OAKFIELD DEVELOPMENTS (Toronto) LIMITED ..... APPELLANT;

AND

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

Toronto 1968 Nov. 4-5

Ottawa 1969 Mar. 13

Income tax—Associated companies—Control—Ontario Corporations Act, R.S.O. 1960, c. 71—Supplementary letters patent authorizing new shares—Ante-dating of supplementary letters patent—Whether allotment valid—Income Tax Act, s. 39.

Appellant and each of a number of other companies, all incorporated by letters patent under the laws of Ontario, had outstanding 5,000 common shares held by the same persons and would in consequence be associated companies under s. 39 of the *Income Tax Act* following an amendment in 1960. In order to avoid the tax consequences of that relationship by divesting the common shareholders of control, each of the companies on December 20, 1960, applied for supplementary letters patent authorizing *inter alia* the issue of 5,000 voting preference shares. The supplementary letters patent (under the seal of the Provincial Secretary) although not issued until February 1961 were dated December 20, 1960. On December 21, 1960, each company's directors allotted 5,000 voting preference shares to two strangers.

Held, on appeal from an income tax assessment of appellant, inasmuch as the supplementary letters patent did not issue until February 1961 appellant had no unissued preference shares on December 21, 1960, and there could therefore be no valid contract on that date for the allotment of preference shares: hence the company remained under the control of the common shareholders. Neither the validity of the supplementary letters patent nor the status of the company was an issue in these proceedings and the respondent was thus not precluded from establishing that the supplementary letters patent bore a date antecedent to their actual issuance.

Pellatt's case (1876) L.R. 2 Ch. App. 527, applied. *Letain v. Conwest Exploration Co.* [1961] S.C.R. 98, discussed.

INCOME tax appeal.

Wolfe D. Goodman for appellant.

Douglas K. Laidlaw, Q.C. and *Colin L. Campbell* for respondent.

CATTANACH J.:—This is an appeal from the assessments to income tax dated September 15, 1965, for the 1963 taxation years ending March 31, 1963, and August 27, 1963,

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of Polestar Developments Limited, a predecessor corporation of Oakfield Developments (Toronto) Limited the appellant named in the style of cause herein.

The appellant is a private company created, pursuant to the laws of the Province of Ontario by letters patent of amalgamation dated October 8, 1964.

Polestar Developments Limited (hereinafter called "Polestar") was a private company incorporated pursuant to the laws of the Province of Ontario by letters patent dated March 22, 1960.

By letters patent of amalgamation dated August 27, 1963, Polestar amalgamated with Oakview Developments Limited to form Polestar Developments (1963) Limited.

By letters patent of amalgamation dated November 12. 1963, Polestar Developments (1963) Limited amalgamated with Dorset Land Developments Limited to form Polestar Developments (Ontario) Limited.

By letters patent of amalgamation dated October 8, 1964, Polestar Developments (Ontario) Limited amalgamated with eleven other private Ontario companies to form Oakfield Developments (Toronto) Limited, the appellant herein.

At all material times, Polestar was a member of a partnership carrying on business under the firm name and style of Overbrook Holdings which partnership was engaged in the business of land development.

The taxation year of Polestar ended March 31 in each and every year. As a result of the amalgamation of Polestar with Oakview Developments Limited to form Polestar Developments (1963) Limited the taxation year of Polestar commencing April 1, 1963, was ended on August 27, 1963.

The Minister, in assessing the appellant in respect of the tax payable by Polestar for its two fiscal periods ending March 31, 1963, and August 27, 1963, did so on the basis that Polestar was a company which was associated with each and all of forty-two other companies, the names of which were set out in paragraph 3 of the reply to the notice of appeal, and which are referred to as the Okun group, on October 8, 1964. By reason of the amalgamation, the forty-two companies were reduced to thirty-two in number.

