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BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

THE SHAWINIGAN WATER AND POWER COMPANY ..... RESPONDENT.

Revenue—Income Tax—The Income War Tax Act, R.S.C. 1927, c. 97, s. 6(1) (o)—Para. (o) of s. 6(1) of the Income War Tax Act intra vires Parliament—Order in Council P.C. 5948, dated December 23, 1948, intra vires the Governor in Council—"Additional charge" and "contribution" paid to the Province of Quebec under provisions of "An Act to Ensure the Progress of Education" S. of Q. 1926, 10 Geo. VI, c. 21 are taxes and within definitions of "corporation tax" and "specific corporation tax" in P.C. 5948 but not within definitions of "rental" and "royalty" therein—Such taxes not deductible under s. 6(1) (a) of the Income War Tax Act—Appeal from Income Tax Appeal Board allowed.

In its income tax return for the taxation year 1947 the respondent deducted an amount of $316,087.16 which it had paid to the Minister of Hydraulic Resources for the Province of Quebec under the provisions of "An Act to Ensure the Progress of Education", S. of Q., 10 Geo. VI, c. 21, enacted in 1946 by the Legislature of that Province.

The deduction was disallowed by the appellant on the ground that it was a corporation tax as defined by P.C. 5948 dated December 23, 1948, and passed under the authority of s. 6(1) (*o*) of the Income War Tax Act, R.S.C. 1927, c. 97, and, therefore, under the provisions of that subsection was not deductible. On an appeal from the assessment the Income Tax Appeal Board held that the Quebec Education Act did not impose a corporation tax, that P.C. 5948 was *ultra vires* the Governor in Council and that, in any event, a portion of the deduction was within the exceptions provided for in the Order in Council as being rents or royalties in respect of natural resources. The Board referred the assessment back to the Minister for re-assessment and to allow the full amount of the deduction "as it was an expense wholly, exclusively and necessarily laid out for the purpose of earning the income for the year 1947". From that decision the Minister appealed to this Court.

Held: That para. (*o*) of s. 6(1) of the Income War Tax Act, R.S.C. 1927, c. 97, is *intra vires* Parliament. In exercising the power of "raising money by any mode or system of taxation", as provided in s. 91(3) of the British North America Act, Parliament could in enacting or amending an Income Tax Act specify those expenses or outlays which would be deductible and those which would not be deductible in computing taxable income.

2. That the disallowance of a deduction from income of a corporation tax paid to the Government of a province or to a municipality, as enacted by s. 6(1) (*o*) of the Income War Tax Act, cannot be said to be legislation "in relation to education", even if that tax be one which has for its purpose the raising of funds to be used for school purposes. To contend that a trespass on provincial rights is occasioned by the effect of the passage of para. (*o*) is to stress the possible consequential effect of the legislation rather than the subject-matter. *Reference re Saskatchewan Farm Security Act* [1947] 3 D.L.R. 689; [1949] 2 D.L.R. 145; *Margarine* case [1950] 4 D.L.R. 689, referred to.

3. That the Governor in Council in enacting P.C. 5948 has defined "corporation tax" in accordance with the duty imposed on him by para. (*o*) of s. 6(1) of the Income War Tax Act, R.S.C. 1927, c. 97; and in using the words "either formally or in effect", or otherwise has not exceeded the power conferred by that paragraph. It follows that P.C. 5948 must be declared valid and *intra vires* the Governor in Council.

4. That the "additional charge" levied under para. c and the "contribution" levied under para. d of s. 3 of the Act to Ensure the Progress of Education, Statutes of Quebec, 1946, 10 Geo. VI, c. 21 were taxes just as much as were the taxes levied on the paid-up capital of oil refining companies and telephone companies under para. 3a of the Act, where they are, in fact, called taxes. The test is not answered by the mere name of the impost or levy but rather by ascertaining its essential nature. *Attorney General of Canada* v. *Registrar of Titles* [1934] 4 D.L.R. 764 referred to.

5. That in effect, (although not formally), the imposition of these taxes singled out classes of corporations, namely those holding or owning water power rights for taxation or for discriminatory rates or burdens of taxation, by imposing a tax in respect of the activities or operations mainly done by or carried on by corporations, namely, electricity generated and derived from hydraulic powers. Such taxes are, there-

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fore, within the definition of "specific corporation tax" contained in s. 2(5) of P.C. 5948 and may not be deducted unless they fall within the exceptions provided for in that section.

6. That the taxes levied under paras. c and d of the Quebec Education Act were not levied to compensate the province for the value of the occupation of the water power sites or of the use of the water, or for the value of things forming part of its natural resources prior to their severance, taking, extraction or removal, but were levied solely for the purpose of raising funds to establish the Education Fund and thereby promote the progress of education. These taxes, therefore, were not within the definitions of "rental" and "royalty" as found in P.C. 5948 and do not fall within any of the exemptions contained therein.

7. That since P.C. 5948 clearly prohibits the deduction of specific corporation taxes, and that the payments made by the respondent fall within the definition of that term, such payments are not deductible under s. 6(1) (*a*) of the Income War Tax Act, R.S.C. 1927, c. 97, even though these expenses when measured by sound commercial and accounting practices alone would appear to be deductible. *Montreal Light, Heat and Power Consolidated* v. *Minister of National Revenue* [1942] S.C.R. 89; *Ushers' Wiltshire Brewing* v. *Bruce* 6 T.C. 399 referred to.

8. That in seeking to ascertain what is or is not a corporation tax, it is necessary to look at the particular subsection of the Quebec Education Act under which the tax is paid and that the nature of the levy is not to be determined by reference to other subsections which impose different levies in different ways on different persons, notwithstanding that all such levies constitute part of the same fund, but are made up from many miscellaneous sources.

9. That the appeal is allowed.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Ottawa.

D. W. Mundell, Q.C., Léon Garneau, Q.C. and *T. Z. Boles* for appellant.

W. B. Scott, Q.C. and *E. J. Courtois* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (January 23, 1953) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated June 11, 1951 (4 T.A.B.C. 270), which allowed an appeal by the respondent company from an assessment to income tax made upon it on February 3, 1950, in respect of the taxation year ending December 31, 1947. In computing

its taxable income for that year, the respondent claimed as a deduction the sum of $316,087.16 which it had paid to the Minister of Hydraulic Resources for the Province of Quebec under the provisions of "An Act to Ensure the Progress of Education," enacted by the Legislature of the Province of Quebec, 10 George VI, c. 21. That deduction was disallowed by the Minister on the ground that it was a corporation tax as defined by the regulations contained in P.C. 5948 passed under the authority of s. 6(1) (*o*) of the Income War Tax Act, and therefore under the provisions of that subsection was not deductible.

An appeal to the Income Tax Appeal Board was allowed, the Board being of the opinion that the Quebec Act did not impose a corporation tax, and that the Governor in Council in enacting P.C. 5948 exceeded the powers conferred on him by s. 6(1) (*o*) of the Income War Tax Act, and that it was therefore *ultra vires*. The Board also held that in any event a portion of the deduction claimed was within the express provisions of certain exceptions contained in P.C. 5948, as being rents or royalties in respect of natural resources. The Board referred the assessment back to the Minister for re-assessment and to allow the full amount of the deduction claimed, "as it was an expense wholly, exclusively and necessarily laid out for the purpose of earning its income for the year 1947."

In submitting that the appeal should be allowed and the assessment restored, counsel for the appellant vigorously attacked each of these conclusions of the Board.

This appeal was heard at the same time as eight others in which the Minister was the appellant and in which the respondents were seven other power corporations, also in the Province of Quebec, namely: St. Maurice Power Corporation, The Canadian Light & Power Company, Ottawa Valley Power Company, Saguenay Power Company, Ltd., Gatineau Power Company, Northern Quebec Power Company, Ltd., Southern Canada Power Company, and MacLaren-Quebec Power Company. In each case the issue was the same as I have outlined above, and in each case the appeals of the corporations have been allowed by the Income Tax Appeal Board. I am advised that in every case the full amounts now claimed by the Minister as payable have, in fact, been paid, no doubt under protest.

