

BETWEEN :

Winnipeg
1966

CREE ENTERPRISES LTD. APPELLANT;

Mar. 22

AND

Mar. 24

THE MINISTER OF NATIONAL }
REVENUE }

RESPONDENT.

Income tax—Inter-corporate dividend—When deductible—Dividend paid from “designated surplus”—Control by two related corporations—Whether each controls—Income Tax Act, s. 28(2) and (3).

On December 1, 1960, M Co which owned beneficially 27 of the 40 voting shares in C R Ltd transferred 20 of those shares to appellant and immediately thereafter acquired the 13 remaining voting shares from their owner so that appellant and M Co then owned equally the 40 voting shares in C R Ltd. M. Co and appellant were respectively controlled by Mr. and Mrs. R, husband and wife, and Mr. R was throughout president of C R Ltd, under whose by-laws he had a casting vote at all meetings of directors and shareholders. On December 31, 1960, C R Ltd paid a dividend of \$72,000 of which a substantial part was paid out of undistributed income on hand at the end of its preceding taxation year.

Held, appellant acquired control of C R Ltd on December 1, 1960, within the meaning of s. 28(3) of the *Income Tax Act*, and in computing its income for the year appellant was consequently prohibited from deducting that part of the dividend paid out of C R Ltd’s undistributed income on hand at the end of its preceding taxation year, which amount became “designated surplus” under s. 28(2) of the *Income Tax Act*.

On the proper construction of s. 28 of the *Income Tax Act*, where more than 50% of the voting stock of a corporation is owned by two or more resident Canadian taxpaying corporations which do not deal with one another at arm’s length, the first mentioned corporation is controlled by *each* of the others.

APPEAL from a decision of the Tax Appeal Board.

Harold Buchwald, Q.C. and *D. C. Abbott* for appellant.

G. W. Ainslie for respondent.

GIBSON J.:—The true meaning of “control” of a corporation as that word is employed in s. 28 of the *Income Tax Act* is the issue to be determined in this action.

The problem of determining when a corporation is controlled for the purpose of that section arises in this way. Inter-corporation dividends passing between two resident Canadian tax paying corporations are income for the recipient corporation by reason of s. 6(1)(a)(i) of the Act, but

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are tax exempt by reason of being deductible under s. 28(1) of the Act unless the situation obtains as is envisaged by s. 28(2) of the Act "before the control was acquired", in which latter case no deduction is permitted because the surplus of undistributed income, out of which such dividends are paid, is categorized by this latter sub-section as "designated surplus".

"Control" by one corporation of another corporation for the purpose of ascertaining whether a deduction from income is permissible under s. 28(1) of the Act, or whether it is prohibited by s. 28(2) of the Act is delineated in s. 28(3) of the Act in these words:

For the purpose of subsection (2), one corporation is controlled by another corporation if more than 50% of its issued share capital (having full voting rights under all circumstances) belongs to the other corporation or to the other corporation and persons with whom the other corporation does not deal at arm's length.

What is in issue in this case is not the same meaning judicially decided of "control" of a corporation employed in certain other sections of the *Income Tax Act*. (Compare *Buckerfield's v. M.N.R.*¹, Jackett P., at p. 302 regarding "control" as used in s. 39(4) the *Income Tax Act*:

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

*Pender Enterprises v. M.N.R.*², Noël J., at p. 356 regarding "control" as used in section 139(5a) of the *Income Tax Act*: "... 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.... Now, although this interpretation was given in connection

¹ [1965] 1 Ex. C.R. 299.

² [1965] C.T.C. 343.

with Section 39 of the *Income Tax Act*, I can see no reason why it should not apply as well to Section 139(5a) of the Act..."; and see also Cameron J., in *Vancouver Towing Co. Ltd. v. M.N.R.*¹)

For the determination of the issue in this case, I am of opinion that it is only necessary to interpret the meaning of the words employed in s. 28 of the *Income Tax Act*, and particularly s-ss. 1, 2, 3, 4, 5 and 6. That section provides a complete dictionary in itself. These sub-sections read as follows:

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(1) Where a corporation in a taxation year received a dividend from a corporation that

- (a) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year,
- (b) (Repealed 1956, c 39, s 7, effective August 14, 1956.)
- (c) (Repealed 1965, c. 18, s 8 (1), effective on Royal Assent, June 30, 1965)
- (d) was a non-resident corporation more than 25% of the issued share capital of which (having full voting rights under all circumstances) belonged to the receiving corporation, or
- (e) was a foreign business corporation more than 25% of the issued share capital of which (having full voting rights under all circumstances) belonged to the receiving corporation,

an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporations income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