During the whole of the taxation years of Polestar now under review there were 5,000 issued and outstanding common shares each carrying one vote per share held as follows:

1/3 by Ardwell Holdings Limited	1,667
1/3 by Bradford Investments Limited	1,666
1/9 by Doric Development Limited	556
1/9 by Loring Developments Limited	556
1/9 by Adair Developments Limited	555
Total	5,000

At the same time the shares in other companies in the Okun group were held in the same manner except that in some instances Loring Developments Limited and El Ciudad Limited were interchanged. These companies are referred to in paragraph 4(a) of the reply to the notice of appeal as the "inside group" who were, in fact, the same group namely, the estate of Benjamin S. Okun, Bernard M. Okun, Meyer Okun, Stanley Leibel, Sidney Freedman Family Trust, Morris Freedman and his wife Dorothy, Harry Freedman and his wife Lillian and Sidney Freedman.

If these were the only facts applicable there is no question, nor is there any dispute between the parties that the appellant would be associated with the Okun group of companies within the meaning of section 39(4) of the *Income Tax Act*[1].

[1] Sec. 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,

(a) one of the corporations controlled the other,

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

(c) each of the corporations was controlled by one person and the person who controlled one of the corporations was related to the person who controlled the other, and one of these persons owned directly or indirectly one or more shares of the capital stock of each of the corporations,

(d) one of the corporations was controlled by one person and that person was related to each member of a group of persons that controlled the other corporation, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations, or

(e) each of the corporations was controlled by a related group and each of the members of one of the related groups was related to all of the members of the other related group, and one of the members of one of the related groups owned directly or indirectly one or more shares of the capital stock of each of the corporations.

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However, in the budget speech of the Minister of Finance on March 31, 1960, he referred to his previous comment on the problem of associated companies. He said that it was becoming too easy to divide a corporation into a number of smaller components so that each may qualify for a low rate of tax on its first $25,000 of income earned. Accordingly it was proposed to introduce legislation applicable to the 1961 and subsequent taxation years for the purpose of providing that only one of a group of associated companies should receive the benefit of the lower rate of tax on the first $25,000 of taxable income. This was to be done by the then applicable rule for determining whether one corporation is associated with another, based on the ownership of a specified percentage of shares being replaced by a rule related to control of the corporations.

This proposed legislation was in fact enacted by chapter 43, Statutes of Canada, 1960, section 11(1) of which amended section 39(4) to read as it presently does.

This proposed legislation, the enactment of which appeared to be a certainty, was brought to the attention of Meyer Okun by his chartered accountant. There is no question that the impact of the proposed legislation on the Okun group of companies was discussed as well as the means to avoid its operation. Legal opinion was obtained by the chartered accountant as to the safety of a plan to do this which plan I expect was inspired by the chartered accountant who was seeking legal opinion in confirmation on behalf of his client or clients.

In any event all thirty-two companies, including Polestar, applied for and obtained from the Provincial Secretary for the Province of Ontario, supplementary letters patent in identical form to those obtained by Polestar which are dated December 20, 1960. In each case a number of voting preference shares equal to the number of authorized, issued and outstanding common shares then in existence in each of the companies was created by the supplementary letters patent. It was also provided that an application for the surrender of the charter would be based on the consent of the shareholders holding at least 50% of the shares carrying voting rights. This policy was obviously designed to permit of the winding up of the companies in the event of a deadlock between the common and preference shareholders.

In the case of each of the thirty-two companies the number of directors was increased from three to four. In each case one of the existing directors retired and steps were taken to elect two of the persons who became preference shareholders to the board of directors of each company.

All these corporate actions took place at meetings of the board of directors of each company held on December 21, 1960, the day after the date borne by all supplementary letters patent. The minutes of the meetings of each company are precisely similar in their terms. As intimated the meeting of the directors of each company were held on the same day beginning at 9:00 a.m. for the first company and those of the other companies at five minute intervals until 10:40 a.m. when the interval was twenty minutes followed by two thirty minute intervals, thus bringing the time to 12:30 p.m. The meetings resumed at 2:00 p.m. and continued at fifteen minute intervals until the final meeting at 3:00 p.m., although I noticed that on two occasions two companies held meetings simultaneously, one of those companies being Polestar.