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It was agreed at the hearing of the appeals that the evidence given before the Income Tax Appeal Board, and a certain admission of facts supplementary thereto which was filed with the consent of all parties, would be the evidence on these appeals, subject only to the question of the admissibility of certain evidence tendered to the Board.

At the hearing I heard counsel for all the respondents, each of whom in the main adopted the arguments of the others. In one respect, however, they were not in accord. Counsel for Ottawa Valley Power Company and for Mac-Laren-Quebec Power Company did not join with counsel for the other respondents in the submission that s. 6(1) (*o*) of the Income War Tax Act was *ultra vires* the Parliament of Canada. In all cases the respondents submit that P.C. 5948 exceeded the powers conferred on the Governor in Council by s. 6(1) (*o*) of the Act and was therefore *ultra vires*, that in any event, the payments sought to be deducted were within the exceptions provided for in P.C. 5948 and were also disbursements and expenses wholly, exclusively, and necessarily laid out and expended for the purpose of earning the income, and therefore deductible under the provisions of s. 6(1) (*a*) of the Act.

Very many issues were raised during the course of the argument. In my opinion, however, the issue as a whole will be determined by considering five major questions as follows:

1. Is para. (*o*) of s. 6(1) of the Income War Tax Act invalid?

2. Is P.C. 5948 enacted thereunder *ultra vires* the Governor in Council?

3. Does the disbursement made by the respondent fall within the general provisions of P.C. 5948, defining corporation tax and specific corporation tax?

4. If Question 3 is answered in the affirmative, is the respondent entitled to the benefit of the exceptions contained in the definition of specific corporation tax?

5. In any event, is the deduction permissible under the provisions of s. 6(1) (*a*) of the Income War Tax Act?

1. PARA. (O) OF S. 6(1) OF THE INCOME WAR TAX ACT

The disputed Para. (*o*) in the form below was enacted by s. 5(1) of c. 63, Statutes of Canada, 1947, and by s. 17 of the same Act, it and the regulations passed pursuant thereto were made applicable to 1947 and subsequent years.

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*o*) any corporation tax, as defined by regulation made by the Governor in Council, paid to the government of a province or to a municipality.

It is not suggested that Parliament could not delegate to the Executive the power to define "corporation tax." Nor could it be suggested that in exercising the power of "raising of money by any mode or system of taxation," as provided in s. 91 (3) of the British North America Act, Parliament could not in enacting or amending an Income Tax Act specify those expenses or outlays which would be deductible and those which would not be deductible in computing taxable income. *Prima facie* at least, para. (*o*) is *intra vires* of Parliament. I may note here that the Income Tax Appeal Board found it unnecessary to reach any conclusion on this question.

Para. 3 of the respondent's reasons contained in its Reply summarizes its submission that para. (*o*) is *ultra vires*. It is as follows:

3. Section 6(1) (*o*) is *ultra vires* the Parliament of Canada and in its purpose, object, and effect it does not come within Section 91(3) of the British North America Act. The purpose and object of 6(1) (*o*) is to prevent any Province from exercising its constitutional power of direct taxation by levying a corporation tax. Moreover under the guise of Income Tax legislation Section 6(1) (*o*) encroaches and trespasses upon the exclusive powers of the Government of a Province or of a municipality to raise revenue by direct taxation for maintaining the schools within such Province or such municipality.

On the first point it was submitted that para. (*o*) in its real nature and substance is not intended for the purpose of "raising of money by any mode or system of taxation" as provided in s. 91(3) of the British North America Act; but that its real purpose was to bring pressure to bear upon the various provinces to enter into the agreements contemplated by the Dominion-Provincial Tax Rentals Agreement Act, 1947, and "to penalize the people in any province that did not elect to suspend the authority given to it under the constitution (s. 92(2) of the British North America Act) to levy personal income taxes, succession duty taxes and corporation taxes"—that is, the provinces that did not enter into such agreements. The provinces of Ontario and Quebec had not then entered into such agreements and I understand that the Province of Quebec in

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which all the respondent corporations carry on business, has not as yet entered into any such agreement.

Now while it is the fact that para. (*o*) was re-enacted in the form set out above at the same session of Parliament as the Dominion-Provincial Tax Rentals Agreement Act, 1947, and received the Royal assent on the same date, I am quite unable to find that the purpose of its provisions denying the deductibility of corporation tax was to penalize the inhabitants of any province which did not enter into an agreement under that Act, or to bring pressure on the provinces to enter into such agreements. It must be noted that the Income War Tax Act had long since established the general principle that taxes paid to a province were not deductible.

Para. (*o*) was first enacted in 1940 and by it deductions were not allowed in respect of:—

(*o*) any tax, licence fee or other levy, or the amount represented by the increase in any tax, licence fee or levy imposed, exacted or increased after the 24th day of June, 1940, by virtue of the authority contained in any provincial statute or Order in Council, save such amount as the Minister in his discretion may allow.

In that form para. (*o*) was not limited to corporations, but applied to all taxpayers. However, by s. 5(2) of Statutes of Canada, 1946, c. 55, para. (*o*) in that form was repealed and the following substituted therefor (applicable to the year 1947 but never used in that form):

(*o*) any corporation tax paid to the government of a province except any such tax the deduction of which may be allowed by the Minister as a royalty or rental on natural resources in the province.

In that form the general principle was established that corporation tax paid to the Government of a province was not to be deducted, the only exception being such corporation taxes as might be allowed by the Minister as a royalty or rental on natural resources. As will be noted later, s. 6(6) of the Act provided a definition of corporation tax as applicable to para. (*o*) in that form.

It is the fact—as will be noted later—that the change in the final form of para. (*o*) was brought about because of the prospective agreements to be entered into by the Dominion with the provinces and that such agreements made provision for the non-deductibility of corporation taxes, save as excepted therein. In substance, there was no change in the general policy regarding corporation taxes

—they continued to be non-deductible; but the prohibition was broadened to include such taxes paid to municipalities as well as to a province.

I can find nothing to support the respondent's submission that the purpose and object of enacting para. (*o*) in its final form was to prevent a province from exercising its constitutional powers of direct taxation by levying a corporation tax; or that it encroaches or trespasses upon the exclusive powers of the government of a province or a municipality to raise revenue by direct taxation for maintaining its schools. The constitutional powers of a non-agreeing province and of its municipalities were not affected in the slightest degree by the passage of para. (*o*).

It seems to me that in attacking the validity of para. (*o*) the respondents have stressed the possible consequential effect of the legislation rather than the subject matter. The distinction was pointed out by Rand, J. in *Reference re Saskatchewan Farm Security Act* (1). The judgment of the Supreme Court of Canada in that case was affirmed in the Privy Council (2), in which Viscount Simon stated:

> There was abundant evidence that agriculture is the main industry of Saskatchewan and that it is the principal source of revenue of its inhabitants. It is moreover clear that the result of the impeached legislation, if it is validly enacted, would be to relieve in some degree a certain class of farmers from financial difficulties due to the uncertainties of their farming operations. But, as Rand, J. points out, there is a distinction between legislation "in relation to" agriculture and legislation which may produce a favourable effect upon the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is "the true nature and character of the legislation"—not its ultimate economic results—that matters *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at pp. 839-40. Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase "Agriculture in the Province" may be construed, and whatever advantages to farmers the reshaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture.

Reference may also be made to the *Margarine* case (3), where Lord Morton of Henryton in delivering the judgment of the Privy Council, quoted the paragraph just referred to and continued at p. 702 as follows:

> Although the prohibition now under consideration relates to a different subject-matter, the passage just quoted would seem to apply with much

(1) [1947] 3 D.L.R. 689 at 705. (2) [1949] 2 D.L.R. 145 at 149.
(3) [1950] 4 D.L.R. 689.

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force to the present case. The prohibition might well "produce a favourable effect on the strength and stability" of the dairy industry; but the passage just quoted shows that this fact alone is not sufficient to make it legislation "in relation to agriculture" within s. 95; and there is no other ground on which it can be brought within s. 95. To sum up, the connection between the prohibition and the operations carried on by farmers is too indirect and remote to bring the prohibition within the terms of s. 95, and for this reason counsel's fourth and last argument fails.

