1953

Oct. 19

Oct. 21

BETWEEN:

TRANS-CANADA INVESTMENT CORPORATION LIMITED ..... } APPELLANT;

AND

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

Revenue—Income—The Income Tax Act 11-12 Geo. VI, c. 52, s. 27(1)—Dividends received from a Canadian Corporation—Appeal from Income Tax Appeal Board allowed.

Held: That in the circumstances of this case dividends from a Canadian Corporation are deductible by virtue of s. 27(1) of the Income Tax Act notwithstanding the fact that such dividends are paid in the first instance to a trustee-corporation and by it paid to the receiving corporation.

APPEAL from a decision of the Income Tax Appeal Board.

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

K. E. Meredith for appellant.

J. L. Farris, Q.C. and *T. E. Jackson* for respondent.

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

1953

TRANS-CANADA INVESTMENT CORPORATION LIMITED v. MINISTER OF NATIONAL REVENUE

CAMERON J. now (October 21, 1953) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated April 9, 1953, which disallowed an appeal by the appellant from an assessment made upon it for its taxation year 1950. By that assessment, dated February 1, 1952, there was added to the declared income of the appellant the sum of $737.26 received by it in that year from the Yorkshire and Canadian Trust Limited, under the circumstances presently to be mentioned, and which amount the appellant had claimed as a deduction under s. 27(1) of the Income Tax Act.

The facts are not in dispute. The appellant is a company incorporated under the laws of the Province of British Columbia, and carries on business as the administrator of certain fixed investment trust known as Trans-Canada Shares, Series "A", Series "B", and Series "C". The trust known as Trans-Canada Shares Series "B" was constituted and is governed by an agreement dated September 1, 1944 (Exhibit 1), the parties thereto being (*a*) the Administrator of the Trust, the appellant herein; (*b*) the Trustee, the Yorkshire and Canadian Trust Limited; and (*c*) the holders of certificates representing Trans-Canada Shares Series "B".

The plan of operation was as follows. The appellant, as administrator of the Trust, from time to time purchased a fixed number of common shares in fifteen selected Canadian corporations (called a "Trust Unit"), endorsed the share certificates in favour of the Yorkshire and Canadian Trust Limited (hereinafter to be called "the Trustee"), and delivered them so endorsed to the Trustee, which thereupon registered them in its own name. Upon the deposit with it of one "Trust Unit" as aforesaid, the Trustee issued certificates representing 1,000 undivided one-thousandths' interest in the "Trust Unit", each of such interests being termed a Trans-Canada Share Series "B". These certificates, so issued by and in the name of the Trustee, were in two forms:

(*a*) certificates which are registered on the books of the Trustee in the name of the registered owner; and

(*b*) bearer certificates which are not registered on the books of the company, but which are negotiable and passed by delivery. Attached to these is a series of coupons which

1953

TRANS-CANADA INVESTMENT CORPORATION LIMITED v. MINISTER OF NATIONAL REVENUE

Cameron J.

entitle the holder thereof, upon surrender on the semi-annual dates mentioned, to receive the proportion of the income from the "Trust Unit" to which he is entitled.

The certificates when issued by the Trustee were in the denominations requested by the administrator, were then delivered by the latter to the various purchasers thereof. Exhibits 2 and 3 are respectively samples of the registered and bearer certificates so issued.

The Trustee, as the registered owner of the shares in the fifteen companies (which I shall hereafter refer to as the "underlying companies"), received all dividends paid thereon, and on March 1 and September 1 in each year, as required by the said Trust Agreement, distributed its net income therefrom to the holders of the Series "B" certificates, after deducting therefrom the various charges specified in the agreement, which were as follows:

(*a*) a fixed fee to the administrator;

(*b*) its own charges;

(*c*) taxes and other Governmental charges;

(*d*) a reserve fund for contingent tax liability. I understand, however, that no such reserve was set up at any time.

In the case of registered owners of the Series "B" certificates, payment was made by the special cheque of the Trustee, which was headed "Trans-Canada Shares Series 'B' —semi-annual distribution of income." In the case of those holding bearer certificates, payment was made to an individual, bank or trust company surrendering the semi-annual coupon.

