BETWEEN:

AARON'S (PRINCE ALBERT) LIMITED ET ALIOS[1] ..... APPELLANTS;

AND

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

Winnipeg 1966 Apr. 20, 21, 22 Ottawa May 24

Income tax—Associated corporations—Income Tax Act, s. 39(4)—Saskatchewan company—Wholly-owned subsidiary—Whether "controlled" by parent company—Nominee of parent company—Parent company controlling voting right.

A Co was the registered and beneficial owner of two of the three issued shares of *B Co* (both being Saskatchewan companies incorporated by filing a memorandum of association) and the remaining share was registered in the name of *A Co*'s nominee, who was a director of *B Co*. *A Co*'s two shares were voted by a representative of *A Co* who was a director and president of *B Co*. *B Co*'s articles of association provided that all motions at shareholders' and directors' meetings required unanimous consent.

Held, B Co was controlled by *A Co* within the meaning of s. 39(4) of the *Income Tax Act* and therefore disentitled to the lower rate of tax under s. 39. The nominee of the third share was subject to *A Co*'s control with respect to the voting right of that share, and accordingly *A Co* had through its ownership of *B Co*'s shares control of the votes of all three issued shares of *B Co*.

Buckerfield's Ltd. et al v. M.N.R. [1965] 1 Ex. C.R. 299, applied. *I.R.C. v. J. Bibby & Sons Ltd.* [1944] 1 All E.R. 548, [1945] 1 All E.R. 667; *I.R.C. v. Silverts, Ltd.* [1951] 1 All E.R. 703, distinguished, *S. Berendsen Ltd. v. C.I.R.* [1958] Ch. 1; *M.N.R. v. Sheldon's Engineering Ltd.* [1954] Ex. C.R. 507, [1955] S.C.R. 637; *Barclays Bank Ltd. v. I.R.C.* [1960] 2 All E.R. 817, referred to.

Income tax—Associated companies—Income Tax Act, s. 39—Saskatchewan company—Articles of association requiring unanimous consent at meetings—Validity of—Saskatchewan Companies Act, R.S.S. 1953, c. 124, ss. 14(b), 18—Saskatchewan Interpretation Act, R.S.S. 1953, c. 1, s. 3.

A provision in a Saskatchewan company's articles of association that motions at shareholders' and directors' meetings require unanimous consent is valid notwithstanding the provision of s. 14(*b*) of the Saskatchewan *Interpretation Act* as to the power of a majority to bind the minority and various provisions of the Saskatchewan *Companies Act* authorizing or requiring certain things to be done by "special resolution", i.e. by a three-fourths majority. In view of the provisions of s. 3 of the *Interpretation Act* s. 14(*b*) cannot be

[1] The other appellants are: Morgan's Limited, Aaron's (Saskatoon) Limited, Allied Business Supervisions Limited, Miller Building Limited, Aaron Building Limited, Aaron's Renfrew Furs Limited, Career Girl Store Limited, Aaron's Ladies Apparel Limited, I & A Realty Limited.

1966

AARON'S (PRINCE ALBERT) LTD. *et al* v. MINISTER OF NATIONAL REVENUE

considered as overriding the right of incorporators under s 18 of the *Companies Act* to adopt such regulations for the government of the company as they think fit.

Theatre Amusement Co. v. Stone (1915) 50 S.C.R. 32, *Quin & Axtens Ltd. et al v. Salmon* [1909] A.C. 442; *N.-W. Transportation Co. v. Beatty* (1887) 12 App. Cas. 589, referred to.

Income tax—Associated corporations—Income Tax Act, s. 39(4)—Ownership of half voting shares—Right to casting vote vested in chairman of board—Whether "president" of company in control—Saskatchewan companies.

A owned half the voting shares of a Saskatchewan company and was a director and president of the company. *B* owned 74 of the 150 voting shares of another Saskatchewan company and one share was owned by *B*'s husband in trust to vote it as *B* directed. *B*'s husband was one of the company's three directors and president of the company. *A* and *B*'s husband acted as chairman at their companies' meetings but neither had been elected chairman of his company's board of directors. Under the articles of association of both companies the chairman of the board of directors was entitled to preside at general meetings, and the chairman at any meeting had a casting vote in case of a tie.

Held, neither *A* nor *B* was entitled to be chairman of shareholders' meetings of their respective companies and to exercise a casting vote, and therefore neither *A* nor *B* controlled their respective companies within the meaning of s. 39(4) of the *Income Tax Act*. The appointment of *A* and of *B*'s husband as president of his company did not give either of them the right to preside at meetings. The office of president was not mentioned in the Saskatchewan *Companies Act* or in the company's articles. Moreover, *B*'s husband when exercising the casting vote was not bound to vote it as *B* might direct.

Semble, control of a company arising from the right to a casting vote is not the control contemplated by s. 39(4) of the *Income Tax Act* since the situation is not of the kind aimed at by the provision and since the casting vote unlike the votes arising from shareholding which are exercisable without responsibility to the company or to other shareholders is not the holder's property but an adjunct of office.

INCOME TAX APPEALS.

R. B. Slater, F. K. Turner and *A. Anhang* for appellants.

Bruce Verchere and *Gordon Anderson* for respondent.

THURLOW J.:—These ten appeals are from re-assessments of income tax for the taxation years 1961 and 1962, (except those of Miller Building Limited, Career Girl Store Limited and I & A Realty Limited which relate only to the 1962 taxation year) all of which were based on assumptions by the Minister that all ten of the appellant companies

together with Aaron Investments Limited and Miller Men's Wear Limited were at relevant times "associated" with each other within the meaning given that expression for the purposes of section 39 of the *Income Tax Act*[1]. In each case the sole issue raised is whether the Minister's assumptions were correct, or perhaps more accurately the extent to which the assumptions were correct, but this issue has by the terms of an order stating issues to be determined and directing that the appeals be heard together on common evidence, as well as by the positions taken by counsel in the course of the trial, been further narrowed to certain particular issues defined in paragraphs 1 and 2 of the order with respect to the control of particular appellant companies and to a further more general issue stated in paragraph 3 of the order as to whether any and if so which of the companies were associated in either of the taxation years in question. These issues are stated and dealt with later in these reasons. The order also provided that "upon the determination of the answers to the aforesaid questions by the Court, all of the Appeals will be referred back to the Respondent for reconsideration, and if necessary in respect of all or any one or more of the Appellants, allocation pursuant to subsections 3 and 3(*a*) of section 39 of the *Income Tax Act* and re-assessment of all or any one or more of the Appellants in accordance with the Court's determination of the answers to the said questions".