Now in the instant case it is suggested that the trespass on provincial rights is occasioned by the effect of the passage of para. (*o*); that taxpayers would complain to the provincial taxing authorities that they were not entitled thereunder to deduct corporation taxes, and in particular, the tax imposed by the Province of Quebec under the Act to Insure the Progress of Education, and to urge the province not to levy any such taxes. I am unable to see that such a contention in any way affects the true nature of the subject-matter of the legislation. It is merely a consequenial effect of the exercise of the undoubted power of Parliament to raise money by imposing a tax on income.

It could scarcely be suggested that a general income tax which would include levies on those engaged in farming would be legislation "in relation to agriculture" although it would undoubtedly affect farmers, and indirectly agriculture. Similarly, it cannot be found that the disallowance of a deduction from income of a corporation tax is legislation "in relation to education," even if that tax be one which has for its purpose the raising of funds to be used for school purposes.

Para. (*o*) is part of the disallowance section of the Income War Tax Act, is meaningless by itself, and must be read with the Act as a whole. The Act itself is clearly within the competence of Parliament. In determining what income is to be the subject of taxation, it is necessary to determine what deductions, if any, should be allowed or disallowed. In doing so, consideration has to be given to the question as to whether or not municipal and provincial taxes should be considered as proper deductions. Its power to give priority to provincial and municipal taxes or to declare them as non-deductible, is completely unfettered.

In my opinion, it was competent for Parliament to enact para. (*o*) of s. 6(1) of the Income War Tax Act, and I must therefore reject the submission of counsel for the respondent that it is *ultra vires*.

2. IS P.C. 5948—DATED DECEMBER 23, 1948—ULTRA VIRES THE GOVERNOR IN COUNCIL?

The Order in Council revoked the regulation contained in a previous one—P.C. 332, dated January 30, 1948 (as amended by P.C. 953 dated March 6, 1948)—which regulation had defined "corporation tax" pursuant to the provisions of s. 6(1) (*o*), and provided a new regulation defining that term; it further provided that the new regulation was to apply to 1947 and subsequent taxation years.

One of the submissions was that the Governor in Council, having made earlier regulations pursuant to the authority of para. (*o*), was *functus officio* and therefore had no power to substitute other regulations therefor. Section 31(1) (*g*) of the Interpretation Act, R.S.C. 1927, c. 1, as amended, provides a complete answer to that submission and I must reject it.

P.C. 5948 is as follows:

Income War Tax Act—Regulations defining Corporation Tax
P.C. 5948

AT THE GOVERNMENT HOUSE AT OTTAWA

Thursday, the 23rd day of December, 1948.

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

His Excellency the Governor General in Council, on the recommendation of the Minister of National Revenue and pursuant to the powers conferred by the *Income War Tax Act*, Revised Statutes of Canada, 1927, Chapter 97, is pleased to order as follows:

1. The regulations established under paragraph (*o*) of ss. (1) of section 6 of the *Income War Tax Act* by Order in Council P.C. 332 of 30th January, 1948, as amended, are hereby revoked; and

2. The following Regulation, defining corporation tax for the purposes of paragraph (*o*) of subsection (1) of section 6 of the *Income War Tax Act*, is hereby made and established in substitution for the regulations hereby revoked:

(1) For the purpose of paragraph (*o*) of subsection one of section six of the *Income War Tax Act*, a corporation tax means a specific corporation tax or a corporation gross revenue tax as hereinafter defined except any such tax that was imposed on or before September 1, 1941, if the rate of or manner of imposing the tax has not been changed since that day; Provided that where the rate of or manner of imposing any such tax that was imposed on or before September 1, 1941, has been changed after that day, the tax shall be deemed to be the amount of tax payable by the taxpayer minus the amount that would have been payable by him if there had been no change.

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(2) An amount deemed to be a corporation tax under paragraph (*a*) of subsection five of this Regulation is a corporation tax for the purposes of paragraph (*o*) of subsection one of section six of the *Income War Tax Act* notwithstanding anything contained in subsection one.

(3) For the purposes of this Regulation where a charge by way of a corporation tax is imposed on one class of persons and that charge or a like charge is imposed on another class of persons on whom such a charge might be deemed to be imposed by way of royalty or rental, the charge or the like charge on the second class of persons is a corporation tax.

(4) Where a corporation tax was imposed under legislation in force on or before September 1, 1941, but the legislation was suspended or repealed pursuant to a Wartime Tax Agreement and that legislation or a new enactment in the place thereof imposing the same tax was brought into force after the expiration of the Wartime Tax Agreement, the tax shall be deemed to have been imposed on or before September 1, 1941, for the purpose of this Regulation.

(5) In this Regulation "specific corporation tax" means a tax or fee other than a tax on net income or gross revenue, the imposing of which singles out for taxation or for discriminatory rates or burdens of taxation corporations, or any class or classes thereof, or any individual corporation, either formally or in effect, by imposing a tax or fee on or in respect of any act, matter or thing or any activities or operations mainly done by, or affecting, or carried on by corporations, or otherwise, except

(*a*) a *bona fide* and reasonable provincial licence, registration, filing or other fee of an amount not in excess of

(i) the amount of $250 per annum for each corporation; or

(ii) the amount of the fee imposed on or immediately prior to September 1, 1941,

whichever is greater, and if it does exceed the said greater amount, the amount of the excess shall be deemed to be a corporation tax for the purpose of this Regulation;

(*b*) a licence fee or other fee or tax for specific rights, benefits or franchises granted by a municipality, or where they are exercised or enjoyed only on territory not included in any municipality by any authority (including a province) having jurisdiction in such territory;

(*c*) any assessment under *The Workmen's Compensation Act* of any province;

(*d*) a business or occupancy tax based on floor space or on the rental or assessed value of property, imposed by a municipality, or in territory not included in any municipality by any authority (including a province) having jurisdiction in such territory; or

(*e*) any royalty or rental on or in respect of natural resources within a province.

(6) In this Regulation "corporation gross revenue tax" means a tax that is levied on the gross revenue or any part thereof of a corporation but does not include

(*a*) a *bona fide* and reasonable business or occupancy tax imposed by a municipality or, in a territory not included in a municipality, by any authority (including a province) having jurisdiction

in such territory on the gross revenue or gross receipts within the municipality or territory from all or part of the business of;

(i) a telephone, electric light, electric power, gas, street railway or bus company, in lieu of taxes imposed on power lines, pole lines, towers, cables, wires, conductors, conduits, equipment, mains, tracks, and other like property or improvements at a rate not in excess of three per cent of the gross receipts or gross revenue subject to the tax; or

(ii) of any other corporation if

(A) the tax is imposed under legislation enacted prior to June 27, 1946;

(B) the tax is in lieu of such a tax based on floor space or upon the rental or assessed value of property;

(C) the tax is imposed on a corporation or class of corporations that is subject to the said tax under legislation enacted prior to June 27, 1946; and

(D) the rate of tax is not in excess of the general tax rate;

(*b*) a licence fee or tax for specific rights, benefits or franchises granted by a municipality, or where they are exercised or enjoyed only in territory not included in any municipality, by any authority (including a province) having jurisdiction in such territory.

