

Zehnder & Co. (Appellant) v. Minister of National Revenue (Respondent)

Kerr J.—Halifax, November 13, 14, 1969; Ottawa, February 6, 1970.

Income tax—Residence of company—Shipping company incorporated in Canada—Shipping operations managed abroad—Head office in Canada—Officers and directors resident in Canada—Actual control exercised by beneficial owners abroad.

The R company which was incorporated in Canada in 1948 carried on a shipping business through managers in England. The R company had its head office first in Montreal, later in Halifax, N.S., and there it kept its register of members, minute books, corporate seal, maintained a bank account, issued share certificates and held directors' meetings. The majority of the R company's shares were held by appellant as nominee for H. Both appellant and H were resident in England. The R company had five directors, all of whom resided in Halifax. Three of the directors, who were also the company's principal officers, held shares in the R company but these were beneficially owned by appellant. The officers and directors of the R company carried out their duties as officers and directors upon the instructions of H or members of his family.

Held (affirming an income tax assessment for 1964), the R company was resident in Canada in 1964 within the meaning of s. 2(1) of the *Income Tax Act*; it was not necessary to determine whether it was also resident elsewhere. The R company's directors exercised management and control in Canada over the company's essential affairs even though they did so in carrying out instructions given in England by H and his family.

De Beers Consolidated Mines Ltd v. Howe [1906] A.C. 455, applied; *M.N.R. v. Crossley Carpets (Can.) Ltd* [1968] C.T.C. 570; *Bullock v. Unit Construction Co.* (1959) 38 T.C. 713, referred to.

INCOME tax appeal.

R. H. Rhude, Q.C., and D. H. McDougall, for appellant.

G. W. Ainslie, Q.C., and C. D. MacKinnon, for respondent.

KERR J.—This is an appeal from the decision of the Tax Appeal Board dated June 21, 1968, in respect of the income tax assessment of the appellant for its 1964 taxation year for tax on its portion of undistributed income of Rex Shipping Company Limited, hereinafter called "Rex", on hand as of March 31, 1964.

At all relevant times the appellant was a shareholder of Rex and was not a resident of Canada.

The issue is whether Rex was a person resident in Canada within the meaning of section 2(1) of the *Income Tax Act*, at the time relevant to the assessment. If Rex was such a person, the appellant is liable to pay the assessed tax as a non-resident shareholder of Rex. The respondent says that Rex was such a person resident. The appellant says the contrary.

On the issue of the residence of Rex the following sections of the Act are pertinent:

2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.

139(4a)¹ For the purposes of this Act, a corporation incorporated in Canada shall be deemed to have been resident in Canada throughout a taxation year if it carried on business in Canada at any time in the year.

Rex was incorporated under the *Companies Act* of Canada as a private company by Letters Patent dated December 23, 1948. It acquired and operated 4 cargo vessels, the S.S. *Belwoods Park* (renamed *Brookhurst*), *Port Royal Park* (renamed *Fernhurst*), *Fort Miami* (renamed *Midhurst*) and *Banff Park* (renamed *Oakhurst*).

The vessels were 4 of 58 initially acquired by Acadia Overseas Freighters Limited under an agreement (Exhibit A-1) dated November 20, 1947, between Acadia and His Majesty the King, in right of Canada, through War Assets Corporation. Acadia assigned its right in relation to these 4 vessels to Rex by an agreement (Exhibit A-4) dated May 2, 1949, between Acadia and Rex.

Under this assignment agreement Rex undertook to perform all Acadia's obligations under the original agreement insofar as they related to these 4 vessels. One of the conditions was that, except with the prior written approval of His Majesty the King in right of Canada, the vessels were to be operated under Canadian registry.

By another agreement (Exhibit A-5) between His Majesty the King, Acadia and Rex, dated May 2, 1949, His Majesty consented to the said assignment and Rex covenanted to keep the vessels under Canadian registry.

