BETWEEN:

THE ALGOMA CENTRAL AND HUDSON BAY RAILWAY COMPANY ..... APPELLANT;

1960 May 24, 25

1961 Jan. 24

AND

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

Revenue—Income—Income tax—Railroad subsidized by grant of Crown lands—Lands pledged to secure bonds—Whether revenue obtained from sale of mining, prospecting and timber rights, capital or income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(1)(j) and 139(1)(e).

The appellant company was incorporated by Act of Parliament in 1899 for the purpose of constructing a railroad through the District of Algoma. To assist in financing the project cash subsidies were paid the company by both the Federal and Ontario governments and the latter body also granted it large tracts of land along the proposed right of way. The appellant subsequently sold bonds to the public and pledged the lands as security. Thereafter the proceeds of any sale of these lands or of the timber or mineral rights thereon had to be accounted for to the trustee for the bondholders. From time to time the appellant disposed of the mineral, surface and timber cutting rights in the lands it had been granted. In assessing the appellant for the years 1953 to 1956 inclusive the Minister added the sum received for such rights to the appellant's declared income. In an appeal from the assessment it was contended for the appellant that the amounts in question were not income but receipts of a capital nature and formed part of the subsidy lands granted and received as capital assets along with the cash subsidies. The Minister submitted that dealing with the granted lands formed part of the appellant's business and the receipts part of its income and, that in any event, they constituted receipts which were dependent upon use of production from property.

Held: That even if the lands when received were of a capital nature, their character was changed by the manner in which they were dealt with by the appellant. To deal with the mining and timber-cutting rights it set up an organization which carried on its activities as a business operation in the same manner as an ordinary trader in such items. The profit was obtained by transactions having the characteristics of a trade, business or of an adventure in the nature of trade, and the profits were properly assessed as taxable income. *The Commissioners of Inland Revenue v. Livingston* 11 T.C. 538 at 542 and *Western Leaseholds Ltd. v. Minister of National Revenue* [1960] S.C.R. 10 at 23, referred to and followed. *Hudson's Bay Co. v. Stevens* 5 T.C. 424, distinguished.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Fournier at Toronto.

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B. V. Elliot, Q.C. and *A. D. McAlpine* for appellant.

G. D. Watson, Q.C. and *T. Z. Boles* for respondent.

FOURNIER J. now (January 24, 1961) delivered the following judgment:

The appellant filed with the Department of National Revenue returns of its income for its taxation years 1953, 1954, 1955 and 1956. By re-assessments, the respondent added to the appellant's declared income for the above years certain amounts on the ground that they were properly taken into account in computing the taxpayer's taxable income in accordance with the provisions of ss. 3 and 4 of the *Income Tax Act*. The appellant objected to the re-assessments and stated that the amounts added to its declared income were not income but receipts of a capital nature derived from Land Grant lands. Nevertheless, the Minister confirmed the assessments and an appeal is now taken thereupon.

The appellant is a company incorporated by a Special Act of Parliament under the name of The Algoma Central Railway Company (Statutes of Canada 1899, 62-63 Victoria, c. 50). Its name was changed to The Algoma Central and Hudson Bay Railway Company in 1901 by 1 Edward VII, c. 46. Its head office is in the city of Sault Ste. Marie, in the province of Ontario. The purposes and powers of the appellant are found in the following sections of the incorporating Statute:

> 8. The company may lay out, construct and operate a railway . . . from a point at or near the town of Sault Ste. Marie, in the district of Algoma, on the St. Mary River, to a point on the main line of the Canadian Pacific Railway at or near Dalton station, and thence south-westerly to Michipicoten Harbour upon Lake Superior.
>
> 9. The Company, for the purposes of its undertaking, may—
>
> (*a*) erect and maintain docks, dock yards, wharfs, slips and piers at any point on or in connection with its railway, and all the termini thereof, on navigable waters for the convenience and accommodation of vessels and elevators;
>
> (*b*) acquire and work elevators;
>
> (*c*) acquire and run steam and other vessels for cargo and passengers upon any navigable water which its railway may connect with;
>
> (*d*) acquire and utilize water and steam power for the purpose of compressing air or generating electricity for lighting, heating or motor purposes, and may dispose of surplus power generated by the Company's works and not required for the undertaking of the Company;
>
> (*e*) acquire exclusive rights, letters patent, franchises or patent rights and again dispose of the same.

