cela d'ailleurs n'aurait pu avoir pour effet d'écarter sa responsabilité car il aurait

1968

NAPPER v. CITÉ DE SHERBROOKE

Le Juge Pigeon

fallu en conclure tout au plus qu'il y avait eu abus des fonctions. Or, l'acte fait par abus des fonctions engage la responsabilité du commettant. *Hudson's Bay Co. c. Vaillancourt*[4]. Ici, cependant, il est clair que les fautes génératrices de la responsabilité sont bien des actes faits par les constables dans l'exécution de leurs fonctions. En effet, il s'agit de la façon dont ils ont dirigé la circulation et garé la voiture mise à leur disposition pour se rendre au lieu où ils étaient chargés d'accomplir ce travail lequel entre manifestement dans le cadre de leurs fonctions.

On objectera peut-être qu'une municipalité n'a pas l'obligation de prendre des précautions spéciales pour permettre des courses cyclistes dans ses rues qui ne sont pas destinées à cet usage. Cet argument serait à considérer si l'on voulait fonder la responsabilité sur une faute de la municipalité elle-même. Elle pourrait alors faire valoir qu'elle n'avait pas l'obligation de veiller à la protection des coureurs et qu'on ne peut lui reprocher d'avoir pris des mesures insuffisantes à cet égard. Si le service de la police municipale avait en l'occurrence refusé de faire quoi que ce soit pour faciliter la course, ce refus n'aurait pas engagé la responsabilité de la municipalité. Évidemment, on ne doit pas supposer que les organisateurs auraient eu en ce cas la témérité de faire faire la course quand même. De toute façon, ce n'est pas ce qui s'est produit. Le service de la police municipale a pris des dispositions spéciales pour permettre la course et celle-ci a eu lieu dans les conditions que l'on sait. Nous n'avons pas à décider si l'on a commis une faute ou une illégalité en prenant ces dispositions. En effet, la source de la responsabilité de la municipalité n'est pas sa faute personnelle ou quasi-délictuelle mais celle de ses constables, et celle-ci ne consiste pas en une omission mais en deux actes imprudents faits dans l'exécution de leurs fonctions. Ce n'est pas parce que la municipalité n'avait pas l'obligation de créer la situation qui rendait ces actes imprudents que, celle-ci étant créée, ils n'étaient pas obligés d'agir avec une prudence et un soin raisonnables. Même en présence du danger créé par la faute criminelle d'un tiers un constable reste tenu d'agir avec prudence. *Beim c. Goyer*[5].

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[4] [1923] R.C.S. 414, 2 D.L.R. 1008.

[5] [1965] R.C.S. 638, [1966] 4 C.C.C. 9, 57 D.L.R. (2d) 253.

Le juge de première instance ayant rejeté l'action n'a pas fait d'estimation du montant des dommages. En Cour d'appel, le juge Rivard a fait l'estimation suivante:

Perte d'un an aux études	$ 5,000.00
Souffrances	1,000.00
Perte des joies de la vie	1,000.00
Incapacité fixée à 15%	10,000.00
Déboursés	3,902.47
	$20,902.47
Plus 7% pour l'échange	1,463.18
TOTAL	$22,365.65

Le demandeur soutient avec raison que le montant pour incapacité est insuffisant en regard du fait établi qu'un jeune médecin qui, comme lui, se spécialise en anesthésie aux États-Unis gagne dès le début de $20,000 à $25,000 par année. Même si l'on tient compte qu'il n'avait pas terminé ses études médicales et que, par conséquent, l'élément d'incertitude à allouer est plus considérable que d'habitude, il semble impossible de fixer à moins de $30,000 l'indemnité pour incapacité partielle. D'un autre côté, une revue de la preuve et des pièces au sujet des déboursés oblige à les fixer à $3,635.21 et de ce total il faut noter qu'une somme de $1,378 représente des frais médicaux et d'hospitalisation encourus au Canada et auxquels il n'y a pas lieu d'ajouter le pourcentage de 7 pour cent admis au procès comme prime à payer sur les montants en dollars des États-Unis. Il faut traiter de la même manière les sommes accordées pour souffrances et perte des joies de la vie parce qu'elles ne sont pas une compensation pour un gain pécuniaire perdu aux États-Unis.

Pour ces raisons, l'indemnité est fixée comme suit:

Perte d'un an aux études		$ 5,000.00
Incapacité partielle		30,000.00
Déboursés totaux	$3,635.21	
Déboursés au Canada	1,378.00	2,257.21
		$37,257.21
Plus 7%		2,608.00
Souffrances		1,000.00
Perte des joies de la vie		1,000.00
Déboursés au Canada		1,378.00
TOTAL		$43,243.21

1968

NAPPER v. CITÉ DE SHERBROOKE

Le Juge Pigeon

En conséquence, je suis d'avis de faire droit à l'appel avec dépens dans toutes les cours et condamner l'intimée à payer au demandeur $43,243.21 avec intérêt à compter du 30 janvier 1962.

Appel accueilli avec dépens.

Procureurs du demandeur, appelant: Blanchette & Roberge, Sherbrooke.

Procureur de la défenderesse, intimée: A. Rivard, Sherbrooke.

1968

*Mar. 28
June 3

DORILA TROTTIER ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Alimony—Agreed monthly payments to estranged wife secured by mortgage—Whether deductible as alimony—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(l).

The appellant was the owner of a hotel which he operated for a number of years with the help of his wife. They separated in 1958. It was agreed that the wife was entitled to half the value of the hotel, estimated at $90,000. Four documents were executed to implement the agreement reached. These documents included a separation agreement under which the wife agreed to accept a second mortgage for $45,000 on the hotel property in full settlement of all claims for an allowance from her husband and her dower rights. In 1961, the appellant sought to deduct, as alimony under the provisions of s. 11(1)(*l*) of the *Income Tax Act*, R.S.C. 1952, c. 148, the monthly payments thereafter made by him to his wife under the agreement. The Minister disallowed the deduction and his contention, which had been reversed by the Income Tax Appeal Board, was upheld by the Exchequer Court. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

The monthly payments did not fall within the terms of s. 11(1)(*l*) of the *Income Tax Act*. Reading the four documents together, it appeared that the agreement between the parties was not that the husband should pay his wife a periodic allowance for maintenance and that his agreement to do so should be collaterally secured by a second mortgage; it was rather a release by her of all her claims for an allowance and the giving by her of an irrevocable power of attorney to bar her dower in her husband's lands in exchange for a single consideration: the giving of the mortgage for $45,000. The obligation to make the payments under the mortgage was not dependent on the wife continuing to live. She was free to assign it at any time. The separation agreement terminated all claims arising

*PRESENT: Cartwright C.J. and Fauteux, Martland, Hall and Pigeon JJ.

from the status of the parties as husband and wife. The payments made thereafter were in satisfaction of obligations arising not as between husband and wife but as between mortgagor and mortgagee.

Revenu—Impôt sur le revenu—Pension alimentaire—Paiements mensuels à l'épouse séparée garantis par hypothèque—Sont-ils déductibles comme étant une pension alimentaire—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(l).

L'appelant était le propriétaire d'un hôtel qu'il exploitait depuis plusieurs années avec l'aide de son épouse. Ils se sont séparés en 1958. Il a été convenu que l'épouse avait droit à la moitié de la valeur de l'hôtel, qui fut évalué à $90,000. Quatre documents ont été exécutés pour donner suite à l'entente. Ces documents comprenaient une convention de séparation en vertu de laquelle l'épouse s'engageait à accepter une seconde hypothèque de $45,000 sur l'hôtel, en règlement complet de toute réclamation pour une allocation qu'elle pourrait avoir contre son mari ainsi que de ses droits douaires. En 1961, l'appelant a tenté de déduire les paiements mensuels qu'il a faits par la suite à son épouse en vertu de la convention, comme étant une pension alimentaire selon les dispositions de l'art. 11(1)(*l*) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148. Le Ministre a refusé la déduction et sa prétention, qui a été rejetée par la Commission d'appel, a été confirmée par la Cour de l'Échiquier. Le contribuable en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Les paiements mensuels ne tombent pas sous les termes de l'art. 11(1)(*l*) de la *Loi de l'impôt sur le revenu*. Si l'on considère les quatre documents ensemble, il appert que la convention entre les parties n'était pas que le mari devait payer à son épouse une allocation périodique pour son entretien et que son engagement à le faire devait être garanti collatéralement par une seconde hypothèque; c'était plutôt une quittance qu'elle donnait de toutes ses réclamations pour une allocation et la remise qu'elle faisait d'un mandat irrévocable ayant pour effet d'exclure son douaire des biens de son mari en échange d'une seule et unique considération: la remise d'une hypothèque de $45,000. Que l'épouse continue de vivre ou non n'enlevait rien à l'obligation de faire les paiements en vertu de l'hypothèque. Elle était libre d'en faire la cession en tout temps. La convention de séparation mettait fin à toutes les réclamations résultant du statut matrimonial des parties. Les paiements faits par la suite avaient pour effet de satisfaire les obligations nées non pas entre un mari et son épouse mais entre un débiteur et son créancier.

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

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

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[1] [1967] 2 Ex. C.R. 268, [1967] C.T.C. 28, 67 D.T.C. 5029.

1968

TROTTIER v. MINISTER OF NATIONAL REVENUE

Andrew Brewin, Q.C., for the appellant.

M. A. Mogan, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from a judgment[1] of Cattanach J. allowing an appeal from a decision of the Income Tax Appeal Board and upholding the contention of the Minister that the appellant was not entitled to deduct from his income for his 1961 taxation year the sum of $3,150 paid by him to his wife in nine monthly instalments.

The question to be determined is whether the payments made by the appellant fell within the terms of clause (*l*) of s. 11(1) of the *Income Tax Act* which reads as follows:

> (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: .....
>
> (*l*) an amount paid by the taxpayer in the year, pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement, as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage, if he was living apart from, and was separated pursuant to a divorce, judicial separation or written separation agreement from, his spouse or former spouse to whom he was required to make the payment at the time the payment was made and throughout the remainder of the year.

It is common ground that, during the relevant period, the appellant was living apart from and was separated from his wife pursuant to a written separation agreement and that during the taxation year in question he made nine payments of $350 each to her. The dispute is as to whether these amounts were paid "pursuant to...a written agreement as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof", these being the words of s. 11(1)(*l*) relied on by the appellant.

It is necessary to state the facts in some detail. The appellant and his wife were married in 1929 and lived together as man and wife until they separated some time in 1957 or 1958. From 1944 to 1947 the appellant was, with his brother, the joint owner of a hotel in Chelmsford, Ontario, known as the Algoma Hotel. In 1947 the appellant purchased his brother's interest and became and remains the sole owner of the hotel. The appellant and his wife lived

[1] [1967] 2 Ex. C.R. 268, [1967] C.T.C. 28, 67 D.T.C. 5029.

together at the hotel until the time of their separation. The wife kept the books of the business, looked after the kitchen and dining room and the rental of the bedrooms. The appellant looked after the beverage rooms. The appellant kept the beverage room receipts; the wife kept the other hotel receipts and applied them either on expenses or improvements or for her own use and maintenance. At the time of the separation the hotel was valued at $90,000 to $100,000. The wife taught school at various times during her married life and contributed an undetermined amount of her earnings toward the upkeep and improvement of the hotel.

In 1958 the parties agreed to separate. The wife retained Mr. J. L. McMahon as her solicitor. On August 7, 1958, the appellant and his wife went to Mr. McMahon's office. The appellant was not independently represented. Four documents were drawn by Mr. McMahon and signed either then or later by the appellant and his wife. These documents were attached as schedules to a joint statement of facts on behalf of the parties, which was filed at the hearing in the Exchequer Court.

The first document is headed "Memorandum of Agreement between Dorila Trottier and Yvonne Trottier". It was signed and sealed by both parties in the presence of Mr. McMahon on August 7, 1958. So far as relevant it reads:

> It is agreed that the parties will sign a Separation Agreement when the first payment of ($12,000.00) Twelve Thousand Dollars, on a mortgage to Yvonne Trottier is made. The Separation Agreement shall include the mortgage given by Dorila Trottier to Yvonne Trottier for Forty-Five Thousand ($45,000.00) Dollars, dated the 7th day of August, 1958, in full settlement. Yvonne Trottier will sign a permanent Bar of Dower.

The second document is a Charge under the *Land Titles Act* on the hotel property made by the appellant to his wife. It provides for payment of $45,000 with interest at 5 per cent per annum. The wording of the payment clause is as follows:

> PROVIDED THIS CHARGE TO BE VOID on payment of the said sum of——FORTY-FIVE THOUSAND——($45,000.00)—00/00 dollars in lawful money of Canada, with interest at FIVE (5%) per cent. per annum as follows:
>
> THE sum of Twelve Thousand Dollars ($12,000.00) shall be paid when the proceeds of a first mortgage loan to Canada Permanent Mortgage Corporation dated July 29th, 1958, are available, or within one month from the date of execution of the Charge, which ever is the sooner. The balance of Thirty-Three Thousand ($33,000.00) Dollars shall be paid in

1968

TROTTIER v. MINISTER OF NATIONAL REVENUE

Cartwright C.J.

equal consecutive monthly instalments of Three Hundred and Fifty ($350.00) Dollars, including interest, commencing on the 1st day of October, 1958, and on the 1st day of each and every month thereafter until all arrears of principal and interest monies hereby secured are fully paid and satisfied. The interest at the rate of Five per cent (5%) per annum shall be calculated half yearly, not in advance, on the unpaid balance of principal outstanding. Not withstanding, anything written above the interest shall not be calculated at any time on a principal sum greater than Twenty-One Thousand ($21,000.00) Dollars. Such monthly instalments when received by the mortgagee shall be applied firstly on account of interest and interest in arrears, if any, and secondly upon the unpaid balance of the Principal. The interest payable shall be calculated from the 1st day of September, 1958.

The Charge contains the following clause:

PROVIDED the Mortgagors, when not in default, shall have the privilege of paying the whole or any part of the mortgage money hereby secured without notice or bonus at any time.

It also contains an acceleration clause providing that on default of payment of any instalment the balance of the principal shall at the option of the mortgagee become due and payable.

The third document is a direction, signed by the appellant, directing the Canada Permanent Mortgage Corporation to pay $12,165 to Yvonne Trottier out of the first mortgage on the hotel property made to that company.

The fourth document is headed "Separation Agreement". It is dated August 7, 1958, and executed under seal by the appellant and his wife. It was signed in the month of October 1958 when the wife received the payment of $12,000 provided for in the Charge.

Paragraph 7 provides for payments of $50 a month by the husband to the wife for the maintenance of their daughter "for a period of two years or until such time as her education is completed". No issue is raised as to this paragraph.

The only other provision in the agreement dealing with payment is para. 2, which reads as follows:

The wife accepts in full settlement a second mortgage upon the property known as Lot number (2) TWO, in the Fourth concession in the Township of Balfour, for the sum of Forty-Five Thousand ($45,000.00) Dollars in full settlement of all claims for an allowance for herself from her husband. This is provided the convenants in the mortgage are observed.

The main contention of the appellant is that the separation agreement and the mortgage must be read together and, so read, constitute an agreement imposing upon the appel-

lant an obligation to make payments of an allowance on a periodic basis for the maintenance of his wife, within the terms of s. 11(1)(*l*).

I agree that these documents which were prepared contemporaneously and relate to the same transaction should be read together; but, so reading them, it appears that the agreement between the parties was not that the husband should pay his wife a periodic allowance for maintenance and that his agreement to do so should be collaterally secured by a second mortgage; it was rather a release by her of all her claims for an allowance and the giving by her (in para. 4 of the agreement) of an irrevocable power of attorney to bar her dower in her husband's lands in exchange for a single consideration, the giving of the mortgage for $45,000. The obligation to make the payments under the mortgage was not dependent on the wife continuing to live. She was free to assign it at any time.

The giving of the mortgage was analogous to the payment of a lump sum by which once and for all the husband was released from liability to support his wife. The mortgage was given because the husband was not in a position to pay the lump sum in cash. While the facts differ from those in *Minister of National Revenue v. Armstrong*[2], the case at bar appears to me to fall within the principle on which that case was decided.

Paragraph 2 of the separation agreement has already been quoted. Paragraph 1 reads as follows:

> 1. The husband and wife will henceforth live separate from each other, and neither of them will take proceedings of any kind against the other for restitution of conjugal rights, or molest or annoy or in any way interefere with the other or make any demands whatsoever upon the other arising from their status as husband and wife.

The agreement, in consideration of the giving of the mortgage, terminates all claims arising from the status of the parties as husband and wife. The payments made thereafter were in satisfaction of obligations arising not as between husband and wife but as between mortgagor and mortgagee.

It may be observed in passing that part of each monthly payment was made up of interest on the capital sum which the appellant had undertaken to pay.

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[2] [1956] S.C.R. 446, [1956] C.T.C. 93, 56 D.T.C. 1044.

1968

TROTTIER v. MINISTER OF NATIONAL REVENUE

Cartwright C.J.

On a consideration of the documents, read together and without giving effect to any extrinsic evidence, it is my opinion that the appeal fails and it becomes unnecessary to consider the alternative argument of counsel for the respondent that the payments agreed to be made by the appellant were not for maintenance but in satisfaction of the wife's claim that she was entitled to a fair share in the hotel property. That this was so was deposed to by the wife and it was submitted by counsel for the respondent that, even if her evidence would have the effect of varying the wording of the documents, it was admissible on the principle stated as follows in Phipson on Evidence, 10th ed., at p. 724, para. 1789:

> Where a transaction has been reduced into writing merely by agreement of the parties, extrinsic evidence to *contradict or vary* the writing is excluded only in proceedings between such parties or their privies, and not in those between strangers, or a party and a stranger; since strangers cannot be precluded from proving the truth by the ignorance, carelessness or fraud of the parties; nor, in proceedings between a party and a stranger will the former be estopped, since there would be no mutuality.

However, as mentioned above, I do not find it necessary to deal with this branch of the argument.

While I have stated my reasons in my own words, I wish to express my substantial agreement with the reasons of Cattanach J.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Hawkins & Gratton, Sudbury.

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

STANLEY ROSS TEASDALE (*Plaintiff*) ..APPELLANT; 1968

*Mar. 20, 21
June 3

AND

MALCOLM NEIL MACINTYRE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Negligence—Plaintiff and defendant agreeing to share expenses of holiday trip to be taken in defendant's car—Plaintiff injured due to defendant's negligent driving—Whether an arrangement of a commercial nature—Whether driver liable—The Highway Traffic Act, R.S.O. 1960, c. 172, s. 105(2).

The plaintiff and the defendant were fellow students and planned to take a motor holiday together in the defendant's automobile. Their intention was to camp along the route and the plaintiff supplied the larger portion of the necessary camping equipment. They agreed to share all food and other costs, and in so far as the costs of gas and oil were concerned it was decided that the defendant would obtain a credit card and at the end of the trip the plaintiff would pay to the defendant one-half of the amount payable to the oil company. They also arranged to take turns in driving the car.

Some hours after they had left on their journey the car turned over on a curve due to the defendant's negligent driving and the plaintiff was seriously injured. The plaintiff sued claiming damages for the said negligence and at trial judgment was given in his favour. On appeal, the Court of Appeal by a majority reversed the trial judgment. An appeal by the plaintiff from the judgment of the Court of Appeal was then brought to this Court.

Held (Cartwright C.J. and Judson J. dissenting): The appeal should be dismissed.

Per Martland, Ritchie and Spence JJ. The arrangement between the plaintiff and the defendant was not an arrangement of a commercial nature and therefore the defendant was not within the exception in s. 105(2) of *The Highway Traffic Act,* R.S.O. 1960, c. 172. The said s. 105(2) prevented the plaintiff's recovery from the defendant.

Per Cartwright C.J. and Judson J., *dissenting*: The many cases in which s. 105 of *The Highway Traffic Act, supra,* has been considered established the rule that a driver, who by negligent driving causes injuries to a passenger in his car, is not relieved from liability if there is a contract in existence between the driver and the passenger by the terms of which the passenger is under a legal obligation to pay the driver for carrying him. In the present case there was an arrangement under which an enforceable obligation to pay was assumed by the passenger.

[*Ouelette v. Johnson,* [1963] S.C.R. 96, referred to.]

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

1968

TEASDALE v. MACINTYRE

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of King J. Appeal dismissed, Cartwright C.J. and Judson J. dissenting.

Bernard L. Eastman, for the plaintiff, appellant.

C. F. McKeon, Q.C., for the defendant, respondent.

The judgment of the Chief Justice and Judson J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—The facts out of which this appeal arises are undisputed. They are set out in the reasons of my brother Spence.

The only question to be decided is whether the respondent is relieved, by the terms of s. 105 of *The Highway Traffic Act,* R.S.O. 1960, c. 172, from liability for the damages caused to the appellant by the negligent driving of the respondent.

Since the predecessor of that section was first enacted, by 1935 (Ont.), c. 26, s. 11, it has been considered in many cases, one of the most recent being *Ouelette v. Johnson*[2].

In my opinion, these cases establish the rule that a driver, who by negligent driving causes injuries to a passenger in his car, is not relieved from liability if there is a contract in existence between the driver and the passenger by the terms of which the passenger is under a legal obligation to pay the driver for carrying him. This rule is applicable although the agreement to pay relates to a single and isolated journey and the driver is not otherwise engaged in the business of carrying passengers for compensation and regardless of the manner in which the amount to be paid is to be calculated.

In the case at bar I think it clear that the appellant had undertaken to pay to the respondent one-half of the amount which the respondent would become liable to pay for the gas and oil used on the journey which the appellant and respondent were taking in the automobile belonging to the respondent. The circumstance that the object of that journey was pleasure and not business appears to me to be irrelevant. I find myself unable to distinguish the

[1] [1967] 2 O.R. 169, 62 D.L.R. (2d) 689.
[2] [1963] S.C.R. 96.

case at bar from that of *Ouelette v. Johnson, supra.* It may be that the choice of the phrase "an arrangement of a commercial nature" in that case was not a particularly happy one but read in context it is equivalent to "an arrangement under which an enforceable obligation to pay is assumed by the passenger".

For these reasons and those given by Laskin J.A. in the Court of Appeal, with which I am in complete agreement, I would allow the appeal with costs in this Court and in the Court of Appeal, set aside the judgment of the Court of Appeal and restore the judgment at trial.

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

SPENCE J.:—This is an appeal by the plaintiff from the judgment of the Court of Appeal for Ontario[3] pronounced on April 10, 1967. By that judgment, the Court of Appeal reversed the judgment at trial which had been in favour of the plaintiff in the sum of $9,754.55; the interest on that amount prior to the decision of the Court of Appeal brought the total within the appealable limit to this Court.

The facts may be simply stated. The plaintiff and the defendant were fellow students in accounting working in the same office in the City of Toronto. Neither one of them was affluent and neither one owned a car, but both planned to purchase automobiles. From some time in the spring of the year 1963, the two young men had discussed the possibility of taking a motor holiday together. Neither one of them could afford to go away on such a holiday alone. The respondent MacIntyre purchased a Triumph TR.3 sports car and it was agreed that that would be the vehicle which they would use on their intended trip. As the appellant put it in the evidence, "at that time when we discussed it, we were going to take Neil's car. I did not have a car at the time". The two agreed that they would travel by automobile from Toronto easterly through Kingston to Montreal, on to Quebec City, and then down through the eastern United States to the Atlantic Seaboard, and return through the United States to Toronto, their point of commencement. Each of them supplied certain equipment. Since it was their intention to camp along the route,

[3] [1967] 2 O.R. 169, 62 D.L.R. (2d) 689.

1968

TEASDALE v. MACINTYRE

Spence J.

equipment for that purpose was necessary, and the appellant seems to have supplied the larger portion of that equipment. They agreed that they would share equally the costs of food on the way; as each put it in his evidence, one at trial and the other on examination for discovery, it was just about who would get his wallet out first. As they agreed to share equally all other costs, they agreed to share equally the costs of the gas and oil. Again, quoting the appellant, "for the transportation, well, it was arranged that Neil was to get a credit card and at the end of the trip we were going to split gas and oil costs on a 50-50 basis of the actual cost of the trip. If there had been any major repairs, well, we would have—would have—probably kicked in. If there was, we would each have paid part of it". It was further arranged that both of them would drive the car just as their particular desire of the moment dictated.

The trip was to be solely for vacation purposes, there being no commercial purpose to be served. Again, quoting the appellant, "and, well, I guess being friends, and there was a fair cost involved, we had to make an arrangement or deal so that we could have gone on the trip".

The respondent obtained his credit card from the oil company; the two men packed their goods and in mid-morning on July 15, 1963, left Toronto on their holiday. For the first 100 or so miles, the respondent drove, then they stopped, purchased gasoline using the credit card on that occasion, and changed drivers so that the appellant drove from that point, which was evidently somewhat west of Kingston, to Cornwall. During the trip, they had stopped on several occasions to purchase refreshments at small cost and sometimes one and sometimes the other paid for those refreshments. In Cornwall, having had a cup of coffee, they again changed drivers so that the respondent resumed the driving of the automobile. About fifteen miles east of Cornwall, the car turned over on a curve and the appellant was seriously injured.

The learned trial judge held, and there has been no appeal from this finding, that the accident occurred solely due to the negligence of the respondent. The appellant sued claiming damages for such negligence. It is, therefore, apparent that the sole question to be determined upon this appeal is whether or not the appellant is entitled to

such damages in view of the provisions of s. 105(2) of *The Highway Traffic Act,* R.S.O. 1960, c. 172. That section provides:

> 105 (1) The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner.
>
> (2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle.

That section and its predecessors have been the subject of many judgments in the Courts of the Province of Ontario and other sections with like intent have been the subject of decisions in the Courts of many of the other provinces. I see, however, no need to quote and analyze those many judgments, in view of the fact that this Court only in 1963 has authoritatively pronounced its interpretation. The judgment in *Ouelette v. Johnson*[4] was recognized by both the learned trial judge and the Court of Appeal in this case as being such an authoritative pronouncement upon the subject, and both the learned trial judge and the Court of Appeal sought to apply it to the circumstances which I have outlined above. In that case Ouelette, Johnson and one Kennefic, were all employees of the Consolidated Denison Mine in Elliott Lake, in the Province of Ontario, and they all lived in Sudbury. During the week they resided near the mine head in accommodation provided by the company but they desired to return home each week-end. Johnson and Kennefic had from time to time travelled with one Dionne in the latter's automobile who charged them $2 each one way for the trip. When Ouelette purchased an automobile, Johnson approached him and proposed that the two should make the same arrangement. Ouelette, on several occasions after he had purchased his automobile, had travelled to Sudbury alone. The trial judge found as a fact that the arrangement for the $2 charge one way for the trip was made not in relation to the cost of the gas and oil but rather because Johnson had paid the same amount to Dionne previously.

[4] [1963] S.C.R. 96.

1968

TEASDALE v. MACINTYRE

Spence J.

During a trip by Ouelette, with Johnson and Kennefic as his passengers under this arrangement, an accident occurred due solely to the negligence of Ouelette. As in the present case, the only issue in this Court was whether or not Ouelette's liability was prevented by the provisions of the same s. 105(2) of *The Highway Traffic Act*. Cartwright J. (as he then was) said at p. 100:

> In my opinion the principle enunciated in the judgment of the Court of Appeal in *Lemieux v. Bedard,* [1953] O.R. 837, is correct. It is accurately summarized in the headnote as follows:
>
> > One who enters into an agreement to transport other persons in the automobile on a particular journey, in return for payment of an agreed sum of money, and proceeds to carry out the agreement, makes it his business on that occasion to carry passengers for compensation, and will not be relieved by s. 50(2) (now s. 105(2)) of The Highway Traffic Act from liability for his negligence, even if there is no evidence that he has engaged in the business on any other occasion.
>
> This principle applies *a fortiori* to the case at bar in which the arrangement was carried out week after week.
>
> I do not wish to be understood as approving the judgment of the Court of Appeal in *Csehi v. Dixon,* [1953] O.W.N. 238, 2 D.L.R. 202. In that case the Court accepted the decision in *Wing v. Banks* but found themselves able to distinguish it on the ground that the amount of the fixed fee agreed to be paid by the plaintiff to the defendant for transporting him was arrived at by estimating a portion of the cost of the gasoline and oil used by the defendant. In my respectful view, once it has been determined that the arrangement between the parties was of a commercial nature the manner in which the amount of the fee to be paid was decided upon becomes irrelevant.
>
> I would dismiss both appeals with costs.

I point out that the tests as put in that judgment occurring in the last few lines is this, that once it has been determined that the arrangement between the parties was of a commercial nature the manner in which the amount of the fee to be paid was decided becomes irrelevant. The question to be resolved, therefore, is whether under the circumstances outlined above "the arrangement between the parties was of a commercial nature". It must be remembered that if it is found that such an arrangement was of a commercial nature then it is a finding that the respondent was "in the business of carrying passengers for compensation". I use the words of subs. (2) of s. 105 of *The Highway Traffic Act*. I am unable to regard the evidence in this case, and which I have outlined in some detail above, as showing that there had occurred "an arrangement of a commercial nature". With respect, I share the views enunciated in the Court of Appeal for Ontario by Evans J.A.

There was, in my opinion, no element of a contract of carriage. The arrangement, rather, in my view, was that of a joint adventure, not, in this particular case, an adventure in trade but an adventure in recreation. It would seem to me that every word of the plaintiff's evidence is corroborative of that view. As I have pointed out above, the plaintiff (here appellant) did not testify that the respondent took his car, he testified, "We were going to take Neil's car". I emphasize the word "we". Then the plaintiff's testimony in reference to the obtaining of the credit card was not that the respondent obtained a credit card and that he then charged to the appellant one-half of the amount which would be payable on the account but rather, and again I quote, "...it was arranged that Neil was to get a credit card and at the end of the trip we were going to split the gas and oil costs on a 50-50 basis of actual cost of the trip". It was the arrangement of the two of them that the respondent should obtain the credit card; since the car was his the credit card would naturally be carried in his name, but it was surely only for the purpose of keeping the account in a convenient form, not so one could charge the other but so they could both pay the same amount toward the discharge of the amount payable to the oil company. As the appellant said time after time, "We were to split". The arrangement as to the driving of the vehicle, although in no way conclusive, is another indication of the intent of the arrangement, for, again, the plaintiff said, "We were going to share driving depending on whoever got tired". All other costs of the trip were to be shared, or to use the words of the litigant, "split" in the same fashion; those costs being of smaller individual amounts, it was easy enough to divide them informally and the more formal method of the credit card was necessary to keep proper account of the largest cost which the two of them in their joint adventure would incur, that is, the cost of the gasoline and oil for use in the respondent's automobile.

For these reasons, I have come to the conclusion that the arrangement between the appellant and the respondent was not "an arrangement of a commercial nature" and s. 105 of *The Highway Traffic Act* by subs. (2) prevents the appellant's recovery from the respondent. Counsel for the appellant stressed that the finding of the learned trial judge that the "arrangement was of a commercial character" was

1968

TEASDALE v. MACINTYRE

Spence J.

a finding of fact which should not be disturbed on appeal. It must be remembered that in the present case there is not the slightest conflict of testimony. The evidence was given on behalf of the plaintiff alone and the evidence, so far as the present topic is concerned, consisted of the examination and cross-examination of the plaintiff and a reading by his counsel of excerpts from the cross-examination of the defendant (the present respondent). Not only is there no question of credibility, but there is no question of what the evidence, and all the evidence, was, and, in my view, the Court of Appeal was quite entitled, considering that uncontradicted evidence, to come to a conclusion which differed from that of the trial judge as to the nature of the arrangement.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs, CARTWRIGHT C.J. *and* JUDSON J. *dissenting.*

Solicitors for the plaintiff, appellant: Du Vernet, Carruthers, Beard and Eastman, Toronto.

Solicitors for the defendant, respondent: McGarry & McKeon, Toronto.

1968

*May 8

RONALD VICTOR MARKHAM (*Plaintiff*) . . APPELLANT;

AND

CONTINENTAL MARBLE & GRANITE LTD. and BORDIGNON MASONRY LTD. (*Defendants*). . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Interpretation—Contract for facing of building with pre-cast granite awarded to defendants—Prior agreement whereby first defendant agreed to pay plaintiff percentage of total value of "the granite contract"—Basis upon which remuneration payable to plaintiff.

The action herein concerned the remuneration to be paid to the plaintiff by the defendants under an agreement in writing between the parties whereby the first defendant agreed to pay to the plaintiff 4 per cent of the total value of "the granite contract" relating to the Bank of

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

Canada Building in Vancouver, British Columbia. The agreement defined the total value of the granite contract as follows: "the value of the contract being based upon the total cost of the granite delivered to the job, and including all costs except the actual cost of installing the granite on the building". The trial judge held that the plaintiff was entitled to 4 per cent of the cladding contract (that is, for the facing of the building) less the cost of installation of the cladding. The remuneration payable to the plaintiff upon this basis was $22,570.46. The Court of Appeal held that the plaintiff was entitled to 4 per cent of the granite (in the form of granite chip or granite slab) delivered to the job, less the cost of installation of the granite. The remuneration payable to the plaintiff on this basis was $574.80. From the judgment of the Court of Appeal the plaintiff appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

APPEAL from a judgment of the Court of Appeal for British Columbia, allowing an appeal from a judgment of Dryer J. Appeal allowed.

B. W. F. McLoughlin, for the plaintiff, appellant.

Philip d'A. Collings, for the defendants, respondents.

At the conclusion of the argument of counsel for the respondents the Court retired and on returning the following judgment was delivered by

THE CHIEF JUSTICE (orally for the Court):—Mr. McLoughlin, we do not find it necessary to hear you in reply. We are all of opinion that the appeal succeeds and that the judgment of the learned trial judge should be restored. We agree with the construction placed upon the contract, ex. 8, by the learned trial judge and we are in substantial agreement with his reasons.

The appeal is allowed with costs in this Court and in the Court of Appeal for British Columbia and the judgment at trial is restored.

Appeal allowed and judgment at trial restored.

Solicitors for the plaintiff, appellant: Lawrence, Shaw, Stewart & McLoughlin, Vancouver.

Solicitors for the defendants, respondents: Comparelli & Collings, Vancouver.

1968

*Mar. 11, 12
May 22

MARCEL DELISLE (*Plaintiff*).....APPELLANT;

AND

THE SHAWINIGAN WATER & POWER COMPANY (*Defendant*) .} RESPONDENT.

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

Negligence—High voltage transmission line—Erection of television antenna on roof of house by 16 year old boy—Contact of antenna with wire—Power company not liable—Civil Code, art. 1053.

The plaintiff, a 16 year old boy, was seriously injured when the television antenna he was trying to install on the roof of his father's house came in contact with a high voltage transmission wire belonging to the defendant company. The antenna was some 7 feet high and over 13 feet wide. The wire was some 11 feet away from the part of the roof where the plaintiff was situated when the accident occurred. The installation of that power line had been authorized by the Provincial Electricity Board and, as prescribed by the Board, complied with the National Electrical Safety Code of the U.S. The evidence showed that the clearance required, under the regulations of Hydro-Quebec, between a building and that kind of line was greater than that required by the said Code. The trial judge apportioned the liability at 75 per cent against the defendant company and 25 per cent against the plaintiff. The Court of Appeal allowed the appeal and dismissed the action. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

Per Fauteux, Martland, Judson and Ritchie JJ.: The defendant company should not be considered to have been in breach of the duty to maintain a reasonable clearance between its line and the house merely because another electrical transmission company adopted a different standard. Assuming, however, that the Hydro-Quebec standards ought to apply, the defendant was not required reasonably to anticipate injury to a person located more than 11 feet from its line. In the circumstance of this case, it was not an undue proximity of the defendant's line to the house which was the effective cause of the accident.

Per Pigeon J.: The trial judge did not err in holding that the plaintiff had been at fault. The latter's imprudence was unquestionable. On the other hand, the defendant company could not be considered to have committed a fault merely because it did not follow the standards established by Hydro-Quebec. The evidence does not disclose that these standards were generally considered as the only ones acceptable.

Faute—Fil électrique à haute tension—Installation par un garçon de 16 ans d'une antenne de télévision sur le toit d'une maison—Contact de l'antenne avec le fil—Absence de responsabilité de la compagnie d'électricité—Code civil, art. 1053.

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*PRESENT: Fauteux, Martland, Judson, Ritchie and Pigeon JJ.

Le demandeur, âgé de 16 ans, a été sérieusement blessé lorsqu'une antenne de télévision qu'il avait entrepris d'installer sur le toit de la maison de son père est venue en contact avec un fil électrique à haute tension appartenant à la compagnie défenderesse. L'antenne avait 7 pieds de haut et plus de 13 pieds de large. La partie du toit de la maison où se trouvait le demandeur quand il a reçu le choc n'était pas à moins de 11 pieds du fil chargé. L'installation du fil avait été autorisée par la Régie de l'électricité et, tel que prescrit par la Régie, était conforme au National Electrical Safety Code des États-Unis. La preuve est à l'effet que l'Hydro-Québec exigeait que la distance entre un immeuble et un fil de ce genre devait être plus grande que celle exigée par ledit Code. Le Juge au procès a conclu qu'il y avait eu faute commune et a fait porter à la victime un quart de la responsabilité. La Cour d'appel a rejeté l'action. Le demandeur en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Les Juges Fauteux, Martland, Judson et Ritchie: On ne peut pas considérer que la compagnie défenderesse a manqué à son devoir de maintenir un espace libre raisonnable entre son fil et la maison pour la seule raison qu'une autre compagnie d'électricité a adopté une norme différente. Cependant, prenant pour acquis que les normes de l'Hydro-Québec doivent s'appliquer, on ne pouvait pas raisonnablement exiger que la défenderesse prévoie qu'une personne placée à plus de 11 pieds de sa ligne pourrait être blessée. Dans les circonstances, la cause effective de l'accident n'était pas la proximité indue du fil de la défenderesse.

Le Juge Pigeon: Le Juge de première instance n'a pas fait erreur en statuant que le demandeur avait commis une faute. L'imprudence de ce dernier est incontestable. Par contre, la défenderesse ne peut pas être considérée en faute du seul fait qu'elle n'a pas suivi les normes établies par l'Hydro-Québec. La preuve ne démontre pas que ces normes étaient généralement considérées comme les seules acceptables.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge Laroche. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Laroche J. Appeal dismissed.

Georges Emery, Q.C., for the plaintiff, appellant.

Charles Gonthier, for the defendant, respondent.

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

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[1] [1964] Que. Q.B. 633, [1966] 2 C.C.C. 38, 55 D.L.R. (2d) 452.

1968

DELISLE v. SHAWINIGAN WATER & POWER CO.

MARTLAND J.:—The facts in this case are fully outlined in the reasons of my brother, Pigeon, and do not require to be repeated here.

I agree with the reasons delivered by Mr. Justice Choquette, in the Court of Queen's Bench (Appeal Side)[1], with which the other four members of that Court agreed.

My brother, Pigeon, points out that it was stated, in those reasons, that the clearance required, under the regulations of Hydro-Quebec, between a building and an electrical transmission line with a voltage exceeding 4,000 volts was 8′6″, whereas the clearance actually required by those regulations, for a voltage of 7,200, was 10′11″.

The evidence on this matter was given by the witness, Godin. Choquette J. refers to this testimony in the following passage from his judgment:

> Cet expert dit, p. 250: «La norme . . . pour un circuit à 4000 volts . . . veut que l'espacement soit de *8′6″* d'une bâtisse, sans exception.» (Ce sont là les normes de l'Hydro-Québec, qui diffèrent de celles du National Electrical Safety Code.)

It is of interest to note that, later in his evidence, Godin was asked about this matter again and testified as follows:

> Q. Après tout ce que vous avez dit, là, à quelle distance doit être un fil de la maison que vous voyez sur la photographie, s'il s'agit d'un fil monophasé portant quatre mille (4,000) volts et plus?
> R. Nos normes indiquent huit pieds et six pouces (8′6″), approximativement.

On the other hand, in the material before us there appeared, as Exhibit P-21, a graph entitled "Normes de Construction de Lignes de Transmission de l'Hydro-Québec", which indicates a clearance requirement of 10′11″ for a line with a force of 7,200 volts.

On the basis of the plan of the house prepared by the witness, Lindsey, which was put in evidence, and placing the electrical transmission wire at the location shown by him, a computation discloses that the distance from the wire, at its nearest point, to the base of the old aerial (where the appellant was situated) was some 11½′. Assuming the electrical wire was situated in the position stated by the appellant's witness, Gaudreau, that distance would be slightly greater.

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[1] [1964] Que. Q.B. 633, [1966] 2 C.C.C. 38, 55 D.L.R. (2d) 452.

I agree with my brother Pigeon that the respondent should not be considered to have been in breach of the duty to maintain a reasonable clearance between its line and the house merely because another electrical transmission company adopted a different standard.

But, even assuming that the Hydro-Quebec rules ought to be applied to determine the requisite clearance from a building in locating the respondent's electrical transmission line, the reasoning of Choquette J. applies whether that standard called for a clearance of 8'6" or 10'11". The respondent was not required reasonably to anticipate injury to a person located more than 11 feet from its line. In the circumstances of this case, it was not an undue proximity of the respondent's line to the house which was the effective cause of the accident.

For these reasons I would dismiss this appeal, with costs.

LE JUGE PIGEON:—L'appelant a été rendu invalide par un choc électrique qu'il a reçu le 7 mai 1958, alors qu'âgé de 16 ans, il avait entrepris d'installer au-dessus d'une antenne de télévision fixée à la maison de son père, une seconde antenne destinée à permettre la réception d'émissions sur le canal 4.

Pour faire cette opération le demandeur avait d'abord gagné le toit de la véranda en partant du balcon. Là, accroupi à genoux, il avait saisi l'antenne que son beau-frère lui avait tendue d'en bas. Celui-ci étant rentré dans la maison, le demandeur a grimpé à quatre pattes une distance de quelques pieds sur le toit de la maison incliné à 40°, il s'y est assis les jambes repliées devant lui et chaussé de bottes de caoutchouc, à côté de l'antenne existante dont le support à sa gauche était fixé à la corniche et s'élevait environ 4 pieds au-dessus du toit. Il a alors pris la nouvelle antenne à deux mains pour la soulever afin de pouvoir ensuite en insérer la tige dans le support de l'autre.

La nouvelle antenne était un objet fort encombrant fait de tubes d'aluminium. Elle se composait d'une tige de 7'1½" destinée à être placée en position verticale et au sommet de laquelle était fixée perpendiculairement par le milieu une autre tige mesurant 13'7½". Cette tige horizontale était garnie de 9 barres transversales espacées presque régulièrement à partir de chaque extrémité et mesurant environ 4' de longueur. Ces barres transversales étaient également

1968

DELISLE v. SHAWINIGAN WATER & POWER CO.

Le Juge Pigeon

perpendiculaires à la tige verticale de façon à se trouver, une fois celle-ci fixée au support vertical, dans le même plan horizontal que la tige les supportant.

En face de la maison, il y avait une ligne de distribution d'énergie électrique comprenant deux conducteurs, un fil chargé à 7,200 volts tendu à environ vingt-cinq pieds du sol, et quelque trois pieds plus bas, un fil relié à la terre. Il y avait également fixés aux mêmes poteaux, six ou sept pieds plus bas, deux fils téléphoniques. Tous ces fils se trouvaient à une faible distance en avant de la maison et couraient dans une direction à peu près parallèle à la façade. La distance mesurée horizontalement entre le fil chargé et la corniche du toit du balcon à la hauteur de laquelle il se trouvait, était d'un peu moins de 6 pieds d'après l'arpenteur de la compagnie intimée alors que d'après l'ingénieur de l'appelant, cette distance serait d'environ $4\frac{1}{2}$ pieds. Quoi qu'il en soit, il n'est pas contesté que ce fil chargé se trouvait un peu plus haut que le sommet de la tige verticale de l'antenne existante et à 9.35 pieds de distance horizontale. Il se trouvait également à quelque 11 pieds du toit à la base de cette antenne.

En partant des mesures ci-dessus indiquées, on voit combien il était difficile pour l'appelant de réussir à soulever la nouvelle antenne plus haut que les fils sans accident. Les photographies versées au dossier font voir que la tige horizontale de l'antenne existante s'avançait en biais au-dessus du toit en s'en rapprochant derrière l'endroit où le demandeur y était assis et cette tige était comme l'autre garnie de barres transversales mais d'une longueur moindre. Il est donc évident que le demandeur ne pouvait pas reculer plus loin sur le toit au moment où il soulevait la nouvelle antenne. Même s'il la plaçait dans la position la plus favorable, c'est-à-dire la tige horizontale parallèle aux fils électriques, il ne pouvait éviter de passer très près. En effet, les barres transversales de quatre pieds de longueur ajoutaient plusieurs pouces aux 7 pieds de la tige verticale. De plus, le demandeur devait nécessairement tenir la nouvelle antenne devant lui alors que l'autre dans son dos l'empêchait de reculer. Cela plaçait l'extrémité inférieure de la tige à au moins un pied du toit ce qui, théoriquement, laissait quand même un espace suffisant. Mais il semble bien que ce n'est pas ce que le demandeur a fait si l'on tient compte de ce qu'après l'accident l'antenne, comme des

photographies le démontrent, s'est trouvée à rester accrochée au fil inférieur par la barre transversale d'une extrémité. De plus, le demandeur a dit qu'il regardait «le bout» de l'antenne pour ne pas toucher aux fils. S'il avait tenu la tige horizontale parallèle aux fils, il aurait dû regarder les deux bouts. Il est donc pratiquement certain que le malheureux a tenu l'antenne de façon à placer cette tige dans une position presque perpendiculaire aux fils électriques. En faisant l'opération de cette manière, le demandeur devait presque fatalement subir le terrible accident dont il a été victime. En effet, l'hypoténuse du triangle formé par la tige verticale de l'antenne (7′1½″) et la moitié de la tige horizontale (½ de 13′7½″) atteint bien près de 10 pieds.

Le demandeur a affirmé qu'à ce moment-là il regardait le bout de l'antenne pour ne pas toucher au fil et que celui-ci s'en trouvait à ½″ à peu près. Il est tout à fait évident que personne ne peut dans les conditions où se faisait cette opération, apprécier avec exactitude une distance de cet ordre. L'ingénieur électricien, témoin expert de la demande, ayant relevé à une extrémité de l'antenne «une marque qui peut indiquer un court circuit», il faut en déduire qu'il y a eu contact avec le fil chargé. Il est également clair qu'un fort courant a alors traversé le demandeur, la résistance de son corps étant d'après la preuve environ 1,000 ohms alors que le fil était chargé à 7,200 volts. L'intensité de la décharge a fait sauter le fusible de 10 ampères qui protégeait la ligne, le demandeur a échappé l'antenne et il est tombé sur le sol.

En Cour supérieure, le procès a porté uniquement sur la responsabilité, le montant des dommages subis étant fixé à $45,000 par admission des parties. Le juge de première instance a conclu qu'il y avait faute commune et fait porter à la victime un quart de la responsabilité. La Cour d'appel a rejeté l'action.

Il est évident que le juge de première instance n'a pas fait erreur en statuant que le demandeur avait commis une faute. L'imprudence de ce dernier est incontestable.

De même il faut dire aussi que c'est à bon droit que le premier juge a statué qu'il ne pouvait être question en l'occurrence de la responsabilité du fait de la chose (1054 c.c.). Tout en ne niant pas que l'électricité doit être considérée comme une chose au sens de cet article, il faut dire que notre jurisprudence est depuis longtemps fixée dans le

1968

DELISLE v. SHAWINIGAN WATER & POWER CO.

Le Juge Pigeon

sens suivant: cette responsabilité ne s'applique qu'aux dommages causés par le fait autonome de la chose. Comme le dit le juge Anglin dans *Curley c. Latreille*[2]:

> Responsibility for damage caused by a thing which he has under his care (Art. 1054 C.C. par. 1) arises only when the occurrence is due to the thing itself, not when it is ascribable to the conduct of the person by whom it is put in motion, controlled or directed.

Ce principe a été réaffirmé par lui alors qu'il était devenu juge en chef de cette Cour dans l'arrêt unanime *Lacombe c. Power*[3].

La seule question à étudier est donc de savoir si l'intimée a commis une faute. Les fils chargés d'électricité à haute tension sont des objets extrêmement dangereux. Plus on augmente la tension, comme on le fait sans cesse, plus le danger est grand. Dans le cas présent, la preuve révèle qu'en septembre 1951, soit un peu plus de six ans avant l'accident, l'intimé s'est fait autoriser par la Régie de l'électricité à réaménager à 6,900 volts au lieu de 2,300 la ligne dont il s'agit. (L'expression employée dans le document rédigé en anglais est «reframe», quant au voltage, on l'a subséquemment normalisé à 7,200 au lieu de 6,900.) Dans cette autorisation il a été stipulé que l'installation devait être conforme au National Electrical Safety Code, une publication du ministère du Commerce des États-Unis datant de 1948.

L'intimée fait valoir que ce code n'exige qu'une distance horizontale de 3 pieds entre tous bâtiments et des fils conducteurs dont le voltage est de 300 à 8,700 volts. De plus, lorsque cet écartement est observé, ce code-là n'exige que les conducteurs soient protégés que dans le seul cas où ils sont si proches de fenêtres, balcons, escaliers de sauvetage ou autres lieux accessibles qu'il y a danger qu'ils viennent en contact avec des personnes («where such supply conductors are placed near enough to windows, verandahs, fire escapes or ordinarily accessible places, to be exposed to contact by persons»).

D'un autre côté, l'appelant fait état de ce que depuis longtemps (le témoin Pierre Godin dit avant 1952) Hydro-Québec avait établi des standards beaucoup plus rigoureux.

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[2] (1920), 60 R.C.S. 131 à 140, 55 D.L.R. 461.

[3] [1928] R.C.S. 409, 4 D.L.R. 979.

D'après ceux-ci, l'espace libre à laisser entre la partie la plus rapprochée d'un bâtiment et des fils conducteurs est de 10'11" pour une ligne dont le voltage excède 4,000 volts. Il faut noter que c'est par erreur que dans le jugement de la Cour supérieure on dit que d'après ce témoin, l'espace libre doit être de 8½' dans le cas d'un circuit monophasé à 7,200 volts. C'est pour le cas d'un circuit à 4,000 volts que le témoin a fait cette affirmation. Pour le cas d'une ligne à 7,200 volts il a bien dit qu'il fallait, suivant les standards d'Hydro-Québec, un espace libre de près de 11 pieds, soit l'espace libre prescrit pour une tension allant jusqu'à 12,000 volts. Il a du reste ajouté que si l'on exigeait cet espacement, c'est que l'on considérait qu'en tout état de cause un tel circuit devait être traité comme susceptible d'atteindre 12,000 volts dans certaines conditions anormales. En conséquence, il y avait lieu d'adopter comme mesure de prudence la protection requise pour le voltage plus élevé.

Peut-on juger l'intimée en faute parce qu'elle n'a pas suivi cet exemple et s'en est tenue au code établi par le ministère du Commerce des États-Unis et prescrit par la Régie de l'électricité? Même en prenant pour acquis que les précautions prescrites par l'autorité administrative ne constituent pas une définition limitative des devoirs des entreprises assujetties à un contrôle administratif, il faudrait pour en venir à cette conclusion beaucoup plus que la seule preuve qu'Hydro-Québec a établi des standards plus rigoureux. La faute se définit en regard du soin que doit apporter un citoyen d'une vigilance et d'une prudence normales. Comme on l'a fait observer dans de nombreux arrêts, celui qui est accusé de négligence se disculpe en démontrant qu'il a agi suivant ce qui est généralement considéré acceptable à l'époque où il faut se placer pour apprécier sa conduite. *The London & Lancashire c. La Compagnie F. X. Drolet*[4]. Rien ne démontre qu'au moment où l'intimée a réaménagé la ligne en en triplant le voltage, les normes d'Hydro-Québec étaient généralement considérées comme les seules acceptables et celles du Code prescrit par la Régie de l'électricité comme insuffisantes ou périmées.

On dit que le danger que présentait l'installation en face de la propriété du père du demandeur était tel que le con-

[4] [1944] R.C.S. 82, 1 D.L.R. 561.

1968

DELISLE v. SHAWINIGAN WATER & POWER CO.

Le Juge Pigeon

tremaître de l'intimée sentait le devoir de prévenir ce dernier de voir à prendre des précautions spéciales s'il devait entreprendre du peinturage ou une autre opération de ce genre autour de sa maison. Il est bien évident qu'il y avait là en effet un danger réel que l'intimée aurait pu supprimer par des moyens courants à sa disposition soit en éloignant le fil chargé par une traverse, soit en l'isolant dans une enveloppe protectrice. Cependant cela ne suffit pas à la constituer en faute car elle n'a pas l'obligation d'éliminer tous les risques de ce genre mais seulement le devoir de prendre des précautions raisonnables. En déterminant ce qui est raisonnable il faut considérer que les travaux de peinturage comme ceux d'installation d'antennes de télévision sont ordinairement exécutés par des ouvriers qualifiés. La preuve ne démontre pas que pour un tel ouvrier, l'installation présentait un danger excessif contre lequel l'intimée avait le devoir de le prémunir.

La preuve révèle que le règlement de l'intimée interdit à tous ses préposés à l'entretien des lignes de s'approcher à moins de 2 pieds d'un fil chargé; cependant, elle ne démontre pas que l'installation de l'intimée auprès de la propriété du père du demandeur était telle qu'un ouvrier chargé d'y exécuter des travaux ne pouvait pas le faire tout en respectant cette règle de prudence. Il est vrai qu'Hydro-Québec va plus loin: son règlement exige 4 pieds. Là encore la preuve ne démontre pas que cette norme soit généralement reconnue comme seule acceptable.

Étant venu à la conclusion que l'intimée ne peut être considérée en faute du seul fait de n'avoir pas suivi les normes d'Hydro-Québec, il n'est pas nécessaire de décider si elle a raison de soutenir, comme la Cour d'appel l'a admis, que même s'il en était autrement, sa faute n'aurait pas contribué à l'accident parce que la partie du toit de la maison où se trouvait le demandeur quand il a reçu le choc n'était pas à moins de 11 pieds du fil chargé.

Cependant je dois dire que je suis loin d'être convaincu que ce raisonnement soit juste. Tout d'abord, il est contraire au fait brutal que la proximité du fil chargé est un facteur essentiel de l'accident. Si lorsque l'on a haussé le voltage de la ligne on l'avait placée suivant les standards d'Hydro-Québec, il y aurait eu 5 ou 6 pieds de plus entre

la façade de la maison et le fil chargé, et l'accident ne se serait pas produit. Ensuite, il ne faut pas oublier que ce pour quoi une distance est à observer, c'est une ligne de transmission, pas une clôture ou un mur entourant un bâtiment. S'il fallait envisager des conducteurs chargés tout le tour de la maison, la situation serait sûrement différente et rien ne démontre qu'il ne faudrait pas un espace beaucoup plus considérable. Autrement dit, la règle de prudence adoptée par l'Hydro-Québec c'est de ne pas placer une ligne portant le voltage dont il s'agit de façon telle qu'un conducteur soit à moins de 10'11" de la partie la plus rapprochée du bâtiment. Évidemment, il s'ensuit qu'un espace libre plus considérable va exister pour tout le reste du bâtiment mais n'est-ce pas un facteur important qu'il ne faut pas éliminer. Dans *Thatcher c. Canadian Pacific Railway Company*[5], la Cour d'appel d'Ontario a admis comme une faute cause d'un accident à une traverse à niveau dans une localité où la vitesse des trains n'était pas limitée, le fait d'y circuler à une vitesse telle qu'il était impossible de ne pas dépasser la limite permise dans la ville voisine vers laquelle le train se dirigeait. On a donc considéré que le public avait droit de compter sur toutes les conséquences normales des mesures de protection jugées nécessaires et non seulement sur ce qui est formellement prescrit.

Je suis d'avis que l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Blain, Piché, Bergeron, Godbout & Emery, Montreal.

Attorneys for the defendant, respondent: Chisholm, Smith, Davis, Anglin, Laing, Weldon & Courtois, Montreal.

[5] [1947] O.W.N. 965, 61 C.R.T.C. 162.

1968
*Mar. 26, 27, 28
June 3

FORMEA CHEMICALS LIMITED (*Plaintiff*) ..... APPELLANT;

AND

POLYMER CORPORATION LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Patents—Infringement—Crown corporation an agent of the Crown—Action for infringement of patent against Crown corporation—Whether liable by way of injunction and damages—Right of Crown to use any patent —Whether Crown corporation covered—Patent Act, R.S.C. 1952, c. 203, ss. 19, 56—Government Companies Operation Act, R.S.C. 1952, c. 133, s. 3(1).

The plaintiff, as assignee of a patent, commenced proceedings for infringement in the Supreme Court of Ontario against the defendant, a Crown corporation. By virtue of s. 3(1) of the *Government Companies Operation Act*, R.S.C. 1952, c. 133, the defendant is "for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty". The defendant pleaded that the relief sought by the plaintiff was not available by virtue of s. 19 of the *Patent Act*, R.S.C. 1952, c. 203, which provides that "the Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof . . . ". The action was dismissed by the trial judge whose judgment was affirmed by a majority judgment in the Court of Appeal. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

By virtue of s. 19 of the *Patent Act*, the defendant had statutory authority to use the patent. The words "Government of Canada" in that section are equivalent to "the Crown". The submission that the rights conferred by the section are not sufficient to empower the sale of a product to the public which is, or has been produced by the use of, a patented invention, could not be entertained. The word "use" covers sale. The use by the defendant of the patent was, in the circumstances, a use by the Crown within s. 19. There was therefore no infringement.

Brevets—Contrefaçon—Compagnie de l'État, mandataire de la Couronne—Action pour violation d'un brevet contre cette compagnie—Peut-elle être recherchée par voie d'injonction et en dommages—La Couronne ayant droit de se servir d'une invention brevetée—La compagnie de l'État a-t-elle ce même droit—Loi sur les brevets, S.R.C. 1952, c. 203, arts. 19, 56—Loi sur le fonctionnement des compagnies de l'État, S.R.C. 1952, c. 133, art. 3(1).

La demanderesse, comme cessionnaire d'un brevet, a institué des procédures contre la défenderesse, une compagnie de l'État, pour violation d'un brevet devant la Cour suprême de l'Ontario. Selon l'art. 3(1) de la

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*PRESENT: Cartwright C.J. and Fauteux, Martland, Judson, Ritchie, Spence and Pigeon JJ.

Loi sur le fonctionnement des compagnies de l'État, S.R.C. 1952, c. 133, la défenderesse est «à toutes ses fins, mandataire de Sa Majesté, et elle ne peut exercer ses pouvoirs qu'en cette qualité». La défenderesse a plaidé que la demanderesse ne pouvait pas se prévaloir du remède recherché vu les dispositions de l'art. 19 de la *Loi sur les brevets*, S.R.C. 1952, c. 203, qui prévoit que «Le Gouvernement du Canada peut à tout moment se servir d'une invention brevetée, en payant au breveté, pour l'usage de l'invention, la somme que, dans un rapport, le commissaire estime être une indemnité raisonnable . . . ». L'action a été rejetée par le Juge de première instance dont le jugement a été confirmé par un jugement majoritaire de la Cour d'appel. La demanderesse en a appelé à cette Cour.

Arrêt: L'appel doit être rejeté.

En vertu de l'art. 19 de la *Loi sur les brevets*, la défenderesse avait l'autorité statutaire de se servir du brevet. Dans cet article, les mots «Gouvernement du Canada» sont l'équivalent de «la Couronne». La prétention que les droits conférés par l'article ne sont pas suffisants pour permettre la vente au public d'un produit qui est, ou a été, fabriqué en se servant de l'invention brevetée, ne peut pas être admise. Les mots «se servir» comprennent la vente. L'usage de l'invention brevetée par la défenderesse était, dans les circonstances, un usage par la Couronne dans le sens de l'art. 19. Il n'y a donc pas eu de contrefaçon.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], confirmant un jugement du Juge Parker. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Parker J. Appeal dismissed.

P. B. C. Pepper, Q.C., and *R. J. Fraser*, for the plaintiff, appellant.

Gordon F. Henderson, Q.C., and *John Richard*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This appeal is from a judgment of the Court of Appeal for Ontario[1], which, by a majority decision, dismissed an appeal by the appellant, initially restricted by order of the Court of Appeal to certain points of law raised in the notice of appeal from the judgment at trial which had dismissed the appellant's action against the respondent. The present appeal involves only the appellant's claim for relief by way of injunction and damages for alleged infringement by the respondent of the appellant's patent.

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[1] [1967] 1 O.R. 546, 35 Fox Pat. C. 21, 49 C.P.R. 251, 61 D.L.R. (2d) 475.

1968

FORMEA CHEMICALS LTD. v. POLYMER CORPORATION LTD.

Martland J.

The patent in question, no. 453,251 and entitled "Polymeric Compositions and Methods of Making the Same", was granted on December 14, 1948, to T. A. TeGrotenhuis, W. C. McCoy and L. L. Evans. It was assigned by the patentees to the respondent on February 18, 1949, pursuant to an agreement whereby the respondent undertook to pay to the patentees royalties on material produced under the patent. The agreement provided that the respondent, if not in default, had the option to reassign the patent to the patentees, without prejudice to the respondent's right thereafter to contest the scope and validity of the patent.

This option was exercised by the respondent on January 9, 1953, after receiving an opinion of counsel that the patent did not cover the materials being produced by the respondent.

The patentees, on May 3, 1955, assigned the patent to the appellant, which commenced these infringement proceedings in respect of materials produced by the respondent subsequent to January 9, 1953.

The respondent was incorporated on February 13, 1942, under Part I of *The Companies Act, 1934,* c. 33, Statutes of Canada, 1934. Its objects included the manufacturing, selling and generally dealing in synthetic rubber. At all material times all of its issued shares, other than directors' qualifying shares, were held by the Minister of Munitions and Supply, and later by the Minister of Defence Production. By proclamation dated August 1, 1946, made pursuant to s. 6 of the *Government Companies Operation Act,* c. 24, Statutes of Canada, 1946 (now R.S.C. 1952, c. 133), that Act was made applicable to the respondent. That Act provides, by s. 3(1), that

> Every Company is for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty.

The respondent, in its statement of defence, pleaded that the relief sought by the appellant in respect of the alleged infringement was not available to the appellant by virtue of s. 19 of the *Patent Act,* R.S.C. 1952, c. 203. That section provides that:

> The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof, and any decision of the Commissioner under this section is subject to appeal to the Exchequer Court.

The proceedings in this case were brought in the Supreme Court of Ontario, in reliance upon s. 56(1) of the *Patent Act*. Section 56 reads as follows:

56. (1) An action for the infringement of a patent may be brought in that court of record that, in the province wherein the infringement is said to have occurred, has jurisdiction, pecuniarily, to the amount of the damages claimed and that, with relation to the other courts of the province holds its sittings nearest to the place of residence or of business of the defendant; such court shall decide the case and determine as to costs, and assumption of jurisdiction by the court is of itself sufficient proof of jurisdiction.

(2) Nothing in this section impairs the jurisdiction of the Exchequer Court under section 21 of the Exchequer Court Act or otherwise.

The learned trial judge reached the following conclusions:

It would appear that this court could assume jurisdiction under the Patent Act so long as a right to claim for infringement exists. Since the Crown has a right to use any patented invention, subject to paying compensation, such use cannot be an infringement to provide this Court with jurisdiction under section 56(1) of the Patent Act.

Having decided that the Crown has a right to use any patented invention, subject to paying compensation, also disposes of the submission that use by the Crown is a tort which would give this Court jurisdiction.

He also held that neither of the products, in the making of which the appellant alleged that the respondent had infringed the patent, was covered by the patent.

The appeal from this judgment was initially restricted, by order of the Court of Appeal, to certain points of law referred to in the notice of appeal.

The only points of law stated in the notice of appeal which were argued by the appellant in the Court of Appeal were points 2 and 3:

2. The learned trial judge erred in law in considering that the defendant is "the Government of Canada" within the meaning of s. 19 of the Patent Act, R.S.C. 1952, Ch. 203 and that the defendant has "used the patented inventions" within the meaning of that section. The learned trial judge thereby erred in law in his conclusion that this Honourable Court has no power to assess compensation.

3. The learned trial judge erred in law in concluding that the Court has no jurisdiction to entertain that part of the plaintiff's claim (Polysar SS-250) which seeks damages for alleged infringement of patent.

The Court of Appeal, by a majority of two to one, dismissed the appeal.

1968

FORMEA CHEMICALS LTD. v. POLYMER CORPORATION LTD.

Martland J.

McLennan J.A., who delivered the reasons of the majority, after stating that the real issue was raised in ground 3, reached the following conclusion, which he considered decisive:

> My conclusion is that at common law an action for infringement of patent being an action in tort is not maintainable against the respondent because it is an agent of the Crown and its powers may be exercised only as such agent and although the Crown Liabilities Act, Statutes of Canada, 1952-3, Cap. 30, provides that the Crown is liable for damages in respect of a tort, a saving clause in the section imposing liability is applicable to this case, and the common law rule is not affected.

The saving clause to which he refers, and on which he relies in his judgment, is subs. (6) of s. 3.

Wells J.A., as he then was, dissented and was of the opinion that the commercial sale by the respondent to the public of its products was not the "use" of a patented invention within the meaning of s. 19 of the *Patent Act,* that such sales would constitute an infringement of a patent, and that the respondent, though a Crown agent, if it exceeded its powers could be made liable in tort for such an infringement by virtue of s. 3(3) of the *Government Companies Operation Act,* which provides that:

> 3. (3) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by a Company on behalf of Her Majesty, whether in its name or in the name of Her Majesty, may be brought or taken by or against the Company in the name of the Company in any court that would have jurisdiction if the Company were not an agent of Her Majesty.

While I have reached the conclusion that the appeal fails, my reasons are not the same as those of the majority in the Court of Appeal.

It is unnecessary to determine, in the circumstances of the present case, what may be the liability of an agent of the Crown, which, without lawful authority, infringes upon the rights of others. I do not base my decision upon, nor do I adopt the general proposition that an action in tort will not lie as against an agent of the Crown.

In my opinion, the appellant's claim for an infringement of its patent fails because the respondent, by virtue of s. 19 of the *Patent Act,* had statutory authority to use the patent. That section confers the right to use any patented invention upon the "Government of Canada". I agree with Wells J.A. that this phrase is equivalent to "the Crown". He refers, on this point, to ss. 9 to 13 of the

British North America Act. It is also implicit in the judgment of this Court in *The King v. Bradley*[2] that the two terms are equivalent. That case involved a petition of right against the Crown in respect of compensation claimed to be payable under s. 19, which claim had been denied by the Crown.

The submission of the appellant, which found favour with Wells J.A., is that the rights conferred by s. 19 are not sufficient to empower the sale of a product to the public which is, or has been produced by the use of, a patented invention. In reaching this conclusion he traces the history of the Crown's rights, in relation to patents, in England, and relies upon the recent decision of the House of Lords in *Pfizer Corporation v. Ministry of Health*[3].

In England, the granting of a patent for an invention was an exercise of the Royal Prerogative. In *Feather v. The Queen*[4], it was held that:

> Letters patent, in the usual form, for an invention, whereby, on the prayer of the patentee, the Crown of its "special grace, certain knowledge, and mere motion," grants to him "special licence, full power, sole privilege and authority to" "make, use, exercise and vend" the invention, and "enjoy the whole profit, benefit, commodity and advantage from time to time coming, growing, accruing, and arising by reason of the said invention," and prohibits "all and every person and persons, bodies politic and corporate, and all other our subjects whatsoever, of what estate, quality, degree, name or condition soever," directly or indirectly, from making, using or practising the same "without the consent, licence or agreement" of the patentee, with the condition that the patentee should supply articles of the invention for the use of the Crown, at and upon such reasonable prices and terms as should be settled by the officers of the Crown requiring them; and that the letters patent should be "taken, construed and adjudged in the most favourable and beneficial sense for the best advantage of" the patentee, do not preclude the Crown from the use of the invention protected by the patent, even without the assent of or compensation made to the patentee.

At p. 268, Chief Justice Cockburn, delivering the judgment of the Court, said:

> This appears to shew that in granting a privilege, otherwise of universal application, the Crown will not be bound unless it expressly declares its intention to that effect, and that grants of a privilege, however general in their terms, can, in the absence of express words to bind the Crown, be taken only as conferring the privilege as against the subject, exclusive of the Crown.

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[2] [1941] S.C.R. 270, 1 C.P.R. 1, 2 D.L.R. 737.
[3] [1965] A.C. 512.
[4] (1865), 6 B. & S. 257, 122 E.R. 1191.

1968

FORMEA CHEMICALS LTD. v. POLYMER CORPORATION LTD.

Martland J.