By subsequent agreements in 1950 between His Majesty the King, Rex and the Canadian Maritime Commission, approval was given by His Majesty to the operation of the vessels under United Kingdom registry and Rex covenanted that at all times while the vessels were under United Kingdom registry it would appoint and employ a manager in the United Kingdom. Pursuant thereto, by an agreement (Exhibit A-10) dated April 27, 1950, between Rex and Hadjilias & Company Limited, of London, England, Rex appointed that company to be manager of the vessels with power to act as managing owners and ships husbands of the vessels, with broad powers, *inter alia*, on behalf of Rex to enter into agreements for the employment of the vessels, to receive freight revenue and other moneys arising out of their operation and to make disbursements in relation to them and to discharge

¹ As enacted 1960-61, c. 49, s. 38(6), applicable to the taxation year concerned. It was amended 1965, c. 18, s. 28(4), applicable to the 1965 and subsequent taxation years to read as follows:

139(4a) For the purposes of this Act, a corporation shall be deemed to have been resident in Canada throughout a taxation year if

- a) in the case of a corporation incorporated after April 26, 1965, it was incorporated in Canada; and
- b) in the case of a corporation incorporated before April 27, 1965, it was incorporated in Canada and, at any time in the taxation year or at any time in any preceding taxation year of the corporation ending after April 26, 1965, it was resident in Canada or carried on business in Canada.

such functions as the Board of Directors of Rex would prescribe, with a proviso that in the exercise of their powers the managers "shall at all times as may be necessary or expedient act in consultation with such Board of Directors". Hadjilias & Company Limited also covenanted to keep detailed books, accounts and records in connection with the vessels and to provide all such information as may be required by the Canadian Maritime Commission and the Foreign Exchange Control Board of Canada, and to remit excess money to Rex in Canada from time to time. The agreement also provided for remuneration to Hadjilias & Company Limited for services. That company operated the vessels pursuant to the management agreement and remitted moneys to Rex in Halifax thereunder.

There were mortgages on the vessels to secure payment of the purchase price, and interest, to His Majesty the King, in right of Canada. The Canadian Maritime Commission and the Foreign Exchange Control Board were interested in that and other respects in the operation of the vessels.

It is convenient now to set forth the following facts which were admitted at the trial by counsel for the appellant pursuant to a Notice to Admit Facts:

1. The Appellant, Zehnder and Company, has for its address Zurich, Switzerland.

2. The Appellant is shown on the share register as the owner of 469 common shares in Rex Shipping Company Limited (hereinafter called "Rex") of the 505 issued common shares issued.

3. Rex was incorporated by Letters Patent on December 23rd, 1948, pursuant to the *Companies Act*, Stats. Can. 1934.

4. By the Letters Patent authorized capital of Rex was stated to be \$500,000.00 divided into 3,500 preference shares of \$100.00 each and 1,500 common shares of \$100.00 each.

5. At the time of its incorporation the Head Office of Rex was in the City of Montreal, in the Province of Quebec, Canada.

6. That the following provisional directors were all resident in Canada:

Lucien Beauregard, K.C.

Jean Brisset

L. S. Reycraft

Jules Y. Beauregard

J. O. Brunelle

7. At a meeting on May 2nd, 1949, held at Room 33, 240 St. James Street West, Montreal, Province of Quebec, at three-thirty in the afternoon, the provisional directors resigned and the following persons were elected as directors of Rex:

Emanuel E. Hadjilias

Nicholas E. Kulukundis

Leonidas Adrianopoulos

George P. Hadjilias

Basil Salamis

8. At a meeting of the directors on March 10th, 1950, the persons referred to in paragraph 7 resigned as directors of Rex and the following persons were elected as directors of Rex:

Harry I. Mathers, President and Director

Evatt R. Mathers, Vice-President and Director

George D. Webb, Secretary and Director

Arthur Atkinson, Director

G. L. Payne, Director

The above persons have at all material times been residents of Canada.

* * *

11. At the time relevant to the period in question, the shareholders in Rex were as follows:

<i>Shareholder</i>	<i>Common shares</i>	<i>Preference Shares</i>
H. I. Mathers	2	—
Evatt R. Mathers	1	—
George D. Webb	1	—
G. Tidgwell	1	—
P. B. Sifneos	10	20
Z. A. Sifneos	10	20
Maria Sifneos	2	6
Rita Sifneos	3	5
Janette Sifneos	3	6
Dr. P. E. Sifneos	3	6
Zehnder and Company	469	937

* * *

13. All share certificates issued by Rex have been executed in Halifax or Montreal by one or more of the Canadian directors.