In 1950, the appellant held as its own property a certificate for 1,000 shares of Series "B", and in respect thereof received from the Trustee the sum of $737.26. These cheques (Exhibit 4) are for an amount in excess of that figure, but nothing hinges on that difference. In its tax return it showed the receipt of that amount but claimed that it was deductible under the provisions of s. 27(1) of the Income Tax Act, which is as follows:

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

(*a*) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year, . . .

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

The respondent, however, being of the opinion that the said sum was not a dividend or the sum of dividends received from the corporation that was resident in Canada, disallowed the said deduction and added that amount to the appellant's taxable income. Then followed the appeal to the Income Tax Appeal Board, and later to this Court.

At the hearing it was conceded that each of the "underlying companies" which paid the dividends to the Trustee was a corporation that was resident in Canada in 1950, and was not, by virtue of a statutory exemption, exempt from taxation under Part 1 of the Act for the year 1950. It follows, therefore, that if the appellant corporation had been the registered owner of the shares in the "underlying companies," and as a consequence had received the dividends directly from them, it would have been entitled to deduct the amount of such dividends in computing its taxable income. Is its position otherwise because of the particular facts of this case?

Counsel for the appellant—on whom the onus lies—submits that, notwithstanding the intervention of the Trustee, that which the appellant received was a dividend from a corporation resident in Canada and that the appellant received it from that corporation. The respondent denies that when received by the appellant it had the quality or characteristics of such a dividend; and that even if it were found to be such, the appellant received it from the Trustees and not from the "underlying companies."

Firstly, was it a *dividend* from a Canadian corporation not exempt from taxation? In considering this question, I must elaborate somewhat on the facts disclosed in evidence. The Trust established under the provisions of the Trust Agreement (Exhibit 1) is a fixed investment trust. The names of the "underlying companies" and the number of shares in each, which together make up a "Trust Unit," are set out in the agreement. They cannot be changed by the Trustee except upon the direction of the administrator who has certain limited powers to direct sales of portions thereof, and in that case the proceeds are held on deposit in a chartered bank or invested in Government bonds until the

1953

TRANS-CANADA INVESTMENT CORPORATION LIMITED v. MINISTER OF NATIONAL REVENUE

Cameron J.

administrator directs the Trustee to purchase therewith shares in some one or more of the named "underlying companies," but not otherwise. By Clause 34 of the agreement, it is provided that the holder of certificates representing in the aggregate 200 Series "B" shares, or any multiple thereof, is entitled upon surrender of his certificates to the Trustee to require the latter to either—

(*a*) sell forthwith the shares of stock in the "underlying companies" then constituting one-fifth of a "Trust Unit," or the proper multiple thereof, and pay over the proceeds to him; or

(*b*) to transfer to him duly endorsed, stock certificates representing one-fifth (or the proper multiple thereof), representing the proportionate part applicable to his shares of stock in the "underlying companies" held by the Trustee.

These facts were known to a purchaser of the Series "B" certificates, not only because he became a party to the agreement upon subscribing for shares, but also because the information was given to him in a summary forming part of the certificate itself. At the time of the semi-annual distribution of income, a registered owner of the certificate was furnished with a statement showing precisely the shares held by the trustee in respect of each "Trust Unit."

It is also shown that the Trustee took meticulous care to ensure that the stocks in the "underlying companies" represented in each "Trust Unit" were kept separate from all others. When dividends were received, they were immediately placed in a special Series "B" Trust Account and all distributions made, whether to registered owners or to those holding bearer certificates, were paid out of that account.

From these facts, and particularly because he could at any time demand that the Trustee deliver to him his proper proportion of the shares in the "underlying companies," it seems to me that the holder of the Series "B" certificate was, in fact, the beneficial owner of the basic shares represented thereby. While he was not the registered owner, and although the administrator had the right to vote the said shares at any meeting of the "underlying companies," no one other than the holder of Series "B" certificates had any beneficial interest in such shares. The number of shares to which he was entitled in each company was fixed at the time he purchased the certificates, remained the same

throughout, and he was entitled to physical possession thereof, upon demand.