In 1876, in the House of Lords, in *Dixon v. The London Small Arms Company Limited*[5], it was held that a company which employed a patented process in the manufacture of small arms for the Crown, and which was not a servant or agent of the Crown, was liable in a suit for infringement.

Lord Cairns L.C. said, at p. 641:

> My Lords, I have used the words "servants or the agents of the Crown" for this reason. The case of *Feather v. The Queen,* 6 B. & S. 257; 35 L.J. (Q.B.) 200, decided that although every grant of letters patent communicates in general terms to the patentee the right, and the sole right, to use and to exercise the invention, and prohibits other persons from using or exercising that invention, yet that a grant of that kind, being a Crown grant, must be construed with reference to those principles which regulate Crown grants, and that that which appears from its wording to be a general privilege and a general prohibition must be read with an exception in favour of the Crown itself; and inasmuch as an exception in favour of the Crown itself cannot be a personal exception, for the Crown itself could not exercise patent rights, the exception must be not only in favour of the Crown, but in favour also of those who act on behalf of, and as the agents of, the Crown. I, therefore, in the course of the argument, took the liberty of proposing to the Solicitor-General the insertion of words in the letters patent which would indicate the decision of the Court in the case of *Feather v. The Queen;* and, with the exception of one word which the Solicitor-General proposed to add, I did not find that he took any exception or made any objection to the words which I proposed to insert. I propose to read, my Lords, and I submit to your Lordships that it is the proper course that we should read, the grant of the letters patent as a grant by the Crown to the patentee of a "license, full power, sole privilege and authority that he" the patentee, "his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants, or agents, or such others as he" the patentee, "his executors, administrators, or assigns, shall at any time agree with, and no others." I propose there to insert these words, "excepting officers, agents, and servants of the Crown, acting on behalf of and for the use of the Crown" "from time to time, and at all times hereafter, for the term of years herein expressed, shall and lawfully may make, use, exercise, and vend the said invention within our *United Kingdom, &c.*" My Lords, I say I did not understand the Solicitor-General to object to the words which I proposed to insert, except that he added to the words which I have proposed the word "agents," I having used simply the words "officers and servants of the Crown".

What the Court was concerned with in the passage quoted was this. Accepting the proposition established in *Feather v. The Queen,* that letters patent for an invention, though general in terms, must be construed as subject to an exception in favour of the Crown, such exception was not purely personal to the Crown, but extended to officers,

[5] (1875-6), 1 App. Cas. 632.

agents and servants of the Crown acting on behalf of and for the use of the Crown. I do not, as did Wells J.A., construe this as "a substantial limitation of the Royal Prerogative". The position of the Crown was still the same, i.e., the letters patent of invention did not affect it. But, in addition, as Lord Cairns said in the passage quoted:

> . . . the exception must be not only in favour of the Crown, but in favour also of those who act on behalf of, and as the agents of, the Crown.

In 1883 a new *Patent Act* was passed in England (46 & 47 Vict., c. 57), which, in effect, reversed the decision in *Feather v. The Queen,* and which altered the law as to the use of a patent by an agent or servant of the Crown, as stated in the *Dixon* case, by extending the right of use to contractors, and also by making provision for compensation.

It provided as follows:

> 27. (1). A patent shall have to all intents the like effect as against Her Majesty the Queen, her heirs and successors, as it has against a subject.
>
> (2). But the officers or authorities administering any department of the service of the Crown may, by themselves, their agents, contractors, or others, at any time after the application, use the invention for the services of the Crown on terms to be before or after the use thereof agreed on, with the approval of the Treasury, between those officers or authorities and the patentee, or, in default of such agreement, on such terms as may be settled by the Treasury after hearing all parties interested.

These provisions were carried forward, in substantially the same terms, in subsequent legislation. The *Patents Act, 1949,* which was under consideration in the *Pfizer* case, contains the following provisions:

> 21. (2). Subject to the provisions of this Act and of subsection (3) of section three of the *Crown Proceedings Act,* 1947, a patent shall have the same effect against the Crown as it has against a subject.
>
> 46. (1). Notwithstanding anything in this Act, any Government department, and any person authorised in writing by a Government department, may make, use and exercise any patented invention for the services of the Crown in accordance with the following provisions of this section.

The subsequent provisions of s. 46, inter alia, provide for compensation.

Canadian legislation with respect to these matters has been substantially different. In 1869 there was enacted an *Act Respecting Patents of Invention* (c. 11, Statutes of

1968

FORMEA CHEMICALS LTD. v. POLYMER CORPORATION LTD.

Martland J.

Canada, 1869). It provided for the granting of patents of invention by the Commissioner of Patents of Invention. Section 21 provided that:

> The Government of Canada may always use any patented invention or discovery, paying to the patentee such sum as the Commissioner may report to be reasonable compensation for the use thereof.

Section 19 of the present Act, previously quoted, is to the same effect. The rights of a patentee in Canada are defined by s. 46 of the Act. It is this section which, subject to the conditions of the Act, confers exclusive rights upon the patentee.

There was not then, and there is not now any provision, similar to the English legislation, declaring that a patent has the like effect against the Crown as it has against a subject. In the absence of such a provision, and in the light of s. 16 of the *Interpretation Act*, R.S.C. 1952, c. 158, it is questionable whether a patent does have effect against the Crown. Section 16 provides that

> No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

In *McDonald v. The King*[6], it was stated that, apart from statute, the Crown has power, if it sees fit to do so, to use a patented invention without the assent of the patentee and without making compensation to him therefor.

This point was left open in the decision of this Court in *The King v. Bradley, supra*. I do not think it is necessary to determine it in these proceedings because of the opinion I have reached as to the scope of s. 19.

The differences between s. 19 of the Canadian Act and s. 46(1) of the English Act are material. The former confers upon the Crown an unrestricted right to use a patent. The latter confers on a Government department the right to make, use and exercise a patent "for the services of the Crown."

It is in the light of these differences that I now turn to a consideration of the *Pfizer* case. The question in issue there was as to whether the Ministry of Health was within

[6] (1906), 10 Ex. C.R. 338.

the protection offered by s. 46(1) of the English *Patent Act* when it purchased supplies of a drug for National Health Service hospitals from an English company, which imported the drug from abroad and which had no licence from the holder of the English patent in respect of that drug. The drug was used by the hospitals for both in-patients and out-patients. It was supplied by the hospitals to out-patients on payment of a nominal charge made under the National Health Service regulations.

The main issue, in both the Court of Appeal[7] and in the House of Lords[8] was as to whether this supplying of drugs was "for the services of the Crown." It was held that it was. Another issue was as to whether the Ministry of Health was authorized under the section to sell the drug to out-patients. The House of Lords determined this issue by deciding that the relationship of the Ministry to the out-patients was a statutory relationship and not a sale, in the sense of a consensual contract. This was also the view taken by the Court of Appeal, but, in addition, it was held there that the word "use" was broad enough to cover a sale by the Ministry.

It is contended by the appellant that the reasoning of the House of Lords indicates that, unlike the Court of Appeal, they held the opinion that "use" in s. 46(1) did not authorize sale. I think the proper interpretation of their reasons is that, holding the view that there had been no sale, they preferred not to deal with the matter. Thus, for example, Lord Evershed says, at p. 541:

> It was the view of Diplock L.J. that nonetheless the true implication of the word "use" in the 1883 Act and repeated in the subsequent legislation involved, as a proper and essential aspect or exercise of "using", a power also to vend, that is, so that a Government department could give authority to "vend" articles which were the subject of letters patent. I wish to acknowledge the attraction of the argument of the learned Lord Justice which was, as I understand, accepted also by his colleagues in the Court of Appeal. But for my own part while I greatly respect the reasoning of the Lord Justice I would prefer to express no view upon it.

In any event, it is my opinion that the word "use" in s. 19 of the Canadian Act has a broader application than it

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[7] [1964] Ch. 614.

[8] [1965] A.C. 512.

1968

FORMEA CHEMICALS LTD. v. POLYMER CORPORATION LTD.

Martland J.

has in the context of s. 46(1) of the English Act. In s. 19 the Crown is given an unrestricted power at any time to use any patented invention. In s. 46(1) no power is conferred upon the Crown (which is bound by the patent by s. 21(2)), but a power is given to a Government department to use a patent "for the services of the Crown."

In relation to s. 19 I would adopt the statement of Diplock L.J. at p. 658:

> The verb "use," in relation to the object "any patented invention," is in its ordinary connotation wide enough to comprehend selling the patented articles if the invention is itself a product or articles manufactured by patented process if the invention is a process of manufacture.

In my opinion the Crown, under s. 19, has an unrestricted right to use a patent. It caused the respondent to be incorporated to manufacture, sell and deal in synthetic rubber and made the respondent, for all its purposes, its agent. The use by the respondent of the patent was, in the circumstances, a use by the Crown within s. 19. This being so, there was no infringement by the respondent of such patent.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

ROBERT JOHN CORCORAN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1968

*May 21
June 24

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Criminal law—Information—Charge of making false statement in connection with application for admission to Canada—Information not stating what was the false statement—Oral particulars of offence given by Crown counsel before trial proceeded with—Whether information fatally defective—Criminal Code, 1953-54 (Can.), c. 51, s. 492(3)—Immigration Act, R.S.C. 1952, c. 325, s. 50(f).

The appellant was convicted by a magistrate of having made a false statement in connection with his application for admission to Canada. A motion to quash the information on the ground that it was defective was refused, but, before the start of the trial, Crown counsel told the defence what question was alleged to have been answered falsely. On appeal to a district judge, the information was again attacked and the conviction was quashed. A further appeal to the Appellate Division of the Supreme Court by the Crown was allowed and the judgment of the magistrate was reinstated. An application for leave to appeal to this Court was granted on the questions of law as to (1) whether the information was fatally defective and (2) whether the judgment of the magistrate should have been reinstated on the assumption that the information was not fatally defective.

Held: The appeal should be allowed and the case remitted to the district judge for a hearing on the merits by way of trial *de novo*.

The information was not fatally defective. The appellant knew that he was charged with making a false statement in his application. The charge as framed was not so lacking in detail of the circumstances that it did not identify the transaction. There was a right to demand particulars and, in fact, oral particulars were given. Defence counsel appeared to have been content to proceed with these oral particulars.

As conceded by the Crown, the Court of Appeal erred in reinstating the judgment of the magistrate. The proper order was to remit the case to the district judge for a hearing on the merits by way of trial *de novo*.

Droit criminel—Dénonciation—Accusation d'avoir fait une déclaration fausse à l'égard d'une demande d'admission au Canada—La dénonciation ne spécifiant pas la fausse déclaration—Détails fournis oralement par l'avocat de la Couronne avant que le procès suive son cours—La dénonciation était-elle fatalement viciée—Code criminel, 1953-54 (Can.), c. 51, art. 492(3)—Loi sur l'immigration, S.R.C. 1952, c. 325, art. 50(f).

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*PRESENT: Cartwright C.J. and Fauteux, Judson, Hall and Pigeon JJ.

1968

CORCORAN v. THE QUEEN

L'appelant a été déclaré coupable par un magistrat d'avoir fait une déclaration fausse à l'égard de sa demande d'admission au Canada. Une requête pour faire rejeter la dénonciation pour le motif qu'elle était viciée a été refusée, mais, avant que le procès ne débute, le procureur de la Couronne a révélé oralement à la défense la question à laquelle on prétendait qu'une fausse réponse avait été donnée. Sur appel à un juge de district, la dénonciation a encore été attaquée et la déclaration de culpabilité a été annulée. Un appel subséquent de la Couronne à la Cour d'appel a été accueilli et le jugement du magistrat a été rétabli. L'appelant a obtenu la permission d'appeler à cette Cour sur les questions de droit suivantes: (1) la dénonciation était-elle fatalement viciée et (2) le jugement du magistrat aurait-il dû être rétabli, prenant pour acquis que la dénonciation n'était pas fatalement viciée.

Arrêt: L'appel doit être accueilli et le dossier renvoyé au juge de district pour une audition du litige par voie de procès *de novo*.

La dénonciation n'était pas fatalement viciée. L'appelant savait qu'il était accusé d'avoir fait une déclaration fausse dans sa demande. L'acte d'accusation, tel que rédigé, ne manquait pas à ce point de détails sur les circonstances, qu'il n'identifiait pas l'affaire. L'accusé avait le droit de demander des détails et, en fait, des détails ont été fournis oralement. Il semble que le procureur de la défense était satisfait de procéder avec les détails qu'on lui avait fournis oralement.

Tel qu'admis par la Couronne, la Cour d'appel a fait erreur en rétablissant le jugement du magistrat. L'ordonnance appropriée aurait été de renvoyer le dossier au juge de district pour une audition du litige par voie de procès *de novo*.

APPEL d'un jugement de la Cour d'appel de l'Alberta accueillant un appel de la Couronne et rétablissant la déclaration de culpabilité imposée par le magistrat. Appel accueilli et dossier renvoyé au juge de district.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta allowing an appeal by the Crown and restoring the conviction imposed by the magistrate. Appeal allowed and case remitted to district judge.

Brian A. Crane, for the appellant.

John A. Scollin and *C. D. MacKinnon*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant, Robert John Corcoran, was charged by information dated August 10, 1966, that

on or about the 11th day of February, A.D. 1966 at the City of Calgary, in the Province of Alberta, Robert John Corcoran, Advertising agent, of

205 Wolf Street, Townsite of Banff, Province of Alberta, did knowingly and unlawfully make a false statement in connection with the application for admission of himself to Canada, the said offence being contrary to Subsection (*f*) of Section 50 of the *Immigration Act*, Revised Statutes of Canada 1952, being Chapter 325 as amended.

The magistrate convicted the appellant.

At the beginning of this trial, counsel for the appellant moved to quash on the ground that the information was defective. The magistrate refused to grant this application and proceeded to hear the evidence, but before the magistrate went on with the trial, counsel for the Crown told counsel for the appellant which question and answer alleged to be false in the appellant's application for permanent admission to Canada was in issue in the case. In other words, he gave him oral particulars.

On appeal to a District Judge, the appellant's counsel again moved against the information. It is apparent from the record of the proceedings before the judge that it was made clear to him, as it had been to the magistrate, what question was involved in this information. No evidence was taken before the judge and after argument, he granted the application and quashed the conviction.

The Appellate Division of the Supreme Court of Alberta allowed the Crown's appeal and ordered that the judgment of the District Judge be set aside and that the judgment of the magistrate be reinstated.

Leave to appeal was granted by this Court on the following questions of law:

(1) Whether the information is fatally defective.

(2) Whether on the view that the information is not fatally defective the Court of Appeal erred in reinstating the judgment of His Honour Magistrate Stillwell rather than remitting the case to the Appeal Court having jurisdiction under Section 719 to hear a trial de novo under Part XXIV of the *Criminal Code*.

The question in the application for admission to Canada which gives rise to the difficulty in this case is the following:

13. Have you or has any member of your family suffered from mental illness, tuberculosis, or been convicted of a criminal offence, refused admission or deported from Canada? (If "yes" to any of these, give details) Answer—No.

The Crown's allegation was that the applicant had been convicted of a criminal offence in the United States which

1968

CORCORAN v. THE QUEEN

Judson J.

he failed to disclose. This was the oral information given by counsel for the Crown to the accused before the trial began both before the magistrate and at the trial *de novo* before the District Judge.

Section 50(*f*) of the *Immigration Act*, R.S.C. 1952, c. 325, under which the accused was charged, reads as follows:

> 50. Every person who
>
> (*f*) knowingly makes any false or misleading statement at an examination or inquiry under this Act or in connection with the admission of any person to Canada or the application for admission by any person
>
> is guilty of an offence . . . .

My opinion is that this information was not fatally defective. It charges an offence punishable upon summary conviction. Section 701(1) dealing with summary convictions makes applicable ss. 492 and 493 of the *Criminal Code*. Section 492, subs. (3), provides:

> (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

The accused here knew that he was charged with making a false or misleading statement in his application for admission to Canada. I do not think that the charge as framed is so lacking in detail of the circumstances that it does not identify the transaction. There would have been no difficulty in stating in the information that what was held against the accused was that he falsely stated that he had not been convicted of a criminal offence. Failure to do this was not a fatal defect in the information.

The accused had a right to demand particulars and, in fact, oral particulars were given to him and, as the record of what happened before the magistrate indicates, whatever merits counsel for the accused may have attributed to his motion to quash, he appears to have been content to proceed with the trial with these oral particulars. The appeal cannot succeed on this ground.

However, and as conceded by the respondent, there was error in the order of the Court of Appeal in reinstating the judgment of the magistrate. I would allow the appeal,

remit the case to the District Judge for a hearing on the merits, by way of a trial *de novo*, on the information as amended by the oral particulars given before the magistrate.

1968
CORCORAN
v.
THE QUEEN
Judson J.

Appeal allowed.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

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

LIDO INDUSTRIAL PRODUCTS LIMITED (*Defendant*) ..... APPELLANT;

1968
*June 3, 4
June 21

AND

MELNOR MANUFACTURING LIMITED and MELNOR SALES LIMITED (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Industrial designs—Registered design—Action for infringement—Motion for interlocutory injunction—Whether substantial grounds of defence to action—Balance of convenience—Industrial Design and Union Label Act, R.S.C. 1952, c. 150.

The plaintiffs are the assignees of a registered industrial design but do not market in Canada the lawn sprinklers bearing that design. They instituted an action for infringement against the defendant and applied to Jackett P. for an interlocutory injunction. The defendant apparently does not deny having copied, with minor variations, the design of the plaintiffs, but in its defence, raised questions as to the lack of originality of the registered design and as to the plaintiffs' proprietary right. The interlocutory injunction was granted by the President. The defendant was granted leave to appeal to this Court.

Held (Fauteux and Martland JJ. dissenting): The appeal should be allowed and the interlocutory injunction dissolved.

Per Cartwright C.J. and Hall and Pigeon JJ.: There were substantial grounds of defence to the action. It was therefore necessary to consider the question of the balance of convenience. The effect of the injunction will be to prevent the defendant from dealing with a large quantity of sprinklers it has on hand until after the selling season while the plaintiffs are not marketing in Canada sprinklers bearing the registered design. The injunction should not have been granted.

Per Fauteux and Martland JJ., *dissenting:* The granting of the interlocutory injunction was a matter of discretion. In the circumstances the President exercised his discretion in accordance with the proper principles and this Court should not interfere with it.

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*PRESENT: Cartwright C.J. and Fauteux, Martland, Hall and Pigeon JJ.

1968

LIDO INDUSTRIAL PRODUCTS LTD. v. MELNOR MANUFACTURING LTD. *et al.*

Dessins industriels—Dessin enregistré—Action pour contrefaçon—Requête pour injonction interlocutoire—La défense soulève-t-elle des questions sérieuses—De quel côté est le plus grand préjudice—Loi sur les dessins industriels et les étiquettes syndicales, S.R.C. 1952, c. 150.

Les demanderesses sont les cessionnaires d'un dessin industriel enregistré mais ne vendent pas au Canada les arrosoirs de pelcuse portant ce dessin. Elles ont institué contre la défenderesse une action pour contrefaçon et ont demandé au juge de première instance d'accorder une injonction interlocutoire. Apparemment la défenderesse ne nie pas avoir copié, avec des changements minimes, le dessin des demanderesses, mais en défense, elle prétend que le dessin enregistré manquait d'originalité et met en doute le droit de propriété des demanderesses. L'injonction interlocutoire a été accordée par le juge de première instance. La défenderesse a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être accueilli et l'injonction interlocutoire dissoute, les Juges Fauteux et Martland étant dissidents.

Le Juge en Chef Cartwright et les Juges Hall et Pigeon: La défense à l'action soulève des motifs sérieux. En conséquence, il était nécessaire de rechercher de quel côté était le plus grand préjudice. L'injonction aura pour effet d'empêcher la défenderesse de disposer d'une grande quantité d'arrosoirs qu'elle a en mains jusqu'à ce que la saison où ils sont en demande ait pris fin, alors que les demanderesses ne mettent pas en vente au Canada des arrosoirs portant le dessin enregistré. L'injonction n'aurait pas dû être accordée.

Les Juges Fauteux et Martland, *dissidents:* L'octroi de l'injonction interlocutoire était une question de discrétion. Dans les circonstances, le Juge de première instance a exercé sa discrétion selon les principes appropriés et cette Cour ne devrait pas intervenir.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada accordant une injonction interlocutoire. Appel accueilli, les Juges Fauteux et Martland étant dissidents.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada granting an interlocutory injunction. Appeal allowed, Fauteux and Martland JJ. dissenting.

Joseph Sedgwick, Q.C., and *Weldon F. Green,* for the defendant, appellant.

Christopher Robinson, Q.C., and *James D. Kokonis,* for the plaintiffs, respondents.

The judgment of Cartwright C.J. and Hall and Pigeon JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal, brought pursuant to leave granted by my brother Pigeon, from an order

of the President of the Exchequer Court made on April 26, 1968, granting an interlocutory injunction restraining the defendant until the trial of the action from applying a design registered by the plaintiffs under No. 226/29037 to any article for the purpose of sale and from selling or offering for sale or use any article to which any such design has been applied.

The appeal was argued at considerable length and the merits of the questions raised in the action were gone into in greater detail than is usual on such an application.

The defendant apparently does not deny having copied, with minor variations, the design of the plaintiffs. The main defence to the action is that the registration of the design is invalid as it lacks originality. A further defence raised is that the assignor under whom the plaintiffs claim, was never the proprietor of the design.

It is desirable that in dealing with this appeal we should refrain as far as possible from expressing an opinion on the merits of the plaintiffs' claim as the action remains to be tried.

On reading the reasons of the learned President as a whole it appears to me that he proceeded on the basis not only that it was clear that the defendant had copied the plaintiffs' design but that the plaintiffs' right to the exclusive use of the design could not be seriously questioned. The learned President said in part:

> This being a case of piracy of the defendant's rights without colour of right, it is not a case, in my view, where the granting of an interlocutory injunction depends upon balance of convenience.

I cannot think that the learned President would have so expressed himself unless he had concluded that there was little, if any, doubt as to the plaintiffs' exclusive right to the use of the design. The applicable rule is conveniently summarized in Halsbury 3rd ed., vol. 21 at p. 366, as follows:

> Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff.

1968

LIDO INDUSTRIAL PRODUCTS LTD. v. MELNOR MANUFACTURING LTD. *et al.*

Cartwright C.J.

On the argument before us several sprinklers were produced for our inspection and it was conceded, but only for the purposes of this appeal, that the design of the end of the sprinkler Ex. 17 (if it was a design capable of being registered) was in the public domain in Canada at the time when it is alleged that the defendant copied the plaintiffs' design.

Without expressing anything in the nature of a final opinion, I find it very difficult to see how it could be successfully suggested that there was any such difference between Ex. 17 and the plaintiff's sprinkler as would warrant a finding that the latter was possessed of any originality. If, on the other hand, it could be said that a sufficient difference exists between the shape of Ex. 17 and that of the plaintiffs' sprinkler to warrant a finding that the latter possesses originality, it would appear to me to be difficult to maintain that the difference between the shape of the plaintiff's sprinkler and that of the defendant's is not equally pronounced. The other defence mentioned above is also one which cannot be regarded as unsubstantial or trivial. In my opinion very serious doubts exist as to the plaintiffs' right.

With the greatest respect it seems to me that the learned President was in error in holding that he did not have to consider the question of the balance of convenience.

The effect of the injunction will be to prevent the defendant from dealing with some seventy thousand sprinklers which it has on hand until after the trial; and the evidence given on behalf of the plaintiffs indicates that the season for selling lawn sprinklers is "essentially finished by the end of June in any year there being only small reorders after that".

The plaintiffs are not marketing and do not at present intend to market in Canada sprinklers bearing the design which they have registered. They claim that the sale by the defendant of its sprinklers will reduce the sales of sprinklers of a more expensive type which are marketed by the plaintiffs.

With respect, I do not think that the learned President would have granted this interlocutory injunction if he had been of the view, which in my opinion is inescapable, that

there are very substantial grounds of defence to the action and had gone on to consider where the balance of convenience lies.

I would allow the appeal and direct that the interlocutory injunction be dissolved. Our order should recite an undertaking by the defendant to keep an account of its sales of the sprinklers alleged to infringe the plaintiffs' design until the trial of the action. I would direct that the costs of the appeal should be in the cause.

The judgment of Fauteux and Martland JJ. was delivered by

MARTLAND J. (*dissenting*):—This is an appeal from an order of the learned President of the Exchequer Court granting an interlocutory injunction to restrain the appellant from applying to any article, for the purpose of sale, the design registered under No. 226/29037 in the Register of Industrial Designs, for which a certificate of registration had been given to the respondents' assignor.

The respondents are assignees, under a registered assignment of that design. They allege an infringement of it.

Sections 7(3) and 9 of the *Industrial Design and Union Label Act*, R.S.C. 1952, c. 150, provide as follows:

7. (3) The said certificate, in the absence of proof to the contrary, is sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registry, and of compliance with the provisions of this Act.

9. An exclusive right for an industrial design may be acquired by registration of the same under this Part.

On the question of infringement, the learned President said this:

With regard to the question of infringement, in my view, the plaintiff has made out a very strong *prima facie* case that the defendant has, contrary to section 11 of the *Industrial Design and Union Label Act*, R.S.C. 1952, chapter 150, without the licence in writing of the registered proprietor or of his assignee, applied for the purposes of sale "a fraudulent imitation" of the registered design, if it has not applied the registered design itself, to the ornamenting of its sprinklers. Furthermore, it has done so, and persists in doing so, some time after it has been formally advised of the plaintiffs' registered trade mark. In the absence of any evidence or explanation from the defendant, I can only conclude that the defendant was guilty of unashamed appropriation of the plaintiffs' legal rights or that it was under the impression that the minor changes it made in the course of appropriating the plaintiffs' design were sufficient to convert that design into a new and different design, a point of view I find it impossible to appreciate. I have examined a sprinkler to which the registered design has admittedly been applied and the defendant's sprinkler that is part of the

1968

LIDO INDUSTRIAL PRODUCTS LTD. v. MELNOR MANUFACTURING LTD. *et al.*

Martland J.

Statement of Claim from every different angle and, apart from a direct head-on view, their similarity is, in my view, incontrovertible. Even from a direct head-on view, the defendant's sprinkler is an obvious adaptation of the plaintiffs'.

In answer to the respondents' motion, the appellant filed no material. It relied upon the contention that the respondents' design was invalid. Each of the grounds alleged by the appellant was considered by the learned President. I am not prepared, at this stage of the proceedings and on the evidence before us, to disagree with his reasons in respect of these matters.

He had in mind the practice in respect of the granting of interlocutory injunctions, and he said this:

> I have in mind, of course, the long established practice in patent matters that an interlocutory injunction will not ordinarily be granted on the basis of a recent patent where there is a genuine case to be decided as to its validity. (Compare *Smith v. Grigg Ld.*, (1924) 1 K.B. 655.) I realize that, in an appropriate case, this practice is applicable in industrial design matters. I should, however, be very hesitant about applying that practice in an industrial design case where there is, as I am convinced there is here, a clear case of appropriation by the defendant of the plaintiffs' industrial design which, I must assume, is ordinarily a valuable property acquired at some expense as other property is acquired, knowing that he is appropriating something to the exclusive use of which, by virtue of an Act of Parliament, the plaintiff has a duly registered title; and, I am none the less hesitant about applying the practice because the defendant has managed to raise some very tenuous arguments based upon an interpretation of the statute that possibly might lead to the invalidation of the title.

His final conclusion was as follows:

> This being a case of piracy of the defendant's rights without colour of right, it is not a case, in my view, where the granting of an interlocutory injunction depends upon balance of convenience.

The granting of the interlocutory injunction was a matter of discretion. In my opinion, in the circumstances of this case, the learned President exercised his discretion in accordance with the proper principles, and I am not prepared to interfere with it. I would dismiss the appeal with costs.

Appeal allowed; costs in the cause; FAUTEUX *and* MARTLAND JJ. *dissenting.*

Solicitor for the defendant, appellant: W. F. Green, Toronto.

Solicitors for the plaintiffs, respondents: Smart & Biggar, Ottawa.

ALMINEX LIMITED AND OTHERS (*Defendants*) ..... APPELLANTS;

AND

CANADIAN DELHI OIL LIMITED (*Plaintiff*) ..... RESPONDENT.

1968

*May 6, 7
June 3

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Unitization agreement—Interpretation.

S P Co. was one of the participants in a unitization agreement made between some 30 companies. The said company, the rights and liabilities of which in relation to the unit were purchased by the plaintiff respondent, drilled an off-target or off-pattern producing well in a part of the lands described in the unitization agreement as the "Buffer Zone". It had previously drilled what, for practical purposes, was a dry hole within the target area.

S P Co. applied for the admission to the unit of the tract on which both wells were situated. It was not admitted. The company then sued for a declaration that it was entitled to have the tract admitted into the unit area as at March 1, 1964, without the application of any penalty factor and with an interim and final participation factor of certain amounts, for specific performance of the unit agreement and the unit operating agreement and damages in lieu of or in addition to specific performance.

The trial judge found that the plaintiff was entitled to have its tract admitted as of March 1, 1964, with a producibility factor of .5, that is with the application of the penalty factor applied by the Oil and Gas Conservation Board to the producing well on the tract. The Board had reduced the economic allowable of this well to 33 barrels per day, as a result of the well having been drilled off target; 66 barrels per day was the economic allowable for on-target wells in this field. The trial judge found that the tract porosity-footage of this well was 81. He awarded the plaintiff damages in the sum of $60,000.

On appeal, the Appellate Division of the Supreme Court of Alberta varied the trial judgment to permit the plaintiff a full, unpenalized participation in the unit with a tract porosity-footage of 107, and referred the case back to the Trial Division for assessment of the additional sums payable to the plaintiff. An appeal by the defendants from the judgment of the Appellate Division was then brought to this Court.

Held: The appeal should be dismissed.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], varying a judgment of Primrose J. Appeal dismissed.

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

[1] (1967), 62 W.W.R. 513.

1968

ALMINEX LTD. *et al.* v. CANADIAN DELHI OIL LTD.

C. M. Leitch, Q.C., for the defendants, appellants.

J. H. Laycraft, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—I agree with the reasons and conclusions stated in this case by the Chief Justice of Alberta, who delivered the unanimous judgment of the Appellate Division[1], from which this appeal is brought. Accordingly, I would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Macleod, Dixon, Burns, Love, Leitch, Lomas, Charters & Montgomery, Calgary.

Solicitors for the plaintiff, respondent: Chambers, Saucier, Jones, Peacock, Black, Gain & Stratton, Calgary.

1968

*May 10, 13
June 24

ROSEANN MARKLING (now CROOKS), an infant suing by her mother VIOLA BOURQUE as her next friend, (*Plaintiff*) ..... APPELLANT;

AND

JOHN EWANIUK, EVELYN KOLENDRESKI, and MORRIS EWANIUK (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Motor vehicle swerving off highway and crashing into embankment—Driver's vision impaired by headlights of approaching vehicle—Action by gratuitous passenger—Whether wilful and wanton misconduct on part of driver—The Vehicles Act, R.S.S. 1965, c. 377, s. 168(2).

The plaintiff was a gratuitous passenger in an automobile being driven by the defendant K, age 18, who was the holder of a learner's licence. The automobile was owned by the defendant JE who had entrusted it to his son ME. The latter was a licensed operator and was occupy-

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

[1] (1967), 62 W.W.R. 513.

ing a seat in the automobile beside the driver. While driving at an excessive rate of speed, K was dazzled by the headlights of a car approaching from the opposite direction and although her vision was thus impaired she failed to reduce her speed. After the other car had passed, the subject car swerved to the left and ran for some 75 yards with its left wheels off the pavement until it struck a culvert. It passed over the culvert and then crashed into an embankment. The car was completely demolished and the plaintiff was seriously injured.

The plaintiff's action for damages was dismissed by the trial judge who found that K's negligence was not in the wilful or wanton category. An appeal from the trial judgment was dismissed by the Court of Appeal and the plaintiff then appealed to this Court.

Held: The appeal should be allowed against the respondents JE and K; the appeal against the respondent ME should be dismissed.

No question arose as to the veracity of the appellant's witnesses and the question being one as to the proper inferences to be drawn from truthful evidence, this Court was in as good a position to decide as were the Courts below. Accordingly, considering the evidence as a whole, the Court was of the view that the appellant did establish that the driver K, in the manner in which she was driving at the time of the accident, showed "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves", and thus there was on her part "wilful and wanton misconduct" within the meaning of s. 168(2) of *The Vehicles Act*, R.S.S. 1965, c. 377. The respondents JE and K were, therefore, liable under the said s. 168(2). No view was expressed as to the liability of ME. The question of liability, if any, of a licensed operator accompanying the holder of a learner's licence pursuant to s. 66(3) of the Act for the negligence or for the wilful and wanton misconduct of that person was left open.

McCulloch v. Murray, [1942] S.C.R. 141; *Studer v. Cowper*, [1951] S.C.R. 450, followed; *Walker v. Coates*, [1968] S.C.R. . . . , referred to, *Montgomerie & Co., Ltd. v. Wallace-James*, [1904] A.C. 73; *Dominion Trust Co. v. New York Life Insurance Co.*, [1919] A.C. 254, applied.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], dismissing an appeal from a judgment of MacPherson J.

Henry C. Rees, Q.C., for the plaintiff, appellant.

J. B. Goetz, Q.C., for the defendants, respondents.

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

HALL J.:—This is an appeal from the Court of Appeal for Saskatchewan[1] which upheld the judgment of MacPherson J. in the Court of Queen's Bench for Saskatchewan, dismissing an action by the appellant for damages sustained

[1] (1967), 62 W.W.R. 383.

1968

MARKLING v. EWANIUK et al.

Hall J.

by Roseann Markling (now Crooks) in an automobile accident near Domremy in Saskatchewan at about 12:30 a.m. on June 2, 1963.

Roseann Markling was a gratuitous passenger in an automobile being driven by the respondent Evelyn Kolendreski, age 18, who was the holder of a learner's licence. Section 66 of *The Vehicles Act*, R.S.S. 1965, c. 377, which reads as it did in 1963 relating to learners, is as follows:

> (3) A person holding a learner's licence shall not drive a motor vehicle on a public highway unless accompanied by a licensed instructor, operator or chauffeur occupying a seat beside the driver.

The automobile was owned by the respondent John Ewaniuk who had entrusted it to his son Morris Ewaniuk. Morris was a licensed operator and was occupying a seat in the automobile beside the driver.

The law relating to the liability of a driver and of an owner when any loss, damage or injury is caused by a motor vehicle is set out in s. 168(1) of *The Vehicles Act* of Saskatchewan and the law relating to liability to a gratuitous passenger is set out in s. 168(2). Section 168 reads as follows:

> (1) Subject to subsection (2), when any loss, damage or injury is caused to a person by a motor vehicle, the person driving it at the time is liable for the loss, damage or injury, if it was caused by his negligence or improper conduct, and the owner thereof is also liable to the same extent as the driver unless at the time of the incident causing the loss, damage or injury the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of a person entrusted by him with the care thereof.
>
> (2) The owner or driver of a motor vehicle, other than a vehicle ordinarily used for carrying passengers for hire or gain, is not liable for loss or damage resulting from bodily injury to or the death of a person being carried in or upon or entering, or getting onto, or alighting from the motor vehicle, unless there has been wilful and wanton misconduct on the part of the driver of the vehicle and unless the wilful and wanton misconduct contributed to the injury.

The liability of the owner John Ewaniuk and of the driver Evelyn Kolendreski is governed by s. 168(2) above. The appellant had, therefore, to establish that there had been "wilful and wanton misconduct on the part of the driver of the vehicle and that such wilful and wanton misconduct contributed to the injury".

It is now accepted that the statement by Sir Lyman Duff C.J.C. in *McCulloch v. Murray*[2], that:

> All these phrases, gross negligence, wilful misconduct, imply conduct in which, if there is not conscious wrongdoing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves.

is the ruling definition or test of what can constitute wilful and wanton misconduct within the meaning of said s. 168 (2): *Studer v. Cowper*[3].

To succeed the appellant had to establish as against the driver and owner that at the time she was injured the automobile was being driven in a manner indicating "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves".

The learned trial judge made the following findings of fact:

> This is an action for personal damages arising from an automobile accident which occurred at 12:30 a.m. on June 2, 1963. The plaintiff was a gratuitous passenger in an automobile owned by the defendant John Ewaniuk in the care of his son Morris Ewaniuk, who was in the car, and driven by Evelyn Kolendreski, a young lady with whom he was then keeping company. Another young lady, Darlene Youzwa, and a young man were also in the car at the time.
>
> * * *
>
> These young people got together in Wakaw in the early evening of Saturday, June 1, 1963. They first drove to Cudworth, a distance of about 11 miles, where 12 bottles of beer were purchased for them by a friend because they were too young to buy it legally for themselves. The boys apparently had some other beer in the car because they consumed 2 bottles on the way back to Wakaw without touching the dozen purchased. Having returned to Wakaw, they went to the home of Miss Youzwa where each of the 5 of them consumed 2 bottles of beer of the dozen purchased and the remaining 2 were left behind at Miss Youzwa's home. In the aimless sort of way that young people pursue pleasure they went to the centre of Wakaw and then decided to go to Hoey to a dance, it being then about midnight. There is little doubt in my mind that the suggestion that they go to Hoey came from the plaintiff who was looking for a particular young man. Having decided to go to Hoey they all got back into the car and Miss Kolendreski got behind the wheel as if to drive. The plaintiff and Miss Youzwa then suggested that Morris Ewaniuk should drive because of his greater experience and the fact that they were going on a main highway. To this Miss Kolendreski replied that she would drive only as far as the highway and turn over to Morris. In fact, she did not do this but arriving at the highway turned onto it and proceeded toward Hoey. The plaintiff and Miss Youzwa remonstrated with her

[2] [1942] S.C.R. 141 at 145. [3] [1951] S.C.R. 450 at 451.

1968

MARKLING
v.
EWANIUK
et al.

Hall J.

concerning her speed but this had little effect. Eleven miles from Wakaw the car went into the ditch on the lefthand side of the road, rolled and the passengers were injured in varying degrees, the plaintiff most seriously.

* * *

As she drove on the highway Miss Kolendreski remained quite properly in her own lane until shortly before the accident. Eleven miles from Wakaw a car coming from the opposite direction bore extremely bright lights which dazzled Miss Kolendreski and the plaintiff. Morris Ewaniuk who was sitting in the front seat between Miss Kolendreski and the plaintiff was either asleep or paying little attention because he has no vivid recollection of the lights as do the others. I am inclined to find, as the plaintiff and Miss Youzwa suggest, that both he, in the front, and the other young man in the back were asleep.

In order to encourage the approaching driver to lower his lights, Miss Kolendreski in accordance with well-known practise, raised and lowered her own two or three times but to no avail. After the other car had passed, the subject car swerved to the left, drove for at least 75 yards with the left wheels off the pavement and the right wheels on the pavement until it came to a culvert over an irrigation ditch. The car jumped the culvert and crashed into the embankment on the other side and was completely demolished. It ended up 30 or 40 feet northwest of the culvert in the left ditch.

* * *

There are two factors of negligence, therefore, which have been proved. Firstly, her failure to slow down significantly when her vision was impaired by the brilliance of the approaching lights; secondly, her swerve to the left.

and he concluded:

In my view the accident was due to the inexperience of Miss Kolendreski in handling what to experienced drivers is a not unusual situation, namely, the negligence of another driver failing to dim glaring lights. Her negligence was due to inexperience and is not in the wilful or wanton category.

As to credibility, he said:

At the time of the accident the plaintiff was 16, Miss Youzwa was 17, Miss Kolendreski and Morris Ewaniuk were 18. There was considerable conflict in the evidence between the plaintiff and Miss Youzwa on the one hand and Miss Kolendreski and Morris Ewaniuk on the other. The former were very clear and definite whereas the latter were extremely vague and uncertain and for this reason in determining the facts I have chosen to accept the evidence of the plaintiff and Miss Youzwa where it is in conflict with that of the defendants, except in the instances mentioned below. These defendants seemed unable to recall even the principal facts of the evening.

The appellant accepts these findings, but contends that the learned trial judge erred in certain other findings of fact as follows:

(1) When he said:

I have difficulty in accepting the plaintiff's statement that Miss Kolendreski was driving the car at 70 miles an hour and faster. It is

difficult enough for an experienced person to determine the speed of a car in which he is travelling. At that time the plaintiff was 16 years of age and quite inexperienced. She says she looked from her position on the extreme righthand side of the driver's seat and saw the speedometer needle at 70 m.p.h. I have no doubt that she looked but I do not believe that the angle of her view would give her an accurate reading. I have no doubt that the car which was a new one of the current year, and powerful, was capable of considerable speed but I cannot accept the evidence of great speed which comes from the plaintiff alone. If I have her evidence noted correctly, Miss Youzwa felt that Miss Kolendreski was driving too fast but did not attempt to estimate the speed.

As to this, it must be noted that there was no evidence as to the location of the speedometer or as to what a person in the position of Roseann Markling could see, and consequently nothing which would justify the learned trial judge in rejecting her evidence. Then, as to the witness Miss Darlene Youzwa, he was in error in stating that she had not attempted to estimate the speed. Her evidence on this point is as follows:

Q. Said nothing. Well now from there on what speed did you attain in your estimation on that trip?
A. I don't know, I'd say at least 70, 75 even, you know to me this is what I thought it was at least.

THE COURT: How old were you at that time?
A. I was 17.

THE COURT: Did you have any particular experience in judging speed of vehicles?
A. Not really no but I don't know I still feel that you can more or less feel the speed you are going at if you are speeding, I think you can more or less tell that you are speeding, that you don't have to look at a speedometer in order to see if you are going over 60 or whatever it is.

(2) That the accident appears to have occurred some 75 yards north of where the vehicles met.

The learned trial judge did not make a finding as to where the automobile being driven by the respondent Evelyn Kolendreski met the southbound vehicle with the bright lights. The evidence appears to establish quite conclusively that the vehicles met just south of the railway crossing. Miss Youzwa testified that they met "about a car length before the tracks". Roseann Markling testified that the vehicles met right at the railroad crossing. There was no other evidence on the point. The accident occurred some 450 yards north of the railway crossing so that the vehicle with the bright lights had gone its way and disappeared southwards before the Ewaniuk automobile continuing northward

1968

MARKLING v. EWANIUK et al.

Hall J.

eventually went across the centre of the highway and ran for some 75 yards partly in the west ditch and partly on the pavement and then struck a culvert, passing over the culvert and crashing into the embankment on the other side. The impact was a severe one, for as the learned trial judge said, the automobile was completely demolished.

The appellant contends that the circumstances established in evidence which may be summarized as set out below speak for themselves and constitute *prima facie* evidence that the driver Evelyn Kolendreski showed "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves". The circumstances relied on in this regard by the appellant are:

(1) The driver was inexperienced and possessed only a learner's licence;

(2) She was driving at an excessive speed;

(3) She continued to drive at an excessive speed when asked to slow down by her passengers Roseann Markling and Darlene Youzwa;

(4) She continued to drive at an excessive speed when it must have been apparent to her that the licensed operator who, by s. 66 of *The Vehicles Act* of Saskatchewan was required to be beside her, was asleep;

(5) She continued to drive after reaching the highway when she had undertaken to drive only to the highway;

(6) She failed to slow down significantly when her vision was impaired by the lights of the approaching vehicle, but instead increased her speed, saying "I must speed up to get away from these lights".

(7) She ran off the left side of the road and into the west ditch on a straight stretch of road without the intervention of any other traffic, obstacle or object some 375 yards north of where the vehicles met.

This case is similar in many respects to the case of *Walker v. Coates et al.*[4] The facts in *Walker v. Coates* were that Barry Alan Coates was driving his Volkswagen automobile when, at about 3:30 a.m. on September 22, 1963, when the vehicle was being driven south towards Banff on a two-lane paved highway 36½ feet in width, had crossed the centre double traffic line and struck a direction sign pointing to the entrance of Buffalo Paddock which was 18 inches off the eastern or left edge of the highway. There were no skid

[4] [1968] S.C.R. 599.

marks where the car approached the sign and the force of the impact was evidently very great. The driver Barry Alan Coates was killed and the passenger Walker injured. Walker was asleep in the back seat of the car at the time and could give no evidence as to how the accident had happened. It was contended on behalf of the appellant Walker that the circumstances of the accident spoke for themselves and constituted *prima facie* evidence of the fact that in driving his Volkswagen as he did at a high rate of speed across the centre line of the highway and across the left lanes so as to collide forcibly with the road sign, the driver Barry Alan Coates showed "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves". Speaking for the Court, Ritchie J. said in this regard:

> The application of the rule which is usually referred to as *res ipsa loquitur* to cases of negligence has been accepted in this Court in the cases of *Ottawa Electric Co. v. Crepin*, [1931] S.C.R. 407 at p. 411 and *Parent v. Lapointe*, [1952] 1 S.C.R. 376 at p. 381, in the terms in which it was stated by the Exchequer Chamber in *Scott v. London and St. Katherine Docks Company*, (1865), 3 H. & C. 596, where it was said:
>
> > There must be reasonable evidence of negligence.
> >
> > But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.
>
> There can be no doubt in the present case that the motor vehicle was under the management of Coates and that the accident was one which in the ordinary course of things would not have happened if he had used proper care, but it is contended on behalf of the respondent that the rule does not extend to proof of gross negligence.
>
> This proposition was advanced by Ruttan J. sitting at trial in the case of *Ball v. Kraft*, (1967), 60 D.L.R. (2d) 35, where he said, at p. 39:
>
> > . . . *Kerr v. Cummings*, [1952] 2 D.L.R. 846, 6 W.W.R. (N.S.) 451 (affirmed on appeal to the Supreme Court of Canada, [1953] 2 D.L.R. 1, [1953] 1 S.C.R. 147) is authority for the principle that *res ipsa loquitur* does not apply to create a presumption of gross negligence. Negligence, as that authority holds, may be inferred when the circumstances "warrant the view that the fact of the accident is relevant to infer negligence." [[1952] 2 D.L.R. at p. 852]. But the plaintiff must still prove gross negligence. Robertson J.A. in our Court of Appeal in *Kerr v. Cummings*, [1952] 2 D.L.R. at p. 853, said:
> >
> > > "Unless the plaintiff in an action for gross negligence, when the cause of the accident is unknown, suggests a reason showing a greater probability that the accident may have happened from gross negligence than from the reason suggested by the defendant, the plaintiff must fail."

1968

MARKLING v. EWANIUK et al.

Hall J.

And in the Supreme Court of Canada, [1953] 2 D.L.R. at p. 2, Kerwin J., in giving the judgment of the Court said:

> "...it is impossible, in my view, to say that the mere happening of the occurrence in the present case gives rise to a presumption that it was caused by very great negligence..."

It is, in my view, clear that Mr. Justice Kerwin intended his observations to be limited, as he says himself, to the facts of the case with which he was dealing, and although those facts were similar to the facts in the present case, there were marked differences amongst which was the fact that in the *Kerr* case, *supra,* there was "a governor on the car which precluded a speed exceeding 40 miles per hour". In the *Kerr* case Mr. Justice Kerwin also made an express finding to the effect that he could not read the evidence as indicating either that the driver had been without sleep during the previous night or that he had fallen asleep at the wheel.

The passage from the judgment of Robertson J.A. in the Court of Appeal of British Columbia in *Kerr v. Cummings* to which Ruttan J. referred in *Ball v. Kraft* is based on the authority of an English Admiralty case *The Kite,* [1933] P. 154, where Langton J., sitting alone, approved the dissenting judgment of Lord Dunedin in the Scottish case of *Ballard v. North British Railway, Co.,* [1923] S.C. (H.L.) 43 at 54. The passage which he approved reads, in part, as follows:

> I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion.

If the rule of *res ipsa loquitur* is accepted in cases where proof of "negligence" is in issue, I can see no logical reason why it should not apply with equal force when the issue is whether or not there was "very great negligence" provided, of course, that the facts of themselves afford "reasonable evidence, in the absence of explanation by the defendant, that the accident arose" as a result of "a very marked departure from the standards" to which Sir Lyman Duff C.J.C. referred in the *McCulloch* case.

In the *Walker v. Coates* case it was established in evidence that Barry Alan Coates knew he was tired and sleepy when he set out for Banff, and it was established that he had had very little sleep for 36 hours before the accident.

I am aware that this is an appeal in which neither the trial judge nor the Court of Appeal for Saskatchewan was prepared to draw an inference of wilful and wanton misconduct, but as no question arises as to the veracity of the appellant's witnesses this is, I think, a case which is governed by the language of Lord Halsbury in *Montgomerie*

& Co., Ltd. v. Wallace-James[5], which was affirmed by the Privy Council in *Dominion Trust Co. v. New York Life Insurance Co.*[6] Lord Halsbury said in part:

> ...where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.

Accordingly, considering the evidence as a whole, I am of the view that the appellant did establish that the driver Evelyn Kolendreski, in the manner in which she was driving at the time of the accident, showed "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves".

The respondents John Ewaniuk and Evelyn Kolendreski are, therefore, liable under s. 168(2) of *The Vehicles Act* of Saskatchewan. I express no view as to the liability of Morris Ewaniuk. The question of the liability, if any, of a licensed operator accompanying the holder of a learner's licence pursuant to s. 66(3) of *The Vehicles Act* of Saskatchewan for the negligence or for the wilful and wanton misconduct of that person is left open.

The appeal should, therefore, be allowed against the respondents John Ewaniuk and Evelyn Kolendreski with costs here and in the Courts below and judgment should be entered against them in favour of the appellant for the amount fixed by the learned trial judge, namely, the sum of $12,000. The appeal and the action against the respondent Morris Ewaniuk should be dismissed without costs here or in the Courts below.

RITCHIE J.:—I have had the advantage of reading the reasons for judgment of my brother Hall and I fully agree that this appeal should be disposed of in the manner which he suggests, but I would like to make it plain that I do not consider this to be a case to which the maxim *res ipsa loquitur* is applicable. Here there is direct evidence of the negligence which forms the basis of the finding of liability

[5] [1904] A.C. 73 at 75.

[6] [1919] A.C. 254 at 257.

1968

MARKLING v. EWANIUK et al.

Ritchie J.

against Evelyn Kolendreski and it is therefore unnecessary to have resort to the rule which is embodied in the maxim to which I have referred.

Appeal allowed against owner and driver with costs; appeal against licensed operator accompanying driver dismissed without costs.

Solicitors for the plaintiff, appellant: Rees, Shmigelsky, Angene & Carey, Saskatoon.

Solicitors for the defendants, respondents: Goetz & Murphy, Regina.

1968

*Mar. 25, 26
June 24

LEO ROSS, GEORGE BANKS AND FLOYD DYSON ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Common gaming house—Accused officers of unincorporated bridge and social club—Bridge players charged a fee for playing—Whether bridge a game of skill or of chance or of mixed chance and skill—Criminal Code, 1953-54 (Can.), c. 51, ss. 168(1)(f), 176(1).

The appellants, who were officers of an unincorporated bridge and social club, were convicted of unlawfully keeping a common gaming house, contrary to s. 176(1) of the *Criminal Code*. The game played was bridge; and fees were charged to the players. The Court of Appeal upheld the conviction and ruled that bridge was a game of mixed chance and skill. The appellants obtained leave to appeal to this Court where the question raised was as to whether there was any evidence upon which the Court of Appeal could find that the game of bridge was a game within the definition of "game" in s. 168(1)(*f*) of the *Criminal Code*.

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

Per Cartwright C.J. and Judson, Ritchie and Pigeon JJ.: Bridge is a game containing an element of chance and an element of skill and is, therefore, a "game" within the meaning of s. 168(1)(*f*) of the Code. It was clear that Parliament intended to avoid the uncertainties involved in determining what is the dominant element and deliberately chose to include in the definition of "game" all mixed games as well as games of chance.

Per Spence J., *dissenting:* In the game of bridge the only chance involved is the chance in the dealing of the cards. The element of skill predominates in the playing of the game. On that basis, the game of bridge is not a game of chance or mixed chance and skill. The predominance of skill indicates that it should not be considered as being within the words of the statute "a game of mixed chance and skill".

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*PRESENT: Cartwright C.J. and Judson, Ritchie, Spence and Pigeon JJ.

1968

ROSS, BANKS AND DYSON v. THE QUEEN

Droit criminel—Maison de jeu—Dirigeants d'un club de bridge non constitué en corporation accusés d'avoir tenu une maison de jeu—Les joueurs de bridge tenus de payer pour jouer—Le bridge est-il un jeu d'adresse ou de hasard ou un jeu où se mêlent le hasard et l'adresse—Code criminel, 1953-54 (Can.), c. 51, art. 168(1)(f), 176(1).

Les appelants, qui étaient des dirigeants d'un club de bridge non constitué en corporation, ont été déclarés coupables d'avoir tenu illégalement une maison de jeu, contrairement à l'art. 176(1) du *Code criminel*. Le jeu en question était le bridge; et les joueurs devaient payer pour le privilège de jouer. La Cour d'appel a maintenu la déclaration de culpabilité et a statué que le bridge est un jeu où se mêlent le hasard et l'adresse. Les appelants ont obtenu la permission d'appeler à cette Cour où la question soulevée a été de savoir s'il y avait une preuve en vertu de laquelle la Cour d'appel pouvait déclarer que le jeu de bridge est un jeu selon la définition du mot «jeu» de l'art. 168(1)(*f*) du *Code criminel*.

Arrêt: L'appel doit être rejeté, le Juge Spence étant dissident.

Le Juge en Chef Cartwright et les Juges Judson, Ritchie et Pigeon: Le bridge est un jeu qui comporte un élément de hasard et un élément d'adresse et il est, en conséquence, un «jeu» au sens de l'art. 168(1)(*f*) du Code. Il est clair que le Parlement voulait éviter les incertitudes qui se présentent lorsqu'il s'agit de déterminer quel est l'élément dominant et a délibérément choisi d'inclure dans la définition de «jeu» au même titre que les jeux de hasard tous ceux où se mêlent le hasard et l'adresse.

Le Juge Spence, *dissident:* Le seul élément de hasard dans le jeu de bridge se trouve dans la distribution des cartes. C'est l'élément d'adresse qui prédomine dans le jeu de bridge. Par conséquent, le jeu de bridge n'est pas un jeu de hasard ni un jeu où se mêlent le hasard et l'adresse. Le fait que l'adresse prédomine montre bien qu'il ne doit pas être considéré comme compris dans le sens des mots du statut «un jeu où se mêlent le hasard et l'adresse».

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], confirmant la déclaration de culpabilité des trois appelants. Appel rejeté, le Juge Spence étant dissident.

APPEAL from the judgment of the Court of Appeal for Ontario[1], affirming the appellants' conviction. Appeal dismissed, Spence J. dissenting.

G. Arthur Martin, Q.C., for the appellants.

Clay M. Powell, for the respondent.

The judgment of Cartwright C.J. and Judson, Ritchie and Pigeon JJ. was delivered by

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[1] [1967] 2 O.R. 420, (1968), 2 C.R.N.S. 185, 1 C.C.C. 261.

1968

ROSS, BANKS AND DYSON v. THE QUEEN

PIGEON J.:—The appellants have been convicted on the charge of keeping "a common gaming house". The agreed statement of facts shows that they were officers of an unincorporated bridge and social club. The game played was bridge and the players were charged for playing it the following fees:

> For one pivot, which is the equivalent of three rubbers, the charge of $1.00; for more than one pivot but less than two pivots, the charge of $1.25; for two complete pivots, a charge of $1.50; for more than two pivots but less than three pivots, a charge of $1.75; and for three pivots or more, a maximum charge of $2.00.

The question raised on the appeal is the following:

> Was there any evidence upon which the Court of Appeal for Ontario could find that the game of bridge was a "game" within the definition of "game" in section 168(1)(*f*) of the *Criminal Code*?

The following provisions of s. 168 of the *Criminal Code* should be considered:

> 168. (1) In this Part,
>
> * * *
>
> (*d*) "common gaming house" means a place that is
>
> (i) kept for gain to which persons resort for the purpose of playing games; or
>
> (ii) kept or used for the purpose of playing games
>
> (A) in which a bank is kept by one or more but not all of the players,
>
> (B) in which all or any portion of the bets on or proceeds from a game is paid, directly or indirectly, to the keeper of the place,
>
> (C) in which, directly or indirectly, a fee is charged by the players for the privilege of playing or participating in a game or using gaming equipment, or
>
> (D) in which the chances of winning are not equally favourable to all persons who play the game, including the person, if any, who conducts the game;
>
> * * *
>
> (*f*) "game" means a game of chance or mixed chance and skill;
>
> * * *
>
> (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; or . . .

A brief description of the game of bridge, more precisely contract bridge, was given in evidence. It is sufficient to say that it shows that the cards in the hands of each of the four players are determined by chance but that afterwards the outcome of the game depends in substantial measure upon the skill of the players in bidding and in playing their hands. In this the only element of chance is that which results from the deal and the fact that only the hand of the dummy is disclosed to the other players after the bidding. The opinion of an expert bridge player heard as the only witness was that, on the whole, the element of skill outweighs the element of chance. Appellants' contention is that this takes the game of bridge out of the category of games of mixed chance and skill.

In considering this submission, it is convenient to start by examining the language used in the enactment. Taken by themselves the words used in the definition of "game" are not ambiguous. They apply to any game of chance only or of mixed chance and skill. The word "mixed" implies no indication of the respective proportions of the two elements. Nothing shows that they must be equal or nearly so. Nothing indicates which is to be preponderant. The first rule to observe in construing any legislative enactment is that unless there is ambiguity, it is to be applied literally.

In the Encyclopedia Britannica, under the heading "gaming and wagering", one reads:

> In England and the United States a general distinction between lawful and unlawful gaming seems to be that where skill predominates, the gaming is lawful; where chance does, it is unlawful (27 *Corpus Juris* p. 969). A court must decide which is the predominant factor in the case of each game in question. Cases show that one cannot rely on the record, for it is full of reversals and contradictions.

It seems clear that the Parliament of Canada sought to avoid the uncertainties involved in trying to ascertain the predominant factor in mixed games by enacting that they would be treated in the same way as games of pure chance. The law in force prior to the enactment of the 1892 *Criminal Code* was the *Gaming Houses Act* originally enacted by 38 Vict., c. 41, reproduced in R.S.C. 1886, c. 158. As in the United Kingdom act, 17-18 Vict., c. 38, "unlawful game" was not defined. From the decision of the Queen's Bench Division in *Jenks v. Turpin*[2], it would appear that

[2] (1884), 15 Cox C.C. 486, 13 Q.B.D. 505.

1968

ROSS, BANKS AND DYSON v. THE QUEEN

Pigeon J.

card games were considered "unlawful" if they were games of chance, or games of chance and skill combined which cannot be called games of mere skill.

When the first criminal code was enacted (55-56 Vict., c. 29), s. 196 read as follows:

> 196. A common gaming-house is—
>
> (*a*) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance; or
>
> (*b*) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which—
>
> (i) a hand is kept by one or more of the players exclusively of the others; or
>
> (ii) in which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet.

Three years later, chapter 40 of 58-59 Vict. added to paragraph *a* "or at any mixed game of chance and skill", thus making the two paragraphs identical in that respect.

What is now subpara. B of para. (ii) of the definition of "common gaming house" was added in 1919 by 8-9 Geo. V, c. 16. Sections 4 and 5 of the same statute also replaced the words "any unlawful game" by "any game of chance or any mixed game of chance and skill" in s. 985 (702 of the 1892 *Criminal Code*, 169 of the present *Criminal Code*) and made a similar change in s. 986 (703 of the 1892 Code). Those two sections had their origin in ss. 4 and 8 of the *Gaming Houses Act* and it is apparent that the purpose of the amendment was to preclude any possibility of construction by reference to the law prior to the *Criminal Code*.

What is now in substance subpara. (C) of para. (ii) of the definition of "common gaming house" as well as subs. 2 of article 168 was added in 1938 (c. 44, s. 12). This came shortly after a decision of the Court of Appeal of British Columbia, *Rex v. Williamson*[3], in which it held that a certain club could no longer be considered as not operating for gain as this Court had on different facts decided, a few years before, in *Bampton v. The King*[4]. No changes of substance have been made since that time and in the

[3] (1937), 51 B.C.R. 456, 2 W.W.R. 545, 68 C.C.C. 380, 3 D.L.R. 553.
[4] [1932] S.C.R. 626, 58 C.C.C. 289, 4 D.L.R. 209.

present *Criminal Code,* the maximum fees for playing games in clubs remain those that were established by the 1938 statute.

To support their contention that in classifying games, one has to ascertain what is the dominant element, appellants contend that there is an element of chance in every game, even in those that are admittedly games of skill such as chess, tennis and golf. This argument overlooks the principle that statutes must be read in accordance with the usual and accepted meaning of the words used. It is undoubtedly true that there are chances involved in any human activity and that, statistically, results are never predictable with complete certainty. However, when the statute speaks of chance as opposed to skill, it is clear that it contemplates not the unpredictables that may occasionally defeat skill but the systematic resort to chance involved in many games such as the throw of dice, the deal of cards.

Among dictionary definitions, the following appear to be of some interest:

Funk & Wagnalls New Standard Dictionary:

> The expression *games of chance* is used to describe those contests the outcome of which is largely governed by chance, as in cards, dice and gambling games generally; and in opposition to *games of skill* the result of which depends largely upon the dexterity of the contestant.

Bouvier's Law Dictionary. Vo Gaming:

> There are some games which depend altogether upon skill, others which depend upon chance, and others which are of a mixed nature. Billiards is an example of the first; lottery, of the second; and backgammon, of the last.

Larousse XX^e siècle:

> *Jeu de hasard.* Jeu dans lequel le hasard seul décide de la perte ou du gain.
>
> *Jeux d'adresse.* Jeux où l'adresse a la principale part, comme le billard, la balle, etc.

Robert Dictionnaire de la langue française:

> Jeux mixtes, où le hasard peut être plus ou moins corrigé à l'aide du calcul ou de certaines combinaisons.

Having cited the above definition of "jeux mixtes" (mixed games) given by a French lexicographer, I must add that French courts having to apply criminal code provisions aimed at games of chance ("jeux de hasard") only, have held those provisions applicable to games in

1968

ROSS, BANKS AND DYSON v. THE QUEEN

Pigeon J.

which chance is the predominating element, not to those in which skill predominates, and have placed bridge among the latter.

Dalloz Nouveau Répertoire. Vo Jeu.

N° 37. Depuis 1877, la jurisprudence attribue le caractère de jeu de hasard à tous les jeux dans lesquels la chance prédomine sur l'adresse et les combinaisons de l'intelligence. C'est ainsi qu'elle considère comme jeux de hasard: le loto, le poker, le baccara, les petits chevaux. Ne sont pas par contre considérés comme jeux de hasard ceux où l'adresse prédomine tels que le billard, les échecs, le bridge ou le piquet.

Thus, it would appear that French courts interpret "jeux de hasard" much as British and American courts interpret "games of chance". However, granting that, in the application of legislative provisions aimed at games of chance ("jeux de hasard") the generally accepted view is that these include only games of pure chance or games in which chance is the dominating element, it does not follow that all other games must be considered as games of skill within the meaning of a code provision contemplating not only games of chance, but games of mixed chance and skill as well. To admit appellants' contention that mixed games in which skill is a dominant element are to be considered as games of skill really means to deprive of any effect the words "or mixed chance and skill".

In my opinion this would be contrary to Parliament's clearly expressed intention. It is clear that Parliament intended to avoid the uncertainties involved in determining what is the dominant element and deliberately chose to include in the definition of "game" all mixed games as well as games of chance.

Concerning Wurtele J.'s dictum in *The King v. Fortier*[5], it must be noted that it is not only *obiter* but entirely unsupported by any reference or analysis of the enactment.

I would dismiss the appeal.

SPENCE J. (*dissenting*):—This is an appeal from the decision of the Court of Appeal for Ontario[6] pronounced on July 4, 1967, wherein that Court dismissed an appeal from the conviction of the three accused by the police magistrate at Toronto on September 22, 1966.

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[5] (1903), 7 C.C.C. 417 at 423.

[6] [1967] 2 O.R. 420, (1968), 2 C.R.N.S. 185, 1 C.C.C. 261.

The three accused were convicted on the charge that:

> within six months ending on the 12th day of March, A.D. 1966, at the Municipality of Metropolitan Toronto, in the County of York, unlawfully did keep a common gaming house situate and known as 3101 Bathurst Street, Suite 201, contrary to the Criminal Code.

Although the Crown, at the commencement of the trial, adduced the evidence of detective John Frederick Leybourne, upon the continuation of the trial on a later date, an agreed statement of facts was submitted. That statement with the evidence of Mr. Eric Murray, who was called as the only defence witness, comprised the complete record considered by the learned magistrate. Mr. Murray was described by McLennan J.A., in the Court of Appeal, as follows: "His qualifications as an expert on the game of bridge are impressive." In view of the offices held by Mr. Murray, as taken from his own evidence, that description may be said to be, at any rate, not put too strongly. Upon such evidence, and after the submission of argument in writing, the learned magistrate convicted the three accused. That conviction was affirmed by the Court of Appeal, McLennan J.A. giving in writing the reasons of the Court.

The three accused applied for and obtained leave to appeal to this Court, and served a notice of appeal in which was set out the following ground of law:

> Was there any evidence upon which the Court of Appeal for Ontario could find that the game of bridge was a "game" within the definition of "game" in section 168(1)(*f*) of the *Criminal Code*?

McLennan J.A., in giving the reasons for judgment of the Court of Appeal, said:

> The narrow question is whether a card game called "Bridge" is a game of skill, in which event the convictions cannot stand, or whether it is a game of chance or of mixed chance and skill, and if so, the convictions must be affirmed.

Section 176(1) of the *Criminal Code* provides:

> 176. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and is liable to imprisonment for two years.

Section 168(1) of the *Criminal Code* provides, in part:

> 168. (1) In this Part,
>
> * * *
>
> (*d*) "common gaming house" means a place that is
>
> (i) kept for gain to which persons resort for the purpose of playing games; or

1968

ROSS, BANKS AND DYSON v. THE QUEEN

Spence J.

(ii) kept or used for the purpose of playing games

(A) in which a bank is kept by one or more but not all of the players,

(B) in which all or any portion of the bets on or proceeds from a game is paid, directly or indirectly, to the keeper of the place,

(C) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or

(D) in which the chances of winning are not equally favourable to all persons who play the game, including the person, if any, who conducts the game;

* * *

(*f*) "game" means a game of chance or mixed chance and skill;

It will be seen from a perusal of this section that the ground of law cited by the appellants for the determination of this Court is essentially the same question as that set out by McLennan J.A. and which I have quoted above.

Counsel for the Crown before this Court took the position that whether or not the game of bridge was one of skill, on the one hand, or, on the other hand, a game of chance, or mixed chance and skill, was a question of fact and not a question of law, that that question of fact had been resolved by the magistrate and therefore there was no question of law to submit to this Court. Counsel cited authority for that proposition: *R. v. Thompson*[7], per Lewis J. at p. 94. I am of the opinion that such objection is not well based. What this Court must do is interpret the words in s. 168(1)(*f*) of the *Criminal Code* "means a game of chance or mixed chance and skill" and that interpretation is a question of law. As I have said, the magistrate came to his decision upon consideration of the agreed statement of facts and of the evidence of Mr. Murray. That agreed statement of facts must be set out in full. It is as follows:

STATEMENT OF FACTS

The North York Bridge and Social Club is located at 3101 Bathurst Street, Toronto, in Suite 201 of an office building and its name is listed as a tenant on the main directory in the lobby of the building. The facilities and amenities provided by the Club are as indicated in the photographs of the Club premises filed as exhibits. These facilities include: one long room with card tables; an area where a restaurant is set up with tables on which food may be served; a partitioned area used as an office; and a room used as a lounge with television and other amenities. The

[7] (1943), 29 Cr. App. R. 88, [1943] 2 All E.R. 130.

Club premises are open from twelve noon until midnight, and sometimes later, seven days per week. The premises, during the six months prior to March 11, 1966 were used primarily for the playing of card games.

During the period in question, the accused, George Banks, who is aged 42, married, with one child, and is a local Toronto business man was elected President of the Club. Mr. Banks is of previous good character and has carried on business in the city of Toronto as a purse and belt manufacturer for some twenty-five years. The accused, Leo Ross, who is aged 32, married, and of previous good character, was employed as a Bridge Instructor and was also elected an officer of the Club. Mr. Ross is a recognized bridge expert in the city of Toronto and has worked as a Bridge Instructor in several bridge clubs in the city. He was at various times in charge of the premises. The accused, Floyd Dyson, was employed as a Bridge Director sometime in the month of February 1966 and at a meeting of the Club members was elected a member of the executive.

A copy of the minutes of the said meeting have been filed as an exhibit. Mr. Dyson is of previous good character and has been a recognized bridge player in the city of Toronto for a number of years and has instructed in the game of bridge.