When the appeals came on for trial counsel for the Minister stated that the appeals of I & A Realty Limited and Aaron Building Limited with respect to their re-assessments for the 1962 taxation year had been settled between the parties and by consent an order was granted allowing with costs the appeals of I & A Realty Limited and Aaron Building Limited from the re-assessments for 1962 and referring the re-assessments back to the Minister for reconsideration and re-assessment on the basis that during the 1962 taxation year I & A Realty Limited and Aaron Building Limited were associated only with each other and with Aaron Investments Limited. This has rendered it unnecessary to deal with three of the particular issues defined in the earlier order and with the general issue as well so far as the re-assessments of these appellants for 1962 are involved.

[1] R.S.C. 1952, c. 148.

1966

AARON'S (PRINCE ALBERT) LTD. *et al* v. MINISTER OF NATIONAL REVENUE

Thurlow J.

Seven other particular issues, and the rest of the general issue, however, remain. For the determination of these the parties put before the Court an agreed statement of facts which together with copies of the articles of association of nine of the appellant companies tendered by counsel for the Minister and the minute books of several of the appellant companies tendered on behalf of the appellants constitute the material on which the issues are to be decided.

Each of the appellant companies was incorporated under the *Companies Act*[1] of the Province of Saskatchewan on the filing of a memorandum of association and each adopted the articles of Table A of that Act either with or without modifications as its articles of association.

As each of the particular issues to be determined includes the preliminary words "Within the meaning of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended" and poses a question whether a particular company or person or group controlled a particular appellant company during a stated period, it will be convenient at this point to review the provisions of the Act under which the problems arise.

Subsection (1) of section 39 provides that the tax payable by a corporation under Part 1 of the Act is 18 per cent of the first $35,000 of the amount of income subject to tax and 47 per cent of the amount by which the income subject to tax exceeds $35,000. By subections (2) and (3) however where two or more corporations are "associated" with each other the aggregate amount of their incomes taxable at the 18 per cent rate is not permitted to exceed $35,000. The reason for this is not hard to discern. Without such provisions section 39(1) would constitute an invitation to those beneficially interested in profitable corporate enterprises to so arrange and multiply corporate structures as to render the whole of a taxable income in excess of $35,000 taxable at the lower rate. To take the simplest situation a person owning the shares of a corporation earning from $35,000 to $70,000 in taxable income might arrange to have half of the amount earned by a second corporation and thus avoid paying 47 per cent on any of the income. By the same process a person or a group of closely related persons might, even if not owning all the shares, accomplish in their own

[1] R.S.S. 1953, c. 124.

interest in a substantial way the same result. The overall purpose of the provisions as to "associated" companies, as I read them, is to prevent the owners of the equity stock in corporations from gaining, whether intentionally or otherwise, such a tax advantage[1]. But the method adopted by the provisions is arbitrary and is made to depend not on the right of shareholders to benefit from profits but on various relationships between shareholders, some of which are particularly defined and others not, and by whom the companies concerned were "controlled"[2].

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[1] *Vide* Jackett P. in *Buckerfield's Ltd. et al v. M.N.R.* [1965] 1 Ex. C.R. 299 at 305. "The course of action that section 39 has been designed to discourage is the multiplication of corporations carrying on a business in order to get greater advantage from the lower tax rate."

[2] 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 those 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.

(4*a*) For the purpose of this section,

(*a*) one person is related to another person if they are "related persons" or persons related to each other within the meaning of subsection (5*a*) of section 139; and

(*b*) "related group" has the meaning given that expression in subsection (5*c*) of section 139; and

(*c*) subsection (5*d*) of section 139 is applicable *mutatis mutandis*.

(5) When two corporations are associated, or are deemed by this subsection to be associated, with the same corporation at the same time, they shall, for the purpose of this section, be deemed to be associated with each other.

1966

AARON'S (PRINCE ALBERT) LTD. *et al* v. MINISTER OF NATIONAL REVENUE

Thurlow J.

Subsections (5*a*), (5*c*) and (5*d*) of section 139 are as follows:

(5*a*) For the purpose of subsection (5), (5*c*) and this subsection, "related persons", or persons related to each other, are

(*a*) individuals connected by blood relationship, marriage or adoption;

(*b*) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described by subparagraph (i) or (ii);

(*c*) any two corporations

(i) if they are controlled by the same person or group of persons,

(ii) if each of the corporations is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

(iii) if one of the corporations is controlled by one person and that person is related to any member of a related group that controls the other corporation,

(iv) if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

(v) if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other corporation, or

(vi) if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation.

(5*c*) In subsections (5*a*), (5*d*) and this subsection,

(*a*) "related group" means a group of persons each member of which is related to every other member of the group; and

(*b*) "unrelated group" means a group of persons that is not a related group.

(5*d*) For the purpose of subsection (5*a*)

(*a*) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by whom the corporation is in fact controlled; and

(*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, 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

(*c*) where a person owns shares in two or more corporations, he shall as shareholder of one of the corporations be deemed to be related to himself as shareholder of each of the other corporations.

With respect to the meaning of "controlled" in Section 39(4) Jackett P. in *Buckerfield's Limited et al v. M.N.R.*[1] said at page 302:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation It might, for example, refer to control by "management", where management and the board of directors are separate, or it might refer to control by the board of directors. The kind of control exercised by management officials or the board of directors is, however, clearly not intended by Section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of Section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that in Section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors. See *British American Tobacco Co. v. C.I.R.*, [1943] 1 All E.R. 13, where Viscount Simon, L.C., at page 15, says:
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> > "The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes."
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> See also *M.N.R. v. Wrights' Canadian Ropes, Ltd.*, [1947] A.C. 109 per Lord Greene M.R at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within Section 6 of the *Income War Tax Act*.