It had been agreed by the common shareholders and the directors of each of the thirty-two companies that preference shares in each of the companies were to be created with voting rights equivalent to the number of votes exercisable by the common shareholders to avoid the undesirable consequences as the companies would otherwise be associated companies within the meaning of the *Income Tax Act*.

In almost every instance the persons acquiring preference shares received a personal guarantee from Meyer Okun saving the holder harmless from any loss by reason of the sale of the shares or on the winding up of the company to the full amount subscribed by them for the shares. In the case of Polestar, Meyer Okun also guaranteed the 10% cumulative dividend payable on the preference shares.

As a consequence of the foregoing circumstances the appellant alleges in paragraph 4 of its notice of appeal, that during the relevant taxation years 5,000 common shares carrying 5,000 votes were held as I have indicated above and at the same time Lionel H. Schipper held 4,999 preference shares and his wife, Carol, held one preference share mak-

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ing 5,000 votes, the equal to those vesting in the holders of the common shares. Mr. and Mrs. Schipper were strangers in the tax sense to the holders of the common shares.

On this basis the appellant alleges in paragraph 5 of its notice of appeal that at no time during the taxation years under review were the common shareholders of Polestar in control of Polestar because Lionel H. Schipper and Carol Schipper owned shares in Polestar representing the aggregate 50% of the outstanding votes eligible to be cast at any meeting of shareholders.

From this proposition it would follow that at no time during the pertinent taxation years was Polestar associated with any other corporation within the meaning of section 39(4)(*b*) which the appellant contends to be the case here.

This appeal, on the matter in issue between the parties which I have to decide, will fail or succeed upon the determination of the question, is the control of Polestar vested in the common shareholders? This appeal was argued upon the assumption that the group which held the common shares in Polestar was the group which controlled the other thirty-one companies. Whether or not Polestar is an "associated company" depends on the determination of the question as to control of it being vested in the common shareholders.

The word "controlled" as used in the above subsection has been held by the President of this Court in *Buckerfield's Limited, et al v. M.N.R.*[2] to mean the right of control that rests in the ownership of such a number of shares as carries with it the right to a majority of the votes, i.e. *de jure* control and not *de facto* control. This interpretation by the President was adopted with approval by the Supreme Court of Canada in *M.N.R. v. Dworkin Furs (Pembroke) Ltd., et al.*[3]

The Minister's contention is that control is vested in the common shareholders and counsel for the Minister's attack upon the argument on behalf of the appellant is two-fold:

(1) The inside group (as described above) have a right under a contract, in equity or otherwise with the holders of the preference shareholders of Polestar to control the voting rights of the preference shares and therefore by virtue of section 39(4a)(*c*) and

[2] [1965] 1 Ex. C.R. 299.

[3] [1966] Ex. C.R. 228; [1967] S.C.R. 223.

section 139(5d)(*b*)[4] were deemed to have had the same position in relation to the control of Polestar as if they owned the preference shares.

(2) No preference shares were ever validly issued in Polestar and the purported allotment of those shares was invalid, void and of no force or effect in law in that at the date of the purported allotment, i.e. December 21, 1960, the supplementary letters patent to Polestar although dated December 20, 1960, had not been issued.

The facts upon which counsel bases his second contention are that the receipt of the application for supplementary letters patent on behalf of Polestar was acknowledged by the Deputy Provincial Secretary by letter dated December 29, 1960, in which it was intimated that the material was in order but that a clearance was being awaited from the Corporations Tax Branch of the Treasury Department with respect to the payment of all corporation tax. The acknowledging letter does not indicate the date upon which the application was received by the Department, but I assume it to have been December 20, 1960, because the receipt for the fee, which normally accompanies the application is dated December 20, 1960, and the supplementary letters patent when issued bore that date. By letter dated February 9, 1961, the Deputy Provincial Secretary advised the solicitor for the applicant, Polestar, that the necessary clearance had been received and that the supplementary letters patent had been given a tentative engrossing date of December 20, 1960, subject to further consideration by the Department before they would be issued. The tenor of the letter leads me to the conclusion that even as at February 9, 1961, a firm date had not been given for the supplementary letters patent. It was hedged with quali-

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[4] Sec. 39(4a) For the purpose of this section,

. . .