10. The Company may construct, work and maintain a telegraph line and telephone lines along the whole length of its railway and branches, and may establish offices for the transmission of messages for the public; and, for the purpose of erecting and working such telegraph and telephone lines, the Company may enter into a contract with any other company.

2. The Company may enter into arrangements with any other telegraph or telephone company for the exchange and transmission of messages, or for the working in whole or in part of the lines of the Company.

3. No rates or charges shall be demanded or taken from any person for the transmission of any message by telegraph or telephone, or for leasing or using the telegraph or telephones of the Company, until such rates or charges have been approved of by the Governor in Council.

4. *The Electric Telegraph Companies Act* shall apply to the telegraphic business of the Company.

In 1901, the appellant was authorized to extend its line of railway "from a point on the main line of the Canadian Pacific Railway, thence in a general direction northerly to some point on James Bay, not further north than Equam River."

The appellant received Dominion subsidies in cash under Statutes of Canada intituled in each instance "An Act to authorize the granting of subsidies in aid of the construction of the lines of railway therein mentioned." These cash subsidies were not considered as taxable income. It also received land grants pursuant to Canada and Ontario Statutes.

The cash and land subsidies granted by the Province of Ontario to the appellant to aid in the construction and operation of the railway were for the public purpose of increasing employment, encouraging immigration and establishing industries. In the preamble of c. 30 of the Ontario Statutes 1899, 63 Victoria, the Legislature, in an *Act respecting aid by Land Grant to the Algoma Central Railway,* recognized the difficulties which would face the Company in its undertaking. Realizing that, owing to the undeveloped character of the country through which the railway would pass, its traffic for some years to come would not be of sufficient value to produce a revenue on the capital invested, it granted in fee simple the lands described in the above Act.

The appellant, to finance the cost of construction of the railway and its operation, in addition to the cash subsidies received, raised funds from the public. It pledged the land grant lands received and its railway line as securities for

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the bonds which were sold to the public, and the proceeds of any sale of these lands or the timber or minerals thereon had to be accounted for to the Trustee for the bondholders to meet the Company's obligations to its bondholders. Even with these subsidies the appellant was in financial difficulties with its bondholders before the construction of the line was completed and until 1959, when all arrears of bond interest and the bonds were redeemed under new financing arrangements. Only then did the Company come under the control of the shareholders.

The appellant received in land grant lands approximately 83 townships having an area of over 2,100,000 acres or 3,347 square miles. The townships were scattered along its railway line. From time to time, it disposed of certain rights inherent to the land grant lands received, including rights to the minerals, timber, surface rights and other rights having value. It is the receipts from the agreements concerning the aforesaid rights, and not that of the land itself, which are the subject of the present litigation.

In the taxation years 1953, 1954, 1955 and 1956, the appellant, in its income tax returns, declared the following taxable incomes:

1953	*1954*	*1955*	*1956*
$1,850,989.75	$743,925.80	$2,489,888.45	$3,170,523.71

During these years, it had also received amounts from Land Grant lands as follows:

	1953	*1954*	*1955*	*1956*
1. Mining claim rentals for 35 sources	$ 2,196.64	$ 2,685.11	$ 1,073.82	$ 1,927.05
2. Prospecting fees from 6 sources	6,700.00	3,300.00	9,700.00	13,500.00
3. Timber dues from 11 sources	36,936.93	52,352.43	41,176.72	73,380.36
4. Timber dues from Great Lakes Power Co.	....	....	512.54	10,294.70
	$ 45,833.57	$ 58,337.54	$ 52,463.08	$ 99,102.11

In its re-assessments for these taxation years, the respondent, under the above headings, added to the appellant's taxable income the amounts *supra,* which he confirmed following the notices of objection.