I turn now to the first of the particular issues to be determined. This is stated as follows:

> Within the meaning of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended,
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> 1(*a*) during the period commencing on February 1, 1960 and ending on December 31, 1962 did Allied Business Supervisions Limited control Career Girl Store Limited?

Throughout the period mentioned there were three issued shares of Career Girl Store Limited (hereafter referred to as Career Girl) all of which were beneficially owned by Allied Business Supervisions Limited (hereafter referred to as Allied). Two of the three shares were registered in the name of Allied. The other was registered for part of the time in the name of R. N. Hall and during the remainder of the period in the name of Joseph Tomney each of whom in turn was the nominee of Allied. Throughout the period Alexander Aaron was the representative of Allied in respect of its shares in Career Girl and was a director and the president of the latter company. Hall and Tomney in succes-

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

1966

AARON'S (PRINCE ALBERT) LTD. *et al* v. MINISTER OF NATIONAL REVENUE

Thurlow J.

sion were also directors. The articles of association of this company consisted of Table A with certain modifications one of which was:

> 6. That all motions put before any meeting of shareholders or directors of the Company shall require the unanimous consent of all its members, and Paragraphs 46, 76 and 82 of the said Table "A" shall be amended accordingly.

Counsel for the Minister challenged the validity of this article on grounds which are considered later in these reasons with respect to the third issue but for the purpose of considering this issue I shall assume that paragraph 6 is a valid article and that it means *inter alia*, as I think it does, that no decision could be taken by the company in general meeting except by unanimous consent of all the members. On this basis it was submitted that Allied nevertheless "controlled" Career Girl during the period in question since Allied was throughout the period the beneficial owner of the two shares held by itself and of the share held by its successive nominees, that as beneficial owner Allied was entitled to call upon the nominee to transfer the share at any time either to Allied itself or to another nominee and thus to put an end to the existing trust and was further entitled to direct the manner in which the nominee should exercise the rights, including voting rights, attaching to his nominal ownership of the share and that Allied was accordingly at all material times in a position to secure unanimous consent of all shareholders to the decisions which it desired Career Girl to make.

Counsel for the appellants on the other hand submitted that a second shareholder was a continuing necessity, that so far as Career Girl was concerned that shareholder was the sole owner of the share registered in his name and was entitled to vote as he saw fit and that Allied being thus unable to control the vote attaching to the nominee's share was not in a position to enforce unanimous consent to its proposals and was therefore unable to control Career Girl.

But for certain expressions of judicial opinion in somewhat similar situations, I should have thought the solution of the question so raised to be too clear for serious argument. Because of the form of the statutory provisions and of what I conceive to be their purpose I do not think the question is to be approached merely from the point of view

of Career Girl or that it is equivalent to asking: "From the point of view of Career Girl did Allied control Career Girl?" On the contrary since both corporations, and possibly others as well, may be affected by the answer the question is I think to be considered objectively and given the kind of practical answer which a businessman might be expected to give. As I see it the situation is plainly one of the kind at which the statutory provisions appear to be aimed and in the absence of anything to the contrary in the facts it is I think to be taken that the nominee was, in the exercise of the voting right attaching to the share held in his name, subject to the control of Allied. Nor do I think it is reasonable to assume that the nominee in this situation would not carry out the instructions of the beneficiary of the share. Allied thus appears to me to have had through its ownership of the shares control of the votes of all three issued shares of Career Girl and therefore to have controlled the company.

The chief expression of opinion relied on by the appellants in support of their position was that of the House of Lords in *Inland Revenue Commissioners v. J. Bibby and Sons Limited*[1] where the question, which arose on the taxation of a particular company rather than on a question of relationship between companies, was whether the directors of a company "had a controlling interest therein". The directors owned beneficially less than half of the issued shares but some of them held additional shares of which they were trustees, (though not bare trustees), and these shares along with the shares held beneficially gave the directors more than 50 per cent of the voting power in the company. Both in the Court of Appeal[2] and in the House of Lords it was held that the directors had a controlling interest within the meaning of the statutory provision under consideration. In discussing the matter, however, Lord Greene, M.R. in the Court of Appeal expressed the view that the case of shares held by a director as a bare trustee would be different and that the voting power attaching to shares so held would reside in the beneficial owner of the shares. In the House of Lords this view was doubted and the question whether even in such a case the voting power attaching to shares so held would reside in the director

[1] [1945] 1 All E.R. 667. [2] [1944] 1 All E R. 548.

1966

AARON'S (PRINCE ALBERT) LTD. *et al* *v.* MINISTER OF NATIONAL REVENUE

Thurlow J.

holding them (for the purposes of the particular statutory provision) was expressly left open. Thus Lord Russell of Killowen said at page 670:

> It is true that the Court of Appeal except the case of what they describe as a bare trustee, but express a view that the control would reside in the beneficial owner of the shares. The case envisaged is no doubt the case of the director who puts shares into the name of a nominee, taking probably a blank transfer executed by the nominee. I prefer to express no definite opinion in relation to this question, but to keep it as an open question to be debated when the necessity for a decision thereon in fact arises

Lord Simonds also said at page 673:

> Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognized in company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial owner. A clean cut there must be. It is for this reason that, while respectfully concurring in every other line of the judgment of Lord Greene, M.R., I would reserve further consideration of that part of it which deals with the case of the so-called bare trustee. His case is not yet before your Lordships and perhaps never will be. If and when it is, the validity of the distinction made by Lord Greene, M.R., will have to be considered and I should myself require a more satisfactory explanation than has yet been given of a term which, though it has statutory sanction, has never, I believe, received statutory definition.