In accordance with various invoices and the ledger book of the Club filed as exhibits, all of the furniture and fixtures in and about the Club premises are owned by the North York Bridge and Social Club; and were paid for by the North York Bridge and Social Club. The Club maintains a bank account and all monies received are deposited to the credit of the Club and all disbursements are paid out of Club funds. The four officers of the Club are George Banks, Leo Ross, Floyd Dyson and Morris Taylor; and any two of the said officers have signing privileges on the Club account for the disbursal of funds.

Sometime during the month of December, 1964, the accused Banks contacted Sergeant of Detectives, John Wilson, respecting the proposed operation of a bridge and social club. Sergeant Wilson advised Banks as to the means of becoming incorporated.

On December 29, 1964, one Louis Silver, a Solicitor acting on behalf of Banks and other proposed incorporators also contacted Sergeant Wilson as to the proposed club. As a result, Mr. Silver, on January 4, 1965, sent a letter to the Ontario Provincial Secretary's Office as to the proposed incorporation. Further correspondence was exchanged between Silver and the Provincial Secretary's Office leading to an application for incorporation being submitted on January 14, 1965. Photostatic copies of this correspondence have been filed as exhibits. A copy of the final application for incorporation as submitted to the Provincial Secretary's department has also been filed as an exhibit.

In March of 1965, the Club began actual operations, On September 24, 1965, the Provincial Secretary's Office advised Mr. Silver that it would not approve the application for incorporation at that time. Meanwhile, on August 12, 1965, officers from the Morality Squad of the Metropolitan Toronto Police force attended at the Club premises. It was observed that there were approximately 40 men playing cards at the time. In some of the games, the officers observed that there was an exchange of money between players taking part in the games. It was learned that the Club charged an annual membership fee of $35.00, an amount arrived at by the auditors of the Club as being appropriate to cover the then expenses of running the Club and to be adjusted as required for this purpose.

There were seven additional attendances by various members of the Morality Squad from December 13, 1965 to and including March 11, 1966.

1968

ROSS, BANKS AND DYSON v. THE QUEEN

Spence J.

All these attendances were pursuant to warrants to search filed as exhibits in this case. During all these attendances, card games were observed to be played. All the visits made by the police to the premises were made during the afternoon hours with the exception of one visit which was made during the evening hours. During the afternoon visits, the officers did not observe any bridge being played, however, at the time of the evening attendances upon the premises, two games of bridge were in fact in progress.

It would appear that the fees charged for playing bridge are as follows: for one pivot, which is the equivalent of three rubbers, the charge of $1.00; for more than one pivot but less than two pivots, the charge of $1.25; for two complete pivots, a charge of $1.50, for more than two pivots but less than three pivots, a charge of $1.75; and for three pivots or more, a maximum charge of $2.00. The length of a rubber would be approximately fifteen to twenty minutes, and consequently, an average pivot would be about one hour.

On March 11, 1966, various articles on the premises were seized pursuant to a warrant to search. Among those articles were decks of playing cards. During the last seven visits, either the accused Banks or the accused Ross was warned by the officers attending that in their opinion, the operation of the Club violated the Canadian Criminal Code. It seems, on the other hand, that Mr. Silver had previously advised Banks and other members of the Club including Ross, that in his opinion, the operation of the Club on the basis of instructions given to him were not in contravention of the provisions of the Canadian Criminal Code.

The ledger of the Club was seized on March 11, 1966 and filed as an exhibit. This ledger was prepared by a chartered accountant and is admittedly in good order. It has one sheet entitled "Card Fees" which sheet reveals the amounts that were collected for card fees during the time of the operation of the Club. The yearly dues supplemented by the above card fees constituted the only revenues to the Club. The restaurant facilities are provided to the operator of the restaurant and all profits derived from the operation of the restaurant are retained by the operator without any payment being made to the Club.

I shall attempt to summarize the evidence given by Mr. Murray. Having outlined his qualifications, he very tersely described the game of bridge in a few paragraphs as follows:

Q. Now, will you explain to the Court how bridge is played and the basis on which it's played?

A. Well, very briefly, bridge is a card game and it's played with the full deck of fifty-two cards. Thirteen cards are dealt to each four players who participate in partnerships, one partnership against the other.

The cards are dealt thirteen face down to each player and thereafter the partnerships bid—the players bid in rotation, attempting to reach certain contracts.

When a final contract has been determined, then a person who has named the suit first becomes the declarer. His partner spreads his hand face up on the table, which becomes the dummy, and the play commences and you can play through by tricks, each trick consisting of four cards, one card from each player's hand, including the dummy, to each trick. You bid and achieve game contracts or

> parts of contracts. With slam contracts you receive points bonuses so that your end result is correlated into points, and these points are kept on a tabulation.

Mr. Murray continued to testify that the literature as to the game of bridge was voluminous consisting of many hundreds of books and a very large number of magazines, monthly publications in Canada, North America and throughout Europe. He pointed out that bridge was now played on a basis of international competition, likening it to the Davis Cup in tennis. Mr. Murray then dealt with the elements of chance and skill in the playing of the game of bridge. He quite freely admitted that the dealing of the cards was altogether a matter of chance. He described the deal as "that is merely putting the weapons in the players' hands" and continued, "well, once the cards are dealt, the game is entirely skill, in my opinion". Mr. Murray contrasted the game of bridge with other card games such as poker and pointed out that in the latter there was, what he described, as the co-mingling throughout the game of skill and chance, and then testified, "this isn't true of bridge at all; once the cards are dealt it becomes a question of conveying information between a partnership within the limits of the rules of the game and then once the cards are dealt the dummy becomes a question of playing the hand the most skilful way you can". The latter part of this sentence is an accurate quotation from the evidence as certified but the word "dummy" must be an error. Mr. Murray was of the opinion that after the deal theoretically there is no opportunity for chance to enter into the playing of the game. He remarked that it was possible for an individual to play a hand that, in his opinion, might be played badly and yet he might succeed, but that had nothing to do with chance because a skilful player, even in a short game, is going to succeed. Then, in cross-examination, he added: "Certainly over any lengthy period of time it's virtually a certainty, if the period of time is long, you have control of the situation if you have skill".

Mr. Murray gave as his opinion that in any game there was some element of chance however small and he used as an example two games which could easily be considered those of pure skill: firstly, a chess game between masters, and, secondly, a finely played tennis match. In the first case, he pointed out that the chance slamming of a door

1968

ROSS, BANKS AND DYSON v. THE QUEEN

Spence J.

nearby when a chess master was in deep concentration might disturb his thinking and cause him to make a poor move, and, in the second case, a chance pebble on an otherwise perfectly prepared court, might cause a ball to twist out of line. Those are both examples of what I might term accidental hazards. An example had occurred to me of tournament professional golf, where a bad lie on a fairway 285 yards away from the tee and quite imperceptible might cause difficulty to even the most skilful and cautious player.

McLennan J.A., in giving the reasons for the Court of Appeal, expressed the view that the element of chance caused originally by the deal continued to affect the play of the game thereafter. In short, that there was the same co-mingling of chance and skill as Mr. Murray had pointed out would occur in a poker game. The learned justice in appeal said:

> The play of the hand follows the bidding. The play consists of each of the players, in some order or other, which has not been described in the evidence, placing a card on the table with one from the exposed hand and such cards constitute a "trick". As each player has 13 cards to start with there must be 13 tricks, won or lost, following each deal. One must assume, because it was not otherwise stated, that the play of 13 tricks following a deal is an individual game or part of a game. It seems a reasonable inference from the reference in Mr. Murray's evidence to "bidding" and "contract" that the partnership making the highest bid undertakes or contracts to win a certain number of the 13 tricks. The winning of a trick must be based upon some values determined either by certain differences between the cards or some rule of the game giving values to groups of cards. It is obvious that such values, and they may be the same or different values from the bidding values, must determine whether a trick is won or lost, and since what particular cards and the playing values thereof each player has is determined by the chance of the deal, the play of the cards or the way in which they can be played are substantially affected by chance. The defensive play, no doubt, refers to the play of the cards by the partnership opposing the partnership making the highest bid and defensive play would also be substantially affected by chance for the same reasons as the play.

With respect, these conclusions do not seem to be in accordance with the evidence given by Mr. Murray. Once the cards were, by chance, dealt thirteen to each player, then it was the task of each of those players by the exercise of his skill to inform his partner with a very considerable degree of accuracy what thirteen cards, which had been so dealt to him by chance, he held in his hand. It is also the part of each pair of players, by the process of bidding, to deceive their two opponents as to the values of the cards

which they held in their hands. When the bidding was completed, it was the part of each of the players to so play the thirteen cards in his hand as to arrive, in the case of those successful in the bidding, at the contract which they had declared and in the case of those who were unsuccessful in the bidding to defeat that contract.

I am of the opinion that once the cards had been dealt then in the progress of the play all element of chance disappears and any chance thereafter can only result from the deal. In these circumstances, therefore, I believe it must be taken as established that in the game of bridge the only chance involved is the chance in the dealing of the cards and that certainly the element of skill predominates in the playing of the game. It is the submission of counsel for the appellants that on that basis the game of bridge is not "a game of chance or mixed chance and skill".

I am of the view that there is some aid in interpretation in the submission made to us by counsel for the appellants that in a very complete research of prosecution as to gaming in Canada and the United Kingdom he had not found a single case where the playing of a game of bridge had been the subject of prosecution. There is a series of cases dealing with other games where remarks have been made, perhaps obiter, by the courts indicating that in the view of those courts the game of bridge was a game of skill or even of pure skill. So, in *Woolf v. Freeman*[8], Macnaghten J. remarked at p. 181:

> It is certainly lawful to play bridge. In playing games of cards some skill is required. Bridge is a game of skill, but whether poker is a game of skill is more questionable.

In *D'Orio v. Leigh & Cuthbertson Ltd.*[9], Ellis, Co. Ct. J., said at p. 156:

> After the problem to be played is determined by the method above stated, it appears that skill, if it is not entirely necessary to win the game, predominates and the element of chance if, not negligible, is a no greater factor than it is in any game of skill such as bridge.

In *re Betty Loeb Allen*[10], Gibson C.J. said, at p. 281:

> The rules of the game of bridge, which have been established on an international basis, are set forth in encyclopedias and other texts, and we are satisfied from the rules and from the many publications on the subject that the game is predominantly one of skill.

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[8] [1937] 1 All E.R. 178.
[9] (1929), 41 B.C.R. 153, 2 W.W.R. 171.
[10] (1962), 377 Pac. 2nd. 280.

1968

ROSS, BANKS AND DYSON v. THE QUEEN

Spence J.

In *Regina v. Thompson*[11], Lewis J. said:

> Bearing in mind that all games of cards are made unlawful by statute and that the Gaming Act, 1845, did not repeal specifically that part of the statute of 33 Hen. 8 which dealt with "carding", we are of opinion that the proper question for a jury, when dealing with a game of cards, is: Is this a game of skill, i.e., a game in which the element of chance is so slight as to render the game one which can properly be said to be a game of mere skill?

(The underlining is my own.)

In my view, we are not assisted by a general statement as to games of cards, such as made by Chancellor Boyd in *The King v. Laird*[12]:

> Euchre is a well known game at cards, imported from the States and it is a game of chance.

Nor that made by Harvey C.J., dissenting, in the Supreme Court of Alberta, in *Rex v. Hing Hoy*[13]:

> The ordinary game of cards in which there is a chance in the deal of the cards as to the value of the hands dealt to each player is a game in which chance and skill are combined, and that is no doubt what is meant by the expression "mixed game of chance and skill".

It may be noted that the actual game involved in this case was that of fan-tan which is surely a game of chance alone.

Counsel for the appellant stressed in his argument to this Court a statement made by Wurtele J. in the Court of King's Bench, Appeal Side, in the Province of Quebec, in *The King v. Fortier*[14]:

> A game of chance is one in which hazard entirely predominates; and a mixed game of chance and skill is one in which the element of hazard prevails notwithstanding the skill and adroitness of the gamesters and the combinations brought to bear by their understanding and ability.

It is the submission of counsel that the interpretation of the words in s. 168(1) of the *Criminal Code* "or mixed chance and skill" should therefore be that in order to fall within such classification the game must be one in which chance prevails over skill or predominates and that, therefore, a game of bridge in which any element of chance ends with the deal and where that element of chance is overcome and very much subordinated by the exhibition of skill thereafter should not be classed as such a mixed game.

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11 (1943), 29 Cr. App. R. 88 at 100, [1943] 2 All E.R. 130.

12 (1903), 7 C.C.C. 318 at 319.

13 (1917), 28 C.C.C. 229 at 232, 11 Alta. L.R. 518, 36 D.L.R. 765.

14 (1903), 7 C.C.C. 417 at 423.

Although in the *Fortier* case the game of bridge was not being considered at all, certainly the element of predominance of one factor or the other was considered by the learned justice in appeal to be a telling and important element. On the basis that there must be some chance in every game, as Mr. Murray testified, I am of the opinion that the statements made in the *Woolf* case, in the *D'Orio* case, and in the *Betty Loeb Allen* case support the contention that the predominance of skill in the game of bridge should indicate that it is not properly considered a game of mixed chance and skill. Indeed in the *Betty Loeb Allen* case a conviction for permitting an illegal game to be played was quashed by the Supreme Court of California for that exact reason. I have come to this conclusion much assisted by the test stated by Lewis J., giving judgment for the Court of Criminal Appeals in *R. v. Thompson, supra,* when he put the question "Is this a game of skill, i.e., a game in which the element of chance is so slight as to render the game one which can properly be said to be a game of mere skill?"

The question arises, of course, that if a game is a game of chance, when although skill is present chance predominates, then what is the necessity of the words in the statute "a game of mixed chance and skill". The explanation may well be found in the judgment of Salmond J. in *Weathered v. Fitzgibbon*[15]:

> The term "game of chance" is, however, ambiguous. It may be limited to games which are pure games of chance, or it may also include games, such as most games of cards, which are games of chance and skill combined. The question as to the true interpretation in this respect of s. 10 of the Gaming Act was considered and determined by this Court in *Scott v. Jackson,* [1911] N.Z.L.R. 1025. There, if I understand the decision aright, it was held that the term "game of chance" as used in s. 10 of the Gaming Act is limited to games of pure chance, and does not include games of mixed chance and skill. This decision is chiefly based on the provisions *in pari materia* of s. 163 of the Crimes Act, 1908, defining the indictable offence of keeping a common gaming-house, in which a distinction is drawn by the Legislature between games of chance and games of mixed chance and skill. It was held accordingly that the term "game of chance" as used in the corresponding provisions of the Gaming Act was similarly used by the Legislature as distinguished from games in which chance was combined with skill. By a game of pure chance I understand to be meant a game in which there is either no element of skill whatever, or an element of skill so unsubstantial and unimportant that for all practical purposes the game is one of chance exclusively. All such games are unlawful games within the meaning of s. 10 of the Gaming Act. But this section has no

[15] [1925] N.Z.L.R. 331 at 337.

1968

ROSS, BANKS AND DYSON v. THE QUEEN

Spence J.

application to games of mixed skill and chance—that is to say, to games in which there exists a substantially operative element of skill—for example, most games of cards.

The legislator, therefore, desiring to include in the prohibition not only games of pure chance but games where, although a degree of skill was present, the predominating element was chance, used the words as they appear in the present statute. I am none the less of the opinion that in the game of bridge, where the element of skill far outweighs any element of chance and where in fact the element of chance is a mere coincidental preliminary, it should not be considered as being within the words of the statute "a game of mixed chance and skill".

For these reasons, I would allow the appeal and quash the conviction.

Appeal dismissed, SPENCE J. *dissenting.*

Solicitor for the appellants: G. A. Martin, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

1967

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JOSEPH ARTHUR McCONNELL AND NEIL LEATH BEER ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Jury trial—Possession of housebreaking instruments—Whether trial judge's instructions to jury amounted to comment on failure of accused to testify—Whether new trial only remedy—Canada Evidence Act, R.S.C. 1952, c. 307, s. 4(5)—Criminal Code, 1953-54 (Can.), c. 51, ss. 295(1), 592(1)(b)(iii).

The appellants were convicted of possession of housebreaking instruments, contrary to s. 295(1) of the *Criminal Code*. The trial judge instructed the jury that they did not have to accept the explanations given to the police by the accused because they had not been given under oath. Upon counsel for the accused taking objection to that portion of the charge, the trial judge recharged the jury that they were not to take the previous charge as meaning that the onus was upon the accused to testify, and that the jury was not to be influenced by their failure to testify. It was argued before the Court of Appeal that these observations offended against the

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

provisions of s. 4(5) of the *Canada Evidence Act*, R.S.C. 1952, c. 307, as being a comment on the failure of the accused to testify, and that a new trial should necessarily be had. The Court of Appeal, by a majority judgment, affirmed the conviction. The accused appealed to this Court.

Held (Hall and Spence JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Judson and Ritchie JJ.: The language used by the trial judge was not so much a "comment" on the failure of the accused to testify as a statement of their right to refrain from doing so, and it should not be taken to have been the intention of Parliament in enacting s. 4(5) of the *Canada Evidence Act* to preclude judges from explaining to juries the law with respect to the rights of accused persons in this regard. The remarks of the judge viewed in context and on a reasonable interpretation do not amount to a comment in breach of the section. That section was enacted for the protection of accused persons against the danger of having their right not to testify presented to the jury in such fashion as to suggest that their silence is being used as a cloak for their guilt. It would be "most naive" to ignore the fact that when an accused fails to testify, there must be at least some jurors who say to themselves "if he didn't do it, why didn't he say so". It is for this reason that it is of the greatest importance that a trial judge should remain unhampered in his right to point out to the jury that there is no onus on the accused to prove his innocence by going into the witness box. To construe s. 4(5) of the *Canada Evidence Act* as interfering with that right not to testify would run contrary to the purpose of the section itself.

Even if the comment was a violation of s. 4(5), this was a proper case for the application of s. 592(1)(*b*)(iii) of the *Criminal Code*.

Per Hall and Spence JJ., *dissenting:* The trial judge's explanations clearly violated s. 4(5) of the *Canada Evidence Act*. Consequently, an error fatal to the validity of the proceedings has occurred and the remedy is not in trying to speculate whether it had a material or no effect on the jury, but in a new trial.

Droit criminel—Procès par jury—Possession d'instruments d'effraction—Les directives du juge au jury étaient-elles des commentaires sur l'abstention des accusés de témoigner—Est-ce qu'un nouveau procès est le seul remède—Loi sur la preuve au Canada, R.S.C. 1952, c. 307, art. 4(5)—Code criminel, 1953-54 (Can.), c. 51, art. 295(1), 592(1)(b)(iii).

Les appelants ont été déclarés coupables d'avoir eu en leur possession des instruments d'effraction, contrairement à l'art. 295(1) du *Code criminel*. Dans ses directives, le juge au procès a dit aux jurés qu'ils n'étaient pas obligés d'accepter les explications données à la police par les accusés parce que ces explications n'avaient pas été données sous serment. Lorsque le procureur des accusés s'est objecté à cette partie des directives, le juge au procès, dans de nouvelles directives, a dit aux jurés qu'ils ne devaient pas considérer les instructions antérieures comme voulant dire qu'il incombait à l'accusé de témoigner, et que les jurés ne devaient pas être influencés par l'abstention des accusés de témoigner. En Cour d'appel, on a soutenu

1968

McCONNELL AND BEER v. THE QUEEN

que ces remarques allaient à l'encontre des dispositions de l'art. 4(5) de la *Loi sur la preuve au Canada*, S.R.C. 1952, c. 307, comme étant un commentaire sur l'abstention des accusés de témoigner, et qu'il fallait nécessairement un nouveau procès. La Cour d'appel, par un jugement majoritaire, a confirmé la déclaration de culpabilité. Les accusés en ont appelé à cette Cour.

Arrêt: L'appel doit être rejeté, les Juges Hall et Spence étant dissidents.

Les Juges Fauteux, Judson et Ritchie: Le langage employé par le juge au procès était plutôt un énoncé du droit des accusés de s'abstenir de témoigner qu'un «commentaire» sur leur abstention de le faire, et on ne doit pas considérer que le Parlement avait l'intention, par l'art. 4(5) de la *Loi sur la preuve au Canada*, d'empêcher les juges d'expliquer au jury la loi concernant les droits des accusés à cet égard. Les remarques du juge, considérées dans leur contexte et raisonnablement interprétées, ne sont pas un commentaire en violation de l'article. Le but de cet article est de protéger les accusés contre le danger d'avoir leur droit de ne pas témoigner présenté au jury de manière à suggérer que leur silence est utilisé pour masquer leur culpabilité. On serait des plus naïfs si on mettait de côté le fait que lorsqu'un accusé ne témoigne pas il y a au moins quelques-uns des jurés qui se disent «s'il ne l'a pas fait, pourquoi ne le dit-il pas». C'est pour cette raison qu'il est de la plus grande importance que le juge au procès soit libre de signaler au jury que l'accusé n'a pas le fardeau d'établir son innocence en témoignant. Interpréter l'art. 4(5) de la *Loi sur la preuve au Canada* comme portant atteinte à ce droit de ne pas témoigner irait à l'encontre du but de l'article lui-même.

Même si le commentaire était une violation de l'art. 4(5), il s'agit ici d'un cas où l'on doit appliquer l'art. 592(1)(*b*)(iii) du *Code criminel*.

Les Juges Hall et Spence, *dissidents:* Les explications données par le juge au procès étaient clairement une violation de l'art. 4(5) de la *Loi sur la preuve au Canada*. En conséquence, il y a eu une erreur fatale à la validité des procédures et le remède est un nouveau procès et non pas de se demander si cela a influencé le jury, substantiellement ou non.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], confirmant la déclaration de culpabilité prononcée contre les appelants. Appel rejeté, les Juges Hall et Spence étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the appellants' conviction. Appeal dismissed, Hall and Spence JJ. dissenting.

John O'Driscoll, for the appellants.

Ronald G. Thomas, for the respondent.

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[1] [1967] 2 O.R. 527, (1968), 2 C.R.N.S. 50, 1 C.C.C. 368.

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

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] affirming the conviction of the appellants on a charge that they did, without lawful excuse, have in their possession instruments for housebreaking contrary to s. 295 (1) of the *Criminal Code*.

It should be said at the outset that this is an appeal brought pursuant to the provisions of s. 597(1)(*a*) of the *Criminal Code* and that the jurisdiction of this Court rests upon the dissenting opinion of Mr. Justice Wells in the Court of Appeal for Ontario.

The facts which gave rise to this prosecution were that at 12:35 a.m. on September 3, 1966, the appellant Beer was sitting behind the steering wheel of a motor vehicle owned by his wife which was parked at the rear of some dry cleaning premises in Sault Ste. Marie. The head lights were turned off, the motor was running and the appellant McConnell was some 60 feet away under an open window of the premises in question. A search of the motor vehicle revealed an iron bar, a screw driver and a table knife either on or under the front seat of the vehicle. Beer admitted ownership of these instruments and told the police that the screw driver was being used because they were having trouble with the ignition and that the bar was used for taking off hub caps. Mrs. Beer gave evidence to the effect that her husband had been using the screw driver to work on the car and that the bar had been moved from the trunk to underneath the front seat at the time of a camping trip during the previous summer when the table knife had also been used. The arrangements that Beer may have made during the previous summer do not appear to me to be an explanation for having the tools where they were found at the time and place in question, and the fact that at the time of the arrest, a complete jack, including a wheel nut wrench with a chisel affair on the other end of it was found in the back trunk of the car, appears to me to weaken considerably the explanation for the presence of the bar under the front seat. In addition to this, Beer's evidence in explanation of the presence of the bar was elicited on cross-examination of a Crown witness and is

[1] [1967] 2 O.R. 527, (1968), 2 C.R.N.S. 50, 1 C.C.C. 368.

1968

McCONNELL AND BEER v. THE QUEEN

Ritchie J.

self-serving so that in my view its admissibility was highly questionable.

McConnell admitted his association with Beer but explained his presence under the open window of the dry cleaning establishment by saying that he was relieving himself. While this may afford a reason for his being where he was, it does not seem to me to afford any explanation for being associated with Beer in the possession of the instruments in question.

I do not think that it is open to question that the instruments found by the police were capable of being used for housebreaking and it appears to me desirable in this regard to refer to the final paragraph of the reasons for judgment of Judson J., with which the majority of this Court concurred, in *Tupper v. The Queen*[2] where he spoke of the effect of s. 295(1) of the *Criminal Code*. Mr. Justice Judson there said:

> Once possession of an instrument capable of being used for housebreaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question.

In the present case neither of the accused gave evidence at the trial, and in the course of his charge the learned trial judge pointed out to the jury that they did not have to accept the unsworn explanation which McConnell had given to the police for his presence under the open window.

Upon counsel for the accused taking objection to this portion of the charge, the learned trial judge recalled the jury and said:

> Gentlemen of the Jury, it was pointed out that in the course of my charge to you I stated that you did not have to accept the explanations of the accused because those explanations were not made under oath. You are not to take it from that that there is any onus upon the accused to prove their innocence by going into the witness box and testifying in their defence. There is no such onus on these or any accused persons in any criminal trial of proving their innocence by going into the witness box and testifying in their own defence. You are not to be influenced in your decision by either of the accused not going into the witness box and testifying, but the Court does point out that these explanations were given and when made were not made under oath and it is not only for that reason alone but for any other number of reasons that may occur to you, to decide if you will accept these explanations.

It was argued before the Court of Appeal, as it was before this Court, that these observations offended against

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[2] [1967] S.C.R. 589 at 593, 2 C.R.N.S. 35, 63 D.L.R. (2d) 289, [1968] 1 C.C.C. 253.

the provision of s. 4(5) of the *Canada Evidence Act* and that a new trial should accordingly be had. Section 4(5) of the *Canada Evidence Act* reads as follows:

> The failure of the person charged or of the wife or husband of such person to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

Mr. Justice Evans, in the course of his reasons for judgment in the Court of Appeal, with which MacKay J.A. agreed, expressed himself in the following terms:

> The principle underlying the prohibition in Section 4(5) is the protection of the accused. Originally it was part of the same enactment by which the disability of an accused person to testify was removed. *R. v. Romano* 24 C.C.C. 30. In a jury case when an accused does not testify on his own behalf, this fact is immediately known to the jury and one would be most naive to believe that it is not considered by them in their deliberations. To hold that an accidental slip or an innocuous statement indicating the failure of the accused to testify must *ipso facto* result in a reversible error does violence to the intent and meaning of the Statute.
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> I am of the opinion that the impugned statement must be considered solely in the light of possible prejudice to the accused. If there is no possibility of prejudice then it does not amount to misdirection because it is a statement of law and amounts to an explanation of the legal rights of an accused who has already adopted a position of which the jury is aware. The absence of such a legal explanation might well react unfavourably to the accused particularly when defence counsel fails to explain to the jury his client's legal right to remain silent.
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> * * *
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> In the present case I have carefully considered the "comment" objected to and I am unable to find that it could be considered in any way prejudicial to the appellants. It is favourable to the accused since it is an explanation of the legal right of the accused persons to adopt the position which they did adopt coupled with a clear warning by the Trial Judge that no prejudicial inference is to be drawn from their election to remain out of the witness box. There is no suggestion in the remarks of the Trial Judge that there was evidence peculiarly within the knowledge of the appellants which they could give and which they failed to give.

Mr. Justice Evans did, however, express the view that "once it was determined that the comment violated the statutory provisions it was a fatal defect and a new trial was mandatory". Although Mr. Justice MacKay agreed with Evans J.A. that the remarks of the trial judge did not constitute a "comment" so as to offend against s. 4(5), he did not agree that the effect of such a comment, if made, was to make "a new trial mandatory." Mr. Justice MacKay said:

> I desire, however, to express the view that even if the comments of the learned trial judge in reference to the appellants not giving evidence

1968

McCONNELL AND BEER v. THE QUEEN

Ritchie J.

could be construed as offending against section 4(5) of the *Canada Evidence Act*, that this would be a proper case to apply the provisions of section 592(1)(*b*)(iii) of the *Criminal Code*.

In his dissenting opinion, Mr. Justice Wells took the view that in recharging the jury as he did the learned trial judge had made a direct comment on the failure of the accused to testify and that in so doing he had violated the provisions of s. 4(5) of the *Canada Evidence Act*, and that a new trial was accordingly necessary. Mr. Justice Wells, who found the matter to be concluded by the decision of this Court in *Bigaouette v. The King*[3], expressed himself as follows:

> Looking at what the learned trial judge said in the case at bar, it would appear to me that in this case there is a much more direct comment on the failure of the accused to testify in their own defence. It is not a mere pointing out that certain matters are not contradicted, it deals directly with their failure to testify at their trial. In my opinion, this direct comment comes squarely within the prohibition of the Statute and renders a new trial necessary. The matter is decisively concluded in my opinion by the judgment of the late Chief Justice which I have quoted from in *Bigaouette v. The King*.

In the *Bigaouette* case Sir Lyman Duff, at p. 114, speaking on behalf on this Court, adopted the law as being

> . . . correctly stated in the judgment of Mr. Justice Stewart in *Rex v. Gallagher*, 1922 37 C.C.C. 83 in these words:
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> > ' . . . it is not what the judge intended but what his words as uttered would convey to the minds of a jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.'

It is, I think, pertinent to observe that at the conclusion of his reasons for judgment in *Wright v. The King*[4] Chief Justice Rinfret, speaking for the majority of this Court, said:

> We think the *Bigaouette* case certainly goes as far on that subject as this Court would care to go . . .

In the *Bigaouette* case the accused was charged with the murder of his mother and he admitted that he was in the house at the time when the death was said to have

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[3] [1927] S.C.R. 112, 47 C.C.C. 271, 1 D.L.R. 1147.

[4] [1945] S.C.R. 319, 83 C.C.C. 225, 2 D.L.R. 523.

occurred and in the *Gallagher* case the accused was the last person known to have been seen with the deceased whose murder he was accused of having committed; in each case the learned trial judge was found to have commented on the accused's failure to testify in explanation of these circumstances. There is nothing of this kind in the present case. Here the language used by the trial judge to which objection is taken was not so much a "comment" on the failure of the persons charged to testify as a statement of their right to refrain from doing so, and it does not appear to me that it should be taken to have been the intention of Parliament in enacting s. 4(5) of the *Canada Evidence Act* to preclude judges from explaining to juries the law with respect to the rights of accused persons in this regard. I am accordingly in agreement with Mr. Justice Evans "that the remarks of the trial judge viewed in context and on a reasonable interpretation do not amount to a comment in breach of the section".

I think it is to be assumed that the section in question was enacted for the protection of accused persons against the danger of having their right not to testify presented to the jury in such fashion as to suggest that their silence is being used as a cloak for their guilt.

As has been indicated by Mr. Justice Evans, it would be "most naive" to ignore the fact that when an accused fails to testify after some evidence of guilt has been tendered against him by the Crown, there must be at least some jurors who say to themselves "If he didn't do it, why didn't he say so". It is for this reason that it seems to me to be of the greatest importance that a trial judge should remain unhampered in his right to point out to the jury, when the occasion arises to do so in order to protect the rights of the accused, that there is no onus on the accused to prove his innocence by going into the witness box. To construe s. 4(5) of the *Canada Evidence Act* as interfering with that right would, in my opinion, run contrary to the purpose of the section itself.

It was stressed in the course of the argument that by referring to the fact that the explanations of the accused were not given under oath, the trial judge was indirectly commenting on their failure to testify, and in my view this

1968

McCONNELL AND BEER v. THE QUEEN

Ritchie J.

reasoning runs contrary to the decision of this Court in *Kelly v. The King*[5] where the accused had not gone onto the witness stand but had been permitted to address the jury and in so doing had made a number of statements of fact. In the course of his charge to the jury the trial judge said: (See 27 C.C.C. 138 at 166 and 167):

> But as far as facts are concerned the only way to bring them properly before a jury is to bring them out from the lips of the witnesses or documents submitted to you which have been proved. You should have the guarantee of the religious sanction of an oath backing up the statement before you should consider them. I am bound to say that, because I do not know whether I was quite justified in allowing the accused to make several of the statements he made. Any statements of facts made by the accused you should dispel from your minds.

And he later said:

> These matters could have been brought out in cross-examination and have been brought out from certain witnesses. I am not laying stress upon that not being done, but laying stress upon the facts laid before you without your having the sanction of an oath to commend them to you. These statements should be expunged from your mind.

It will be remembered that the facts to which the judge was referring were facts laid before the jury in the unsworn statement of the accused. One of the points raised in the case reserved by the trial judge and which was argued on the appeal to this Court was whether this language constituted a comment on the failure of the accused to testify, contrary to s. 4(5) of the *Canada Evidence Act*, and in the course of the reasons for judgment which he delivered on behalf of the majority of the Court, Mr. Justice Anglin said, at page 263:

> There was no comment whatever on the failure of the accused to testify. His right to do so was not mentioned during the trial. The learned judge merely discharged his duty in warning the jury against treating the statement which he had allowed the accused to make as the equivalent of sworn testimony; . . .

In the same case Mr. Justice Duff, speaking for himself at page 259, said:

> . . . I can find nothing, which, when fairly construed, amounts to such comment within the meaning of the statutory prohibition.

If any further authority were needed, I would adopt the language used by Mr. Justice Longley in *The King v.*

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[5] (1916), 54 S.C.R. 220.

McLean[6] as being applicable to the present case. In that case the trial judge, in the course of his charge to the jury, had said:

> Now you are not to consider the prisoner at all in this matter. He has the right to do as he did; that is to sit there and say nothing . . .

and Mr. Justice Longley, speaking on an equal division of the Court, said:

> I am aware that in both Canada and the United States decisions have gone very far in the direction of shutting out anything which bore the semblance of comment on the part of judge or counsel in respect of the non-testifying of the prisoner on his trial. But it seems to me there should be some limit to this doctrine, and I think the limit should be where the reference could not be construed as unfavorable to the prisoner, nor its effect as occasioning any substantial wrong or miscarriage on the trial. What the learned judge said, on this trial, could only be regarded, I think as favorable to the prisoner, since it instructed the jury that the prisoner had a clear right, under the law, to remain silent.

As I have indicated, I agree with the opinion of the majority of the Court of Appeal that the remarks of the trial judge to which objection is here taken do not constitute a "comment" in contravention of s. 4(5) of the *Canada Evidence Act,* but I am bound to say, with the greatest respect for those who may hold a contrary view, that I do not agree with the suggestion in the reasons for judgment of Mr. Justice Evans to the effect that the case of *Bigaouette v. The King*[7] is to be treated as authority for the proposition that whenever a breach of that section occurs it constitutes a "fatal defect" in the proceedings making a new trial "mandatory" so that the curative provisions of s. 592(1)(*b*)(iii) cannot be applied.

No one would, I think, question the binding effect of the decision rendered by Sir Lyman Duff, C.J., on behalf of this Court in the *Bigaouette* case. That was a case of murder in which the evidence was almost entirely circumstantial and the language used by the learned trial judge, which was construed as relating "to the failure of the accused to testify" was, in my opinion, such that it could not have been said with any certainty whether or not the jury would necessarily have convicted on the circumstantial evidence if the offending words had been omitted. It was no doubt for this reason that the Chief Justice made

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[6] (1906), 39 N.S.R. 147.

[7] [1927] S.C.R. 112, 47 C.C.C. 271, 1 D.L.R. 1147.

1968

McCONNELL AND BEER v. THE QUEEN

Ritchie J.

no mention whatever of the provisions of the curative section of the *Criminal Code*. What the Chief Justice did say before adopting the language used by Mr. Justice Stuart in *Gallagher's* case, was:

> It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment implied in this passage upon the failure of *la defense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood in the other way, that it seems plainly obnoxious to the enactment referred to, subs. 5 of s. 4, R.S.C., c. 145.

I do not think that the meaning of any of the language employed by the Chief Justice in that case should be so enlarged as to be treated as authority for the general proposition that all "comments" which contravene s. 4(5), however innocuous they may be, are "fatal" in the sense that they are not curable by the application of the curative provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*. As is indicated in the excerpt above quoted from the reasons for judgment of Rinfret C.J. in *Wright v. The King*, the case of *Bigaouette* marks the limit to which "this Court would care to go" on the subject.

It is true that since the *Bigaouette* case three cases have been decided in the Court of Appeal of Ontario which hold that the provisions of s. 4(5) of the *Canada Evidence Act* constitute an arbitrary rule leaving no discretion to the court and that any breach of that section is fatal to the proceedings. These cases are *Rex v. McNulty and Courtney*,[8] and *Reg. v. Groulx and Nevers*[9] and *R. v. Lizotte*[10], but the contrary view has been adopted in British Columbia in *R. v. Darlyn*[11] and in New Brunswick in *Rex v. MacDonald*[12] and in *Ayles v. The Queen*[13]. In the case of *Molleur v. The King*[14], which was decided in 1948, Mr. Justice Casey, speaking on behalf of the majority of the

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[8] [1948] O.W.N. 827.

[9] [1953] O.R. 337, 16 C.R. 145, 105 C.C.C. 380.

[10] [1955] O.W.N. 593.

[11] [1947] 2 W.W.R. 872, 4 C.R. 366, 90 C.C.C. 142, [1948] 1 D.L.R. 203.

[12] (1948), 93 C.C.C. 15 at 21, 24, 8 C.R. 182, 23 M.P.R. 20.

[13] (1956), 119 C.C.C. 38, 8 D.L.R. (2d) 399.

[14] (1948), 93 C.C.C. 36, 6 C.R. 375, [1948] Que. K.B. 406.

Quebec Court of King's Bench at page 43, applied the curative section where crown counsel had made a comment on the failure of the accused to testify.

I am in agreement with the decision in the last three cited cases and would adopt the view expressed by Mr. Justice MacKay in the Court of Appeal in the present case to the effect that the provisions of s. 592(1) of the *Criminal Code* could be invoked in such a case as this even if the comment had been found to be in breach of s. 4(5) of the *Canada Evidence Act*. The relevant provisions of the *Criminal Code* read as follows:

> 592. (1) On the hearing of an appeal against a conviction, the Court of Appeal
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> (*a*) may allow the appeal where it is of the opinion that . . .
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, ...
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> (*b*) may dismiss the appeal where...
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (ii) of paragraph (*a*) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; . . .

There are a number of authorities concerned with the proper application of s. 592(1)(*b*)(iii) which are to the effect that once an error in law has been found to have occurred at the trial, the onus resting upon the Crown is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred.

It appears to me that if the remarks of the learned trial judge in the present case could have been construed as a "comment" which offended against the provisions of s. 4(5), his error would have been an error in law and I can see no logical reason why the provisions of s. 592(1)(*b*)(iii) should not apply to an error in law which consists in the breach of the provisions of the *Canada Evidence Act* in the same way as they would apply to any other such error.

As I do not consider that the remarks made by the learned trial judge concerning the accused's right to keep silent were obnoxious to the statutory direction contained in s. 4(5) of the *Canada Evidence Act*, I would dismiss this appeal on that ground, but I am in any event satisfied

1968

McCONNELL AND BEER v. THE QUEEN

Ritchie J.

that even if they could have been so construed, they could not have had any effect upon the outcome in the present case.

The judgment of Hall and Spence JJ. was delivered by

HALL J. (dissenting):—The facts are set out in the reasons of my brother Ritchie and I agree that the learned trial judge's charge to the jury was unexceptional in all but the one material respect in which, when he recalled the jury, he said:

> Gentlemen of the Jury, it was pointed out that in the course of my charge to you I stated that you did not have to accept the explanations of the accused because those explanations were not made under oath. You are not to take it from that that there is any onus upon the accused to prove their innocence by going into the witness box and testifying in their defence. There is no such onus on these or any accused persons in any criminal trial of proving their innocence by going into the witness box and testifying in their own defence. You are not to be influenced in your decision by either of the accused not going into the witness box and testifying, but the Court does point out that these explanations were given and when made were not made under oath and it is not only for that reason alone, but for any number of reasons that may occur to you, to decide if you will accept those explanations.

He recalled the jury because counsel for the accused, at the conclusion of the charge, had said:

> Your Honour, you said when referring to the explanation of Mr. McConnell that the statement was not made under oath, and you said it is up to you to decide, was he there for that reason only. I believe it is not incumbent upon the accused to prove that was the only reason. The onus would be on the Crown to prove that that was not the only reason.

Counsel's objection to the charge related to the following:

> The explanations of Mr. Beer were not made under oath and you do not have to accept them. Consider the circumstances under which they were made and then decide. If you have any reasonable doubt, then you must give the accused the benefit of that doubt.

In my view there was no reason to recall the jury because the sentences just quoted did not call for any further explanation. The judge was merely stating what was the fact, namely, that the accused were not under oath when they gave their explanations to the police officers when first seen and that, of course, was clearly apparent to everyone. Statements made by an accused in circumstances which require him to make an immediate explanation, as was the case here, are clearly admissible and cannot, in the circumstances, be made under oath and, therefore, it is up

to the jury to decide whether or not the explanation is to be believed or is one that might probably be true. The learned judge in the present case had said towards the close of his charge:

> Thirdly, if in possession of the accused, if they are instruments of housebreaking, did the accused give you an explanation of having them with lawful excuse which might probably be true?
>
> If you have any reasonable doubt as to whether the explanation is probably true, you must give the accused the benefit of that doubt.

However, having recalled the jury, the learned judge then, in my view, clearly violated s. 4(5) of the *Canada Evidence Act* when he said:

> Gentlemen of the Jury, it was pointed out that in the course of my charge to you I stated that you did not have to accept the explanations of the accused because those explanations were not made under oath. *You are not to take it from that that there is any onus upon the accused to prove their innocence by going into the witness box and testifying in their defence. There is no such onus on these or any accused persons in any criminal trial of proving their innocence by going into the witness box and testifying in their own defence.* You are not to be influenced in your decision by either of the accused not going into the witness box and testifying, but the Court does point out that these explanations were given and when made were not made under oath and it is not only for that reason alone, but for any number of reasons that may occur to you, to decide if you will accept these explanations.

(Emphasis added.)

Section 4(5) of the *Canada Evidence Act* reads:

> (5) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution. R.S., c. 59, s. 4; 1948, c. 33, s. 1; 1953-54, c. 51, s. 749.

The question for decision is whether the learned judge, having contravened the provisions of s. 4(5) above, the error is fatal to the validity of the trial.

Courts of appeal in Canada have taken opposite views on this question. The decisions of the Court of Appeal of Ontario in *Rex v. McNulty and Courtney*[15] and *Reg. v. Groulx and Nevers*[16] and in *Reg. v. Lizotte*[17] are to the effect that the curative provisions of s. 592(1)(*b*)(iii) have no application where there has been a breach of the section. The contrary view was expressed in British

[15] [1948] O.W.N. 827.
[16] [1953] O.R. 337, 16 C.R. 145, 105 C.C.C. 380.
[17] [1955] O.W.N. 593.

1968

McCONNELL AND BEER v. THE QUEEN

Hall J.

Columbia in *R. v. Darlyn*[18] and in New Brunswick in *R. v. Ayles*[19] and the same view was accepted in *Rex v. MacDonald*[20] and *Moleur v. The King*[21].

The matter has been dealt with in this Court in several cases including *Bigaouette v. The King*[22] and in *Wright v. The King*[23]. In the Bigaouette case, Sir Lyman Duff, at p. 114, speaking for the Court, said:

> It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment implied in this passage upon the failure of *la défense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood in the other way, that it seems plainly obnoxious to the enactment referred to, subs. 5 of s. 4, R.S.C., c. 145. The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex v. Gallagher*, (1922) 37 Can. Cr. C. 83, in these words:
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> > . . . it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.
> >
> > There must be a new trial.

In the *Wright* case, Chief Justice Rinfret, speaking for the majority of the Court, said:

> We think the *Bigaouette* case (1927) S.C.R. 112 certainly goes as far on that subject as this Court would care to go and, like the majority of the Court of Appeal, we are unable to find that the remarks here complained of could have any effect on the jury as being a comment "obnoxious to the statutory direction".

The pith of the decision in *Wright* was that what the learned trial judge had said was not a "comment" within the meaning of s. 4(5) of the *Canada Evidence Act*. The phrase "obnoxious to the statutory direction" used within quotation marks by Rinfret C.J.C. in the above extract

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[18] [1947] 2 W.W.R. 872, 4 C.R. 366, 90 C.C.C. 142, [1948] 1 D.L.R. 203.
[19] (1956), 119 C.C.C. 38, 8 D.L.R. (2d) 399.
[20] (1948), 93 C.C.C. 15 at 21, 24, 8 C.R. 182, 23 M.P.R. 20.
[21] (1948), 93 C.C.C. 36 at 41, 43, 46, 6 C.R. 375, [1948] Que. K.B. 406.
[22] [1927] S.C.R. 112, 47 C.C.C. 271, 1 D.L.R. 1147.
[23] [1945] S.C.R. 319, 83 C.C.C. 225, 2 D.L.R. 523.

from his reasons obviously referred to the phrase used by Duff J. (later C.J.C.) in *Bigaouette* as "plainly obnoxious to the enactment". The *Wright* case is authority only for the proposition that what was said in that case at the trial was not a comment and consequently the Court did not have to deal with whether, if there had been a comment, a new trial would necessarily have to be ordered. The case of *Kelly v. The King*[24], referred to by my brother Ritchie, is to the same effect. There the accused who was a building contractor, having dispensed with counsel, addressed the jury on his own behalf, and in so doing introduced topics and statements of fact which had nothing to do with the issues before the Court and made charges against prosecution counsel which had no relation to the issues being tried. The learned trial judge had permitted him to make these statements and charges and subsequently, in charging the jury, the learned judge pointed out to them that the statements of the accused so made in his address were not evidence and were to be disregarded, not having been given under oath. This Court held that in so doing, the learned trial judge had not *commented* in violation of the *Canada Evidence Act*. Duff J. (later C.J.C.) at p. 259 said:

> As to the first of these grounds I can find nothing, which, when fairly construed, amounts to such comment within the meaning of the statutory prohibition.

In his reasons, speaking for the majority in the Court of Appeal, Evans J.A. said:

> In a jury case when an accused does not testify on his own behalf, this fact is immediately known to the jury and one would be most naive to believe that it is not considered by them in their deliberations.

My brother Ritchie, in referring to this, states that it was in part to protect the accused from such speculations that s. 4(5) of the *Canada Evidence Act* was enacted. With deference, I cannot agree. The accused is accorded the protection he is entitled to by the mandatory directions which the trial judge must give that an accused is presumed to be innocent and that the burden of proving the guilt of an accused beyond a reasonable doubt rests upon the Crown. The learned trial judge adequately discharged his duty to the accused in the instant case when he said:

> For these reasons, therefore, both Mr. McConnell and Mr. Beer are presumed to be innocent until the Crown, his accuser, proves him guilty,

[24] (1916), 54 S.C.R. 220.

1968

McCONNELL AND BEER v. THE QUEEN

Hall J.

and this presumption of innocence remains with the accused from the time they were charged and throughout this trial until the end and this presumption of innocence only ceases to apply at the end of the trial if, after hearing all evidence, you are satisfied that Mr. McConnell or Mr. Beer is guilty beyond a reasonable doubt.

The onus or burden of proving the guilt of these two accused persons beyond a reasonable doubt rests upon the Crown and never shifts. There is no burden upon either of these two persons to prove his innocence. The Crown must prove beyond a reasonable doubt that they are guilty of the offence before they can be convicted.

The protection which an accused is entitled to under s. 4(5) is compliance with the positive injunction not to *comment* imposed upon the judge and counsel for the prosecution, in other words, no *comment* on the subject from either of them.

In the present case, Wells J.A. (now C.J.H.C.) took the view that in recharging the jury as he did, the learned judge had made a *comment* on the failure of the accused to testify, and in so doing, had violated the provisions of s. 4(5) of the *Canada Evidence Act* and that a new trial was, accordingly, necessary.

I am in full agreement with Wells J.A. Section 4(5) of the *Canada Evidence Act* is clear and unambiguous. In it Parliament has defined an area that is forbidden ground to the judge and to counsel for the prosecution. It is not a difficult matter for either or both to keep from entering the prohibited zone. If they refrain from doing what Parliament says they must not do, Courts of appeal and this Court will not be required to rationalize and refine these transgressions as they try to measure the depth of the imprint left on the minds of jurors as being consequential or inconsequential. No measurement of the effect of departing from the standards set by Parliament becomes necessary where the judge and counsel for the prosecution obey the law.

What the learned judge said in the instant case was clearly a comment. In my view, in dealing with a case of this kind, it is a case of comment or no comment. If there was no comment within the meaning of the statute as in the *Wright* and *Kelly* cases, that ends the matter. If there was a comment as in *Bigaouette,* an error fatal to the validity of the proceedings has occurred and the remedy is not in trying to speculate whether it had a material or no effect on the jury, but in a new trial. The accused in no

way contributed to the result. It flows solely from the failure of the judge or of counsel for the prosecution to obey the law which Parliament has clearly laid down.

As long as the doctrine of *stare decisis* is applicable, it is, I think, not open to this Court to refuse to follow *Bigaouette*. *Bigaouette* came to this Court by way of appeal from the Court of Queen's Bench of Quebec which Court had affirmed Bigaouette's conviction for murder, Allard J. dissenting. The dissent was on several grounds, including one that the learned trial judge had violated s. 4(5) of the *Canada Evidence Act*. Allard J. expressed this dissent as follows:

> 4° Le savant Juge, dans mon opinion, a aussi erré en droit, quand au bas de la page 30 il dit:
>
> «*Il était donc seul* avec sa mère à la maison, quand la mort est arrivée, et si l'accusé était seul avec sa mère quand elle a été tuée et égorgée, la défense aurait dû être capable d'expliquer par qui ce meurtre a été commis. Car une pareille boucherie n'a pas dû se faire sans que l'accusé en eut connaissance.»
>
> Et continuant dans le même ordre d'idées, il ajoute à la page 32 dans deux phrases qui se suivent, dont la première commence par les mots:
>
> «Il ne viendra à l'idée de personne et surtout . . . et dont la deuxième commence par les mots:
>
> «Il ne vous viendra pas à l'idée . . . . .
>
> Dans ces deux dernières phrases le savant juge écarte comme auteur possible du crime tous les gens du voisinage, c'est-à-dire des appartements voisins de celui de la victime pour ne laisser devant le jury que l'accusé comme l'auteur certain. Et dans la partie tirée du bas de la page 30 le savant juge, après avoir affirmé et conclu que l'accusé était seul à la maison avec sa mère quand elle a été tuée, il ajoute que la défense aurait dû être capable d'expliquer par qui ce meurtre a été commis, car dit-il, pareille boucherie n'a pû se faire sans que l'accusé en eut connaissance.
>
> N'est-ce pas là reprocher à l'accusé de ne pas avoir rendu témoignage en sa faveur pour établir son innocence ou au moins dénoncer l'auteur du crime, n'est-ce pas là au moins suggérer au jury que l'accusé aurait dû établir, par son témoignage, qu'il n'avait pas tué sa mère et de plus donner le nom du coupable, s'il ne l'est pas lui-même.
>
> Le savant Juge affirme que l'accusé était seul avec sa mère quand le crime a été commis. Or, reprochant à la défense de ne pas avoir expliqué ce meurtre et dénoncé le coupable, c'était lui reprocher de ne pas avoir rendu témoignage lui-même. Ce commentaire du savant Juge constitue une violation formelle de l'acte de la preuve du Canada. Sec. 4 Sous-Section 5. La Couronne devait prouver la culpabilité de l'accusé. Ce dernier n'avait pas à établir son innocence. Cette seule partie de la charge du savant Juge est suffisante pour vicier le verdict du jury et lui donner droit à un nouveau procès. Nos recueils judiciaires contiennent plusieurs décisions en ce sens.
>
> Je me contenterai de citer un jugement de La Cour d'Appel de l'Alberta re *Rex vs Gallagher,* 37 C.C.C., page 83, où le Tribunal a décidé:
>
> "Where the trial judge, in his charge to the Jury, in a criminal trial, suggests that evidence ought to have been given, which only the

1968

McCONNELL AND BEER v. THE QUEEN

Hall J.

accused could have given, he commits a breach of sub-section 5 of section 4 of the Canada Evidence Act which provides that the failure of the person charged . . . . . to testify shall not be made the subject of comment by the judge . . . . . and the accused is entitled to a new trial."

It is of particular significance that the decision in this Court setting aside the conviction for murder and granting a new trial was solely on this ground. Duff J. (as he then was) said at p. 113:

It should be said at the outset that the jurisdiction of this court rests upon the dissent of Mr. Justice Allard, and in particular upon his view, in which he was not in agreement with his colleagues, that the learned trial judge, in instructing the jury, *had failed to observe the imperative direction of subs. 5 of s. 4 of the Canada Evidence Act,* which, in effect, requires the trial judge to abstain from any comment upon the failure of the accused to take advantage of the privilege which the law gives him to be a witness at the trial in his own behalf.

(Emphasis added.)

The only question dealt with in the judgment of this Court was in relation to subs. (5) of s. 4 of the *Canada Evidence Act* and Duff J., speaking for the Court, concluded: "The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex v. Gallagher*"[25] and he quotes the very passage relied upon by Allard J. in his dissent. It is pertinent to quote the whole paragraph in the judgment of Stuart J.A. in *Gallagher* from which the quote just mentioned was taken. He said:

I agree with what my brother Beck has said. But I would like to add that it is quite possible—or rather of course very probable—that the trial Judge did not intend to refer, even indirectly, to the failure of the accused to testify at the trial. The situation seems to me to be this that the trial Judge inadvertently used language which was, on the face of it, to say the least, clearly capable of being understood as a reference to the failure of the accused to testify although it seems tolerably clear that, in their proper meaning, the words used must be taken as a reference to such failure. But it is not what the Judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. *Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.*

(Emphasis added.)

[25] (1922), 37 C.C.C. 83, 17 Alta. L.R. 519, 1 W.W.R. 1183, 63 D.L.R. 629.

My brother Ritchie says, regarding the fact that Duff J. did not refer to s. 1014(2) in *Bigaouette:* "That was a case of murder in which the evidence was almost entirely circumstantial and the language used by the learned trial judge, which was construed as relating 'to the failure of the accused to testify' was, in my opinion, such that it could not have been said with any certainty whether or not the jury would necessarily have convicted on the circumstantial evidence if the offending words had been omitted. It was no doubt for this reason that the Chief Justice made no mention whatever of the provisions of the curative section of the *Criminal Code.*" That ignores, in my view, the acceptance by Duff J. of the word 'fatal' in the quotation from *Gallagher* in which Duff J. says: "The law in our opinion is correctly stated in the judgment of Mr. Justice Stuart in *Rex v. Gallagher...*" and it ignores also Duff J.'s description of Allard J.'s dissent as, "The learned trial judge, in instructing the jury, had failed to observe the *imperative* direction of subs. 5 of s. 4 of the *Canada Evidence Act.*" (Emphasis added) I fail to see how the use of the word 'imperative' and acceptance of the word 'fatal' by Duff J. can be explained away by conjecture as to the reason why Duff J. did not refer to the curative section of the *Code.* It is more logical, I think, with deference to contrary opinion, to accept that Duff J. knew and appreciated that 'fatal' meant 'not curable'.

If the law is as so stated by Stuart J.A. in *Gallagher* and proclaimed as correct in this Court by Duff J. in *Bigaouette,* it should not be departed from as would appear to be the effect of the majority opinion. The statement by Cartwright J. (as he then was) in *Binus v. The Queen*[26] states the circumstances in which this Court may depart from a previous judgment of its own. He said:

> I do not doubt the power of this Court to depart from a previous judgment of its own but, where the earlier decision has not been made *per incuriam,* and especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons. The ancient warning, repeated by Anglin C.J.C. in *Daoust, Lalonde & Cie Ltée v. Ferland,* (1932) S.C.R. 343 at 351, 2 D.L.R. 642, *ubi jus est aut vagum aut incertum, ibi maxima servitus prevalebit,* should not be forgotten.

[26] [1967] S.C.R. 594 at 601, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227.

1968

McCONNELL AND BEER v. THE QUEEN

Hall J.

There are no compelling reasons in the instant case to depart from the law as laid down in *Bigaouette* in 1927.

If Parliament intended to qualify the word "comment" in the said section to have it mean "comment adversely or prejudicially", it could have amended the statute accordingly or may still do so. It is not for the Court to do it.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed, HALL *and* SPENCE JJ. *dissenting.*

Solicitors for the appellants: O'Driscoll, Kelly & McRae, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

1968

*Feb. 16
June 26

INDUSTRIAL INCOMES LIMITED (*Defendant*) ..... APPELLANT;

AND

MARALTA OIL CO. LTD. (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Trusts and trustees—Agreements to assign debtor's interest in proceeds of oil well production—Proceeds to be held in separate account until drilling account and creditors' claims paid—Assignee entitled to all further amounts as might be received—Whether trust created.

The plaintiff M had a 30 per cent interest in a farm-out agreement acquired from X. A well was completed and production obtained but M was heavily in debt both to the drilling contractor and many other creditors. The drilling contractor filed a mechanics' lien with the result that M's interest in the operation was in danger of forfeiture. To avoid this forfeiture and to protect its assets and creditors M entered into an agreement with X to assign its 30 per cent interest in the net proceeds of production. X then assigned the same 30 per cent to R. M and the creditor drilling company joined in this agreement. The drilling company's account was settled at $39,596.22, which R agreed to pay.

From the proceeds of production, R was (*a*) to reimburse itself for the $39,596.22; (*b*) after such payment, to distribute the proceeds among the creditors of M up to the sum of $52,000; and (*c*) to retain the balance after those two sums had been paid. R agreed to deposit the proceeds in a separate account in a named bank and the same were to be distributed monthly as set out above.

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*PRESENT: Judson, Ritchie, Hall, Spence and Pigeon JJ.

These agreements were all executed at the same time and dated May 1, 1953. There was a further assignment of the 30 per cent interest on April 1, 1954, from R to the defendant I. The latter entered into the same agreement that R had made, the only difference being that when I took the assignment, $12,811.95 had been paid on the drilling account thus leaving unpaid and subject to retainer under (*a*) above, the sum of $26,774.27. This sum had been received and retained by the end of February 1956. The drilling account had then been fully satisfied. From February 1956 to September 1962, I received a further $50,000. It never kept a separate account of the moneys received. It paid some creditors, made compromises with others and left some claims unpaid.

An action brought by M against I to recover moneys alleged to be held in trust and misappropriated by the defendant was dismissed by the trial judge on the ground that no trust was established. This judgment was reversed by the Appellate Division of the Supreme Court of Alberta. The defendant then appealed to this Court claiming a restoration of the judgment at trial. A cross-appeal relating to the allowance of set-offs by the Court of Appeal and claiming a return of M's interest in the oil well was also made.

Held: The appeal and cross-appeal should be dismissed.

The Court agreed with the Appellate Division that there was a trust for payment and that the matter did not simply rest in contract as found by the trial judge. *Seller v. Industrial Incomes Ltd.* (1963), 44 W.W.R. 485, 41 D.L.R. (2d) 329, referred to.

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Milvain J. Appeal and cross-appeal dismissed.

J. C. Major, for the defendant, appellant.

M. Millard, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This action was brought by Maralta Oil Co. Ltd., against Industrial Incomes Limited to recover certain moneys alleged to be held in trust and misappropriated by the defendant. The learned trial judge dismissed the action on the ground that there was no trust established. This judgment was reversed by the Appellate Division of the Supreme Court of Alberta. The defendant now appeals to this Court claiming a restoration of the judgment at trial.

The facts are set out in detail in the reasons for judgment of the Appellate Division[1]. Maralta had a 30 per cent interest in a farm-out agreement acquired from

[1] (1964), 49 W.W.R. 175, 46 D.L.R. (2d) 511.

1968

INDUSTRIAL INCOMES LTD. v. MARALTA OIL CO. LTD.

Judson J.

Mutual Holdings Limited. A well was completed and production obtained but Maralta was heavily in debt both to the drilling contractor and many other creditors. The drilling contractor filed a mechanics' lien with the result that Maralta's interest in the operation was in danger of forfeiture. To avoid this forfeiture and to protect its assets and creditors Maralta entered into an agreement with Mutual Holdings Limited to assign its 30 per cent interest in the net proceeds of production. Mutual Holdings Limited then assigned the same 30 per cent to Rocky Mountain Supply Company Limited. Maralta and the creditor drilling company joined in this agreement. The drilling company's account was settled at $39,596.22, which Rocky Mountain agreed to pay.

From the proceeds of production, Rocky Mountain was

(a) to reimburse itself for this $39,596.22;

(b) after such payment, to distribute the proceeds among the creditors of Maralta up to the sum of $52,000; and

(c) to retain the balance after those two sums had been paid.

The full terms of the agreement are next set out. Rocky Mountain agreed that:

> . . . it will deposit the share of proceeds of production from the well . . . in a separate account in The Royal Bank of Canada, Third Street West Branch, Calgary, Alberta, and will distribute the same on the last business day of each month, commencing with the last business day of May, 1953, as follows:
>
> (*a*) To its own account until it has received the sum of Thirty-nine Thousand, Five Hundred and Ninety-six Dollars and Twenty-two Cents ($39,596.22); then
>
> (*b*) rateably among the creditors of Maralta . . . , until such creditors have received an aggregate amount not in excess of Fifty-two Thousand ($52,000) dollars, or such lesser amount as may be owing to such creditors by Maralta as at the date hereof;
>
> and thereafter the separate account shall be closed and Rocky shall own and be entitled to all further amounts as may be received by it in respect of the said share of proceeds.

These agreements were all executed at the same time and dated May 1, 1953. There was a further assignment of the 30 per cent interest on April 1, 1954, from Rocky Mountain Supply Company Limited to Industrial Incomes Limited, the defendant in this action and the appellant before this Court. Industrial Incomes entered into the

same agreement that Rocky Mountain had made. The only difference is that when Industrial Incomes took the assignment, $12,811.95 had been paid on the drilling account thus leaving unpaid and subject to retainer under para. (a) of the above agreement, the sum of $26,774.27. This sum had been received and retained by the end of February 1956. The drilling account had then been fully satisfied. From February 1956 to September 1962 the date when the action was instituted, Industrial Incomes received a further $50,000. It never kept a separate account of the moneys received. It paid some creditors, made compromises with others but left unpaid creditors' claims which on a reference were ascertained at $19,781.70, and for that amount judgment was given.

The learned trial judge held that no trust was created by the documents which are outlined above. A unanimous Court in the Appellate Division disagreed with this conclusion. With respect, I agree with the conclusion of the Appellate Division that there was a trust. The Appellate Division emphasized, and rightly so, that these moneys were to be kept in a separate account in a certain bank until the drilling account and the creditors' claims up to $52,000 had been paid. It was only after this time that the account was to be closed and the assignee entitled to all further amounts that might be received. These assignments did not enable the assignee to refrain from paying certain accounts and retain the money. I agree that there was a trust for payment and that the matter did not simply rest in contract as the learned trial judge found.

One of the difficulties in this case is the judgment of Kirby J. in the Trial Division of the Supreme Court of Alberta given on September 10, 1963. This judgment is *Seller v. Industrial Incomes Limited*[2]. Seller was one of the creditors and he had purchased a number of claims against Maralta and taken assignments of them. In his action he alleged that there was a trust for creditors. The judgment of Kirby J. was that there was no such trust for creditors and he dismissed the action.

He came to this conclusion because there was, in his opinion, no evidence that the creditors had been notified of the transfer or that a trust had been created for particular

[2] (1963), 44 W.W.R. 485, 41 D.L.R. (2d) 329.

1968

INDUSTRIAL INCOMES LTD. v. MARALTA OIL CO. LTD.

Judson J.

creditors even without communication to or assent by them. This judgment was not appealed. According to ex. 6, which was filed in the present action, there came into existence, at some time, a complete list of some 30 trade creditors with claims totalling $48,086.64. There were, in addition, on this list, claims of $3,000 by Maralta's associates in the drilling venture and claims of $2,000 by two officers of Maralta. There was no proof that this list was a schedule to the documents that are said to have created the trust for creditors but Seller, when he brought his action, was obviously aware of the provision that he thought had been made for creditors. It is difficult for me to understand why this knowledge on the part of creditors, who were not a large body, would not be in existence on May 1, 1953, when the documents were signed.

The present action which is now under appeal was instituted on September 20, 1962. The judgment at trial in this action is dated November 14, 1963, two months after the dismissal of the creditors' action, *Seller v. Industrial Incomes Limited.*

Although the Court of Appeal in the present action said that the question whether these documents constituted a trust for the creditors or whether Maralta itself was the beneficiary of the trust, was not argued before them, nevertheless their judgment must be based on the conclusion that Maralta was the beneficiary of this trust and that it was revocable by Maralta for non-compliance with its terms. Industrial Incomes never made any attempt to keep the moneys received from the production of the well in a separate account as required by the agreement and left unpaid claims amounting to the sum for which judgment was given.

The principle is stated in 38 Hals., 3rd ed., p. 840, in the following terms:

> **Trusts for creditors.** If a debtor conveys property in trust for the benefit of his creditors who are not parties to the conveyance, and to whom the fact of its execution is not communicated, the conveyance merely operates as a power to the trustee to apply the property in satisfying their claims; and inasmuch as the debtor himself is in fact the only cestui que trust, it is revocable by him before the property is so applied, and cannot be enforced by the creditors. A trust in favour of creditors is not, however, revocable if the creditors are parties to or assent to the conveyance or if the fact of its execution is communicated to them.

The order of the Court of Appeal was made in the following terms:

> Once the amount owing to creditors as at the 1st day of May, 1953 is ascertained, then from such amount or $52,000, whichever is the lesser, the respondent may deduct the aggregate of amounts paid by it to the creditors either in payment of such claims or in purchase of such claims. The appellant will be entitled to the balance. Where the respondent has purchased a claim at less than the actual amount owing, it may only claim credit for the amount actually paid and not the original amount owing, for a trustee may not benefit by buying up debts. See Lewin on Trusts, 15th ed., p. 202.
>
> As this is an express trust, The Limitation of Actions Act has no application.
>
> There will be judgment for the appellant for the amount so ascertained with costs . . . .
>
> If counsel are unable to agree as to the amount of this judgment, the matter shall be referred to the trial judge.

As a result of this order for reference, certain agreements were made between counsel. The Court of Appeal also advised counsel that it intended to allow set-offs as well as payments made and that its judgment was to be read accordingly.

Only two items came before the trial judge on the reference. The first was the cost of defending the law suit, *Seller v. Industrial Incomes Limited,* above referred to. The second was extra payments for auditors' work. Both these items were allowed by the trial judge and credit was given for them under the judgment as entered. The result was that the Court of Appeal directed the entry of judgment in favour of Maralta for $19,781.70.

We are now faced in this Court with a cross-appeal. First, it is said that there was error in allowing set-offs other than payments made in cash. I agree with the Court of Appeal on this point.

Second, it is said that if set-offs are allowed, then certain allowances were not made for two deliveries of oil well casings. If Maralta had intended to open up this matter, it should have done so on the reference back to the trial judge, who could have taken evidence and made an adjudication. I am unable on this record at this stage to make any finding on the validity of this claim. I am in the same position with the extra allowance for auditors' claims.

The cross-appeal also claims a return of Maralta's interest in the oil well. This must be dismissed. Maralta

1968

INDUSTRIAL INCOMES LTD. v. MARALTA OIL CO. LTD.

Judson J.

entered into the agreement to save its interest in the oil well from being lost in mechanics' lien proceedings. To do this it had to agree, first, to the payment of the drilling costs, and then to the release of any surplus after the payment of creditors' claims. The trust is only for the payment of these creditors' claims and it is being enforced.

The appeal and the cross-appeal should be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the defendant, appellant: Chambers, Saucier, Jones, Peacock, Black, Gain & Stratton, Calgary.

Solicitors for the plaintiff, respondent: Millard, Johnson & Maxwell, Calgary.

1968

*May 14, 15, 16, 17 June 24

SIDMAY LIMITED, G.B.L. HOLDINGS LIMITED, ALDERSHOT APARTMENTS LIMITED, DUNDAS TERRACE APARTMENTS LIMITED, BLACK DUKE INVESTMENTS LIMITED, JOSEPH M. GORDON and BERNARD BENJAMIN (*Plaintiffs*) ..... APPELLANTS;

AND

WEHTTAM INVESTMENTS LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Corporation engaged in business of lending money on security of real estate not registered under Act—Validity of mortgages—The Loan and Trust Corporations Act, R.S.O. 1960, c. 222, s. 133(1).

The defendant was a small corporation, incorporated by letters patent under *The Corporations Act*, 1953 (Ont.), c. 19. The objects and powers of the company as set out in its letters patent included owning and dealing in mortgages of realty. It was declared to be a private company with the number of shareholders limited to fifty. At no time did it issue securities or debentures or accept money on deposit or borrow money on the security of its property. The defendant did not limit its investments to first mortgages nor was it concerned that any loan made by it should not exceed two-thirds of the value of the land mortgaged.