(*c*) subsection (5d) of section 139 is applicable *Mutatis mutandis*,

Sec. 139(5d) For the purpose of subsection (5a)

. . .

(*b*) a person who had a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, shares in a corporation, or to control the voting rights of shares in a corporation, shall, except where the contract provided that the right is not exercisable until the death of an individual designated therein, be deemed to have had the same position in relation to the control of the corporation as if he owned the shares; and

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fications. However by letter dated February 15, 1961, the supplementary letters patent were transmitted to the solicitor for Polestar.

Meanwhile, on what I assume to have been a verbal assurance that the supplementary letters patent would issue under date of December 20, 1960, a meeting of the directors of Polestar was held at 10:30 a.m. on December 21, 1960, at which were present Stanley Leibel, Meyer H. Okun and Morris Freedman. The chairman announced that the supplementary letters patent varying the authorized capital had been received. He also announced that subscriptions for shares had been received from Lionel H. Schipper and Carol Schipper for 4,999 preference shares and 1 preference share respectively which upon motion made were allotted. Share certificates were directed to be prepared. The number of directors was then increased from three to four. Lionel H. Schipper and Carol Schipper were appointed directors and Morris Freedman resigned. The minutes state that Morris Freedman then retired from the meeting and that Lionel H. Schipper and Carol Schipper took their places at the meeting.

The minutes were signed by Stanley Leibel, Meyer Okun, Lionel H. Schipper and Carol Schipper and by Leibel and Okun as president and secretary respectively. The minutes were consented to by all shareholders who appended their signatures thereto.

As intimated before Lionel Schipper was a stranger in the tax sense to the common shareholders of Polestar although he had met Meyer Okun. He is a barrister and solicitor of some 10 years standing practising his profession in Toronto, Ontario. Meyer Okun had approached Mr. Schipper's father with the proposal that he should buy 5,000 preference shares of Polestar for $5,000 which would bear dividends at 10% and that he, Meyer Okun, would personally guarantee the payment of that dividend and save him harmless from any possible loss thereon.

Mr. Schipper, Sr., nominated his son to buy the shares on his behalf with funds he provided and engaged his son to take the steps to acquire the shares and safeguard his interests.

Accordingly by a document (Exhibit A2) dated December 19, 1960, addressed to Polestar, Lionel Schipper subscribed for 5,000 preference shares.

By letter also dated December 19, 1960, Meyer Okun wrote to Mr. Schipper referring to previous arrangements as discussed between them and enclosed two application forms for preference shares. Mr. Okun advised that the shares had been allotted, certificate No. 1 to Lionel H. Schipper for 4,999 preference shares and certificate No. 2 to Carol Schipper for 1 preference share. Mr. Okun's personal guarantee was also enclosed.

By letter dated December 22, 1960, Mr. Okun assured Mr. Schipper that his personal guarantee, in addition to indemnifying him from loss by reason of sale of the shares or winding up of Polestar, also included a personal guarantee of the payment of dividends. It was also agreed between them that Mr. Schipper should be guaranteed the repayment of $5,000 paid for the preference shares on thirty day's notice.

Mr. Schipper was fully cognizant of the purpose sought to be achieved by the issuance of the preference shares carrying voting rights precisely equivalent to the voting rights vested in the issued common shares. He knew that purpose to be that the companies would not be associated within the meaning of the *Income Tax Act*.

By letter dated December 22, 1960, Mr. Schipper acknowledged Mr. Okun's letter of December 19, 1960, and enclosed his subscription for 5,000 preference shares and his cheque for $5,000.

Thereafter the dividends on the preference shares were regularly paid by Polestar.