(7) In this Regulation

(*a*) "natural resources" means lands and waters, any rights to or interests in lands and waters, vested in the Crown in right of a province, including forests, minerals, petroleum and natural gas on or in such lands and waters and rights vested in the Crown in the said right to take wild animals and fish on or in such lands and waters;

(*b*) "rental" means a charge imposed on a person in respect of the occupation or use by him of a natural resource, whether improved or unimproved, including the use of water or water power sites, without severance, taking, extraction or removal thereof or of any part thereof, the real intent and purpose of which charge is to compensate for the value of such occupation or use; and

(*c*) "royalty" means a charge

(i) required to be paid by a person in respect of any right conferred on or vested in him to sever, take, extract or remove anything forming part of the natural resources of a province including therein timber, mineral ore, petroleum and natural gas, and wild animals or fish the right to take which forms part of said natural resources;

(ii) the amount of which is determined by reference to the quantity or value or both of the thing that he severs, takes, extracts or removes, or alternatively in the case of mineral ore, the value at market prices of the minerals contained therein after extraction therefrom; and

(iii) the real intent and purpose of which is to compensate a province for the value in whole or in part of the said thing prior to its severance, taking, extraction or removal;

but does not include a charge, the amount of which is determined in relation to the profits or gross receipts derived by the said person from the sale of products produced by the processing or manufacturing of the said thing unless provision is made for a reasonable deduction from

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the profits or gross receipts in determining the amount of the charge, in respect of the costs and value added to the said thing by reason of the processing or manufacturing for the purpose of eliminating, in the determination of the amount of the charge, any value added to the said thing by the said processing or manufacturing.

(8) This Regulation applies in respect of the 1947 and subsequent taxation years.

(Signed) A. D. P. HEENEY,
Clerk of the Privy Council.

The Income Tax Appeal Board held that the Order in Council was invalid on the ground that the Governor in Council in enacting it had exceeded the powers conferred by para. (*o*). It was of the opinion that in defining "specific corporation tax" (para. (5) of the Regulation—*supra*), the definition was wide enough to include taxes levied on other than corporations. Its conclusions on this point were as follows:

> Surely when Parliament enacted section 6(1) (*o*) and quite clearly stated that it was "any corporation tax" which was to be disallowed as a deduction, it meant a tax imposed solely upon corporations. In any event, I have reached the conclusion that that is the meaning which must be given to the words "any corporation tax" as contained in section 6(1) (*o*), and that these words cannot be interpreted to mean "any tax imposed upon a corporation". That being the case, I am of the opinion that the words "as defined by Regulation made by the Governor in Council" which immediately follow the phrase "any corporation tax" merely gives the Governor in Council the right to set forth by regulation such purely corporation taxes as he might determine should not be permitted to be a deduction from income, but that the Governor in Council had no power, in the regulations which he was authorized to make, to include any tax which might happen to be payable by a corporation but was payable also by individuals or partnerships or other types of association and say that such a tax or rental or supplementary charge or royalty is a corporation tax and will be disallowed as a deduction under the provisions of section 6(1) (*o*).
>
> In my opinion, the Governor in Council has exceeded his powers in the regulation contained in P.C. 5948, having gone far beyond what Parliament authorized him to do, which was to settle the corporation taxes—within the limits of what were purely corporation taxes—which would not be allowed as deductions under section 6(1) (*o*). Having reached this conclusion, it is not necessary for me to decide whether the Governor in Council was *functus officio* after he passed the first Order in Council, P.C. 332, dated 30th January, 1948.

Before me the Regulation was said to be invalid on at least two grounds. It was submitted that Parliament in using the word "define" did not have in mind a lengthy definition such as is found in the Regulation, but something of a much more limited nature, something that would set out or enumerate such taxes within the limits of levies made

on corporations alone as could not be deducted; and that by the use of the words "any *corporation* tax," Parliament intended that the Governor in Council should have no power to pass any regulation save in regard to taxes levied on corporations alone.

In my opinion, the nature and extent of the power conferred by para. (*o*) upon the Governor in Council to define corporation tax is sufficiently clear in the words of the paragraph itself. Later herein reference will be made to various definitions of the word "define." For the moment it is sufficient to say that it here means "to state precisely, declare or set forth" what the term "corporation tax" means. That is what was done by the Regulation contained in the Order in Council.

But if there is any doubt on the matter, it is entirely removed by a consideration as to how the law stood and the state of things existing at the time para. (*o*) in its final form was enacted. I have no doubt that I am entitled to enter upon such a consideration.

In *re Mayfair Property Co.* (1), Lindley, M.R. said:

> In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's Case, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.

In *Keates* v. *Lewis Merthyr Consolidated Collieries* (2), Lord Atkinson said:

> In the construction of a statute it is, of course, at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed and to the evils which, as appears from its provisions, it was designed to remedy.

Again, in *Murray* v. *I.R.C.* (3), Lord Lindley stated: "I think reasons can be conceived why the Legislature should have desired to impose the tax in this way," and proceeded to state the reasons.

As I have stated above, the special provision prohibiting the deduction of corporation taxes *as such* was contained in para. (*o*) by s. 5(2), Statutes of Canada, 1946, c. 55. By the next subsection (3) of the same amending Act, Parliament itself defined corporation tax as follows:

> (6) For the purpose of paragraph (*o*) of subsection one of this section "corporation tax" means any tax or fee other than a tax on

(1) [1898] 2 Ch. 28 at 35. (2) [1911] A.C. 641 at 642.
(3) [1918] A.C. 541 at 549.

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net income, the imposing of which in the opinion of the Minister singles out for taxation or for discriminatory rates or burdens of taxation, either formally or in effect, corporations or any class or classes thereof or any individual corporation, but does not include . . .

It is to be noted particularly that in that definition Parliament stated what corporation tax *means*, and did not enumerate the various provincial Acts which were corporation taxes. It may be noted, also, that the exceptions contained in the definition (but not here set out) are in many respects the same as the exceptions contained in the definition of "specific corporation tax" in P.C. 5948, but did not include an exemption for royalty or rental on natural resources within a province, the deductibility thereof being left to the Minister's discretion in para. (*o*) itself.

Then in 1947 an entirely new situation arose. The wartime agreements which had been entered into between the Dominion of Canada and all the provinces pursuant to the Dominion-Provincial Taxation Agreement Act, 1942, were about to expire. On July 17, 1947, the Dominion-Provincial Tax Rental Agreements Act, 1947, received the Royal assent. Briefly, it empowered the Minister of Finance with the approval of the Governor in Council on behalf of the Government of Canada, to enter into agreements with the provinces by the terms of which compensation would be paid to such agreeing provinces (together with their municipalities) as would refrain for a five-year period from levying personal income taxes, corporation income taxes, corporation taxes and succession duties, *all as defined in the several agreements to be entered into.*

It was necessary, of course, that the definition of corporation tax in the Income War Tax Act should include within its scope the definitions of that term in all of the prospective agreements to be negotiated and entered into by the Minister with the various provinces under the Dominion-Provincial Tax Rental Agreements Act, 1947. For that reason, the original statutory definition of corporation tax formerly found in s. 6(6) was repealed and by the amended para. (*o*) the power to define that term was conferred on the Governor in Council—the same authority as was required to approve the terms of any agreement entered into by the Minister of Finance with a province—and in each of which agreements "corporation tax" was to be defined. The non-deductibility of such corporation taxes was also extended to those paid to municipalities.

In construing the nature of the power conferred on the Governor in Council to *define* corporation tax, it seems clear that what Parliament intended was that the Governor in Council should by regulation declare or state what the term means—as Parliament itself had previously done in the repealed s. 6(6)—taking also into consideration the definition or definitions which would be included in the Dominion-Provincial Agreements themselves.

In *Dill* v. *Murphy* (1) the Judicial Committee of the Privy Council considered the meaning of the word "define" as found in the Colonial Act of 1854. By that Act the Legislature of Victoria was empowered to "define" the privileges, immunities and powers to be held, enjoyed and exercised by the Council and Assembly and by the members thereof. The Colonial Legislature in pursuance of that power enacted that such bodies and their members should hold and enjoy such of the like privileges, immunities and powers as at the passing of the Imperial Act of Parliament, 18 and 19th Vict. c. 55, were held and enjoyed by the Commons House of Parliament of Great Britain and Ireland, and by the committees and members thereof. It was held that this enactment had properly defined their privileges and sufficiently exercised the power delegated to the Local Legislature. Lord Cranworth in that case said at p. 514:

> The question solely turns upon the true construction and interpretation of the word "define" used in the 35 section of the Colonial Act. There can be little doubt on this ground. The attempt of the Appellant to interpretate and give it the meaning of "enumerate" is absurd, and plainly untenable. The word "define", in the opinion of their Lordships, is equivalent to the word "declare." It has been also urged, that when the Colonial Legislature was required to define its privileges, it was bound to specify, one by one, the privileges it decided upon claiming; but it would be impossible and could not be intended, that it was to go by an exhaustive process through the whole series of Parliamentary immunities and privileges. The Colonial Parliament have clearly defined the privileges claimed, and could not have done so in any way more convenient.