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*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

The defendant was not registered under *The Loan and Trust Corporations Act*, R.S.O. 1960, c. 222, but was registered at all relevant times under *The Mortgage Brokers Registration Act*, R.S.O. 1960, c. 244.

Although there was evidence that the defendant was engaged in the business of lending money on the security of real estate there was no evidence that it was doing anything else which could be regarded as carrying on the business of a loan or trust corporation within the meaning of *The Loan and Trust Corporations Act* or that it ever held itself out to be a loan or trust corporation within the meaning of that Act.

In an action brought by the plaintiffs for a declaration that a certain mortgage made by the first plaintiff to the defendant and that certain other mortgages collateral thereto were void and unenforceable, the trial judge held that the defendant was carrying on the business of a loan and trust corporation contrary to *The Loan and Trust Corporations Act* and that the effect of that Act was to render the prime mortgage and the collateral mortgages null and void. He decided that no term as to repayment of the moneys advanced could be imposed on the plaintiffs and made the declaration for which they asked. On appeal, the Court of Appeal allowed the appeal and directed a reference to determine the amount owing by the plaintiffs to the defendant under the said mortgages. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held: The appeal should be dismissed.

The defendant company was not at the relevant times transacting the business of a loan corporation in contravention of s. 133(1) of *The Loan and Trust Corporations Act* and that Act did not invalidate the impugned mortgage.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Grant J. Appeal dismissed.

Hon. R. L. Kellock, Q.C., and *W. M. H. Grover*, for the plaintiffs, appellants.

J. J. Robinette, Q.C., and *S. G. M. Grange, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from a unanimous judgment of the Court of Appeal[1] allowing an appeal from a judgment of Grant J. and directing a reference to the Master at Toronto to determine the amount owing by the appellants to respondent and that in all other respects the action be dismissed.

There is no dispute as to the relevant facts.

[1] [1967] 1 O.R. 508, 61 D.L.R. (2d) 358.

1968

SIDMAY LTD. *et al.* v. WEHTTAM INVESTMENTS LTD.

Cartwright C.J.

By an agreement dated May 5, 1964, Sidmay Limited, Gordon and Benjamin agreed to borrow from the respondent the sum of $308,250 on the security of lands in Burlington. This was short-term financing to enable the construction of maisonnettes pending the arrangement of long-term mortgage financing. The term of the proposed mortgage was six months from May 1, 1964, and interest was to be calculated monthly at the rate of 12 per cent per annum on the whole of the loan amount, to be payable at the time of each advance notwithstanding that the total loan amount had not been advanced. Pursuant to the said agreement the plaintiff Sidmay Limited executed and delivered to Wehttam the mortgage in question in this appeal. It is dated May 8, 1964, and contemplates the advance of $308,250. It provides for payment of interest at 12 per cent per annum monthly on the whole of the principal amount. The mortgage contains a covenant by the mortgagor to pay and also a guarantee by the plaintiffs Gordon and Benjamin to pay the amount loaned. Moneys were advanced under the mortgage by the mortgagee to the mortgagor or to third persons on the direction of the mortgagor. There is a disagreement between the parties as to whether the full amount of $308,250 was advanced but this question will be determined on the reference directed by the judgment of the Court of Appeal.

The appellants or some of them also executed and delivered to the respondent the following mortgages as collateral security for payment of the mortgage for $308,250 referred to above:

(a) Collateral mortgage Black Duke Investments to the respondent dated June 5, 1964;

(b) Collateral mortgage from G.B.L. Holdings Limited to the respondent dated August 5, 1964;

(c) Collateral mortgage from Dundas Terrace Apartments Limited to the respondent dated August 5, 1964;

(d) Collateral mortgage from Aldershot Apartments Limited to the respondent dated August 11, 1964.

The respondent was incorporated on July 10, 1956, by letters patent under *The Corporations Act*, 1953 (Ont.), c. 19. The objects and powers of the respondent as set out in

its letters patent include owning and dealing in mortgages of realty. It was declared to be a private company with the number of shareholders limited to fifty. The respondent is a small corporation; except for a qualifying share held by a Mr. Gotfrid all its shareholders are members of the family of one Matthew Elman. At no time did it issue securities or debentures or accept money on deposit or borrow money on the security of its property; it did not advertise; its business was carried on from Mr. Elman's residence.

The respondent did not limit its investments to first mortgages nor was it concerned that any loan made by it should not exceed two-thirds of the value of the land mortgaged.

The respondent was not registered under *The Loan and Trust Corporations Act,* R.S.O. 1960, c. 222, but was registered at all relevant times under *The Mortgage Brokers Registration Act,* R.S.O. 1960, c. 244.

Although there was evidence that the defendant was engaged in the business of lending money on the security of real estate there was no evidence that it was doing anything else which could be regarded as carrying on the business of a loan or trust corporation within the meaning of *The Loan and Trust Corporations Act,* or that it ever held itself out to be a loan or trust corporation within the meaning of that Act.

The statement of claim delivered by the appellants is a lengthy document but, in view of a reference having been directed to ascertain the amount owing on the mortgage and the claim that the mortgage transaction is unconscionable having been withdrawn, the claim requiring consideration is pleaded as follows in paras. 24 and 25 and clause (a) of the prayer for relief in the statement of claim:

> 24. The plaintiffs further allege that the said mortgage referred to in paragraph 6 and the said collateral mortgages referred to in paragraphs 10, 11 and 15 hereof were taken by the defendant in the course of carrying on the business of lending money on the security of real estate, which the said defendant was prohibited from carrying on by virtue of the provisions of *The Loan and Trust Corporations Act,* R.S.O. 1960, chapter 222 and the plaintiffs allege that the said mortgages are accordingly void and unenforceable.
>
> 25. The plaintiffs plead the provisions of sections 1(h), 2, 133 and 161 of the said *Loan and Trust Corporations Act* and sections 1(f), 2, 3 and 340 of *The Corporations Act,* R.S.O. 1960, chapter 71.

1968

SIDMAY LTD. *et al.* *v.* WEHTTAM INVESTMENTS LTD.

Cartwright C.J.

THE PLAINTIFFS THEREFORE CLAIM:

(a) a declaration that the said mortgage from Sidmay Limited to the defendant dated the 8th day of May, 1964 and the said collateral mortgages are void and unenforceable;

Grant J. held that the defendant was carrying on the business of a loan and trust corporation contrary to *The Loan and Trust Corporations Act* and that the effect of that Act was to render the prime mortgage and the collateral mortgages null and void. He decided that no term as to repayment of the moneys advanced could be imposed on the plaintiffs and made the declaration for which they asked in clause (a) quoted above. He made no order as to costs.

The Court of Appeal held that the defendant was not carrying on the business of a loan or trust corporation within the meaning of *The Loan and Trust Corporations Act* and that in any event the effect of that Act was not to render the mortgages invalid. The Court of Appeal went on to express the opinion that if the mortgages were held to be illegal and void the declaration asked for by the plaintiffs should not in any event be made except on the condition of the payment back to the defendant by the plaintiffs of the moneys advanced by the defendant.

Kelly J.A. after a careful review of many decisions and of the history of the statutes which may be regarded as the predecessors of *The Loan and Trust Corporations Act,* hereinafter referred to as the Act, came to the following conclusions:

1. That the defendant was not at the relevant times transacting the business of a loan corporation in contravention of s. 133(1) of the Act and that the Act does not invalidate the impugned mortgage.

2. That even if it were held that the defendant had contravened s. 133(1), the plaintiffs were not entitled to relief because they are not persons for whose protection the prohibition in s. 133(1) was enacted.

3. That even if the plaintiffs had not been barred from the relief they claimed on the grounds set out in 1 and 2 above the Court should grant them that relief only on the terms that they repay to the defendant the moneys they had borrowed from it.

Wells J.A., as he then was, agreed with Kelly J.A.

Laskin J.A. opened his reasons as follows:

I have had the privilege of reading the reasons for judgment of my brother Kelly and I agree with him that *The Loan and Trust Corporations Act*, R.S.O. 1960, c. 222, does not invalidate the impugned mortgage. I am also in substantial agreement with him on the alternative view that he has taken of the case, but would like to express my own opinion thereon.

I share the view, held unanimously by the Court of Appeal, that the Act does not invalidate the impugned mortgage and I find myself so fully in agreement with the reasons of Kelly J.A. for reaching this conclusion that I am content to adopt them and will not attempt to repeat or summarize them. This is sufficient to dispose of the appeal and consequently I refrain from dealing with grounds 2 and 3 above upon which also Kelly J.A. was prepared to base his judgment. I do not intend by this to cast any doubt upon the validity of his reasons; but while it was desirable for the Court of Appeal to consider these alternative matters in case on a further appeal there should be disagreement as to ground 1 there is now no necessity to consider them.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Blake, Cassels & Graydon, Toronto.

Solicitors for the defendant, respondent: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

1968

*May 13, 14
June 24

ALBERT STERN (*Plaintiff*) .....APPELLANT;

AND

JACK SHEPS, PHILLIP KOSLOVSKY, BENJAMIN COHEN and NATIONAL TRUST COMPANY LIMITED, as Executors and Trustees of the Last Will and Testament of MINNIE STERN (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Husband and wife—Pre-nuptial agreement—Mutual waiver of rights under the Dower Act—Whether contrary to public policy—The Dower Act, R.S.M. 1954, c. 65 [now 1964, c. 16].

Contracts—Uberrimae fidei—Not all pre-nuptial agreements are to be categorized as uberrimae fidei.

The appellant, who was a bachelor aged 57, and a widow agreed to get married and two days prior to the marriage they entered into a pre-nuptial agreement whereby the parties agreed, *inter alia*, to mutually renounce all rights which would arise upon their marriage by virtue of *The Dower Act*, R.S.M. 1954, c. 65. The parties were married on January 31, 1957, and lived together as man and wife until the wife died on May 1, 1964. She left a will dated July 3, 1957. Her estate was valued for taxation purposes at $228,000. Nothing was left to the appellant. He purported to take under *The Dower Act*, R.S.M. 1954, c. 65, then in force under which he claimed to be entitled to a life estate in the homestead of the deceased and also to one-third of the net estate.

An action brought by the appellant to set aside the pre-nuptial agreement was dismissed at trial, and on appeal the trial judgment was upheld by the Court of Appeal. An appeal was then brought to this Court. The substantial ground argued in the Court of Appeal and in this Court was that the pre-nuptial agreement of January 29, 1957, was void as being contrary to public policy.

Held: The appeal should be dismissed.

The Court adopted the reasons of Monnin J.A. who had dealt fully and correctly with the public policy issue.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Bastin J. Appeal dismissed.

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

[1] (1966), 58 W.W.R. 612, 61 D.L.R. (2d) 343.

Maurice J. Arpin, Q.C., for the plaintiff, appellant.

Francis C. Muldoon and *Rémi Lafrenière,* for the defendants, respondents.

The judgment of the Court was delivered by

HALL J.:—The appellant Albert Stern was a bachelor age 57 who, in January 1957, was the manager of a large department store in St. Paul, Alberta. He learned through a traveller who came to the store of one Mrs. Minnie Koslovsky, a widow, who resided in Winnipeg. The appellant had not known of her prior to this. He telephoned Mrs. Koslovsky and she suggested that he should come to Winnipeg to see her. They had several conversations in which the appellant states that he told Mrs. Koslovsky he would want from $25,000 to $30,000 to start a business in Winnipeg. She promised, according to appellant, that she would provide $25,000. They agreed to get married. The appellant returned to St. Paul, resigned his position, shipped his personal belongings to Winnipeg and moved there.

On January 29, 1957, two days prior to the marriage, the appellant and Mrs. Koslovsky entered into a pre-nuptial agreement which is the subject of this litigation. The agreement which was under seal was executed in the office of Mrs. Koslovsky's solicitor, Mr. David Levin, Q.C. It contained covenants as follows:

1. The said Minnie Koslovsky and the said Albert Stern hereby covenant and agree with each other that during their marriage, each of them shall be completely independent of the other as regards the enjoyment, control, administration and disposal of all property, both real and personal, whether owned at the commencement of the said marriage or acquired thereafter.

2. The said Albert Stern for himself, his heirs, executors, administrators and assigns respectively, further covenants and agrees with the said Minnie Koslovsky that if the said Minnie Koslovsky should predecease him, he will, and does hereby waive, remise, release, renounce and stands debarred of all right, title, interest, claim and demand whatsoever to the present and/or future estate of the said Minnie Koslovsky, her heirs, executors, administrators and assigns, both at law and in equity or by statute or otherwise howsoever, whether in possession or expectancy or whether by or under the Dower Act, R.S.M. 1954, Cap. 65, and amendments thereto, the Devolution

1968

STERN
v.
SHEPS *et al.*

Hall J.

of Estates Act, R.S.M. 1954, Cap. 63 and amendments thereto, The Testator's Family Maintenance Act, R.S.M. 1954, Cap. 264 and amendments thereto, and/or any other Act or law whatsoever and wheresoever, either now or hereafter in force, and whether or not the said Minnie Koslovsky predeceases testate or intestate the said Albert Stern, including all rights of election to take under the Will of the said Minnie Koslovsky or not, and any life estate in any homestead of the said Minnie Koslovsky, and of, in, to and out of which the said Albert Stern now has or may hereafter have any right, title, estate, claim or interest.

3. The said Albert Stern hereby covenants and agrees with the said Minnie Koslovsky that neither he nor his heirs, executors, administrators, trustees or assigns, nor any person or persons, or corporations whatsoever for him and in his name or on his behalf shall at any time hereafter bring or carry on or prosecute any or any manner of actions, causes of actions, suits, proceedings, claims or demands whatsoever or howsoever against the said Minnie Koslovsky, her estate or effects, or for or by reason or in respect of any act, matter, cause, or thing waived, remised, released, renounced or barred by this indenture.

Minnie Koslovsky covenanted to the same effect with the appellant.

The appellant, who at one time considered qualifying for the law profession, had attended McGill University for one year. He acknowledged that he had read the agreement and understood it and that it was signed of his own free will and without any compulsion.

The parties were married on January 31, 1957, and lived together as man and wife until the wife died on May 1, 1964. She left a will dated July 3, 1957. Her estate was valued for taxation purposes at $228,000. Nothing was left to the appellant. He purported to take under *The Dower Act,* R.S.M. 1954, c. 65, then in force under which he claimed to be entitled to a life estate in the homestead of the deceased, 25 O'Meara Street, Winnipeg, where the parties had cohabited since their marriage. This property was valued at $17,500 and he also claimed to be entitled to one-third of the net estate.

He brought action against the respondents as executors and trustees of the last will and testament of Minnie Koslovsky-Stern claiming:

(*a*) A declaration that the document of the 29th of January, 1957, is contrary to public policy, is null and void and of no effect.

(*b*) A declaration that the plaintiff's signature to the said document was procured by the undue influence and misrepresentation of the

deceased and ought to be set aside, either wholly or as to the portions in conflict with the plaintiff's rights under sections 12, 13, 14 and 22 of *The Dower Act*.

(*c*) Alternatively, recision of the said document of the 29th of January, 1957, or of so much thereof as purports to affect the plaintiff's rights under *The Dower Act*, on the grounds of undue influence and misrepresentation.

(*d*) A declaration that the plaintiff is entitled to a one-third interest in the deceased's net estate and to a life estate in the deceased's homestead, in addition, pursuant to *The Dower Act*.

The action was tried by Bastin J. and his judgment was upheld by the Court of Appeal for Manitoba[1]. Bastin J. found as follows:

The first ground is that the covenant by plaintiff waiving any claim to his wife's property, contained in the agreement (Ex. 1), is without consideration. I hold that the consideration to support this covenant is the similar covenant by Mrs. Minnie Koslovsky. There was great disparity between the rights being relinquished by plaintiff and those being given up by Mrs. Koslovsky; but consideration, even if it appears inadequate, is effective in the absence of fraud or undue influence.

The second ground is a claim by the plaintiff that by a verbal agreement made prior to the pre-nuptial agreement, Mrs. Koslovsky promised she would give the plaintiff between $20,000 and $25,000 to establish a business in Winnipeg and that she failed to do so. According to plaintiff, Mrs. Koslovsky explained to him that she required the pre-nuptial agreement to satisfy her relatives but that it would not govern her relationship with the plaintiff. It is in evidence that the plaintiff received from his wife a cheque dated March 26, 1957, for $2,000; another dated April 10, 1957, for $2,000; and a third dated May 1, 1957, for $1,000—a total of $5,000—which he claims was not a gift but a loan, which he has since repaid with interest. It is the contention of plaintiff that this verbal agreement to give him $20,000 or $25,000 was part of the consideration for him signing the pre-nuptial agreement and that his wife's failure to make the gift was a repudiation of the written agreement. If any such promise were made, plaintiff waived its performance by accepting and repaying the loan of $5,000. There is no evidence that plaintiff ever made a demand on his wife to perform such a promise and this renders his story quite improbable, and I reject it.

His third ground is that the pre-nuptial agreement is contrary to public policy and to the intent of *The Dower Act*. At common law an adult is presumed to be *sui juris* and entitled to contract freely. This is a fundamental principle of law which can only be affected by express legislation. I can find nothing in *The Dower Act* to show an intention on the part of the Legislature to interfere with the freedom of spouses to contract themselves out of the benefits of this Act.

* * *

[1] (1966), 58 W.W.R. 612, 61 D.L.R. (2d) 343.

1968

STERN v. SHEPS *et al.*

Hall J.

Another ground is that of undue influence. The relationship of husband and wife does not create a presumption of undue influence, and in any case plaintiff has admitted he understood the terms of the agreement and entered into it without any compulsion and of his own free will.

The final ground is that in April 1959 plaintiff and his wife verbally agreed to cancel the pre-nuptial agreement and that, relying on this verbal agreement, he made a will on April 26, 1959, under which his wife was to benefit. The existence of such a verbal agreement is a matter of credibility and I consider that all the surrounding circumstances make this story improbable. The fact that his story is improbable in the circumstances, the existence of discrepancies in his evidence, and his demeanour, all combine to make his story as to this agreement completely incredible.

The substantial ground argued in the Court of Appeal and in this Court was that the pre-nuptial agreement of January 29, 1957, was void as being contrary to public policy. The findings of Bastin J. on the other points are fully supported by the evidence.

Monnin J.A. dealt fully and correctly with the public policy issue and I adopt his reasons. I do not think that I can usefully add anything to what he has said on this issue.

It was also urged that the pre-nuptial agreement was voidable on the ground that it was an agreement classed as a contract *uberrimae fidei*. Freedman J.A. appears to accept the proposition that the agreement in question here was in that class although also holding that the appellant had in no way been misled. I cannot accept the view that all pre-nuptial agreements are to be categorized as *uberrimae fidei*. *Williams v. Moody Bible Institute of Chicago*[2], cited by Freedman J.A., deals with an agreement in which a wife was not given full disclosure and in fact was misled by her prospective husband as to his assets and financial condition at the time she entered into the pre-nuptial agreement. There well may be a substantial difference between a case such as *Williams* and a case where it is the husband and not the wife who is attacking the agreement on the ground of failure to disclose and particularly in the case of a husband to a marriage of convenience who knows and agrees in advance that he will not participate in the

[2] [1937] 2 W.W.R. 316, 4 D.L.R. 465.

wife's estate. I do not find it necessary to go into this phase of the matter in view of the finding by Freedman J.A. that the appellant in this case was not in fact misled.

1968
STERN
v.
SHEPS *et al.*
Hall J.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Arpin, Rich & Houston, Winnipeg.

Solicitors for the defendants, respondents: Graffton, Dowhan, Muldoon & Lafrenière, Winnipeg.

DONALD EDWIN MOORE ..... APPELLANT;

AND

THE MINISTER OF MANPOWER AND IMMIGRATION ..... RESPONDENT.

1968
*June 10
June 24

ON APPEAL FROM THE IMMIGRATION APPEAL BOARD

Immigration—Deportation—Deportee illegally in country—Deportee arrested when about to leave voluntarily—Inquiry and order for deportation—Order not specifying destination—Whether order validly made—Whether deportee entitled to choose destination—Immigration Act, R.S.C. 1952, c. 325, ss. 2(d), 26, 36, 40.

The appellant, a citizen of the United States with a criminal record in that country and who had been deported from Canada in 1959, entered Canada in 1967 from Panama by air carrying a Canadian passport stating that he was born in Canada and was a Canadian citizen. Two days after his entry and while waiting to board a plane to Panama, he was arrested. An inquiry was ordered under s. 26 of the *Immigration Act*, R.S.C. 1952, c. 325, and the appellant was ordered deported. The deportation order did not specify the country to which he was to be deported, but the Minister has stated that he intends to direct that the appellant be deported to the United States. An appeal to the Immigration Appeal Board was dismissed. The appellant was granted leave to appeal to this Court.

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

Per Cartwright C.J. and Martland, Judson and Ritchie JJ.: The discretion of the Director under s. 26 of the *Immigration Act* to order an inquiry is purely administrative and not subject to judicial review.

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

1968

MOORE v. MINISTER OF MANPOWER AND IMMIGRATION

The Special Inquiry Officer had jurisdiction to make the deportation order since the appellant was unlawfully in Canada. It is not necessary that the destination be stated in the order of deportation.

The appellant had no right to choose his destination. The choice rests with the Minister and not with the person to be deported. The Minister has that power and his mode of exercising that choice does not raise a question of law which is reviewable by this Court.

Per Cartwright C.J. and Martland J.: The onus of proving that a deportation order valid on its face is in fact not made *bona fide,* is on the party who alleges it. In the case at bar the appellant has not discharged that onus.

Per Spence J., *dissenting*: The purpose of the deportation provisions in the *Immigration Act* is to prevent the entry into Canada of a person who is not entitled under the provisions of the statute to enter and to evict from Canada any person who is remaining in Canada and is not entitled under the provisions of the Act to so remain. The discretion given to the Director under s. 26 of the Act is semi-judicial in character. In view of the circumstances of this case, no inquiry could, in the terms of s. 26, have been "warranted". All that had to be done in order to carry out the purposes of deportation, *i.e.,* the getting out of Canada of a person not entitled to remain, was to let the appellant proceed to board the plane.

Immigration—Expulsion—Personne étant dans le pays illégalement—Personne mise sous arrêt alors qu'elle était sur le point de quitter le pays volontairement—Enquête et ordonnance d'expulsion—Ordonnance ne spécifiant pas la destination—Ordonnance a-t-elle été validement émise—La personne expulsée a-t-elle le droit de choisir sa destination—Loi sur l'immigration, S.R.C. 1952, c. 325, art. 2(d), 26, 36, 40.

L'appelant, un citoyen des États-Unis ayant un dossier criminel dans ce pays et qui avait été expulsé du Canada en 1959, est entré au Canada en 1967, venant du Panama par avion, et étant en possession d'un passeport canadien indiquant qu'il était né au Canada et qu'il était un citoyen canadien. Il fut mis sous arrêt deux jours après son entrée et alors qu'il attendait à l'aérogare pour s'embarquer à bord d'un avion à destination du Panama. La tenue d'une enquête fut ordonnée en vertu de l'art. 26 de la *Loi sur l'immigration,* S.R.C. 1952, c. 325, et une ordonnance d'expulsion fut rendue contre l'appelant. Cette ordonnance ne spécifait pas le pays où l'appelant devait être renvoyé, mais le Ministre a déclaré qu'il avait l'intention d'ordonner que l'appelant soit renvoyé aux États-Unis. Un appel à la Commission d'appel de l'immigration a été rejeté. L'appelant a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être rejeté, le Juge Spence étant dissident.

Le juge en Chef Cartwright et les Juges Martland, Judson et Ritchie: La discrétion conférée au Directeur par l'art. 26 de la *Loi sur l'immigration* d'ordonner une enquête est purement administrative et n'est

pas sujette à être revisée par les tribunaux. L'enquêteur spécial avait la juridiction d'émettre l'ordonnance d'expulsion puisque l'appelant était au Canada illégalement. Il n'est pas nécessaire que l'ordonnance d'expulsion mentionne l'endroit où la personne expulsée doit être renvoyée.

L'appelant n'avait pas le droit de choisir sa destination. Le choix appartient au Ministre et non pas à la personne qui doit être expulsée. Le Ministre a ce pouvoir et la manière dont il exerce ce choix ne soulève pas une question de droit qui peut être revisée par cette Cour.

Le Juge en Chef Cartwright et le Juge Martland: Il incombe à la personne qui plaide ce moyen de prouver qu'une ordonnance d'expulsion, valide à sa face, n'a pas, en fait, été émise de bonne foi. Dans l'instance, l'appelant n'a pas rencontré ce fardeau.

Le Juge Spence, *dissident*: Le but des dispositions de la *Loi sur l'immigration* visant l'expulsion est d'empêcher l'entrée au Canada d'une personne qui n'a pas droit, en vertu des dispositions de la Loi, d'y entrer et d'expulser du Canada toute personne qui y demeure alors qu'elle n'a pas droit, en vertu des dispositions de la Loi, d'y demeurer. La discrétion conférée au Directeur en vertu de l'art. 26 de la Loi a un caractère semi-judiciaire. Dans les circonstances, une enquête, selon les termes de l'art. 26, n'était pas «justifiée». Pour rencontrer les exigences du statut, *i.e.*, de voir à ce qu'une personne qui n'a pas droit de demeurer au Canada sorte du pays, on n'avait qu'à laisser l'appelant s'embarquer sur l'avion.

APPEL d'une décision de la Commission d'appel de l'immigration confirmant une ordonnance d'expulsion. Appel rejeté, le Juge Spence étant dissident.

APPEAL from a decision of the Immigration Appeal Board affirming a deportation order. Appeal dismissed, Spence J. dissenting.

Bernard Chernos, for the appellant.

C. R. O. Munro, Q.C., and *N. M. Thurm,* for the respondent.

Martland J. concurred with the judgment delivered by

THE CHIEF JUSTICE:—This appeal is brought, pursuant to leave granted by this Court on May 27, 1968, from a decision of the Immigration Appeal Board given on April 9, 1968, which dismissed an appeal from a deportation order made against the appellant by a Special Inquiry Officer dated February 1, 1968.

1968

MOORE v. MINISTER OF MANPOWER AND IMMIGRATION

Cartwright C.J.

The facts are succinctly stated in the reasons of my brother Judson. I agree with his conclusions that a decision of the Director, pursuant to s. 26 of the *Immigration Act*, to cause an inquiry to be held is not subject to judicial review and that the Special Inquiry Officer had jurisdiction to make the deportation order.

It is clear since the decision of this Court in *Rebrin v. Bird*[1] that a deportation order is valid in form although it does not name the country to which the person named is to be deported but it does not follow from this that it would be improper for the order to specify that country. The wording of s. 40(2) of the *Immigration Act* quoted by my brother Judson appears to contemplate the destination being named in either the deportation order or a separate order or direction made by the Minister, Director, a Special Inquiry Officer or an immigration officer.

In the case at bar no such separate order appears to have as yet been made but the Minister has stated, in a letter to the solicitor for the appellant, that if the deportation order is upheld he intends to direct that the appellant be deported to the United States.

There was no doubt ample evidence before the Special Inquiry Officer to warrant and indeed to require the making of a deportation order. The Minister has not as yet made an order naming the country to which the appellant is to be deported but the question as to whether the Minister or the appellant has the right to choose that destination is one of law depending on the construction of the Act and the regulations and was fully argued before us and should now be decided.

It is to be regretted that the words of the Statute do not deal explicitly with the question. It would have been easy to do so. I agree, for the reasons he has given, with the view of my brother Judson that the conclusion to be drawn from the wording of the Act is that the choice rests with the Minister.

It remains to consider the argument addressed to us by Mr. Chernos which is summarized in his factum as follows:

> The true purpose of these deportation proceedings has been to surrender the appellant to a foreign state because he is an alleged fugitive

[1] [1961] S.C.R. 376, 34 C.R. 412, 130 C.C.C. 55, 27 D.L.R. (2d) 622.

criminal sought by such foreign state. For that purpose it was necessary to arrest the appellant to prevent his return to Panama and to institute deportation proceedings against him although he neither desired nor intended to come into or remain in Canada. Since November 26, 1967, the appellant has been attempting to quit Canada to return at his own expense to Panama from whence he came. The only proper inference from this evidence is that the real object of these deportation proceedings is the surrender of a 'fugitive criminal' to the United States of America because the United States of America wants him. An exercise of the power to deport for the purpose of extradition is an abuse which should be restrained by this Court. An order of deportation for such purpose is 'ultra vires' the Minister, not made in good faith, neither genuine nor bona fide, and but a sham and a device to perpetrate an illegal act.

Section 22 of the *Immigration Appeal Board Act* is as follows:

> 22. Subject to this Act and except as provided in the *Immigration Act*, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation or the making of an application for the admission to Canada of a relative pursuant to regulations made under the *Immigration Act*.

By s. 23(1) of that Act, which gives a right of appeal to this Court with leave, our jurisdiction is limited to dealing with questions of law.

The appellant's submission quoted above is made on the supposition that the appellant has been ordered not merely to be deported but to be deported to the United States. I have already pointed out that no irrevocable decision has been made by the Minister in regard to this but I propose to consider the submission on the basis that such a direction has been made. That was the basis on which this branch of the argument proceeded.

I agree with the view expressed by Stephenson J. in *Regina v. Governor of Brixton Prison Ex parte Soblen*[2], that the onus of proving that a deportation order valid on its face is in fact a sham, or not made *bona fide*, is on the party who alleges it, "however difficult it may be for him to discharge the onus".

In the case at bar that onus has not, in my opinion, been discharged. It was urged by Mr. Chernos in the course of his forceful argument that only one inference can be drawn

[2] [1963] 2 Q.B. 243 at 281.

1968

MOORE v. MINISTER OF MANPOWER AND IMMIGRATION

Cartwright C.J.

from the combined circumstances that the appellant has both the desire and the means of returning to Panama the country whence he came, that the Minister has announced his intention of deporting him to the United States and that that country has requested his return as a fugitive criminal. I am unable to agree. To decide that the deportation proceedings are a sham or not bona fide it would be necessary to hold that the Minister did not genuinely consider it in the public interest to expel the appellant. This is the view expressed in *Soblen's* case, *supra,* and I agree with it.

In the case at bar, there are good reasons for expelling the appellant as is shown in the reasons of my brother Judson. A person who is unlawfully in Canada cannot exempt himself from liability to have an inquiry directed and to be ordered to be deported by demonstrating his desire to leave Canada voluntarily. The question whether, in such circumstances, deportation proceedings should be initiated is not committed to the Courts.

Once it has been held that a valid deportation order has been made which does not name the destination to which the deportee is to be sent, and that in such circumstances Parliament has committed to the Minister the choice as to what that destination shall be, I agree with my brother Judson that the Minister's mode of exercising that choice does not raise a question of law which is reviewable by this Court on an appeal brought pursuant to s. 23(1) of the *Immigration Appeal Board Act.*

I wish to guard myself against being supposed to say that if the facts were found to be as suggested by Mr. Chernos the Courts would be powerless to intervene and to declare that an act having the appearance of being done under the authority of the *Immigration Act* and in accordance with its provisions is *ultra vires* because in reality done for a purpose other than that specified by the Statute.

Since the facts established do not warrant a finding that the order appealed from was wrong in law, or that the proceedings and decisions of which the appellant complains were not taken and made in good faith it follows that this appeal cannot succeed.

For the reasons given by my brother Judson and those stated above, I would dismiss the appeal.

Martland and Ritchie JJ. concurred with the judgment delivered by

JUDSON J.:—The appellant, Donald Edwin Moore, entered Canada on November 24, 1967. He came from the Republic of Panama by way of Mexico. On November 26, 1967, he went to the Toronto International Airport to return to Panama. He had a return ticket for this purpose. He was waiting to board the aircraft when he was arrested. He was notified on November 28, 1967, that the Director of Immigration had directed an enquiry under s. 26 of the *Immigration Act*. On February 1, 1968, following the enquiry, the appellant was ordered to be deported. The deportation order did not specify the country to which he was to be deported. On February 1, 1968, the appellant served Notice of Appeal to the Immigration Appeal Board. The Board dismissed the appeal on April 9, 1968. The appeal to this Court is, with leave, from the dismissal of the appeal by the Immigration Appeal Board.

The first submission of the appellant is that the Special Inquiry Officer should have declined to act and permitted him to leave Canada as he was trying to do. It is argued that the Special Inquiry Officer had no jurisdiction since the appellant was neither seeking to come into Canada nor seeking to remain in Canada. The answer to this submission is that the appellant was unlawfully in Canada contrary to the *Immigration Act*. On May 8, 1959, a deportation order had been made against him and he was deported to the United States on May 22, 1959. He was therefore in breach of s. 19(*e*)(ix) of the *Immigration Act*. He was also in possession of a Canadian passport which stated that he was born in Canada and was a Canadian citizen. He was, in fact, born in the United States and was a citizen of that country. When he was trying to leave, he produced that passport for the purpose of obtaining from Canadian Pacific Airlines a tourist card to enable him to enter Mexico on his return journey. He also had a serious criminal

1968

MOORE v. MINISTER OF MANPOWER AND IMMIGRATION

Judson J.

record in the United States. This was the reason for his deportation in 1959. There can be no doubt that the deportation order was properly made.

The next submission is that the deportation order should have stated the Republic of Panama as the destination, as the appellant requested. The deportation order simply orders a deportation and does not specify any destination. The answer to this submission is that the order was made in accordance with the terms of the Act and Regulation 22. Regulation 22 provides that a Special Inquiry Officer making a deportation order shall make the deportation order in the form prescribed by the Minister. This form does not provide for a destination being stated. It was considered in *Rebrin v. Bird and the Minister of Citizenship and Immigration*[3] and was held to be valid.

The only question in this appeal is whether the person being deported has a right to choose his destination after a deportation order has been validly made. "Deportation" is defined by the Act in s. 2(*d*):

> 2. In this Act
>
> (*d*) "deportation" means the removal under this Act of a person from any place in Canada to the place whence he came to Canada or to the country of his nationality or citizenship or to the country of his birth or to such country as may be approved by the Minister under this Act, as the case may be.

Section 36 provides:

> (1) Subject to subsection (2), a person against whom a deportation order has been issued shall be deported to the place whence he came to Canada or to the country of which he is a national or citizen or to the country of his birth or to such country as may be approved by the Minister under this Act.
>
> (2) Unless otherwise directed by the Minister or an immigration officer in charge, a person against whom a deportation order has been made may be requested or allowed to leave Canada voluntarily.

The only provisions for voluntary departure in the Act are contained in s. 36(2), just quoted, and s. 40(2), which imposes a liability for the costs of deportation on a transportation company in certain events.

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[3] [1961] S.C.R. 376, 34 C.R. 412, 130 C.C.C. 55, 27 D.L.R. (2d) 622.

Section 40(2) reads:

(2) Where a deportation order or rejection order is made against a person other than a person described in subsection (1), the transportation company that brought him to Canada shall, where he is deported, pay the costs of deportation or rejection from the port of entry from which he will leave Canada and shall at its expense convey him or cause him to be conveyed to the place whence he came to Canada or to the country of which he is a national or citizen or to the country of his birth as directed in the deportation order, rejection order or other order or direction made by the Minister, Director, a Special Inquiry Officer or an immigration officer or at the request of the transportation company and subject to the approval of the Minister, to a country that is acceptable to such person and that is willing to receive him.

Section 36(2) and the concluding words of s. 40(2) are permissive only and do not compel the Minister to act under them. The definition of "deportation" and s. 36(1) state four possible destinations:

(a) the place whence he came;

(b) the country of which he is a national or citizen;

(c) the country of birth;

(d) such country as may be approved by the Minister under this Act.

The sections do not state that the Minister may make the choice, if the facts of a given case permit a choice. Neither do they impose any limitation on the power of the Minister. We have here a valid deportation order. There are four stated destinations. My conclusion on this legislation is that the choice rests with the Minister and not with the person to be deported. He has the power and its mode of exercise does not raise a question of law which is reviewable by this Court.

It has been stated that the discretion given to the Director under s. 26 of the Act is quasi judicial in character and subject to review by a court if it thinks that he acted on insufficient information. I cannot agree with this. The discretion is purely administrative and not subject to judicial review.

This matter was fully dealt with in this Court in *Calgary Power Limited v. Copithorne*[4] and the above proposition

[4] [1959] S.C.R. 24, (1958), 16 D.L.R. (2d) 241, 78 C.R.T.C. 31.

1968

MOORE v. MINISTER OF MANPOWER AND IMMIGRATION

Judson J.

decisively rejected. The implications of any such doctrine are serious. The administration of the *Immigration Act* would be paralysed. There would be repercussions on the laying of informations and the preferring of indictments under the *Criminal Code*, and, in all probability, on the powers of arrest.

I state this conclusion without finding it necessary to consider s. 22, 14-15-16 Eliz. II, c. 90, the *Immigration Appeal Board Act* enacted in 1967. It reads as follows:

> 22. Subject to this Act and except as provided in the *Immigration Act*, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation or the making of an application for the admission to Canada of a relative pursuant to regulations made under the *Immigration Act*.

and replaces s. 39 of the old Act, which read as follows:

> 39. No court and no judge or officer thereof has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister, Deputy Minister, Director, Immigration Appeal Board, Special Inquiry Officer or immigration officer had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

I would dismiss the appeal.

SPENCE J. (*dissenting*):—I have had the privilege of reading the reasons for judgment of the Chief Justice and Judson J. I am unable to agree with the conclusions therein for the following reasons.

The purpose of the deportation provisions in the *Immigration Act* is to prevent the entry into Canada of a person who is not entitled under the provisions of the statute to enter and to evict from Canada any person who is remaining in Canada and is not entitled under the provisions of the Act to so remain. The definition of "deportation" in s. 2(*d*) commences with the words " 'deportation' means the removal under this Act of a person from any place in Canada . . ."

Section 11(2) of the statute provides:

> 11. (2) A Special Inquiry Officer has authority to inquire into and determine whether any person shall be allowed to come into Canada or to remain in Canada or shall be deported.

The special inquiry officer in the present case informed the appellant of such purpose of the inquiry. As pointed out by Judson J., the appellant was arrested under the provisions of s. 16 of the *Immigration Act,* and I agree with my learned brother that he was properly so arrested.

Section 19(1)(*a*) of said statute provides:

> 19. (1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning
>
> (*a*) any person, other than a Canadian citizen, who engages in, advocates or is a member of or associated with any organization, group or body of any kind that engages in or advocates subversion by force or other means of democratic government, institutions or processes, as they are understood in Canada;

In compliance with that section, R. G. Lynn, Immigration Officer in Toronto, Ontario, on November 27, 1967, reported by telegram and that report was produced as an exhibit before the special inquiry officer. It reads as follows:

IMM TOR
27-11-67 1:35 195
DIST ADMIN TOR URGENT ATTN ENFORCEMENT
TO DIRECTOR OF IMMIGRATION

PURSUANT TO SUBPARAGRAPHS (IV), (VIII) AND (IX) OF PARAGRAPH (E) OF SUBSECTION (1) OF SECTION 19 OF THE IMMIGRATION ACT, THIS IS A REPORT CONCERNING DONALD EDWIN MOORE A PERSON OTHER THAN A CANADIAN CITIZEN OR A PERSON WITH CANADIAN DOMICILE WHO WAS A MEMBER OF A PROHIBITED CLASS AT THE TIME OF HIS ADMISSION TO CANADA, NAMELY THE PROHIBITED CLASS DESCRIBED IN PARAGRAPH (D) OF SECTION 5, WHO CAME TO CANADA OR REMAINS THEREIN WITH A FALSE OR IMPROPERLY ISSUED PASSPORT OR BY REASON OF ANY FALSE OR MISLEADING INFORMATION, FORCE, STEALTH OR OTHER FRAUDULENT OR IMPROPER MEANS WHETHER EXERCISED OR GIVEN BY HIMSELF OR BY ANY OTHER PERSONS AND WHO RETURNS TO OR REMAINS IN CANADA CONTRARY TO THE PROVISIONS OF THIS ACT AFTER A DEPORTATION ORDER HAS BEEN MADE AGAINST HIM

SIGNED R G LYNN
IMMIGRATION OFFICER
TORONTO ONTARIO 27 NOVEMBER 1967

1968

MOORE v. MINISTER OF MANPOWER AND IMMIGRATION

Spence J.

The duty of the Director of Immigration to whom such report was made is set out in s. 26 of the *Immigration Act* as follows:

> 26. Subject to any order or direction by the Minister, the Director shall, upon receiving a written report under section 19 *and where he considers that an inquiry is warranted,* cause an inquiry to be held concerning the person respecting whom the report was made.

(The emphasis is my own.)

There was no order or direction by the Minister in the present case. Acting upon this report, one J. B. Bissett, the Chief Enforcement Officer, Home Branch, purporting to act for the Director of Immigration, on the 28th of November 1967, telegraphed to the District Administrator of Immigration in Toronto largely repeating from Lynn's telegram report which I have set out above and concluding, "I direct that an inquiry be held". I shall presume, without further investigation, that Mr. Bissett could so act for the Director of Immigration as that issue was not referred to by counsel in argument before this Court. Presuming Mr. Bissett's act to be that of the Director, it is quite evident that he was purporting to exercise a discretion given to the Director by the provisions of s. 26 of the *Immigration Act* which I have quoted. The words "and where he considers that an inquiry is warranted" expressly provide for such discretion. The discretion, in my view, is semi-judicial in character because its exercise results in the setting up of an inquiry to determine whether the appellant should be permitted to remain in Canada or to be deported. I need cite no authority for the proposition that in such a quasi-judicial exercise of discretion the person purporting to exercise the discretion must do so judicially. It is, surely, the essence of a judicial exercise of discretion that a person receive proper and complete information upon the matter as to which he is to exercise the said discretion.

Mr. Lynn, in his written report which I have quoted, made no mention whatsoever that at the time when the appellant was arrested he was in the Malton Airport at Toronto awaiting the opportunity to board the plane to Panama or that he always has insisted and still does insist

that he desires not to remain in Canada but to leave Canada and to leave Canada just as quickly as he is permitted. Had the Director or Mr. Bissett acting in his place and stead been so informed it would seem inevitable that he would have come to the conclusion that an inquiry was not "warranted". All that had to be done in order to carry out the purposes of deportation, i.e., the getting out of Canada of a person not entitled to remain, was to let the appellant proceed and therefore no inquiry could, in the terms of s. 26, have been "warranted".

Counsel for the Minister pointed out that the appellant had been guilty of several serious infractions of the provisions of the *Immigration Act* for which he was subject to prosecution. Of course, the complete answer to that submission is that under Part VI of the *Immigration Act* there is not only a statement of the various offences but detailed provision as to their prosecution and to date there has been no attempt to institute any such prosecution. Any such purpose for the arrest of the appellant would seem to have been long since forgotten. Counsel for the Minister also pointed out that the appellant is said to have committed various offences in the United States of America and that the authorities there seek his return for the purpose of prosecuting him upon such offences. Again, there is a procedure recognized in international law and made statutory in Canada by the provisions of the *Extradition Act,* R.S.C. 1952, c. 322, as amended, a procedure which has been used on very many occasions for the purpose of delivering to the authorities of the United States of America persons who are charged with extraditable offences thereunder. In the present case, this Court has not been informed of any attempt to commence proceedings under the provisions of the *Extradition Act.*

Counsel for the Minister argued that if this appeal were allowed and the deportation order quashed the appellant would be free and could change his mind about his desire to leave Canada and could disappear. Of course, there are means both legal and practical to prevent that. I am sure that the Department of Manpower and Immigration could

1968

MOORE v. MINISTER OF MANPOWER AND IMMIGRATION

Spence J.

provide a sufficiently alert guard to make certain that the appellant boarded the plane for Panama from which he came through Mexico and once he was aboard and the plane was in flight it would be a little difficult for him to change his mind and return to Canada. Secondly, at the slightest indication of a change of mind, the appellant would become a person who being in Canada and not being entitled to be in Canada sought to remain in Canada, and then would be a proper subject for a hearing by an inquiry officer, and could, of course, be detained for such purpose. Thirdly, there are always the possible charges under the *Immigration Act* hanging over the head of the appellant.

For these reasons, I would allow the appeal and quash the deportation order.

Under the provisions of s. 23(3) of the *Immigration Appeal Board Act*, 14-15-16 Eliz. II, c. 90, no order as to costs should be made.

Appeal dismissed, SPENCE J. *dissenting.*

Solicitor for the appellant: A. C. Bazos, Toronto.

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

DAME PAULINE MIGNAULT, JACQUES NADEAU, PIERRE NADEAU ET JEAN NADEAU (*Demandeurs*) .....

APPELANTS;

1968
*Mai 27
Juin 24

ET

RÉAL ROUSSEAU et WINDMILL POINT INC. (*Défendeurs*) .....

INTIMÉS.

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

Automobile—Collision frontale—Pertes de vie—Responsabilité—Dommages—Code civil, arts. 1053, 1054, 1056.

Lors d'une collision frontale intervenue entre une automobile conduite par le défendeur R et une automobile conduite par D, le mari de la demanderesse, seul passager de R, perdit la vie de même que les deux passagers de D. Le juge de première instance jugea que la collision était imputable à R et accorda des dommages au montant de $93,000. La Cour d'Appel, par un jugement majoritaire, statua que l'accident devait être attribué au conducteur D qui conduisait du mauvais côté de la route, et réduisit les dommages à la somme de $64,000. Seule la demanderesse en appela à cette Cour.

Arrêt: L'appel doit être accueilli.

Les deux conducteurs doivent être tenus responsables. La faute d'inattention de R, telle qu'établie au dossier, et celle de D, non contestée devant cette Cour, ont, dans les circonstances de cette cause, été simultanément et inséparablement actives pour contribuer à rendre inévitable l'accident qui en est résulté. Quant aux dommages, les parties sont d'accord pour accepter la décision de la Cour d'Appel.

Motor vehicle—Head-on collision—Fatal accident—Liability—Damages—Civil Code, arts. 1053, 1054, 1056.

Following a head-on collision between an automobile driven by the defendant R and an automobile driven by D, the husband of the plaintiff, the only passenger in the car driven by R, was killed as well as the two passengers in the car driven by D. The trial judge held that the driver R was liable and awarded damages in the sum of $93,000. The Court of Appeal, by a majority judgment, held that the driver D, who was driving on the wrong side of the road, was liable for the accident, and reduced the damages to $64,000. The plaintiff only appealed to this Court.

Held: The appeal should be allowed.

Both drivers were liable. R's fault of inattention, as established in the evidence, and D's fault, which was not contested before this Court, have, in the circumstances of this case, simultaneously and

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* CORAM: Les Juges Fauteux, Martland, Ritchie, Spence et Pigeon.

1968

MIGNAULT *et al.* v. ROUSSEAU *et al.*

inseparably contributed to make this accident inevitable. As to the damages, the parties agreed to accept the decision of the Court of Appeal.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], in an action concerning a motor vehicle accident. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], dans une action résultant d'un accident d'automobile. Appel accueilli.

François Mercier, c.r., et *Philippe Casgrain,* pour les demandeurs, appelants.

Pierre de Grandpré, c.r., pour les défendeurs, intimés.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Il s'agit d'une collision d'automobiles survenue le 5 octobre 1960, vers 6 heures 20 de l'après-midi, sur la route 9, qui relie Québec à Montréal. Cet accident se produisit à l'endroit où le chemin du Rang 7, en la paroisse St-Cyrille, rejoint la route 9. Une automobile Citroën, appartenant à l'intimée Windmill Point Inc. et conduite du côté nord vers Montréal par l'intimé Réal Rousseau, vint en collision avec une automobile Chevrolet, appartenant à Jean-Guy Desrosiers et conduite en sens inverse vers Québec par son frère, Claude Desrosiers. Trois personnes y perdirent la vie: Me Jean-Marie Nadeau, seul passager de Rousseau, et Thérèse et Georges Champagne, passagers de Desrosiers. Seuls les deux conducteurs survécurent et en raison de la gravité de leurs blessures respectives, seul Rousseau a-t-il quelques souvenirs précis de ce qui s'est passé à l'instant même de l'accident. Ce dernier et une dame Pagé et son époux qui voyageaient à une assez grande distance à l'arrière de la voiture conduite par Rousseau, en sont les seuls témoins oculaires.

Cette tragédie de la route donna lieu à plusieurs actions dans lesquelles on chercha, en demande, à en faire reposer la responsabilité sur l'un ou l'autre des conducteurs ou sur les deux. Dame Mignault, veuve de Me Nadeau, et leurs enfants, qui sont ici les appelants, poursuivirent les deux

[1] [1967] B.R. 301.

conducteurs et propriétaires des automobiles concernées et demandèrent contre eux une condamnation conjointe et solidaire au paiement des dommages leur résultant du décès de Me Nadeau. A l'audition, cependant, ils se désistèrent de leur recours contre Jean-Guy Desrosiers, le propriétaire de la Chevrolet. L'action et les autres intentées furent entendues et jugées simultanément par M. le juge Lesage de la Cour supérieure. Attachant beaucoup d'importance et de poids au témoignage de dame Pagé, le savant juge jugea que la collision était imputable à Rousseau. L'action de la veuve et des enfants Nadeau fut donc rejetée quant à Claude Desrosiers et accueillie quant à Rousseau et Windmill Point Inc. qui furent condamnés à leur payer les dommages qui, au total, furent estimés à la somme de $93,000.

La décision concernant cette action donna lieu à deux appels: (i) celui de dame Mignault et ses fils, à l'encontre de cette partie du jugement exonérant Claude Desrosiers et (ii) celui de Rousseau et Windmill Point Inc., à l'encontre de la condamnation prononcée contre eux. Ces deux appels furent entendus simultanément et ultérieurement décidés le même jour. Disons immédiatement que les juges de la Cour d'appel furent unanimes à écarter la version que dame Pagé donna de cet accident et ce, non pas parce qu'on a trouvé qu'il y avait lieu de mettre en doute la bonne foi ou la crédibilité de ce témoin, mais parce qu'on a jugé, et à bon droit,—ainsi qu'il a d'ailleurs été reconnu devant nous par les parties,—que cette version était invraisemblable et irréconciliable au regard des faits connus de cet accident. Quant à son époux, Jean-Paul Pagé, il ne regardait pas devant lui au moment où l'accident s'est produit et aucune des parties n'a invoqué devant nous le peu qu'il en a rapporté dans son témoignage. Ceci étant, il n'y aura pas lieu de revenir sur ces deux témoignages. La Cour d'appel[1] se divisa sur la question de responsabilité. La majorité, composée de MM. les juges Rinfret et Taschereau, jugea que cet accident devait être attribué à Claude Desrosiers qui conduisait du mauvais côté de la route sans qu'aucune explication de sa présence à cet endroit n'apparaisse au dossier. Dissident, M. le juge Choquette fut d'avis que Desrosiers et Rousseau étaient égale-

[1] [1967] B.R. 301.

1968

MIGNAULT *et al.* *v.* ROUSSEAU *et al.*

Le juge Fauteux

ment responsables. Aussi bien et par suite de cette décision majoritaire, l'action de dame Mignault et ses fils fut rejetée quant à Rousseau et Windmill Point Inc. et accueillie quant à Claude Desrosiers qui fut condamné à leur payer les dommages que tous les juges furent d'accord à réduire à la somme de $64,000.

Desrosiers n'a pas appelé de cette décision. Il y a donc chose jugée quant à sa faute et sa responsabilité. D'autre part, dame Mignault et ses fils appellent à l'encontre de cette partie du jugement qui exonère Rousseau et Windmill Point Inc. et c'est là la question que nous avons à considérer.

Les faits pertinents, qui ont été prouvés ou qui ont été admis devant nous par les parties, peuvent être exposés bien simplement.

L'accident s'est produit vers 6 heures 20 de l'après-midi, à un endroit où la route, dont le centre est marqué d'une ligne blanche, est droite sur une distance d'environ 3 milles et large de 22 pieds avec de chaque côté un accotement carrossable d'une largeur de 7 pieds. Le temps était beau. Il faisait clair. La visibilité était parfaite. Il n'y avait, au moment et à l'endroit où s'est produit l'accident, aucun autre véhicule que les deux qui sont entrés en collision. Le choc est survenu tout près sinon au point même du prolongement de la route du Rang 7, sur la route 9. Il s'agit, le fait est admis, d'une collision frontale qui eut lieu dans la partie nord de la route 9, soit la partie réservée à Rousseau qui voyageait de l'est à l'ouest. Après la collision, la Chevrolet, conduite par Desrosiers, s'est arrêtée sur le côté nord de la route, à 27 pieds à l'est des débris marquant l'endroit du choc, et la Citroën, conduite par Rousseau, se trouvait 18 pieds plus à l'est que la Chevrolet et était entrée de reculons dans le fossé nord de la route 9. Le véhicule de Desrosiers n'a laissé aucune trace de freinage. On a, par ailleurs, du côté nord et à 3 pieds du bord de la route, relevé quatre traces parallèles de freinage. Ces traces, elles-mêmes pratiquement parallèles à la route, commençaient et se continuaient sur une distance de 56 pieds à l'est de l'endroit du choc. Contrairement au juge de la Cour supérieure, qui considéra que ces traces n'étaient pas reliées aux voitures impliquées dans l'accident, les juges de la Cour

d'appel furent unanimes à reconnaître, et je crois à bon droit, que ces quatre traces de freinage devaient être attribuées à la Citroën. Cette voiture, en effet, est munie de freins sur les quatre roues et l'espacement des roues à l'avant est supérieur de trois à quatre pouces à l'espacement des roues à l'arrière. Quant à la vitesse des deux véhicules, au moment de l'accident, Rousseau déclare qu'il conduisait de 50 à 55 milles à l'heure et que la voiture Chevrolet, conduite par Desrosiers, est arrivée, comme un bolide, sur la sienne. Ce témoignage, les dommages très considérables subis par les deux véhicules et le recul de la Citroën causé par la Chevrolet font preuve qu'au moment de l'accident, les deux voitures voyageaient à une très bonne allure et que la vitesse de la Chevrolet était sûrement pas moindre que celle de la Citroën. La vitesse combinée à laquelle ces deux véhicules s'approchaient l'un de l'autre et le caractère frontal de leur collision sur la partie nord de la route excluent, je crois, la possibilité que Desrosiers ait fait un virage subit vers la gauche, pour entrer sur cette partie de la route réservée à Rousseau, et indiquent conséquemment qu'il s'y était déjà engagé alors qu'il était à une certaine distance du point où la collision s'est produite et à une distance appréciable du point où Rousseau avait la possibilité de réaliser le danger résultant de cette conduite. Rousseau reconnaît, dans son témoignage, qu'au moment de l'accident, il faisait clair, que la visibilité était excellente et qu'à l'endroit de l'accident, la route est droite à perte de vue. Il n'a pas vu la Chevrolet s'engager sur le côté nord de la route. En fait, et plusieurs fois, ainsi qu'il appert particulièrement du passage suivant, il en fait l'aveu:

> Q. Vous l'avez vue, (la Chevrolet) l'accident se produisait?
> R. S'est produit.
>
> * * *
>
> Q. Une autre réponse que vous avez donnée à une question qui vous a été posée à l'enquête du Coroner à la page vingt et un (21): «R. Non, bien si vous ne voulez pas ces détails-là; c'est arrivé comme un bolide comme ça en pleine figure, en pleine face et je me suis réveillé à l'hôpital»; c'est bien ce que vous avez déclaré à l'enquête du Coroner?
> R. Oui.
> Q. C'est bien ce qui s'est passé, ce qui s'est produit?
> R. Oui.

1968

MIGNAULT *et al.* *v.* ROUSSEAU *et al.*

Le juge Fauteux

Q. A la page trente et un (31), on vous posait la question: «Q. Comme ça, vous avez vu la machine; elle arrivait sur vous, vous ne l'avez pas vue venir de loin? R. Non, c'est arrivé comme ça»;

R. Oui.

Q. C'est bien comme ça que cela s'est produit?

R. Oui.

Q. A l'endroit de l'accident, par rapport à la direction que vous suiviez, la route est droite n'est-ce pas?

R. Droite à perte de vue.

Q. A perte de vue?

R. Oui.

Q. En conséquence pour vous qui veniez de Québec, vous dirigeant vers Montréal, à l'endroit de l'accident, devant vous, la route est droite à perte de vue; c'est cela?

R. C'est cela.

Q. Est-ce que le jour de l'accident la visibilité était bonne?

R. Je crois qu'elle était excellente.

Q. Il faisait clair?

R. Il faisait clair, oui.

Il se rappelle de l'imprécation qu'il a lancée lorsque la Chevrolet est arrivée sur sa voiture. Invoquant la gravité des blessures subies par Rousseau, son procureur nous a invités à ne pas tenir compte des admissions ci-dessus. Je n'ai trouvé au dossier aucune justification pour ce faire. Rousseau a commis une faute d'inattention. La faute de Desrosiers et celle de Rousseau ont, dans les circonstances particulières à l'espèce, été simultanément et inséparablement actives pour contribuer à rendre inévitable l'accident qui en est résulté. Aussi bien, je dirais, avec tout le respect pour l'opinion contraire, que les deux conducteurs doivent en être tenus responsables et ce dans une proportion que nous ne pouvons déterminer sur le présent appel.

Il n'est pas contesté que lors de cet accident, Rousseau qui était préposé de l'intimée Windmill Point Inc., était dans l'exercice de ses fonctions. Il s'ensuit que les intimés et Claude Desrosiers doivent être condamnés conjointement et solidairement à la réparation des dommages que le décès de Me Nadeau entraîne pour chacun des appelants.

En ce qui concerne ces dommages, les parties sont d'accord à accepter la décision de la Cour d'appel qui les a fixés à $40,000 pour dame Mignault personnellement, à $12,000 pour dame Mignault en sa qualité de tutrice de son fils mineur Michel Nadeau, à $7,000 pour Jean Nadeau et à $5,000 pour Jacques Nadeau.

Pour ces raisons, je maintiendrais l'appel et, procédant à rendre le jugement qui aurait dû être rendu, condamnerais conjointement et solidairement les intimés et Claude Desrosiers à payer à dame Mignault personnellement $40,000, et en sa qualité de tutrice de son fils mineur Michel $12,000, à Jean Nadeau $7,000 et à Jacques Nadeau $5,000. Le tout avec dépens dans toutes les Cours.

1968

MIGNAULT *et al.* *v.* ROUSSEAU *et al.*

Le juge Fauteux

Appel accueilli avec dépens.

Procureurs des demandeurs, appelants: Byers, McDougall, Casgrain, Stewart & Kohl, Montréal.

Procureurs des défendeurs, intimés: Deschênes, de Grandpré, Colas, Godin, Coderre & Lapointe, Montréal.

FRANCINE BÉDARD (*Demanderesse*) ....APPELANTE;

1967

*Nov. 28

ET

JEAN-FRANÇOIS PROVENCHER (*Défendeur*) ..... INTIMÉ.

1968

Juin 12

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

Procès par jury—Action pour séduction et pour frais de gésine—Droit à un procès par jury—Code civil, art. 1053, 2261—Code de procédure civile, art. 421.

Prétendant avoir été séduite par le défendeur et avoir ultérieurement donné naissance à un enfant dont elle soutient que le défendeur est le père, la demanderesse réclame un montant de $46,414.62, représentant les dommages lui résultant de cette séduction ainsi que ceux qu'elle a encourus pour frais de gésine. Pour le motif qu'une poursuite cumulant deux causes d'action, dont l'une n'est pas susceptible d'être jugée par un jury, ne peut pas être instruite par un jury, le juge de première instance a rejeté la requête de la demanderesse pour obtenir un procès par jury. Ce jugement a été confirmé par une décision majoritaire de la Cour d'appel. La demanderesse a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être accueilli, le Juge Pigeon étant dissident.

Les Juges Fauteux, Abbott, Martland et Hall: La demanderesse fonde son action sur une séduction dolosive, et tous les montants qu'elle réclame sont réclamés à titre de dommages résultant d'un tort personnel se rattachant à cette faute. Il s'agit donc d'une action qui, suivant l'art. 421 de l'ancien *Code de procédure civile*, est susceptible d'être instruite par un juge et un jury.

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*CORAM: Les Juges Fauteux, Abbott, Martland, Hall et Pigeon.

1968

BÉDARD v. PROVENCHER

Le Juge Pigeon, *dissident*: Toute la demande n'est pas comprise dans la catégorie des litiges qui peuvent faire l'objet d'un procès par jury. La poursuite dans le cas présent est une réclamation de dommages pour séduction et aussi de frais de gésine découlant de la paternité et dus même en l'absence de séduction. Pour les frais de gésine donc, une cause distincte du délit de séduction est alléguée, la paternité. C'est une cause d'action qui n'est pas susceptible d'être instruite devant un jury.

Trial by jury—Action for seduction and for lying-in expenses—Whether plaintiff entitled to trial by jury—Civil Code, arts. 1053, 2261—Code of Civil Procedure, art. 421.

Asserting that she had been seduced by the defendant and that she had subsequently given birth to a child of which, she alleged, the defendant was the father, the plaintiff claimed a sum of $46,414.62, representing the damages resulting from this seduction as well as her lying-in expenses. The trial judge dismissed her petition to have the case heard by a jury on the ground that a trial by jury could not be had where several causes of action, of which one is not susceptible to be heard by a jury, are joined in the same suit. This judgment was affirmed by a majority judgment in the Court of Appeal. The plaintiff was granted leave to appeal to this Court.

Held: The appeal should be allowed, Pigeon J. dissenting.

Per Fauteux, Abbott, Martland and Hall JJ.: The plaintiff based her action on a dolose seduction, and all the moneys claimed are claimed as damages resulting from a personal wrong connected with this fault. This was therefore an action which was, according to art. 421 of the previous *Code of Civil Procedure,* susceptible of being tried by a judge and jury.

Per Pigeon J., *dissenting*: The whole of the demand was not included in the category of actions which can form the subject of a trial by jury. There is here a claim for damages for seduction and also one for the lying-in expenses arising from the paternity and owed even in the absence of seduction. Therefore, as to the lying-in expenses, a cause of action distinct from the delict of seduction is alleged, the paternity. That is a cause of action which is not susceptible of a trial by jury.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec, affirming a judgment of Beaudoin J. Appeal allowed, Pigeon J. dissenting.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec, confirmant un jugement du Juge Beaudoin. Appel accueilli, le Juge Pigeon étant dissident.

Raymond Beaudet, c.r., pour la demanderesse, appelante.

Jean-Louis Provencher, pour le défendeur, intimé.

Le jugement des Juges Fauteux, Abbott, Martland et Hall fut rendu par

LE JUGE FAUTEUX:—L'appelante a intenté à l'intimé une poursuite en recouvrement de dommages. Au soutien de cette action, la demanderesse déclare en substance que, par des promesses de mariage, le défendeur a réussi à la séduire et, par ses œuvres, l'a mise enceinte d'un enfant auquel elle donna naissance le 31 juillet 1963 et dont, par la suite, le défendeur a admis la paternité; elle déclare que ces promesses de mariage, qu'elle tenait pour sincères, étaient fallacieuses et qu'en fait, le défendeur l'a lâchement abandonnée dès qu'informé qu'elle était enceinte. Elle demande à ce que ce dernier soit condamné à lui payer tous les dommages, lui résultant de cette séduction, dont ceux qu'elle a dû encourir pour frais de gésine, soit un total de $46,414.62. Le défendeur contesta cette action. Au jour de l'inscription pour enquête et audition, la demanderesse, optant pour un procès par jury, présenta une requête à la Cour supérieure afin que la cause soit placée sur le rôle spécial des procès par jury.

Saisi du mérite de cette requête, M. le juge Beaudoin, s'appuyant sur les arrêts de la Cour d'appel dans *Forsyth v. Boyce*[1] et *Miss A. v. A.*[2], jugea que, dans sa poursuite, la demanderesse cumule deux causes d'action dont l'une, fondée sur l'art. 1053 du *Code Civil,* est en réclamation de dommages pour torts personnels découlant de la séduction et dont l'autre, fondée sur les dispositions de l'art. 2261 du *Code Civil,* est en recouvrement de frais de gésine; que, suivant l'art. 421 de l'ancien *Code de procédure civile,* alors en vigueur, la première réclamation est susceptible d'être instruite par un jury alors que la seconde ne l'est pas. Invoquant la règle voulant que ne peut être instruite par un jury une poursuite cumulant deux causes d'action dont l'une n'est pas susceptible d'être jugée par ce mode d'instruction, M. le juge Beaudoin déclara que la demanderesse n'avait pas droit au procès par jury et rejeta la requête avec dépens.

Porté en appel, ce jugement fut confirmé par une décision majoritaire de la Cour, alors composée de MM. les juges

[1] (1939), 67 B.R. 270.

[2] [1945] B.R. 545.

1968
BÉDARD
v.
PROVENCHER
Le Juge Fauteux

Rinfret, Taschereau et Choquette. Parlant pour lui-même et M. le juge Taschereau, M. le juge Rinfret précise que le problème à résoudre se borne à savoir si, aux termes des arts. 421 et 422 C.P.C., la demanderesse a droit à un procès par jury et si son action est véritablement une poursuite en recouvrement de dommages pour torts personnels. Ces articles se lisent comme suit:

> Art. 421. Le procès par jury peut avoir lieu dans toute action fondée sur dette, promesse ou convention d'une nature commerciale, soit entre commerçants, soit entre une partie qui est commerçante et une autre qui ne l'est pas et aussi dans toute poursuite en recouvrement de dommages résultant de torts personnels ou de délits et quasi-délits contre la propriété mobilière.
>
> Art. 422. Il y a lieu sur la demande de l'une des parties, lorsque la somme réclamée par l'action excède mille piastres.

S'appuyant sur la signification donnée aux mots *torts personnels* dans *Robinson v. Cie des Tramways de Montréal*[3], où on a dit que ces mots visent . . . *toute réclamation fondée sur une atteinte à la personne d'un autre, soit à sa vie, à son corps, à ses membres, sa santé ou sa réputation,* le savant juge déclare que, sous cette rubrique, il y a lieu d'inclure la réclamation pour séduction, mais non celle pour frais de gésine. Quant à ce qu'il faut entendre par ces mots *frais de gésine,* il réfère à l'énumération qu'en donne Sir Mathias Tellier (dissident) dans *Forsyth v. Boyce, supra,* à la page 283:

> Ce sont les frais du médecin ou des médecins dont la fille a eu besoin pour son accouchement; ceux de l'infirmière ou des infirmières; ceux de l'hospitalisation, quand il y en a eu; le coût des médicaments et, sans doute, le coût des aliments de la malade.

Ces frais que la mère peut réclamer, poursuit M. le juge Rinfret, ont été classés dans *Forsyth v. Boyce* et *Miss A. v. A., supra,* non pas comme dommages, mais comme aliments dus à l'enfant; d'où il suit que l'action qui les réclame ne peut être entendue par un jury parce que n'étant pas l'une des actions prévues à l'art. 421 C.P.C.

Dissident, M. le juge Choquette exprime ses vues comme suit:

> La question en litige est clairement exposée par mon collègue M. le juge Rinfret.

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[3] (1914), 23 B.R. 60 à 64.

1968

BÉDARD v. PROVENCHER

Le Juge Fauteux

Je suis bien d'accord que, lorsque les relations ont été librement consenties, sans dol ni promesse de mariage et sans contravention au Code pénal, les frais de gésine résultant de ces relations ne peuvent être réclamés qu'en vertu de la loi seule, et non en vertu d'un délit ou d'un tort personnel. Dans ce cas, il ne peut être question de procès par jury.

Mais si les frais de gésine et de premiers soins à l'enfant résultent d'une séduction dolosive ou d'un délit criminel, je ne vois pas pourquoi la femme ne pourrait pas les réclamer aussi à titre de dommages-intérêts découlant de ce dol ou à (sic) ce délit.

Dans le cas actuel, l'appelante fonde son action sur une séduction dolosive et tous les montants qu'elle réclame se rattachent à cette séduction. Aucune exception ni inscription en droit, totale ou partielle, ne paraissent avoir été opposées à cette action. Dans ces conditions, je ne vois pas pourquoi l'appelante se verrait refuser le bénéfice de l'article 421 C.P.

Il appartiendra évidemment au jury ou au juge, suivant le cas, de décider s'il y a eu séduction ou non, si les dommages réclamés sont une suite directe et immédiate de cette séduction et si l'action est prescrite, en tout ou en partie. Nous n'avons pas pour le moment à trancher ces questions.

Dans les circonstances, je ferais droit à l'appel avec dépens et accueillerais la requête de la demanderesse. Frais réservés.

L'appelante a obtenu la permission d'appeler de ce jugement.