* * *

17. No register of members of the Appellant or branch register of members of the Appellant has ever been kept or maintained outside the Province of Nova Scotia or Quebec.

18. The minute book containing the minutes of meetings of the Board of Directors and members of Rex has at all times been kept within the Province of Nova Scotia or Quebec.

19. The corporate seal of the Appellant has at all times been kept within the Province of Nova Scotia or Quebec.

20. From the 6th of June, 1950, until the present Rex has maintained a current bank account with a Head Office of the Bank of Nova Scotia, located in Halifax.

21. All cheques drawn on this account have been signed by two of the Canadian directors.

22. Two of the Canadian directors, upon receipt of the bank statement would execute the bank's form of settlement of balances and release.

* * *

30. The agreement³ between His Majesty the King and Rex dated the 2nd day of May, 1949 (and filed as Exhibit A-5 before the Tax Appeal Board) was executed by two of its Canadian directors in the City of Halifax.

31. The agreement³ between Rex and Acadia Overseas Freighters Limited dated May 2nd, 1949, was executed in Canada.

32. The agreement⁴ between H.M. the King, the Canadian Maritime Commission and Rex (re S.S. Fort Miami) dated April 14th, 1950, was executed within the Province of Nova Scotia by two of the Canadian directors of Rex (and was filed in the Tax Appeal Board as Exhibit A-6 in *Janet Sifneos v. M.N.R.*).

33. In 1950 Rex purchased from Crown Assets Disposal Corporation a 10,000 dead weight ton dry cargo vessel known as S.S. "Fort Miami". In the bill of sale Rex was described as having its principal place of business in the City of Halifax.

34. In the mortgage which was given by Rex at the time of purchase of the S.S. "Fort Miami" Rex described itself as

"a body politic and corporate having its head office and principal place of business at 10 Prince Street in the City of Halifax in the Province of Nova Scotia, Canada."

³ Exhibit A-5 in Exchequer Court.

³ Exhibit A-4 in Exchequer Court, re purchase of vessels.

⁴ Exhibit A-6 in Exchequer Court.

The mortgage was executed within the Province of Nova Scotia.

* * *

36. The agreement⁵ between H.M. the King, the Canadian Maritime Commission and Rex (re S.S. Belwoods Park) dated May 16th, 1950, was executed within the Province of Nova Scotia by two of the Canadian directors of Rex (and was filed in the Tax Appeal Board as Exhibit A-8).

37. In 1950, Rex purchased from Crown Assets Disposal Corporation a 10,000 dead weight ton dry cargo vessel known as S.S. "Belwoods Park".

In the Bill of Sale, Rex was described as having its principal place of business in the City of Halifax.

38. In the mortgage which was given by Rex at the time of purchase of the S.S. "Belwoods Park" Rex described itself as

"a body politic and corporate having its head office and principal place of business at 10 Prince Street in the City of Halifax in the Province of Nova Scotia, Canada."

The mortgage was executed within the Province of Nova Scotia.

* * *

40. The agreement⁶ between H.M. the King, the Canadian Maritime Commission and Rex (re S.S. "Banff Park") dated May 1st, 1950, was executed within the Province of Nova Scotia by two of the Canadian directors (and filed with the Tax Appeal Board as Exhibit A-7).

41. In 1950 Rex purchased from Crown Assets Disposal Corporation a 10,000 dead weight ton dry cargo vessel known as S.S. "Banff Park". In the bill of sale Rex was described as having its principal place of business in the City of Halifax.

42. In the mortgage which was given by Rex at the time of purchase of the S.S. "Banff Park" Rex described itself as:

"a body politic and corporate having its head office and principal place of business at 10 Prince Street in the City of Halifax in the Province of Nova Scotia, Canada".

The mortgage was executed within the Province of Nova Scotia.

* * *

44. The agreement⁷ between H.M. the King, the Canadian Maritime Commission and Rex (re S.S. "Port Royal Park") dated May 17th, 1950, was executed within the Province of Nova Scotia by two of the Canadian directors (and filed with the Tax Appeal Board as Exhibit A-9).

45. In 1950, Rex purchased from Crown Assets Disposal Corporation a 10,000 dead weight ton dry cargo vessel known as S.S. "Port Royal Park". In the bill of sale Rex was described as having its principal place of business in the City of Halifax.