The question to be answered is whether the amounts added are taxable income within the meaning of the provisions of the *Income Tax Act* or capital gain from the sale of assets in the form of rights inherent to the ownership of land. The provisions of the Act, among others, which should be specially considered in determining the nature of the amounts added to the appellant's income are ss. 3, 4 and 6(1)(*j*). I quote:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, . . .

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

* * *

6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

Payments based on production or use.

(*j*) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property, but instalments of the sale price of agricultural land shall not be included by virtue of this paragraph.

There is no definition of "income" or "capital" in the *Income Tax Act,* so in many instances it is most difficult to find the difference between the "income" contemplated by the provisions of s. 3 of the Act and a "capital gain". Section 4 is of some help when it states that income from a business or property is equivalent to the balance of profits or gains therefrom. On the other hand, it is generally recognized that any profit made from the sale or realization of a capital asset is not a receipt of business or trade unless the realization of such asset forms part of a business, a trade or an adventure in the nature of trade.

The appellant through counsel contends that at all relevant times it was solely engaged in the business of operating a line of railway and a fleet of vessels and did not engage in the business of selling or leasing lands or the timber or minerals thereon. The receipts from the timber and minerals, which are involved in this appeal, were part of the subsidy lands granted to it and received from the Province of Ontario as subsidies in aid of the construction

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of the appellant's line of railway. The lands were also granted for public purposes, namely, to establish new industries and create employment in the province. The timber and minerals disposed of were received as capital assets along with cash subsidies received for the same purpose. The methods used to dispose of part of the assets were in fact sales of such assets in the course of realization of the cash equivalent thereof. The receipts from such sales were capital receipts. The cash subsidies were capital receipts and not taxable. It was finally submitted that if one form of subsidy is not taxable it would seem illogical and unrealistic that the disposal of another capital asset representing another form of subsidy should be taxed.

On behalf of the respondent it was urged that the basis for justification of the land grants by the Province of Ontario to the appellant is expressed in the preamble of the Act as "that, owing to the undeveloped character of the country through which it will pass, the traffic of the railway for some years to come will be limited to carrying timber and mineral ores and will not be of sufficient value to produce a revenue on the capital invested."

To create or increase traffic revenue, the Company disposed of certain lands received and of certain rights inherent therein. When the appellant disposed of certain lands, it was a condition of the grants that the Company's railway would be used for the transporting of supplies, materials to or from the lands sold and all products of the purchaser's industry on the lands. In cases of timber cutting rights agreements it was stated that the purpose of the agreements was to assure the Company of traffic revenue and provided that one of the objects of the lessor in granting the cutting rights was to obtain traffic over its railway lines and was part of the consideration for and a condition of the granting of said cutting rights. The contractor agreed with the Company to route or cause to be routed all of its traffic, both inbound and outbound, through the Company's railway line. Similarly in mining cases, the lessor's primary object in granting the lease was to increase traffic on its railway and to provide cargoes for its ships.

The respondent further submits that the Land Grant lands activities form a significant part of the appellant's complex operations. They are carried on, under the direction and control of an official designated as the Superintendent of Lands and Forests, in a separate corporate division, and are integrated with the other activities so as to complement and augment its railway business. They can hardly be classed as unusual to the Company's ordinary course of business. The business operations are complex and extensive. Not only is there a practice established over many years of dealing with Land Grant lands as part of its business operations, but the continued and repetitive character of the operation is emphasized by the fact that it has apparently been considered necessary to establish and operate a recording office, a transfer office and an issuer (or issuers) of permits to use Land Grant lands for prospecting and trapping. A portion of the salaries of those thus occupied is allocated to operations of this division of the Company's activities. In addition, amounts from $10,000 to $18,000 per year were expended in the pertinent period for the purpose of cruising the Company's limits it requires for railway ties in its operations and inspecting and scaling timber. It is apparent that the development and integration of mining activities and timbering operations in areas tributary to the Company's railway, with a view to developing traffic for its railway lines, is a business purpose ancillary to the main purpose of developing traffic for its railway.