These expressions would cause me greater hesitation in reaching my conclusion were it not for the difference between the question which required determination in the *Bibby* case and that presented here. Here the question is: Did Allied control Career? If it did that is the end of the matter and as I see it, it matters not whether its control exists by virtue of its ownership of shares in its own name or by virtue of its ownership of shares in the name of its nominee or by a combination of the two. In the *Bibby* case the question was: Did the directors of the company have a controlling interest therein? The directors had the necessary shares and the necessary votes and the answer was accordingly in the affirmative. But there was no question asking: "Did beneficiaries of a trust 'control' or 'have a controlling interest' in the company?" or "Did directors beneficially entitled to shares held by nominees 'control' or 'have a controlling interest' in the company?" It seems to me therefore not to be inconsistent with the judgment in the *Bibby* case that a person beneficially entitled to all the shares of a company might be said to "control" it or to

"have a controlling interest" in it even though all the shares were held in the names of nominees who, if they were the directors, might also be held to "control" or to "have a controlling interest" for the purposes of the provisions considered in the *Bibby* case[1].

A somewhat similar point was put thus in *I.R.C. v. Silverts, Ltd.*[2] by Evershed, M.R., at page 709 in the course of comparing the *Bibby* case with that of *British American Tobacco Co. Ltd. v. I.R.C.*[3].

> It is, no doubt, true to say that their Lordships in the *Bibby* case had not before them the special case of a trust with custodian and managing trustees, but we see no distinction in principle between that case and the case (say) of an ordinary settlement of shares containing a stipulation that the trustees (as registered holders of the settled shares) should at all times vote in accordance with the directions of the tenant for life. A stipulation of that kind clearly falls to be disregarded under the *Bibby* decision, and the statutory control accorded to the managing trustees over their custodian trustee is equally *res inter alios* so far as the company is concerned.
>
> In our opinion, this result involves no conflict with the *British American Tobacco* case Although (as already stated) the formula "controlling interest" ought to be treated as being used in the same sense in the Acts of 1937 and 1939, namely, in the ordinary sense of the English language, yet (as observed by Romer J.) the questions posed in the *British American Tobacco* case and in the *Bibby* case were different. In neither case was the question the general one: "Who controls the company?" In the *British American Tobacco* case the question was whether (in the ordinary and proper sense of the words) company A held a controlling interest in company C, though the control was exercised, not directly but indirectly through the agency of company B. If the question were raised under some other taxing provision: "Has company B a controlling interest in Company C?" an affirmative answer to that question might be given consistently with the affirmative answer to the first question in the *British American Tobacco* case. So, in the *Bibby* case and in the present case, the question: "Have the directors a controlling interest in the company?" falls to be answered, aye or no, without regard to the possible question (if asked) whether some other person or body has (indirectly) a controlling interest in the same company.

Moreover the statement of Lord Simonds in the *Bibby* case that "Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control" appears to me to imply that a person, to whose external control a shareholder who can control a company is amenable, is himself in

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[1] Compare Cameron J, in *Vancouver Towing Co. Ltd. v. M.N.R.* [1946] Ex. C.R. 623 at 631.

[2] [1951] 1 All E R 703.

[3] [1943] 1 All E R. 13.

1966

AARON'S (PRINCE ALBERT) LTD. *et al* *v.* MINISTER OF NATIONAL REVENUE

Thurlow J.

control of the company, as well. The only difference between the control of such a person and that of the nominal shareholder appears to me to be that the shareholder has the right to control by exercising the voting rights attaching to the shares while the person to whom he is amenable has the right to control by externally controlling the exercise by the shareholder of the voting rights attaching to the shares held in his name. The present case accordingly appears to me to resemble the *British American* case more closely than the *Bibby* and *Silverts* cases and to be distinguishable from them.

This view may not be entirely consistent with the view of the scope of the *British American* case later expressed by the Court of Appeal in *S. Berendsen Ltd. v. C.I.R.*[1] but it seems to me to be in harmony with the view of the Supreme Court of Canada in *M.N.R. v. Sheldon's Engineering Limited*[2]. In that case the question was whether at a particular time Sheldon and Egoff controlled a company. They held proxies from McKay and Baird who were the registered owners of a majority of the shares which they held as nominees of their employer, the Royal Bank of Canada. In this Court[3] Potter J., said at page 519 :

> No authorities were cited by either side relative to the legal effect of control of a meeting of a company by proxies, and the weight of authority is that it is the total of the voting power or shares in the hands of those persons who own the shares that gives control.
>
> A company which holds shares in another company must vote at meetings of such other company by the use of proxies. Nevertheless, on the authorities, particularly the statement of the law by Viscount Simon, L.C., in *British American Tobacco Company v. Inland Revenue Commissioners* it is the holding of the majority of the shares by which one company controls another, and it was not suggested that, because the company holding the majority of shares in another named proxies to vote them, the company was controlled by the proxy holders.
>
> I therefore hold that neither W. D. Sheldon, Jr., George Murray Egoff, Harold William Mogg, nor William Clark Caldwell was a person who controlled directly or indirectly the old company at the time approval was given to the agreement of July 4, 1949, and its execution authorized on behalf of the old company.

In the Supreme Court, however, Locke J., who delivered the unanimous opinion of the Court appears to have gone

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[1] [1958] Ch. 1. See also the remarks of Viscount Simonds in *Barclays Bank Ltd. v. I R.C.* [1960] 2 All E R. 817 at 821.

[2] [1955] S.C.R. 637.

[3] [1954] Ex. C.R. 507.

further and to have held that control was in the Royal Bank of Canada when he said at page 644:

> W. D Sheldon, Jr. alone, did not, nor did he, together with his three associates Egoff, Caldwell and Mogg, control the old company at the time on July 4, 1949, when the resolutions and by-laws authorizing the sale to the new company were adopted by the directors and subsequently confirmed by the shareholders. I cannot accept the contention advanced on behalf of the Minister that, by reason of s. 73 of the *Companies Act* (R S O. 1937, c. 251), Sheldon was entitled to vote upon the shares standing on the share register of the company in the names of McKay and Baird. That section, in my opinion, has no application to a case in which, in addition to the instrument of hypothecation, an actual transfer of the shares to the creditor has been made. It would require an express provision in the *Companies Act* to authorize any person other than a shareholder or a proxy to vote at meetings of the company.
>
> At the time these steps were taken by the old company, *it was completely controlled by the bank.*

(Italics added).