(2) Dividends not deductible. Notwithstanding subsection (1), where

- (a) a dividend was paid by a corporation that was resident in Canada and was controlled by the receiving corporation, and
- (b) the payer corporation had undistributed income on hand at the end of its last complete taxation year before the control was acquired (which undistributed income is hereinafter referred to as the "designated surplus"),

if the dividend was paid out of designated surplus, no amount is deductible under subsection (1), and, if a portion of the dividend was paid out of designated surplus, the amount deductible under subsection (1) is the dividend minus the aggregate of

- (c) the portion of the dividend that was paid out of designated surplus, and
- (d) the part of any amount deductible under subsection (2) of section 11 in computing the receiving corporation's income reasonably attributable to the portion of the dividend that was not paid out of designated surplus.

(3) Controlled corporation. For the purpose of subsection (2), one corporation is controlled by another corporation if more than 50% of its

¹ [1946] Ex. C.R. 623 at p. 632.

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issued share capital (having full voting rights under all circumstances) belongs to the other corporation or to the other corporation and persons with whom the other corporation does not deal at arm's length.

(4) "Control period." In this section, "control period" means the period from the commencement of the payer corporation's taxation year in which the control was acquired to the end of the taxation year in which the dividend was paid.

(5) Amount of corporation's earnings in control period. In this section, the amount of a corporation's earnings for a control period that was available for payment of dividends at a particular time is the amount by which

(a) the aggregate of its incomes for the taxation years in the control period,

exceeds

(b) the aggregate of

(i) its taxes under this Part for the taxation years in the control period,

(ii) all dividends paid in the control period before the particular time, to the extent that they are not, for the purpose of subsection (2), deemed to have been paid out of designated surplus, and

(iii) such part of the dividends deemed under this Part to have been received from the corporation in the control period before the particular time as was included in computing the recipients' incomes to the extent that they are not, for the purpose of subsection (2) deemed to have been paid out of designated surplus.

(6) Dividends not regarded as paid out of designated surplus. For the purpose of subsection (2)

(a) where the amount of a corporation's earnings for the control period that was available for payment of dividends was, at the time a particular dividend was paid, equal to or greater than the particular dividend plus all other dividends paid by the payer corporation at the same time as the particular dividend, no part of the particular dividend shall be regarded as having been paid out of designated surplus, and

(b) DIVIDEND PAID OUT OF DESIGNATED SURPLUS—in any other case, the portion of the particular dividend that was paid out of designated surplus is the proportion of

(i) the aggregate of the particular dividend and all other dividends paid by the payer corporation at the same time as the particular dividend minus the amount, if any, of the corporation's earnings for the control period that was available for payment of dividends at that time, or

(ii) the designated surplus minus the aggregate of

(A) the tax-paid undistributed income of the payer corporation as of the commencement of the control period,

(B) any amount upon which tax has been paid by the payer corporation under Part II after the commencement of the control period and before the dividend was paid, and

(C) the dividends paid by the payer corporation out of the designated surplus during the control period but before the particular dividend was paid,

whichever is the lesser, that the particular dividend is of the aggregate of the particular dividend and all other dividends paid by the payer corporation at the same time as the particular dividend.

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In this case it is necessary to consider two other corporations besides the appellant corporation, Cree Enterprises Limited. They are Metropolitan Construction Limited and Crown Realty Limited. Cree Enterprises Limited at all material times was a land developer. Metropolitan Construction Limited bought the developed land from Cree Enterprises Limited and built speculative houses for sale on such land. Crown Realty Limited sold such houses, and it also engaged in a general insurance business, but its only customer for such business in fact was Metropolitan Construction Limited.

It is agreed that Metropolitan Construction Limited and the appellant Cree Enterprises Limited at all material times were not dealing at arm's length within the meaning that such words are used in the *Income Tax Act*.

It is a dividend paid by Crown Realty Limited to the appellant Cree Enterprises Limited that gives rise to the subject matter of this action.

There was an Agreed Statement of Facts filed at the trial of this action made by the parties, which reads as follows:

1. The Appellant was incorporated under the provisions of the Manitoba Companies Act on the 2nd day of June, A.D. 1959, and its fiscal period ended on the 31st day of May, A.D. 1961.