Under these circumstances I do not think that the amounts which the appellant received were other than dividends from the "underlying companies." The majority decision of the House of Lords in *Archer-Shee* v. *Baker* (1), strongly supports that view. There the appellant's wife, resident in the United Kingdom, was the life tenant of a trust fund under an American will, the trustees of which were resident in New York. The trust fund consisted entirely of foreign government securities, foreign stocks and shares, and other foreign property, the trustees having powers of sale and reinvestment. The income from the fund was paid by the trustees to the order of the appellant's wife, at a New York bank. The issue in the appeal against the assessment levied against the appellant in respect of his wife's income was whether such income arose from the specific securities, stocks and shares, and other property constituting the trust fund or from "possessions out of the United Kingdom other than stocks, shares or rents." The House of Lords, reversing the Court of Appeal, held that the appellant's wife was the beneficial owner of the securities, stocks and shares, and other property constituting the trust fund and was entitled to receive and did receive the interest and dividends thereof. In coming to this view they assumed that the law of trusts on this point was the same in New York as in England. That this assumption was erroneous was shown by their subsequent decision in *Garland* v. *Archer-Shee* (2). That fact, however, does not affect the applicability of the decision in the first *Archer-Shee* case (*supra*) to the facts of the present case, it being assumed that the law of trusts on this point in British Columbia is the same as that of England as laid down in the first *Archer-Shee* case.

In the first *Archer-Shee* case, Lord Wrenbury said at p. 866:

> I have to read the will and see what is Lady Archer-Shee's right of property in certain ascertained securities, stocks and shares now held by the Trust Company 'to the use of my said daughter.' It is, I think, if the law of America is the same as our law, an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she is tenant for life. Her right is not to a balance sum, but to the dividends subject to deductions as above mentioned. Her right under the will is 'property' from which income is derived.

(1) [1927] A.C. 844. (2) (1930) 15 T.C. 693; [1931] A.C. 212.

1953

TRANS-CANADA INVESTMENT CORPORATION LIMITED v. MINISTER OF NATIONAL REVENUE

Cameron J.

And Lord Carson, in the same case, said at p. 870:

> In my opinion upon the construction of the will of Alfred Pell once the residue had become specifically ascertained, the respondent's wife was sole beneficial owner of the interest and dividends of all the securities, stocks and shares forming part of the trust fund therein settled and was entitled to receive and did receive such interest and dividends. This, I think, follows from the decision of this House in *Williams* v. *Singer* (1921) 1 A.C. 65, and in my opinion the Master of the Rolls correctly stated the law when he said ((1927) 1 K.B. 123) 'that in considering sums which are placed in the hands of trustees for the purpose of paying income to beneficiaries, for the purposes of the Income Tax Acts, you may eliminate the trustees. The income is the income of the beneficiaries; the income does not belong to the trustees.'

And, at p. 871:

> My Lords, I am unable to understand why or how the character of the sum paid to the respondent's wife ever became changed or, as the Master of the Rolls graphically says, 'was no longer clothed in the form in which it was originally received, having no trace of its ancestry,' simply because the deductions due by law have been made and because it has been mixed up with other trust moneys by the trustees. It is, in my view, in the same position as if the trustees had arranged to have the interest and dividends paid direct to the respondent's wife and she had discharged the necessary outgoings in accordance with the law. Whether the necessary outgoings according to law were discharged by the trustees or by the cestui que trust cannot, in my opinion, make any difference. I think the appeal should be allowed, . . .

Reference may also be made to *Pan-American Trust Company* v. *M.N.R.* (1), in which the President of this Court considered the first *Archer-Shee* case and followed the principles therein laid down. Reference may also be made to *Kemp* v. *Minister of National Revenue* (2); to *Nelson* v. *Adamson* (3); and to *Syme* v. *Commissioner of Taxes* (4).

On the principles laid down in these cases, I reach the conclusion that what the appellant was entitled to receive and did, in fact, receive, was the dividends of the various Canadian companies.

The second question is whether, being a dividend as I have found it to be, it was received *from* a Canadian corporation. Counsel for the respondent contends that the language of the section requires that it must have come directly from a Canadian corporation to the appellant, and that as it was paid in the first instance to the Trustee, and then by the latter to the appellant, it was not, in fact, received *from* a Canadian corporation. He submits that

(1) [1949] Ex. C.R. 265.
(2) [1948] 1 D.L.R. 65.
(3) [1941] 2 K.B. 12.
(4) [1914] A.C. 1013.

while it may have been derived from a Canadian corporation, it was not *received from* a Canadian corporation.