At no time did Mr. Schipper or his wife attend any directors' or shareholders' meetings of Polestar, nor did either of them at any time exercise the voting rights in the preference shares held by them. Minutes of directors' and shareholders' meetings were sent to them for their signature.

Mr. Schipper testified that he had no real interest in the management or the affairs of Polestar. His sole concern was in the receipt of dividends at 10% regularly and that in this respect he had placed his reliance on Mr. Okun's personal guarantee.

He did testify however that there was no discussion or arrangement between him and Meyer Okun or any other shareholder of Polestar that he would refrain from voting the preference shares held by him or that he would vote

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them as directed by the holders of the common shares. He testified that he was at liberty to attend corporate meetings either as director or shareholder and to vote his shares as he pleased, but he did not find it expedient to do so because his sole interest in receiving dividend payments was complied with. He added that no such arrangement was made with his wife by the common shareholders of Polestar. Mrs. Schipper was not called as a witness to testify that she was under no agreement to refrain from voting or to vote as directed by the common shareholders, nor was Mr. Schipper's father who was obviously the beneficial owner of the preference shares. Mr. Okun was not called to deny the existence of such an arrangement. If it should become incumbent upon me to do so I would be inclined to accept Mr. Schipper's testimony in this respect because he was the sole negotiator on his father's behalf and also on behalf of his wife.

In argument counsel for the Minister advanced five points which are set out as I understood them:

(1) The appellant has failed to demolish the assumption of the Minister outlined in paragraph 4(b) of his notice of reply to the effect that the holders of the common shares had a right under a contract, in equity or otherwise to control the voting rights vested in the preference shares in Polestar which voting rights represented 50% of the total voting rights and accordingly by virtue of section 39(4a)(*c*) and section 139(5d)(*b*) of the *Income Tax Act* the common shareholders are deemed to be in the same position with respect to the control of Polestar as if they owned the preference shares

(2) On the basis of the evidence adduced I should infer that such a right as outlined immediately above subsisted in the holders of the common shares.

(3) The proper inference to be drawn from all the circumstances was that the true relationship between Lionel Schipper and Polestar was that of creditor and debtor and that the true substance of the transaction between them was that Lionel Schipper simply loaned the money to Polestar.

(4) The preference shares were not validly allotted to Lionel and Carol Schipper at the meeting of the directors of December 21, 1960, and accordingly they never became preference shareholders.

(5) Polestar was not in possession of preference shares at December 21, 1960, the date of the meeting of the directors, because at that date the supplementary letters patent creating the preference shares had not been issued and accordingly no allotment ever took place.

There is no question whatsoever that the supplementary letters patent when issued bore date of December 20, 1960.

Neither is there any doubt that the supplementary letters patent were not signed, sealed and delivered until a date approximate to February 15, 1961.

In reply to the foregoing arguments advanced on behalf of the Minister, counsel for the appellant submitted that,

(1) the Minister had no status to attack the issue of the preference shares;

(2) in any event the Schippers were shareholders because they acted as shareholders and held themselves out as such;

(3) the issue of the preference shares was ratified by Polestar at its first annual meeting held on October 2, 1961, when the supplementary letters patent creating the preference shares had been delivered to Polestar and prior to the 1963 taxation years of the appellant, the minutes of that meeting containing a statement in general terms that all previous acts of the directors were ratified and approved; and

(4) the supplementary letters patent take effect from their date.

If, as argued by the Minister, the supplementary letters patent did not issue until well after the date thereof and if the date borne by the supplementary letters patent is not conclusive as against the Minister, it follows that, as at December 21, 1960, the date of the meeting of the directors at which preference shares were purportedly allotted to the Schippers, Polestar was not possessed of preference shares and any purported allotment of preference shares is void. If the original act was void no subsequent acts either by Polestar, or by the Schippers can rectify that invalidity. The authorized share capital of Polestar was fixed by its letters patent and consisted only of common shares. The only way that the authorized capital so set out in the original letters patent can be increased or varied is by supplementary letters patent (see section 33, *Ontario Corporations Act*).