And at page 645:

> While the arrangements which were carried into effect at the meetings of the two companies on July 4 were made in advance and, no doubt, included settling the consideration to be paid for the depreciable assets, *it was the bank and not Sheldon, Jr., either alone, or together with his associates, that was in command of the old company after June 21.*

(Italics added).

This view appears to coincide with that expressed by Denning L.J., in *Barclays Bank Ltd. v. I.R.C.*[1] when he said at page 832:

> A man has control of a company not only when he has the majority voting power by means of shares in his own name; but also when he has it by means of shares in the name of a nominee; and also when he has it by means of some shares in his own name and other in the name of a nominee

The views of Denning L.J., on this point differed from those of the majority but the views of the latter are in my opinion inapplicable in the present situation since under the English statute there under consideration the question was posed from the point of view of the taxpayer company. As already indicated I do not think this is the correct approach in determining control for the purpose of ascertaining whether companies are "associated" for the purposes of section 39 of the *Income Tax Act*.

A further case relied on by the appellants was *Rubenstein v. M.N.R.*[2] but as I was informed that that case is

[1] [1960] 2 All E.R. 817.

[2] (1965) 39 Tax A.B.C. 7.

1966

AARON'S (PRINCE ALBERT) LTD. *et al* v. MINISTER OF NATIONAL REVENUE

Thurlow J.

presently under appeal to this Court I think it better to refrain from commenting on it beyond observing that it did not arise under section 39.

For the reasons which I have stated I am of the opinion that Allied Business Supervisions Limited was in a position to control all the voting power of Career Girl Store Limited and that the question posed by the issue as stated should be answered in the affirmative.

The second issue, numbered 1(*b*) in the order is:

> Within the meaning of the *Income Tax Act* R.S C. 1952, c. 148, as amended,
>
> 1(*b*) during the period commencing on February 1, 1960 and ending on December 31, 1962 did Aaron's (Saskatoon) Ltd. or Aaron's (Saskatoon) Ltd. and Morgans Ltd. together control Aaron's Renfrew Furs Ltd ?

Throughout the period mentioned there were 6,250 issued shares of Aaron's Renfrew Furs Limited (hereafter referred to as Renfrew) 750 of which were owned beneficially by and registered in the name of Morgans Limited and 5,499 of which were beneficially owned by and registered in the name of Aaron's (Saskatoon) Limited (hereafter referred to as Saskatoon). The remaining share as well was beneficially owned by Saskatoon and during the period was successively registered in the names of Peter A. Mahon, Roy N. Hall and Joseph Tomney in each case as nominee of Saskatoon. The articles of association of Renfrew were similar to those of Career Girl Store Limited and also contained as number 6 a provision requiring unanimous consent of all members for any decision taken in a general meeting.

In respect of this issue counsel put forward the same arguments as had previously been advanced in respect of the first issue and in particular those with respect to the validity of the requirement for unanimous consent and to the right to control through the voting power of the nominee shareholder.

For the reasons already stated with respect to the first issue I am of the opinion that at all material times Morgans controlled 750 votes and Saskatoon controlled 5,500 votes, that when combined the votes of these two companies amounted to complete control of Renfrew and that the question posed by the issue should be answered in the affirmative.

As the next two issues, numbered 1(*c*) and 1(*d*) in the order, are concerned with the control of the same company and raise the same problem they may be considered together. These issues are:

1. Within the meaning of the *Income Tax Act* R.S.C. 1952, c. 148, as amended,

(*c*) during the period commencing on February 1, 1960 and ending on July 14, 1961 did Isidore Aaron and Alexander Aaron together control Aaron's Ladies Apparel Limited.

(*d*) during the period commencing on July 14, 1961 and ending on December 31, 1962 did Aaron's (Prince Albert) Limited control Aaron's Ladies Apparel Limited?

The issued share capital of Aaron's Ladies Apparel Limited (hereafter referred to as Ladies Apparel) consisted of 1,008 common shares of which during the period mentioned in 1(*c*) 349 shares were held by Isidore Aaron, 349 by Alexander Aaron and 310 by Margaret Pratt each being the registered and beneficial owner of the shares so held. Isidore Aaron and Alexander Aaron are brothers. In the period mentioned in 1(*d*) the 698 shares formerly held by Isidore Aaron and Alexander Aaron were beneficially owned by and registered in the name of Aaron's (Prince Albert) Limited (hereafter referred to as Prince Albert).

The articles of association of Ladies Apparel provided:

6. That all motions put before any meeting of shareholders or directors of the Company shall require the unanimous consent of all its members, and Paragraphs 46, 76 and 82 of the said Table "A" shall be amended accordingly.

and the sole question for determination on these issues is whether this article is valid and thus requires, as it purports to do, that unanimous consent of all members of the company be obtained for any decision to be taken by the shareholders. If so, it is plain that the questions must be answered in the negative for at all material times there were 310 shares held by Margaret Pratt the votes of which were not controlled by Isidore Aaron or Alexander Aaron or by Prince Albert. On the other hand, if, as contended on behalf of the Minister, article 6 is invalid, it is equally clear that both questions must be answered in the affirmative.

Briefly, the Minister's contention is that article 6 is repugnant to section 14(*b*) of the *Interpretation Act*[1] of

[1] R.S.S., 1953, c. 1.

1966

AARON'S (PRINCE ALBERT) LTD. *et al* v. MINISTER OF NATIONAL REVENUE

Thurlow J.

the Province of Saskatchewan, and that it is also inconsistent with a number of sections of the *Companies Act*[1] which specifically authorize or require certain things to be done by "special resolution" an expression which is defined in the statute as being a resolution which *inter alia* is passed by a majority of not less than three-fourths of the members.

Section 14(*b*) of the *Interpretation Act* provides:

14. In an Act words making a number of persons a corporation shall:

(*b*) vest in a majority of the members of the corporation the power to bind the others by their acts;

Similar wording is also to be found in the *Interpretation Act*[2] of Canada. According to Wegenast on Canadian Companies, page 218, this provision is probably intended merely to embody the common law rule.