I agree that it is possible to interpret the language of the section as requiring that the dividend must have been received directly from the paying corporation. But in my view, there is another interpretation that may be put upon it, an interpretation which I think is more consonant with the intention of Parliament as I deem it to be from the language itself.

In *Caledonian Railway* v. *North British Railway* (1), Lord Selborne said at p. 122:

> The more literal construction of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which the intention can be better effectuated.

Again, in *Shannon Realties* v. *St. Michel* (2), it was stated that if the words used are ambiguous, the Court should choose an interpretation which will be consistent with the smooth working of the system which the statute purports to be regulating.

Now, from a perusal of the words of the section, it seems clear that the purpose of the enactment was to reduce the number of taxes on corporate earnings. Such earnings are ordinarily subject to taxation when earned by a corporation, and again when ultimately distributed by way of dividend to shareholders who are individuals. Were it not for the provisions of s. 27(1), there would be a further tax on such earnings when they were passed from one corporation to another by way of dividends.

To carry out that intention it was necessary to limit the deduction to corporations—and that was done. It was also necessary to provide that it related to a dividend, and that that dividend issued or came from a corporation resident in Canada and which was not exempt from tax—and that was done in apt language. If the purpose of Parliament was as I have stated, then it was not necessary in order to carry out that purpose, to require that the dividend must have been received directly from the paying corporation. In fact, such a requirement would have drastically curtailed the relief to corporate taxpayers which I think it was intended to grant to them.

(1) (1881) 6 A.C. 114. (2) [1924] A.C. 192.

1953

TRANS-CANADA INVESTMENT CORPORATION LIMITED v. MINISTER OF NATIONAL REVENUE

Cameron J.

It seems to me that counsel for the respondent, in submitting that the dividend must have been "received from" a corporation, has placed the emphasis in the wrong place. In my view, the important matter is that the dividend shall have come from a Canadian corporation and that the emphasis should therefore be placed on "a dividend from a corporation."

In my opinion, the appellant did receive a dividend from Canadian corporations—namely, the "underlying companies"—notwithstanding the fact that the dividends were paid in the first instance to the Yorkshire and Canadian Trust Limited, which company, in my opinion, was nothing more than a trustee for the appellant and other owners of Series "B" certificates to hold the shares to which they were severally entitled, to receive the dividends thereon, to distribute the income semi-annually, and upon demand made to deliver the proper numbers of shares in the "underlying companies," or their proceeds if sold, upon the instructions of the holder.

For these reasons the appellant is entitled to succeed.

I should note that in the Notice of Appeal the appellant, as an alternative to its main appeal, submitted that if it were not successful in the main appeal, it was entitled to a deduction for depletion in respect of the said dividends in the sum of $50.87. While that right was denied in the respondent's reply, his counsel at the trial conceded that he could not support the finding of the Income Tax Appeal Board on that point and conceded the appellant's right to that deduction. I merely note that matter for, in view of my finding that the appellant is entitled to the full deduction of its main claim, it cannot receive the deduction for depletion also.

There will therefore be judgment allowing the appeal on the main issue; the decision of the Income Tax Appeal Board will be set aside, and the matter referred back to the respondent to re-assess the appellant in accordance with my findings.

The appellant is entitled to its costs after taxation.

Judgment accordingly.

THE MINISTER OF NATIONAL REVENUE (*Respondent*) ..... } APPELLANT;

1955

*May 12
*Nov. 15

AND

TRANS-CANADA INVESTMENT CORPORATION LIMITED (*Apellant*) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Assessment—Taxation—Income Tax—Dividends from taxable Canadian corporations paid Trustee of Investment Trust—Net income therefrom paid by Trustee to Trust's beneficiaries—Whether sums so received taxable—The Income Tax Act, 1948 (Can.) c. 52, ss. 27 (1), 58, 60.

Under an agreement entered into between the respondent as administrator, the Yorkshire and Canadian Trust Ltd., as trustee, and the holders of certificates in a fixed investment trust known as "Trans-Canada Shares Series 'B'", the respondent purchased a fixed number of shares in fifteen Canadian companies (called a "trust unit") and delivered them to the Trustee which registered them in its own name. Pursuant to the agreement the Trustee then issued certificates repre-

*PRESENT: Rand, Estey, Locke, Cartwright and Fauteux JJ.