The respondent concludes that the basic facts, found or assumed by the Minister, which are put on issue in this appeal are that receipts from Land Grant land operations are part of the appellant's profit-making activities, to wit, income from its business; that they are not properly classified as receipts from the sale of a capital asset outside the course of established business; that in any event they constitute receipts which were dependent upon use of or production from property.

I believe that the admitted or established facts which are important and material to the issue are those concerning the amounts added to the appellant's taxable income. The sums thus added were received by the appellant as a result

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of certain agreements between the Company and third parties. These agreements were related to mining claims, prospecting privileges and timber dues and not to the sale of the lands received as land grants.

It was realized at the very outset that the Company, to meet its purposes and the objects of its incorporation, would need the help of both the Canadian and the Provincial Governments. Statutory cash subsidies were paid by both authorities as the construction work progressed. Land grants were received from the Province of Ontario for the reasons recited in the preamble of the above Act. The Company, to finance the railway line and operate its railway, had to issue bonds. The subsidy lands were used or given as collateral security for the bonds. When the Company granted or disposed of mining claims, prospecting privileges or timber cutting rights, the monies received therefrom had to be accounted for to the trustee of the bondholders and for their benefit.

The method followed by the Company in dealing with the aforesaid assets is interesting and important. The agreements concerning the mining rights were in the form of documents drawn in pursuance of *The Short Forms of Leases Act* (R.S.O. 1950, c. 361). They were in the basic form of a lease of land which, in consideration of rents and other considerations reserved, demises to the lessee a specified area for a specified period of time. The rent therefor being the sum of $1 per acre on the execution of the lease, a further sum of 25 cents per acre in each year thereafter during the currency of the lease and paying as rent, in addition thereto, specified royalties related to the profits of any mine which may be located on the land, with special per ton royalties in respect of iron and pyrite mines. The receipts from mining land leases in the period under discussion were the amounts paid by way of annual rentals and not royalties for ore extracted.

The receipts from prospecting agreements were amounts paid for the right to exclusive user of specific rights on designated areas of land for limited periods. There were no amounts received for removal of minerals.

The timber cutting rights were disposed of and paid for on the basis of the amounts of the quantities cut—in other words, on the "stumpage basis".

The last items subject to this litigation are the amounts received from Great Lakes Paper Co. in 1955 and 1956. It appears that pulpwood cutting rights in the designated area had been granted to Lake Superior Paper Co. Ltd. in 1911 and assigned to Abitibi Power & Paper Co. Ltd. in 1928. In December 1928, a lease of a water site was granted by the appellant to The Algoma District Power Co. with the incidental right to flood certain areas. This lease must have been subject to the prior cutting rights granted to Lake Superior Paper Co. over part of the same lands. The Power Company decided to raise its dams and to flood additional acreage. In January 1955, the appellant obtained from Abitibi Power & Paper Co. a release of its interest in the areas to be flooded and in the timber in such areas, subject to certain conditions. It was then arranged between the appellant and Great Lakes Power Co. that all merchantable timber possible of salvage within economic limits would be salvaged and utilized and offered to Abitibi Power & Paper Co. and that Great Lakes Power Co. would pay the same stumpage as was payable under the cutting agreement held by Abitibi Power & Paper Co.

Neither the amounts involved in the re-assessments, which were taken from statements prepared by the appellant at the request of the respondent, nor the agreements forming part of the record are in dispute, except as to the inferences to be drawn from the evidence. To arrive at correct and legal conclusions, many tests are, of necessity, to be applied to the facts, assumed or established.

Certain general principles have to be kept in mind when determining whether the amounts assessed are income or capital gains. Income tax is a tax imposed on the person measured by his income from all sources. The fact that income is not defined by the Statute leaves the determination of the income of the taxpayer according to the facts of each case under the general law as provided in the different Parts of the Act. But, as stated in *The Saskatchewan Co-operative Wheat Producers, Ltd.* and *The Minister of National Revenue*[1].