The method by which an agreement to take shares is constituted is (1) by an application for shares to the company which may be verbal or in writing, (2) the allotment of the shares applied for and (3) notice to the applicant of the allotment. Allotment is a necessary element in the contract to take shares and is the formal act of appropriation of a certain number of unissued shares, pursuant to an application therefor, to the applicant (see Lord Cairns in *Pellatt's* case[5]). Therefore, if it is open to the Minister to prove that the actual issue of the supplementary letters patent was not

[5] (1876) L R 2 Ch. App. 527 at p. 535.

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December 20, 1960, the date they bore, but rather February 15, 1961 well subsequent to the date of the meeting of the directors on December 21, 1960, then the contract between the Schippers and Polestar to take preference shares failed because the subject matter did not exist.

As against this counsel for the appellant submitted that the supplementary letters patent take effect from their date and that a prerogative act under the great seal (of Ontario) cannot be contradicted.

By section 3 of the *Ontario Corporations Act* the Lieutenant Governor may in his discretion by letters patent issue a charter creating a corporation for any of the objects to which the authority of the Legislature extends and by section 5 the Provincial Secretary may in his discretion and under his seal of office exercise the rights conferred by the statute on the Lieutenant Governor but not those conferred upon the Lieutenant Governor-in-Council.

The effect of the foregoing sections seems to me to be that the Provincial Secretary is authorized to bring into being a company resembling one created by royal charter but subject to the restrictions which are imposed on its proceedings by the statute to which it owes its origin.

Lord Dunedin said in *Attorney-General v. De Keyser's Royal Hotel*[6]:

> . . . if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. . . .

Furthermore, the letters patent and the supplementary letters patent issued to Polestar were not issued under the great seal of Ontario but as provided in the statute by the Provincial Secretary under the seal of his office.

It seems to me, therefore, that the authority of the Provincial Secretary is limited by the restrictions imposed upon him by the Act and that the Crown has curtailed, to the extent of the restrictions so imposed, the royal prerogative delegated to the Lieutenant Governor and subdelegated to the Provincial Secretary.

Accordingly it follows that those cases upon which counsel for the appellant relied, which dealt with documents issued under the great seal, have no application to the circumstances of the present appeal.

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[6] [1920] A.C. 508 at 526.

The foregoing point does not appear to have been raised before the Supreme Court of Canada in *Letain v. Conwest Exploration Co.*[7].

In that case the respondent had entered into an option agreement with the defendant under which, if the defendant caused a company to be incorporated on or before October 1, 1958, certain mining claims owned by the respondent were to be transferred to the company so incorporated.

An application for letters patent was made to the Secretary of State before that date and the applicants were advised that letters patent would be prepared on the basis of their bearing date of September 25, 1958. A series of circumstances then occurred whereby certain changes in the corporate name were requested and withdrawn with the result that the letters patent were not signed, sealed, recorded and delivered until October 20, 1958, but when issued they bore the date of September 25, 1958, on the basis of the commitment previously given to the applicants therefor.

Action was brought and the basis of the action as developed in the pleadings was that the actual letters patent were signed, sealed and issued after October 1, 1958, the relevant date mentioned in the agreement between the parties to the litigation.

The matter was first heard by Collins J. before whom a point of law was raised, which was that under section 133 of the *Dominion Companies Act*, except in a proceeding for the purpose of rescinding or annulling the letters patent, the letters patent shall be conclusive proof of every matter and thing therein set forth which, of course, included the date of September 25, 1958.

The sections of the *Dominion Companies Act*[8] before the courts were section 11 and 133 reading as follows:

> 11. The company shall be deemed to be existing from the date of the letters patent.
>
> 133. Except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent or supplementary letters patent issued under this Part, such letters patent or supplementary letters patent, or any exemplification or copy thereof certified by the Registrar General of Canada, shall be conclusive proof of every matter and thing therein set forth.