2 Metropolitan Construction Ltd. (hereinafter referred to as "Metropolitan") was incorporated under the provisions of the Manitoba Companies Act on the 30th day of March, A.D. 1954, and its fiscal period ended on the 30th day of November, A.D. 1961.

3. Crown Realty Ltd. was incorporated under the provisions of the Manitoba Companies Act on the 25th day of November, A.D. 1961, and its relevant fiscal periods ended 29 February, 1960 and 28 February, 1961.

4. At all times material to this Appeal, all of the issued shares of Metropolitan, having full voting rights under all circumstances, were beneficially owned by Myles Sheldon Robinson.

5. At all times material to this Appeal, all of the issued shares of the Appellant, having full voting rights under all circumstances, were beneficially owned by Mrs. Constance Robinson.

6. Mrs. Constance Robinson is the wife of Myles Sheldon Robinson.

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7. Harry Moroz was not related within the meaning of ss. (5a) of sec. 139 of the *Income Tax Act* to either Myles Sheldon Robinson, or Mrs Constance Robinson.

8. The Common Shares of Crown Realty Ltd. had full voting rights under all circumstances.

9 The Preferred Shares of Crown Realty Ltd., did not have full voting rights under all circumstances.

10. Immediately prior to the 1st day of December, A.D. 1960, the following were the shareholders of Crown Realty Ltd.:

COMMON PREFERRED

Myles Sheldon Robinson (in trust for Metropolitan)	1	
Harry Moroz	13	1
Victoria Margaret Jardine (in trust for Metropolitan)	1	
Metropolitan	<u>25</u>	<u>2</u>
	<u>40</u>	<u>3</u>

11. On the 1st day of December, A.D. 1960, Metropolitan sold and transferred 20 Common Shares and 1½ Preferred Shares to the Appellant for the sum of \$36,250.00.

12. On the 5th day of December, A.D. 1960, Harry Moroz sold and transferred his 13 Common Shares and 1 Preferred Share of Crown Realty Ltd, to Myles Sheldon Robinson.

13. On the 5th day of December, A.D. 1960, Myles Sheldon Robinson transferred 1 Common Share of Crown Realty Ltd. to Harold Buchwald who acknowledged that he held the Share as bare trustee for and on behalf of Myles Sheldon Robinson.

14. On the 10th day of December, A.D. 1960, Mr. Buchwald transferred back to Myles Sheldon Robinson the 1 Common Share of Crown Realty Ltd. which he held in trust for Mr. Robinson.

15. On the 10th day of December, A.D. 1960, Myles Sheldon Robinson sold and transferred 13 Common Shares and 1 Preferred Share of Crown Realty Ltd., to Metropolitan for the sum of \$23,565 00, and also transferred back to Metropolitan the 1 Common Share which he held in trust for that Company.

16. On the 10th day of December, A.D. 1960, Mrs. Jardine transferred back to Metropolitan the 1 Common Share of Crown Realty Ltd. which she held in trust for that Company.

17 As a result of the Share transfers referred to in Paragraphs numbered 11 to 16, both inclusive, from and after the 10th day of December, A.D 1960 the following were the Shareholders of Crown Realty Ltd :

	COMMON	PREFERRED
METROPOLITAN CONSTRUC- TION LTD	20	1½
CREE ENTERPRISES LTD. ..	<u>20</u>	<u>1½</u>
	<u>40</u>	<u>3</u>
	<u>==</u>	<u>==</u>

18. On the 28th day of December, A.D. 1960, the Board of Directors of Crown Realty Ltd., passed a resolution declaring a dividend in the aggregate amount of \$72,000.00 on the outstanding Common Shares of Crown Realty Ltd., payable to Shareholders of record at the close of business on the 31st day of December, A.D. 1960.

19. As of the 31st day of December, A.D. 1960, Metropolitan was indebted to Crown Realty Ltd. in excess of \$36,000 00, and it was agreed between Crown Realty Ltd. and Metropolitan that the dividend of \$36,000.00 payable to Metropolitan was to be applied to reduce Metropolitan's indebtedness to Crown Realty Ltd.

20. On the 31st day of December A.D. 1960, Crown Realty Ltd., paid to the Appellant the sum of \$36,000 00 in satisfaction of the dividend declared by Crown Realty Ltd., on the 28th day of December, A.D. 1960.