Capital must not be confused with income which is equivalent to the expression of "balance of gains and profits".

[1] [1928-34] C.T.C. 41, 46.

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Lord Macmillan, in *Minister of National Revenue* and *Spooner*[1], said (p. 186, *in fine*):

> . . . It is necessary in each case to examine the circumstances and see what the sum really is, bearing in mind the presumption that "it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it" . . .

As neither "income" nor "capital gain" are defined, the line of separation between the two is difficult to determine. In this respect, Lord Justice Clerk, in *Californian Copper Syndicate v. Harris*[2], at page 166, said:

> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The finding may be that an investment has been sold or a trade has been carried on. When in doubt, means have to be taken to establish what the intention of the taxpayer was and also the latter's whole course of conduct when dealing with the items in question. The intention is determined according to the facts. As to the taxpayer's whole course of conduct, the President of this Court, in the case of *Cragg* and *Minister of National Revenue*[3], at page 45 (*in fine*), says:

> There is, I think, no doubt that each of the profits made by the appellant could, by itself, have been properly considered a capital gain and the Court must be careful before it decides that a series of profits, each one of which would by itself have been a capital gain, has become profit or gain from a business. Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances. . . .

It is important at the outset to see how the Province of Ontario was induced to grant lands and the rights inherent therein to the appellant and the object of the grant. These facts are indicated in the preamble of the Statute (S.O. 1900, 63 Vict., c. 30). I quote:

> . . . and whereas The Lake Superior Power Company has constructed a large hydraulic power canal at the Town of Sault Ste. Marie, in the Province of Ontario, and power houses, plant and works supplying power

[1] [1928-34] C.T.C. 184. [2] [1903-11] 5 T.C. 159.
[3] [1952] Ex. C.R. 40 at 45; 5 D.T.C. 34; [1951] C.T.C. 322.

to operate the industries now located upon it, and The Sault Ste. Marie Pulp and Paper Company has constructed and now operates large industries at the Town of Sault Ste. Marie, Ontario, whereby the natural resources of the region are being utilized in its manufacturing processes, and the said two last mentioned companies have, as an inducement to the granting of the said lands to the railway company, severally offered, in consideration of such grant being made, to construct, equip and operate large and important additional works and industries in the Province of Ontario, to make use of such raw materials, and manufacture the same, and thus promote immigration to the Province by furnishing employment to labour therein, contribute to the development of its resources and add to the public wealth thereof; . . .

It is evident that the Province was induced to part with the lands for the consideration that two large companies agreed to undertake works and developments which in the last analysis would be in the interest of both companies and the Province. The business operations of the companies would be increased by the new undertakings. The influx of new inhabitants, the use of raw material and manufacture of such would contribute to the development of its resources and add to the public wealth of the Province.

As to the appellant railway company, it had applied to the Government for land grants of a specified number of acres of the Crown lands for each mile of its railway, constructed or to be constructed. The main reason given for the granting of the request is indicated in the following words of the preamble (O.S. 1900, c. 3):

. . . and whereas, such railway will run through a country not hitherto accessible for the purpose of habitation, and its construction is rendered difficult and costly by reason of the nature of the territory to be traversed by it; and whereas, owing to the undeveloped character of the country through which it will pass, the traffic of the railway for some years to come will be limited to carrying timber and mineral ores and will not be of sufficient value to produce a revenue on the capital invested therein;

The above indicates two difficulties facing the Company in its undertaking. Firstly, the construction of its railway line would be a costly enterprise by reason of the nature of the territory to be traversed; secondly, the revenue from the traffic, limited to timber and mineral ores, would be, for some years, insufficient to meet the obligations incurred by the financing of the project. The grants of Crown lands could help pay the construction costs with the proceeds of the sale or sales of the land, if disposed of or used as collateral security for loans, bonds, etc. The receipts from the renting, leasing or granting of the rights attached

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thereto could be used to supplement the revenue from traffic as to meet its financing obligations or paying part of its operating expenses.