1955

MINISTER OF NATIONAL REVENUE v. TRANS-CANADA INVESTMENT CORPORATION LTD.

senting one thousand undivided one thousandths interests in the trust unit to the beneficiaries of the trust. The Trustee, as the registered owner of the company shares received all dividends paid thereon and after deduction of certain charges paid the balance to the beneficiaries of the Trust. In 1950 the respondent purchased on its own account one thousand "Trans-Canada Shares Series 'B'" and subsequently received from the Trustee payment of the net income earned by the trust unit. In its income tax return it claimed this amount as a deduction under s. 27 (1) of *The Income Tax Act* (1948, S. of C., c. 52). The deduction was disallowed by the appellant. An appeal by the respondent was disallowed by the Income Tax Appeal Board but on further appeal to the Exchequer Court of Canada was allowed.

Held (Rand and Estey JJ. dissenting): That the dividends received by the respondent were in the words of s. 27 (1) of *The Income Tax Act* received "from a corporation that (*a*) was resident in Canada in the year and was not by virtue of a statutory provision, exempt from tax under this Part for the year" and the mere interposition of a trustee between the dividend-paying companies and the beneficial owner of the shares did not change the character of the sum.

Per Cartwright and Fauteux JJ.: The fact that Parliament, by 1949, S. of C., c. 25, s. 27, added s-s 7 (to s. 58 of the Act), prescribing an arithmetical formula for apportioning between a trustee and an individual beneficiary the dividends from taxable corporations received in the first instance by the trustee and did not add a corresponding sub-section as to a corporate beneficiary, does not constitute a sufficient reason for construing s. 27 (1) in a manner contrary to the plain meaning of the words in which it is expressed.

Per Rand J. (dissenting): By s. 27 a corporation must have "received a dividend from a corporation" and on the face of it the respondent did not receive a dividend from the underlying companies. *In re Income Tax Acts, 1924-1928,* (1929) St. R. Qd. 276. *Baker* v. *Archer-Shee* [1927] A.C. 844, distinguished. In the light of the precise language of ss. 58 and 60 of *The Income Tax Act* and the scheme which it embodies, the respondent could not be said to have "received" from the underlying companies the dividends which were paid to the Trustee.

Per Estey J. (dissenting): The trust agreement read as a whole does not contain language to support a construction that either a legal or equitable right is created in favour of the certificate holders in respect of the dividends received by the Trustee from the underlying companies. *Baker* v. *Archer-Shee, supra,* distinguished.

Judgment of the Exchequer Court [1953] Ex. C.R. 292, affirmed.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada (1) allowing an appeal from a decision of the Income Tax Appeal Board (2) which had disallowed an appeal by the Respondent from an assessment made upon it for the taxation year 1950.

(1) [1953] Ex. C.R. 292; 53 D.T.C. 1227.

(2) (1953) 8 Tax A.B.C. 220.

1955

MINISTER OF NATIONAL REVENUE v. TRANS-CANADA INVESTMENT CORPORATION LTD.

J. L. Farris, Q.C. and *T. E. Jackson* for the appellant.

K. E. Meredith for the respondent.

RAND J.: (dissenting)—The respondent is what is called the administrator of an investment trust. It raises money, purchases securities which it places in the custody of a trustee, in this case a corporate body, and disposes of certificates representing fractional interests in trust units of the securities deposited. A unit consists of a specified number of shares of common stock of named companies and is divided into 1,000 "Trust Shares Series B", each representing 1 $1/1000$ undivided interest in the unit.

But the administrator can, in addition, be itself a purchaser of these certificates, and that was the case here. Three agencies are thus concerned: the underlying companies earning income in respect of which dividends are paid; the intermediate trustee by which that stock is held and to which the dividends are paid; and the respondent the holder of Series B shares. Dividends declared out of income on which the underlying companies had paid taxes imposed on Canadian companies resident in Canada were received by the trustee. These and other incidental income arising in the course of administering the trust, after deductions for fees, etc. of both the trustee and the administrator, were distributed among the certificate holders including the respondent. As received by the respondent, they became income out of which dividends would be payable to its own shareholders.