La demanderesse fonde son action sur le fait d'une séduction suivie de grossesse et obtenue par des manœuvres dolosives, des promesses de mariage fallacieuses et rompues sans juste motif. Il s'agit donc, comme il est expressément ou implicitement reconnu aux raisons de jugement en Cour d'appel, d'une action fondée sur une séduction dolosive, sur la faute. Nous n'avons pas à nous demander si, lors de l'enquête et audition au mérite, la demanderesse réussira ou non à prouver cette séduction, cette faute, ou à établir que les dommages réclamés en sont une suite directe et immédiate. Au stade où en est le procès, la seule question que nous sommes appelés à décider est, ici comme en Cour d'appel et en Cour supérieure, de savoir si la demanderesse a droit à un procès par jury. Plus précisément, il s'agit de déterminer si, dans le cas d'une séduction dolosive suivie de grossesse, la femme qui en est victime peut, en droit, réclamer, à titre de dommages résultant de torts personnels, ses frais de gésine par l'action que l'art. 1053 C.C. accorde à toute personne qui, par suite de délits ou quasi-délits, subit un tort personnel ou si elle ne peut les réclamer, qu'à titre d'aliments ou autre mais non à titre de dommages,

1968

BÉDARD v. PROVENCHER

Le Juge Fauteux

par l'action qui nous vient de l'ancien droit et dont l'existence est reconnue par l'art. 2261 C.C. A la solution de cette question, je ne trouve guère d'assistance aux arrêts de *Forsyth v. Boyce* et *Miss A. v. A., supra.* Dans ces deux causes, la question qui nous occupe ne s'est pas présentée. Il s'agit, en effet, de cas, où après enquête et audition au mérite, on jugea que la preuve démontrait, non pas que la demanderesse avait été victime de manœuvres dolosives, mais qu'elle avait donné un consentement libre et volontaire aux relations sexuelles. En tel cas, assurément, la femme n'a aucun droit d'action, en vertu de 1053 C.C., pour réclamer, à titre de dommages, quoi que ce soit, frais de gésine ou autres, puisqu'elle a, elle-même, participé librement, volontairement, sans influence indue, sans dol ou sans violence, à causer l'acte d'où résulte le préjudice dont elle se plaint. Dans ce cas elle peut, cependant, recourir au droit d'action que, indifféremment du caractère de la séduction, reconnaît l'art. 2261 C.C. et réclamer, de l'auteur de sa grossesse, non pas à titre de dommages mais à titre d'aliments ou autre, les frais afférents à sa grossesse et à l'accouchement. C'est que cette action, tant en raison des motifs qui l'inspirent que de sa propre nature, n'est pas une action en dommages mais une action sanctionnant l'inobservation de l'obligation que la loi impose, à l'auteur de la grossesse, de payer les frais médicaux, pharmaceutiques, d'hospitalisation et tous autres, employés aux soins de la femme qui doit accoucher et aux premiers secours de son enfant. C'est là un recours indépendant mais dont l'existence ne touche en rien au droit de recourir à celui qui sanctionne la violation du devoir de ne pas nuire à autrui, dans les cas où sont réunies toutes les conditions de l'art. 1053 C.C. Aussi bien, et comme le peut toute personne qui, par suite de délits ou quasi-délits, subit des dommages résultant d'un tort personnel, la femme victime d'un dol ou d'un viol, par exemple, peut invoquer l'art. 1053 C.C. pour obtenir réparation complète de l'entier préjudice qu'elle en souffre, ce qui ne saurait exclure la réclamation de tous les frais que lui font nécessairement encourir sa grossesse, son accouchement et les premiers secours qu'elle doit donner à son enfant. En somme, la demanderesse, en l'espèce, fonde son action sur la faute, et tous les montants qu'elle réclame, sont réclamés à titre de dommages résultant

d'un tort personnel se rattachant à cette faute. Il s'agit donc d'une action qui, suivant l'art. 421 de l'ancien *Code de procédure civile,* est susceptible d'être instruite par un juge et un jury. A ce stade de la procédure, on ne saurait priver la demanderesse de son droit à ce mode d'instruction, en faisant appel à des situations hypothétiques qui peuvent ne pas se produire et que de toute façon, il appartiendra au juge, qui pourra être appelé à les considérer, d'en disposer suivant les prescriptions du nouveau Code de procédure si, toutefois, elles se produisaient. On ne saurait davantage faire appel aux dispositions de ce nouveau Code pour décider du mérite d'une requête présentée et jugée en Cour supérieure au temps où l'ancien Code régissait la matière, ce dont, d'ailleurs et à bon droit, les juges de la Cour d'appel et les parties se sont gardés, bien que le nouveau Code soit entré en vigueur alors que l'affaire était pendante en Cour d'appel.

En tout respect pour l'opinion contraire et d'accord avec toutes les raisons données et les réserves faites par M. le juge Choquette, je suis d'opinion qu'on aurait dû faire droit à la requête faite par la demanderesse afin que la cause soit placée sur le rôle spécial des procès par jury.

Pour ces raisons, je maintiendrais l'appel, infirmerais le jugement de la Cour d'appel et celui de la Cour supérieure, et accorderais la requête de la demanderesse-appelante. Avec dépens.

LE JUGE PIGEON (*dissident*):—Le jugement de la Cour supérieure confirmé avec une dissidence par la Cour d'appel, a refusé le procès par jury requis par la demanderesse. Dans son action, celle-ci prétend avoir été séduite par le défendeur et avoir ultérieurement donné le jour à un enfant dont elle soutient qu'il est le père. Dans les pièces de plaidoirie il est admis que les parties ont eu des relations intimes du mois de juin 1960 jusqu'à l'automne 1962 sinon davantage, et l'enfant est né le 31 juillet 1963. Au para. 14 de la déclaration, la demanderesse allègue qu'elle «a dû encourir des frais de gésine et pourvoir aux premiers besoins de son enfant» et elle réclame de ce chef des sommes qui forment un total de $1,414.62. Ensuite au para. 16, elle allègue que «par sa séduction et son lâche abandon» le défendeur lui a causé des dommages s'élevant à $45,000.

1968

BÉDARD v. PROVENCHER

Le Juge Pigeon

En conséquence, l'action réclame une somme totale de $46,414.62 que la demanderesse dit lui être due «pour injures personnelles».

Le juge de première instance a fait à ce sujet les observations suivantes:

> Il est à noter que la demanderesse réclame sous deux chefs d'action différents, soit pour frais de gésine la somme de $1,414.62, soit pour dommages encourus à la suite de la séduction le montant de $45,000.
>
> Le Tribunal croit qu'il faut distinguer entre le recours pour frais de gésine, qui trouve sa source dans la loi et est d'une nature alimentaire, et celui pour dommages à la suite de séduction qui résulte d'un délit ou quasi-délit. Bien que la mère puisse poursuivre personnellement pour séduction et frais de gésine, il reste que cette dernière réclamation concerne d'abord l'enfant et que s'il ne s'agit pas à proprement parler d'aliments que l'enfant puisse demander, mais d'une assistance, le recours est toutefois indépendant de celui que la mère pourrait prétendre pour elle-même à la suite de la séduction (ANDRÉ NADEAU, Traité de Droit Civil du Québec, Vol. 8, pp. 174 et seq., Nos. 191 et seq., FORSYTH v. BOYCE (1939) 67 B.R. 270—les juges Tellier et Rivard dissidents; MISS A. v. A., 1945 B.R. 545).

Ce raisonnement me paraît inattaquable et conforme à une jurisprudence bien établie quant à la nature du recours pour frais de gésine. Depuis longtemps les tribunaux du Québec décident uniformément que la fille-mère peut exercer ce recours contre le père de son enfant, qu'elle ait été séduite ou non. Il ne paraît pas nécessaire de statuer dans la présente cause si, au cas de séduction, les frais de gésine sont susceptibles d'être réclamés à titre de dommages découlant du délit au lieu de l'être à titre d'aliments dus par le fait de la paternité. Dans le cas présent, l'action de la demanderesse les réclame clairement à ce second titre. Même en admettant qu'ils y soient également réclamés alternativement à titre de dommages, il n'en reste pas moins certain que, pour ce qui est des frais de gésine, l'action est rédigée de façon que le tribunal devra les accorder à titre d'aliments s'il en vient à la conclusion que le défendeur est le père de l'enfant même si la séduction n'est pas prouvée ou s'ils n'en découlent pas. A l'audition, le procureur de l'appelante n'a pas nié que telle soit la nature de la demande. Il faut donc dire que la poursuite que l'on veut faire instruire devant un jury est une réclamation de dommages pour séduction et aussi de frais de gésine découlant de la paternité de l'enfant et dus même en l'absence de séduction.

La jurisprudence sur le droit au procès par jury dans la province de Québec est fixée dans le sens que pour qu'une cause soit susceptible d'être ainsi instruite, il est nécessaire que toute la demande soit comprise dans la catégorie des litiges qui peuvent faire l'objet de ce genre de procès. Aucun des juges de la Cour du banc de la reine n'a mis en doute ce principe que le juge de première instance applique en citant l'arrêt de la Cour d'appel dans *Lacoste c. Dame Emrick*[4].

Plus que cela, le juge dissident ne nie pas que les frais de gésine dus par le père en l'absence de séduction soient recouvrables «en vertu de la loi seule, et non en vertu d'un délit ou d'un tort personnel». Il ajoute même: «dans ce cas il ne peut être question de procès par jury». Le seul motif de sa dissidence c'est qu'à son avis dans la présente instance, l'appelante fonde son action «sur une séduction dolosive et tous les montants qu'elle réclame se rattachent à cette séduction». C'est là où je ne puis le suivre. Le plus que l'on puisse dire c'est, comme on l'a vu, que la demanderesse les réclame également du chef de la séduction tout en les réclamant aussi du chef de la paternité. Devant la déclaration rédigée comme elle l'est le tribunal, s'il en vient à la conclusion qu'il n'y a pas séduction ou que les frais de gésine n'en découlent pas mais que par ailleurs la paternité est prouvée, devra nécessairement accueillir l'action pour ceux des montants réclamés à titre de frais de gésine qui seront prouvés et jugés recouvrables à ce titre. La Cour ne pourra certainement pas rejeter l'action en entier dans de telles circonstances.

Il me paraît à propos ici d'expliquer pourquoi il n'est pas impossible en la présente instance que les frais de gésine ne découlent pas de la séduction même si elle est prouvée de même que la paternité. C'est qu'il est admis qu'il s'est écoulé presque deux ans et demi entre les premières relations et le début de la grossesse. Même si les premières relations ont été obtenues par séduction, il peut se faire que celles qui ont provoqué la grossesse doivent être considérées comme ayant été librement consenties et constituent par conséquent une cause distincte (*novus actus interveniens*).

[4] [1960] B.R. 1144.

1968

BÉDARD v. PROVENCHER

Le Juge Pigeon

Cela seul suffirait à démontrer conclusivement que pour les frais de gésine, une cause d'action distincte du délit de séduction est alléguée, savoir la paternité. Cette cause d'action n'est pas un délit et, ainsi qu'on est unanime à le dire en Cour d'appel comme en première instance, elle n'est pas une cause d'action susceptible d'être instruite devant un jury.

Suivant l'art. 427 du Code de procédure en vigueur lors de la demande de procès par jury en cette cause le juge le présidant, s'il était accordé, devrait obligatoirement, comme l'ordonne encore l'art. 371 du nouveau Code, formuler les questions auxquelles le jury serait appelé à répondre. Selon l'usage invariable, ces questions sont toujours formulées de façon à demander une réponse appropriée dans chaque alternative impliquée dans la contestation. Ici après avoir demandé comme première question s'il y a eu séduction et naissance d'un enfant en conséquence le juge ne pourrait pas omettre de prévoir la possibilité d'une réponse négative, il ne pourrait pas dire: «C'est une situation hypothétique qui peut ne pas se produire?» C'est une alternative que la contestation l'oblige à considérer. Or il ne pourrait certainement pas demander au jury dans cette alternative de dire si le défendeur est le père d'un enfant pour la naissance duquel la demanderesse a subi des frais de gésine. Ce n'est pas une question susceptible d'être soumise à un jury. Va-t-on dire que le juge devrait alors retirer la cause du jury et la juger seul? C'est ce que l'ancien Code ne permettait pas et ce serait contraire à l'interprétation uniformément donnée à la loi régissant les procès par jury dans la province de Québec depuis leur introduction en 1785.

Une revue de la jurisprudence du Québec sur le droit au procès par jury fait voir que, dès 1856, on décidait en revision qu'une action en déclaration de paternité et dommages n'est pas susceptible de ce mode d'instruction. *Clarke c. McGrath*[5]. Cela n'est pas sans importance car, depuis la première loi à ce sujet en 1785 (25 Geo. III, c. 2, art. 9) jusqu'au nouveau *Code de procédure civile* mis en vigueur le 1er septembre 1966, l'expression employée dans la version

[5] (1856), 1 L.C.J.5.

anglaise pour décrire la seule catégorie de recours où cette demande peut être comprise a été substantiellement la même: «damages on personal wrongs». Le statut de 1785 disait en français «dommages dans (les actions) d'injures personnelles». Les Statuts refondus du Bas-Canada 1860 disent: «torts personnels qui doivent être compensés en dommages»—«personal wrongs proper to be compensated in damages»; le Code de procédure de 1867 et celui de 1897: «dommages résultant de torts personnels»—«damages resulting from personal wrongs»; le nouveau *Code de procédure civile*: «dommages à la personne»—«damages resulting from personal injuries» (art. 332).

Il faut noter que lorsque la législature a édicté le Code de procédure de 1897 elle a reproduit sans changement le texte antérieur à une époque où la jurisprudence était bien fixée dans le sens que le droit au procès par jury n'existe que si toute la demande est susceptible de ce mode d'instruction. La loi du Québec sur l'interprétation des statuts ne renferme pas, comme celle du Canada et de la plupart des provinces, une disposition décrétant que le Parlement n'est pas censé adopter l'interprétation jurisprudentielle en réédictant un texte législatif. Par conséquent, il faut considérer que la répétition du texte sans modification consacre définitivement l'interprétation donnée par les tribunaux. Dans *La Malbaie c. Boulianne*[6], le juge Rinfret (avant de devenir juge en chef) disait à pp. 389-390:

> Pendant que la jurisprudence et la pratique de la province de Québec s'affirmaient ainsi avec persistance, le Code Municipal a été complètement refondu en 1916. C'est le code que nous avons actuellement. A cette époque, les décisions de nos tribunaux avaient invariablement interprété l'article 743 du code (maintenant l'article 670) de la façon que nous avons montrée; et cependant, en 1916, la législature n'a pas modifié le texte de l'article dans le but d'indiquer une intention contraire à celle que lui avait donnée la jurisprudence.
>
> A cet égard, nous tenons à référer à ce que dit le Conseil Privé, dans la cause de *Casgrain v. Atlantic and North-West Railway Co.* (1895 A.C. 282, at 300):
>
> Their Lordships cannot assume that the Dominion Legislature, when they adopted the clause verbatim in the year 1888, were in ignorance of

[6] [1932] R.C.S. 374.

1968

BÉDARD v. PROVENCHER

Le Juge Pigeon

the judicial interpretation which it had received. It must, on the contrary, be assumed that they understood that sect. 12 of the Canadian Act must have been acted upon in the light of that interpretation. In these circumstances their Lordships, even if they had entertained doubts as to the meaning of sect. 12 of the Act of 1888, would have declined to disturb the construction of its language which had been judicially affirmed.

Ce principe a été de nouveau réaffirmé, de façon encore plus précise, si possible, par le Conseil Privé, dans la cause de *Webb v. Outrim* (1907 A.C. 80, at 89), où nous trouvons ce passage, que nous extrayons du jugement prononcé par le Lord Chancelier, The Earl of Halsbury:

It is quite true, as observed by Griffith C.J., in the above-mentioned case of *D'Emden v. Pedder* (1903, I Commonwealth L.R. 91, at 110) that: "When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

Il faut souligner que refuser le procès par jury en cette cause ce n'est pas priver la demanderesse d'un droit. Au Québec ce mode d'instruction n'est pas la règle mais l'exception. On n'y a droit que dans les cas prévus; si la demande est telle qu'elle n'entre pas en entier dans les catégories énumérées, ce droit n'existe pas. Nous n'avons pas à nous demander s'il est possible de formuler une action pour séduction de façon à ne pas y inclure une demande de frais de gésine sans séduction dolosive, il suffit de constater que l'action dont il s'agit n'est pas ainsi formulée.

Je conclus donc au rejet de l'appel mais sans frais vu la nature du litige, les faits admis ou prouvés par écrit et la réprobation qu'il convient de manifester à l'égard de l'étalage dans la défense de détails sordides manifestement destinés à accabler la femme à laquelle le défendeur a pendant plus de deux ans et demi chanté son amour et dont il a pendant tout ce temps reçu les faveurs.

Appel accueilli avec dépens, LE JUGE PIGEON *étant dissident.*

Procureurs de la demanderesse, appelante: Beaudet & Gratton, Victoriaville.

Procureur du défendeur, intimé: J. L. Provencher, Victoriaville.

ANNIE HAYDUK (*Plaintiff*) .....APPELLANT;

AND

MARY WATERTON and KATE FLICHUK, Executrices of the Estate of Kost Sereda, and ELIZABETH SEREDA, Executrix of the Estate of Andrew H. Sereda, and JOHN SEREDA, and ANNA SEREDA, and TOBY SEREDA, and ISABELLE L. McCLAIN, and KATHERINE FLECHUK (also Flichuk), and MARY WATERTON and JAMES WATERTON and PRUDENTIAL TRUST COMPANY LIMITED (*Defendants*) .....RESPONDENTS.

1967
*Oct. 25, 26, 27
1968
June 6

KATHERINE FLECHUK (otherwise known as KATE FLICHUK), MARY WATERTON and JAMES E. WATERTON (*Plaintiffs*) .....APPELLANTS;

AND

MARY WATERTON and KATE FLICHUK, Executrices of the Estate of Kost Sereda, ELIZABETH SEREDA, Executrix of the Estate of Andrew H. Sereda, JOHN SEREDA, ANNA SEREDA, TOBY SEREDA, ISABELLE L. McCLAIN and PRUDENTIAL TRUST COMPANY LIMITED (*Defendants*) ..RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Father transferring land to son—Encumbrance executed by son—"Liferent" to father and on death of father equal remainder interest to each of three daughters and son—Son leasing petroleum and natural gas rights with consent of father and daughters—Whether father entitled to receive royalties paid pursuant to lease as his own income during his lifetime.

In 1943, K, the registered owner of a quarter section of land reserving coal, transferred this land to his son A. At the same time A executed an encumbrance which gave K and his wife and the survivor of them a "liferent" in the land, with an equal remainder interest to each of their three daughters (the female appellants) and A. A petroleum and natural gas lease which A entered into with C S Co., following the discovery of oil in the area in 1947, provided that the lessor was to receive a royalty of 12½ per cent on production. K consented to the lease but no consent thereto was obtained by A from his three sisters. They contested the validity of the lease but later a settlement was effected and they ratified the lease. In 1948 K assigned various

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

1968

HAYDUK
v.
WATERTON
et al.

FLECHUK
(otherwise
FLICHUK)
et al.
v.
WATERTON
et al.

portions of the royalty to his son J and members of J's family and A, and, later in the same year, he entered into a royalty trust agreement with a trust company. In 1952 K made assignments to two of his daughters.

Drilling on the land was successful and oil and gas came into production. The royalties were paid to the trust company and were disbursed by it to K and to his various assignees, according to their interests, until June 14, 1957, when K purported to revoke the assignments which he had made in favour of J and members of J's family. Thereafter, no payments were made to them and the moneys were accumulated, until April 20, 1959, in a fund known as Fund 1. The trust company obtained an interpleader order on March 13, 1958, respecting the moneys affected by the purported revocation. Pleadings were filed but the action was not proceeded with to judgment.

The other moneys received by the trust company, not affected by the revocation, were paid out until April 20, 1959. At that time the trust company was advised of a dispute as to K's right to receive or dispose of the royalties. An interpleader order was obtained on June 9, 1960, and this gave rise to two actions which were tried together. Since April 20, 1959, the trust company ceased all payments, and the entire royalty payments received by it were all accumulated in a second fund, known as Fund 2.

K died in 1961, having been predeceased by his wife in 1945.

The submission of the appellants was that K never, at any time, had the right to receive or dispose of the 12½ per cent royalty payable under the C S lease. It was contended that, under the provisions of the encumbrance, he had only a "liferent", thereby being in the position of a tenant for life. As such, he was not entitled to the proceeds, received by way of royalty, from the lease of the petroleum substances, because such receipts were capital and not income, and, therefore, rightly belonged to the remaindermen.

The trial judge, while acknowledging that the term "liferent" conveys the conception of a life tenancy and that normally the proceeds of a royalty would not be included, found as a fact that K's family had agreed that K should be entitled to receive the royalties paid pursuant to the lease as his own income during his lifetime. Accordingly, he dismissed both actions. The Appellate Division of the Supreme Court of Alberta held that he was justified in making this finding and agreed with his reasons. Appeals in the two actions were then brought to this Court.

Held (Cartwright C.J. dissenting): The appeals should be dismissed.

Per Martland, Judson, Ritchie and Spence JJ.: In essence what had occurred here was the creation of a trust by K, with A as trustee, of which the beneficiaries were K and his wife, A and the three appellants. K, the settlor, reserved to himself a "liferent" and some additional benefits. The meaning of the word "liferent" in the encumbrance was ambiguous and in determining what the parties meant by that term it was proper to consider the evidence as to what had subsequently occurred. As held by the Courts below, the members of K's family had agreed as to his right to the royalties. This was not, therefore, a matter of acquiescence by a beneficiary in a breach of

trust by a trustee. It was a matter of agreement by all parties as to the intention of a settlement agreement which provided for their interests in the land.

Campbell v. Wardlaw (1883), 8 App. Cas. 641; *Gowan v. Christie* (1873), L.R. 2 H.L. Sc. & Div. 273; *McColl Frontenac Oil Co. Ltd. v. Hamilton*, [1953] 1 S.C.R. 127; *Berkheiser v. Berkheiser and Glaister*, [1957] S.C.R. 387; *Watcham v. Attorney-General of East Africa Protectorate*, [1919] A.C. 533, referred to.

Per Cartwright C.J., *dissenting*: It was the duty of the trustee to hold the proceeds of the royalties as forming part of the capital of the trust, to invest them, to pay the income from the investments to K during his lifetime and on his death to distribute the capital amongst the remaindermen. It was not proved that the appellants had entered into a binding agreement the effect of which was to alter the rights of the parties so that K became entitled to receive as his own the whole of the royalties so long as he lived. The evidence established only that after the discovery of oil, the parties were in doubt as to what were the true rights of K in respect of the royalties, that he took the view that he was entitled to receive them as his own and that the three appellants acquiesced in this primarily because they "did not wish to disturb or upset their father".

The payments of the royalties to K as if he was entitled to them for his own use were breaches of trust but breaches in which each of the appellants acquiesced. A beneficiary who has consented to a breach of trust may retract the consent so given at any time before the consent has been acted upon. In regard to the money in the two funds, whatever consent had been given by the three appellants was withdrawn before it was acted upon and those moneys remained in the hands of the trust company.

APPEALS from judgments of the Supreme Court of Alberta, Appellate Division, affirming the decision at trial dismissing two actions which arose out of the same facts and were tried together. Appeals dismissed, Cartwright C.J. dissenting.

J. C. Cavanagh, Q.C., and *R. J. Biamonte*, for the plaintiff, appellant, Annie Hayduk.

Terence Sheard, Q.C., and *Gordon S. D. Wright*, for the plaintiffs, appellants, Katherine Flechuk *et al.*

W. A. Stevenson, for the defendant, respondent, Elizabeth Sereda.

J. T. Joyce and *J. A. Hustwick*, for the defendants, respondents, John Sereda *et al.*

J. J. Stratton and *G. A. I. Lucas*, for the defendant, respondent, Prudential Trust Co. Ltd.

1968

HAYDUK v. WATERTON et al.

FLECHUK (otherwise FLICHUK) et al. v. WATERTON et al.

Cartwright C.J.

THE CHIEF JUSTICE (*dissenting*):—The relevant facts, the course of the proceedings in the Courts below and the questions raised in these appeals are set out in the reasons of my brother Martland which I have had the advantage of reading.

I agree that the appellants cannot successfully question the payments made by Andrew Sereda and later by the Prudential Trust Company Limited out of the proceeds of the royalties derived from the sale of the oil found in the land described in the "encumbrance" dated August 24, 1943, executed under seal by Andrew Sereda. Each of the appellants was well aware that these payments were being made and acquiesced therein.

I have, however, reached a different conclusion as to the rights of the parties in regard to the two funds held by the Trust Company pending the result of the proceedings in relation thereto.

As a matter of construction, it is my opinion, as it was that of the learned trial judge, that the legal effect of the "encumbrance" was as follows: Andrew Sereda remained the owner in fee simple of the legal estate in the lands which Kost Sereda had conveyed to him and held the same in trust for the benefit of Kost Sereda and Eva Sereda as life tenants with remainder in fee of one-quarter share each for himself, the appellant Annie Hayduk, the appellant Katherine Flechuk and the appellant Mary Waterton. Whatever meaning the draftsman or Andrew Sereda intended should be given to the word "liferent" I am unable to find any ground for holding that it conferred on Kost Sereda rights higher than those of a tenant for life.

The "encumbrance" also contained provisions for additional payments for the support of Kost Sereda and Eva Sereda during their lifetime but these provisions do not require further consideration. It is established that the proceeds of oil extracted from land form, as between the life tenants and the remaindermen, capital and not income. I find nothing in the words of the "encumbrance" to justify a departure from that rule. It was therefore the duty of the trustee to hold the proceeds of the royalties as forming part of the capital of the trust, to invest them, to pay the income from the investments to Kost Sereda during his lifetime and on his death to distribute the capital amongst the remaindermen.

The difficult question is whether the appellants entered into a binding agreement the effect of which was to alter the rights of the parties so that Kost Sereda became entitled to receive as his own the whole of the royalties so long as he lived. If such an agreement were in fact entered into between Kost Sereda, Andrew Sereda and the three appellants, the Courts would, in my opinion, give effect to it as a family arrangement, the agreement by each of the remaindermen to give up his or her share of the royalties being a sufficient consideration for the similar agreement made by the others. For this reason, I do not think that if the making of such an agreement was proved the argument that the appellant Annie Hayduk received no consideration would avail.

However, on a consideration of the evidence and of the reasons of the learned trial judge, I have reached the conclusion that it was not proved that any such agreement was made. It seems to me that the evidence establishes only that, after the discovery of oil, the parties were in doubt as to what were the true rights of Kost Sereda in respect of the royalties, that he took the view that he was entitled to receive them as his own and that the three appellants acquiesced in this primarily because they "did not wish to disturb or upset their father".

The Court of Appeal disposed of the matter at the conclusion of the argument of counsel for the appellants without calling on counsel for the respondents, as follows:

> The learned trial judge found as a fact that there was an agreement among the members of the family that the proceeds from the lease should belong to the father for his lifetime.
>
> We all agree that the learned trial judge was justified on the evidence in coming to the conclusion which he did. We have come to the same conclusion and concur in his reasons.

It is therefore necessary to examine the findings of fact in this regard made by the learned trial judge. These are contained in the passage in his reasons quoted by my brother Martland and which, as a matter of convenience, I shall repeat:

> Now, I think one must now bear in mind a situation that existed in fact. At the time this happened it is clear, I think, that the parties who in 1943 when this family arrangement was arrived at and who were not thinking of oil and gas rights, now in 1947 know that such rights do exist and that they are valuable, and it was wondered just what would be done about it, the family, I am sure, feeling that father was entitled to the natural income from the land, and which was all they had been thinking

1968

HAYDUK v. WATERTON et al.

FLECHUK (otherwise FLICHUK) et al. v. WATERTON et al.

Cartwright C.J.

about to start with, reached the conclusion that during his lifetime he would be equally entitled to the proceeds of the royalty to deal with as he saw fit during his lifetime in the same fashion as he would deal with and was entitled to deal with the normal farm income that had been thought of in the original instance. This I think happened.

and in the following passage:

> In this case it is obvious that Kost and Andrew certainly, that is the trustee and the donor under the original trust, treated the royalty as if it fell within the conception of income, and therefore available to Kost during his lifetime. The documentation they entered into makes that clear. It seems to me clear too from the documentation that the plaintiffs Mary Waterton and Katherine Flechuk entered into bear this same concept out. The plaintiff Annie Hayduk has not signed documentation to this effect. Her evidence, however, is before us from discoveries that were read and from them it appears abundantly clear that she was aware from the outset or virtually so that her father was dealing with the royalty as something in which he himself had a life interest, and she explains not having taken exception by saying that she did not want to disturb or upset her father. From the evidence of the other daughters that was put in this same idea is conveyed in addition to the documents they signed that "Well, we are not going to disturb father". Now, to me this conveys what I think to be and find to be the fact, that this whole family had agreed to the proposition, and the reason why Mrs. Hayduk would not want to kick up a row and not hurt father is that, having agreed to a proposition as a family deal, it would certainly hurt father to find that members of the family were now trying to break it down. I am, therefore, of the conclusion that though an explanation is now given, that it was only because "We didn't want to hurt father", that no action was taken contrary to his, was because in fact the family were in agreement and understood the situation to be, that Kost understood it to be such and acted upon that understanding.

The first of these passages does not appear to me to be a finding that the appellants agreed to give up their rights under the trust document but rather that they had concluded, mistakenly, that their father was entitled to the royalties for his own use during his lifetime.

The second passage goes farther than this and is, I think, a definite finding by the learned trial judge that an agreement was made.

It is with hesitation that I differ from a finding of fact made by the trial judge and concurred in by the Court of Appeal but the finding which he has made does not rest on the evidence of any witness who says that an agreement was reached. It is an inference which he draws from all the evidence; but that evidence does not appear to me to amount to more than this, that for several years none of the appellants objected to their father receiving the royalties as his own. This is not in my opinion sufficient to

support a finding that they must have agreed that he was going to be entitled to receive the royalties for the rest of his life.

The only basis on which the judgment can be supported is that there was a concluded agreement in the nature of a family settlement. For such an agreement to be binding it must appear that all of the parties to the settlement are bound. In my opinion, the evidence does not warrant an inference that the appellant Annie Hayduk agreed, even if it could be said that it was sufficient to support an inference that the appellants Mary Waterton and Katherine Flechuk did agree.

In my view, the payments of the royalties to Kost Sereda as if he was entitled to them for his own use were breaches of trust but breaches in which each of the appellants acquiesced. The law is clear that a beneficiary who has consented to a breach of trust may retract the consent so given at any time before the consent has been acted upon. In regard to the moneys in the two funds, whatever consent had been given by the three appellants was withdrawn before it was acted upon and those moneys remain in the hands of the Trust Company.

For these reasons, I have reached the conclusion that the appeal should be allowed and that judgment should be entered declaring that each of the appellants is entitled to a one-quarter share in the two funds held by the Prudential Trust Company Limited except such parts thereof as represent interest on the investment of the moneys received by way of royalties.

As the other members of the Court do not share my view, it is not necessary for me to consider what order should be made as to costs or whether any directions for an accounting are necessary.

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

MARTLAND J.:—These two actions, which arise out of the same facts, were tried together. The plaintiffs in both actions are appealing from judgments of the Appellate Division of the Supreme Court of Alberta, which affirmed the decision at trial dismissing both actions.

The facts giving rise to these proceedings are as follows: Prior to August 24, 1943, Kost Sereda, the father of the three female appellants, who are hereinafter referred to as

1968

HAYDUK v. WATERTON et al.

FLECHUK (otherwise FLICHUK) et al. v. WATERTON et al.

Martland J.

"the appellants", was the registered owner, in fee simple, of the South-East Quarter of section 19, township 50, range 26, West of the Fourth Meridian, in the Province of Alberta, reserving to the Canadian Pacific Railway Company all coal. This land is hereinafter referred to as "the land".

On August 24, 1943, he transferred the land to his son, Andrew. Prior to that time he and his wife had farmed the land. He had previously also owned another farm, which had been transferred, some years before, to his son, John. At the time of the transfer of the land to Andrew, Kost was over 83 years of age.

On the same date that the land was transferred, Andrew executed an encumbrance of the land and of a lot in the townsite of Calmar. It provided as follows:

I, Andrew H. Sereda, of the City of Prince Albert, in the Province of Saskatchewan, Fur Trader, being the owner of an estate in fee simple in the following lands and premises, namely:

(1) The South East Quarter of Section Nineteen (19) in Township Fifty (50) Range Twenty six (26) West of the 4th Meridian in the Province of Alberta containing 160 acres more or less Reserving all coal on or under the said land to the Canadian Pacific Railway Company;

(2) Lot Twelve (12) in Block One (1) Plan 4250 E.O. of the Townsite of Calmar registered in the Land Titles Office for the North Alberta Land Registration District;

And desiring to render the said land available for the purpose of securing to and for the benefit of:

(1) Kost Sereda of Calmar in the Province of Alberta and Eva Sereda his wife and the survivor of them of the liferent of the said lands;

(2) The said Kost Sereda and Eva Sereda and the survivor of them such moneys in addition as they and the survivor may require to support them in comfort during the lifetime of both and the survivor;

(3) Kate Flechuk, Mary Waterton and Annie Hayduk, the natural and lawful daughters of the said Kost and Eva Sereda equally three fourths of the said lands or their equivalent value after deduction of the moneys referred to in the next paragraph;

(4) From the encumbrance in favour of the said daughters there shall be deducted three fourths of any moneys with interest at 6% per annum in addition to the said lands liferents the said Andrew H. Sereda may have expended or paid out to or on behalf of the said Kost Sereda and Eva Sereda, and also a further sum of Three hundred ($300.00) Dollars;

The said Andrew H. Sereda doth encumber the said lands with the liferent of the said Kost Sereda and Eva Sereda and the survivor;

The said Andrew H. Sereda doth further encumber the said lands with such moneys as during the lifetime of the said Kost Sereda and Eva Sereda in addition to the said liferent of lands they may require to support them in comfort;

The said Andrew H. Sereda doth further encumber the said lands so that on the death of the said Kost and Eva Sereda the said Kate Flechuk, Mary Waterton and Annie Hayduk shall receive equally between them each a one fourth interest in the said lands as owners in fee simple, subject to a charge against the said of any moneys with interest at 6% per annum paid out by me the said Andrew H. Sereda in addition to the said liferent for the maintenance in comfort of the said Kost & Eva Sereda; and a sum of Three hundred ($300.) Dollars payable to me the said Andrew H. Sereda by the said Kate Flechuk, Mary Waterton and Annie Hayduk out of the interest in the said land now encumbered in their favour.

And subject as aforesaid the said Incumbrancees shall be entitled to all the powers and remedies given to an Encumbrancee.

Kost and his wife filed a caveat, giving notice of their interest under the encumbrance.

It would appear that Kost, feeling that he could not, at his age, continue to farm the land, disposed of it in favour of his son, Andrew, and of his three daughters, at the same time making provision for the support of his wife and himself, while they lived.

Kost's wife, Eva, died in 1945.

At the time the transfer and the encumbrance were made, it seems clear that no one then contemplated the possible value of the minerals underlying the land. Oil production in the Leduc area, where the land is situate, did not occur until 1947.

In that year, on February 8, Andrew entered into a petroleum and natural gas lease with The California Standard Company (hereinafter referred to as "California Standard"), and on February 11 Kost executed a consent to the lease. The term of this lease was for ten years and if, within that time, drilling operations were commenced, thereafter until all the petroleum, natural gas and other hydrocarbons, other than coal, or any of them, had been fully recovered. A "royalty and rental" of 12½ per cent of gross production of petroleum and natural gas, or its market value equivalent, was provided to be paid to the lessor.

On April 16, 1947, Andrew reconveyed the surface of the land to his father.

1968

HAYDUK v. WATERTON et al.

FLECHUK (otherwise FLICHUK) et al. v. WATERTON et al.

Martland J.

No consent to the lease had been obtained by Andrew from his three sisters, the appellants. On October 23, 1947, they commenced an action contesting the validity of the lease.

On November 7, 1947, the appellants entered into an agreement with George Cloakey, under which they received from him the sum of $5,000. He was granted an option to acquire a lease of the appellants' interest in the petroleum, natural gas and other hydrocarbons, other than coal, (hereinafter referred to as "petroleum substances"). It was also agreed that, if he could make a settlement with California Standard, the appellants would affirm the existing lease to that company in consideration of their receiving $75,000 in cash, and a further $75,000 out of production from the land.

This agreement stipulated that

> neither the consent, approval, ratification or affirmation of the said Standard Lease nor anything done or received by the Optionors under the provisions of this Agreement shall operate in any way to hinder, defeat, delay or prejudice the rights, remedies and powers of the Optionors against the said ANDREW H. SEREDA to claim, take or receive a share or interest in the royalty to be payable to the said ANDREW H. SEREDA under the said Standard Lease or any other lease affecting the optioned area under and by virtue of the encumbrance annexed as Schedule "A" hereto.

A settlement was effected on September 22, 1948, by an agreement made by the California Standard Company, the appellants, and three other oil companies, which companies acquired one-half of the lessee's interest in the California Standard lease. The appellants ratified that lease. They agreed to the obtaining of a consent judgment in the proceedings which concerned the validity of that lease, declaring the lease to be valid "and to be a first charge upon all the interest of the said Andrew H. Sereda, the said Kost Sereda and the Claimants (the appellants) in the petroleum and natural gas underlying the said lands".

This agreement also contained a saving clause, much less broad in its terms than the one quoted above from the Cloakey agreement, and containing no reference to any interest in royalty under the California Standard lease. It read:

> Nothing herein contained shall operate in any way to hinder, delay, defeat or prejudice any rights the Claimants may have against the said

Andrew H. Sereda with respect to the lands, the subject of this Agreement, or the petroleum and natural gas underlying the same.

The appellants duly received from the three oil companies the two sums of $75,000 provided for in their agreement with George Cloakey.

The following month, Kost Sereda, on October 30, executed four documents, each called an "Assignment of Life Interest in Oil Royalty", which granted to each of the four assignees a portion of the royalty payable under the California Standard lease. Reference was made in the recitals to the encumbrance, dated August 24, 1943, and to the lease.

Each assignment also recited that:

> AND WHEREAS it was further provided in the said Incumbrance that on the death of the Assignor and his said wife, Kate Flechuk, Mary Waterton and Annie Hayduk, natural and lawful daughters of the Assignor, shall receive equally between them each a one-fourth (1/4th). interest in the said lands as owners in fee simple, subject to certain cash payments therein set forth, the remaining one-fourth (1/4th) interest to be held by the said Andrew H. Sereda.
>
> . . .
>
> AND WHEREAS the Assignor is by virtue of the provisions of the said Incumbrance entitled to all income which may be derived from the said lands during the remaining years of his life and therefore is entitled to all of the said royalty payable under the said Indenture of Lease and is accordingly possessed of and the owner of the gross royalty of twelve and a half percent (12½%), of the total production from any well or wells that may be drilled upon the said lands or any part thereof for life,

By these assignments Kost Sereda assigned, out of the 12½ per cent royalty, to his son, John, 3 per cent; to John, in trust for John's son, Toby, 1½ per cent; to John's wife, Anna, 2 per cent; and to his son, Andrew, 3 per cent, making a total, in all, of 9½ per cent.

On November 23, Kost Sereda entered into a royalty trust agreement with the Prudential Trust Company, Limited (hereinafter referred to as "the Trust Company"), under the terms of which the Trust Company assumed the obligation of receiving payment of the royalties paid pursuant to the lease, and of disbursing the same to the parties interested. This agreement was afterwards ratified by the assignees under the four assignments abovementioned.

1968

HAYDUK v. WATERTON et al.

FLECHUK (otherwise FLICHUK) et al. v. WATERTON et al.

Martland J.

On September 22, 1956, Anna Sereda assigned ½ of 1 per cent royalty to her daughter, Isabelle L. McClain, and on the same date Toby Sereda assigned ¼ of 1 per cent royalty to the same assignee.

In 1952, Kost Sereda made an undated assignment of 1 per cent to his daughter, the appellant Mrs. Waterton, and on July 28 of that year also made a like assignment in favour of his daughter, the appellant Mrs. Flichuk.

Mrs. Waterton, on September 8, 1952, directed that half of her share be paid to her son, James Waterton.

Each of the assignments to Mrs. Waterton and to Mrs. Flichuk was signed by the assignee as well as by Kost Sereda, and each provided that:

> I the Transferee hereby agree to accept the said Royalty subject to the terms, conditions and provisions set forth in the Trust Agreement under which the same is issued.

Drilling on the land was successful and oil and gas came into production. The royalties were paid to the Trust Company and were disbursed by it to Kost Sereda and to his various assignees, according to their interests, until June 14, 1957, when Kost Sereda purported to revoke the assignments which he had made in favour of John Sereda, John's wife, Anna, and son, Toby. Thereafter, no payments were made to them or to persons claiming through them. The moneys were accumulated, until April 20, 1959, in a fund known as Fund 1.

The Trust Company obtained an interpleader order on March 13, 1958, respecting the moneys affected by the purported revocation. Pleadings were filed, but the action has not been determined.

The other moneys received by the Trust Company, not affected by the revocation, were paid out until April 20, 1959. At that time the Trust Company was advised of a dispute as to Kost Sereda's right to receive or dispose of the royalties. An interpleader order was obtained on June 9, 1960, which is the basis of the present proceedings. Since April 20, 1959, the Trust Company ceased all payments, and the entire royalty payments received by it have all been accumulated in a second fund, known as Fund 2.

Andrew Sereda died on September 4, 1959. His wife, Elizabeth, is the executrix of his estate.

Kost Sereda died on September 28, 1961, at the age of 101. The appellants, Mrs. Waterton and Mrs. Flichuk, are the executrices of his estate.

The learned trial judge made the following findings of fact, which are fully supported by the evidence:

> In this case it is obvious that Kost and Andrew certainly, that is the trustee and the donor under the original trust, treated the royalty as if it fell within the conception of income, and therefore available to Kost during his lifetime. The documentation they entered into makes that clear. It seems to me clear too from the documentation that the plaintiffs Mary Waterton and Katherine Flechuk entered into bear this same concept out. The plaintiff Annie Hayduk has not signed documentation to this effect. Her evidence, however, is before us from discoveries that were read and from them it appears abundantly clear that she was aware from the outset or virtually so that her father was dealing with the royalty as something in which he himself had a life interest, and she explains not having taken exception by saying that she did not want to disturb or upset her father. From the evidence of the other daughters that was put in this same idea is conveyed in addition to the documents they signed that "Well, we are not going to disturb father."

The submission of the appellants is that Kost Sereda never, at any time, had the right to receive or dispose of the $12\frac{1}{2}$ per cent royalty payable under the California Standard lease. It is contended that, under the provisions of the encumbrance, he had only a "liferent", thereby being in the position of a tenant for life. As such, he was not entitled to the proceeds, received by way of royalty, from the lease of the petroleum substances, because such receipts were capital and not income, and, therefore, rightly belonged to the remaindermen.

The learned trial judge, while acknowledging that the term "liferent" conveys the conception of a life tenancy and that normally the proceeds of a royalty would not be included, found as a fact that the Sereda family had agreed that Kost Sereda should be entitled to receive the royalties paid pursuant to the lease as his own income during his lifetime. Accordingly, he dismissed both actions.

The Appellate Division of the Supreme Court of Alberta held that he was justified in making this finding and agreed with his reasons.

On the appeal before this Court, the position taken by the appellant Mrs. Hayduk differed from that taken by the appellants Mrs. Waterton and Mrs. Flichuk. On behalf of the former, it was contended that she was entitled to

1968

HAYDUK v. WATERTON et al.

FLECHUK (otherwise FLICHUK) et al. v. WATERTON et al.

Martland J.

recover from the respondents 25 per cent of all the royalties realized from the lands. Counsel for the latter two appellants conceded that, while there had been acquiescence by the beneficiaries, properly entitled, in the payments of royalty disbursed by the Trust Company, any consent to the alleged breach of trust had been retracted. Therefore, he said that these appellants were entitled, together, to one-half of the moneys held by the Trust Company in Funds 1 and 2, after allowance of whatever sums should have been paid out as income, and one-half of the income thereon since the death of Kost Sereda.

In my opinion there is no doubt, on the evidence, that there was acquiescence by all the appellants in the disbursement of royalties by the Trust Company to Kost Sereda and to those persons holding assignments from him, and, accordingly, they are not entitled to recover from the Trust Company, or from anyone else, the amounts of the moneys so disbursed. The serious issue in this appeal is as to the argument raised by the appellants Mrs. Waterton and Mrs. Flichuk respecting the disbursement by the Trust Company of Funds 1 and 2.

The position of Kost Sereda under the terms of the encumbrance was that he, along with his wife, had a "liferent". In addition, they were entitled to be provided, by the appellants and Andrew Sereda, with such moneys, in addition to the liferent, as they required to support them in comfort.

The use of the word "liferent" in this document was unusual. It is a term used in the law of Scotland. It is defined in Stroud's Judicial Dictionary, 3rd ed., as follows:

> "Liferent" is used in Scotland to denote an estate or beneficial interest for life in moveables as well as realty; a liferenter, at least of realty is, as nearly as may be, the same as a tenant for life.

What was its meaning, as used in a somewhat roughly drawn encumbrance, drafted in Leduc, Alberta, in 1943? Did it necessarily have the same meaning as it would receive if used in a family settlement in Scotland drawn by a Scottish solicitor?

The position of the appellants is that the word "liferent", as used in this document, must be given the meaning ascribed to it by Scots law, and that the liferenter is not entitled to destroy any part of the substance of the land.

The appellants rely upon the judgment of the House of Lords in *Campbell v. Wardlaw*[1]. In that case, a testator had directed his trustees to pay to his wife "the whole annual produce and rents of the residue and remainder of my means and estate, heritable and moveable, during all the days and years of her life". Before his death, coal and iron mines had been leased by the testator. After his death, the trustees leased others. The issue was as to the widow's right to receive the rents from these latter leases, there being no question as to her right to receive the rents from the leases made prior to the testator's death. It was held that she was not entitled to the rents from the later leases.

The words used in the will were considered to be equivalent to the gift of an interest as a liferentrix. The widow's rights in respect of mines opened before her husband's death are based upon a presumed intention that the person with the limited interest would be at liberty to work the opened mines. (*Per* Lord Blackburn, at p. 646.)

At p. 655, Lord FitzGerald says:

> I think that the laws of both countries are in this respect substantially the same; that is to say a tenant for life in England, and a liferenter, as he is called in Scotland, namely, the person to benefit under the trust deed, stand in the same position; each is entitled to the whole produce and profits derivable from that life estate whatever they are; but in both countries equally he is subject to this limitation, that in England, he must not destroy the corpus of the estate, or, as it is more correctly expressed in Scotland, the substance of the estate is to be preserved and not destroyed; and in both countries it is subject to this also, that the settlor may in either case expressly indicate a contrary intention—he might have said in this case that his widow should, if she had the rents derivable from opened mines, equally have the rents derivable from mines which were unopened.

At p. 650, Lord Watson makes this statement, which is, I think, of some significance:

> Had this deed contained an express or implied provision by the late Sir George Campbell that these minerals should be or might be worked by the trustees in the course of their administration, I should have been prepared to hold that it was his intention that when they were so worked his widow was to enjoy the rents or lordships arising from their working, as part of her usufructuary right.

In the present case, which does not involve a will, the settlor and all beneficiaries lived for some years after the encumbrance was made. In essence what occurred was the creation of a trust by Kost Sereda, with Andrew as trus-

[1] (1883), 8 App. Cas. 641.

1968

HAYDUK v. WATERTON et al.

FLECHUK (otherwise FLICHUK) et al. v. WATERTON et al.

Martland J.

tee, of which the beneficiaries were Kost and his wife, Andrew and the three appellants. Kost, the settlor, reserved to himself a "liferent" and some additional benefits.

The encumbrance did not give to the trustee any specific power to work minerals underlying the land, or to grant leases in respect of the same. He did, however, acquire that power by the consent of all the beneficiaries. Andrew, the trustee, executed the lease to California Standard on February 8, 1947. On February 11, 1947, Kost approved the lease in writing. The three appellants contested the validity of such lease, but later, for a substantial consideration, involving the payment to the appellants by three oil companies of $150,000 and the transfer to those companies by the lessee, California Standard, of half of its lessee's interest under the lease, recognized the validity of the lease. Therefore, after the execution of the settlement agreement of September 22, 1948, the position was that the trustee, Andrew, by consent of all beneficiaries, had validly leased the petroleum substances under the land. This situation was, therefore, comparable to that mentioned by Lord Watson in the passage above quoted.

It is also significant, as the learned trial judge points out, that a little more than two months after the lease was granted to California Standard by Andrew, the land was transferred back to Kost, by transfer dated April 14, 1947, and registered on April 16, but reserving to Andrew all mines and minerals, other than coal. Kost, therefore, became owner of the surface of the land and Andrew owned the petroleum substances. However, the encumbrance continued, and it was now an encumbrance providing for a liferent to Kost in respect of the petroleum substances underlying the land.

There is no evidence to show that in making this transfer Andrew was acting on his own. The transfer was drawn by the same solicitor who drafted the encumbrance and the fact of this transfer being made was specifically recited in the agreement which the appellants made with George Cloakey.

When the settlement agreement was made the appellants convenanted to join with California Standard in ob-

taining a consent judgment that the lease to that company by Andrew was "to be a first charge upon all the interest of the said Andrew H. Sereda, *the said Kost Sereda* and the Claimants in the petroleum and natural gas underlying the said lands". (The italicizing is my own.)

It is, I think, at this point of time that we must consider what the interested parties to the settlement must be taken to have meant by "liferent", in relation to the question of whether or not it was intended to include receipts obtained by way of royalty from the leasing of petroleum and natural gas. The trust property now consisted of the petroleum substances in respect of which a lease had been granted authorizing their production by a lessee in consideration of payment by the lessee of a share of production.

Prior to and at the time of the execution of the settlement agreement, the rights of the appellants as remaindermen in respect of the land were obviously a matter of their serious consideration. After obtaining legal advice, they had challenged Andrew's right to make the lease, which was virtually certain to continue after Kost's death. They had recognized the validity of that lease, which called for royalty payments to be made to Andrew.

Unfortunately, we do not have the benefit of Andrew's evidence, he having died in 1959. We do, however, know that no demand was made upon him by any of the appellants for payment to her of any part of the royalties. We also know that it was only a little over a month after the appellants executed the settlement agreement that Kost effected assignments of royalty to members of the John Sereda family and to Andrew. Clearly Kost and Andrew were under the impression, following the execution of the settlement agreement, that Kost was entitled, during his lifetime, to receive the royalties.

All of the appellants became aware of these assignments soon after they were made. None of them challenged Kost's right to receive the royalties until the year 1959. In fact, two of them, Mrs. Waterton and Mrs. Flichuk, were themselves recipients of a share of the royalty from Kost.

As I see it, the situation is, therefore, that in 1943, when the encumbrance was executed, we have a document which defines an interest by using a word from a system of law other than that which applies in Alberta. The view of the

1968

HAYDUK v. WATERTON et al.

FLECHUK (otherwise FLICHUK) et al. v. WATERTON et al.

Martland J.

interested parties as to what they meant to accomplish is probably summarized in an answer of Mrs. Hayduk, on discovery. Asked whether the term "liferent" was discussed, she said:

> We said that everything must go to the parents during their lifetime and if that wasn't sufficient then the brother (Andrew) was to add what was necessary and then all of us would then settle it between us.

Clearly no one was giving specific consideration to oil royalties at that time, but the evidence which I have summarized, as to what occurred subsequently, in my view, does establish a common understanding among the parties that "liferent" should include a right to royalties during Kost's life, and an agreement that this should be so.

I think it is proper in the present case to consider that evidence in determining what the parties meant by the word "liferent". It has already been pointed out that it is not a term of English common law, which is in force in Alberta. In the case of *Campbell v. Wardlaw,* previously mentioned, where the words of the will were considered to give the widow the equivalent of a liferent, reference was made, in the judgment of Lord Watson, at p. 649, to a statement of Earl Cairns, in *Gowan v. Christie*[2], in respect of mineral leases:

> There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out-and-out of a portion of land. It is liberty given to a particular individual for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and take them away just as if he had bought so much of the soil.

The judgment of Earl Cairns was mentioned in the case of *McColl Frontenac Oil Company Limited v. Hamilton*[3], (an Alberta case), but it was found unnecessary in that case to decide whether the oil lease there in question constituted a grant of the minerals. In *Berkheiser v. Berkheiser and Glaister*[4], (a Saskatchewan case), the oil lease under consideration was held by three members of the Court to be a grant of a *profit à prendre* for an uncertain term. The other two members of the Court said

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2 (1873), L.R. 2 H.L. Sc. & Div. 273.
3 [1953] 1 S.C.R. 127, 1 D.L.R. 721.
4 [1957] S.C.R. 387, 7 D.L.R. (2d) 721.

it created either a *profit à prendre* or an irrevocable licence to search for and win the named substances. In 1956, in Alberta, *The Land Titles Act Clarification Act,* 1956 (Alta.), c. 26, declared, retroactively, that the term "lease", as used in *The Land Titles Act,* includes an agreement of the kind made between Andrew Sereda and California Standard. In view of this, it is not possible to assume that the use of the word "liferent" necessarily debarred the life-renter from a right to receive the "rent and royalty" covenanted to be paid by California Standard. The meaning of the word in the encumbrance is ambiguous.

In *Watcham v. Attorney-General of The East Africa Protectorate*[5], a decision of the Privy Council, Lord Atkinson said, at p. 538:

> The principle of the above-mentioned decisions, so far as it is based on the probability of a change during the lapse of time in the meaning of the language used in an ancient document, cannot of course have any application to the construction of modern instruments, but even in these cases extrinsic evidence may be given to identify the subject-matter to which they refer, and where their language is ambiguous the circumstances surrounding their execution may be similarly proved to show the sense in which the parties used the language they have employed, and what was their intention as revealed by their language used in that sense.
>
> The question, however, remains whether in such instruments as these proof of user, or what the parties to them did under them and in pursuance of them, can be used for the like purpose. In *Wadley v. Bayliss,* (1814) 5 Taunt. 752, it was decided that the user of a road described in an ambiguous way in an award made under an Enclosure Act by the owner of a holding by the award allotted to him, might be proved in evidence in order to ascertain the meaning of those who worded the award. In *Doe v. Ries,* (1832) 8 Bing. 178, 181, Tindal C.J., in delivering judgment, the document to be construed being modern, said: "We are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties." The fact mainly relied upon in that case to show that the document to be construed was a legal demise, and not a mere agreement for a lease, was this: that the person who claimed to be the tenant or lessee had been put into possession and remained there. In *Chapman v. Bluck,* (1838) 4 Bing. N.C. 187, 193, was practically to the same effect. Tindal C.J., in giving judgment, said: "Looking only at the two first letters between the parties, on which the tenancy depends, I think this falls within the class of cases in which it has been held that an instrument may operate as a demise, notwithstanding a stipulation for the future execution of a lease. But we may look at the acts of the parties

[5] [1919] A.C. 533.

1968

HAYDUK
v.
WATERTON
et al.

FLECHUK
(otherwise
FLICHUK)
et al.
v.
WATERTON
et al.

Martland J.

also; for there is no better way of seeing what they intended than seeing what they did, under the instrument in dispute." Park J. said: "The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued."

The learned trial judge has found, as a fact, the existence of an agreement among the parties as to Kost's right to the royalties. He says:

> Now, I think one must now bear in mind a situation that existed in fact. At the time this happened it is clear, I think, that the parties who in 1943 when this family arrangement was arrived at and who were not thinking of oil and gas rights, now in 1947 know that such rights do exist and that they are valuable, and it was wondered just what would be done about it, the family, I am sure, feeling that father was entitled to the natural income from the land, and which was all they had been thinking about to start with, reached the conclusion that during his lifetime he would be equally entitled to the proceeds of the royalty to deal with as he saw fit during his lifetime in the same fashion as he would deal with and was entitled to deal with the normal farm income that had been thought of in the original instance. This I think happened.

His conclusion has been adopted by the judgment of the Appellate Division, with which I agree.

This is not, therefore, a matter of acquiescence by a beneficiary in a breach of trust by a trustee. It is a matter of agreement by all parties as to the intention of a settlement agreement which provided for their interests in the land.

I would dismiss the appeals in both actions, with costs.

Appeals allowed with costs, CARTWRIGHT C.J. *dissenting.*

Solicitors for the plaintiff, appellant, Annie Hayduk: Cavanagh, Henning, Buchanan, Kerr & Witten, Edmonton.

Solicitors for the plaintiffs, appellants, Katherine Flechuk et al.: Silverman, Wright & Stubbs, Edmonton.

Solicitors for the defendant, respondent, Elizabeth Sereda: Morrow, Hurlburt, Reynolds, Stevenson & Kane, Edmonton.

Solicitors for the defendants, respondents, John Sereda et al.: Hansen, Joyce, Ross & Hustwick, Edmonton.

Solicitors for the defendant, respondent, Prudential Trust Co. Ltd: Chambers, Saucier, Jones, Peacock, Black, Gain & Stratton, Calgary.

JEFFREY BAIN AUSTIN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1968

*May 2
June 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Entering dwelling house with intent to commit indictable offence—Elements of offence—Proof of intent—Criminal Code, 1953-54 (Can.), c. 51, s. 293.

The appellant was convicted by a magistrate upon a charge of unlawfully entering a dwelling house with intent to commit an indictable offence therein, contrary to s. 293 of the *Criminal Code*. The magistrate found that the accused had entered unlawfully and without lawful excuse and had not given an explanation of his presence, that is, a reasonable or logical explanation. His conviction was affirmed by the Court of Appeal. He was granted leave to appeal to this Court on the question of law as to whether the magistrate had erred in failing to determine whether the intent to commit an indictable offence had been proved beyond a reasonable doubt.

Held (Judson and Pigeon JJ. dissenting): The appeal should be allowed and the conviction quashed.

Per Martland J.: The offence defined in s. 293 of the Code contains two elements: an entry without lawful excuse and an accompanying intent, which must exist at the time of entry, to commit an indictable offence in the dwelling house. Under subs. (2) of s. 293, the Crown could establish a case against the accused upon proof of entry without lawful excuse and in the absence of other evidence. Where, however, other evidence is given relating to the circumstances the Court must be satisfied, upon the whole of the evidence, beyond a reasonable doubt, that the entry was made accompanied by the requisite intent. The trial judge appears to have overlooked that the explanation given by the accused, while not establishing a lawful excuse for his presence in the premises, might well have created a reasonable doubt as to his intent to commit an indictable offence therein.

Per Hall and Spence JJ.: Proof of the intent to commit an indictable offence, which intent must exist at the time of entry, is a necessary ingredient for a conviction and all that subs. (2) does is to provide *prima facie* evidence, not disturbing the principle of law that on the whole evidence the Crown must prove each essential element including, in this charge, the intent beyond reasonable doubt. There was no evidence upon which the magistrate could find beyond a reasonable doubt that the accused had entered the premises with intent to commit an indictable offence.

Per Judson and Pigeon JJ., *dissenting:* When the magistrate stated that the appellant had not given the Court an explanation for his presence, that is, a reasonable or logical explanation, he was stating his

*PRESENT: Martland, Judson, Hall, Spence and Pigeon JJ.

1968

AUSTIN v. THE QUEEN

conclusion that in his opinion the accused's explanation was no explanation at all. The magistrate's mode of expression meant that he rejected the explanation as one that might reasonably be true and convicted on the operation of s. 293(2). He was not required to find that the Crown had to prove beyond a reasonable doubt entry with intent to commit an indictable offence quite apart from the operation of the presumption. He correctly applied the presumption. On the facts of this case, the appellant's entry was without lawful excuse.

Droit criminel—Entrée dans une maison d'habitation avec l'intention d'y commettre un acte criminel—Éléments de l'infraction—Preuve de l'intention—Code criminel, 1953-54 (Can.), c. 51, art. 293.

L'appelant a été déclaré coupable par un magistrat de s'être introduit illégalement dans une maison d'habitation avec l'intention d'y commettre un acte criminel, contrairement à l'art. 293 du *Code criminel*. Le magistrat a statué que l'accusé s'était introduit illégalement, sans excuse légitime, et n'avait pas donné d'explication de sa présence, c'est-à-dire, une explication raisonnable ou logique. La déclaration de culpabilité a été confirmée par la Cour d'appel. L'appelant a obtenu la permission d'en appeler à cette Cour sur la question de droit, à savoir si le magistrat avait erré en omettant de décider si l'intention de commettre un acte criminel avait été prouvée hors d'un doute raisonnable.

Arrêt: L'appel doit être accueilli et la déclaration de culpabilité annulée, les Juges Judson et Pigeon étant dissidents.

Le Juge Martland: L'infraction dont on donne une définition à l'art. 293 du Code contient deux éléments: l'entrée sans excuse légitime et une intention l'accompagnant, devant exister au moment de l'entrée, de commettre un acte criminel dans la maison d'habitation. En vertu de l'alinéa (2) de l'art. 293, la Couronne peut prouver l'accusation sur preuve d'une entrée sans excuse légitime et en l'absence de toute autre preuve. Cependant, lorsqu'une autre preuve relativement aux circonstances est présentée, la Cour doit être satisfaite hors d'un doute raisonnable, en se basant sur la preuve entière, que l'entrée était accompagnée de l'intention requise. Il semble que le juge au procès n'a pas tenu compte que l'explication donnée par l'accusé, quoique n'établissant pas une excuse légitime de sa présence sur les lieux, pouvait très bien avoir créé un doute raisonnable quant à son intention d'y commettre un acte criminel.

Les Juges Hall et Spence: La preuve de l'intention de commettre un acte criminel, laquelle intention doit exister au moment de l'entrée, est un élément nécessaire pour obtenir une déclaration de culpabilité et tout ce que l'alinéa (2) fait est de fournir une preuve *prima facie*, sans mettre de côté le principe de droit que la Couronne, en se basant sur toute la preuve, doit établir chaque élément essentiel y compris, dans le cas présent, l'intention hors d'un doute raisonnable. Il n'y avait aucune preuve sur laquelle le magistrat pouvait statuer hors d'un doute raisonnable que l'accusé s'était introduit dans les lieux avec l'intention de commettre un acte criminel.

Les Juges Judson et Pigeon, *dissidents*: Lorsque le magistrat a déclaré que l'appelant n'avait pas donné à la Cour une explication de sa

présence, c'est-à-dire une explication raisonnable ou logique, il énonçait ses conclusions à l'effet que dans son opinion l'explication donnée par l'accusé n'était pas une explication. L'expression employée par le magistrat signifie qu'il a rejeté l'explication comme pouvant être raisonnablement véridique et a appliqué l'art. 293(2) pour le déclarer coupable. Il n'était pas obligé d'en venir à la conclusion que la Couronne devait prouver hors d'un doute raisonnable une entrée avec l'intention de commettre un acte criminel indépendamment du jeu de la présomption. Il a correctement appliqué la présomption. Sur les faits de la cause, l'entrée de l'appelant était sans excuse légitime.

APPEL d'un jugement de la Cour suprême de l'Alberta, confirmant une déclaration de culpabilité. Appel accueilli, les Juges Judson et Pigeon étant dissidents.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming the appellant's conviction. Appeal allowed, Judson and Pigeon JJ. dissenting.

J. Harper Prowse, for the appellant.

Brian A. Crane, for the respondent.

MARTLAND J.:—I am in agreement with my brother Spence and merely wish to add the following comments:

The charge against the appellant was that he did unlawfully enter a dwelling house with intent to commit an indictable offence therein, contrary to s. 293 of the *Criminal Code.*

Section 293 provides as follows:

293. (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling house with intent to commit an indictable offense therein is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling house is prima facie evidence that he entered or was in the dwelling house with intent to commit an indictable offence therein.

There are two elements in the offence charged as defined in s. 293(1):

1. Entry without lawful excuse.
2. An accompanying intent to commit an indictable offence therein.

1968
AUSTIN
v.
THE QUEEN
Martland J.

Under subs. (2) it is provided that entry without lawful excuse is *prima facie* evidence of entry with intent to commit an indictable offence therein. In other words, in the absence of other evidence the Crown can establish a case against the accused upon that evidence.

Where, however, other evidence is given relating to the circumstances the Court must be satisfied, upon the whole of the evidence, beyond a reasonable doubt, that the entry was made accompanied by the requisite intent.

In finding the appellant guilty, the Court said this:

> I find as a fact that the accused entered the premises of 505 Kennedy Towers unlawfully and without lawful excuse and he has not given this Courtroom an explanation for his presence, that is, a reasonable nor a logical explanation.
>
> Jeffrey Bain Austin I find you guilty of being in these premises contrary to Section 293 of the Criminal Code.

(The underlining is mine.)

The Court appears to have been of the view that if a prima facie case, under subs. (2), was made, thereafter the onus was on the appellant which had to be met by providing a reasonable and logical explanation for his presence in the premises. This overlooks the fact that the evidence, while not establishing a lawful excuse for the presence of the accused in the premises, might well create a reasonable doubt as to his intent to commit an indictable offence therein. This is a vital element in the commission of this offence, and it appears to have been overlooked in this case.

For this reason I think this appeal should be allowed and the conviction quashed.

The judgment of Judson and Pigeon JJ. was delivered by

JUDSON J. (*dissenting*):—The Appellate Division of the Supreme Court of Alberta, in affirming this conviction by the magistrate, delivered the following unanimous reasons:

> Assuming that rule in the Ungaro case is applicable, it is clear that the learned Magistrate considered whether the explanation of the Appellant's presence in the apartment was one which might reasonably be true. He found that under all the circumstances disclosed the explanation was not one which might reasonably be true. We have examined those circumstances and we agree with his conclusion. Accordingly the appeal is dismissed.

To me it is clear that the magistrate disbelieved the appellant and, in particular, held that his evidence was untruthful when he stated that Mrs. Hickling had intended him to look in and keep an eye on the children. Although the appellant stated that he knew the girl and that she was in the apartment baby-sitting and that his only purpose was to "See if she was O.K.", the girl's evidence, which was accepted by the Magistrate, was that the appellant opened the door, said "Hi" to her and went directly into the boy's room and that she was too frightened to ask him to leave.

The following are the reasons in full of the magistrate:

> Firstly, with respect to the evidence of the adults, Mr. and Mrs. Hunt, I find that their evidence is very clear. As a matter of fact, I marvel at the restraint exercised by Mr. Hunt in the manner in which he gave his testimony. The testimony of both Mr. and Mrs. Hunt and of the Constable, Constable Benson, make it quite clear that the accused was adamant at the time that Mrs. Hickling had asked him to look in upon her children while she was absent from the city. I accept the denial of Mrs. Hickling that she made such a request or that such a request would be even thought necessary because she had left her children in charge of a capable sitter. The evidence of the young girl Margaret or Peggy, as she was probably called, Hickling, who was babysitting the young Hunt boy at the time on this occasion, was quite clear after she got over her first fright at being in this Courtroom. The evidence of that young lady and the evidence of Mr. and Mrs. Hunt clearly indicate also at the time the Hunts returned that Austin, the accused, was sitting on the bed and not at the doorway as he himself said in his own testimony. In other words, on both of those occasions I find that his evidence is untruthful and I accept the evidence to the contrary by the other persons.
>
> I find as a fact that the accused entered the premises of 505 Kennedy Towers unlawfully and without lawful excuse and he has not given this Courtroom an explanation for his presence, that is, a reasonable nor a logical explanation.

In my opinion, when the magistrate stated that the appellant had not given the court an explanation for his presence, that is, a reasonable or logical explanation, he was stating his conclusion that in his opinion the accused's explanation was no explanation at all. When an explanation is tendered as one that might reasonably be true, it cannot be mere fancy but must have relation to the evidence. The magistrate's mode of expression does not mean that he failed properly to apply s. 293(2) of the *Criminal Code*. It means that he rejected the explanation as one that might reasonably be true and convicted on the operation of s. 293(2). He was not required to find that the

1968
AUSTIN
v.
THE QUEEN
Judson J.

Crown had to prove beyond a reasonable doubt entry with intent to commit an indictable offence quite apart from the operation of the presumption. He correctly applied the presumption and in so doing his judgment was affirmed by the Appellate Division.

Section 293 reads:

> 293. (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling house with intent to commit an indictable offense therein is guilty of an indictable offense and is liable to imprisonment for ten years.
>
> (2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling house is *prima facie* evidence that he entered or was in the dwelling house with intent to commit an indictable offence therein.

The appellant's entry into the apartment was without lawful excuse. He went directly to the boy's room where he sat on the bed and on at least one occasion, laid his hands on the boy. When the boy pulled away from the appellant and tried to get out of bed, the appellant still stayed with him.