In the Oxford Dictionary (Unabridged) the following are included among the meanings of "define":

> 4. To determine, lay down definitely; to fix, decide; to decide upon, fix upon;
>
> 5. To state precisely or determinately; to specify;

(1) Moore's P.C. Cases, N.S. Vol. 1, 487.

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6. To state exactly what (a thing) is; to set forth or explain the essential nature of:

(b) To set forth or explain what (a word or expression) means; to declare the signification of (a word).

In enacting P.C. 5948 containing the Regulation, the Governor in Council in stating what "corporation tax" means, has set forth and explained the essential nature of that term, has stated precisely or determinately what it means and that I think is what Parliament intended it should do.

The major attack, however, is directed against the extent of the power conferred on the Governor in Council. It is said that in the term "corporation tax," corporation is an adjective qualifying the noun "tax" and that its effect is to limit the power of definition to those taxes which are actually imposed and levied solely on corporations. For the respondents it was contended that the appellant to succeed must depend on the catch-all phrase "or otherwise," found at the conclusion of the definition of "specific corporation tax." Counsel for the appellant, however, disclaimed any intention in this case of placing any weight on those words but directed his argument to the words "the imposing of which singles out for discriminatory rates or burdens of taxation, corporations or any class or classes thereof, or any individual corporation, either formally or in effect," and more particularly the concluding words "either formally or in effect." The import of these words is to bring within the definition of specific corporation tax those enumerated taxes which formally or specifically are levied on corporations or classes of corporations or on an individual corporation, and also those which, though not formally or specifically so levied, are in effect so levied.

Now it cannot be doubted that Parliament could have included in the Income War Tax Act the same definitions of corporation tax and of specific corporation tax as those enacted by P.C. 5948 and could have included therein the same words "either formally or in effect" as are found in the Regulation. Indeed, it had used precisely these words in the repealed s. 6(6) defining "corporation tax." Surely the Governor in Council in exercising the power to define a term could take into consideration and, if thought advisable, adopt part or all of the language Parliament itself had used in defining the same term for the same purpose, namely, the non-deductibility of such taxes.

Again, if the terms of the Regulation in P.C. 5948 be compared with the relevant provisions of the agreements (Ex. RC5) entered into by eight of the provinces with the Dominion pursuant to the Dominion-Provincial Tax Rentals Agreement Act, 1947 (seven of which were entered into prior to the date of P.C. 5948), it will be found that while the Regulation defines corporation tax as including both a specific corporation tax and a gross revenue tax (both as later defined therein), the agreements provided definitions of corporation tax and corporation income tax which in their terms correspond precisely and almost verbatim with the definitions of specific corporation tax and gross revenue tax respectively as found in the Regulation. I have not examined them individually but I am informed that the Agreement with the Province of Manitoba dated August 20, 1947, is typical of all. In the Interpretation Section thereof (s. 16) meaning of "corporation tax" is word for word the same as that of "specific corporation tax" in the Regulation, including the words "either formally or in effect," and the exceptions are the same, including that applicable to rental or royalty in respect of natural resources within a province. Likewise, the definitions of rental, royalty and natural resources are precisely the same.

I think that these agreements are admissible in evidence, inasmuch as the change in the wording of para. (*o*) of the Income War Tax Act (which conferred the power on the Governor in Council to define corporation tax) and the Dominion-Provincial Tax Rental Agreements Act, 1947, form part of the same legislative scheme. The latter Act is pleaded in the respondent's Reply and as I have mentioned above it provides that the term "corporation tax" in the Act shall be as defined in the agreements themselves.

In any event, I think that in entering upon the legislative scheme of providing for agreements with the provinces under the 1947 Act, and which included the necessity of changing the form of para. (*o*), Parliament must have had in mind certain provincial Acts which had already been entered into to enable the provinces to enter into such agreements. Four or five of the provinces had already passed such enabling legislation prior to the coming into effect of the new form of para. (*o*) or the Dominion-Provincial Tax Rentals Agreement Act. Of these, I am informed

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that that of Manitoba—Statutes of 1947, c. 56—is an example. Appended to that Act itself is the form of agreement which the Provincial Treasurer was authorized to execute. That form, insofar as it is here relevant, is in precisely the same language as in the completed agreement to which I have referred above. I was informed by counsel for the appellant that in some other cases similar definitions were contained in the enabling provincial Acts and then embodied in the agreement. The definitions of corporation tax, in its various forms, as defined in these Acts or in an appendix thereto, were surely available to the Governor in Council in carrying out its power to define the same term, and I think that Parliament necessarily intended that he should take them into consideration; otherwise, the whole intent and purpose of the Legislative scheme would have been frustrated. He did take them into consideration and for all practical purposes adopted them in their entirety in the Regulation, and in my view was entitled to do so.

It may be noted, also, that the Dominion had previously entered into agreements with the then nine provinces of Canada pursuant to the provisions of the Dominion-Provincial Taxation Agreement Act, Statutes of Canada, 1942-3, c. 13. In many respects these agreements were for the same purpose as the later agreements of 1947. By the Act, the Minister of Finance was empowered, with the approval of the Governor in Council, to enter into agreements regarding provincial and municipal personal income and corporation taxes "as defined in such agreement." These agreements are found in Ex. RC4. I refer only to that with the Province of Quebec dated May 28, 1942, which I am informed is typical of all. That agreement remained in effect until March 31, 1947, and was therefore in effect for part of the taxation year in question and for that reason alone I think it is admissible. Therein "corporation tax" was defined as follows:

> (1) In this agreement or any appendix thereto, unless the context otherwise requires, the expression,—
>
> (a) "Corporation tax" means the tax or fee the imposing of which singles out for taxation or for discriminatory rates or burdens of taxation, *either formally or in effect*, corporations or any class or classes thereof or any individual corporation except—

There again are found the words "either formally or in effect."

The Province of Quebec by c. 27, Statutes of Quebec, 1942, empowered its representatives to enter into an agreement in that form and similar enactments were passed by the other provinces.

S. 9 of that Act provided as follows:

9. (1) Notwithstanding anything herein contained, this agreement shall not be construed as interfering with the right of the Province to levy and collect taxes, licence fees and royalties upon or in respect of natural resources within the Province but any such taxes, licence fees and royalties imposed after June twenty-fourth 1940, and increases in taxes, licence fees and royalties after the said date will be subject to the provisions of section 6(*o*) of the Income War Tax Act.

(2) Taxes, licence fees and royalties imposed by the enactments enumerated in Appendix C to this agreement shall be deemed to be upon or in respect of natural resources.

Appendix C thereto included c. 90, R.S.Q. 1941, "An Act to Provide for the Erection of an Education Fund from the Natural Resources of the Province," an Act which was said to be the predecessor or parent of "An Act to Insure the Progress of Education, 1946." It is submitted by the respondents that as the former Act was similar to the latter and included a provision for levies on power corporations, by its inclusion in Appendix C there was a recognition that such levies were recognized as in the nature of rentals or royalties on natural resources within the province, and were therefore to be deductible; and that the same treatment should be accorded to the levies made under the later Act of 1946. It is common ground, however, that no levies on power corporations were ever made under the old Act at any time. The provisions of s. 9, while providing that the levies under the old Act should be deemed to be upon or in respect of natural resources, clearly provide that if levied after June 24, 1940, they would be regarded as being subject to the provisions of the then para. (*o*) and therefore *prima facie* non-deductible. Moreover, c. 27 of Statutes of Quebec, 1942, did not define "natural resources" or rental or royalty, but provided that all the taxes imposed by the enactments enumerated in Appendix A thereto, not being income taxes, should be deemed to be corporation taxes, and all those imposed by the enactments set forth in Appendix B should be deemed to be neither corporation nor income taxes. I am unable to conclude that the inclusion of the former Act in Appendix C can be of any assistance to the respondent herein.