21. The amount of Crown Realty Ltd.'s earnings, as that phrase is defined by s.s. (5) of Sec. 28 of the *Income Tax Act*, R.S.C. 1952, c. 148, for the period from the 1st day of March, A.D. 1960 until the 28th day of February, A.D. 1961, was \$22,509.36 and prior to the 1st day of March, A.D. 1960, Crown Realty Ltd., had undistributed income on hand within the meaning of the *Income Tax Act*, in excess of \$24,745 32, namely \$58,318.42.

22. The Directors and Officers of Crown Realty Ltd. were as follows:

(a) Prior to the 5th day of December, A.D. 1960:

President	Myles Sheldon Robinson
Vice-President	Harry Moroz
Secretary-Treasurer	Victoria Margaret Jardine

(b) From the 5th day of December, A.D. 1960 to the 10th day of December, A.D. 1960:

President	Myles Sheldon Robinson
Vice-President	Harold Buchwald
Secretary-Treasurer	Victoria Margaret Jardine

(c) From the 10th day of December, A.D. 1960 to the 29th day of November, A.D. 1965:

President	Myles Sheldon Robinson
Vice-President	Constance Robinson
Secretary	Saul Benjamin Zitzerman
Treasurer	Victoria Margaret Jardine

23. Clauses 17 and 27 of By-Law No. 1 of Crown Realty Ltd., the General By-Law of that Company, provide, *inter alia*, as follows:

"PRESIDENT

17. The President shall be the chief executive officer and Managing Director of the Company. He shall, if present, preside at all meetings of shareholders and Directors; . . ."

"VOTES

27. Every question submitted to any meeting of shareholders shall be decided in the first instance by a show of hands and in the case of an equality of votes the Chairman shall both on a show of hands and at a poll have a casting vote in addition to the vote or votes to which he may be entitled as a shareholder. . . ."

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24. An amount equal to the dividend of \$36,000.00 paid to Metropolitan by Crown Realty Ltd. was deducted from the income of Metropolitan for the fiscal period ended on the 30th day of November, A.D. 1961, both by Metropolitan in its return of income and by the Respondent in assessing Metropolitan, for the purpose of determining Metropolitan's taxable income, pursuant to the provisions of ss. (1) of Sec. 28 the *Income Tax Act* aforesaid.

25. The Appellant and Metropolitan at all material times were resident in Canada.

(At times in these Reasons, Metropolitan Construction Limited, Cree Enterprises Limited, and Crown Realty Limited are respectively referred to as "Metropolitan", "Cree", and "Crown".)

In considering the respective relevant fiscal year periods of Metropolitan, Cree and Crown and s. 28(4) of the *Income Tax Act* in relation to the question of the control of Crown it more incisively points up the problem for interpretation by setting out the beneficial shareholdings in Crown Realty Limited during the period under review as follows:

(a) *Prior to December 1st, 1960:*

METROPOLITAN CONSTRUCTION LTD.	67.5%
HARRY MOROZ	32.5%
	100.0%

(b) *December 1st to December 5th, 1960:*

HARRY MOROZ	32.5%
METROPOLITAN CONSTRUCTION LTD.	17.5%
CREE ENTERPRISES LTD.	50.0%
	100.0%

(c) *December 5th to December 10th, 1960:*

MYLES SHELDON ROBINSON	32.5%
METROPOLITAN CONSTRUCTION LTD.	17.5%
CREE ENTERPRISES LTD.	50.0%
	100.0%

(d) *December 10th, 1960 (to date):*

METROPOLITAN CONSTRUCTION LTD.	50.0%
CREE ENTERPRISES LTD.	50.0%
	100.0%

For the purpose of demonstrating how the respondent applied the provisions of s. 28 of the Act in relation to the facts of this matter, it is convenient to record what happened for tax purposes to the surplus of Crown Realty Ltd.

by reason of what it and Metropolitan and the appellant Cree did during the relevant period.