The magistrate properly convicted the appellant of an offence against s. 231(1) of the *Criminal Code* on the same evidence.

I would dismiss the appeal.

The judgment of Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta pronounced on November 8, 1967, whereby that Court dismissed an appeal from the conviction by the magistrate made on May 1, 1967, of the accused upon the charge that he did:

> on or about the 3rd day of April, A.D. 1967 at the City of Edmonton, in the Province of Alberta, did without lawful excuse enter a dwelling house situated at Suite # 505, Kennedy Towers, with intent to commit an indictable offence therein, contrary to Section 293 of the *Criminal Code*.

This Court granted leave to appeal upon the following question of law:

> Did the learned Magistrate err in failing to determine whether the intent to commit an indictable offence, which is an essential element in the offence defined by section 293(1) of the *Criminal Code*, had been proved beyond a reasonable doubt?

A rather detailed statement of the relevant facts is necessary. The appellant was living separated from his wife and family in Apartment 1104 in the Kennedy Towers Apartment House in the City of Edmonton. A Mrs. Lucy Hickling with her son David and her daughter Peggy, twelve years of age, lived in Suite # 708 in the same apartment house. A Mr. and Mrs. James Hunt and their son David, seven years of age, lived in Suite 505 again in the same apartment house.

The appellant knew Mrs. Hickling and her children and had spent part of the evening prior to April 3, 1967, in the company of Mrs. Hickling. He also knew that Mrs. Hickling was leaving for Calgary to spend the weekend. On April 3, 1967, about 5:00 p.m., when the appellant returned from his work, he met in the elevator of the apartment house Peggy Hickling. The appellant left his brief case in his own apartment and then went to the Hickling apartment, picked up Peggy Hickling there, and another young boy from another apartment, and took the two children with him when he went shopping. He returned a very short time later and left the children at their respective apartments. He then returned to his own apartment, and to use his own words, "I had something to eat. I had nothing to do so I decided to go down and see how David and Peggy Lou were making out". The appellant arrived at the Hickling apartment, # 708, to find that David was there alone. He spent a short time with David and then learning that Peggy Hickling was in apartment 505, the Hunt apartment, he went to that apartment, knocked on the door, and went in. Peggy Hickling had been engaged by Mrs. Hunt to act as a baby sitter for her young child David. She had gone to the apartment after she and the appellant had parted a little earlier in the evening and her brother David Hickling had later attended that apartment to give her a sandwich. It would appear that when he left the apartment, David Hickling had not pressed the lock on the door so that when the appellant knocked on the door and opened it it was unlocked permitting his easy entry. The hour was about 9:30 in the evening; David Hunt had retired to his bed but was not asleep. The door to David Hunt's room was almost opposite the entrance door to the

1968

AUSTIN v. THE QUEEN

Spence J.

apartment and it stood open. The appellant walked into David Hunt's bedroom and sat down on the edge of the bed.

The appellant, in his evidence, gave as his reason for entering the boy David Hunt's bedroom that he was not asleep and that the appellant throught he might be able to get the boy to sleep. The appellant swore that in an attempt to persuade the boy to sleep he promised him a ride in his, the appelant's motor boat, if the boy would sleep. David Hunt, who gave unsworn evidence, corroborated this statement adding, "I said we could buy our own boat". Although David Hunt said that the appellant laid against him and his feet were then partially on the floor, Peggy Hickling who had stood in the doorway of the room and observed all that occurred, testified that when the boy David Hunt attempted to roll off the bed the appellant merely put his hand on the boy to hold him in the bed and that at that time the appellant was sitting on the edge of the bed with his feet on the floor. At this juncture, Mr. and Mrs. Hunt returned. What could only be described as a fracas occurred, the police were called and the appellant was taken into custody. Constable Benson of the Edmonton Police Force, who had attended at the apartment upon being summoned, gave evidence that he questioned the appellant as to the reason he had been in the apartment and that the appellant told him that he, the appellant, had been asked by Mrs. Hickling to look in on her children while she was away in Calgary. The constable testified that because of that answer they had not held the appellant in custody that night, but after a further investigation they did place the appellant under arrest and proceeded with the charge. It would appear that that subsequent investigation included questioning Mrs. Hickling, Peggy Hickling's mother, as she gave evidence at the trial that she had not requested the appellant to look after her daughter since she had already arranged for a responsible person as baby sitter for her children.

In his evidence, the appellant testified that his purpose in going down to the Hickling apartment was that he knew Mrs. Hickling was out of town and he thought that she might appreciate him "looking in on the kids to see how they were doing and to be sure they were o.k.". He acknowledged that he did not recall Mrs. Hickling asking

him directly to do so but said that they had had considerable conversation and "I think I may have mentioned that I would check on the kids when she was out of town".

It should be added that both the appellant and James Hunt admitted that they had drunk what they both described as a rather small quantity of alcohol during the course of the evening. Upon all that evidence, the magistrate convicted the accused of a breach of s. 293 of the *Criminal Code*. That section provides:

> 293. (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling house with intent to commit an indictable offence therein is guilty of an indictable offence and is liable to imprisonment for ten years.
>
> (2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling house is prima facie evidence that he entered or was in the dwelling house with intent to commit an indictable offence therein.

In view of the wording of the question of law propounded by this Court in its order granting leave to appeal, the appellant chose to argue that even upon the basis that the accused had not proved the lawful excuse, the burden of proof which lies upon him under the provisions of s. 293 (1), the Crown had failed to prove that there was any intent to commit an indictable offence. By subs. (2) of s. 293, evidence that the accused without lawful excuse entered the dwelling house is *prima facie* evidence that he intended to commit an indictable offence therein. Proof of the intent, of course, is a necessary ingredient for a conviction and all that subs. (2) does is to provide *prima facie* evidence not disturbing the principle of law that on the whole evidence the Crown must prove each essential element including, in this charge, the intent beyond reasonable doubt: *Regina v. Wendel*[1]. It was also pointed out in the judgment of Tysoe J.A. in that case that the intent must exist at the time of the entry. Tremeear, in the 6th edition, at p. 476, however, in the notes to the section, expresses the view that so long as the intent and the being in the premises are in concurrence then a conviction may be adjudged. The learned author of Tremeear bases his opinion on *The King v. Higgins*[2], a decision of the

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[1] (1966), 57 W.W.R. 684, 50 C.R. 37, [1967] 2 C.C.C. 23.

[2] (1905), 10 C.C.C. 456.

1968

AUSTIN v. THE QUEEN

Spence J.

Supreme Court of Nova Scotia. In *The King v. Higgins*, the charge was "for being unlawfully in a dwelling house by night with intent to assault", while in the *Wendel* case and the present case the charge is "entering a dwelling house with intent". I am, therefore, of the opinion that here the judgment in the *Wendel* case outlines the applicable law and in order to support a conviction it must be found that the accused had entered the apartment with intent to commit an indictable offence.

When one turns to consider whether there was any evidence upon which the magistrate could find beyond reasonable doubt that the accused had entered the apartment with intent to commit an indictable offence, one asks oneself what indictable offence is it alleged the accused intended to commit. The form of charge, unlike those used on the great majority of occasions, does not specify the intended indictable offence and merely describes it in the words of the section as "an indictable offence". I have read the complete evidence at trial, and such references to argument as are contained in the appeal case and I have read the respondent's factum, and I do not find therein any clear statement of the offence which it was alleged the accused intended to commit. It is true that the accused was charged at the same time with common assault upon David Hunt and, pleading not guilty thereto, by consent the evidence adduced in reference to the charge presently under appeal was applied to the assault charge. The accused was convicted and was fined $100. Counsel for the Crown in his argument before us would seem to rely upon that conviction as showing the indictable offence which it was alleged the accused intended to commit when he entered the apartment.

It is significant that the conviction for assault was one for common assault. The learned magistrate said in discussion with counsel for the accused:

> In this particular case, I find that the intent on his own evidence was to pull him back into bed, that was sufficient attempt to create an assault here by touching that boy.
>
> *Counsel for the accused*: With no hostile intent.
>
> *The learned magistrate*: The attempt was to restrain him, which is sufficient. I don't accept your argument that it has to be hostile in the sense that you are suggesting not with the new Criminal Code as we have it as of 1955.

I cannot understand how upon the whole record there can be any evidence that when the accused entered the apartment he had any intent to commit an assault on the boy, David Hunt. There is no evidence that he knew the age of the boy or even that he had known the boy at all. There is no evidence that he knew the boy would be in bed or would be up and around. There is a perfectly reasonable explanation given by the accused, and in no way contradicted, that his whole intent, which was first arrived at after he entered the apartment, was to persuade the boy to go to sleep, as a boy of that age should have been asleep at that hour. The grasping of the boy by the arm or his shoulder to prevent the boy from leaving his bed was only part of the carrying out of the purpose, not any evidence of an intent to commit an indictable offence.

The learned magistrate was much concerned with what he termed "nasty, sexual overtones" but such concern which moved him to request a pre-sentence report and which he even mentioned in his report to the Appellate Division has no support whatsoever from the evidence. I have no hesitation in saying there was no evidence of intent to commit an indictable offence against the boy David Hunt at any time let alone at the time the accused entered the apartment.

Was there any evidence of intent to commit an indictable offence as to the girl Peggy Hickling? The accused had the girl in his car earlier and had shown no such intent on that occasion. The accused was a good friend of the girl's mother. When the accused entered the apartment, on his explanation to merely check on the girl's welfare, he merely greeted her and she greeted him as he walked past her into the boy's room. The accused never moved near her or touched her. She made no protest at his entry. Although in examination in chief the girl testified in reply to clearly leading questions by the Crown that she was frightened to ask the accused to leave, on cross-examination, she agreed that such fear was really at the possible displeasure of the Hunts should they return, as they did, and discover the accused in the apartment. Again, on all of the evidence, there is simply no evidence of intent to commit any indictable offence against the girl Peggy Hickling either at the time of the accused entering into the apartment or thereafter.

1968
AUSTIN
v.
THE QUEEN
Spence J.

For these reasons, I would allow the appeal and quash the conviction.

Appeal allowed and conviction quashed, JUDSON *and* PIGEON JJ. *dissenting.*

Solicitors for the appellant: Prowse, Dzenick, Grossman & Mousseau, Edmonton.

Solicitor for the respondent: The Attorney General for Alberta.

1967
*Dec. 6, 7
1968
June 26

GERARD WILLIAM DeCLERCQ .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Voir dire—Confession—Trial by judge without jury—Accused asked by trial judge whether inculpatory statement true—Whether proper question—Criminal Code, 1953-54 (Can.), c. 51, s. 592(1)(b)(iii).

In the course of an investigation by the police, the appellant was taken to the police station where he was subsequently charged with indecent assault. He was then cautioned and made an inculpatory statement which he signed. During the *voir dire* as to the admissibility of that statement, the trial judge, sitting without a jury, asked the accused, while he was giving evidence, whether the statement was true. The trial judge had stated at the outset of the inquiry that he did not propose to look at it. An objection to the question was overruled, and the accused replied that the statement was substantially correct. The trial judge admitted the statement. The appellant was convicted and his conviction was affirmed by a majority judgment in the Court of Appeal. He appealed to this Court, where the issue was as to whether the trial judge erred in law when he asked the accused whether the statement was true.

Held (Hall, Spence and Pigeon JJ. dissenting): The appeal should be dismissed.

Per Cartwright C.J.: The trial judge did not err in law in putting the question which he did. It was not possible to say that, as a matter of law, the question was not permissible, although it was permissible only on the ground that it might assist the trial judge in determining the credibility of the evidence which the accused was giving on the *voir dire*. However, this was eminently a case in which the trial judge should, in the exercise of his discretion, have refrained from putting the question.

Per Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The question was admissible: *R. v. Hammond,* [1941] 3 All E.R. 318. While the

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

inquiry on a *voir dire* is directed to finding whether a statement is voluntary, it does not follow that the truth or falsity of the statement must be irrelevant to such an inquiry. There had been no attempt by the trial judge to use the *voir dire* as a means of determining the guilt of the appellant. The inquiry as to the truth of the statement was related solely to the weight to be given to the evidence on the issue as to whether or not it was voluntary.

Per Hall J., *dissenting:* It is true that the accused cannot be compelled by the Crown to testify on the *voir dire* and does so only of his own will. However, the very purpose of holding a separate inquiry into the admissibility of a confession is that this issue may be dealt with only on evidence relevant thereto. It is an essential feature of this system that the accused is thereby permitted to testify on that issue without prejudice to his right not to testify on the main issue. If an accused cannot testify on the *voir dire* without being liable to be asked questions bearing directly on his guilt or innocence, he is put in a situation where he cannot do so without in effect being deprived from the benefit of the rule against compulsory self incrimination. At least this is so when the trial is by a judge alone. The question as to whether it was proper for the trial judge to do what he did is a pure question of law.

Per Spence J., *dissenting:* The question should be ruled to be inadmissible. Under the particular circumstances of the *voir dire,* the answer of the accused to the question as to whether the statement was true is not relevant, has no probative value in determining the voluntary or involuntary character of the statement, and deprives the accused from the benefit of the rule against self incrimination. It was not possible to say that the putting of the question by the trial judge did not cause a miscarriage of justice.

Per Pigeon J., *dissenting:* Questions to an accused concerning the truth of a statement allegedly made by him cannot be permitted as having a bearing on his credibility. These questions really go to the main issue of guilt. They cannot be helpful in reaching a decision on the only issue on the *voir dire*: the admissibility of the statement. The result of permitting, on a *voir dire,* questions pertaining to the truth or falsity of the statement must inevitably be to weaken the rule against the admission of involuntary statements and thus to undermine a very necessary safeguard against improper treatment of suspects.

Droit criminel—«Voir dire»—Confession—Procès par un juge seul—Le juge demande à l'accusé si sa déclaration incriminante est véridique—Est-il permis de poser une telle question—Code criminel, 1953-54 (Can.), c. 51, art. 592(1)(b)(iii).

Au cours d'une investigation policière, l'appelant a été amené au poste de police où il a été subséquemment accusé d'avoir commis un attentat à la pudeur. Il a fait et signé une déclaration incriminante après avoir été mis en garde. Lors du «voir dire» pour décider de l'admissibilité de cette déclaration, le juge au procès, siégeant sans jury, a demandé à l'accusé au cours de son témoignage si la déclaration était véridique. Le juge avait déclaré au début de l'enquête qu'il n'avait pas l'intention de regarder la déclaration. Une objection à

1968

DECLERCQ v. THE QUEEN

cette question ayant été rejetée, l'accusé a répondu que la déclaration était substantiellement exacte. Le juge a admis la déclaration. L'appelant a été déclaré coupable et ce jugement a été confirmé par un jugement majoritaire de la Cour d'appel. L'accusé en appela à cette Cour, où le débat s'est engagé sur la question de savoir si le juge avait erré en droit lorsqu'il a demandé à l'accusé si la déclaration était véridique.

Arrêt: L'appel doit être rejeté, les Juges Hall, Spence et Pigeon étant dissidents.

Le Juge en Chef Cartwright: Le juge n'a pas erré en droit en posant la question. Il n'est pas possible de dire qu'en droit, la question n'était pas admissible, bien qu'elle ne l'était que pour aider le juge à en venir à une conclusion sur la crédibilité du témoignage de l'accusé sur le «voir dire». Cependant, il s'agit du cas par excellence où le juge aurait dû, dans l'exercice de sa discrétion, s'abstenir de poser la question.

Les Juges Fauteux, Abbott, Martland, Judson et Ritchie: La question était admissible: *R. v. Hammond,* [1941] 3 All E.R. 313. Bien que l'enquête sur le «voir dire» porte sur la question de savoir si une déclaration est volontaire, il ne s'ensuit pas que la véracité ou la fausseté de la déclaration n'a aucun rapport avec l'objet d'une telle enquête. Le juge n'a pas tenté de se servir du «voir dire» pour déterminer la culpabilité de l'appelant. L'enquête sur la véracité avait rapport seulement à la crédibilité du témoignage sur la question de savoir si la déclaration était volontaire.

Le Juge Hall, *dissident*: Il est vrai que l'accusé ne peut pas être contraint par la Couronne de témoigner sur le «voir dire» et qu'il le fait seulement de sa propre volonté. Cependant, le but véritable d'une enquête distincte sur l'admissibilité d'une confession est de faire en sorte que cette question ne soit traitée que sur la preuve qui lui est pertinente. Permettre ainsi à l'accusé de témoigner sur ce point sans préjudice de son droit de ne pas témoigner sur la question principale de culpabilité est une caractéristique essentielle de ce système. Si un accusé ne peut pas témoigner sur le «voir dire» sans s'exposer à ce qu'on lui pose des questions portant directement sur sa culpabilité ou son innocence, il est placé dans une situation telle qu'il ne peut le faire sans être effectivement privé du bénéfice de la règle que personne n'est tenu de s'incriminer. Tel est le cas du moins lorsque le juge siège sans jury. La question de savoir si ce que le juge a fait était permis est une pure question de droit.

Le Juge Spence, *dissident:* La question n'était pas admissible. Selon les circonstances particulières du «voir dire», la réponse de l'accusé à la question portant sur la véracité de la déclaration n'est pas pertinente, n'a pas de valeur probante pour déterminer le caractère volontaire ou involontaire de la déclaration et prive l'accusé du bénéfice de la règle que personne n'est tenu de s'incriminer. Il n'est pas possible de dire que le fait d'avoir posé cette question à l'accusé n'est pas une erreur judiciaire grave.

Le Juge Pigeon, *dissident:* Des questions à un accusé sur la véracité de la déclaration censée avoir été faite par lui ne peuvent pas être admises comme ayant rapport à sa crédibilité sur le «voir dire». Ces questions portent en réalité sur la question principale: sa

culpabilité. Elles ne peuvent pas être utiles pour en arriver à une conclusion sur le seul point qui se soulève lors d'un «voir dire»: l'admissibilité de la déclaration. Permettre, alors des questions sur la véracité ou la fausseté d'une déclaration ne peut avoir d'autre résultat que d'affaiblir la règle à l'encontre de l'admission d'une déclaration involontaire et ainsi détruire une protection indispensable contre le mauvais traitement des prévenus.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], confirmant une déclaration de culpabilité pour attentat à la pudeur. Appel rejeté, les Juges Hall, Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the appellant's conviction for indecent assault. Appeal dismissed, Hall, Spence and Pigeon JJ. dissenting.

Joseph A. Mahon, Q.C., for the appellant.

R. G. Thomas, for the respondent.

THE CHIEF JUSTICE:—The facts out of which this appeal arises and the course of the proceedings in the Courts below are set out in the reasons of my brother Hall and I will endeavour to avoid repetition.

The only question not disposed of at the hearing of the appeal is whether the learned trial Judge erred in law when he asked the appellant, who was giving evidence on the *voir dire,* whether the inculpatory statement, dated August 6, 1964, signed by the appellant, which the Crown was seeking to introduce in evidence, was true and insisted on an answer to the question in spite of the objection of counsel.

The rule that when the Crown seeks to introduce in evidence an inculpatory statement said to have been made by the accused the onus lies upon the Crown to show that the statement was voluntary is firmly established. It is stated in the following words in *Ibrahim v. R.*[2]:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against

[1] [1966] 1 O.R. 674, [1966] 2 C.C.C. 190.
[2] [1914] A.C. 599 at 609.

1968

DECLERCQ v. THE QUEEN

Cartwright C.J.

him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

It has frequently been applied in this Court.

While the reason for the rule is said to be the danger that a confession, the making of which has been induced by threats or promises made by a person in authority, may well be untrue, it must now, I think, be regarded as settled that when an inquiry is held during the course of a trial as to the admissibility of an inculpatory statement sought to be introduced by the Crown, the question to be determined is whether or not the statement was voluntary and not whether or not it is true. On the other hand, an assertion by the accused that the statement is untrue may logically have a bearing in determining whether or not it was voluntary.

In *R. v. Mazerall*[3], Robertson C.J.O., giving the unanimous judgment of the Court of Appeal, said at page 787:

> It would be a strange application of a rule designed to exclude confessions the truth of which is doubtful, to use it to exclude statements that the accused, giving evidence upon this trial, has sworn to be true.

I incline to the view that this observation was *obiter*. The statements the admissibility of which was in question in that case had been made by Mazerall under oath before a Royal Commission under the compulsion of a statute. The basis of the judgment was that such evidence could be used against him unless he had objected to answer and thereby become entitled to the protection afforded by s. 5 of the *Canada Evidence Act*.

The question to be determined by the Judge on the *voir dire* being whether or not the statement was voluntary in the sense mentioned above, I think it clear that the Crown could not lead evidence on that inquiry, the sole object of which was to show that the statement given was true. Such evidence should be excluded on the ground that it was irrelevant. In *Hollington v. F. Hewthron & Co.*[4], Lord Goddard, giving the judgment of the Court of Appeal, drew a distinction between the "modern law" of evidence

[3] [1946] O.R. 762, 2 C.R. 261, 86 C.C.C. 321, 4 D.L.R. 791.
[4] [1943] 1 K.B. 587.

and the law before the passing of the statutes which removed the incompetency of witnesses and parties and their spouses on the ground of interest, and, having done so, said at page 594:

> The law being what it was before these statutes were passed, it is not surprising to find Sir FitzJames Stephen saying, in his Digest of the Law of Evidence, 12th ed., p. 217, Note XVIII, that the law of competency "was formerly the most, or nearly the most important and extensive branch of the law of evidence," and that rules of incompetency are "nearly the only rules of evidence treated of in the older authorities." But, nowadays, it is relevance and not competency that is the main consideration, and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded.

I agree with his concluding statement that the general rule is that all evidence that is relevant to an issue is admissible while all that is irrelevant is excluded.

I do not understand that counsel for the respondent seeks to justify the putting of the question as to the truth of the statement on the ground that it was relevant; his argument is that it was a question properly put on cross-examination as bearing upon the credibility of the accused.

It is not possible to say that at the stage when the question was put the credibility of the accused was not in issue; he had deposed that one of the officers had said to him "it would be better for me if I did make a statement and co-operated in this respect"; the two officers who were present at the time at which the accused said that this had been said to him had both been examined as witnesses; one had said that he had no recollection of such a statement being made and the other had in effect denied the making of any such statement.

While he did not refer to them by name, it would seem that when the learned trial Judge said he was satisfied by the authorities that the question which he put to the accused was proper, he had in mind the cases of *R. v. Hammond*[5] and *LaPlante v. The Queen*[6]. Neither of these cases suggests that the question put to the accused as to the truth of his statement was permissible on any ground other than its bearing on the question of his credibility.

In the *Hammond* case, *supra*, Cassels J., who was the trial Judge, made it clear that he did not decide on the

[5] [1941] 3 All. E.R. 318, 28 Cr. App. R. 84.
[6] [1958] O.W.N. 80.

1968

DECLERCQ v. THE QUEEN

Cartwright C.J.

admissibility of the confession as the result of the admission of the appellant that it was a true confession. He admitted it because he was satified on all the evidence that it was a voluntary statement and this is stressed in the judgment of the Court of Criminal Appeal.

In the *LaPlante* case, *supra,* the second ground of appeal was "that answers made by the accused to questions put by counsel for the Crown showing that the contents of the statement made by him were true were not admissible in evidence on the *voir dire* held to decide whether those statements should be admitted as voluntary". Laidlaw J.A., who gave the unanimous judgment of the Court of Appeal, dealt with this ground in the following paragraph, at page 81:

> In respect of the second ground, we can add nothing to the reasons given by Mr. Justice Humphreys in *R. v. Hammond* (1941), 28 Cr. App. R. 84. The evidence given by the accused in cross-examination on the *voir dire* that the statements made by him were true, touches the issue of credibility. Likewise, the admission by him that he killed Edwin Jones touches the matter of his credibility, and his answers in respect of both matters to the questions put by counsel for the Crown were relevant to the issue as to whether or not the statements made by him were voluntary.

It should be noted that an application for leave to appeal from the judgment of the Court of Appeal in the *LaPlante* case was made to this Court. It was heard on December 16, 1957, and judgment was reserved. Judgment was given on December 19, 1957, dismissing the application. As is usual in such cases, written reasons for dismissing the application were not given. The case being a capital one, five Judges sat to hear the application. The Court consisted of Kerwin C.J., Rand, Locke, Cartwright and Abbott JJ.

While it may be that much of what was said in the judgment in *R. v. Hammond, supra,* was *obiter,* the paragraph quoted above from the judgment in *LaPlante v. The Queen, supra,* formed the ratio of that decision.

In the case at bar the decision of the learned trial Judge at the conclusion of the *voir dire* was as follows:

> The court has to determine whether the statement is a free and voluntary statement, and I am satisfied on the evidence that it is. Accordingly, it will be admitted.

I do not find it possible to say that, as a matter of law, the question put in the case at bar was not permissible

although I think it clear that it was permissible only on the ground that it might assist the trial Judge in determining the credibility of the evidence which the accused was giving on the *voir dire*.

However, while it cannot be said that the question was legally inadmissible, in my respectful opinion, this was eminently a case in which the trial Judge should, in the exercise of his discretion, have refrained from putting the question on the ground discussed in *Noor Mohamed v. The King*[7]:

> It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

This passage has frequently been referred to with approval; an instance is the unanimous judgment of this Court in *Lizotte v. The King*[8].

While, in my opinion, the learned trial Judge ought not to have put the question and ought not to have required an answer after the objection of counsel, I find myself unable to say that the course he followed constituted an error in law. It was, in my view, with the greatest respect, a mistaken exercise of his discretion but, as has so often been held, in an appeal to this Court in a criminal case, our jurisdiction, differing sharply from that of the Court of Appeal, is limited to dealing with questions of law in the strict sense.

For these reasons, I have reached the conclusion that it cannot be said that the learned trial Judge erred in law in putting the question which he did. The ground on which I am of opinion that he ought not to have put it raises no question of law in the strict sense and it follows that in my opinion the appeal must be dismissed.

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[7] [1949] A.C. 182 at 192.

[8] [1951] S.C.R. 115 at 127, 128, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.

1968

DECLERCQ v. THE QUEEN

Martland J.

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

MARTLAND J.:—The facts which give rise to this appeal are set out in the reasons of my brother Hall. The sole issue before this Court is as to whether the learned trial judge erred in law when he asked the appellant whether the statement which he had signed was true.

This is exactly the same issue which had to be determined by the Court of Criminal Appeal in *R. v. Hammond*[9]. In that case, as in this, a question had been put to the accused on the *voir dire* as to whether a statement which he had made was true. The judgment of the Court was delivered by Humphreys J., who said, at p. 321:

> This appeal is brought on the sole ground that the question which was put by counsel for the prosecution in cross-examination of the accused was inadmissible. In our view, it clearly was not inadmissible. It was a perfectly natural question to put to a person, and was relevant to the issue of whether the story which he was then telling of being attacked and ill-used by the police was true or false. It may be put as it was put by Viscount Caldecote, L.C.J., in the early part of the argument of counsel for the appellant, that it surely must be admissible, and in our view is admissible, because it went to the credit of the person who was giving evidence. If a man says, "I was forced to tell the story. I was made to say this, that and the other," it must be relevant to know whether he was made to tell the truth, or whether he was made to say a number of things which were untrue. In other words, in our view, the contents of the statement which he admittedly made and signed were relevant to the question of how he came to make and sign that statement, and, therefore, the questions which were put were properly put. They were admissible, and they could not, therefore, have wrongly affected the mind of the judge.

It was after stating this conclusion as to the admissibility of the question that he went on to point out that the trial judge had not reached his conclusion as to the admissibility of the statement as the result of the admission as to its truth.

As the Chief Justice has pointed out in his reasons, the *Hammond* case was followed by the Court of Appeal for Ontario in *LaPlante v. The Queen*[10], a capital case, and an application for leave to appeal, which could only have been granted on a question of law, was refused by this Court.

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[9] [1941] 3 All E.R. 318, 28 Cr. App. R. 84.

[10] [1958] O.W.N. 80.

The notice of motion for leave to appeal to this Court, in that case, relied only upon two grounds. The first was that there had been non-direction amounting to mis-direction in the charge to the jury in respect of serious inconsistencies in the evidence. The second was stated as follows:

> Were the questions put to the appellant during the course of cross-examination on the voir dire by counsel for the Crown as to the truth or falsity of Exhibits 26 and 27 inadmissible, irrelevant and prejudicial?

The exhibits mentioned were statements made by the appellant.

The written submission to the Court said, in respect of this question:

> It is submitted that the sole function of the Voir Dire is to determine whether or not the Statement or Statements are voluntary. It is submitted that on the Voir Dire the truth or falsity of the Statement is irrelevant and any question directed to the issue of truth or falsity is irrelevant, inadmissible and prejudicial.

Reference was made to the *Hammond* case as well as to *R. v. Weighill*[11] and *R. v. Mandzuk*[12].

I am in agreement with the conclusions stated in the *Hammond* case. While it is settled law that an inculpatory statement by an accused is not admissible against him unless it is voluntary, and while the inquiry on a *voir dire* is directed to that issue, and not to the truth of the statement, it does not follow that the truth or falsity of the statement must be irrelevant to such an inquiry. An accused person, who alleged that he had been forced to admit responsibility for a crime committed by another, could properly testify that the statement obtained from him was false. Similarly, where the judge conducting the *voir dire* was in some doubt on the evidence as to whether the accused had willingly made a statement, or whether, as he contended, he had done so because of pressure exerted by a person in authority, the admitted truth or the alleged falsity of the statement could be a relevant factor in deciding whether or not he would accept the evidence of the accused regarding such pressure.

There was no attempt by the learned trial judge in the present case to use the *voir dire* as a means of determining

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[11] (1945), 83 C.C.C. 387, 61 B.C.R. 140, 1 W.W.R. 561, 2 D.L.R. 471.

[12] (1945), 85 C.C.C. 158, 62 B.C.R. 16, 3 W.W.R. 280, [1946] 1 D.L.R. 521.

1968

DECLERCQ v. THE QUEEN

Martland J.

the guilt of the appellant. He stated at the outset of the inquiry that he had not seen the statement and that he did not propose to look at it. When it was produced it was handed to the witness for identification and he was questioned concerning it. Had he been satisfied that the statement was not voluntary, the trial judge would not have become aware of its contents. The inquiry as to its truth was related solely to the weight to be given to the evidence on the issue as to whether or not it was voluntary.

In my opinion, the appeal should be dismissed.

HALL J. (*dissenting*):—The appellant was convicted by His Honour Judge Waisberg, sitting without a jury in the County Judges' Criminal Court for the County of York on May 5, 1965:

> THAT he did on or about the 4th day of August in the year 1964 at the Municipality of Metropolitan Toronto in the County of York, indecently assault one Patricia D'Amata, a female person, contrary to the Criminal Code.

He was sentenced on May 14, 1965, to six months definite and two years less one day indefinite.

The charge arose out of a complaint by an 11-year old child, Patricia D'Amata, that, in the absence of her parents from the house in which the appellant was a lodger, he had indecently assaulted her by having carried her to his room and placed her on his bed and while on the bed had touched her on the thigh above the knee. She objected and was released. The complaint continued that the appellant grabbed a younger sister, placed her on the bed and touched her in the same manner, but on being threatened by the older girl with a broom he released the younger girl and both girls went to their own room. The complainant's parents were employed away from the home and when they came home in the evening the complainant told her father what had happened. He phoned the police who came to the D'Amata home about 8:00 o'clock that evening, August 4, 1965.

At approximately 2:00 a.m., August 6, 1965, Detectives Gossen and Pringle of the Metropolitan Toronto Police Department went to the appellant's room and requested him to accompany them to the police station. They told him they were conducting an investigation but the matter would not be discussed until they arrived at the police

station. The appellant got dressed and agreed to go along with the officers. At the police station the appellant was told by the officers that they were investigating an alleged indecent assault with respect to the daughters of his landlord. The appellant was not cautioned and had not been placed under arrest. After some conversation with the appellant, the officers charged him with indecent assault. He was cautioned and a statement taken which was reduced to writing and signed by him.

A *voir dire* was held as to the admissibility of that statement. The two detectives testified that no advantage had been held out to the appellant nor were any threats made. They said the appellant was nervous, embarrassed and co-operative. The learned trial judge said when the statement was being tendered as an exhibit on the *voir dire* that he did not propose to look at it. The record as to this is as follows:

Q. I am showing you a statement which I ask to be entered as Exhibit One.

MR. MAHON: It shouldn't be entered as an exhibit yet.

MR. HANS: This would be merely, Your Honour, for identification, his signature and Detective Pringle's signature, and the fact that this was read out loud and corrected, not as far as content ...

THE COURT: I haven't seen the statement yet. I don't propose to look at it.

MR. HANS: This is on the voir dire.

The appellant gave evidence on the *voir dire* as follows:

DIRECT-EXAMINATION ON THE VOIR DIRE BY MR. MAHON:

Q. Gerard, the officers say that they came to your room at 2:00 A.M. on the 6th day of August 1964, is that correct?

A. That is correct.

Q. And that you were asleep in your room and that they woke you up, is that correct?

A. Yes, sir.

Q. I see; did they say anything to you in the room as to the nature of the charge against you?

A. No, they didn't.

Q. I see. And then you put your clothes on, did you?

A. Yes.

Q. Why did you do that?

A. They asked me to.

Q. Did they ask you to do anything else?

A. To come along with them to the station.

Q. Did you ask them the nature of the charge?

A. Yes, I did.

1968

DECLERCQ v. THE QUEEN

Hall J.

Q. Did they tell you?
A. No, sir.
Q. So you went and got into the car and went with the officers, is that right?
A. Yes.
Q. There were two officers, and the two officers who testified, was it these two?
A. Yes.
Q. On the way down to the station, was there any conversation about the charge, or the nature of the charge?
A. I was trying to find out what it was all about. I was sort of puzzled.
Q. Did they tell you?
A. No.
Q. Did they tell you the nature of the charge?
A. I asked whether it was a serious charge?
Q. What did they say?
A. One of the officers agreed to it?
Q. Pardon?
A. One of the officers said it was serious.
Q. He said it was a serious charge, I see. Now, after you got down to the station, what happened?
A. Well, they began to interrogate me.
Q. They began to question you?
A. Yes, sir.
Q. There were just the two officers there, Gossen and Pringle, and what happened?
A. The officers—its such a long time ago, its very hard to remember exactly what happened.
Q. The exact wording?
A. Yes; they did explain that the indecent assault had happened in the house at 54 Beatrice Street.
Q. I see.
A. And they asked me would I be so kind...
Q. Speak up, I can't hear.
A. ...as to make a statement, which I did.
Q. And did they say anything else before you made the statement?
A. Well, I asked them what I should do; did I have to. They said, well, it would be better for me if I did make a statement and cooperated in this respect.
Q. And was it subsequent to that you told them—you made a statement?
A. Yes.
Q. Then later, was there a caution given to you?
A. Yes.
Q. I see. And was what you told them before caution in the statement itself?
A. More or less, it was all along the same lines, yes.
Q. The officer said you were nervous and agitated, would you agree with that?
A. Yes, I may have been.

Q. And did they tell you you were entitled to counsel?
A. No, sir.

MR. MAHON: That will be all.

CROSS-EXAMINATION ON THE VOIR DIRE BY MR. HANS:

Q. Mr. DeClercq, at this time were you feeling ashamed? Were you feeling ashamed of yourself?
A. Yes, I think any person with police officers. . .
Q. Was your conscience bothering you?

MR. MAHON: No. Objection; the only matter that is material here—This is not cross-examination in general. It is an examination purely on the question of the voluntariness of the statement.

THE COURT: Where is the statement? Have you it there?—Court receives document.

BY THE COURT:

Q. Give the witness the exhibit. Is that the statement you signed?
A. Yes, sir.
Q. Is it true?

MR. MAHON: Now, in addition to that, the question of whether the statement is true or is not is not material here.

THE COURT: I think it is.

MR. MAHON: It is purely whether the statement is voluntary or not.

THE COURT: Eventually the proper statement was put to the witness. I think it is very important whether it is true or not. I note your objection and I think it is a proper question taken at this time.

MR. MAHON: There are all sorts of cases.

THE COURT: Yes, I have read them all. I am quite familiar with them and I am satisfied with my ruling.

WITNESS: Yes, Your Honour.

THE COURT: All right.

WITNESS: . . . except for a few details, I would say the statement is correct.

THE COURT: All right. Have you any further questions?

MR. HANS: No further questions, Your Honour.

It is obvious that the first part of the last answer was not recorded and it is to be noted that the appellant was not asked as to the details in which the statement was not correct. After hearing argument, the learned trial judge admitted the statement. It could not be successfully argued that the statement should not have been admitted because the evidence on the *voir dire* was quite conclusive that it was in fact a voluntary statement apart altogether from the question as to its truth put by the judge.

Accordingly, the issue in this appeal is not whether the statement was properly admitted but whether the learned trial judge was in error in taking over the cross-examination of the appellant, and having directed that the

1968

DECLERCQ v. THE QUEEN

Hall J.

'confession' be put in the appellant's hands, put to him the question "Is it true?" Defence counsel objected that the question was not proper. The learned judge ruled that his question was proper and required the appellant to answer which he did.

An appeal was taken to the Court of Appeal[13] on a number of grounds, but the only one we are now concerned with is no. 5 as follows:

> 5. That I gave evidence on the voir dire; that when objection was made by my Counsel to my being cross-examined on the contents of the statement, the Judge himself, over the objection of my Counsel questioned me as to the truth or otherwise of the statement; that I replied that the statement was true in part; that the learned trial Judge erred in questioning me on the statement otherwise than on the ground as to whether or not the statement was a voluntary statement.

The appeal was heard by MacKay, McLennan and Laskin JJ.A. MacKay and McLennan JJ.A. dealt with this ground of appeal as follows:

> As to the appellant being asked on the *voir dire* if his statement given to the police was true, we are bound by the decision of this court in *Regina v. LaPlante* (1958) OWN 80 in which it was held that such a question is permissible.

Laskin J.A. dissented, saying:

> The accused was charged with an offence of a sexual nature, and the rule of caution against convicting on the uncorroborated evidence of the complainant is applicable. If the accused's statement was properly receivable, it would provide ample corroboration of competent evidence against the accused. Objection was taken at the trial to its admissibility, and the trial Judge, who was sitting alone, proceeded to a *voir dire*. The accused gave evidence on the trial within a trial, and in the course of his testimony the presiding Judge asked him if the statement was true. The reply given after objection was that it was substantially true.
>
> In my opinion, this question was improperly asked on the *voir dire*. I do not find fault with the trial Judge because he was following the judgment of this Court in *Regina v. LaPlante*, (1958) O.W.N. 80, which in turn rested on the judgment of the English Court of Criminal Appeal in *Rex v. Hammond*, (1941) 3 All E.R. 318, 28 Cr. App. R. 84. To say, as was said in the *Hammond* case that the question is relevant to credibility is too simple an analysis of the issues raised by the question. I prefer the contrary approach of the Saskatchewan Court of Queen's Bench in *Regina v. Hnedish* (1958) 26 W.W.R. 685, 29 C.R. 347. I note also that *Rex v. Hammond* was questioned by the British Columbia Court of Appeal in *Rex v. Weighill*, (1945) 2 D.L.R. 471, 83 C.C.C. 387, and it is criticized in Cross on Evidence (2nd ed. 1963) p. 55.

[13] [1966] 1 O.R. 674, [1966] 2 C.C.C. 190.

I do not regard this Court as being prevented by any principle of *stare decisis* from reconsidering its previous decisions. If distinctions must be made, I would readily agree that to allow a trial Judge sitting alone (or Crown Counsel in such a case) to ask the incriminating question is more prejudicial than to permit it to be put on a *voir dire* in the course of a trial by jury. I do not, however, find it seemly to rest my difference with the *LaPlante* case on this distinction alone.

A number of vital principles of criminal law administration are brought under scrutiny in respect of the matter at hand. It is, of course, clear that the prevailing rule in Canada that permits illegally obtained evidence to be adduced at a trial if relevant to the issues does not apply to what I may call involuntary admissions of guilt made to persons in authority. The reason for this has to do with the values that we believe are worth protecting beyond the mere desirability of whether the holding of a trial within a trial is designed to control improper inducements or threats or other misbehaviour by the police in any efforts they may make to secure an incriminating statement from an accused or whether the *voir dire* is merely intended to assure the presiding Judge that the statement is reliable. I realize that I am drawing a line that may be very thin, since reliability or trustworthiness is closely related to the conduct of the interrogating police officers. Authorities can be cited to show that both the considerations mentioned lie back of holding of a trial within a trial for a preliminary consideration of admissibility. Although the basis of the exclusion of confessions improperly extracted from an accused has not hitherto been regarded, at least in our cases, as based on the privilege against self-crimination, there is the respected opinion of Dixon J. as he then was, of the High Court of Australia in *McDermott v. The King* (1948) 76 C.L.R. 501, at p. 513 that the rules respecting confessions and the privilege against self-crimination are related.

If an accused must expose himself on a *voir dire* to an incriminating inquiry when he finds it necessary to give evidence to resist the reception of an inculpatory statement, the relation with the privilege against self-crimination is more pronounced and the privilege is prejudiced, especially on a trial by a Judge alone. Indeed, on such a trial, the distinction between a *voir dire* and the trial proper becomes blurred if the accused, who is not then testifying in defence, may be compelled on the *voir dire* to answer an incriminating question. However, there is prejudice to the principle that an accused is not a compellable witness. Strictly speaking, the *Hammond* case does not preclude a trial Judge from excluding a confession as involuntary even where the accused has admitted its truth. But this possibility seems to me to be weak protection against what I consider substantial unfairness. I gave fleeting consideration to possible resort to section 5 of the *Canada Evidence Act,* R.S.O. 1952, c. 307 in connection with the *voir dire* but I do not see how it can be said that the *voir dire* and the trial on the merits are separate proceedings. Apart from this, I would not think that an accused's admission on the *voir dire* that his statement was true could be put before the jury even if the statement itself was admitted. Even if he gives evidence before the Jury, the trial Judge ought not to allow cross-examination on his admission on the *voir dire* nor should he permit that admission to be adduced through a Crown witness. This is predicated on the correctness of the *Hammond* case so far as it goes. I doubt that even it can be carried so far as to support the right of a Crown witness to give evidence that the accused admitted the truth of his inculpatory statement on the *voir dire*.

1968

DeClercq v. The Queen

Hall J.

Apart from the foregoing, the law of evidence has developed policies of exclusion based on confusion of issues and undue prejudice. The first is more appropriately referable, on the matter under discussion, to trial by Judge alone, but the second has a general application for present purposes. The trial within a trial has a limited object—to enable the trial Judge to decide whether an inculpatory statement made to persons in authority is admissible by examining the circumstances surrounding its making. To use such an occasion to obtain verification from the accused of the truth of his statement is to depart from the purpose for which the *voir dire* is held, and is to prejudice the accused unfairly on the very question of admissibility. Putting the matter another way, the question whether a confession is true, even if relevant to the issue of its voluntariness (and, hence, admissibility), involves resort to a line of inquiry that goes to much beyond the issue for which it is invoked at to make it improper either to initiate it or pursue it.

Since *Rex v. Hammond*[14] is the starting point for all subsequent discussion on the point, it is desirable to see what was really dealt with in *Hammond*. The facts as stated in the report at pp. 84-5 are as follows:

In opening the case counsel for the prosecution stated that the appellant had made a statement amounting to a confession of the crime to the police and that he proposed to relate the circumstances in which the statement had been made. Defending counsel said that he intended to object to the admissibility of the statement, and the Judge then heard evidence as to its admissibility in the absence of the jury. After the evidence of the police the appellant went into the witness-box and said that the confession had been extorted from him by violence and ill-treatment on the part of the police. Counsel for the Crown then cross-examined the appellant as follows: "Q.—Your case is that this statement was not made voluntarily? A.—Yes. Q.—Is it true? A.—Yes." Counsel put further questions in order to ensure that the appellant understood what he was saying. After hearing all the evidence on the preliminary issue, Cassels, J., ruled that the statement was voluntary and admissible, and it was subsequently put in evidence at the trial before the jury. The statement described in great detail how the appellant had committed the crime and included a number of matters which were proved to be unknown to the police.

It is of great importance to note that Hammond's confession was not received in evidence by the trial judge, Cassels J., as a result of Hammond's admission that it was a true confession but the confession was admitted by Cassels J. as a voluntary one apart altogether from Hammond's admission that what it contained was true. This is made very clear by Humphreys J. in the appeal judgment at p. 88 where he said:

The facts of this case go even further, for it is clear from the statement made by Cassels, J., the presiding Judge, that he did not decide

[14] [1941] 3 All E.R. 318, 28 Cr. App. R. 84.

on the admissibility of this confession as the result of the admission of the appellant that it was a true confession. He himself had some doubt whether or not the question as to its truth was a desirable question to put, and he said: "I had almost said that it was unnecessary to put the statement in detail. I have listened to everything the prisoner had to say in his evidence-in-chief. I hold that this statement is a voluntary statement, and admissible in evidence."

We cannot entertain the smallest doubt that the appellant was rightly convicted upon evidence which was properly before the jury. Further, we are satisfied that the evidence of his confession of the crime was rightly admitted by the Judge, who was in no way misled by anything which took place. The appeal is dismissed.

The *ratio decidendi* is clearly in those last two paragraphs. They show that what was said as to the question respecting the truth of the confession being relevant to credibility on the *voir dire* is an *obiter dictum* which deserves respect but nothing more.

Concerning the refusal in this Court of leave to appeal from the judgment of the Ontario Court of Appeal in the *LaPlante* case, no reasons were given and, therefore, nothing shows that this was not done on the view that, it being a jury trial, no substantial wrong or miscarriage of justice had occurred because, apart from the question respecting the truth of the confession, there was sufficient evidence to justify the trial judge's conclusion that it was voluntary.

The question 'was the learned trial judge right or wrong in putting the question which he did to the appellant and in requiring him to answer?' now comes to this Court for the first time. A discussion of the nature of the *voir dire* in respect of alleged confessions is, therefore, indicated.

The most quoted and generally recognized authoritative statement relating to the admissibility of confessions by an accused is that of Lord Sumner in *Ibrahim v. The King*[15], where at pp. 609-10, he said:

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Reg. v. Thompson* ((1893) 2 Q.B. 12)...

[15] [1914] A.C. 599.

1968

DeCLERCQ v. THE QUEEN

Hall J.

This statement was accepted and applied by this Court in *Boudreau v. The King*[16]. Kerwin J. (as he then was) said at p. 267:

> Again with great respect, I think it advisable that it should now be stated clearly what this Court considers the law to be. My view is that it has not been changed from that set out in *Ibrahim v. Rex* (1914) A.C. 599 and *Rex v. Prosko* 63 S.C.R. 226.

and Rand J. at pp. 269-70 said:

> The case of *Ibrahim v. Rex* (1914) A.C. 599, *Rex v. Voisin* (1918) 1 K.B. 531 and *Rex v. Prosko* 63 S.C.R. 226 *lay it down that the fundamental question is whether the statement is voluntary.* No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case. *The underlying and controlling question then remains: is the statement freely and voluntarily made?*

(Emphasis added)

In *The Queen v. Fitton*[17], Rand J. referred to *Boudreau* and said at p. 962:

> The rule on the admission of confessions, which, following the English authorities, was restated in *Boudreau v. The King* (1949) S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, (1949) 3 D.L.R. 81, at times presents difficulty of application because its terms tend to conceal underlying considerations material to a determination. The bases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.

It will be seen that in none of these statements is the question of the actual truth of the alleged confession put as one of the factors to be considered. Rand J. stated the proposition in language that permits of no doubt when he said: "The underlying and controlling question then remains: is the statement freely and voluntarily made?" There are numerous decisions to the effect that a confession, even if the truth, will not be admitted if it was obtained by threats or promises or by duress of any kind.

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[16] [1949] S.C.R. 262, 7 C.R. 427, 94 C.C.C. 1, 3 D.L.R. 81.

[17] [1956] S.C.R. 958, 24 C.R. 371, 116 C.C.C. 1, 6 D.L.R. (2d) 529.

See *Regina v. McLean and McKinley*[18]; *R. v. Sim*[19]; *Regina v. Starr*[20] and art. 833 on pp. 267-68 in Wigmore on Evidence, 3rd ed.

Another rule of universal acceptance is that the admissibility of the statement or confession is a question for the judge alone who must decide after a *voir dire* whether or not it is admissible. Once admitted, the statement goes to the jury who alone may decide whether the statement was in fact made, whether it was true and who may give it such weight as they think fit. The circumstances of the taking of the statement must be given in evidence again before the jury even though fully gone into on the *voir dire*. One of the most apt statements of the law in this regard is that of O'Halloran J.A. in *Rex v. Mandzuk*[21], where he said:

> Once these distinctive functions of the Judge and jury (which apply equally in principle where as in this case the Judge sits alone and thereby assumes the additional function of the jury) are appreciated, it becomes apparent that, in determining the admissibility of a statement which may be a confession, it is not the function of the Judge to consider its likely effect upon the minds of the jury. He is confined to determining whether the statement in itself is a confession in whole or in part and if so whether it is voluntary. *He is not concerned with its truth or its untruth as such* or the good or bad effect it may ultimately have upon the minds of the jury. He is of course concerned with the truth of testimony as to whether the statement was or was not made and as to what statement was made. But once the confession is admitted in evidence, then it is to be weighed and judged in the same way as any other testimony which may affect the minds of the jury advantageously or adversely to the accused.

(Emphasis added)

This being the law, it is elementary that the function of the judge on a *voir dire* is to determine:

(1) Whether the evidence establishes that the statement being tendered was in fact made by the accused. If he is not satisfied beyond a reasonable doubt as to this, he must not admit the statement;

(2) Whether the statement was voluntary within the rule in *Ibrahim v. The King* and *Boudreau v. The King*.

The problem is whether the truth of the statement is relevant to this inquiry. It is obvious that it is not directly

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[18] (1957), 126 C.C.C. 395, 32 C.R. 205, 31 W.W.R. 89.

[19] (1954), 108 C.C.C. 380 at 389, 18 C.R. 100, 11 W.W.R. 227.

[20] (1960), 128 C.C.C. 212, 33 C.R. 277, 31 W.W.R. 393.

[21] [1945] 3 W.W.R. 280 at 284, 62 B.C.R. 16, 85 C.C.C. 158, [1946] 1 D.L.R. 521.

1968

DECLERCQ v. THE QUEEN

Hall J.

relevant because fundamentally it is relevant only to the main issue, namely the guilt or innocence of the accused. However, it is contended that it is indirectly relevant as bearing on the credibility of the accused testifying on the *voir dire*. But is it not rather a *petitio principii*, trying to find out from the accused whether he is guilty in order to decide whether to admit his confession as evidence of his guilt?

Whenever the statement or confession amounts to an admission by the accused that he has committed the offence of which he is charged, the truth of the incriminating statement is but theoretically distinguishable from his guilt. If the statement is totally incriminating, asking the accused testifying on the *voir dire*: "Is the statement true?" is tantamount to asking him: "Are you guilty of the offence?" But that is precisely what an accused may not be asked unless he chooses to testify at the trial. In *Batary v. Attorney-General for Saskatchewan*[22], Cartwright J. (as he then was) said, speaking for the majority of the Court:

> It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt. In the absence of clear words in an Act of Parliament or other compelling authority I am unable to agree that that is the state of the law.

Would it not be a stranger inconsistency if the law which carefully protects an accused from being compelled to testify at his trial should permit that, if an incriminating statement has been improperly obtained from him, he would not be permitted to give evidence of such impropriety without being submitted against his will to cross-examination as to his guilt.

It is true that an accused cannot be compelled by the Crown to testify on the *voir dire* and does so only of his own will. However, the very purpose of holding a separate inquiry into the admissibility of a confession is that this issue may be dealt with only on evidence relevant thereto. It is an essential feature of this system that the accused is

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[22] [1965] S.C.R. 465 at 476, 46 C.R. 34, 51 W.W.R. 449, [1966] 3 C.C.C. 152, 52 D.L.R. (2d) 125.

thereby permitted to testify on that issue without prejudice to his right not to testify on the main issue. As Cartwright J. said in the *Batary* case (at p. 478):

> the maxim *nemo tenetur seipsum accusare* ... has been described (by Coleridge J. in *R. v. Scott*, 1856, Dears & B. 47 at 61, 169 E.R. 909) as "a maxim of our law as settled, as important and as wise as almost any other in it".

If an accused cannot testify on the *voir dire* without being liable to be asked questions bearing directly on his guilt or innocence, he is put in a situation where he cannot do so without in effect being deprived from the benefit of the rule against compulsory self-incrimination. At least this is so when the trial is by a judge alone. Before a jury, the problem is not so serious. Those who have to pass upon the guilt or innocence of the accused are to remain in complete ignorance of the evidence on the *voir dire*. But when the accused is tried by a judge alone once this judge has acquired knowledge of the guilt of the accused by a question that he has himself put to him, how can he properly weigh the evidence and give the benefit of the doubt if need be? When the question is being put on the *voir dire*, it cannot be presumed that the confession will be found to have been voluntarily made. The inquiry into the truthfulness then being made as bearing on credibility, it is uncertain whether the confession will be admitted, even if truthful. If it is rejected, how can the accused not be seriously prejudiced by an admission of guilt obtained from him while testifying?

It must also be considered that if it is held to be permissible to question an accused testifying on the *voir dire* as to the truthfulness of the statement of confession sought to be introduced in evidence, even when the accused is tried by a judge alone, an essential safeguard against improper pressure by police authorities is being seriously compromised. If the confession was not voluntarily made, the accused will know that he cannot go into the witness box to disprove the evidence brought against him on that issue without, in fact, renouncing the right to refrain from testifying on the main issue and thus prevent the Court from questioning him on his guilt or innocence. Under our law this right is so sacred that any comment by the prosecutor or the judge on the failure to testify is strictly

1968
DeClercq
v.
The Queen
Hall J.

prohibited. In the Supreme Court of Ontario by Rule 317 of the Rules of Practice it is provided that:

> ... no statement of the fact that money has been paid into court under the preceding rules shall be inserted in the pleadings, and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided ...

Is it not much more serious for a judge trying a criminal case to acquire knowledge of the guilt of the accused otherwise than through evidence properly admitted at the trial? It goes without saying that evidence on the *voir dire* is not evidence at the trial.

This Court having jurisdiction in such cases only on questions of law in the strict sense, a last point remains to be considered, namely whether questioning the accused as was done is an error in law. In *Demenoff v. The Queen*[23], the question before this Court was the admissibility, as a voluntary statement, of the confession of guilt made by the appellant. It was held that the issue being the inferences to be drawn from the evidence relevant to the voluntariness of the confession, the question was not one of law in the strict sense. Reference was made to *The Queen v. Fitton, supra,* where this principle had been admitted but it had been held that the rejection or admissibility of the statement did raise a question of law. Here the question raised is whether it was proper for the trial judge to question the accused respecting the truthfulness of the statement that was sought to be introduced in evidence. This does not depend on any question of fact like the voluntariness or otherwise of the statement. It is a pure question of law.

Reference has been made to the following passages of the judgment of Lord Du Parcq in *Noor Mohamed v. The King*[24]:

> It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The

[23] [1964] S.C.R. 79, 41 C.R. 407, 46 W.W.R. 188.
[24] [1949] A.C. 182 at 192.

distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

It must be pointed out that in that case the Privy Council was considering the propriety of allowing in a murder case evidence of another murder. This had been permitted by the trial judge as evidence of a "similar pattern". The Privy Council quashed the conviction. Immediately after the passage quoted above, which is clearly *obiter*, Lord Du Parcq went on to say:

> Their Lordships have considered with care the question whether the evidence now in question can be said to be relevant to any issue in the case.

He finally concluded by saying (at p. 193):

> After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified on any of the grounds which have been suggested or on any other ground.

When that decision was considered by this Court in *Lizotte v. The King*[25], the following passages were quoted in addition to the passage first above referred to, namely at p. 190:

> In *Makin v. Attorney-General for New South Wales* (1894, A.C. 57, 65), Lord Herschell L.C., delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried". In 1934 this principle was said by Lord Sankey L.C., with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country". (*Maxwell v. The Director of Public Prosecutions*, 1935, A.C. 309, 317, 320).

And at pp. 195-196:

> Their Lordships think that a passage from the judgment of Kennedy J. in the well-known case of *Rex v. Bond* (1906, 2 K.B. 389, 398) may well be quoted in this connexion:
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> "If, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without

[25] [1951] S.C.R. 115 at 126, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.

1968

DÉCLERCQ v. THE QUEEN

Hall J.

> a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions."

Their Lordships respectfully approve this statement, which seems to them to be completely in accord with the later statement of the Lord Chancellor in *Maxwell's* case (1935, A.C. 309, 320), when he said "It is of the utmost importance for a fair trial that the evidence should be prima facie limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined." They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions.

On the basis of those principles this Court held in the *Lizotte* case that evidence disclosing the commission of another murder had been improperly admitted in the course of the cross-examination of a witness and the conviction was quashed and a new trial ordered.

I would quash the conviction here and order a new trial.

SPENCE J. (*dissenting*):—Upon this appeal, I agree with my brother Hall. Despite reference in various cases to the possible impropriety of the exclusion of statements of the accused which are true, it has most certainly been settled by the decisions both in this Court and in England that the task of the trial judge in considering the admissibility of a statement made by the accused to a person in authority is to determine not whether that statement is true but whether it is voluntary. I need not cite authorities for that proposition, the Chief Justice has already done so in his reasons.

The only justification, in my opinion, for either counsel for the Crown or the trial judge questioning the accused when giving evidence on the *voir dire* as to truth or falsity of his statement, which it is sought to introduce, is the relevance of his answer as to the truth of the statement upon the question of his credibility. Careful consideration of the matter convinces me that under the particular circumstances of the *voir dire* the answer of the accused to that question is not relevant and has no probative value in determining the voluntary or involuntary character of the statement. It must be remembered that the statement of

the accused to a person in authority is introduced during the evidence advanced by the prosecution and very often quite early in the course of the trial. At that time, of course, no evidence has been given as to guilt or innocence by the accused or anyone on his behalf, and indeed in the usual course the only evidence given up to that time is evidence by such witnesses as the complainant and police officers. If the accused were to answer the question when put by either Crown counsel or the trial judge in the negative, then there would be no basis upon which the trial judge could come to the conclusion that his answer was false and that therefore his credibility in his testimony to the effect that the statement was not voluntary might be untrue until the trial had been completed. That conclusion could be made only on the basis of the whole evidence. Therefore, I cannot see how a negative answer by the accused to the question as to the truth of the statement would in any way damage his credibility and assist the trial judge in coming to the conclusion as to whether the accused's evidence denying the voluntary nature of the statement was false.

If, on the other hand, the accused answered the question as to the truth of the statement in the affirmative, it would not in any way damage or cast doubt on his other evidence that the statement was not voluntary. It might well be part of the accused's case that despite the fact that he did commit the offence with which he has been charged he cannot be convicted thereof as the Crown must prove its case beyond reasonable doubt, and surely it is plain that the Crown cannot proceed to do so by the production of a statement made to a person in authority which was not voluntary.

Under the circumstances, the affirmative answer in this situation makes the prejudice two-fold; firstly, as I have said, it is not relevant to the issue of whether the statement was voluntary or not voluntary and, secondly, and particularly when, as in the present case, the trial was by judge alone without a jury, the accused suffers all the disabilities pointed out by my brother Hall in his reasons. I am, therefore, of the opinion that despite the decision in

1968

DeClercq v. The Queen

Spence J.

Rex v. Hammond[26] and in *Regina v. LaPlante*[27], the question should be ruled to be inadmissible whether put by Crown counsel or even in the careful fashion put by the learned trial judge in the present case.

It would appear from the wording of the learned trial judge's ruling as cited by the Chief Justice in his reasons that the learned trial judge realized his task and determined that the statement was a voluntary one. I am, however, of the opinion that that ruling is not sufficient justification for this Court to act under the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*. It would be speculation for this Court to say that despite the question put by the learned trial judge to the accused, which I am of the opinion for the above reasons was improper, and the accused's answer thereto, the learned trial judge would have ruled the statement voluntary. The accused's answer to that question may well have been the telling factor in causing the learned trial judge to determine that the statement was a voluntary one. Moreover, had the statement been excluded then counsel for the accused might well have proceeded in a very different fashion in his defence, and might well have chosen not to call the accused in defence.

For these reasons, I am of the opinion that this Court cannot say that the putting of the question by the learned trial judge to the accused upon the *voir dire* caused no substantive miscarriage of justice. I, therefore, agree with my brother Hall that the conviction should be quashed and a new trial directed.

Pigeon J. (*dissenting*):—In this appeal I agree with what my brothers Hall and Spence have said and wish to add the following observations.

I cannot hold that questions to an accused concerning the truth of a statement allegedly made by him, although irrelevant to the inquiry on the *voir dire,* may be permitted as having a bearing on his credibility. These questions really go to the main issue: the guilt or innocence. On the *voir dire,* the answers to such questions cannot be tested

[26] [1941] 3 All E.R. 318, 28 Cr. App. R. 84.
[27] [1958] O.W.N. 80.

against full evidence, and they cannot be of any real help in reaching a decision on the only issue: the admissibility of the statement.

In my view, the result of permitting on a *voir dire* questions pertaining to the truth or falsity of the statement must inevitably be to weaken the rule against the admission of involuntary statements and, in fact, to admit in evidence statements which otherwise would have to be rejected as not voluntarily made. This would be unfortunate because it would tend to undermine a very necessary safeguard against improper treatment of suspects.

There is no reason for the judge sitting on a *voir dire* to put or permit any question respecting the truth of the statement unless he is in some doubt as to whether it was voluntarily made or not. Seeing that he must at that time take the answer of the accused as given, the consequence of such a question must be that any doubt concerning the voluntary character of the statement is resolved in favour of the prosecution if the accused says it is a true statement. The end result of such a course of action is to admit in evidence, because the accused says it is true, an incriminating statement that would otherwise probably be rejected.

Where this can lead is strikingly illustrated by what occurred in the Australian case of *Reg v. Monks* as related in the Australian Law Journal (1960, vol. 34, p. 111). The accused testifying on the *voir dire* said that a confession had been extorted from him by brutal treatment on the part of the police. This confession was the only evidence of any consequence against him. When cross-examined he admitted that it was true in fact and also that he had committed all the offences with which he was charged. Thereupon the trial judge, the Chief Justice himself, ruled the confession admissible, saying that it would be a "public scandal" if, after a full confession upon oath in open court, the accused should thereafter be acquitted. Who will say that this man should properly have been disbelieved when saying that the confession had been extorted because he ought to be believed when confessing his crimes? Yet this is what must be the reasoning on the issue of credibility if

1968

DECLERCQ v. THE QUEEN

Pigeon J.

one is going to contend that the principle of not allowing involuntary confessions in evidence remains unimpaired.

In the present case, much is made of the fact that the trial judge did not look at the statement before he asked the accused whether it was true. It is said that this shows that the accused would not have been prejudiced if the judge had decided to reject the statement. In my view, the fallacy of this reasoning is that under those circumstances the statement was inevitably going to be received in evidence if the accused admitted it to be true. Although the contents had not been disclosed to the judge, it was obvious from what had been said that the statement was inculpatory. When, in order to resolve his doubt concerning its voluntary character, the judge asked the accused whether it was true, the admission obtained by this questioning necessarily resulted in the statement being admitted. To say that the statement was admitted because the trial judge came to the conclusion that it had been voluntarily made is not strictly accurate in the circumstances of this case. In fact, the judge came to this conclusion partly because the accused admitted that it was true.

Because the rule against compulsory self-incrimination is the root of the objection, I cannot agree that this is a matter of judicial discretion respecting the extent of cross-examination on credibility. In considering the cogency of the reasoning in the *Hammond* case we should bear in mind that, in the United Kingdom, judges are allowed to comment on the omission of the accused to testify. In this perspective it is much less obnoxious to permit incriminating questions on the *voir dire*, than under a system where such comments are strictly prohibited. One only has to read the *Bigaouette* case[28] to appreciate the importance of this difference in the applicable legal principles.

Appeal dismissed, HALL, SPENCE *and* PIGEON JJ. *dissenting.*

Solicitor for the appellant: J. A. Mahon, Toronto.

Solicitor for the respondent: The Attorney-General for Ontario.

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[28] [1927] S.C.R. 112; 47 C.C.C. 271, 1 D.L.R. 1147.

ROGER ADAMS and THE CORPORATION OF THE TOWNSHIP OF TORONTO (*Defendants*) ..... APPELLANTS;

AND

MANUEL DIAS (*Plaintiff*) ..... RESPONDENT.

1968
*June 13
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Driver entering divided highway from side road—Stalling while crossing westbound lanes—Turning east into eastbound lane after second stall at middle of intersection—Westbound car crossing median strip and crashing head-on into plaintiff's car—Whether contributory negligence on part of plaintiff—Damages.

The motor vehicle accident out of which the present action arose occurred at about 11 o'clock on a rainy night at the intersection of a divided four-lane highway running east and west and a side road running north and south. The plaintiff was travelling south on the side road and after having brought his vehicle to a full stop at the intersection, he made a considerable entry into the intersection at a time when it was free of traffic. However, his engine stalled and his car was temporarily stationary while straddling the two westbound lanes of the highway. The plaintiff restarted the car but it stalled again when it had reached about the middle or centre of the intersection. The plaintiff again restarted his vehicle and was turning it in a south-easterly direction into the southern section of the highway when he was struck head-on by a police car which was being operated by the defendant. This car had been proceeding westerly on the highway, at a rate well in excess of the 50 m.p.h. speed limit, and had veered over from its own right-hand side of the highway, across the median strip so as to be travelling in a south-westerly direction on its wrong side of the road. The plaintiff sustained permanent and crippling injuries as a result of the collision.

The trial judge allocated the fault for the accident 60 per cent to the defendant driver and 40 per cent to the plaintiff driver and assessed the plaintiff's general damages at $85,000. The Court of Appeal affirmed the apportionment of liability but increased the assessment of general damages to $150,000. The defendant and his employer, the defendant municipality, then appealed to this Court and the plaintiff cross-appealed.

Held (Judson J. dissenting in part): The appeal should be dismissed and the cross-appeal allowed.

Per Cartwright C.J. and Martland, Ritchie and Spence JJ.: The plaintiff was not guilty of any negligence which caused or contributed to the accident. While a driver is in no way relieved from the liability which flows from a failure to take reasonable care simply because another user of the highway is driving in such a fashion as to violate the law, no motorist is required to anticipate, and therefore keep on the look-out for, such an unusual and unexpected violation as was manifested by the defendant's course of conduct in the present case.

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

1968

ADAMS *et al.* v. DIAS

As to the amount of damages, the Court of Appeal did not err in principle in awarding the amount which it did and as that amount did not appear to be inordinately high having regard to the injuries sustained, there was no reason for interfering with the increased award.

Per Judson J., *dissenting*: The concurrent findings by the Courts below on liability should be affirmed. The plaintiff's conduct was a contributing factor to the accident. Until almost the moment of impact the plaintiff never saw the police car and the only reason for the stalling was improper operation.

[*London Passenger Transport Board v. Upson*, [1949] A.C. 155, referred to.]

APPEAL by defendants and CROSS-APPEAL by plaintiff from a judgment of the Court of Appeal for Ontario affirming the division of fault but increasing the assessment of damages made at trial in an action for damages for personal injuries. Appeal dismissed and cross-appeal allowed, Judson J. dissenting in part.

W. B. Williston, Q.C., and *H. A. Willis*, for the defendants, appellants.

R. E. Holland, Q.C., B. B. Shapiro, Q.C., and *G. C. Elgie, Q.C.*, for the plaintiff, respondent.

The judgment of Cartwright C.J. and Martland, Ritchie and Spence JJ. was delivered by

RITCHIE J.:—This appeal arises out of a head-on collision which occurred in the Township of Toronto at about 11 o'clock on a rainy night in April 1964, at the intersection of highway No. 5 and a side road called Mavis Road. The respondent, operating his own motor vehicle had entered the intersection and having crossed the northern section of the highway had just completed a left-hand turn into the southern half thereof, when a police car owned by the appellant municipal corporation and operated by the defendant Adams in the course of his employment as a police officer, crossed from its own proper side of the highway directly into the respondent's path. The respondent sustained permanent and crippling injuries as a result of this collision.

The learned trial judge allocated the fault for this accident 60 per cent to the appellant and 40 per cent to the respondent and assessed the respondent's general damages at $85,000, but the Court of Appeal for Ontario, while

affirming the division of fault made at the trial, allowed the respondent's cross-appeal as to damages and thereby increased the award from $85,000 to $150,000. The appellants now appeal to this Court alleging that the trial judge and the Court of Appeal erred in holding that there was any negligence on the part of the appellant Adams which contributed to the accident and from the Court of Appeal's assessment of the general damages while the respondent cross appeals alleging that there was no real evidence upon which a Court could find that he was negligent.