46. In the mortgage which was given by Rex at the time of purchase of the S.S. "Port Royal Park" Rex described itself as:

"a body politic and corporate having its head office and principal place of business at 10 Prince Street in the City of Halifax in the Province of Nova Scotia, Canada".

The mortgage was executed within the Province of Nova Scotia.

* * *

⁵ Exhibit A-8 in Exchequer Court.

⁶ Exhibit A-7 in Exchequer Court.

⁷ Exhibit A-9 in Exchequer Court.

49. Rex sold:
the S.S. "Midhurst" on September 10th, 1957.
the S.S. "Brookhurst" on November 12th, 1957.
the S.S. "Oakhurst" on December 19th, 1957.
the S.S. "Fernhurst" on March 19th, 1958.

50. Rex in preparing its profit and loss statements for all of its fiscal periods has done so by including in revenue income from all sources in the world, and has never prepared any statements showing income earned from business carried on within Canada.

51. Rex for each of its taxation years has filed a return of income and the appropriate financial statements with the Respondent.

* * *

53. Rex has never filed an income tax return with the fiscal authorities of the United Kingdom or any other country in the world other than Canada.

54. Rex in computing its income under the *Income Tax Act*, R.S.C. 1952, chapter 148, has claimed capital cost allowance on the basis that the capital cost of the four ships was the cost to Rex of acquiring them.

55. Rex has subsequent to the change of its Head Office to Halifax from time to time retained as its solicitors, solicitors who exercise their profession within the Province of Nova Scotia or the Province of Quebec.

56. The auditors for Rex subsequent to the change of its Head Office to Halifax, have been persons who resided in the Province of Nova Scotia.

57. The letters written to the Canadian Maritime Commission requesting permission to sell the ships held by Rex were dictated and written in Halifax, Nova Scotia.

58. The postal address of H. I. Mathers and Sons Limited⁸ was always the same during the period in question as Rex.

59. The balances payable to the Canadian Government on the four ships purchased at the time of closing were paid out of moneys on deposit in a bank account in Halifax, Nova Scotia.

The family named Hadjilias is prominent in this case. First, there is Elias E. Hadjilias, the grandfather of the family, who lived in Greece until about 1946 and thereafter in London until his death in 1951. His son, Emmanuel E. Hadjilias, came to London from Greece about 1919 and lived in the United Kingdom until 1965. He was the principal shareholder of Hadjilias & Company until about 1965 when he transferred his shares to his son Elias E. (who had his grandfather's name) who has always lived in England. Another member of the family, Elias N. Hadjilias, has resided in England ever since 1937, has been a director of Hadjilias ever since 1948 and manager since 1962. George P. Hadjilias was at one time a director of Rex. Still another related member is Emmanuel E. Kulukundis, a son-in-law of the grandfather Hadjilias. He was instrumental in acquiring the 58 ships originally. The grandfather caused Rex to be incorporated. Most of the shares of Rex were held by the appellant Zehnder and Company, of Switzerland, as a nominee for Emmanuel E. Hadjilias.

Harry I. Mathers, who has been president and director of Rex ever since March 10, 1950, is president of I. H. Mathers & Son Limited, of Halifax, Nova Scotia, steamship agents and commission brokers, and that

⁸ Intended to be "I. H. Mathers & Son Limited".

is his principal business. Others who were elected as directors of Rex on that date are his brother Evatt, who is vice-president of Mathers & Son, George Webb (an employee of that firm) and Arthur Atkinson and G. L. Payne (employees of Acadia Overseas Freighters, of which Harry Mathers has been president for many years). They resided in Halifax at all material times. I shall refer to them as the "Halifax directors" of Rex. Zehnder and Company was beneficial owner of the Rex shares that were registered in their names.