Under the Act these moneys represented taxable income in the hands (*a*) of the underlying companies; (*b*) of the respondent; and (*c*) of its shareholders. But the respondent claims to be entitled to deduct from its income the amount so received as dividends received by it from the underlying companies under s. 27(1) which reads:—

> (1) Where a corporation in a taxation year received a dividend from a corporation that
>
> (*a*) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year,
>
> * * *
>
> an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporation's income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

1955

MINISTER OF NATIONAL REVENUE v. TRANS-CANADA INVESTMENT CORPORATION LTD.

Rand J.

and the question is the narrow one whether the moneys were so received by the respondent. The Minister was of the opinion that they were not, and this view was upheld by the Tax Appeal Board. But Cameron J. in the Exchequer Court, on the authority of *Baker* v. *Archer-Shee* (1), held they were and that the respondent was entitled to make the deduction as claimed.

I regret that I am unable to agree with that view of the statute or of the application of the authority mentioned. In Archer the question with which the House of Lords had to deal was quite distinguishable from that here. It was whether the moneys to which a life beneficiary under a trust was entitled were "income arising from securities"; and it was held they were. In this sense "arising from" is equivalent to "derived from", and here as there the moneys payable to the beneficiary by the trustee can, as held by Archer, be said to be "derived from" the dividends paid by the underlying companies; and it is true that, in this case, when a certain share of a trust unit is acquired through certificates, the holder is entitled to call for a fractional part of the underlying securities themselves, a circumstance not present in Archer.

But several obstacles lie in the way of the respondent: the language of s. 27, the provisions of s. 58 dealing with trustees and beneficiaries, and the nature of the trust itself. It is seen that by s. 27 a corporation must have "received a dividend from a corporation" and on the face of it the respondent did not receive a dividend from the underlying companies. *In Re Income Tax Acts, 1924-1928* (2) the expression "derived as dividends", held to extend to income in the hands of a life beneficiary received by the trustee as dividends, was argued by the Commissioner as meaning "received by a shareholder". On this Henchman J. observed:—

> Is there, then, anything in the words in s. 8, subsec. 8, of our Act, "income *derived as dividends* from any company," to compel me to set aside this reasoning and its result? Do the words "derived as dividends from any company" necessarily connote the meaning *"received by the taxpayer* from the company as dividends"?
>
> I do not think so. If that were the meaning, and if it had been intended to bring about a result different from that reached by the Victorian Court, it would have been easy to say "income received (or received by the taxpayer) as dividends from any company . . ." But the

(1) [1927] A.C.

(2) (1929) St. R. Qd. 276.

words are *"derived as dividends,"* and these words appear to me to be directed to the nature of the "original source of the income, rather than to whether the ultimate recipient is the shareholder himself or a person otherwise entitled to the benefit of the dividend."

Then the trust is one for holders of certificates that may number among the thousands; the moneys are massed and the charges to be made against them represent the business return for the organization and management of the investments on the part both of administrator and trustee. The certificates may be payable to holders and transferable by delivery. The administrator has certain powers of directing the sale or purchase of constituent stocks and the investment of proceeds in bonds of or guaranteed by the Government of Canada or that the proceeds remain on deposit in a chartered bank; and all voting power in respect of the stock is vested in the administrator. What is created is an intermediate origin of income distinct from the underlying investments. In Archer the trustee was little more than a depository, but even that was seemingly thought sufficient to divorce the beneficiary from the primary securities by the Court of Appeal and by Lord Sumner and Lord Blanesburgh, dissenting, in the House of Lords.

Ss. 27 and 58 distinguish clearly between a corporation shareholder and a corporation beneficiary of a corporate trustee. S. 58 is headed "Trusts, Estates and Income of Beneficiaries and Deceased Persons". It provides that a trust or estate shall, for the purposes of the Act, be deemed an "individual"; and in this conception, rules out by s-s. (3) the basic deductions under s. 25 to individuals.

S-ss. (4) and (5) provide:—

(4) For the purposes of this Part, there may be deducted in computing the income of a trust or estate for a taxation year such part of the amount that would otherwise be its income for the year as was payable in the year to a beneficiary or other person beneficially interested therein or was included in the income of a beneficiary for the year by virtue of subsection (2) of section 60.