By section 3 of the Saskatchewan statute it is enacted that:

3. (1) This Act extends and applies to every Act and every regulation now or hereafter enacted or made, except in so far as any provision of this Act:

(*a*) is inconsistent with the intent or object of the Act or regulation;

(*b*) would give to any word, expression or clause of the Act or regulation an interpretation inconsistent with the context thereof or the interpretation section of the Act or regulation or;

(*c*) is by the Act or regulation declared not applicable thereto.

In view of this provision I do not think that section 14(*b*) was intended to override the right, which section 18[3] of the *Companies Act* appears to give to persons seeking incorporation of a company, to adopt such regulations for the government of their proposed company as they think fit. The fact that the rule to which Wegenast refers as the "common law rule" is enacted in section 14(1) will thus not serve to render article 6 invalid if it would not otherwise be invalid.

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[1] R.S.S., 1953, c. 124. [2] R.S.C., 1952, c. 158, s. 30.

[3] 18. (1) There may be registered with the memorandum articles of association prescribing regulations for the company, and such articles may adopt all or any of the regulations contained in table A in the first schedule.

(2) If the articles are not registered or, if articles are registered, in so far as the articles do not exclude or modify the regulations in that table, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

On the general question whether such an article is valid or not there is a surprising dearth of authority and I was not referred to any case, nor have I been able to find any, in which the point has been decided. On principle, however, I am unable to see any good reason why it should be invalid. By section 24(1) of the *Companies Act* it is provided that:

> 24 (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they had been respectively signed and sealed by each member, and contained covenants, on the part of each member, his heirs, executors and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

If the incorporators of a company or the members of a company wish to have the company's affairs conducted only to the extent that all members agree, and therefore take steps to so provide in the articles of the company the article so providing becomes a contract between them and the company and there appears to me to be no reason why such a contract should not be valid and enforceable.

The nature of articles of association was described by Duff J. (as he then was) as follows in *Theatre Amusement Co. v. Stone*[1].

> The articles of association are binding upon the company, the directors and the shareholders, until changed in accordance with the law. So long as they remain in force, any shareholder is entitled, unless he is estopped from taking that position by some conduct of his own, to insist upon the articles being observed by the company, and the directors of the company. This right he cannot be deprived of by the action of any majority In truth, the articles of association constitute a contract between the company and the shareholders which every shareholder is entitled to insist upon being carried out.

That an article can restrict the right of a mere majority to bind the minority by an ordinary resolution appears from *Quin & Axtens Ltd. et al v. Salmon*[2]. In that case the articles of a company provided that the business of the company was to be managed by the directors who might exercise all the powers of the company subject to such regulations as might be prescribed by the company in general meeting. Another article provided that no resolution of the directors having for its object the acquisition or letting of premises should be valid if either of two particular directors should dissent. A resolution of the kind mentioned was passed by the directors with one of the two particular

[1] (1915) 50 S C.R. 32 at p. 36 [2] [1909] A C. 442

1966

AARON'S (PRINCE ALBERT) LTD. *et al* v. MINISTER OF NATIONAL REVENUE

Thurlow J.

directors dissenting but it was subsequently approved by a majority of the shareholders in general meeting. The House of Lords held the resolution ineffective and void on the ground that so long as the article remained unrepealed it governed the situation and the vote of a mere majority of the shareholders in general meeting could not override it.

The case of *Edwards v. Halliwell*[1] appears to me to be to the same effect.

The point also seems to have been taken for granted in *North-West Transportation Company, Limited v. Beatty*[2] where Sir Richard Baggallay in delivering the judgment of the Privy Council said:

> The general principles applicable to cases of this kind are well established. *Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated,* the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority,...

(Italics added).

On the other hand I have not found in the cases which I have examined any statement which appears to proceed on the assumption that it is not open to incorporators of a company to provide by the articles that something more than a mere majority should be required in order to bind the minority or that unanimous consent of the members should be required for any decision to be taken by the company.

On the whole therefore I am of the opinion that article 6 is not repugnant to section 14(*b*) of the *Interpretation Act* and that there is nothing in its nature or substance which renders it invalid as a contract between the shareholders and the company or as an article of the company. Nor do I think such an article is inconsistent with the various provisions of the *Companies Act* which provide what may and what must be done by special resolution since the definition of the majority required to pass a special resolution merely prescribes minimum requirements for such a resolution. I shall therefore hold that article 6 is valid and it follows from this that the question posed by the two issues numbered 1(*c*) and 1(*d*) must be answered in the negative.

In the remaining three particular issues defined in the order the question of control turns on whether the person

[1] [1950] 2 All E.R. 1064. [2] (1887) 12 App. Cas. 589 at p. 593.

named in the issue, in addition to the votes to which he was entitled as shareholder, had the right to control the company by the exercise of a casting vote in the case of an equality of the other votes. In each of the three companies the votes of a majority were, under the articles, sufficient to carry an ordinary resolution of shareholders and in each case the articles provided for a casting vote exercisable by the chairman of the meeting in the case of a tie. While this is a point on which opinion may differ, offhand I should have doubted that control arising in that way, if it can be considered to be control at all, was within the meaning of the word "controlled" in section 39(4) of the *Income Tax Act*[1] since the situation seems not to be one of the kind at which I think the provision is aimed and since the casting vote, unlike the votes arising from shareholding, which are exercisable without responsibility to the company or to other shareholders, is, in my opinion, not the property of the holder, but is an adjunct of an office. However, in view of the conclusion which I have reached on the facts respecting the three issues it is not necessary for me to reach a concluded opinion on the question.

The first of these issues, numbered 2(*a*) in the order, is:

Within the meaning of the *Income Tax Act* R.S.C. 1952, c. 148, as amended,

2(*a*) during the period commencing on February 1, 1960 and ending on December 31, 1962 did Alexander Aaron control Allied Business Supervisions Limited?