[7] [1961] S.C.R. 98.

[8] R.S.C. 1952, c. 53.

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Mr. Justice Collins, on the point of law raised before him, took the view that as the terms of the option agreement contemplated the incorporation on or before October 1, 1958, the question before him must be determined on the basis that at the time when the option was granted both parties should be taken to have been aware of the provisions of section 133 of the *Dominion Companies Act* and that section should be applied in determining the rights of the parties arising out of the option. He therefore granted an order dismissing the action.

The matter was then appealed to the Court of Appeal of British Columbia. Sheppard J. said that the substance of section 133 dealt primarily not with evidence but those rights which are to flow from the charter and which are sometimes called the status of the company. It was held that section 133 precluded the respondent in that action from controverting the date of incorporation appearing in the letters patent.

The matter was then appealed to the Supreme Court of Canada.

Kerwin C.J. (whose judgment was concurred in by Taschereau, Fauteux and Judson JJ.) after referring to sections 11, 132 and 133 of the *Dominion Companies Act* said at page 102: (*supra*)

> The above provisions when read together are concerned with the status and capacity of a company incorporated under the Act and while in response to a notice that a constitutional point might be involved the Attorney General of Canada and the Attorney-General of Quebec intervened and were represented by counsel, my conclusion is that we are not concerned with any question as to the right of Parliament to provide for what shall be evidence in a civil case in a provincial court Kutcho Creek Asbestos Company Limited is not a party to this action; it continues to exist and not one of its powers is affected. The rights of the appellant and respondent are to be determined by the meaning to be ascribed to clause 7 of the original agreement between them and the appellant is not precluded by the mere production of the letters patent from showing at the trial that Conwest did not exercise the option in accordance with its terms.

He therefore answered in the negative the point of law raised before Collins J. that the letters patent are conclusive proof of the fact that the company was incorporated on the date specified in the letters patent.

The judgment of Locke, Cartwright, Abbott, Martland and Ritchie JJ. was delivered by Ritchie J. who said at page 105: (*supra*)

It is true that by conclusively fixing the status and powers of a Dominion company as being those set forth in the letters patent, except in a proceeding brought for the purpose of rescinding or annulling such letters patent, s 133 may have an effect on the rules of evidence in provincial Courts in cases where the status of a Dominion company is in issue but this is not legislation "in relation to" civil rights, it is rather legislation having an incidental and consequential effect upon civil rights, and as such it is within the power and authority of the Parliament of Canada (see *Gold Seal Limited v. Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424 at 460. By its very nature, however, such effect is limited to matters which are incidental to the true character and subject-matter of the Dominion *Companies Act* and in a civil action in which the status and powers of a Dominion company are not involved it cannot be extended beyond the scope and purpose of that statute so as to preclude a party in a provincial Court from adducing evidence to establish that in fact the letters patent bear an earlier date than that upon which they were actually signed and sealed.

Kutcho Creek Asbestos Company Limited is a company incorporated under the authority of the Dominion *Companies Act*, endowed with the characteristics enumerated in that statute and in its letters patent granted pursuant thereto, one of which is that its date of incorporation is to be conclusively taken for all purposes of its corporate dealings and activities as being the 25th of September, 1958. The date of incorporation is one of the badges of a company's status and identity, it is an integral part of its corporate personality which flows from its charter as do the other ingredients of its status, the determination of which is, as has been said, a matter within the exclusive jurisdiction of Parliament. With the greatest respect, however, it seems to me that it is not the status of Kutcho Creek Asbestos Company Limited but the actions of the respondent Conwest Exploration Company Limited which are at issue in this case, and I am unable to see how conclusive proof of the fact that the former company has acquired status with effect from September 25th for the purposes of the Dominion *Companies Act* can preclude the appellant from proving whether or not the latter company exercised its option on or before the 1st of October.