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The Governor in Council in exercising the power to define corporation tax was not precluded from using part or all of the language which Parliament itself had used. In framing its definition he had also to use language which would be adequate to include taxes and levies which were, in fact, taxes on corporations, although called by some other name, or which in terms were made applicable to other than corporations, but in fact were levies only on corporations. The whole purpose and intent of para. (*o*) would—or readily could—be frustrated if the definition of corporation tax were confined to taxes which were named by the levying authority as corporation taxes and if it did not include taxes which formally were made applicable to individuals or partnerships as well as corporations, but in effect applied only to corporations. The mere form of the Act or bylaw levying the tax might be sufficient in some cases to establish that the tax singled out corporations for taxation. In others it might be necessary to go behind the form in order to ascertain whether in effect corporations had been singled out to bear the burdens of the tax. In using the words "either formally or in effect," the Governor in Council was ensuring that the substance as well as the form of the taxing enactment would be taken into consideration. That was an ordinary and necessary precaution to take—one which Parliament itself had stamped with its approval. If that precaution had not been taken, any other legislative body, provincial or municipal, could have framed the taxing enactments in such a way as to nullify the intent and purpose of para. (*o*) by making the tax in form applicable to individuals as well as to corporations, and then imposing limitations and conditions which in effect would exclude other than corporations from payment of the tax.

For these reasons I am of the opinion that the Governor in Council, in enacting P.C. 5948 and the Regulation established thereunder, has defined "corporation tax" in accordance with the duty imposed on him by para. (*o*); and in using the words "either formally or in effect," or otherwise, has not exceeded the power conferred by that paragraph. It follows that the Order in Council and the Regulation established thereunder must be declared valid and *intra vires* the Governor in Council.

3. DOES THE DISBURSEMENT MADE BY THE RESPONDENT FALL WITHIN THE GENERAL PROVISIONS OF P.C. 5948 DEFINING CORPORATION TAX AND SPECIFIC CORPORATION TAX?

By s. 2(1) of the Order in Council, "corporation tax" means "a specific corporation tax or a corporation gross revenue tax as hereinafter defined . . ." The appellant submits that the disbursement falls within the later definition of specific corporation tax in s. 2(5) (*supra*). It becomes necessary to consider first the nature of the disbursement made by the respondent.

The Act to Insure the Progress of Education, Statutes of Quebec, 10 George VI, c. 21, was assented to on April 17, 1946. It repealed a similar Act entitled "An Act to Provide for the Creation of an Education Fund from the Natural Resources of the Province (R.S.Q. 1941, c. 90; 16 George V, c. 45), but it is common ground that under that Act no taxes or levies had been imposed on power corporations.

The preamble to the new Act is as follows:

WHEREAS the financial situation and the insufficiency of resources of a large number of school corporations place them in the impossibility of suitably meeting the needs of education;

Whereas such a state of affairs is of a nature to hinder the normal progress of public instruction and prevent the population from entirely benefiting by the advantages to which it is entitled;

Whereas there is reason to relieve immoveable property and particularly small property, an essential factor of stability and social order, from the excessive burden of real estate taxes;

Whereas it is necessary to create new sources of revenue to meet such a situation without further involving immoveable property, and it is deemed just that the natural resources of the Province contribute a reasonable share of the cost of public instruction in the Province;

Whereas it is expedient to adopt measures for such purposes;

Sections 2, 3 and 3a as amended and as applicable to the year 1947 provide for the creation of the Education Fund and its constitution, as follows:

2. In order to assist school corporations to improve and stabilize their financial position and ensure the progress of teaching in the province, a special fund designated under the name of *Education Fund* is created by this Act.

This fund, exclusively affected for the purposes of this Act, shall be constituted and provided for by the sums derived from the various sources enumerated in sections 3 and 3a.

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3. For the civil year 1946 and for each subsequent year,

a. Every holder of timber limits situated within the province shall pay to the Minister of Lands and Forests an additional stumpage due of fifteen cents per cord of wood cut on such timber limits and destined to the manufacture of pulp or of paper, or of the accessory by-products and products of pulp;

b. Every owner of wooded territories situated within the province, save settlers and farmers, shall pay to the Minister of Lands and Forests a contribution of fifteen cents per cord of wood cut on such wooded territories and destined to the manufacture of pulp or of paper, or of the accessory or by-products of pulp;

c. Every holder of hydraulic powers of the public domain shall pay to the Minister of Hydraulic Resources *an additional charge* of fifteen cents per thousand kilowatt-hours of electricity generated and derived from such hydraulic powers;

d. Every owner of hydraulic powers situated within the province shall pay to the Minister of Hydraulic Resources *a contribution* of fifteen cents per thousand kilowatt-hours of electricity generated and derived from such hydraulic powers;

e. The Quebec Hydro-Electric Commission shall pay, out of its revenues, to the Minister of Hydraulic Resources, a sum of two million eight hundred thousand dollars;

f. The Provincial Treasurer shall pay to the said education fund, notwithstanding any provision to the contrary in the Retail Sales Tax Act (Revised Statutes, 1941, chapter 88), one-half of the revenues derived from the tax collected in virtue of the said act; such payment shall however, be restricted, as to the year 1946, to one half of the revenue collected after the thirty-first of March.

The provisions of paragraphs c and d shall not apply to municipal corporations nor to electricity cooperatives formed in virtue of the Rural Electrification Act, nor to any organization acting as an agent of the Crown, *nor to any holder or proprietor of water-powers of a natural output of less than ten thousand horse-power per six months.*

The additional stumpage dues, contributions, charges and instalments provided for in this section shall be exigible on the first of August of each year.

The Minister of Lands and Forests and the Minister of Hydraulic Resources shall, upon reception, remit the proceeds of such contributions to the Provincial Treasurer, who shall pay them into the education fund constituted in virtue of section 2.

3a. For the civil year 1947 and for each subsequent year,

a. Every company refining petroleum in the province shall pay annually to the Provincial Treasurer a tax of one-third of one per centum on the amount of its paid-up capital;

b. Every company owning, operating or utilizing, in the province, a telephone system or part of a telephone system and whose paid-up capital is in excess of one million dollars shall pay annually to the Provincial Treasurer a tax of one-third of one per centum on the amount of its paid-up capital.

S. 18 makes provision for reduction in the amount of contributions, and as amended is as follows:

> The contribution which a holder or owner of hydraulic powers must pay to the Education Fund in virtue of paragraph c or of paragraph d of section 3 is reduced, each year, by the amount equal to that which he has paid in school taxes for the school year ending on the 30th June, 1946.

The general provisions of the Act need not be particularized, it being sufficient to say that the Quebec Municipal Commission is empowered to inquire into the financial position of every school corporation, to declare any such corporation in default which the Commission considers unable to meet its obligations, to prepare a financial re-organization of such corporations as may have been declared in default, to issue bonds guaranteed by the government of the province in lieu of the bonds or debentures in default, and to pay out of the revenue from the Education Fund the principal and interest of such bonds, any deficiency therein to be paid out of the Consolidated Revenue Fund.

Omitting for the moment any consideration as to whether the sums paid by the respondent under the Quebec Act fall within the exceptions contained in s. 2(5) (*e*) of the Regulation as being "any royalty or rental on or in respect of natural resources within the province," do such payments fall within the term "a tax or fee other than a tax on net income or gross revenue?" The respondent's business is the production, transmission, distribution and sale of electric energy derived from hydraulic powers in the Province of Quebec. Part of such hydraulic power is held by the respondent under emphyteutic leases from the Province of Quebec, as enumerated in its reply, and the remaining part is owned by the respondent in full ownership under title from the Crown in the right of the Province of Quebec. In 1947, 1,891,334,000 kilowatt hours of electricity were generated and derived from powers held under such leases, and 2,681,630,000 kilowatt hours from power held by the respondent in full ownership. Under the Act, therefore, it became liable to payments under both subsection c and d of s. 3. In 1947 the "additional charges" under c, and the "contribution" under d, aggregated $684,-022.30, which amount was reduced under s. 18 by the amount paid in school taxes of $367,935.14—a net payment of $316,087.16.