Mathers became president and director of Rex at the request of Emmanuel Hadjilias. Mathers chose the other Halifax directors. As I appreciate the evidence, Mathers had general instructions from Emmanuel Hadjilias to attend to the duties and obligations of Rex and of its directors and officers, and other matters involved in the administration and management of the company, insofar as action was required in Canada; that the vessels would be managed from London by Hadjilias & Company; that he would receive and comply with instructions given to him from time to time by Emmanuel or his son or some member of the family or through Hadjilias & Company; and that he would look to the Hadjilias family for funds necessary for Rex. The major decisions in Rex's affairs were made by that family, and, in handling Rex's affairs in Canada, Mathers did what they requested and took whatever action was necessary on the part of Rex or its directors or officers to implement such decisions, such as the convening of directors' meetings, passing resolutions and executing agreements. Some of the major decisions were the following, shown by the minutes of directors' and shareholders' meetings:

- (a) Directors' meeting—February 14, 1951. Resolution to issue shares to certain persons. Mathers said that instructions to issue the shares came from Emmanuel Hadjilias or his son, and the shares were accordingly issued and certificates were sent to the father or son.
- (b) Directors' meeting—July 3, 1951. Resolution to pay Zehnder and Company 1% commission on gross freights. Directors' meeting—December 11, 1952. Resolution to pay a commission on freights to that company. Mathers said the instructions for this came from the family.
- (c) Directors' meeting—July 3, 1952. Resolution to make a loan to Compania Naviera Hesperia S.A. Directors' meeting—December 17, 1956. Resolution to grant a loan of \$900,000 to that company. Mathers said that the instructions to do so came from one of the family. Mathers knew nothing about the company and made no inquiries.

- (d) Directors' meeting—December 17, 1952. Resolution to open an account in Westminster Bank in London to be handled by Hadjilias & Company. Mathers said the instructions to do so came from the family.
- (e) Shareholders' meeting—December 31, 1958. Resolution to wind up Rex. Mathers said the instructions came from the family and he told Rex's auditors in Halifax to proceed to do so.

The minutes of meetings of Rex's directors after Mathers became president state that they were held in Halifax, but in practice the directors did not hold board meetings or meet together as directors. The practice was that Mathers would prepare the minutes and sign them and then have them presented to the secretary, Webb, who thereupon signed them without question or consultation. All this was done in Halifax. Mathers did not consult with the other Halifax directors. He knew what had to be done and did it for them. Webb signed minutes, agreements, cheques and other documents as secretary, and Evatt Mathers signed as a signing officer when required.

Upon Mathers becoming president Rex appointed Globe Enterprises Limited, a Halifax company, to keep its books of account and do its book-keeping in Halifax, and paid Globe up to \$2000 per ship per year for such services. Mathers owned 50% of Globe's issued share capital and is a salaried officer of that company. Neither he nor any of the Halifax directors received remuneration directly from Rex. Kulukundis owned the other 50% of Globe's shares.

Rex's accounts and books in Halifax were kept in filing cabinets owned by Prince Investments Limited, another Nova Scotia company controlled by Mathers. This company rents office space which it sub-lets to Mathers & Son Limited and to other companies. Rex paid \$40 per year to Prince for what Mathers called "rent" of the accommodation.

Rex's address in Halifax was the I. H. Mathers & Son Limited's address, but it had no actual office space there. Some of its records were lost or destroyed during the course of several moves of the Mathers' offices.

The principal books kept by Rex in Halifax were a general ledger, general journal and a banking book containing a record of the banking transactions of the company in Canada. Hadjilias & Company kept a bank account and detailed records and accounts in London respecting earnings, wages, advances to agents, banking transactions, insurance, charters, and other revenues and expenses related to the operation of the vessels. The

entries in the journal in Halifax by Rex's accountant were based upon monthly statements of receipts and disbursements furnished by Hadjilias & Company, such as Exhibit A-21, and upon other information supplied by the managers.

Rex's annual financial statements for the years 1951 to 1964, Exhibit A-17, include its revenue wherever it was earned and there is no segregation of income earned in Canada from income earned elsewhere. Rex's Profit and Loss statements submitted with its income tax returns show the following general expenses, the majority of which were incurred in Canada, and include auditor's and lawyer's fees, telephone and travelling expenses, and fees paid to the Canadian Shipowners Association, of which Rex was a member in its 1964 taxation year and prior thereto:

1951	\$ 9,897.13
1952	13,058.80
1953	14,022.83
1954	2,214.33
1955	3,113.32
1956	4,562.77
1957	4,279.62
1958	2,842.39
1959	2,710.95
1960	78.25
1961	88.76
1962	70.00
1963	—
1964	—

The auditor's certificates attached to the Annual Statements contain certain qualifications because the statements were based in part upon information furnished by the ships' managers and accepted by the auditors as correct but not confirmed by them.