Throughout the period mentioned Alexander Aaron owned 50 per cent of the voting shares. The remaining shares were owned by Joseph Tomney and Roy N. Hall, until December 20, 1962, when Tomney became the owner of the shares formerly held by Hall. Until December 20, 1960, when Roy N. Hall resigned, all three were directors. The articles provided:

46 In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote

[1] *Vide* Jackett P., in *Buckerfield's Ltd. v. M.N.R.* [1965] 1 Ex. C.R. 299 at 303: "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".

1966

AARON'S (PRINCE ALBERT LTD. *et al* *v.* MINISTER OF NATIONAL REVENUE

Thurlow J.

48 On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is a holder.

41. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

42. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

To determine whether Alexander Aaron had the right to a casting vote at meetings of shareholders it is therefore necessary to ascertain if he was the chairman of the board of directors of the company. Article 79 provided:

79. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but, if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting

The minute book of the company shows that at a general meeting of shareholders held on December 17, 1959, Alexander Aaron and Joseph Tomney were elected directors and that it was resolved that directors should hold office for an indefinite period until their term of office should be changed by a subsequent shareholders meeting. The minutes recited that "Alexander Aaron acted as chairman". At a further meeting of the directors held later on the same day Alexander Aaron was elected as president and Joseph Tomney was elected as secretary. The president and secretary were then authorized to sign certain documents on behalf of the company. The minutes recite that "the meeting was called to order with Alexander Aaron as chairman". Between that date and December 31, 1962, the minute book records minutes of four meetings of the directors and five meetings of the shareholders in each case either reciting that "the meeting was called to order with Alexander Aaron as chairman" or that "Alexander Aaron acted as chairman". In the minutes of a further meeting of the directors there is no mention of who, if anyone, acted as chairman. Nowhere in the recorded minutes is there record of an election of Alexander Aaron as chairman for any term or of any determination of the period for which a chairman was to hold office. Accordingly while it is clear that Alexander Aaron was in fact chairman during the several meet-

ings recorded in the minutes there is no record of his being elected to the office of chairman of the board of directors for any defined term.

Counsel for the Minister submitted that while there is no minute showing the election of Alexander Aaron as chairman of the board of directors his election to that office should be inferred from the fact that on each of the occasions mentioned he appears to have acted as chairman and that the fact that there is no minute of such an election is not significant. While the minutes may be taken as binding the particular company in respect of the matters recited in them it is worthy of note that in each case these minutes are signed by all the shareholders and directors concerned and having regard to the not uncommon practice by which minutes are signed reciting meetings which are never held I do not think that any inference can safely be drawn from the recitals contained in them. In my view there is no basis for reaching the conclusion that Alexander Aaron was ever elected chairman of the board of directors otherwise than for particular meetings or that he was entitled, by virtue of any such election, to be chairman of any general meeting of the shareholders.

It was also submitted that Alexander Aaron was chairman of the board of directors and entitled to preside at shareholders meetings by virtue of his having been appointed president of the company for an indefinite term and in support of this position reference was made to the remarks of Masten J.A., in *Fremont Canning Co. et al v. Wall & Fine Foods of Canada Limited*[1]. The office of president, however, is nowhere mentioned in the Saskatchewan statute or in the articles of the company and in this respect the Dominion, Ontario and Quebec companies legislation differs from that in provinces having company legislation similar to that in England[2]. There being no definition in the articles of Allied of the duties or powers of an officer to be known as the president, it must I think be taken that the only authority conferred on him was that contained in the minutes of the meeting at which he was appointed,

[1] [1941] 3 D.L.R. 96 at 107.

[2] *Vide* Rand J., in *Ghimpelman et al v. Bercovici et al* [1957] S.C.R. 128 at 135.

1966

AARON'S (PRINCE ALBERT) LTD. *et al* v. MINISTER OF NATIONAL REVENUE

Thurlow J.

consisting of authority to sign certain particular documents on behalf of the company, and I can see no basis upon which it can be said that he was, by his appointment as president, constituted the chairman of the board of directors for an indefinite period. In my opinion, therefore, it cannot be said that Alexander Aaron was entitled to be the chairman at any meeting of shareholders that might have been called and to exercise a casting vote in the case of a tie. Regardless, therefore, of whether the right to such a casting vote could be considered as giving him control of the company, I am of the opinion that Alexander Aaron did not control Allied during the period mentioned in the issue as stated and that the question posed by the issue must be answered in the negative.

The next issue, numbered 2(*b*) in the order, is:

> Within the meaning of the *Income Tax Act* R.S.C. 1952, c. 148, as amended,
>
> 2(*b*) during the period commencing on February 1, 1960 and ending on December 31, 1962 did Anne Aaron control Miller Building Limited?

During the period mentioned there were 150 issued shares of Miller Building Limited, 75 of which were held by Wilma, Georgina, Edward and Frank Rawlinson and 74 of which were held by Anne Aaron. The remaining share was also owned by Anne Aaron but was registered in the name of her husband, Alexander Aaron, who was her nominee and held the share under the terms of a trust agreement by which he bound himself to vote according to her direction. The articles of association of this company appear to have consisted of Table A without alteration and contained provisions similar to those already cited in describing the articles of Allied Business Supervisions Limited. Again there is no record of anyone having been appointed chairman of the board of directors, though in what purport to be the minutes of annual meetings of the shareholders held in 1959, 1960, 1961 and 1962 Alexander Aaron is named as having been chairman of the meeting. These minutes also record that Alexander Aaron, E. A. Rawlinson and F. F. Rawlinson were annually elected to be the directors of the company. It is also recorded in what purport to be minutes of meetings of the directors held annually on the same days as the annual meetings of shareholders that A. A. Aaron

was each year elected president but there is no record of anyone having acted as chairman of such meetings. There being three directors Alexander Aaron clearly was not in a position to make himself chairman of the directors.