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It will be noted that under para. (*c*) the respondent was required to pay an additional charge of fifteen cents per 1000 k.w.h. of electricity generated and derived from such hydraulic powers. Considerable stress is laid by the respondents on the word "charge" which is also used in some, but not all, of the emphyteutic leases filed. I have examined one filed by the Gatineau Power Company dated August 8, 1922, which provides that in addition to the fixed annual price or rental of $1,000, the lessees shall pay "an annual supplementary charge or royalty on each h.p. installed as follows:

(*a*) Up to 16,000 h.p.—nothing.

(*b*) On ½ of h.p. installed in excess of 16,000 h.p.—50 cents."

Then provision is made for the revision of such supplementary charges at the end of each ten-year period of the lease (which was for 50 years) and if the parties could not agree on the revision, the matter was to be referred to arbitration.

I am invited to find that because of the use of the term "additional charge" in para. c, that it is of the same nature as the "supplementary charge or royalty" provided for in the leases, and is not therefore a tax, but I find nothing to support that contention. There is no evidence whatever that the supplementary charge or royalty was being revised or that the time for such revision had arrived. Moreover, the "additional charge" in para. c is based on the electricity actually generated and developed, whereas the "supplementary charge or royalty" in the lease I have mentioned, is computed from the actual total turbine power or other hydraulic motors in h.p. as may be from time installed. The provisions for initiating the revision of the supplementary charge or royalty had not been undertaken. Likewise, it could not be considered as merely "raising the rent."

There is still another reason why the levy made under para. (*c*) cannot be considered as in the nature of a rental. In terms the levy is made on "a holder of hydraulic powers of the public domain," and is not confined to those holding leases from the Province of Quebec. In the appeal of one of the respondents—Canadian Light and Power Company—the Income Tax Appeal Board stated that it had been proven that that company was such a holder *under leases from the government of the Province of Quebec.* However,

that does not appear to be the fact. Exhibits A-3 and A-4 in that case are the company's returns for the year 1947 to the Dept. of Hydraulic Resources under the Act to Insure the Progress of Education. Therein it is stated that its hydraulic powers are held under "a lease from Dept. of Railways and Canals, Ottawa". Ex. A-2 is the renewal of the lease itself, dated April 29, 1946, and the lessor therein is His Majesty the King represented by the Minister of Transport. Certainly, as to that company, the levy could not be considered in any way as a rental, there being nothing in the nature of a lease between the parties affected. As to that company it is a tax and nothing more and I am quite unable to find that the same words as are used to impose a tax on one taxpayer can be of a different character and mean something quite different such as rental, when applied to other taxpayers.

In my opinion, the "additional charge" levied under para. c, and the "contribution" levied under para. d, were taxes just as much as were the taxes levied on the paid-up capital of oil refining companies and telephone companies under para. 3a, where they are, in fact, called taxes. The test is not answered by the mere name of the impost or levy, but rather by ascertaining its essential nature.

In the case of *Attorney General of Canada* v. *Registrar of Titles* (1), Macdonald, C.J.B.C. said at p. 764:

> The definition of a tax includes *inter alia* the imposition of it by competent authority. It must be imposed in clear and unambiguous language, and requires compulsory payment. There can be no option on the part of the taxpayer to pay or not to pay a tax.

In the same case Macdonald, J.A. said at p. 773:

> The essentials of a tax were discussed by Duff J. (now C.J.C.) in *Lawson* v. *Interior Tree Fruit & Vegetable Committee,* (1931) 2 D.L.R. 193, at pp. 197-8, referred to with approval by the Judicial Committee in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.,* (1933) 1 D.L.R. 82, at p. 86. The tests are (1) it must be enforceable by law (2) imposed by a public body under legislative authority and for a public purpose. In addition "compulsion is an essential feature" (*Halifax* v. *Nova Scotia Car Works* (1914) 18 D.L.R. 649, at p. 652).

Again, "tax" is defined in Corpus Juris, Vol. 61, p. 65, and in the notes that follow other definitions are extracted from certain decisions, including the following:

> Any Government charge imposed for raising revenue is a "tax" regardless of name by which it is called.

(1) [1934] 4 D.L.R. 764.

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As indicated in its definition, the essential characteristics of a tax are that it is not a voluntary payment or donation but an enforced contribution exacted pursuant to legislative authority in the exercise of the taxing power, the contribution being of a proportional character and payable in money and imposed, levied and collected for the purpose of raising revenue to be used for public or Government purposes and not as payment for some special privilege or service rendered.

In my view, the levies imposed upon the respondent by the Act meets all those tests and are therefore taxes. It is obvious, of course, that they were not imposed on net income or gross revenue.

The Act to Insure the Progress of Education has for its main purpose the rendering of assistance to school corporations in default. Instead of directing that the costs thereby incurred should be paid entirely out of the Consolidated Revenue Fund, it established a special Education Fund to be built up by the annual taxes levied under Clauses a, b, c and d of s. 3, and of Clauses a and b of s. 3a, supplemented by an annual payment of $2,800,000 by one of its own Crown companies (The Quebec Hydro-Electric Commission) and by a further payment by the Provincial Treasurer of one-half of the revenues collected under the Retail Sales Tax Act. The taxes so levied are of various sorts, but in this case I am concerned only with the tax levied under para. c and d, all other taxes being levied on quite a different basis. It is apparent that the imposition of such taxes does not single out for taxation or for discriminatory rates or burdens *all corporations* or any single corporation. Nor does it *formally* single out any class or classes of *corporations.* It is made applicable to every holder or owner of hydraulic powers within the province and therefore *formally* paragraphs c and d could include individuals and partnerships as well as corporations. It is to be noted, however, that s. 3 provides that the provisions of paragraphs c and d shall not apply to municipal corporations, to electricity co-operatives, to an agency of the Crown, *nor to any holder or proprietor of water powers of a natural output of less than 10,000 h.p. per 6 months.*

The effect of that limitation which I have underlined is shown by the Admissions of Fact, filed. Such admissions show that in 1947 twelve power corporations only (including the nine respondents herein) paid additional charges or contributions under paragraphs c and d; that no person

other than a corporation has ever paid or been liable to pay any of such additional charges or contributions; that some corporations, holders or owners of hydraulic powers in Quebec and who have generated electricity therefrom have never paid or been liable to pay any of such additional charges or contributions (presumably because of the deductions for school taxes permitted under s. 18); that in the years 1946 and 1947 persons other than corporations were holders or owners of hydraulic powers in the Province of Quebec within the meaning of paragraphs c and d and generated and derived electricity therefrom, but no person in the Province of Quebec other than a corporation was the holder or proprietor of water powers of a natural output of more than 10,000 h.p. at ordinary six months' flow.

These admissions establish that at least for the years 1946 and 1947 (and there is no suggestion in the evidence that there has since been any change), the taxes levied under paragraphs c and d were borne solely by corporations, either as holders or proprietors of water power of a natural output of 10,000 h.p. per 6 months or over and, whose taxes, levied under paragraphs c and d, exceeded the school taxes which were deductible under s. 18. It can scarcely be doubted that the legislature had full knowledge that only corporations were the proprietors or holders of water power of a natural output of more than 10,000 h.p. at ordinary 6 months' flow and that such corporations alone would be called upon to bear the burden of the additional taxes.

In effect, therefore (although not formally), the imposition of these taxes singled out classes of corporations, namely those holding or owning water power rights for taxation or for discriminatory rates or burdens of taxation, by imposing a tax in respect of the activities or operations mainly done by or carried on by corporations, namely, electricity generated and derived from hydraulic powers.

Such taxes are therefore within the definition of "specific corporation tax" and may not be deducted unless they fall within the exceptions provided for in ss. 5 of the regulation.

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4. IS THE RESPONDENT ENTITLED TO THE BENEFIT OF THE EXEMPTIONS CONTAINED IN THE DEFINITION OF SPECIFIC CORPORATION TAX?