Rex sold the vessels to Asturias Shipping Company S.A. in 1957 and 1958 for \$1,050,000 each. The negotiations for the sales were conducted by the Hadjilias family. The Halifax directors were not consulted but were informed of the arrangements. Asturias is a company controlled by Emmanuel Hadjilias. The Halifax directors knew nothing about the financial standing of this company and made no inquiries. Arrangements with the Canadian Maritime Commission and the Bank of Montreal (Exhibits A-26, A-27, A-28 and A-29) to comply with provisions for depositing the proceeds of the sales in escrow were attended to by Kulukundis and a Montreal barrister, Reycraft, who was appointed by the Halifax directors to be Rex's attorney for such purposes (Exhibits A-24 and A-25) on the instructions of Kulukundis.

Mathers attended to the payments of mortgage instalments to the Canadian Government and also attended to some dealings on behalf of Rex with the Foreign Exchange Control Board. This Board advised Rex that under the *Foreign Exchange Control Act* a Canadian resident shipowner requires a permit from the Board for certain specified currency purposes. Mathers applied for and accepted such permit for Rex (Exhibits A-18, A-19, A-20). There was no objection by Rex that it did not require the permit. Mathers also attended to dealings on behalf of Rex with the

Canadian Maritime Commission to obtain the Commission's approval to change the names of the vessels and gave required notices and copies of agreements to the Commission. Hadjilias & Company completed the change of names in England.

Mathers engaged auditors and solicitors for Rex in Halifax and paid them for their services. He said that the time he himself devoted to Rex was only about twenty-five hours per year in the initial years and less in the later years, for after the vessels were sold there was less company activity.

In its income tax returns for 1958 Rex claimed a liability of \$118,577.22 as a Federal Withholding Tax. This appears to have been claimed upon the basis that it was a resident company paying a dividend to non-resident person.

The loans by Rex to *Compania Naviera Hesperia* are reflected in Rex's returns and Balance Sheets. The greatest amount owed is shown in the 1957 Balance Sheet at \$1,706,229.93. Eventually the principal sum was repaid. The 1964 Balance Sheet shows, as at March 31, 1964 of that year, accounts receivable of \$4,532,062.50 (balance owing on sale of the vessels) and \$28,641.94 from the *Hesperia Company* (interest outstanding on the loan).

The following cases on residence were referred to by counsel in their argument in this appeal:

Cesena Sulphur v. Nicholson (1867) 1 Ex. D. 428; *San Paulo (Brazilian) Ry Co. v. Carter* [1896] A.C. 31 (H.L.); *De Beers Consolidated Mines Ltd v. Howe* [1906] A.C. 455 (H.L.); *American Thread Co. v. Joyce* (1913) 6 T.C. 163 (H.L.); *New Zealand Shipping Co. v. Thew* (1922) 8 T.C. 208 (C.A. and H.L.); *Bradbury v. English Sewing Cotton Co.* [1923] A.C. 744 (H.L.); *Aramayo Francke Mines Ltd v. Eccott* [1925] A.C. 634 (H.L.); *Swedish Central Ry Co. v. Thompson* [1925] A.C. 495 (H.L.); *Egyptian Delta Land and Investment Co. v. Todd* [1929] A.C. 1 (H.L.); *Koitaki Para Rubber Estates Ltd v. Fed. Com. Taxation* (1940) 64 C.L.R. 15; *B.C. Elec. Ry. Co. v. The King* [1946] A.C. 527 (J.C.); *Union Corp. v. I.R.C.* [1952] 1 All E.R. 646 (C.A.); *Bullock v. Unit Construction Co.* (1959) 38 T.C. 713 (C.A. and H.L.); *M.N.R. v. Crossley Carpets Can. Ltd* [1968] C.T.C. 570 (Ex. Ct.); *Yamaska S.S. Co. v. M.N.R.* 64 D.T.C. 194 (T.A.B.)