During the period under review, no proceeds from the sale of land was considered as income or added to the appellant's income, but agreements were entered into with regard to mining claims, prospecting privileges and timber cutting rights. I have examined *supra* how the appellant dealt with these items and the amounts received therefrom.

Though the appellant strongly urged that Land Grant lands were capital assets just as much as cash subsidies, it should be kept in mind that, even if the lands when received were of a capital nature, this character could be changed by the manner in which they were dealt with and used. The proceeds arising therefrom could then be considered as capital gain or income. If the lands had been disposed of as an investment and had thereby realized a profit, it may be considered as capital gain, having regard to all the circumstances of the disposal. On the other hand, if the profit was obtained not by a realization or change of investment but by agreements or transactions having the characteristics of a trade, business or of an adventure in the nature of trade, the profit would be income.

In considering the facts of this case, I will recall that the appellant has submitted that the only way the lands could be converted into cash would be by dealing with them in the way it did. Since it seems generally admitted that it is only from the realization of an investment that a true capital gain can be obtained, it follows that the less an investment is likely to produce a revenue the more difficult it is to establish that it is a capital asset of the nature of an investment. Raw land, mining land, unproven oil acreages-timber limits which cannot be made productive of a yield, except by converting them in some fashion, are not ordinarily acquired as investments. Where the lands herein involved were situated in an undeveloped and rugged country, I am convinced that they could not produce a yield save by converting them in some way. So the appellant made the transactions relating to the mining claims, prospecting privileges, timber cutting rights, trapping rights, etc.

It is in the case of *The Commissioners of Inland Revenue v. Livingston*[1] that the Lord President (Clyde) said at page 542 (*in fine*):

> . . . I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade", is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade", merely because it was a single venture which took only three months to complete. . . .

With far more reason would these remarks be applicable to repeated dealings, as in the present instance, where the amounts received arose from many agreements and transactions. The amounts received from mining claims came from thirty-five different sources; prospecting fees, from six; timber dues, from eleven. The appellant admitted that all the receipts from mining land leases, during the period under review, were the amounts paid by way of annual rental and not royalties paid for ore extracted. Payments for prospecting rights were made for the exclusive exercise of specific rights on designated areas for limited periods. No payment was provided for the removal of minerals. If they are to be considered as payments for option rights, in *Western Leaseholds Ltd. v. Minister of National Revenue*[2] Locke J. said that monies received for granting options on potential oil lands were profits realized from the business of dealing in mineral rights just as royalties reserved were.

As to the amounts received for timber cutting rights, the appellant in its notice of appeal says that "it now disposes of its timber as such, being paid for same on the basis of the amounts cut." It has on numerous occasions been decided that repetitive receipts over many years pursuant to well-defined, established and organized practices for dealing with timber cutting rights were income from a business.

As to the monies paid by Great Lakes Power Co. to the appellant, the Railway Company, on May 28, 1956, wrote to the Power Company a letter reading in part as follows:

> With reference to the clearing by you of the land in that part of your Montreal River Storage basin lying within the limits of Township 24, Range XVI preparatory to raising the water level. . . ." (Then it establishes

[1] 11 T.C. 538. [2] [1960] S.C.R. 10, 23.

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the stumpage dues that shall be paid to the Railway Company for the cutting of the merchantable species to which the appellant would be entitled at certain unit prices).

And the letter continues:

The said dues except pine, are the same as Crown dues presently assessed for the same purpose, namely, on timber cut during land clearing operations from Crown lands and shall be increased from time to time as said Crown dues are increased, and by the same amount. . . .

This letter would indicate that the raising of the water level would be on the Montreal River Storage basin (Great Lakes Power Company). So the only interest the appellant had on that land was the timber cutting rights. It agreed to receive for its cutting right the same dues as the Government. It would be interesting to know exactly how the State considered these receipts for their timber—was it capital or revenue?—, for in all its dealings with the mining lands and the timber rights the appellant appears to have adhered to the procedure generally followed by the State and the individuals making a business of dealing in such matters.