From the definition contained in s. 2(5) of the regulation, there are excepted five categories of levies, the only one relied upon by the respondent being (*e*)—"any rental or royalty on or in respect of natural resources within a province." The regulation also provides definitions for natural resources, rental and royalty in s. 2(7) (*a*) (*b*) (*c*) (*supra*).

The Income Tax Appeal Board came to the conclusion that as to the amounts paid by the respondent under para. c, the respondent was in any event entitled to that deduction. Its reasons were stated as follows:

> There is, however, still another reason for this taxpayer's appeal to succeed at least in part. Even if I were wrong in my conclusion that the Governor in Council had exceeded his powers in making the regulation contained in P.C. 5948, paragraph (*e*) of subsection (5) of section 2 of that regulation provides for an exception in respect of "any royalty or rental on or in respect of natural resources within a province", as such charges shall not be deemed to be a corporation tax within the provisions of the Order-in-Council. I have already found that the additional charge imposed upon the appellant herein under the provisions of paragraph (*c*) of section 3 of the Quebec *Education Act* by reason of the fact that the appellant is a *holder* of hydraulic powers of the public domain, was in the nature of a rent, an annual supplementary charge, or a royalty, and not a tax. In so far, therefore, as the appellant was called upon to pay an additional charge under the Quebec *Education Act* by reason of being the *holder* of hydraulic powers of the public domain under leases from the Crown, such additional charge, in my opinion, was clearly a royalty or rental and, to that extent at least, it came within the express provisions of the exception contained in paragraph (*e*) of subsection (5) of section 2 of the Order-in-Council P.C. 5948.

In view of the conclusion which I have reached as to the interpretation to be placed upon the definition of "rental," it becomes unnecessary to discuss or determine the question as to whether the Crown in the right of the province of Quebec owns the water, the use of which was taken without severance by the respondent in developing electricity. The definition of "rental" concludes with the words "the real intent and purpose of which charge is to compensate for the value of such occupation or use." An examination of the various charges which are excepted out of the definition of "specific corporation tax" indicates that such charges in the main, if not entirely, are not in fact

taxes in the ordinary sense but rather in the nature of fees or charges for which the payer receives some form of compensation in return. The same connotation is involved in the definitions of rental. Not all rental charges are deductible, but only those charges in respect of natural resources, the real intent and purpose of which is to compensate for the value of such occupation or use, and in this case that means for the occupation of a water power site or the use of the water. From what has been said above, it is apparent that the taxes levied under paragraphs c and d were not levied to compensate for the value of the occupation of the water power sites or of the use of the water. They were levied solely for the purpose of raising funds to establish the Education Fund and thereby promote the progress of education. The compensation for the occupation of water power sites and the use of the water had already been determined and agreed upon in the leases themselves. There is nothing in the Act to suggest that the value of the rented property had increased from the time the leases were granted or that the compensation provided for therein was inadequate. The additional charges and contributions, or taxes as I have found them to be, were not therefore within the definition of "rental."

Likewise, they were not "royalties" as that term is defined in the regulation. The definition applies to things severed, taken, extracted or removed and which formed part of the natural resources of the province, such as timber, minerals, oil, wild animals, fish and the like. Here nothing of that nature occurred. Moreover, the definition requires that to be a royalty, the real intent and purpose of the payment is to compensate a province for the value in whole or in part of the said thing prior to its severance, taking, extraction or removal. I place the same interpretation on that requirement as I have done in the similar words found in the definition of rental.

My opinion, therefore, is that the payments in question made by the respondent, fall within the definition of "specific corporation tax" as found in the regulation and do not fall within any of the exceptions contained therein.

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5. IS THE DEDUCTION PERMISSIBLE UNDER S. 6(1) (*a*) OF THE INCOME WAR TAX ACT?

That subsection is as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

On this point also the Income Tax Appeal Board ruled in favour of the respondents, although its reasons for so doing are not apparent in the judgment itself. As I understand the argument of counsel for the respondents, the submission on this point is based on the allegation that while the Income War Tax Act does not specifically provide for the deduction of local school taxes in computing taxable income, such are invariably allowed (perhaps with very minor exceptions) as being wholly, exclusively and necessarily laid out for the purpose of earning the income. It is said that the Education Fund was used to advance education within the province and is therefore a school tax which likewise should be deducted.

As far as I am made aware, the only provision in the Income War Tax Act which specifically provides for the deduction of taxes in computing taxable income is that found in s. 5(1) (*w*), namely, such amount as the Governor in Council may by regulation, allow in respect of taxes on income for the year from mining or logging operations; that, of course, has no application to this case. The mere fact that local school taxes, paid to a municipality for the use of school boards and commissions, and levied upon all classes of property owners—whether Roman Catholic, Protestant or neutrals (such as corporations on which the levies in some cases are higher than on individuals)—have been allowed as a deduction, does not lead to the conclusion that taxes paid to the province under the Act to Insure the Progress of Education by special classes of taxpayers throughout the province as a whole should also be deducted.

These expenses when measured by sound commercial and accounting practices alone would appear to be deductible. But that fact alone does not make them deductible

under s. 6(1) (*a*). As stated by Davis, J. in *Montreal Light, Heat & Power Consolidated* v. *Minister of National Revenue* (1):

> The Court must interpret the statutes without reference to its own views of the fairness or unfairness, in a commercial sense, of the result in any particular case. Parliament has made the law; we are merely to interpret and apply it.

It has been well settled, moreover, that sound commercial and accounting practices are not to be followed where the statute contains some express direction or prohibition which diverges from such practices. In *Usher's Wiltshire Brewery* v. *Bruce* (2), the principle was stated shortly as follows:

> Where a deduction is proper and necessary to be made to ascertain the balance of profits and gains, it ought to be allowed . . . provided there is no prohibition against such allowance . . .

Here the regulation clearly prohibits the deduction of specific corporation taxes, and having found that the payments made by the respondent fall within the definition of that term, such payments are not deductible.

There is another submission to which I must refer in order to indicate that it has not been overlooked.

One of the clauses in the agreed Statement of Facts was as follows:

> 5. Persons other than corporations paid additional stumpage dues or contributions under paras. (*a*) and (*b*) of s. 3 of the above-mentioned Act (i.e., An Act to Insure the Progress of Education).

It is submitted by counsel for some of the respondents that s. 3 of that Act must be read as a whole and that when so read it should be found that the levies—to use a neutral word—imposed by Clauses a, b, c and d of s. 3, and all included in one section of the Act, should be treated as one levy. The argument is then advanced that because levies made under paras. a and b are shown to be payable by individuals as well as by corporations, none of the levies, and particularly those under paras. c and d, are in fact corporation taxes. If that argument is sound it could logically be extended to the provisions of para. f of the same section (*supra*) which require the Provincial Treasurer to pay to the fund a proportion of the revenue under the Retail Sales Tax Act, a payment which is not a tax but merely an allocation of moneys to be received by the Treasurer.

(1) [1942] S.C.R. 89 at 104. (2) 6 T.C. 399 at 429

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It seems to me, however, that in seeking to ascertain what is or is not a corporation tax, it is necessary to look at the particular subsection under which the tax is paid and that the nature of the levy is not to be determined by reference to other subsections which impose different levies in different ways on different persons, notwithstanding that all such levies constitute part of the same fund, but are made up from many miscellaneous sources. If the argument submitted were valid, it would follow that the levies made on companies refining petroleum and on companies owning or operating a telephone system, under s. 3a, a and b, could not be corporation taxes although counsel for at least some of the respondents admitted—and I think properly so—that these levies came squarely within the definition of specific corporation tax in P.C. 5948. It is true that s. 3a did not form part of the original Act, but was added in 1947 by 11 George VI, c. 32 (Quebec); it was made applicable to the year 1947 and its provisions cannot in any respect be considered as differing from those of s. 3. In my opinion, this submission cannot be supported and I reject it.

For the reasons given the appeal herein will be allowed, the decision of the Income Tax Appeal Board set aside, and the assessment made upon the respondent by the Minister will be affirmed. The appellant is entitled to be paid its costs after taxation.

Judgment accordingly.