For the reasons already discussed, I am of the opinion that it cannot be said that Anne Aaron or Alexander Aaron was entitled to be chairman of meetings of shareholders and thus to a casting vote at such meetings. Moreover, while Alexander Aaron may have been bound to cast the vote to which he was entitled as a shareholder in accordance with such directions as Anne Aaron might give him, it is I think apparent that even when he was acting as chairman, (if indeed there ever was a meeting), and even if he was entitled to be the chairman of shareholders meetings and thus entitled to a casting vote in case of a tie he was not bound to cast that vote in accordance with directions given him by Anne Aaron. Accordingly I am of the opinion that it cannot be said that Anne Aaron controlled Miller Business Limited during the period mentioned in the issue as stated and that the question posed by the issue must be answered in the negative.

The remaining particular issue, numbered 2(*c*) in the order, is:

> Within the meaning of the *Income Tax Act* R.S.C. 1952, c. 148, as amended,
>
> 2(*c*) during the period commencing on February 1, 1960 and ending on December 11, 1961 did Alexander Aaron and Isidore Aaron together control Aaron Building Limited?

During the period mentioned there were 2,000 issued shares of Aaron Building Limited, 1,000 of which were held by Abraham Isaac Katz, 500 by Alexander Aaron and 500 by Isidore Aaron. The articles of association consisted of Table A with certain amendments and contained provisions similar to those already cited in describing the articles of Allied Business Supervisions Limited. Again, there is no record of anyone having been appointed chairman of the board of directors. In what purport to be the minutes of a general meeting of shareholders held on December 28, 1959 it is recited that Alex Aaron acted as chairman. In what purport to be minutes of a meeting of provisional directors held earlier the same day it is also recited that he acted as chairman and in minutes of a further meeting of the direc-

1966

AARON'S (PRINCE ALBERT) LTD. *et al* v. MINISTER OF NATIONAL REVENUE

Thurlow J.

tors held still later on the same day it is recited that the meeting was called to order with Alex Aaron as chairman, and that Isidore Aaron was elected as president. There is no record of minutes of any further meeting of shareholders or directors until December 11, 1961, when in minutes of a meeting of directors it is again recited that Alex Aaron acted as chairman. For reasons similar to those already stated with respect to Allied Business Supervisions Limited I am of the opinion that it cannot be said that Alex Aaron or Isidore Aaron was entitled to be chairman of meetings of shareholders and thus to a casting vote in case of a tie and therefore that it cannot be said that Alexander Aaron and Isidore Aaron together controlled Aaron Building Limited during the period mentioned in the issue as stated. It follows that the question posed by the issue must be answered in the negative.

This brings me to the more general issue, numbered 3 in the order to be resolved on the basis of the answers to the particular issues and the admissions made by the parties. It reads:

> 3. Are any one or more of the Appellants or Aaron Investments Limited associated with each other during the 1961 and 1962 taxation years and if so, which of the Appellants are associated with each other or with Aaron Investments Limited during each of the said taxation years.

This poses a complicated question but it was indicated by counsel in the course of argument that the results to follow from the answers to the particular issues on the alleged associations between the companies would not be contentious once the answers were known. As at present advised the position appears to me to be as follows.

1. In view of the answer to issue 1(*a*), that Allied Business Supervisions controlled Career Girl Store Limited from February 1, 1960 to December 31, 1962, these two corporations were "associated" by virtue of section 39(2)(*a*) during both the 1961 and 1962 taxation years.

2. It is admitted that Isidore Aaron controlled both Aaron's (Saskatoon) Limited and Morgans Limited in both the 1961 and 1962 taxation years and that they were associated companies and on the basis of the answer which I have given to issue 1(*b*), that these two companies together controlled Aaron's Renfrew Furs Limited from February 1,

1960, to December 31, 1962, counsel for the appellants agreed that these three corporations were "associated" with each other during both taxation years.

3. In view of the answers to:

(*a*) issue 1(*c*), that Aaron's Ladies Apparel Limited was not controlled by Isidore Aaron and Alexander Aaron together from February 1, 1960 to July 14, 1961, and to:

(*b*) issue 1(*d*), that Aaron's Ladies Apparel Limited was not controlled by Aaron's (Prince Albert) Limited, (which was admittedly controlled by Alexander Aaron), during the period from July 14, 1962 to December 31, 1962, there is no basis for holding Aaron's Ladies Apparel Limited associated with any other company during the 1961 or 1962 taxation years.

4. In view of the answer to issue 2(*a*), that Allied Business Supervisions Limited was not controlled by Alexander Aaron during the period from February 1, 1960 to December 31, 1962, there is no basis for holding Allied to have been associated with any company other than Career Girl Store Limited during the 1961 and 1962 taxation years.

5. Miller Building Limited and Miller Men's Wear Limited were admittedly associated companies. In view of the answer to issue 2(*b*), that during the period from February 1, 1960 to December 31, 1962, Miller Building Limited was not controlled by Anne Aaron there is no basis for holding Miller Building Limited or Miller Men's Wear Limited associated with any of the other companies during the 1961 and 1962 taxation years. Even if the answer had been in the affirmative I should have been unable to see how the assumed association with any company controlled by Alexander Aaron could be supported under section 39(4)(*c*) since Anne Aaron "owned" no share in any company controlled by Alexander Aaron and Alexander Aaron "owned" no share in Miller Building Limited.

6. In view of the answer to issue 2(*c*), that during the period from February 1, 1960 to December 11, 1961, Aaron Building Limited was not controlled by Alexander Aaron and Isidore Aaron together, there is no basis for holding that company to have been associated with any of the other companies during the 1961 taxation year.

1966

AARON'S (PRINCE ALBERT) LTD. *et al* *v.* MINISTER OF NATIONAL REVENUE

Thurlow J.

If these conclusions are not in accord with the views of counsel or are insufficient to dispose of the appeals the matter, as well as the matter of costs, may be spoken to when application is made to settle the judgments. The judgments will not be pronounced in the meantime. Subject to this the appeals will be allowed with costs and the re-assessments will be referred back to the Minister for reconsideration, re-allocation pursuant to subsections 3 and 3(*a*) of section 39 of the *Income Tax Act* where necessary, and re-assessment on the basis of the conclusions in the next preceding six numbered paragraphs.