The authorities were reviewed at some length in the *New Zealand Shipping*, *Swedish Central*, *Egyptian Delta*, *Union Corp.* and *Bullock* cases, and in all those decisions the following dictum of Lord Loreburn L.C. in the *De Beers* case, at page 458, was considered:

The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills v. Nicholson* and the *Cesena Sulphur Co. v. Nicholson*, now thirty years ago,

involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides. It remains to be considered whether the present case falls within that rule. This is a pure question of fact to be determined, not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading.

Lord Loreburn's test was applied in *Unit Construction Co. v. Bullock* (*supra*) by the House of Lords.

In *Minister of National Revenue v. Crossley Carpets (Canada) Ltd* (*supra*), in this court, Gibson J. said, at page 571:

The law, as I understand it, is that a corporation is resident, for income tax purposes, in the country where its central management and control is exercised, (see *De Beers Consolidated Mines, Ltd v. Howe* [1906] A.C. 455) and the place of central management and control is sometimes in the cases said to be the place of paramount authority, (see *The San Paulo (Brazilian) Railway Co. Ltd v. S. G. Carter* [1896] A.C. 31 and *The American Thread Co. v. Joyce* (1913), 6 T.C. 163) but if the place of exercise of paramount authority is divided between two or more countries then in my view the corporation is resident in each of those countries. (See *The Swedish Central Railway Co. Ltd v. Thompson* (1925) 9 T.C. 342 and *cf. Unit Construction Co. v. Bullock* [1960] A.C. 351).

The pure question of fact for decision by this Court (which as Lord Loreburn stated in the *De Beers* (*supra*) case at page 458 is "to be determined, not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading") is whether or not on the evidence the place of exercise of paramount authority of central management and control of the respondent corporation was divided between Canada and England during its taxation years 1961 and 1962.

and he agreed with the conclusion of the Tax Appeal Board that the place of exercise of such authority was divided between Canada and England.

The foundation of Rex's case was that the major decisions for Rex were made by Emmanuel Hadjilias or by some member of the Hadjilias family, that none of them was resident in Canada, that the Halifax directors unquestioningly carried out the instructions given to them by the family, and that the vessels were operated and managed from London by Hadjilias & Company; and it was therefore submitted that the activities of Mathers and the other Halifax directors were merely formal, procedural and clerical and that no substantial element of management and control of Rex was actually exercised in Canada.

What I have to determine is whether Rex was resident in Canada during its 1964 taxation year within the meaning of section 2(1) of the *Income Tax Act*. I do not have to determine whether the company was resident elsewhere also.

As I understand the law, the residence of a company is not determined by or dependent upon the residence of one or more of its shareholders; nor,

despite the influence that shareholders may have over the affairs of a company by virtue of their share ownership and power to remove directors and put persons in their place who agree to their policy, do the powers of shareholders as such invest them with the management and control of the company's business, for the directors are not the agents of the shareholders or bound to comply with directions given by them and the responsibility of the directors and officers of the company is to the company itself and their duties are controlled by the rules and constitution of the company. However, the management and control of a company can be actually exercised otherwise than by its directors and otherwise than under or according to the authority of its constitution, as, for example, in *Unit Construction Co. v. Bullock (supra)*, where African companies which, it was admitted, had residence in Africa and whose directors resided there, were held by the House of Lords to be resident in England as well, because they were actually managed and controlled from England by the directors of their parent company, and such management and control was a fact affecting their residence even although it was exercised irregularly and was not authorized by the constitution of the companies.

In Rex's case the management of its business and the controlling power and authority over its affairs were vested in its Halifax directors and they exercised that power and authority in Canada, albeit in large measure to carry out instructions given by the Hadjilias family and policy decisions made in England by that family. In Canada, Mathers and the Halifax directors executed agreements and attended to business and legal affairs of Rex which were required in connection with and were essential to Rex's business venture of owning and operating the vessels. In my view, the evidence that I have outlined and the facts that have been admitted show that management and control of Rex and of attention to its interests and affairs was exercised and given to a substantial degree, *de jure* and *de facto*, within Canada, by its Halifax directors from the time they were elected up to and including its 1964 taxation year. Consequently, in my view, Rex was a person resident in Canada during its 1964 taxation year within the meaning of section 2(1) of the *Income Tax Act* and the appellant, as a non-resident shareholder, was properly assessed for the tax in question.

The appeal is therefore dismissed with costs.