The only method of creating a body corporate under Part I of the Dominion *Companies Act* is for the Secretary of State to grant a charter by letters patent under his seal of Office (see s. 5(1)). If the charter so granted bears a date earlier than that upon which the Seal was affixed, then, by virtue of s. 133, the company acquires status with effect from the earlier date. The question here, however, is not whether or not Kutcho Creek Asbestos Company Limited is to be conclusively taken as having the status of a company incorporated on the 25th of September, but rather whether or not the respondent caused it to be "incorporated on or before the 1st day of October, 1958" within the meaning of those words as they are used in para. 7 of the agreement pursuant to which this action is brought.

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I am of opinion that the fact that the letters patent of Kutcho Creek Asbestos Company Limited bear date the 25th of September and that company has status as from that date for the purposes of the Dominion *Companies Act* in no way precludes the appellant from adducing evidence to prove whether or not this option was exercised by the respondent in accordance with the terms of the contract now sued upon, and I would accordingly dispose of this appeal as proposed by the Chief Justice.

The *Ontario Corporations Act* contains section 11 which states that,

> A corporation shall be deemed to be in existence on and after the date of its letters patent.

Section 11 of the Ontario Act and section 11 of the Dominion Act are, in effect, identical in their terms.

However the Ontario Act does not contain a provision in any way comparable to section 133 of the *Dominion Companies Act* and accordingly, while the Ontario Act deals with the effective date of letters patent it does not deal with the effective date of supplementary letters patent.

Counsel for the appellant submitted that only the Attorney-General of Ontario can raise the issue of the validity of the issue of letters patent or supplementary letters patent. I agree with that proposition. The validity of the letters patent incorporating a company or supplementary letters patent issued to it cannot be collaterally attacked or questioned in an action brought by or against the company. The validity of letters patent or supplementary letters patent can only be brought into question in an action directly brought for that purpose by the Attorney-General.

But what does the Minister seek to do here? He puts in issue the validity of the contract of the allotment of preference shares between Polestar and the Schippers and says that there was no such contract at the time it was entered into, because as of that date, December 21, 1960, Polestar's capital stock did not include unissued preference shares. He says this because the supplementary letters patent creating such shares, although dated December 20, 1960, did not issue until February 1961. He says that he does not attack the validity of the issue of such supplementary letters patent, nor the status of Polestar but seeks to prove the actual date upon which the supplementary letters patent did issue. There is no provision in the *Ontario Corporations Act* which purports to give retroactive effect

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to supplementary letters patent. As I understand the decision in *Letain v. Conwest Exploration Ltd. (supra)* it is authority for the proposition that the date of letters patent or supplementary letters patent may be proven to be other than that specified thereon in a civil action in which the status of the company is not in issue. Here I do not think that the status of Polestar is in issue and accordingly the Minister is not precluded from establishing that in fact the supplementary letters patent bore a date antecedent to their actual issuance.

It, therefore, follows that no preference shares were validly issued by Polestar and that the common shareholders thereof were in control of that company.

In view of the conclusion I have reached it is not necessary for me to consider the other matters raised by counsel for the Minister.

Normally I would dismiss the appeal were it not for the Minister's prayer in paragraph 7(*a*)(i) and (ii) of his notice of reply,

> (*a*) that the appeal be allowed with costs and the assessments referred back to the Minister to
>
> (i) increase the profit of Polestar Developments Limited from Overbrook Holdings for the fiscal period ending the 31st of March, A.D. 1963, by $7,457.63, and decrease its profit from Overbrook Holdings for the fiscal period ending the 27th day of August, A.D. 1963, by $10,145.06, and
>
> (ii) increase the profit of Polestar Developments Limited from Overbrook Holdings for the fiscal period ending the 24th of December, A.D. 1963 by the said sum of $25,300.00, and decrease its profit from Overbrook Holdings for the fiscal period ending the 30th of April, A.D. 1963, by $25,300.00.

The appeal is therefore allowed with costs and the assessments are referred back to the Minister for reassessment in accordance with paragraph 7(a) of the Minister's notice of reply. In all other respects the assessments are confirmed.