Highway No. 5 is a "through highway" within the meaning of *The Ontario Highway Traffic Act*, R.S.O. 1960, c. 172, s. 1(26), and it runs east and west having two eastbound and two westbound lanes, the most northerly of which is 11 feet 6 inches in width, the other three being 12 feet wide. The two sets of lanes are separated by a median or ripple strip some 4 feet in width which has a maximum height of some 3 inches above the surrounding pavement and tapering to 1/4 inch at its outer edges. Mavis Road which is a paved side road 21 feet 1 inch in width, runs north and south and there is a stop sign situate on the west side of the road about 55 feet north of the north edge of the most northerly lane of No. 5 highway.

At the time and place in question, the respondent was travelling south on Mavis Road and having stopped at the stop sign, made a substantial entry into the intersection at a time when it was free of traffic, and when the trial judge has found that there was no traffic within such a distance as to constitute an immediate hazard, at this point his engine stalled and his car was temporarily stationary while straddling the two west bound lanes of highway No. 5, the respondent restarted the car but it stalled again when it had reached a point which the learned trial judge describes as "about the middle or the center of the intersection straddling what would have been the ripple strip if it had been in the spot where the vehicle came to rest at that time; a little more of the vehicle itself south of the center line than to the north". Dias again restarted his vehicle and was turning it in a south-easterly direction into the southern section of highway No. 5 when he was struck head-on by the police car which had been proceeding westerly on highway No. 5 and had veered over from its own right-hand side of the highway, across the ripple strip so as

1968

ADAMS *et al.* v. DIAS

Ritchie J.

to be travelling in a south-westerly direction on its wrong side of the road. The above account of the movements of the respondent's vehicle is a paraphrase of the finding of the learned trial judge, but in considering the findings concerning the appellant's activities, I think it desirable to quote verbatim from the findings at trial. Having found that "the police car was some very considerable distance east of the intersection when the plaintiff's vehicle entered it" he went on to say:

> There was no traffic in the intersection, of course, when the plaintiff driver entered the intersection with his vehicle. And again I repeat there was no traffic within such a distance or proceeding under such circumstances existing as to constitute an immediate hazard to the plaintiff in the operation of his car, or such as to constitute the plaintiff a hazard to approaching traffic. Although the driver of the police car says he approached the intersection at a speed of some 50 miles an hour, and that he reached a certain point where he applied his brakes, I find he is undoubtedly mistaken in that. The evidence that I accept leads me to believe he was travelling at a speed much in excess of that. I think that is apparent not only from the physical damage to the vehicles and the position of the vehicles as ascertained when they came to rest after the collision but, also, from the evidence of a witness who states that at the crest or about the crest of the hill this vehicle passed him at a speed of some 70 to 75 miles an hour. This was a 50-mile speed zone at the area in question.

The trial judge's account of the part played by the appellant's vehicle in the actual collision itself is phrased in the following language:

> The collision occurred in the south-east quadrant of the intersection. The defendant driver had crossed the ripple strip and was proceeding in a south-westerly direction at the time that he collided or his vehicle collided with the plaintiff's vehicle. The collision was almost head-on. The photographic evidence indicates substantially where the first impact was upon the vehicles. They were some distance apart when they came to rest. Strange to say, the plaintiff's vehicle was some distance to the west of the point of impact. Again, it will be remembered that it was travelling easterly or substantially easterly at the time the impact occurred. Again, this leads me to the conclusion that the other vehicle was travelling at a high rate of speed. The plaintiff was not travelling fast; he was travelling slowly. He has said himself below ten miles an hour. I am inclined to look with some skepticism upon his relation of the events that occurred, by reason of the fact he did suffer some post-traumatic amnesia. However, he is substantially corroborated in the details of the accident which he gives by his passenger Korth.
>
> There is no question whatever in my mind that the defendant driver is negligent, or was negligent, and that his negligence contributed to or was a substantial cause of this accident in question and the resulting damage. I find that he was negligent in that he failed to keep a proper look-out; that he failed to yield to the plaintiff the right of way to which he was entitled under s. 64 of *The Highway Traffic Act*, after having made prior entry into the intersection; and that he failed to keep his

vehicle under such control as would have enabled him to avoid an accident or collision when it was reasonably possible for him so to avoid it. Had he been alert and watching what was occurring ahead of him, and had he been travelling at such a speed that he was able to react properly and adequately to the situation, I think he could have brought and should have brought his vehicle to a stop before he even entered the intersection. While it is true, I think, that the movement of the plaintiff's vehicle within the intersection caused some confusion, particularly on the night in question in the light of the inclement weather, the defendant driver was familiar with this intersection, he could see it if he had been keeping a proper look-out, the movements of the vehicle, and he could have slowed down. He said he did slow down by applying his brakes at a certain time—in one instance he says ten car lengths from the other vehicle, and at another point five or six car lengths from the plaintiff's vehicle. He estimates a car length to be 20 feet. At that time he was headed on a south-westerly course. Just where he veered from his normal lane of traffic, in which he had been proceeding prior to reaching the intersection, or prior to the time when he was close to the intersection, it is difficult to say, but he did veer to the left or to his left, to the south-west and across the median or ripple strip. And I have no hesitation in finding he is right when he says he applied his brakes, although there was no indication upon the pavement that he had done so that was visible or apparent following the accident.

It is thus clearly established from the facts as found by the learned trial judge that the appellant's vehicle was being driven at a rate well in excess of the 50 m.p.h. speed limit directly across the median strip between the two double lanes of highway No. 5 onto a portion of the highway where he had no right to be and that he there ran head-on into the defendant's vehicle.

In dividing the fault so as to find the respondent 40 per cent to blame for the accident, the learned trial judge found the respondent to be negligent in the operation of his vehicle in the following manner:

When it stalled the second time, and before he proceeded forward, I think that he should have been sufficiently alert to have been aware of the presence of and the course of the other vehicle upon the highway. His evidence is that at no time did he see the other vehicle approaching until it was at a point a very short distance from him, and just before or at the time that he started forward after he had stalled the second time. In other words, according to his version, only one half to one second in time before the collision occurred. It is quite apparent to me that at that point of time the other vehicle was on its south-westerly course. Undoubtedly, the driver had taken some steps to avoid the plaintiff's vehicle as best he could under the circumstances, but I think much too late. Had the plaintiff been keeping a proper look-out, I think that there is a good probability that he could have avoided this collision, at least rendered it much less severe. And I think it was quite imprudent, and would have been quite imprudent of him to have proceeded forward after this second stalling with the oncoming vehicle in the position in which it was proceeding at the time that he stalled the second time. I find that he was negligent in that he failed to keep a proper look-out, and that he

1968

ADAMS *et al.* v. DIAS

Ritchie J.

proceeded in the face of danger without insuring that he could safely proceed further on his way. Such negligence, again, I find was a contributing cause to the accident in question and the resulting damage.

With the greatest respect for the learned trial judge, I am of opinion that this latter finding of negligence placed a much higher duty of care on the respondent than that which is required of a reasonably prudent motorist.

It is true that a driver is in no way relieved from the liability which flows from a failure to take reasonable care simply because another user of the highway is driving in such a fashion as to violate the law, but in my opinion, no motorist is required to anticipate, and therefore keep on the look-out for, such an unusual and unexpected violation as was manifested by the appellant's course of conduct in the present case.

It is to be noted that the negligence found against the respondent by the learned trial judge consisted of failure to keep a proper look-out when he proceeded forward after the second time he had stalled. At this time more than half of his vehicle was to the south of the centre line of the highway thus leaving the two northerly lanes, which together measured 23½ feet, almost completely free for the appellant. As Dias moved from the position of his second stall wholly into the southern half of the intersection, it was his duty to look ahead and to the west to determine whether any other vehicles were approaching from these directions at such a distance as to constitute a hazard, but he was in my view under no duty to keep a look-out for cars travelling west on the other side of the ripple strip which divided the highway.

The learned trial judge found that the respondent should have been sufficiently alert to detect the fact that the appellant's car was on a south-westerly course at the time when he was moving away from his second stall, but I do not think that even if he had observed the police car's lights veering towards the south, he could have been expected to foresee that it would continue on this course so as to cross the ripple strip and invade the area which was reserved for eastbound traffic. Upon seeing the lights of the approaching vehicle turning towards the south, the normal reaction of a reasonable motorist would, I think, have been to conclude that it was moving further over into the southerly lane of the northern section of the highway rather

than that it was bent upon crossing the centre line so as to travel entirely onto its wrong side of the road. The fatal error on Constable Adams' part was not that he adopted a south-westerly course, but that he continued on that course across the ripple strip and taking into consideration the speed at which he was travelling, the elapsed time from the moment when his front wheels encountered the ripple strip until the collision occurred cannot have been much more than one second.

In my view the respondent's actions after the appellant had crossed the ripple strip were conditioned by the imminent danger in which he was placed through the appellant's negligence, and with all respect to the learned trial judge, I do not think that he had any opportunity to take avoiding action after the appellant had started to cross the ripple strip. As I have indicated, even if the respondent's vehicle had remained where it was after the second stall, there would have been ample room for Adams to pass it on his own side of the highway and it seems to me that the most probable explanation of the accident is that he became confused, misjudged the position of the respondent's car and thought it necessary to move over to the wrong side of the road. Like all such decisions made by drivers travelling at a high rate of speed, it must have been made in a matter of seconds and the result proved that it was clearly wrong.

This case in my opinion is to be viewed in light of the well-known observation made by Lord Uthwatt in *London Passenger Transport Board v. Upson*[1], at p. 173 where he said:

> A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

The actions of Adams in my view constituted the type of folly which a driver is not bound to anticipate and no amount of experience on the highway would lead the reasonably careful motorist to consider it in any way likely that a police car with its red light flashing which appeared to be approaching the centre line of the highway, was going to continue on its way across the ripple strip directly into his path.

[1] [1949] A.C. 155.

1968

ADAMS *et al.* v. DIAS

Ritchie J.

I am fully conscious of the fact that the findings of fact of the learned trial judge have been affirmed by the Court of Appeal and I in no way dissent from those findings, but it has often been said that when it comes to deciding the proper inferences to be drawn from accepted facts, the Courts below are in no better position to decide the issue than the judges of an appellate Court and I am of the opinion that the facts found by both the Courts below do not support the conclusion that the respondent was guilty of any negligence which caused or contributed to this accident. I would accordingly allow the cross-appeal.

The respondent suffered a severe closed head injury with damage to the brain stem area which has resulted in permanent and crippling disability and the evidence indicates that he will require constant and continual nursing care and service and medical supervision for the rest of his life, so that there can be no question about his right to recover substantial damages. In awarding the respondent $150,000 general damages, the Court of Appeal treated the $85,000 award made by the learned trial judge as being a wholly erroneous estimate of the damage and as I cannot find that the Court of Appeal erred in principle in awarding the amount which it did and as that amount does not appear to me to be inordinately high having regard to the injuries sustained, I can find no reason for interfering with the increased award. I would therefore dismiss the appeal.

The statement of claim was amended at the trial so as to include a claim for "general damages in the amount of $250,000 on behalf of the Ontario Hospital Services Commission *for future hospitalization*". (The italicizing is my own.)

The Ontario Hospital Services Commission is not a party to these proceedings but it is assumed that the claim was included pursuant to s. 52(2) of the Regulations [O. Reg. 1/67] passed pursuant to *The Hospital Services Commission Act*, R.S.O. 1960, c. 176, which read as follows:

> 52(2) The Commission is subrogated to any right of an insured person to recover all or part of the cost of insured services from any other person, including future insured services, and the Commission may bring action in the name of the insured person to enforce such rights.

When this claim was drawn to the attention of the learned trial judge he said:

> If it were indicated to me that this man were required to remain in a hospital over which the Ontario Hospital Services Commission had juris-

diction, then I think I would be inclined to ensure there was some definite sum allocated for that purpose, but I am not at all sure, in the light of the evidence, whether that is going to be so.

This matter was raised before us, but there is, in my opinion, no evidence upon which this Court would be justified in making any estimate of the future hospitalization, if any, which will be undergone by the respondent *in an institution approved by the Commission,* and I therefore do not think that we are in a position to deal with this claim.

The respondent will have the costs of the appeal in this Court and his costs of the cross-appeal both here and in the Court of Appeal for Ontario.

JUDSON J. (*dissenting in part*):—I would not interfere with the trial judge's apportionment of 40 per cent of the responsibility for this accident to the plaintiff. This apportionment was affirmed by the Court of Appeal and in my opinion there was ample evidence for the common conclusion of both Courts on this point.

The plaintiff entered this intersection from a stop street to the north and stalled in this position when Adams in the westbound police car had to make a decision to avoid him by veering either to the north shoulder or the eastbound lanes to the south. Adams chose to veer to the south. The plaintiff stalled his car again in the median strip and then began to make a left turn into the eastbound lanes. The cars collided in the south-east quadrant. Until almost the moment of impact the plaintiff never saw the police car. According to the plaintiff's own witness, who was a motor mechanic and who had examined the car immediately before its recent purchase by the plaintiff, the only reason for the stalling was improper operation.

I would affirm the concurrent findings on liability and accept the increase in the damages awarded in the Court of Appeal. Consequently, I would dismiss the appeal and cross-appeal, both with costs.

Appeal dismissed and cross-appeal allowed with costs, JUDSON J. *dissenting in part.*

Solicitors for the defendants, appellants: Willis, Clarke, Dingwall & Newell, Toronto.

Solicitors for the plaintiff, respondent: Elgie & Philp, Toronto.

1968
*May 28, 29
June 26

NORTH COAST AIR SERVICES LIMITED and ALERT BAY AIR SERVICES LIMITED ..... APPELLANTS;

AND

THE CANADIAN TRANSPORT COMMISSION ..... RESPONDENT.

APPEAL FROM GENERAL ORDERS OF AIR TRANSPORT BOARD

General orders—Aeronautics—Power of Air Transport Board to make general orders—Power of Air Transport Committee to validate otherwise invalid general orders of Air Transport Board—Aeronautics Act, R.S.C. 1952, c. 2, ss. 8, 13, 15—National Transportation Act, 1966-67 (Can.), c. 69, s. 5—Railway Act, R.S.C. 1952, c. 234.

The appellants are licensed commercial air carriers. Their operations were affected by certain general orders of the Air Transport Board, purporting to regulate commercial air traffic. On January 17, 1968, the Air Transport Committee of the Canadian Transport Commission ordered by General Order 1968-A-5 that these orders of the Air Transport Board be made orders of the Air Transport Committee. The appellants were granted leave, under s. 53 of the *Railway Act*, to appeal to this Court where two questions were in issue: whether the Air Transport Board had power to make the orders in question and whether, if the Board had no such power, the general order enacted by the Air Transport Committee was effective to make these orders valid.

Held: The appeal should be allowed and the orders in question declared invalid.

The general orders of the Air Transport Board, made, as they were, without the approval of the Governor in Council, were invalid. *R. v. North Coast Air Services Ltd.* (1968), 65 D.L.R. (2d) 334, applied.

The wording of s. 5 of the *National Transportation Act*, 1966-67 (Can.), c. 69, was not broad enough to grant to the Canadian Transport Commission power to regulate in matters under the *Aeronautics Act*, which were not given to it by that Act, or to exercise regulatory powers given to it in that Act without the approval of the Governor in Council which was still specifically required by the Act.

Ordonnances générales—Aéronautique—Pouvoir de la Commission des transports aériens d'établir des ordonnances générales—Pouvoir du comité des transports aériens de rendre valide les ordonnances générales de la Commission des transports aériens qui autrement seraient invalides—Loi sur l'aéronautique, S.R.C. 1952, c. 2, art. 8, 13, 15—Loi nationale sur les transports, 1966-67 (Can.), c. 69, art. 5—Loi sur les chemins de fer, S.R.C. 1952, c. 234.

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*PRESENT: Cartwright C.J. and Fauteux, Martland, Judson and Ritchie JJ.

Les appelants détiennent un permis d'exploiter des services aériens commerciaux. Certaines ordonnances générales de la Commission des transports aériens, dont le but était de réglementer le trafic aérien commercial, affectent l'exploitation des appelants. Le 17 janvier 1968, le comité des transports aériens de la Commission canadienne des transports a ordonné, par son ordonnance générale 1968-A-5, que les ordonnances en question de la Commission des transports aériens deviennent les ordonnances du comité des transports aériens. Les appelants ont obtenu, en vertu de l'art. 53 de la *Loi sur les chemins de fer*, la permission d'en appeler à cette Cour où deux questions ont été soulevées: à savoir si la Commission des transports aériens avait le pouvoir d'établir les ordonnances en question et si, dans le cas où la Commission n'avait pas ce pouvoir, l'ordonnance générale établie par le comité des transports aériens a eu pour effet de rendre ces ordonnances valides.

Arrêt: L'appel doit être accueilli et il doit être déclaré que les ordonnances en question étaient invalides.

Les ordonnances générales de la Commission des transports aériens, ayant été établies sans l'approbation du gouverneur en conseil, étaient invalides. *R. v. North Coast Air Services Ltd.* (1968), 65 D.L.R. (2d) 334.

Le langage de l'art. 5 de la *Loi nationale sur les transports*, 1966-67 (Can.), c. 69, n'a pas une étendue assez grande pour permettre à la Commission canadienne des transports de réglementer dans les matières sous la *Loi sur l'aéronautique* qui ne lui sont pas allouées par cette Loi, ou pour exercer des pouvoirs de réglementation qui lui sont alloués dans cette Loi sans l'approbation du gouverneur en conseil, qui est encore spécifiquement requise par la Loi.

APPEL des ordonnances générales de la Commission des transports aériens. Appel accueilli.

APPEAL from general orders of the Air Transport Board. Appeal allowed.

A. A. W. MacDonell and *B. A. Crane*, for the appellants.

A. M. Garneau, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal, with leave, pursuant to s. 53 of the *Railway Act*, R.S.C. 1952, c. 234, from General Orders No. 5/51, 7/52, 21/58, 46/67 and 49/67, all of which were orders of the Air Transport Board. In brief, these orders dealt with three subject-matters:

1. (a) prohibiting a commercial air carrier from carrying traffic between points named on the same licence of

1968

NORTH COAST AIR SERVICES LTD. *et al.* *v.* CANADIAN TRANSPORT COMMISSION

Martland J.

any Class 1 or Class 8 scheduled commercial air carriers or between points named on the same licence of any Class 2 or Class 9-2 non-scheduled commercial air carriers.

(b) Prohibiting carriers in Group A from carrying traffic out of the base of another Group A carrier, prohibiting carriers in Group B from carrying traffic out of the base of another Group B or Group C carrier, and prohibiting carriers in Group C from carrying traffic out of the base of another Group C or Group B carrier.

2. Prohibiting Class 4 charter air carriers from chartering aircraft to persons who obtain payment for the transportation of traffic at a toll per unit.

3. Prohibiting the acquisition or the announcement of an intention to acquire by a Canadian air carrier licensed to operate Class 1, 2, 4, 8, 9-2 or 9-4 commercial air services of aircraft having two or more engines with a maximum take-off weight on wheels in excess of 18,000 pounds without first obtaining written approval from the Board.

The appellants are licensed commercial air carriers for non-scheduled flights whose operations were affected by these orders.

Subsequent to the making of these orders, the *National Transportation Act,* 1966-67 (Can.), c. 69, came into effect. Thereafter, on January 17, 1968, the Air Transport Committee enacted General Order No. 1968-A-5, which provided as follows:

WHEREAS the power of the former Air Transport Board to issue orders of general application has been questioned;

AND WHEREAS under the provisions of section 5 of the National Transportation Act certain provisions of the Railway Act including section 34 thereof are made to apply mutatis mutandis to the Canadian Transport Commission;

AND WHEREAS section 34 of the Railway Act authorizes the making of orders or regulations which may be made to apply to all cases or to any particular case or class of cases;

IT IS THEREFORE ORDERED:

THAT under the authority of the Aeronautics Act, section 5 of the National Transportation Act and section 34 of the Railway Act:

(1) the General Orders of the Air Transport Board referred to in Schedule "A" hereto are made orders of the Air Transport Committee; and

(2) unless otherwise specifically provided compliance with the provisions of the said orders where applicable is hereby made a condition of every licence to operate commercial air services.

Included in the orders listed in Schedule A were the orders to which I have previously referred.

Two questions arise on this appeal. The first is as to whether the Air Transport Board had power to make the orders in question in this appeal. The second, which only arises if the Board is held not to have had such powers, is whether the General Order of the Air Transport Committee was effective to make the orders valid.

The first question involves a consideration of the power of the Air Transport Board to make general orders under the provisions of the *Aeronautics Act*, R.S.C. 1952, c. 2. Under that Act, certain powers were conferred upon the Minister of Transport, others upon the Board.

Thus, under s. 3(*f*) it was the duty of the Minister to prescribe aerial routes. Under s. 4, the Minister, with the approval of the Governor in Council, was empowered to make regulations, including, under para. (*h*) of subs. (1), regulations with respect to aerial routes, their use and control.

The powers of the Board were defined in Part II of the Act. Section 8, in subss. (1) and (2), provided as follows:

8. (1) The Board has full jurisdiction to inquire into, hear and determine any matter

(*a*) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, licence, permit, order or direction made thereunder by the Board, or that any person has done or is doing any act, matter or thing contrary to or in violation of this Part, or any such regulation, licence, permit, order or direction, or

(*b*) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act, or thing that by this Part or any such regulation, licence, permit, order or direction is prohibited, sanctioned or required to be done.

(2) The Board may order and require any person to do, forthwith, or within or at any specified time and in any manner prescribed by the Board so far as it is not inconsistent with this Act, any act, matter or thing that such person is or may be required to do under this Part, or any regulation, licence, permit, order or direction made thereunder by the Board and may forbid the doing or continuing of any act, matter or thing that is contrary to this Part or any such regulation, licence, permit, order

1968

NORTH COAST AIR SERVICES LTD. *et al.* *v.* CANADIAN TRANSPORT COMMISSION

Martland J.

or direction and, for the purposes of this section, has full jurisdiction to hear and determine all matters, whether of law or fact.

As to subs. (1), I agree with the views expressed by Tysoe J.A., delivering the judgment of the Court of Appeal for British Columbia, in *R. v. North Coast Air Services Ltd.*[1]. The Court was dealing with an appeal by the present appellant from a conviction for disobeying an order of the Air Transport Board (No. 5/51). At p. 338 he said:

> I am unable to accede to this argument. In my view, s-s. (1) of s. 8 does not empower the Board to make an "order" but merely to "inquire into, hear and determine any matter" where it appears to the Board that any of the circumstances set out in para. (*a*) or (*b*) of the subsection have arisen. Subsection (1)(*b*), on which counsel particularly relied, does no more than authorize an inquiry into and a hearing and determination of any matter in cases where a question has arisen whether the Board should, in the public interest, make any order or give any direction, leave, sanction or approval *that by law it is authorized to make or give,* etc.

Subsection (2) deals only with the making of mandatory orders to compel the enforcement of duties or obligations imposed upon a person by Part II of the Act, or under any regulation, licence, permit, order or direction made by the Board under Part II.

Section 13 deals with the power of the Board to make regulations, subject to the approval of the Governor in Council. The only portions of this section which might be relevant are paras. (*i*) and (*o*), which define the subject-matter of regulations as follows:

> (*i*) respecting traffic, tolls and tariffs, and providing for the disallowance or suspension of any tariff or toll by the Board, the substitution of a tariff or toll satisfactory to the Board or the prescription by the Board of other tariffs or tolls in lieu of the tariffs or tolls so disallowed;
>
> (*o*) providing for the effective carrying out of the provisions of this Part.

It is doubtful whether the Board's orders in issue fell within either of these paragraphs, but, in any event, the approval of the Governor General was not obtained in respect of any of these orders.

Section 15 of the Act deals with the issuance of licences, and subs. (6) of that section provides:

> (6) In issuing any licence, the Board may prescribe the routes that may be followed or the areas to be served and may attach to the licence

[1] (1968), 65 D.L.R. (2d) 334, [1968] 2 C.C.C. 214.

such conditions as the Board may consider necessary or desirable in the public interest, and, without limiting the generality of the foregoing, the Board may impose conditions respecting schedules, places of call, carriage of passengers and freight, insurance, and, subject to the *Post Office Act*, the carriage of mail.

With respect to this provision I agree with what was said by Tysoe J.A., in the *North Coast Air Services Ltd.* case, at p. 337:

> Section 15 appears to me to have no relation to licensees as a group or class but to individual applicants for licences and licences issued to specific individuals. The General Order cannot be supported under that section.

I am in agreement with the conclusions reached by the Court of Appeal in that case regarding the power of the Board to enact the order which was in question, and the reasoning, in my opinion, applies equally to the other orders involved in this appeal.

I am therefore of the opinion that the general orders in question, made, as they were, without the approval of the Governor in Council, were invalid.

Is the situation altered by General Order 1968-A-5 of the Air Transport Committee?

The submission of the respondent is that s. 5 of the *National Transportation Act*, which made certain provisions of the *Railway Act*, R.S.C. 1952, c. 234, applicable to the newly created Canadian Transport Commission, has the effect, by reason of the operation of s. 34 of the *Railway Act*, of authorizing the Air Transport Committee (created by s. 17 of the *National Transportation Act*) to make regulations or orders generally for carrying the *Aeronautics Act* into effect, without the sanction of the Governor in Council.

Section 5 of the *National Transportation Act* provides as follows:

> 5. (1) Except as otherwise expressly provided by this Act, the provisions of the *Railway Act* relating to sittings of the Commission and the disposal of business, witnesses and evidence, practice and procedure, orders and decisions of the Commission and review thereof and appeals therefrom apply in the case of every inquiry, complaint, application or other proceeding under this Act, the *Aeronautics Act* or the *Transport Act* or any other Act of the Parliament of Canada imposing any duty or function on the Commission; and the Commission shall exercise and enjoys the same jurisdiction and authority in matters under any such Acts as are vested in the Commission under the *Railway Act*.

1968

NORTH COAST AIR SERVICES LTD. *et al.* *v.* CANADIAN TRANSPORT COMMISSION

Martland J.

(2) For greater certainty and the avoidance of doubt, but without limiting the generality of subsection (1), it is declared that the following provisions of the *Railway Act,* namely sections 12, 13, 18 to 21, 30, 32 to 41 and 43 to 72 apply *mutatis mutandis* in respect of any proceedings before the Commission pursuant to this Act, the *Aeronautics Act* or the *Transport Act,* and in the event of any conflict between those provisions of the *Railway Act* and the provisions of the *Aeronautics Act* or the *Transport Act* those provisions of the *Railway Act* prevail.

Section 34 of the *Railway Act* is as follows:

34. (1) The Board may make orders or regulations

(*a*) with respect to any matter, act or thing that by this or the Special Act is sanctioned, required to be done, or prohibited;

(*b*) generally for carrying this Act into effect; and

(*c*) for exercising any jurisdiction conferred on the Board by any other Act of the Parliament of Canada.

(2) Any such orders or regulations may be made to apply to all cases or to any particular case or class of cases, or to any particular district, or to any railway or other work, or section or portion thereof; and the Board may exempt any railway or other work, or section or portion thereof, from the operation of any such order or regulation for such time or during such period as the Board deems expedient; and such orders or regulations may be for such time as the Board deems fit, and may be rescinded, amended, changed, altered or varied as the Board thinks proper.

(3) The Board may by regulation or order provide penalties, when not already provided in this Act, to which every company or person who offends against any regulation or order made by the Board shall be liable.

(4) The imposition of any such penalty does not lessen or affect any other liability that any company or person may have incurred.

I do not construe these provisions as having this broad effect. The *National Transportation Act,* while it repealed certain portions of the *Aeronautics Act,* left most of it intact. The power to make regulations, conferred by s. 13 upon the Air Transport Board (and now upon the Canadian Transport Commission), remains the same, and can be exercised only subject to the approval of the Governor in Council. It is difficult to see what purpose is served by retaining that section if, as the respondent contends, the Commission has a general power to regulate without such approval.

In my opinion s. 5 of the *National Transportation Act* does not have the effect which is claimed. Subsection (1) makes applicable those sections of the *Railway Act* relating to sittings of the Commission, disposal of business, witnesses and evidence, practice and procedure, orders and

decisions of the Commission and review and appeals therefrom "*in the case of every inquiry, complaint, application or other proceeding*". It is in this context that the subsection then goes on to say that the Commission shall exercise and enjoy the same *jurisdiction* and *authority in matters under any such Acts* as are vested in the Commission under the *Railway Act*.

Subsection (2) makes reference to specific sections of the *Railway Act* which are to apply, mutatis mutandis, *in respect of proceedings before the Commission.*

Section 5 is therefore concerned with proceedings before the Commission under the *National Transportation Act,* the *Aeronautics Act,* the *Transport Act* and other statutes governing its duties and function. It is with respect to proceedings of the Board and matters coming before it that it is given the same jurisdiction and authority as the Board of Transport Commissioners enjoyed under the *Railway Act.*

My view as to the meaning of s. 5 is strengthened by the wording of the French text. In the English text, in subs. (1) the word "procedure" is used in one place, and the word "proceeding" in another, both words occurring in the same sentence, but in the French text the word "procédure" is used in both places. In subs. (2) where the English text refers to "proceedings", the word "procédures" is used in the French text. This emphasizes the fact that s. 5 is concerned with procedural matters.

In my opinion, therefore, the wording of the section is not broad enough to grant to the Commission power to regulate, in matters under the *Aeronautics Act,* which are not given to it by that Act, or to exercise regulatory powers given to it in that Act without the approval of the Governor in Council which is still specifically required by the Act.

In my opinion, therefore, this appeal should be allowed, and the respective orders of the Air Transport Board, 5/51, 7/52, 21/58, 46/67 and 49/67, declared invalid.

Appeal allowed.

Solicitors for the appellants: MacDonell, Shaw, Graham & Errico, Prince Rupert.

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

1968

*May 28
May 28

RICHARD AUBREY COLLINGE.....APPELLANT;

AND

BARBARA GEE .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Trial by magistrate under Part XVI of the Criminal Code—Whether accused entitled to have or to examine transcript of evidence —Criminal Code, 1953-54 (Can.), c. 51, ss. 453, 454, 471, 555.

The appellant was tried by a magistrate, under Part XVI of the *Criminal Code,* and was convicted of fraud and false pretences. In order to determine whether an appeal was advisable, he requested the respondent, the court reporter, to make a transcript of the Court proceedings available to him without charge and, in the alternative, that he be permitted to inspect the transcript of the proceedings. His request having been refused, he applied to the Court for a writ of mandamus. The judge refused the application and his decision was affirmed by the Court of Appeal. The accused appealed to this Court.

Held: The appeal should be dismissed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming the dismissal of an application for a writ of mandamus. Appeal dismissed.

B. A. Crane, for the appellant.

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

At the conclusion of the argument of counsel for the appellant, the following judgment was delivered:

THE CHIEF JUSTICE (orally for the Court):—Mr. Burke-Robertson, we do not find it necessary to call upon you.

We are all of opinion that when s. 471 of the *Criminal Code* directs that the evidence of witnesses for the prosecutor and the accused shall be taken in accordance with the provisions of Part XV relating to preliminary inquiries it refers to and incorporates, *mutatis mutandis,* s. 453(1) (*a*) and (*b*) and none of the other subsections of that section.

In view of this conclusion none of the other questions which were argued before us require decision.

The appeal is dimissed. There will be no order as to costs.

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

[1] (1968), 64 W.W.R. 321.

1968

COLLINGE v. GEE

Cartwright C.J.

Droit criminel—Procès par un magistrat sous la Partie XVI du Code criminel—L'accusé a-t-il droit d'avoir ou d'examiner la transcription des témoignages—Code criminel, 1953-54 (Can.), c. 51, art. 453, 454, 471, 555.

L'appelant a été jugé par un magistrat, sous la Partie XVI du *Code criminel*, et a été déclaré coupable de fraude et de faux semblants. Pour lui permettre de décider s'il devait en appeler, l'appelant a demandé à l'intimée, la sténographe de la Cour, de lui procurer gratuitement une transcription des procédures et, alternativement, qu'il lui soit permis de l'examiner. Sa demande ayant été refusée, il a présenté une requête pour obtenir un bref de mandamus. Le juge a refusé cette requête et sa décision a été confirmée par la Cour d'appel. L'accusé en a appelé à cette Cour.

Arrêt: L'appel doit être repeté.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique[1], confirmant le refus d'une requête pour obtenir un bref de mandamus. Appel rejeté.

B. A. Crane, pour l'appelant.

W. G. Burke-Robertson, Q.C., pour l'intimée.

Lorsque le procureur de l'appelant eut terminé sa plaidoirie, la Cour a rendu le jugement suivant:

THE CHIEF JUSTICE (orally for the Court):—Mr. Burke-Robertson, we do not find it necessary to call upon you.

We are all of opinion that when s. 471 of the *Criminal Code* directs that the evidence of witnesses for the prosecutor and the accused shall be taken in accordance with the provisions of Part XV relating to preliminary inquiries it refers to and incorporates, *mutatis mutandis,* s. 453(1)(*a*) and (*b*) and none of of the other subsections of that section.

In view of this conclusion none of the other questions which were argued before us require decision.

The appeal is dismissed. There will be no order as to costs.

Appeal dismissed; no order as to costs.

Solicitor for the appellant: F. U. Collier, Vancouver.

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

[1] (1968), 64 W.W.R. 321.

1968
*Jan. 30, 31
June 24

SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC and CIBA, S.A., (*Plaintiffs*) ..... APPELLANTS;

AND

JULES R. GILBERT LIMITED *et al.* (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Infringement—Validity of patent—Chemical process—Anti-histamines—Claim too broad in respect of utility—Claim invalid for want of subject-matter—Patent Act, R.S.C. 1952, c. 203.

The plaintiffs, as owners and licensees respectively of a patent, instituted an action against the defendants for infringement of claim 18 of that patent. The claim in question is for processes which, among others, include several particular chemical reactions, anyone of which might be a step in a process for the synthesis of a substance which has become known by the generic name tripelennamine. That substance is one of a group of drugs which have been found to be useful in blocking the effects of histamines in the body and which have become known as anti-histamines. The Exchequer Court held that claim 18 was invalid and dismissed the action for infringement. The plaintiffs appealed to this Court. It was conceded that claim 18 covers some substances which have no therapeutic value. It was also conceded that if claim 18 was valid the defendants had infringed.

Held: The appeal should be dismissed.

Claim 18 was invalid. It was too broad in its terms in respect of utility. The claim was also bad for want of subject-matter since the claim covered substances which were not useful. The claim being invalid, there could be no infringement.

Brevets—Contrefaçon—Validité du brevet—Procédé chimique—Antihistamines—Revendication trop étendue quant à son utilité—Revendication nulle faute d'objet—Loi sur les brevets, S.R.C. 1952, c. 203.

Les demandereses, étant respectivement les titulaires et les licenciées d'un brevet, ont institué une action contre les défenderesses pour violation de la revendication 18 du brevet. Il s'agit d'une revendication de procédés qui, entre autres, comportent plusieurs réactions chimiques spécifiques, dont l'une quelconque peut être un échelon dans le procédé pour obtenir la synthèse d'une substance connue sous le nom générique de tripelennamine. Cette substance fait partie d'un groupe de produits pharmaceutiques dont on a découvert l'utilité pour arrêter les effets de l'histamine dans le corps et que l'on appelle des antihistamines. La Cour de l'Échiquier a statué que la revendication 18 était nulle et a rejeté l'action en contrefaçon. Les demanderesses en ont appelé à cette Cour. Il fut admis que la revendication 18 couvrait des substances qui n'ont pas de valeur thérapeutique. Il fut aussi admis que si la revendication 18 était valide, les défenderesses l'avaient violée.

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*PRESENT: Fauteux, Martland, Hall, Spence and Pigeon JJ.

1968

SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC *et al.* *v.* JULES R. GILBERT LTD. *et al.*

Arrêt: L'appel doit être rejeté.

La revendication 18 était nulle. Dans ses termes elle était trop étendue en regard de son utilité. La revendication était aussi défectueuse faute d'objet puisqu'elle couvrait des substances qui n'étaient pas utiles. La revendication étant nulle, il ne pouvait pas y avoir contrefaçon.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada[1], rejetant une action en contrefaçon. Appel rejeté.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], dismissing an action for infringement. Appeal dismissed.

Christopher Robinson, Q.C., and *R. S. Smart, Q.C.*, for the plaintiffs, appellants.

I. Goldsmith, for the defendants, respondents.

The judgment of the Court was delivered by

HALL J.:—This is an action for alleged infringement by the respondents of claim 18 of Canadian Patent no. 474637 granted to the appellant Société des Usines Chimiques Rhone-Poulenc on June 19, 1951, for an invention entitled "Substituted Diamines". Claim 18 is, in substance, for processes which, among others, include several particular chemical reactions, any one of which might be a step in a process for the synthesis of a substance which has become known by the generic name tripelennamine.

The first named appellant sues as owner of the patent and the appellant Ciba as exclusive licensee under it. Their claim is that claim 18 of the patent has been infringed by the respondent, Gilbert Surgical Supply Co. Ltd. and by the other respondents. It is conceded that if claim 18 of the patent is valid the respondents have infringed.

The issues were narrowed in the Exchequer Court[1] by an agreement as to facts providing that for the purposes of the action the parties agreed:

1. That the process claimed in claim 18 of Canadian patent No. 474,637 consists in the application of methods which were known

[1] (1967), 35 Fox Pat. C. 174.

1968

SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC *et al.* *v.* JULES R. GILBERT LTD. *et al.*

Hall J.

on June 22, 1943, to substances which were also known on the said date, though the said methods had never at the said date been applied to the said substances except by the inventor named in the said patent.

2. That the substance referred to in paragraphs 6 and 7 of the re-amended Statement of Defence was not manufactured in Canada and was imported from outside Canada.

3. That none of the defendants has any knowledge as to the process by which the said substance was prepared or produced.

Tripelennamine is one of a group of drugs which have been found to be useful in blocking the effects of histamine in the body and which have become known as anti-histamines.

The specification in Canadian Patent No. 474637 is, in part, as follows:

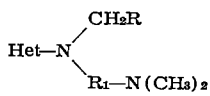
TO ALL WHOM IT MAY CONCERN:

BE IT KNOWN THAT I, RAYMOND JACQUES HORCLOIS, of 31 Rue du Chalet, Malakoff (Seine), France, a citizen of France, having made an invention entitled: "IMPROVEMENTS IN OR RELATING TO SUBSTITUTED DIAMINES", the following is a full, clear and exact disclosure of the nature of the same invention and of the best mode of realizing the advantages thereof:—

The present invention relates to new chemical compounds and to processes of producing the same. More particularly, this invention is concerned with new substituted diamines.

It is the main object of the present invention to provide new tertiary diamines having exceptionally powerful anti-histaminic action. It is a further object of this invention to provide processes for the production of these new diamines.

The new therapeutically active ditertiary diamines of the present invention conform to the general formula:—



where "Het" represents a monocyclic, heterocyclic nucleus, for example, pyridine, piperidine, furane, tetrahydrofurane, thiazole and pyrimidine, R represents a radical selected from the class consisting of aralkyl, aryl and monocyclic heterocyclic groups and aryl substituted in the nucleus by a member of the class consisting of alkyl and alkoxy groups, and R_1 is a lower alkylene group having at least two carbon atoms. Substances in this class possess an exceptionally powerful antihistaminic action.

and includes details set out in the reasons of Thurlow J. not necessary to repeat here. Thirteen examples are given in the specification but only those numbered I, IX and XIII represent separate methods of preparing tripelennamine, example XIII being the method involved in claim 18.

The disclosure portion of the specification concludes:

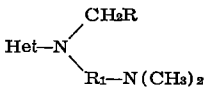
It will be understood that, without departing from the spirit of the invention or the scope of the claims, various modifications may be made in the specific expedients described. The latter are illustrative only and not offered in a restricting sense, it being desired that only such limitations shall be placed thereon as may be required by the state of the prior art.

Claim 18, the claim in question in this action, reads:

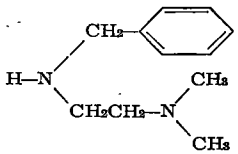
18. A process as defined in claim 8 in which R is phenyl.

Reference to claim 8 brings in successive references to claim 7 and claim 3 the result of which, on the references being incorporated, is that claim 18 reads:

A process for the preparation of new therapeutically valuable tertiary diamines being compounds of the general formula



where Het is pyridine, R is phenyl and R_1 is $—CH_2CH_2—$ and their salts, by reacting a secondary tertiary diamine of the formula



with a compound of the formula

pyridine-X

where X is a halogen atom.

The validity of claim 18 was challenged on a number of grounds, all of which were dealt with by Thurlow J. in his comprehensive reasons now under review. In my view only one of these grounds needs to be considered. If this ground is valid, as I think it is, that concludes the matter adversely to the appellants. This ground has two aspects which are interrelated, the first aspect being that claim 18 is too broad in its terms in respect of utility and for the reasons given in *Hoechst Pharmaceuticals of Canada Limited and Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning v. Gilbert & Company, Gilbert Surgical Supply Co. Limited, Jules R. Gilbert Limited*[2] is invalid. In *Hoechst* Thurlow J. is quoted with approval at p. 193 as follows:

As a matter of interpretation however it is in my opinion clear that the claim refers to every mathematically conceivable sulphonyl urea of

[2] [1966] S.C.R. 189, 32 Fox Pat. C. 56, 50 C.P.R. 26.

1968

SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC *et al.* *v.* JULES R. GILBERT LTD. *et al.*

Hall J.

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.

It is obvious and conceded by appellant that claim 18 of the patent in suit covers at least twelve different substances, namely the alpha, beta and gamma isomers and their four hydrohalide salts. On the other hand, it is equally clear that the beta and gamma isomers are not shown to be therapeutically valuable anti-histamines, the effective antihisme, tripelennamine, being the alpha isomer. It is also established that at least one of the hydrohalide salts cannot be safely used as oral medication, namely the hydrofluoride. This is sufficient to bring the case within the principle of the decision *Re May & Baker Ltd. v. Boots Pure Drugs Co. Ltd.*[3], which is referred to by Thurlow J. and was applied by this Court in *Commissioner of Patents v. Ciba*[4]. This principle is stated as follows in that case by Martland J. at p. 381:

> 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 accordingly the patent was bad for want of subject-matter, since the claims covered substances which were not useful.

As this is sufficient to dispose of the case, I prefer to express no opinion as to the consequence of having claimed, in addition to the substances obtained by the process described in claim 18, the salts of those substances. Similarly, I prefer to express no opinion as to whether the rare radioactive halogen element atastatine is to be considered as included in claim 18 in addition to the four usual halogens. I also prefer to express no opinion as to whether the claim should be read as implying that the alpha isomer may be prepared by the process described otherwise than by using alpha material in the reaction.

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[3] (1950), 67 R.P.C. 23; (1949), 66 R.P.C. 8; (1948), 65 R.P.C. 255.

[4] [1959] S.C.R. 378, 19 Fox Pat. C. 18, 30 C.P.R. 135, 18 D.L.R. (2d) 375.

The appeal should, accordingly, be dismissed with costs. The request of the respondents that their costs should include the costs of preparing and printing the appeal case for appeal No. 10393 between these same parties is refused.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Smart & Biggar, Ottawa.

Solicitors for the defendants, respondents: Duncan, Goldsmith & Caswell, Toronto.

1968

SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC *et al.* *v.* JULES R. GILBERT LTD. *et al.*

Hall J.

LA CAISSE POPULAIRE DE ST-CALIXTE DE KILKENNY (*Requérante*) ..... APPELANTE;

ET

SA MAJESTÉ LA REINE ..... INTIMÉE.

1968

*Mai 22, 23
Mai 23

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA

Couronne—La Poste—Pétition de droit—Vol d'un colis confié à la poste—Entrepreneur de transport postal indépendant—Action contre la Couronne rejetée—Loi sur les postes, S.R.C. 1952, c. 212, art. 40.

Par contrat intervenu entre le Ministère des Postes et un nommé P, ce dernier s'était engagé à transporter le courrier entre Montréal et Rawdon. Un paquet confié au bureau de poste par la requérante, et contenant $14,000, a été volé alors que cet envoi était entre les mains de P. Dans sa pétition de droit, la requérante a réclamé de la Couronne des dommages pour le motif que P était un agent de la Couronne dans l'exécution de ses fonctions. La pétition de droit a été rejetée par la Cour de l'Échiquier. La requérante en a appelé à cette Cour.

Arrêt: L'appel doit être rejeté.

APPEL d'un jugement de Juge Dumoulin de la Cour de l'Échiquier du Canada[1], rejetant une pétition de droit. Appel rejeté.

Jacques de Billy, c.r., pour la requérante, appelante.

Paul Ollivier, c.r., et *Gaspard Côté*, pour l'intimée.

Lorsque le procureur de la requérante eut terminé sa plaidoirie, la Cour a rendu le jugement suivant:

LE JUGE FAUTEUX (*oralement*):—Nous sommes tous d'avis que les dispositions de l'article 40 de la *Loi sur les*

*CORAM: Les Juges Fauteux, Judson, Hall, Spence et Pigeon.

[1] [1964] Ex. C.R. 882.

1968

CAISSE POPULAIRE DE ST-CALIXTE DE KILKENNY v. LA REINE

Le Juge Fauteux

postes, S.R.C. 1952, c. 212, constituent une fin de non-recevoir à l'encontre de la pétition de droit de l'appelante. Ces vues sont d'ailleurs conformes à la décision de notre Cour dans *The Queen v. Randolph et al*[2]. Pour ce motif, et ce motif seulement, l'appel est rejeté avec dépens.

Crown—Post office—Petition of right—Theft of mail from independent carrier—Action against Crown dismissed—Post Office Act, R.S.C. 1952, c. 212, s. 40.

The post office entered into a contract with P, whereby the latter was to carry the mail between Montreal and Rawdon. A package, sent by the petitioner, and containing $14,000, was stolen while it was in the hands of P. In its petition of right, the petitioner claimed damages from the Crown on the ground that P was an agent of the Crown in the execution of his duty. The petition of right was dismissed by the Exchequer Court. The petitioner appealed to this Court.

Held: The appeal should be dismissed.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], dismissing a petition of right. Appeal dismissed.

Jacques de Billy, c.r., for the petitioner, appellant.

Paul Ollivier, c.r., for the respondent.

At the conclusion of the argument of counsel for the petitioner, the following judgment was delivered:

LE JUGE FAUTEUX (*orally*):—Nous sommes tous d'avis que les dispositions de l'article 40 de la *Loi sur les postes,* S.R.C. 1952, c. 212, constituent une fin de non-recevoir à l'encontre de la pétition de droit de l'appelante. Ces vues sont d'ailleurs conformes à la décision de notre Cour dans *The Queen v. Randolph et al*[2]. Pour ce motif, et ce motif seulement, l'appel est rejeté avec dépens.

Appel rejeté avec dépens.

Procureurs de la requérante, appelante: Gagnon, de Billy, Cantin & Dionne, Québec.

Procureur de l'intimée: D. S. Maxwell, Ottawa.

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1 [1964] Ex. C.R. 882.

2 [1966] S.C.R. 260, 56 D.L.R. (2d) 283.

J. HAROLD WOOD ..... PETITIONER;

AND

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

1968
*Oct. 4
Oct. 7

MOTION FOR LEAVE TO APPEAL

Appeals—Jurisdiction—Application for leave to appeal—Desirability that application be brought promptly—Duty of respondent to move to quash when application for leave not made—Costs denied—Exchequer Court Act, R.S.C. 1952, c. 98, ss. 82, 83.

Taxation—Income tax—Income or capital gain—Mortgage acquired at a discount—Whether amount of discount collected at maturity income—Income Tax Act, R.S.C. 1952, c. 48, s. 3.

The applicant was assessed for income tax in 1962 on $700, being the amount of a discount he collected on a mortgage at maturity. The Tax Appeal Board and the Exchequer Court upheld the assessment, but the two tribunals did not agree as to the basis on which the $700 should be considered as income. The applicant filed an appeal to this Court although the amount in controversy, the tax on $700, was less than $500. The Minister did not object. Subsequently, the applicant gave notice than an application for leave to appeal would be made when the appeal came on for hearing. The application for leave was argued in Chambers before the hearing of the appeal and was opposed by the Minister.

Held: Leave to appeal should be granted.

In view of the importance of the question of law involved, it was desirable that it should be reviewed by this Court.

Although this Court sometimes under special circumstances gives leave to appeal at the time an appeal is heard, it is very inconvenient and highly undesirable that applications for leave should be made at such a late date. Also, when a case is inscribed without jurisdiction, it is the duty of the respondent to move to quash if the appellant does not move for special leave. No costs allowed to either party on the application.

Appel—Juridiction—Requête pour permission d'appeler—Doit être présentée promptement—L'intimé a le devoir de demander le rejet de l'appel si une requête pour permission d'appeler n'est pas présentée—Dépens refusés—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 82, 83.

Revenu—Impôt sur le revenu—Revenu ou gain en capital—Hypothèque acquise à escompte—Le montant de l'escompte perçu à l'échéance est-il un revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 48, art. 3.

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*PRESENT: Pigeon J. in Chambers.

1968

WOOD
v.
MINISTER OF NATIONAL REVENUE

Le Ministre a cotisé le requérant pour impôt sur le revenu en 1962 sur $700, montant d'un escompte perçu lors de l'échéance d'une hypothèque. La Commission d'appel de l'impôt et la Cour de l'Échiquier ont maintenu la cotisation, mais les deux tribunaux n'ont pas été d'accord quant au motif de considérer comme revenu cette somme de $700. Le requérant en a appelé à cette Cour quoique le montant en litige, l'impôt sur les $700, fût moins de $500. Le Ministre n'a pas objecté. Subséquemment, le requérant a donné avis qu'il présenterait une requête pour permission d'appeler le jour de l'audition de l'appel. La requête pour permission d'appeler a été plaidée en Chambre avant l'audition de l'appel et le Ministre a fait opposition.

Arrêt: La permission d'appeler doit être accordée.

Vu l'importance de la question de droit qui se présente dans cette cause, il est souhaitable qu'elle soit examinée par la Cour.

Quoiqu'il arrive que cette Cour, dans des circonstances spéciales, donne la permisison d'appeler à l'audition d'un appel, la présentation d'une requête pour permission d'appeler à une date si tardive cause de grands inconvénients et est à éviter. De plus, lorsqu'une cause est inscrite sans juridiction, l'intimé a le devoir de demander le rejet de l'appel si l'appelant ne demande pas la permission d'appeler. Les frais de la requête sont refusés aux deux parties.

REQUÊTE pour permission d'appeler d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Requête accordée.

APPLICATION for leave to appeal a judgment of Gibson J. of the Exchequer Court of Canada[1], in an income tax matter. Application granted.

S. Fisher, for the petitioner.

G. W. Ainslie, for the respondent.

The following judgment was delivered by

PIGEON J.:—The appellant is a solicitor who, over a period of years, acquired some 13 mortgages, usually at a substantial discount. He was assessed for income tax in 1962 on $700 being the amount of a discount on one of these mortgages that he collected at maturity in that year.

Before the Tax Appeal Board, the assessment was upheld on the finding, not that it was profit from a "business", but that "it was a *quasi-bonus*" and therefore "*interest per se*".

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[1] [1967] 1 Ex. C.R. 199, [1967] C.T.C. 66, 67 D.T.C. 5045.

In the Exchequer Court, Gibson J. did not wish to pass on the soundness of that conclusion and did not choose (those are his words) to make a finding that this was profit from a "business". He expressly founded his decision in favour of the Minister on the basis that this "was income from a source within the meaning of the opening words of section 3 of the *Income Tax Act*", adding:

> as far as I know, there is no decision of this Court or of the Supreme Court of Canada in which a question of this kind has been resolved by deciding that such a discount was income from a "source" within the meaning of the opining words of s. 3 of the Act, without deciding whether it was income from any of the particular sources detailed in s. 3 or elsewhere in the Act.

From this judgment, appellant filed an inscription in appeal to this Court as of right without apparently realizing that, due to the rate of tax applicable, the actual amount in controversy was less than $500. Respondent also appears to have overlooked the point and did not move to quash but, on the contrary, signed an agreement as to contents of case and did not object to the appeal being inscribed for hearing at the last term. Being No. 17 on the Ontario list, the case was not called before the vacation. In June, however, appellant became aware of the doubtful jurisdiction and, on June 13, gave to respondent a notice of motion supported by affidavit which was filed the following day. This notice was "that an application will be made to this Honourable Court or to a Judge of this Honourable Court on the day when this appeal comes on for hearing for leave to appeal to this Honourable Court, if such leave should be necessary, . . ."

The parties have now appeared before me and argued the application before the case will be called. Counsel for the respondent agrees that the amount in controversy is under $500 and is a "sum of money payable to Her Majesty" within the meaning of para. (*b*) of s. 83 of the *Exchequer Cour Act,* R.S.C. 1952, c. 98, but otherwise he opposes the application.

In view of the importance of the question of law involved in the decision sought to be appealed from, I consider it desirable that it should be reviewed by this Court and accordingly grant leave to appeal.

In doing so, I must point out that, although this Court sometimes under special circumstances gives leave to appeal

1968
WOOD
v.
MINISTER OF NATIONAL REVENUE
Pigeon J.

at the time an appeal is heard, it is very inconvenient and highly undesirable that applications for leave should be made at such a late date. Especially is this so when, as in this case, the jurisdiction for granting leave is conferred not on the Court but on a judge. The orderly disposition of the business of the Court requires that applications for leave be brought promptly. Also, when a case is inscribed without jurisdiction, it is respondent's duty to move to quash if applicant does not move for special leave.

Under the circumstances, there will be no costs of the application to either party.

Application granted.

Solicitors for the petitioner: MacKenzie, Wood & Goodchild, Toronto.

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

1968
*Oct. 21
Oct. 21

TERENCE JOHN WHITFIELD .....PETITIONER;

AND

CANADIAN MARCONI COMPANY .....RESPONDENT.

MOTION FOR A REHEARING

Jurisdiction—Application for rehearing of appeal—Judgment dismissing appeal already certified to Court of original jurisdiction—Relief refused—Supreme Court Act, R.S.C. 1952, c. 259—Rule 61 of the Rules of the Supreme Court of Canada.

By an oral judgment dated March 8, 1968, this Court dismissed the petitioner's appeal from a judgment of the Court of Appeal of the Province of Quebec which had dismissed the petitioner's appeal from a judgment of the Superior Court of the District of Montreal. The judgment of this Court was settled on April 2, 1968. By this application dated September 20, 1968, the petitioner applied to this Court for a rehearing of his appeal.

Held: The application should be dismissed.

The decision in *Durocher v. Durocher,* 27 S.C.R. 634, is authority for the proposition that when the judgment of this Court has been certified to the proper officer of the Court of original jurisdiction, as has been done in the case at bar, the Court has not jurisdiction to entertain an application such as is now made. Rule 61 of the Rules of this Court does not alter or enlarge this Court's jurisdiction but only provides the manner in which it shall be exercised.

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*PRESENT: Cartwright C.J. and Fauteux, Martland, Ritchie and Pigeon JJ.

Juridiction—Requête pour ré-audition d'un appel—Jugement rejetant l'appel ayant été certifié à la Cour de première instance—Requête refusée—Loi sur la Cour suprême, S.R.C. 1952, c. 259—Règle 61 des Règles de la Cour suprême du Canada.

Par un jugement prononcé oralement le 8 mars 1968, cette Cour a rejeté l'appel porté par le requérant à l'encontre du jugement de la Cour d'appel de la province de Québec qui avait rejeté l'appel que le requérant avait porté à l'encontre d'un jugement de la Cour supérieure du district de Montréal. Le jugement de cette Cour a été déterminé le 2 avril 1968. Par requête en date du 20 septembre 1968, le requérant a demandé à cette Cour de lui accorder une ré-audition de son appel.

Arrêt: La requête doit être rejetée.

Lorsqu'un jugement de cette Cour a été certifié au fonctionnaire compétent de la Cour de première instance, ainsi qu'il en a été fait dans le cas présent, la Cour n'a pas de juridiction pour entendre une requête telle que celle qui lui est présentée: *Durocher v. Durocher*, 27 R.C.S. 634. La Règle 61 des Règles de cette Cour ne change pas ou n'élargit par la juridiction de la Cour mais pourvoit simplement au mode de l'exercer.

REQUÊTE pour obtenir une ré-audition de l'appel[1]. Requête rejetée.

APPLICATION for a rehearing of the appeal[1]. Application dismissed.

Pierre Langlois, for the petitioner.

Hazen Hansard, Q.C., for the respondent.

At the conclusion of the argument of counsel for the petitioner, the following judgment was delivered:

THE CHIEF JUSTICE (orally for the Court):—Mr. Hansard, we do not find it necessary to call upon you.

We are all of opinion that we have no jurisdiction to grant the relief asked for by Mr. Langlois. The unanimous decision of this Court in *Durocher v. Durocher*[2] is authority for the proposition that when the judgment of this Court has been certified to the proper officer of the Court of original jurisdiction, as has been done in the case at bar, the Court has no jurisdiction to entertain an application such as is now made to us.

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[1] (1968), 68 D.L.R. (2d) 766.
[2] (1897), 27 S.C.R. 634.

1968

WHITFIELD v. CANADIAN MARCONI CO.

Cartwright C.J.

This being the state of the law when Rule 61 was made, it is clear that the effect of that rule, which is negative in form, is not to alter or enlarge our jurisdiction but only to provide the manner in which it shall be exercised.

The Court is aware of only one case, that of *Poole v. The Queen*[3] referred to by Mr. Langlois, in which a re-hearing was granted by this Court after the judgment of this Court had been signed and entered, but in that case the Court had been mistakenly informed and proceeded on the belief that its judgment had not been entered.

The application is dismissed with costs on the ground that we have no jurisdiction.

Application dismissed with costs.

Solicitors for the petitioner: Cutler, Lamer, Bellemare, Robert, Desaulniers, Proulx & Sylvestre, Montreal.

Solicitors for the respondent: Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

1968

*Oct. 1
Oct. 21

GÉRARD BOYER .....REQUÉRANT;

ET

SA MAJESTÉ LA REINE .....INTIMÉE.

REQUÊTE POUR RÉ-AUDITION

Appels—Droit criminel—Demande de ré-audition d'une requête pour extension de délai et permission d'appeler—Questions de droit—Code criminel, 1953-54 (Can.), c. 51, art. 141, 149, 288, 597(1)(b).

Pour le motif qu'on n'avait pas démontré l'existence de raisons spéciales, cette Cour refusa une demande d'extension de délai de plus de deux ans qui lui avait été présentée en même temps qu'une demande pour obtenir la permission d'appeler d'un jugement de la Cour d'appel confirmant une déclaration que le requérant était coupable de vol qualifié et d'avoir commis sur une jeune fille un attentat à la pudeur et un acte de grossière indécence. Le requérant a présenté une demande de ré-audition de sa requête pour extension de délai. Il est apparu que le défaut de faire, en temps utile, le nécessaire pour présenter la requête pour permission d'appeler n'était pas imputable au procureur qui avait présenté cette requête mais était dû à la négligence des procureurs qui à ce temp étaient chargés des intérêts

*CORAM: Les Juges Fauteux, Ritchie et Pigeon.

[3] [1968] S.C.R. 381, 68 D.L.R. (2d) 449, 3 C.R.N.S. 213, 3 C.C.C. 257.

du requérant. La Cour décida alors de suspendre son jugement sur la demande de ré-audition et d'entendre les procureurs sur la requête pour permission d'appeler.

Arrêt: La requête pour ré-audition doit être rejetée.

Prenant pour acquis que la demande de ré-audition pouvait être accordée en l'espèce, la requête pour extension de délai et permission d'appeler ne peut pas être accueillie. Les questions soulevées par le requérant, sur la demande de permission d'appeler, ne sont pas, tel que l'exige l'art. 597(1)(*b*) du *Code criminel,* strictement des questions de droit.

Appeals—Criminal law—Motion for rehearing of an application for extension of time and leave to appeal—Questions of law—Criminal Code, 1953-54 (Can.), c. 51, ss. 141, 149, 288, 597(1)(b).

On the ground that special reasons had not been shown, this Court refused an application for an extension of time of more than two years which was presented at the same time as an application for leave to appeal from a judgment of the Court of Appeal affirming the conviction of the petitioner for robbery and for indecent assault on a young girl as well as an act of gross indecency. The petitioner applied for a rehearing of his application for an extension of time. It appeared that the delay in presenting the application for leave to appeal was not attributable to counsel who had made that application but was due to the negligence of the attorneys who, at that time, were representing the petitioner. The Court then decided to suspend its decision on the application for a rehearing and to hear counsel on the application for leave to appeal.

Held: The application for a rehearing should be dismissed.

Assuming that the application for a rehearing could be granted in this case, the application for an extension of time and for leave to appeal could not be granted. The questions raised by the petitioner, on his application for leave to appeal, were not, as required by s. 597(1)(*b*) of the *Criminal Code,* questions of law in the strict sense.

APPLICATION for a rehearing of a motion for extension of time and leave to appeal from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], which had been refused by this Court. Application dismissed.

REQUÊTE pour ré-audition d'une demande pour obtenir une extension de délai et une permission d'appeler d'un jugement de la Cour du banc de la reine, province de Québec[1], qui avait été refusée par cette Cour. Requête rejetée.

B. Beaudry, pour le requérant.

Yves Lagacé, pour l'intimée.

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[1] [1966] B.R. 596.

1968

BOYER
v.
LA REINE

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Il s'agit d'une demande de ré-audition d'une requête pour extension de délai et permission d'appeler dans une affaire criminelle.

Identifié comme l'un des deux individus masqués,—dont l'un était muni d'un revolver,—qui dans la nuit du 29 au 30 octobre 1963 se sont introduits au domicile de Wilfrid Cadotte à Granby, district de Bedford, y ont perpétré un vol et commis sur une jeune fille de 16 ans un attentat à la pudeur et un acte de grossière indécence, Gérard Boyer fut arrêté, accusé et déclaré coupable des infractions décrites aux arts. 288, 141 et 149 du *Code criminel*.

Boyer appela de cette déclaration de culpabilité. Cet appel fut rejeté le 10 mars 1966 par la Cour d'appel[1] alors composée de MM. les juges Pratte, Hyde, Rinfret, Owen et Brossard qui furent unanimes à juger que le juge au procès avait devant lui une preuve suffisante pour identifier Boyer comme l'un des deux individus ayant participé à la commission des infractions ci-dessus.

Par la suite et à divers intervalles de temps entre le 5 avril 1966 et le 23 mai 1968, on produisit, au bureau du Régistraire de cette Cour, certaines des pièces de procédure dont la production est requise dans le cas d'une demande de permission d'appeler faite en vertu de l'art. 597(1)(*b*) du *Code criminel*. C'est ainsi que le 6 avril 1966 on déposa cinq copies d'une requête pour obtenir une extension de délai et permission d'appeler. Rapportable le 26 avril 1966, cette requête ne fut pas présentée à cette date. Ce n'est que le 29 avril 1968 que furent produits le jugement de la Cour d'appel et les raisons données au soutien et ce n'est que le 17 mai 1968 qu'on donna avis aux personnes concernées que la requête, dont copies furent produites en avril 1966, serait présentée à la Cour le 27 mai 1968. C'est à cette date que la Cour fut saisie de la requête pour obtenir une extension de délai et une permission d'appeler du jugement prononcé par la Cour d'appel le 10 mars 1966.

Après avoir entendu Me Beaudry, alors procureur de Boyer, sur la demande d'extension de délai et s'être retirée pour délibérer, la Cour déclara qu'on n'avait pas démontré l'existence de raisons spéciales justifiant d'accorder, en

[1] [1966] B.R. 596.

l'espèce, un délai supplémentaire de plus de deux ans à celui de vingt et un jours prévu à l'art. 597(1)(*b*) et qu'en conséquence, la requête était rejetée.

En septembre dernier, la Cour, ayant considéré une lettre reçue de Boyer comme une demande de ré-audition de la requête ci-dessus, donna instructions au Régistraire d'informer l'inculpé, ainsi que le Ministre de la Justice de la province de Québec, le procureur de la Couronne, ceux de l'inculpé et leurs agents, que cette demande serait entendue le premier jour de la session d'octobre, soit le 1er de ce mois. Advenant cette date, les intéressés ou leurs agents se présentèrent à la Cour. Me Lagacé, procureur de la Couronne, objecta à cette demande de ré-audition et au cours de la réponse faite à cette objection par Me Beaudry, il est apparu que le défaut de faire, en temps utile, le nécessaire pour présenter la requête pour permission d'appeler était imputable à la négligence, non pas de Me Beaudry qui n'agissait pas alors pour Boyer, mais des procureurs qui à ce temps étaient chargés de ses intérêts. La Cour décida alors de suspendre son jugement sur la demande de ré-audition et, sous cette réserve, d'entendre ce que les procureurs pouvaient avoir à soumettre sur la requête pour permission d'appeler.

Au soutien de cette requête, on invoqua deux moyens:

(i) au regard des règles jurisprudentielles relatives à l'identification et à la défense d'alibi, il y a absence de preuve d'identification;

(ii) en droit, une personne ne peut être simultanément trouvée coupable d'attentat à la pudeur et de grossière indécence à l'égard de la même personne.

Après avoir considéré les témoignages auxquels le juge au procès ajouta foi, nous sommes tous d'avis que ces témoignages lui permettaient de conclure, comme il l'a fait, à l'identification de Boyer et au rejet de sa défense d'alibi. Suivant ces témoignages, il appert particulièrement que Boyer et son complice sont demeurés environ deux heures au domicile de Cadotte et que pendant une demi-heure, alors que la jeune fille était la victime de l'attentat commis sur elle par Boyer qui avait enlevé son masque, elle a pu observer son visage et noter la déformation dont son nez, par suite de plusieurs fractures, était affecté et elle a pu ultérieurement, sans qu'aucune suggestion ne lui soit faite, identifier Boyer comme l'un des participants à la commission des crimes ci-dessus.

1968

BOYER
v.
LA REINE

Le Juge Fauteux

En ce qui concerne le second moyen, il faut retenir que l'attentat à la pudeur et l'acte de grossière indécence ont été commis successivement, l'un par l'inculpé et l'autre par son complice. Ce sont là deux infractions distinctes et les témoignages acceptés par le juge au procès lui permettaient de conclure que ces deux infractions avaient été commises dans des circonstances rendant Boyer et son complice parties à chacune.

Les questions sur lesquelles une permission d'appeler peut être accordée en vertu de l'art. 597(1)(*b*) doivent être strictement des questions de droit. Tel n'est pas le caractère des questions soulevées de la part du requérant.

Prenant pour acquis que la demande de ré-audition peut être accordée en l'espèce, nous sommes tous d'avis que la requête pour extension de délai et permission d'appeler ne peut être accueillie. Cette requête est donc rejetée.

Requête rejetée.

Procureurs de l'appelant: Grégoire, Dansereau, Daoust, Duceppe, Allaire, Perron, Beaudry, Blais, Désormeau & Beaudry, Montréal.

Procureur de l'intimé: Le Procureur Général de Québec.

1968

*June 6, 7
Oct. 1

UNION CARBIDE CANADA LIMITED ..... APPELLANT;

AND

PAUL C. WEILER, ROBERT NICOL and LESTER L. PORTER ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour relations—Collective agreement—Arbitration—Whether board of arbitration had power to deal with grievance notwithstanding that it was late in time.

On August 22, 1966, an employee of the appellant company filed a grievance through his union representative. The grievance went through the procedure in the collective agreement then in force and on September 30, 1966, the company replied to the third stage of the grievance. On October 18, 1966, the company received notice from the union of its desire to arbitrate the grievance. The company objected

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

that the notice was too late. This objection was submitted to the arbitration board. The decision of the board was that the union had failed to deliver its notice respecting arbitration within the specified ten-day period as required by the collective agreement, and that the company had not waived the failure to notify in time and had preserved its right to object to arbitration.

The majority of the arbitrators then purported to relieve against the default and held that they had power to proceed to hear the merits. An application by the company to quash the majority decision was dismissed and, on appeal, the decision of the judge of first instance was affirmed by the Court of Appeal. With leave, the company then appealed to this Court.

Held: The appeal should be allowed.

The majority decision was erroneous for the following reasons: (a) The grievance was not timely and the board of arbitration had no power to extend the time. (b) The board of arbitration had no power to go beyond the question submitted in the parties' joint statement. (c) The board of arbitration was in breach of an article of the collective agreement in extending the time and so modifying the terms of the agreement.

Judicial review of this decision was not precluded by s. 34(1) of *The Labour Relations Act*, R.S.O. 1960, c. 202, nor did s. 86, the purpose of which is to require the Courts on motions by way of *certiorari* or otherwise when they are considering proceedings under the Act not to quash such proceedings because of defect of form or technical irregularity, afford any foundation for the decision of the board.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Jessup J. Appeal allowed.