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As at February 29th, 1960	\$ 58,318.42	“Designated” S. 28(2) of Act
For period March 1st, 1960 to February 28th, 1961 (i.e. period in which “control” by the respondent is alleged to have changed) ...	22,509.36	“Control Period Earnings” S. 28(5) of Act
	<u>\$ 80,827.78</u>	
December 28th, 1960 Dividend paid Decem- ber 31st, 1960	\$ 72,000.00	
Apportionment:		
Metropolitan Construction Ltd. — 50% —	\$36,000.00	
Cree Enterprises Ltd. — 50% —	\$36,000.00	
S. 28(6)(b)		
Aggregate dividend	\$ 72,000 00	
Control Period Earnings	22,509.36	
	<u>49,490.64</u>	
Portion out of Des. Surp.	49,490.64	
Proportion taxable to Cree—50%	<u>24,745.32</u>	

In support of his submission as to what canons of interpretation should be applied in construing s. 28 of the Act, counsel for the appellant referred to the following authorities:

A. Interpretation of Taxing Statutes

1. *Mazwell on the Interpretation of Statutes* 11th Ed. (1962) at p. 278.
2. *Denn v. Diamond* (1825) 4 B & C 243.
3. *I.R.C. v. Ross & Coulter* (1948) 1 All. E.R. 616 per Lord Thankerton—mentioned in *Regina v. MacDonald* (1959) 28 W.W.R. 309 (B.C.).
4. *I.R.C. v. Wolfson* (1949) 1 All E.R. per Lord Simonds at 868.
5. *Craies on Statute Law* 6th Ed. (1963) pp. 113-115 & 85.
6. *Simms v. Reg. of Probates* [1900] A.C. 323, 337.
7. *Dock. Co. v. Browne* (1831) 2 B & Ad 43, 58 per Lord Tenterden C.J.
8. *Re Micklethwait* (1855) 11 Ex. 452, 456 per Baron Parke.
9. *Partington v. Att. Gen.* (1869) L.R. 4 H.L. 100, 122 per Lord Cairns.
10. *Cape Brandy v. I.R.C.* [1921] 1 K.B. 64, 71 per Rowlatt J.
11. *Canadian Eagle Oil Co. v. R.* [1946] A.C. 119 per Viscount Simon, L.C.
12. *I.R.C. v. Ross & Coulter* [1948] 1 All E.R. 616 at p. 625 per Lord Thankerton.
13. *Att. Gen. v. Earl of Selborne* [1902] 1 K.B. 396 per Collins M.R.

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14. *Dewar v. I.R.C.* [1935] 2 K.B. 351 per Lord Hanworth M.R.
 15. *Ormond v. Betts* [1928] A.C. 143 per Lord Sumner.
 16. *Pryce v. Monmouthshire Canal Co.* (1879) 4 App. Cas. 197 per Lord Cairns.
 17. *Beeke v. Smith* (1836) 2 M & W 191 per Parke B.
- B. *Canadian Cases on Interpretation of Taxing Statutes*
1. *Shaw v. M.N.R.* [1939] S.C.R. 338 per Duff C.J.C.
 2. *Hatch v. M.N.R.* [1938] Ex. C.R. 208 per Angers J.
 3. *R. v. Crown Zellerbach* 14 W.W.R. (NS) 433 at 439 per Manson J.
 4. *Re Social Services Tax Act, Re W. & G. Grant Construction Co. Ltd.*—47 W.W.R. 125 per Munroe J. at 128.
 5. *Trans-Canada Investment Corporation Ltd. v. M.N.R.* [1953] Ex. C.R. 292; 53 DTC 1227 [1231].
 6. *Osborne—The Concise Law Dictionary*, p. 347.
- C. *Canadian Cases on Interpretation of Statutes Leading to Absurdity*
1. *Massey-Harris Co. v. Strasbourg* (1941) 3 W.W.R. 586, [1941] 4 D.L.R. 620 per MacDonald J.A. (Sask. C.A.).
 2. *M. v. Law Society of Alberta* (1940) 3 W.W.R. 600 per McGillivray, J.A.—Affirmed [1941] S.C.R. 430.
 3. *Waugh and Esquimalt Lumber Co. v. Pedneault* (1949) 1 W.W.R. 14, per Sidney Smith J.A. (B.C. C.A.)
 4. *Regina v. Scory* (1965) 51 W.W.R. 447.
- D. *Judicial Interpretation of "Acquired" & "Acquire" Corpus Juris Secundum*, Vol. I., pp. 918 & 919.

Counsel for the respondent for a similar purpose referred to *Trans-Canada Investment Corporation Ltd. v. M.N.R.*¹ and in particular, the words of Cameron J., at p. 299 as follows:

...But in my view, there is another interpretation that may be put upon it, an interpretation which I think is more consonant with the intention of Parliament as I deem it to be from the language itself. ...