The parties referred the Court to many decisions wherein it is held that each case should be decided on its own facts. I will not deal with many of the decisions quoted, but seeing that the appellant relied heavily on *The Hudson's Bay Co. Ltd. v. Stevens*[1] I believe I should say a few words about that case.

Here was a company dating back to the time of King Charles II, which had territorial and governmental rights in a vast tract of land in North America. It surrendered those rights in exchange for grants of land in respect of which they occupied the position of a mere landowner. They realized those lands, and that raised the question. The view taken there was that these lands in the possession of the Company, being got in exchange for their original rights, were exactly the same as the inherited lands of a private landowner, and that is the basis upon which that company started. The question was whether, looking at it in that way, they had merely developed and sold their lands as a landowner might whose lands had come down from his ancestors, or whether they had taken those lands into their trade, so to speak, and traded in them. This is a

[1] [1903-11] 5 T.C. 424.

résumé of the basic facts of the case by Rowlatt J. in *Alabama Coal, Iron, Land and Colonization Co. Ltd. v. Mylam (H.M. Inspector of Taxes)*[1], leading up to the following remarks made by Lord Justice Farwell in the *Hudson Bay* case (*supra*) at p. 437:

> . . . a man who sells his land, or pictures, or jewels, is not chargeable with income tax on the purchase-money or on the difference between the amount that he gave and the amount that he received for them. But if instead of dealing with his property as owner he embarks on a trade in which he uses that property for the purposes of his trade, then he becomes liable to pay, not on the excess of sale prices over purchase prices, but on the annual profits or gains arising from such trade, in ascertaining which those prices will no doubt come into consideration.

Thus, according to these remarks, even a landowner may be liable for trading in land.

Rowlatt J. concludes by saying, "Therefore, even a person in the position of a landowner can use his existing lands, to put it shortly, as an article of trade, if that is the true view of what he has done with them."

I am unable to find any similarity between what was done with the lands granted to the Hudson Bay Co. and what was done in the present instance. In the *Hudson Bay* case there was the transfer of lands as such. Here we have a company which received Crown lands with rights attached thereto. It did not and admits that it could not sell the lands. It only disposed of certain rights. The only way it could receive some cash value was to deal with mining and timber cutting rights. As a result of covenants, agreements and transactions, it received annual benefits, which were not the difference between, say, the sale prices over purchase prices, but profits or gains arising from their leasing the rights of prospecting or mining or the sale of timber cutting rights, all in the same manner as an ordinary trader in such items. It had an organization to deal with the above rights, which carried on its activities as a business operation and which produced revenues. The monies which were received for mining rentals and prospecting privileges were only for the use of a capital asset for a limited period. Even for the timber dues there was no outright sale of the land. The agreements simply give the contracting parties the right to enter upon and cut the timber on a certain area for a specified period of time.

[1] [1926-7] 11 T.C. 232, 253.

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THE ALGOMA CENTRAL & HUDSON BAY RY. CO. v. MINISTER OF NATIONAL REVENUE

Fournier J.

After perusing the evidence adduced and the submission of the appellant, I have found that the appellant had failed to discharge the burden of proof which rested upon it to demolish the facts admitted, established or assumed by the respondent and which served as the basis for the re-assessments.

Though the Railway Company was primarily a freight carrier, after receiving the Crown lands, wishing to dispose of same, it realized that this could not be done, so it embarked on a series of operations of a business nature. It leased lands to contractors for prospecting purposes and, when the activities of the prospectors were successful, it gave permits for mining claims. Every covenant, agreement, was for a consideration which was a unit price per acre on a designated area and for a specified period. These transactions gave rise to monthly or annual revenues. It also granted timber cutting rights for dues on a stumpage basis. The same applied to the timber cut on the land cleared for flooding purposes. The land reverted to appellant after it had become useless for the purposes for which the rights had been granted to the contractors.

So, I find that the amounts added by the respondent in the re-assessments of the appellant's income for the years 1953, 1954, 1955 and 1956 were made in accordance with the facts of the case and the provisions of the *Income Tax Act*.

Therefore, the appeal is dismissed with costs.

Judgment accordingly.