George D. Finlayson, Q.C., and *D. F. O. Hersey*, for the appellant.

W. B. Williston, Q.C., *Martin L. Levinson* and *J. Sack*, for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—The issue in this appeal is whether a board of arbitration had power under a particular collective agreement to deal with a grievance notwithstanding the admitted fact that it was late in time.

On August 22, 1966, an employee of Union Carbide Canada Limited filed a grievance through his union representative. The grievance went through the procedure in the collective agreement then in force and on September 30, 1966, the company replied to the third stage of the

[1] [1968] 1 O.R. 59, 65 D.L.R. (2d) 417.

1968

UNION CARBIDE CANADA LTD. v. WEILER et al.

Judson J.

grievance. On October 18, 1966, the company received notice from the union of its desire to arbitrate the grievance. The company objected that the notice was too late. This objection was submitted to the arbitration board. The decision of the board was that the union had failed to deliver its notice respecting arbitration within the specified ten-day period as required by the collective agreement, and that the company had not waived the failure to notify in time and had preserved its right to object to arbitration.

The majority of the arbitrators then purported to relieve against the default and held that they had power to proceed to hear the merits.

The company then applied to a judge of the Supreme Court of Ontario to quash the majority decision. This order was refused. The decision of the judge of first instance was affirmed by the Court of Appeal. Subsequently, the Court of Appeal granted leave to appeal to this Court.

The parties prepared a joint statement, the final paragraph of which sets out the question for determination by the board. This question was:

> Is the grievance timely? and
>
> Should the Board decide in the affirmative then to determine if Article 9, Section 2-4, of the Collective Agreement was violated as alleged by the Grievor?

The grievance procedure that we are concerned with in this appeal is set out in the following sections from the collective agreement:

(a) Article X, Grievance Procedure, Section 6:
Grievances shall be presented for adjustment in accordance with the following procedure:

. . .

Step 4. If the grievance is not settled by the foregoing steps, it may be submitted to arbitration, provided the Company is notified in writing not more than ten (10) days from the date of the Company's third step reply. Such written notification shall contain the name of the Union's Arbitrator and the Company shall name its arbitrator within ten (10) days of the receipt of such notification. The matter shall then be processed to Arbitration as outlined in Section 2 of Article XI.

(b) Article XI, Arbitration, Section 4:
A joint statement, or separate statements, by the Company and the Union covering the grievance or dispute and outlining the matter to be settled by the Arbitration Board shall be submitted to all members of the Board within three (3) days after their appointment.

(c) In arriving at a decision, the Arbitration Board shall be limited to the consideration of the dispute or question outlined in this

statement, or statements, referred to in Section 3 and shall not in any way amend, modify or change any of the provisions of this Agreement, or change any decision of the Management unless the Board finds that the Company has violated the express terms of this Agreement.

My opinion is that the majority decision was erroneous for the following reasons:

(a) The grievance was not timely and the board of arbitration had no power to extend the time.

(b) The board of arbitration had no power to go beyond the question submitted in the joint statement.

(c) The board of arbitration was in breach of Article XI, s. 4, above quoted, in extending the time and so modifying the terms of the collective agreement.

The joint statement makes it clear that the decision on the merits is only to be made if there is a preliminary finding that the grievance was timely. Once the board found that the grievance was out of time, this should have been the end of the matter. By assuming to relieve against the time limit and imposing a penalty as a condition for the exercise of this power, the board amended, modified or changed the provisions of the collective agrement in spite of the express provision contained in Article XI, s. 4.

The Court of Appeal[1] held that the appeal failed on the following ground:

This Court is of the opinion that the appeal fails on the following ground which can be put shortly. It is apparent from the two questions submitted to arbitration that the arbitration board was called upon under the first of those questions to determine whether the substantive issue raised by the grievance was arbitrable. This was a matter which, having regard to section 34(1) of *The Labour Relations Act*, R.S.O. 1960, c. 202, the board was entitled to decide. The submission to the the board was wholly in this respect on a question of law and the board's decision thereon is not reviewable.

Section 34(1) of *The Labour Relations Act*, R.S.O. 1960, c. 202, reads:

34 (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

[1] [1968] 1 O.R. 59, 65 D.L.R. (2d) 417.

1968

UNION CARBIDE CANADA LTD. v. WEILER *et al.*

Judson J.

I cannot accept the opinion of the Court of Appeal that s. 34(1) of *The Labour Relations Act* precludes judicial review of this decision. There was no problem here relating to the "interpretation, application, administration, or alleged violation of the agreement, including any question as to whether a matter is arbitrable". The plain fact, so found by the board, was that the union is out of time with stage 4 of its grievance procedure. The subject-matter of the grievance (seniority rights of a particular employee) was plainly arbitrable. We come back to the only issue, namely, whether the board had power to extend the time.

Nor do I think that s. 86 of *The Labour Relations Act* affords any foundation for the decision of the board. Section 86 reads:

> 86. No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

Section 86 is directed solely to the Courts. The whole purpose of the section is to require the Courts on motions by way of *certiorari* or otherwise when they are considering proceedings under the Act, for example, hearings before and decisions of the Labour Relations Board, not to quash such proceedings because of defect of form or technical irregularity. Section 86 does not enable a board of arbitration, as the majority thought in this case, to ignore the plain and emphatic language of the written contract. *Galloway Lumber Co. Ltd. v. Labour Relations Board of British Columbia et al.*[2] does not decide to the contrary. That case affirmed a board's action because there was evidence before the board that the grievance procedure had been complied with. In this case there is the only possible finding of the board that the union had not complied with the grievance procedure.

I would allow the appeal and quash the decision of the board of arbitration. The order for costs in this Court will be in accordance with the condition of the order granting leave that Union Carbide pay the costs of the respondents Paul C. Weiler, Robert Nicol and Lester L. Porter in this Court. The company is entitled to the costs of the motion

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[2] [1965] S.C.R. 222, 51 W.W.R. 90, 48 D.L.R. (2d) 587.

before Jessup J. and the appeal to the Court of Appeal of Ontario against the United Steelworkers of America.

Appeal allowed.

Solicitors for the appellant: McCarthy & McCarthy, Toronto.

Solicitor for the respondent: Martin L. Levinson, Toronto.

1968

UNION CARBIDE CANADA LTD. *v.* WEILER *et al.*

Judson J.

STEINBERG'S LIMITÉE ..... APPELANTE;

ET

LE COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL ..... INTIMÉ;

ET

LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC ..... MIS-EN-CAUSE.

1968

*Janv. 25, 26, 29
Mai 22

STEINBERG'S EMPLOYEES ASSOCIATION et RETAIL CLERKS INTERNATIONAL UNION, LOCAL 486 ..... APPELANTES;

ET

LE COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL et LE PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC ..... INTIMÉS.

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

Travail—Relations ouvrières—Convention collective—Décret relatif au commerce de l'alimentation au détail, région de Montréal—Détermination des heures de travail—Vente prohibée le lundi jusqu'à une heure de l'après-midi—Validité du décret—Loi de la convention collective, S.R.Q. 1941, c. 163—Loi des décrets de convention collective, S.R.Q. 1964, c. 143, art. 2, 6.

Le décret relatif au commerce de l'alimentation au détail pour la région de Montréal, adopté le 4 mai 1965 en vertu de la *Loi de la convention collective,* S.R.Q. 1941, c. 163 (maintenant la *Loi des décrets de convention collective,* S.R.Q. 1964, c. 143), fixe, *inter alia,* les heures pen-

*CORAM: Les Juges Fauteux, Abbott, Martland, Ritchie et Pigeon.

1968

STEINBERG'S LIMITÉE *v.* COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*

dant lesquelles le personnel des magasins d'alimentation dans la région peut travailler à la vente des produits alimentaires. Plus particulièrement, le décret prohibe toute vente le lundi avant une heure de l'après-midi. Le comité paritaire a demandé contre la compagnie appelante une injonction lui enjoignant de cesser d'enfreindre le décret. L'appelante a contesté la validité du décret pour le motif que plusieurs articles excéderaient les pouvoirs conférés par la loi au Lieutenant-Gouverneur en Conseil, que le décret ne peut exister sans ces articles et que par conséquent il est *ultra vires* dans sa totalité. La Cour supérieure a jugé le décret invalide, mais ce jugement fut renversé par une décision majoritaire de la Cour d'appel, qui a décerné l'injonction. La compagnie en a appelé à cette Cour.

Arrêt: L'appel doit être rejeté.

Le fait que l'entrée en vigueur de la convention collective était subordonnée à la proclamation du décret ne la rend pas sans valeur juridique. On ne peut pas non plus dire que, pour cette raison, la convention n'a pas acquis une signification et une importance prépondérantes. Puisque la *Loi des décrets de convention collective* n'exige pas expressément que la convention soit entrée en vigueur avant qu'un décret puisse être rendu, rien n'empêche que la convention soit soumise à une condition suspensive. C'est au ministre qu'il appartient de juger si ce facteur a pour conséquence de priver la convention du degré d'importance qui justifie un décret.

Par l'amendement de 1960 à la *Loi de la convention collective* (8-9 Eliz. II, c. 71, art. 1), la législature a voulu autoriser la fixation par décret des jours ouvrables et des heures de travail dans les magasins. Comme il s'agit d'un pouvoir expressément accordé par un texte qui fait allusion à la réglementation du commerce, on ne peut certainement pas soutenir que le décret attaqué fait indirectement la réglementation du commerce sous couleur de réglementation des heures de travail.

Les Juges Fauteux, Abbott, Martland et Ritchie: On ne peut pas soutenir que le décret est invalide parce qu'il prétend s'appliquer aux établissements n'ayant pas d'employés. La définition d'employeur dans le décret ne doit pas être interprétée comme devant s'appliquer à une personne qui n'est pas un employeur au sens de la définition de ce mot dans la Loi, laquelle est restreinte à celui qui fait exécuter un travail par un salarié. La définition dans le décret est apte à recevoir la signification que le mot «employeur» est censé englober les personnes, sociétés ou corporations, qui font exécuter un travail par un salarié et qui possèdent ou exploitent un établissement commercial assujetti au décret.

Le Juge Pigeon: La définition d'employeur dans le décret (art. 1.01, par. *c*) déborde le cadre de celle que l'on trouve à l'art. 1(*f*) de la Loi. Il n'y a aucune raison d'interpréter cette définition autrement que dans son sens littéral. Dans le décret, la définition d'employeur a été rédigée comme elle l'est dans le but d'assujettir à la réglementation proposée tous les établissements de la catégorie décrite, qu'ils aient des employés ou non, et aussi d'assujettir aux dispositions relatives aux heures d'ouverture et de fermeture ceux qui travaillent à leur compte aussi bien que les autres. Cependant, ce vice de la définition n'entraîne pas la nullité du décret. Il n'en résulte aucune conséquence préjudiciable. La disposition prohibant toute vente le lundi avant une heure (art. 3.05) vise uniquement le travail effectué par des salariés. Pour la même raison, la définition à l'art. 2.00 de ce qui

constitue un établissement commercial ne peut pas être une cause d'invalidité. Les art. 7.03 et 7.04 du décret ne sont pas discriminatoires. Rien dans la loi ne définit de quelle manière le salaire peut être réglementé.

Labour—Collective agreement—Decree respecting the retail food trade, Montreal region—Working hours—Sales forbidden on Monday up to one o'clock—Validity of the decree—Collective Agreement Act, R.S.Q. 1941, c. 163—Collective Agreement Decrees Act, R.S.Q. 1964, c. 143, ss. 2, 6.

The decree respecting the retail food trade in the Montreal region, enacted on May 4, 1965, pursuant to the *Collective Agreement Act*, R.S.Q. 1941, c. 163 [now *Collective Agreement Decrees Act*, R.S.Q. 1964, c. 143] determines, *inter alia*, the hours during which the personnel of the establishments subject to the decree can sell the products. More specifically, the decree forbids all sales until one o'clock of each Monday. The Parity Committee applied for an injunction ordering the appellant company to cease to infringe the decree. The appellant contested the validity of the decree on the ground that a number of its provisions were beyond the powers conferred on the Lieutenant-Governor in Council by the Act, that these provisions were not severable and that consequently the decree was *ultra vires in toto*. The Superior Court held that the decree was invalid, but its judgment was reversed by a majority decision of the Court of Appeal which granted the injunction. The company appealed to this Court.

Held: The appeal should be dismissed.

The contention that the decree had no legal existence because the coming into force of the collective agreement was dependent upon the proclamation of the decree, could not be entertained. Nor could the decree be attacked on the basis that the collective agreement had not acquired a preponderant significance and importance. Since the *Collective Agreement Decrees Act* does not expressly require that a collective agreement take effect before the adoption of a decree, a convention with a suspensive condition is permitted. The Minister is charged with deciding whether this factor deprives the collective agreement of the degree of importance necessary to justify a decree.

It was clear from the wording of the amendment of 1960 to the *Collective Agreement Act* (8-9 Eliz. II, c. 71, s. 1) that the legislature intended to authorize the setting by decree of the working days and hours of work in the commercial establishments. Since this power was expressly granted with reference to the regulation of trade, it could not be said that the decree in question indirectly regulates the trade under the guise of regulating the hours of work.

Per Fauteux, Abbott, Martland and Ritchie JJ.: The contention that the decree was invalid because it purported to apply to establishments in which there were no employees, could not be entertained. The definition of "employer" in the decree ought not to be construed as extending to someone who is not an employer within the definition contained in the Act, which is restricted to those who have work done by an employee. The definition in the decree is capable of receiving the meaning that the word "employer" was intended to encompass those persons, companies or corporations, who have work done by employees, which own or operate commercial establishments subject to the decree.

1968

STEINBERG'S LIMITÉE v. COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*

Per Pigeon J.: The definition of employer in the decree (art. 1.01, para. *c*) goes beyond the definition of that word in s. 1(*f*) of the Act. There is no reason to interpret this definition otherwise than in its literal meaning. In the decree, the definition of employer has been so worded as to make the establishments therein described, whether they have employees or not, subject to the proposed regulations, and also to make those persons doing business in their own account as well as all others subject to the provisions relating to working hours. However, this defect in the definition has no prejudicial result and does not affect the validity of the decree. The provision prohibiting sales on Monday before one o'clock (art. 3.05) is aimed exclusively at the work done by wage earners. For the same reason, the definition in art. 2.00 of what constitutes a commercial establishment cannot be a cause of invalidity. Articles 7.03 and 7.04 of the decree are not discriminatory. There is nothing in the Act which determines the manner in which salaries were to be regulated.

APPEALS from judgments of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing judgments of Duranleau J. Appeals dismissed.

APPELS de jugements de la Cour du banc de la reine, province de Québec[1], infirmant des jugements du Juge Duranleau. Appels rejetés.

C. A. Geoffrion, c.r., pour l'appelante, Steinberg's Ltée.

Philip Cutler et *Pierre Langlois*, pour les associations appelantes.

Claude Tellier et *Paul Jolin*, pour le comité paritaire.

Laurent E. Bélanger, c.r., pour le procureur général du Québec.

Le jugement des Juges Fauteux, Abbott, Martland et Ritchie fut rendu par

MARTLAND J.:—I agree with the conclusions reached by my brother Pigeon, and also with his reasons, save only in respect of the one point hereinafter mentioned, which does not affect the ultimate result.

As he has pointed out, the appellant contended that the decree in question here was invalid because, by reason of the definition of the word "employer" contained in it, and the use of that word in certain provisions of the decree, the decree purported to apply to establishments in which

[1] [1968] B.R. 97.

there were no employees and to sales of merchandise not made by employees. A decree having this scope was, it was submitted, beyond the powers of the Lieutenant-Governor in Council to enact under the provisions of the *Collective Agreement Decrees Act*, R.S.Q. 1964, c. 143. Section 2 of that statute provides:

> 2. The Lieutenant-Governor in Council may order that a collective agreement respecting any trade, industry, commerce or occupation shall also bind all the employees and employers in the Province or in a stated region of the Province, within the scope determined in such decree.

The definition in question is as follows:

> Employer: The term "employer" designates any person, company or corporation owning or operating a commercial establishment subject to this decree.

"Commercial establishment" is defined thus:

> Commercial establishment: The term "commercial establishment" designates any establishment located within the territorial jurisdiction of this decree where food products are sold on a retail basis, for outside consumption.

The word "employer", standing by itself, would mean a person who employs the services of one or more other persons. That is the sense in which it is defined in the *Collective Agreement Decrees Act*:

> 1. (*f*) "employer" includes any individual, partnership, firm or corporation who or which has work done by an employee.

In my opinion the definition of "employer" contained in the decree ought not to be construed as extending to someone who is not an employer within the definition contained in the Act. In *McKay v. The Queen*[2], Cartwright J., as he then was, refers to a rule of construction which is properly applicable in this case:

> The second applicable rule of construction is that if an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly.

The definition in the decree is capable of receiving the meaning that the word "employer" was intended to encompass those persons, companies or corporations, who have work done by employees, which own or operate commercial establishments subject to the decree. I agree with the view

[2] [1965] S.C.R. 798, 53 D.L.R. (2d) 532.

1968

STEINBERG'S LIMITÉE v. COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL et al.

Martland J.

expressed on this point, in the Court of Appeal, by Choquette J.:

> La définition du mot «employeur» dans le décret ne saurait modifier le sens donné à ce terme par la loi précitée (art. 1, *f*); cette définition ne fait en somme que préciser le genre d'établissement commercial que cet employeur (personne, société ou corporation) doit posséder ou exploiter pour être assujetti au décret. Il n'en reste pas moins une personne «qui fait exécuter un travail par un salarié».

I would dispose of this appeal in the manner proposed by my brother Pigeon.

LE JUGE PIGEON:—Dans la présente instance, le Comité Paritaire de l'Alimentation au Détail, Région de Montréal (ci-après désigné «le Comité») a demandé contre l'appelante Steinberg's Limitée (ci-après désignée «Steinberg's») une injonction lui enjoignant en résumé de cesser d'enfreindre le décret relatif au commerce de l'alimentation au détail pour la région de Montréal (ci-après désigné «le décret»).

Le décret, en date du 4 mai 1965, renferme non seulement des dispositions relatives à la durée du travail et au salaire du personnel des magasins d'alimentation dans la région de Montréal mais il fixe également les heures pendant lesquelles ce personnel peut travailler à la vente de produits alimentaires. Aussitôt qu'il a été rendu, Steinberg's a déclaré publiquement qu'elle le considérait juridiquement invalide et ne respecterait pas les heures prévues. Elle a arrêté les poursuites pénales par bref de prohibition et le Comité a réclamé contre elle une injonction. La Cour supérieure a jugé le décret invalide, accueilli le bref de prohibition et rejeté la demande d'injonction. La Cour d'appel[3], au contraire, a par un arrêt majoritaire déclaré le décret valide, cassé le bref de prohibition et décerné l'injonction.

Les moyens invoqués par l'appelante à l'encontre du décret sont en substance les suivants:

1° La convention collective qui a donné naissance au décret est sans valeur juridique parce que suivant ses termes, son entrée en vigueur est subordonnée à la proclamation d'un décret;

2° Le décret a pour seul objet véritable de réglementer non pas les relations de travail, mais le commerce d'alimentation au détail;

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[3] [1968] B.R. 97.

3° La convention collective n'étant pas entrée en vigueur avant le décret, ne peut pas avoir acquis une signification et une importance prépondérantes;

4° le décret renferme des dispositions qui débordent le cadre de la loi régissant ces décrets et ces dispositions ne peuvent en être invalidées indépendamment du reste.

Le premier et le troisième moyens peuvent être étudiés simultanément car ils reposent tous deux sur la même clause de la convention collective conclue le 27 novembre 1963, entre le Syndicat de l'alimentation au détail de Montréal (C.S.N.) et l'Association des détaillants en alimentation du Québec Inc. (Section de Montréal), savoir:

> 8.00 La présente convention prendra effet à compter du jour de l'entrée en vigueur du décret relatif au commerce de l'alimentation au détail dans la région métropolitaine de Montréal et demeurera en vigueur jusqu'au trente et un mars mil neuf cent soixante-six inclusivement.

L'appelante soutient que, parce que la *Loi de la convention collective* (S.R.Q. 1941, ch. 163, aujourd'hui *Loi des décrets de convention collective,* S.R.Q. 1964, ch. 143) statue à l'article 2:

> Il est loisible au lieutenant-gouverneur en conseil de décréter qu'une convention collective relative à un métier, à une industrie, à un commerce ou à une profession, lie également tous les salariés et tous les employeurs . . .

un décret ne peut être rendu sans qu'une convention collective soit d'abord entrée en vigueur. Elle prétend en outre que le ministre ne peut pas, comme l'exige l'art. 6, juger «que les dispositions de la convention ont acquis une signification et une importance prépondérantes pour l'établissement des conditions de travail», si la convention n'est pas déjà en vigueur.

Ces prétentions ne résistent pas à l'examen. Selon les principes généraux du droit, rien n'empêche qu'une convention soit subordonnée à une condition suspensive. Un contrat existe dès qu'il a été conclu même si les obligations qui en découlent sont subordonnées à une condition. Cela résulte implicitement de l'art. 1081 c.c. qui rend nulle l'obligation conditionnelle dans le cas seulement d'une «condition purement facultative de la part de celui qui s'oblige». Il est clair que la condition dont il s'agit n'est pas purement facultative en ce sens, puisque sa réalisation dépend de la volonté d'une autorité extérieure. Alors que le principe

1968

STEINBERG'S LIMITÉE *v.* COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*

Le Juge Pigeon

même de la loi dont il s'agit est de favoriser l'amélioration des conditions de travail en protégeant contre la concurrence déloyale les employeurs qui y consentent, il serait bien singulier que le texte ait pour effet implicite de les obliger à accepter de subir cette concurrence tant qu'un décret ne serait pas rendu. Cela peut signifier un temps considérable puisque, dans le cas présent, il s'est écoulé près d'un an et demi entre la signature de la convention et l'entrée en vigueur du décret.

De même on ne peut pas voir pourquoi le ministre ne pourrait pas juger qu'une convention collective a acquis une signification et une importance prépondérantes quand elle n'est pas encore entrée en vigueur. Évidemment, la signification et l'importance d'une convention collective ne sont pas les mêmes lorsqu'elle est conditionnelle que lorsqu'elle ne l'est pas, mais comment peut-on prétendre qu'elles sont inexistantes? Ce n'est pas aux tribunaux mais au ministre qu'il appartient de juger ces facteurs. La loi n'exigeant pas expressément que la convention soit entrée en vigueur avant qu'un décret puisse être rendu, le principe général de la liberté des conventions doit être appliqué pour admettre une convention conditionnelle. C'est au ministre qu'il appartient de juger si ce facteur a pour conséquence de priver la convention du degré d'importance qui justifie un décret.

Tout comme le premier et le troisième moyens de l'appelante reposent sur une unique prétention, les deux autres se ramènent également à soutenir que les dispositions du décret débordent le cadre fixé par la loi. Pour étudier cette question il est nécessaire d'examiner la portée générale de la loi dont il s'agit et de faire une brève revue de son évolution en regard de certains arrêts des tribunaux.

La législation dont il s'agit a été au Québec la première loi de portée générale à prévoir des restrictions au principe de la liberté des conventions, dans la détermination des conditions de travail des salariés. Elle fut d'abord décrétée sous le titre de «Loi relative à l'extension des conventions collectives de travail» (1924—24 Geo. V, ch. 56), et fut remplacée successivement, en 1937, par la «Loi relative au salaire des ouvriers» (1 Geo. VI, ch. 49) et, en 1940, par la «Loi de la convention collective» (4 Geo. VI, ch. 38).

Dès l'origine, la règle fut de ne pas rendre obligatoires pour tous les employeurs assujettis à un décret toutes les

conditions de travail stipulées dans la convention collective dont l'extension était décrétée, mais uniquement les dispositions relatives à certaines matières telles que le salaire et la durée du travail. Dans la loi de 1937 intitulée «Loi relative au salaire des ouvriers» (1 Geo. VI, ch. 49) on ajouta cependant comme article 10 la disposition que l'on trouve encore, sous une forme modifiée, au paragraphe 1 de ce même article et qui permet de rendre obligatoires par décret certaines autres dispositions de la convention «ainsi que celles que le lieutenant-gouverneur en conseil estime conformes à l'esprit de la loi».

Peu après la mise en vigueur de ce nouveau texte législatif, un décret fut publié concernant l'industrie de la réparation de la chaussure. Par ce décret on voulut rendre obligatoires, en outre des salaires et heures de travail, les prix minimums à être chargés au public pour ces réparations. Cette disposition fut attaquée par bref de prohibition et déclarée invalide tant par la Cour supérieure que par un jugement unanime de la Cour d'appel: *Procureur général de Québec c. Dame Lazarovitch*[4]. L'arrêt, appliquant la règle *ejusdem generis,* décida que les dispositions «conformes à l'esprit de la loi» comprenaient seulement des règles relatives aux relations entre employeur et salarié. Le passage suivant des notes du juge Barclay renferme l'essentiel de la décision:

> Upon a true construction of the Act itself, it is clear that the object and purport of the Act is to regulate the relationship between employers and employees *inter se*, and when recognized bodies make what appears to be a reasonable agreement considering local conditions, their agreement may be extended to and enforced against all other(s) in the same industry, even though not parties to the agreement, and the Act is careful to set forth what kind of arrangements can be made obligatory under such circumstances. But the class of persons thus affected must be employers and employees only. Other individuals and the public at large are not concerned and are not contemplated.

Ce qui donne une autorité particulière à cette décision c'est que la législature a implicitement consacré cette interprétation de la portée générale de la loi. En effet l'arrêt a été rendu quelques jours seulement après la sanction de la *Loi de la convention collective* (4 Geo. VI, ch. 38) dans laquelle l'article 10 de la loi 1937 était reproduit pratique-

[4] (1940), 69 B.R. 214.

1968

STEINBERG'S LIMITÉE v. COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*

Le Juge Pigeon

ment sans modifications. L'année suivante, on y ajoutait l'alinéa suivant (5 Geo. V, ch. 60, art. 1):

> Le décret peut rendre obligatoires des prix minima à être chargés au public pour les services des barbiers et coiffeurs.

C'est le cas de dire l'exception confirme la règle.

Un autre jugement doit également être examiné de façon particulière parce qu'il fut lui aussi suivi d'une modification de la loi. C'est *F. W. Woolworth Co. Ltd. c. La Cour des sessions de la paix*[5]. Il s'agissait également d'un bref de prohibition à l'encontre d'un décret. Celui-ci fixait la durée du travail dans les magasins en déterminant «les heures du commencement et de cessation du travail de vente». La Cour supérieure statua qu'en réalité il s'agissait d'un règlement de fermeture et que la loi ne le permettait pas. A la suite de ce jugement rendu le 4 août 1959, la législature, par une loi sanctionnée le 10 mars 1960, ajoutait à l'article 9 de la loi les alinéas suivants (8-9 Elizabeth II, ch. 71, art. 1):

> Sans restreindre la portée générale de l'alinéa précédent, le décret rend obligatoire, relativement à la durée du travail, entre autres dispositions de la convention collective, celles qui déterminent les jours ou parties de jour ouvrables et non ouvrables, ainsi que l'heure à laquelle débute le travail d'une journée et celle à laquelle il se termine pour chaque catégorie de salariés.
>
> Toutefois, dans tout territoire où est en vigueur un règlement de fermeture adopté en vertu de la Loi de la fermeture à bonne heure ou de toute autre loi, générale ou spéciale, ayant trait au même objet, l'heure à laquelle débute le travail d'une journée et celle à laquelle il se termine doivent être incluses dans la période pendant laquelle ledit règlement permet de tenir ouvert le commerce visé.

Après cette addition à la loi, la Cour d'appel de la Province de Québec décida unanimement qu'un décret relatif aux distributeurs de pain de la région de Montréal interdisait valablement toute livraison le dimanche et le mercredi. *Richstone Bakeries Inc. c. La Cour des sessions de la paix*[6].

Il semble évident que, par l'amendement de 1960, la législature a voulu autoriser la fixation par décret des jours ouvrables et des heures de travail dans les magasins. Le renvoi à la Loi de la fermeture à bonne heure l'implique nécessairement, cette loi visant exclusivement ce genre d'établissements de commerce. De plus, l'alinéa dans lequel se trouve ce renvoi indique comment le législateur a voulu

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[5] [1961] C.S. 48.

[6] [1964] B.R. 97, (1963), 40 D.L.R. (2d) 246.

concilier le pouvoir accordé aux municipalités par cette loi-là avec celui qu'elle attribue au lieutenant-gouverneur en conseil. Celui-ci ne peut pas fixer les heures de travail en dehors de la période pendant laquelle le règlement municipal permet l'ouverture de l'établissement commercial. Si l'on avait voulu que le lieutenant-gouverneur en conseil ne puisse pas arrêter des dispositions ayant pour effet de restreindre les heures d'ouverture, on aurait sûrement rédigé le texte autrement. La disposition comme elle est rédigée implique clairement qu'il le peut. Comme il s'agit d'un pouvoir expressément accordé par un texte qui fait allusion à la réglementation du commerce, on ne peut certainement pas soutenir que le décret attaqué fait indirectement la réglementation du commerce sous couleur de réglementation des heures de travail. C'est un effet que le législateur a prévu et autorisé à la seule condition de ne pas chercher à permettre le travail pendant les heures où la réglementation municipale interdit le commerce.

Cette observation sur un point capital ne suffit pas cependant à disposer du litige car il faut encore se demander si toutes les dispositions du décret relatives aux jours ouvrables et aux heures de travail sont effectivement autorisées par la loi dont il s'agit. Celles que l'appelante a contestées devant nous sont les suivantes:

1° La définition d'employeur (art. 1.01 par. *c*):

> Le terme «employeur» désigne toute personne, société ou corporation possédant ou exploitant un établissement commercial assujetti au présent décret.

2° La définition du commerce visé (art. 2.00 par. *a* 2e al.):

> Le commerce de détail visé par le présent décret comprend le colportage et toute vente ou livraison dans le champ d'application territorial, faits par une personne qui n'y a pas d'établissement commercial. Tout établissement commercial qui fait la vente de produits alimentaires au gros et au détail est, pour les fins des présentes, réputé détaillant et est assujetti aux dispositions du présent décret pour l'ensemble de ses activités.

3° La prohibition de toute vente le lundi avant 1h. (art. 3.05):

> Toute vente est prohibée jusqu'à 1 h. de l'après-midi dans les établissements assujettis au présent décret.

Pour ce qui est de la définition d'employeur dans le décret il suffit de la mettre en regard de celle que l'on trouve

1968

STEINBERG'S LIMITÉE v. COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*

Le Juge Pigeon

à l'article 1 de la loi pour constater qu'elle en déborde le cadre. En effet, celle-ci est la suivante (par. *f*):

«employeur» comprend: tout individu, société, firme ou corporation qui fait exécuter un travail par un salarié.

Le représentant du procureur général a admis à l'audition que cette disposition du décret ne pouvait pas valablement assujettir au décret comme employeur celui qui, d'après la loi, ne l'est pas. Suivant la loi un employeur est celui qui fait exécuter un travail par un salarié. Au contraire, suivant le décret, celui qui exploite un établissement commercial visé, c'est-à-dire un magasin d'alimentation, est déclaré employeur même s'il ne fait exécuter aucun travail par un salarié.

Peut-on dire comme le Juge Choquette en Cour d'appel:

La définition du mot «employeur» dans le décret ne saurait modifier le sens donné à ce terme par la loi précitée (art. 1, *f*); cette définition ne fait en somme que préciser le genre d'établissement commercial que cet employeur (personne, société ou corporation) doit posséder ou exploiter pour être assujetti au décret.

Je ne le crois pas. Il est bien vrai que le décret ne peut valablement promulguer une définition qui ait pour effet de sortir du cadre délimité par la loi. Cependant, cela ne veut pas dire que s'il prétend le faire on devra le considérer valide mais restreint à ce que la loi permet. La disposition excédant l'autorité de celui qui la décrète est nulle et non pas restreinte à ce qui est autorisé. Il importe qu'il en soit ainsi afin que les citoyens ne soient pas tenus d'obéir à des règlements qui leur commandent plus que ce que l'on a le pouvoir d'exiger d'eux et que les tribunaux ne soient pas obligés de refaire en quelque sorte la réglementation pour en limiter la portée à ce qui est susceptible d'être valablement décrété. Il faut à mon avis appliquer à la législation décrétée par délégation la règle que le Conseil privé a appliquée aux lois du Parlement:

The legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

Att. Gen. for B.C. v. Att. Gen. for Canada[7].

Malgré une disposition exprimant formellement la volonté que la loi dont il s'agissait fût appliquée dans toute la mesure où le Parlement avait le pouvoir de la décréter, on l'a déclarée invalide en entier en jugeant qu'elle formait un tout.

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[7] [1937] A.C. 377 à 389.

Je n'oublie pas que l'on doit toujours, si possible, interpréter un texte législatif de façon à ne pas le rendre invalide pour excès de pouvoir («*potius valeat quam pereat*»). Cependant, comme le juge en chef de cette Cour (alors qu'il était juge puîné) l'a fait observer dans *McKay c. La Reine*[8], cette règle signifie que si le texte est susceptible de deux interprétations dont l'une le rend valide, et l'autre invalide, c'est à la première qu'il faut s'arrêter. Dans cette cause-là, il a commencé par démontrer la possibilité d'une interprétation restrictive par application de l'adage «*Verba generalia restringuntur ad habilitatem rei vel personae*» qui est transcrit à l'art. 1020 du *Code civil* comme suit:

> Quelque généraux que soient les termes dans lesquels un contrat est exprimé, ils ne comprennent que les choses sur lesquelles il paraît que les parties se sont proposé de contracter.

Dans la présente cause il n'y a rien de tel. On ne donne aucune raison d'interpréter la définition autrement que dans son sens littéral si ce n'est le fait que le décret ne saurait modifier la loi. Comme nous venons de le voir, la règle énoncée dans *McKay c. La Reine* n'est pas qu'il faut coûte que coûte interpréter un texte législatif de façon à éviter qu'il soit invalide pour excès de pouvoir mais bien qu'entre deux interprétations possibles il faut choisir celle qui évite l'invalidité. Pour appliquer cette règle il est donc essentiel de trouver d'abord une raison valable de s'écarter du sens littéral lorsqu'il conduit à l'invalidité. Ici on ne donne aucun tel motif.

Peut-on considérer que du seul fait que le terme défini est le mot «employeur» on peut présumer que lorsque l'auteur du texte dit «toute personne ... possédant ou exploitant un établissement commercial assujetti» il veut dire en réalité non pas «toute personne» mais «tout employeur» parce qu'il est contraire à la notion même d'employeur que de ne pas avoir d'employés. Cela équivaudrait à soutenir que chaque fois qu'une définition législative va à l'encontre du dictionnaire on peut l'interpréter autrement que dans son sens littéral même si celui-ci est parfaitement clair et sans équivoque. C'est ce que je ne saurais admettre.

En premier lieu, la règle fondamentale c'est qu'il faut rechercher l'intention en considérant ce que comporte le

[8] [1965] R.C.S. 798 à 804, 53 D.L.R. (2d) 532.

1968

STEINBERG'S LIMITÉE *v.* COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*

Le Juge Pigeon

texte et non ce que l'on peut supposer que l'on a voulu dire: «The question is not what may be supposed to have been intended, but what has been said». *Toronto Railway Co. c. City of Toronto*[9].

En second lieu, le but même des définitions législatives est généralement de s'écarter du sens ordinaire du mot défini. Il arrive souvent qu'elles s'en écartent au point d'aller complètement à l'encontre du dictionnaire.

Ainsi en 1964, la législature d'Ontario a décrété qu'un arc ou une arbalète est une arme à feu au sens de sa loi sur la chasse (12-13 Eliz. II, 1964, ch. 34, art. 1, par. 1). Cela peut-il avoir pour effet de rendre l'intention douteuse et de permettre de s'écarter du sens littéral? A l'article 659 du *Code criminel,* le Parlement du Canada a défini le «délinquant sexuel dangereux» de façon à viser non seulement celui qui causera vraisemblablement une lésion corporelle à autrui mais aussi celui qui commettra vraisemblablement «une autre infraction sexuelle». Même dans un cas où il était évident que l'inculpé n'était pas dangereux au sens ordinaire de cette expression, le texte a paru décisif. La majorité en cette Cour n'a pas cru pouvoir l'interpréter de façon à en restreindre l'application à des infractions qui font du coupable un délinquant dangereux au sens ordinaire et elle a refusé d'appliquer à un cas semblable l'adage invoqué dans l'arrêt *McKay* (*Klippert c. La Reine*[10]). Je ne vois pas plus de raison de refuser de prendre au pied de la lettre une définition d'employeur qui englobe celui qui n'a pas d'employés qu'une définition d'arme à feu qui s'applique à l'arc et à l'arbalète et une définition de délinquant sexuel dangereux qui s'applique à celui qui n'est pas dangereux mais porté irrésistiblement à la récidive.

Comme l'a dit Lord Halsbury «the law is not always logical at all». *Quinn v. Leathem*[11]. Le devoir d'appliquer la loi comme elle est écrite signifie que si le texte est clair, on ne doit pas l'interpréter autrement qu'il est rédigé parce que cela ne semble pas logique. C'est qu'il est possible que ce qui paraît illogique soit voulu.

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[9] (1906), 37 R.C.S. 430 à 434.

[10] [1967] R.C.S. 822, 61 W.W.R. 727, 2 C.R.N.S. 319, [1968] 2 C.C.C. 129, 65 D.L.R. (2d) 698.

[11] [1901] A.C. 495 à 506.

Dans le cas présent, on en a la preuve au dossier. La définition d'employeur dans le décret reproduit textuellement la définition du même mot dans la partie de la convention collective dont il rend les dispositions obligatoires. Ces dispositions avaient manifestement pour objet de réglementer sous bien des rapports les établissements commerciaux de vente au détail de produits alimentaires. Ainsi on y trouvait des articles visant les heures d'ouverture et de fermeture. De plus, on s'était préoccupé de viser ceux qui généralement n'ont pas d'employés, tels les colporteurs. Dans le contexte de la convention collective comme elle était soumise au ministre du Travail avec la requête pour en demander l'extension juridique, il était impossible de supposer que la définition d'employeur était rédigée comme elle l'est dans un but autre que celui d'assujettir à la réglementation proposée tous les établissements de la catégorie décrite, qu'ils aient des employés ou non, et aussi d'assujettir aux dispositions relatives aux heures d'ouverture et de fermeture ceux qui travaillent à leur compte aussi bien que les autres. La définition ayant été reproduite sans modification dans le décret, je ne puis pas voir comment on peut penser que l'on a voulu qu'elle ait un sens autre que celui qu'elle avait indubitablement dans le texte dont on l'a tirée.

Cependant, avant de conclure comme la minorité en Cour d'appel que le vice de la définition entraîne la nullité du décret il faut considérer, vu qu'il s'agit d'une disposition accessoire et non d'une règle de fond, s'il en résulte une conséquence préjudiciable. La seule qui soit possible c'est l'application de l'art. 3.05 qui prohibe toute vente le lundi avant 1h. aucune autre disposition du décret n'est susceptible d'être appliquée à celui qui n'est pas un employeur au sens de la loi. Mais est-il bien certain que cette disposition soit applicable à tout employeur au sens du décret? Il faut observer que le mot «employeur» ne s'y trouve pas. Par conséquent, la portée de la disposition n'est pas évidente par elle-même et doit se déterminer selon le contexte. Dans la convention, le texte visant le lundi venait à la suite de paragraphes régissant non pas les heures de travail mais les heures d'ouverture et de fermeture. L'article 3.02 le disait expressément, de même l'alinéa entre les paragraphes (*c*) et (*d*) de l'art. 3.04

1968

STEINBERG'S LIMITÉE v. COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*

Le Juge Pigeon

defendant d'admettre un client dans l'établissement ou d'accepter une commande par téléphone «après l'heure fixée pour la fermeture». Il eut été logique d'interpréter la disposition de l'art. 3.05 dans le même sens. Mais, dans le décret, les paragraphes précédents ont été modifiés et visent uniquement le travail des salariés. Dans ce nouveau contexte, il n'y a plus de raison d'interpréter le texte comme visant le travail effectué par les employeurs alors que la nouvelle rédaction des paragraphes précédents démontre clairement que l'on entend restreindre l'application de la disposition relative aux heures de travail à ce que la loi prévoit, c'est-à-dire le travail des salariés.

Afin d'être aussi complet que possible sur ce point capital, il paraît à propos de noter que la loi mentionne l'artisan dans la définition de «salarié». Par conséquent, les décrets peuvent sûrement régir les heures de travail des artisans en même temps que celles des employés car ils sont des «salariés» au sens de la loi. Vu que, dans la présente cause, il suffit pour décider que la définition d'«employeur» n'invalide pas le décret d'en venir à la conclusion que la disposition relative au lundi vise uniquement le travail effectué par des salariés, il n'est aucunement nécessaire de se demander si les exploitants d'établissements qui ne sont pas des employés seraient susceptibles d'être considérés comme des «salariés» au sens de la loi. De toute façon, le décret ne définit pas cette expression mais utilise au contraire le mot «employé» en le définissant en des termes qui ne visent pas les artisans.

Les observations ci-dessus suffisent pour disposer également de l'attaque dirigée contre l'art. 2.00. Cette disposition ne fait que compléter la définition d'employeur en aidant à déterminer quels sont les établissements assujettis au décret. Dès que l'on en vient à la conclusion que la définition d'employeur n'a pas pour effet d'assujettir à la réglementation des heures de travail les personnes qui ne sont pas des «salariés» au sens de la loi, la définition de ce qui constitute un établissement commercial ne peut être une cause d'invalidité. Il en est de même de certaines expressions qui sont évidemment demeurées dans le décret simplement parce que l'on n'a pas tenu suffisamment compte du fait que l'on avait décidé de remplacer la réglementation des heures d'ouverture et de fermeture des magasins par une réglementation des heures de travail des

salariés. C'est là toute l'importance qu'il faut attacher à des dispositions comme la mention de produits «dont la vente est réglementée par les présentes» (art. 2.00 par. *b*), celle de «l'heure de fermeture» (art. 3.04 par. *c*).

En outre d'invoquer l'invalidité du décret, Steinberg's a prétendu que celui-ci avait cessé d'être en vigueur depuis le 1er juin 1967. La disposition relative à la durée est dans les termes suivants (art. 8.00):

> Le décret entre en vigueur à compter du premier (1er) juin mil neuf cent soixante-cinq (1965) et le demeure jusqu'au premier (1er) juin mil neuf cent soixante-six (1966).
>
> Il se renouvelle automatiquement pour une (1) année, à moins que l'une des parties contractantes ne donne à l'autre partie un avis écrit à ce contraire, dans un délai d'au plus quatre-vingt-dix (90) jours et d'au moins trente (30) jours avant le 1er juin de chaque année. Un tel avis doit également être adressé au Ministre du Travail.

L'appelante prétend que ce second alinéa prévoit un seul renouvellement. Il faut admettre que la clause n'est pas un modèle de rédaction et que c'est bien ce que le début du second alinéa laisse entendre. Mais d'une autre côté, une telle interprétation vient à l'encontre de la fin de la phrase qui fait mention, non pas du 1er juin 1966, mais du 1er juin de *chaque* année. On prive le mot «chaque» de toute signification en disant qu'un seul renouvellement est prévu. Comme il est de règle d'éviter une telle conséquence, il faut présumer que l'on a voulu un renouvellement chaque année pour une année et non pas un seul renouvellement.

Les associations des employés de Steinberg's ont produit une intervention en Cour supérieure pour demander le rejet de l'injonction et une déclaration d'invalidité du décret. Cette intervention a été accueillie par la Cour supérieure mais elle a été rejetée par la Cour d'appel. Les associations ont demandé à cette Cour la permission d'interjeter appel du jugement et, avec notre permission, se sont fait entendre comme appelantes. En outre de certains moyens déjà invoqués par Steinberg's, elles ont soutenu que le décret était discriminatoire. Les dispositions auxquelles elles se sont attaquées de ce chef sont le paragraphe (*c*) de l'art. 7.03 «augmentation générale des salaires réels» et l'article 7.04. Le premier de ces textes exclut de l'augmentation de $2.50 par semaine ceux dont le salaire équivaut au taux prévu au décret majoré de 20 pour cent. Quant au second il soustrait à l'application de l'article

1968

STEINBERG'S LIMITÉE
v.
COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*

Le Juge Pigeon

relatif au salaire, les salariés régis par une convention collective qui prévoit des avantages au moins égaux à ceux du décret.

Pour disposer de cette prétention il ne paraît pas nécessaire de faire plus qu'observer que rien dans la loi ne définit de quelle manière le salaire peut être réglementé. On pourrait indubitablement se contenter de fixer un taux de base, mais rien ne défend de procéder par augmentation. Par ailleurs, si l'on choisit de procéder par augmentation, on ne voit pas ce qui peut défendre de faire varier l'augmentation suivant les classifications. L'un des buts de la loi étant d'améliorer la condition des travailleurs défavorisés, on ne voit pas pourquoi le décret ne pourrait pas renfermer des dispositions ayant pour objet d'accorder des augmentations de salaire à ceux-là seuls que l'on juge défavorisés. La loi fait expressément réserve, à l'art. 13, du droit pour l'employeur d'accorder une rémunération plus élevée ou des avantages plus étendus que ceux fixés par le décret. Si un employeur l'a fait d'avance par une convention collective, comme il semble que ce soit le cas en l'occurrence, quelle illégalité peut-il y avoir à statuer que l'augmentation de salaire accordée à ceux qui reçoivent des taux inférieurs ne s'appliquera pas? C'est donc à bon droit que l'intervention a été rejetée par la Cour d'appel.

Les appels de Steinberg's et des associations d'employés de Steinberg's doivent donc être tous rejetés avec dépens car il va de soi que le bien-fondé de la demande d'injonction implique le rejet du bref de prohibition. Dans le cas de l'appel de Steinberg's dans l'instance en injonction, les dépens devront comprendre ceux de la requête pour suspension.

Appels rejetés avec dépens.

Procureurs de l'appelante, Steinberg's Ltée: Geoffrion & Prud'Homme, Montréal.

Procureurs de l'intimée, Comité Paritaire: Blain, Piché, Bergeron, Godbout & Emery, Montréal.

Procureurs des Associations appelantes: Cutler, Lamer, Bellemare, Robert, Desaulniers, Proulx & Sylvestre, Montréal.

Procureurs du Procureur Général du Québec: Ahern, Bélanger, de Brabant & Nuss, Montréal.

INDEX

CONTRACTS

1. Building contract providing for payment by instalments upon architect's certificate—Breach of term requiring builder to satisfy architect that subcontracts had been paid—Contract terminated by owners—Builder not in breach of term going to root of contract—Damages—Quantum meruit.

ALKOK v. GRYMEK *et al.*, 452.

2. Wrongful attempt by one party to repudiate agreement—Failure of other party to elect to accept repudiation and communicate acceptance within reasonable time—Agreement abandoned by both parties.

CHAPMAN *et al.* v. GINTER, 560.

3. Interpretation—Contract for facing of building with pre-cast granite awarded to defendants—Prior agreement whereby first defendant agreed to pay plaintiff percentage of total value of "the granite contract"—Basis upon which remuneration payable to plaintiff.

MARKHAM v. CONTINENTAL MARBLE & GRANITE LTD. *et al.*, 742

4. Unitization agreement—Interpretation.

ALMINEX LTD. *et al.* v. CANADIAN DELHI OIL LTD., 775.

5. Uberrimae fidei—Not all pre-nuptial agreements are to be categorized as uberrimae fidei.

STERN v. SHEPS *et al.*, 834.

COPYRIGHT

Infringement—Television broadcasting—Television network supplying musical programs to affiliated stations by microwave—Whether radio communication of musical works—Copyright Act, R.S.C. 1952, c. 55, ss. 2(*p*), (*q*), 3(1)(*f*).

COMPOSERS, AUTHORS AND PUBLISHERS ASSOC. OF CANADA LTD. v. CTV TELEVISION NETWORK LTD. *et al.*, 676.

COSTS

Cross-appeal on question of costs—Refusal by Supreme Court of Canada to interfere with disposition made in Court of Appeal—Matter one of discretion for Court of Appeal.

CANADIAN MEMORIAL CHIROPRACTIC COLLEGE v. MUNICIPALITY OF METROPOLITAN TORONTO, 198.

COURONNE

1. Promesse de payer une indemnité pour la fermeture d'une ligne de chemin de fer de service—Calcul du montant de l'indemnité—Doit-on déduire un montant pour l'impôt sur le revenu—Terrain offert par la Couronne à un bas prix pour déménager l'entreprise—La Couronne est-elle empêchée de nier le besoin d'un déménagement—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, arts. 18(1)(*g*), 47(*b*).

FLORENCE REALTY CO. LTD. *et al.* v. THE QUEEN, 42.

2. Vente de terres—Terres des Indiens—Contrat pour la vente par la Couronne de terres des Indiens—Le temps étant de l'essence du contrat—Clause prévoyant la terminaison du contrat et la forfaiture des argents dans le cas de défaut—La clause impose-t-elle une peine ou est-elle une évaluation préalable des dommages—La peine est-elle déraisonnable—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 48—Loi sur les Indiens, S.R.C. 1952, c. 149, art. 37 et seq.

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN, 93.

3. La Poste—Pétition de droit—Vol d'un colis confié à la poste—Entrepreneur de transport postal indépendant—Action contre la Couronne rejetée—Lci sur les postes, S.R.C. 1952, c. 212, art. 40.

CAISSE POPULAIRE DE ST-CALIXTE DE KILKENNY v. LA REINE, 955.

4. *See* also—*Voir* aussi: BREVETS

CRIMINAL LAW

1. Disorderly houses—Keeper of common bawdy house—No evidence of prior use of house as such—Whether accused properly convicted—Criminal Code, 1953-54 (Can.), c. 51, s. 168.

PATTERSON v. THE QUEEN, 157.

2. Appeals—Jurisdiction—Leave to appeal—Dismissal by Court of Appeal of application to extend time to appeal to that Court from a sentence—Whether Supreme Court of Canada has jurisdiction to grant leave to appeal—Penitentiary Act, R.S.C. 1952, c. 206, s. 49(3)—Supreme Court Act, R.S.C. 1952, c. 259, s. 41—Criminal Code, 1953-54 (Can.), c. 51, s. 597(1)(*b*).

HIND v. THE QUEEN, 234.

3. Habitual criminal—Whether accused leading consistently a criminal life—Criminal Code, 1953-54 (Can.), c. 51, s. 660(2)(*a*).

HADDEN v. THE QUEEN, 258.

4. Habitual criminal—Preventive detention—Whether conviction recorded before enactment of habitual criminal provisions to be considered—Whether conviction subsequent to commission of substantive offence to be considered—Whether sentence imposed must have been served—Criminal Code, 1953-54 (Can.), c. 51, s. 660(2)(*a*).

PATON v. THE QUEEN, 341.

5. Habitual criminal — Jurisdiction — Sentence of preventive detention—Finding that accused an habitual criminal not disturbed—Whether expedient to impose sentence of preventive detention—Whether jurisdiction in Supreme Court of Canada to entertain appeal from imposition of such sentence—Supreme Court Act, R.S.C. 1952, c. 259, s. 41—Criminal Code, 1953-54 (Can.), c. 51, ss. 660(1), 667(1).

POOLE v. THE QUEEN, 381.

6. Trial — Indictable offence — Accused electing trial by judge and jury—Magistrate proceeding with preliminary inquiry—Accused re-electing trial by magistrate and pleading guilty—Whether magistrate had jurisdiction to permit change of election and thereupon to try accused—Criminal Code, 1953-54 (Can.), c. 51, s. 468.

COOPER v. THE QUEEN, 450.

7. Sale of drug to procure abortion—Whether intention to use drug for that purpose an essential ingredient of the offence—Criminal Code, 1953-54 (Can.), c. 51, s. 238.

IRWIN v. THE QUEEN, 462.

8. Sexual intercourse with girl under 14 years of age—Whether corroboration of complainant's evidence—Criminal Code, 1953-54 (Can.), c. 51, s. 138(1).

THE QUEEN v. PARISH, 466.

9. Indians—Hunting rights of Manitoba Indians—Possession of game birds during prohibited season contrary to statute—Whether exempt from compliance with statute by virtue of agreement between Canada and Manitoba—Indian Act, R.S.C. 1952, c. 149—Migratory Birds Convention Act, R.S.C. 1952, c. 179, s. 12(1)—Manitoba Natural Resources Act, 1930 (Can.), c. 29; 1930 (Man.), c. 30—B.N.A. Act, 1930, c. 26.

DANIELS v. WHITE AND THE QUEEN, 517.

10. Care and control of motor vehicle while intoxicated or under influence of narcotic drug—Whether two offences—Whether charge bad for duplicity—Criminal Code, 1953-54 (Can.), c. 51, ss. 222, 492, 703, 704, 727.

THE QUEEN v. BRUNET, 713.

11. Information—Charge of making false statement in connection with application for admission to Canada—Information not stating what was the false statement—Oral particulars of offence given by Crown counsel before trial proceeded with—Whether information fatally defective—Criminal Code, 1953-54 (Can.), c. 51, s. 492(3)—Immigration Act, R.S.C. 1952, c. 325, s. 50(*f*).

CORCORAN v. THE QUEEN, 765.

12. Common gaming house—Accused officers of unincorporated bridge and social club—Bridge players charged a fee for playing—Whether bridge a game of skill or of chance or of mixed chance and skill—Criminal Code, 1953-54 (Can.), c. 51, ss. 168(1)(*f*), 176(1).

ROSS, BANKS AND DYSON v. THE QUEEN, 786.

13. Jury trial—Possession of housebreaking instruments—Whether trial judge's instructions to jury amounted to comment on failure of accused to testify—Whether new trial only remedy—Canada Evidence Act, R.S.C. 1952, c. 307, s. 4(5)—Criminal Code, 1953-54 (Can.), c. 51, ss. 295(1), 592(1)(*b*)(iii).

MCCONNELL AND BEER v. THE QUEEN, 802.

14. Entering dwelling house with intent to commit indictable offence—Elements of offence—Proof of intent—Criminal Code, 1953-54 (Can.), c. 51, s. 293.

AUSTIN v. THE QUEEN, 891.

15. Voir dire—Confession—Trial by judge without jury—Accused asked by trial judge whether inculpatory statement true—Whether proper question—Criminal Code, 1953-54 (Can.) c. 51, s. 592(1)(*b*)(iii).

DE CLERCQ v. THE QUEEN, 902.

DROIT CONSTITUTIONNEL
Concluded—Fin

DROIT CRIMINEL

DROIT CRIMINEL—*Continued—Suite*

REAL PROPERTY

Father transferring land to son—Encumbrance executed by son—"Liferent" to father and on death of father equal remainder interest to each of three daughters and son—Son leasing petroleum and natural gas rights with consent of father and daughters—Whether father entitled to receive royalties paid pursuant to lease as his own income during his lifetime.

HAYDUK v. WATERTON *et al.*; FLECHUK *et al.* v. WATERTON *et al.*, 871.

RESPONSABILITÉ

See—Voir: FAUTE

REVENU

1. Impôt sur le revenu—Intérêts et capital réunis—Vente d'une ferme par versements ne portant pas intérêts—Versements constituent-ils une fusion de capital et d'intérêts—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 7(1).

GROULX v. MINISTRE DU REVENU NATIONAL, 6.

2. Impôt sur le revenu—Expropriation d'une terre—Contribuable réalisant un profit imposable—Année d'imposition—Loi sur les expropriations, S.R.C. 1952, c. 106, art. 23—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 85B(1)(*b*).

MINISTER OF NATIONAL REVENUE v. BENABY REALTIES LTD., 12.

3. Impôt sur le revenu—Déductions—Dépenses légales—Procès attaquant avec succès la validité d'une législation d'expropriation—Dépense est-elle déductible—Communications par une compagnie à ses actionnaires—Le coût est-il une dépense déductible—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(*a*), (*b*).

BRITISH COLUMBIA POWER CORPORATION, LTD. v. MINISTER OF NATIONAL REVENUE, 17.

4. Impôt sur le revenu—Déductions—Dépenses légales encourues pour défendre titre à des droits minéraux—Paiements en vertu d'un contrat de dépenses de forage et d'exploration—Sont-ils déductibles—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 12(1)(*a*), (*b*), 83A(3).

FARMERS MUTUAL PETROLEUMS LTD. v. MINISTER OF NATIONAL REVENUE, 59.

5. Taxe de vente—Pétition de droit pour obtenir remboursement—Tranches de marbre importées—Polissage et sciage avant l'installation dans des édifices par l'importateur—Est-ce que le marbre fini est «une marchandise produite ou fabriquée au Canada» et en conséquence sujet à la taxe de vente ou de consommation—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, arts. 30(1)(*a*), 31(1)(*d*)—Loi sur la sécurité de la vieillesse, S.R.C. 1952, c. 200, art. 10(1).

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD., 140.

6. Impôt sur le revenu—Corporations associées—Contrôle par le même groupe de personnes—Plus d'un groupe en état d'exercer le contrôle—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 39(4)(*b*).

VINA-RUG (CANADA) LTD. v. MINISTER OF NATIONAL REVENUE, 193.

7. Impôt sur le revenu—Gain de capital ou revenu—Transactions immobilières—Compagnie privée créée pour vendre une ferme—Compagnie de placement ou compagnie faisant le commerce—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 3, 4, 139(1)(*e*).

BALSTONE FARMS LTD. v. MINISTER OF NATIONAL REVENUE, 205.

8. Impôt sur le revenu—Coût en capital à titre d'allocation—Acquisition du droit de gérer un fonds mutuel pour une période déterminée—«Franchise, concession ou licence»—Bien susceptible de dépréciation—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(*a*)—Règlements de l'impôt sur le revenu, art. 1100(1)(*c*), cédule B, classe 14.

CAPITAL MANAGEMENT LTD. v. MINISTER OF NATIONAL REVENUE, 213.

9. Impôt sur le revenu—Compagnie de navigation—Revenu provenant d'une entreprise exercée au Canada par une compagnie non résidante—Exploitation de navires—Convention entre le Canada et le Royaume-Uni relative à l'impôt (1946), Articles II, III, IV, V—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 2(2), (4), 10(1)(*c*), 31(1).

FURNESS, WITHY & CO. LTD. v. MINISTER OF NATIONAL REVENUE, 221.

10. Impôt sur le revenu—Compagnie minière—Nouvelle mine—Exemption pour 3 ans—Déduction des intérêts payés sur

des titres d'obligations d'intérêts provenant d'investissements—L'intérêt sur les titres d'obligations doit-il être considéré dans le calcul de la base de déduction—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(*c*), 12(1)(*c*), (5)—Règlements de l'impôt sur le revenu, art. 1201(2), (4)(*d*).

GUNNAR MINING LTD. v. MINISTER OF NATIONAL REVENUE, 226.

11. Impôt successoral—Situs des parts d'une compagnie—Non paiement de l'impôt successoral d'un non résident—Saisie des parts par un bref de fieri facias émanant de la Cour de l'Échiquier—Compagnie constituée en corporation au Canada—Situs des parts pour les fins de l'exécution en justice—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 74—Loi de l'impôt sur les biens transmis par décès, 1958 (Can.), c. 29, art. 38(*e*), 47.

HUNT *et al.* v. THE QUEEN, 323.

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

N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE, 413.

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

H. R. WHITTALL v. MINISTER OF NATIONAL REVENUE, 432.

14. Impôt sur le revenu—Dépenses déductibles ou dépenses de capital—Montants payés par une compagnie de chemin de fer pour un relevé géologique—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(*b*).

MINISTER OF NATIONAL REVENUF v. ALGOMA CENTRAL RAILWAY, 447.

15. Impôt sur le revenu—Allocation du coût en capital—Bien susceptible de dépréciation—Achat de 14 taxis licenciés—Le montant attribué à l'achat des licences est-il un bien susceptible de dépréciation comme représentant une automobile ou une licence pour une durée limitée—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(*a*)—Règlements de l'impôt sur le revenu et cédule B, classe 10 et classe 14.

METROPOLITAN TAXI LTD. v. MINISTER OF NATIONAL REVENUE, 496.

16. Impôt sur le revenu—Calcul du dégrèvement pour impôt étranger—Sources du revenu—Effet des amendements de 1960 à la Loi de l'impôt sur le revenu—Convention entre le Canada et les États-Unis, Article XV—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(*c*), 41, 139 (1a), (1b).

INTERPROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUF, 498.

17. Impôt successoral—Capacité de disposer d'un bien—Pouvoir de disposer d'un bien par testament—Y a-t-il pouvoir général de distribuer ou de disposer—Loi de l'impôt sur les biens transmis par décès, 1958 (Can.), c. 29, art. 3(1)(*a*), 3(2)(*a*), 58(1)(*i*).

ROYAL TRUST COMPANY *et al.* v. MINISTER OF NATIONAL REVENUE, 505.

18. Douane et accise—Pièces importées—Pièces fabriquées au pays—Assemblage de dépoussiéreurs—Ont-ils été fabriqués au Canada—Tarif des douanes, S.R.C. 1952, c. 60, art. 11(1).

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE v. RESEARCH-COTTRELL (CANADA) LTD. *et al.*, 684.

19. Impôt sur le revenu—Pension alimentaire—Paiements mensuels à l'épouse séparée garantis par hypothèque—Sont-ils déductibles comme étant une pension alimentaire—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 11(1)(*l*).

TROTTIER v. MINISTER OF NATIONAL REVENUE, 728.

20. Impôt sur le revenu—Revenu ou gain en capital—Hypothèques acquises sur escompte—Le montant d'escompte reçu à l'échéance est-il un revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 48, art. 3.

WOOD v. MINISTER OF NATIONAL REVENUE, 957.

SCHOOLS

See—Voir: NEGLIGENCE

SHERIFF'S SALE

Petition to vacate—Titles to the immoveable sold—Deed of donation not registered—Irregularities in the seizure of the immoveable—Cadastre Act, R.S.Q. 1941,

STATUTES—*Continued*—*Suite*

STATUTES—*Continued—Suite*

STATUTES—*Continued—Suite*

STATUTES—*Continued—Suite*

STATUTES—*Continued—Suite*

STATUTES—*Continued*—*Suite*

STATUTES—*Concluded*—*Fin*

TAXATION

1. Income tax—Interest and capital combined—Sale of farm—Balance of price to be paid by instalments without interest—Whether instalments constituted combined payments of capital and interests—Income Tax Act, R.S.C. 1952, c. 148, s. 7(1).

GROULX v. MINISTRE DU REVENU NATIONAL, 6.

2. Income tax—Expropriation of land resulting in taxable profit to taxpayer—Appropriate year of assessment—Expro-

priation Act, R.S.C. 1952, c. 106, s. 23—Income Tax Act, R.S.C. 1952, c. 148, s.85B(1)(*b*).

MINISTER OF NATIONAL REVENUE v. BENABY REALTIES LTD., 12.

3. Income tax—Deductions—Legal expenses—Litigation successfully attacking validity of expropriation legislation—Whether a deductible expense—Communications by corporation to shareholders—Whether costs a deductible expense—Income Tax Act, R.S.C. 1952, c. 148, s. 12 (1)(*a*), (*b*).

BRITISH COLUMBIA POWER CORPORATION, LTD. v. MINISTER OF NATIONAL REVENUE, 17.

4. Income tax—Deductions—Legal expenses incurred in defending title to mineral rights—Drilling and exploration expenses paid under agreement—Whether deductible—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(*a*), (*b*), 83A(3).

FARMERS MUTUAL PETROLEUMS LTD. v. MINISTER OF NATIONAL REVENUE, 59.

5. Sales tax—Petition or right for refund—Imported slab marble—Polishing and cutting for installation by importer in buildings—Whether finished marble "goods produced or manufactured in Canada" and therefore liable for sale or consumption tax—Excise Tax Act, R.S.C. 1952, c. 100, ss. (30)(1)(*a*), 31(1)(*d*)—Old Age Security Act, R.S.C. 1952, c. 200, s. 10(1).

THE QUEEN v. YORK MARBLE, TILE AND TERRAZZO LTD., 140.

6. Income tax—Associated corporations—Control by same group of persons—More than one group in position to control—Income Tax Act, R.S.C. 1952, c. 148, s. 39(4)(*b*).

VINA-RUG (CANADA) LTD. v. MINISTER OF NATIONAL REVENUE, 193.

7. Income tax—Capital gain or income—Real estate transaction—Private company formed to dispose of farm land—Whether trading company or investing company—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(*e*).

BALSTONE FARMS LTD. v. MINISTER OF NATIONAL REVENUE, 205.

8. Income tax—Capital cost allowance—Acquisition of right to manage mutual fund for limited period—Whether "franchise, concession or licence"—Whether depreciable property—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(*a*)—Income Tax Regulations, s. 1100(1)(*c*), schedule B, class 14.

CAPITAL MANAGEMENT LTD. v. MINISTER OF NATIONAL REVENUE, 213.

9. Income tax—Shipping company—Income from business carried on in Canada by non-resident—Operation of ships—Canada—U.K. Tax Agreement (1946), Articles II, III, IV, V—Income Tax Act, R.S.C. 1952, c. 148, ss. 2(2), (4), 10(1)(*c*), 31(1).

FURNESS, WITHY & CO. LTD. v. MINISTER OF NATIONAL REVENUE, 221.

10. Income tax—Mining company—New mine—Exemption for 3 years—Deduction of interest paid on debentures from interest received from investments—Whether interest on debentures to be considered in computation of depletion base—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(*c*), 12(1)(*c*), 83(5)—Income Tax Regulations, s. 1201(2), (4)(*d*).

GUNNAR MINING LTD. v. MINISTER OF NATIONAL REVENUE, 226.

11. Estate tax—Situs of company shares—Unpaid tax on estate of deceased non resident—Seizure of shares by writ of fieri facias in Exchequer Court—Company incorporated in Canada—Situs of shares for purposes of judicial execution—Exchequer Court Act, R.S.C. 1952, c. 98, s. 74—Estate Tax Act, 1958 (Can.), c. 29, ss. 38(*e*), 47.

HUNT *et al.* v. THE QUEEN, 323.

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

N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE, 413.

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

H. R. WHITTALL v. MINISTER OF NATIONAL REVENUE, 432.

14. Income tax—Deductible expense or capital outlay—Moneys paid by railway company for geological survey—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(*b*).

MINISTER OF NATIONAL REVENUE v. ALGOMA CENTRAL RAILWAY, 447.

TRADE MARKS

Registration—Candy—"Smoothies" for candy—"Smarty" for biscuits and candy and "Smarties" for confections—Whether trade marks confusing—Trade Marks Act, 1952–53 (Can.), c. 49, ss. 6(2), (5), 12(1)(*d*), 55(5).

ROWNTREE CO. LTD. v. PAULIN CHAMBERS CO. LTD. *et al.*, 134.

TRAVAIL

1. Juridiction de la Commission des relations de travail du Québec—Congédiement en violation de la loi—Réintégration—Indemnité inférieure à celle prescrite par la loi—Erreur de droit—Juridiction pour reviser—Code du travail, S.R.Q. 1964, c. 141, art. 14, 117.

FRANÇOIS NOLIN LTÉE v. COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *et al.*, 168.

2. Compétence de la Commission des relations de travail du Québec—Demande d'accréditation—Bref de prohibition—Demande d'accréditation non accompagnée des pièces mentionnées à l'art. 23 du Code du travail—Violation de la règle audi alteram partem—Code du travail, S.R.Q. 1964, c. 141, art. 23.

KOMO CONSTRUCTION INC. *et al.* v. COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *et al.*, 172.

3. Accréditation—Achat de l'actif d'une compagnie par une autre—Fusion des deux usines et de leurs employés—Commission substituant le nouvel employeur au certificat de reconnaissance syndicale—Requête par une seconde union pour représenter tous les autres employés—Bref de prohibition—S'agit-il d'un litige intersyndical—Séances et décisions de la Commission—Code du Travail, S.R.Q. 1964, c. 141, art. 21, 36, 103, 107, 108, 115, 118.

COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC v. CANADIAN INGERSOLL-RAND CO. LTD. *et al.*, 695.

4. Relations ouvrières—Convention collective—Décret relatif au commerce de l'alimentation au détail—Région de Montréal—Détermination des heures de travail—Vente prohibée le lundi jusqu'à une heure de l'après-midi—Validité du décret—Loi de la convention collective, S.R.Q. 1941, c. 163—Loi des décrets de convention collective, S.R.Q. 1964, c. 143, art. 2, 6.

STEINBERG'S LTÉE v. COMITÉ PARITAIRE DE L'ALIMENTATION AU DÉTAIL, RÉGION DE MONTRÉAL *et al.*, 971.