Again, in *Shannon Realities v. St. Michel* [[1924] A.C. 192], it was stated that if the words used are ambiguous, the Court should choose an interpretation which will be consistent with *the smooth working of the system* which the statute purports to be regulating;

[Emphasis is mine.]

and *Highway Sawmills Limited v. M.N.R.*, S.C.R., an unreported judgment pronounced March 11, 1966, the words of Cartwright J.:

The answer to the question [as to] what tax is payable in any given circumstances depends, of course, upon the words of the legislation imposing it. Where the meaning of those words is difficult to ascertain it may be of assistance to consider which of two constructions contended for brings about a result *which conforms to the apparent scheme of the legislation*....

[Emphasis is mine.]

¹ [1953] Ex. C.R. 292; affirmed [1956] S.C.R. 49.

In employing this jurisprudence the appellant submitted that the meaning that should be attached to the words "before the control was acquired" in s. 28(2)(b) of the Act necessitated that there be a "change" of control, or "surrender" of control, at the material time, before s. 28(2) was applicable so as to deny this taxpayer the deduction from income otherwise permitted under s. 28(1) of the Act; and that such did not take place in that Metropolitan had control at all material times, so that there was neither a "change" of or "surrender" of control.

The respondent submitted that the purpose of s. 28(2) was to prohibit any dividends which were paid out of the existing surplus of undistributed income of a corporation when control was acquired by another corporation from being tax exempt under s. 28(1) of the Act in the hands of such receiving corporation, and to permit only dividends which were paid out of earnings made after control was so acquired to be deducted by such a corporation from its income under s. 28(1) of the Act; and that control within the meaning of s. 28(3) of the Act for the purpose of s. 28(2) can be of two types, viz: (1) where more than fifty per cent of the issued share capital belongs to one other corporation and, (2) where such a situation obtains that more than fifty per cent of the share capital belongs to another corporation and persons with whom this other corporation does not deal at arm's length. ("Person" is defined in s. 139(1) (ac) of the Act.)

The respondent's submission is further that in this second type of control situation that every corporate shareholder who does not deal at arm's length with any other corporate shareholder or shareholders and who with it or them jointly owns more than fifty per cent of the issued share capital of another corporation, "controls" such latter corporation for the purpose of s. 28(2) of the Act; and that the appellant Cree was in this position at all material times.

In coming to the conclusion I do in this case, firstly, I am of the opinion that the word "acquired" as used in the phrase "before the control was acquired," in s. 28(2) of the Act, means something different legally when so used in conjunction with these words than when standing alone. To determine its meaning when used with these other words it is necessary to look to these other words and to the other

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parts of s. 28 in order to determine its true meaning. In doing so, as I do, in my opinion it is not necessary to import a meaning of "change" of or "surrender" of control in construing the words "before control was acquired" in s. 28(2)(b).

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The application of these words also is not confined to "outsiders", so to speak, taking over control of such a corporation within the meaning of s. 28(3) of the Act, and includes those shareholder corporations such as those in this case who have what may be referred to as internal relationships.

Secondly, I am of opinion that the "control" means in s. 28(3) of the Act is limited to the special purpose only of computing the deduction from income, if any, under s. 28(1) of the Act and that otherwise the word "control" as used in the second type of situation envisaged in s. 28(3) of the Act, above referred to, might be called a misnomer.

It follows in my view that for the purposes of s. 28 of the *Income Tax Act* that two or more corporations may each control another corporation at the same time. It may be stated this way, namely, that all resident Canadian tax paying corporations (1) who do not deal at arm's length with each other and (2) who own shares ("having full voting rights under all circumstances") in a corporation, each "control" such latter corporation for the purposes of s. 28 of the Act, provided that the total shareholdings of them comprise more than 50% of such issued capital of such corporation.

In the result, therefore, I am of opinion that after March 1, 1960, namely on December 1, 1960, the appellant Cree Enterprises Limited acquired control of Crown Realty Limited within the meaning of s. 28(3) of the *Income Tax Act* and as a consequence at that time by reason of s. 28(2) of the Act the undistributed accumulated earned income in the surplus account of Crown Realty Limited became in law a "designated surplus" so that the portion of it paid out to the appellant as dividends, as stated above, not being part of earnings during the control period (see s-ss. (4) and (5) of s. 28 of the Act cannot be deducted by the appellant from its income during the fiscal period ending March 31, 1961 under the provisions of s. 28(1) of the Act.

The appeal is therefore dismissed with costs.