(5) Such part of the amount that would be the income of a trust or estate for a taxation year if no deduction were made under subsection (4) of this section or under regulations made under paragraph (*a*) of subsection (1) of section 11 as was payable in the year to a beneficiary or other person beneficially interested therein shall be included in computing the income of the person to whom it so became payable whether or not it was paid to him in that year and shall not be included in computing his income for a subsequent year in which it was paid.

1955

MINISTER OF NATIONAL REVENUE v. TRANS-CANADA INVESTMENT CORPORATION LTD.

Rand J.

In relation to s. 11(1)(*a*) the right is given by s-s. (6A), enacted in 1950, to the beneficiary

> who is entitled, either contingently or absolutely, to the property of the trust or estate or some part thereof at some future time

to deduct from the amount that would otherwise be his income from the trust by virtue of s-s. (5), such part as would otherwise be deductible from the income of the trust under regulations authorized by para. (*a*) of s-s. (1) of s. 11, as the trustee may determine. S-s. (6B), enacted in the same year, deals with depletion and in a somewhat converse form it provides that no part of any amount payable to a beneficiary shall, for the purposes of s-ss. (4) and (5), be deemed to be payable out of an amount deductible in computing the income of the trust under para. (*b*) of s-s. (1) of s. 11 except such part as is designated by the trustee as being so payable. Then s-s. (7) makes applicable to the income of an individual beneficiary s. 35, which provides for a deduction from tax by an individual of a percentage of dividends received from taxable corporations. With this specific provision for an individual, how can the case of a corporate body as beneficiary be implied on an interpretation that would render the former superfluous? S-s. (8) provides for the deduction of foreign tax by the beneficiary. S. 60 extends taxation to all benefits received by a beneficiary as, for example, amounts paid by the trust for upkeep and maintenance of property for a life beneficiary. The comprehensive scope of these provisions makes it quite evident that Parliament intended them to be an exclusive code for dealing with the interests of beneficiaries in the conception of which the trustee is deemed to be an independent and individual taxpayer in relation to the income of the trust from which deductions and treatment of moneys payable to the beneficiary are expressly dealt with.

In the light of this precise language and the scheme which it embodies, the respondent as beneficiary cannot be said to have received from the underlying corporations the dividends which were paid to the trustee. What it received was a fractional income from a complex business trust, and whether or not the amount so received may be the subject of deduction in ascertaining the income of the beneficiary depends upon whether it is permitted by the statutory

prescriptions dealing with trust beneficiaries. The deduction claimed is not permitted and it results in what may be called triple taxation. That is a consideration which inclines a court to a rigorous scrutiny of the enactment before it, but it does not permit an interpretation that supplies what Parliament must be taken to have deliberately omitted.

I would, therefore, allow the appeal and restore the original assessment, with costs in this and in the Exchequer Court.

ESTEY J. (dissenting): The respondent, Trans-Canada Investment Corporation Limited (hereinafter referred to as administrator), is administrator of an investment trust, the terms of which are embodied in an agreement dated September 1, 1944, made between the administrator as the party of the first part, the Yorkshire and Canadian Trust Company Limited (hereinafter referred to as the trustee), the party of the second part, and the holders from time to time of the certificates representing the Trans-Canada Shares, Series "B", the parties of the third part (hereinafter referred to as certificate holders).

While in the ordinary course of the business under this investment trust the administrator receives funds to invest, as will be more fully explained, the issue here arises out of the fact that in 1950 the administrator invested its own funds in the purchase of 1,000 Trans-Canada Shares, Series "B" and received two half-yearly payments "of the net income less deductions" from the trustee in a total sum of $737.26. This amount, in its tax return, is shown as a receipt, but claimed as a deduction under s. 27(1) of the *Income Tax Act* (S. of C. 1948, 11 & 12 Geo. V, c. 52), the relevant part of which reads as follows:

> 27(1) Where a corporation in a taxation year received a dividend from a corporation that
>
> (a) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year,
>
> * * *
>
> an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporation's income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

It is conceded that, if the administrator received, within the meaning of s. 27(1), the dividends from the underlying companies, it is entitled to succeed in this litigation.

1955

MINISTER OF NATIONAL REVENUE v. TRANS-CANADA INVESTMENT CORPORATION LTD.

Estey J.

The Minister disallowed the deduction and in this he was supported by the Income Tax Appeal Board. It was, however, allowed in the Exchequer Court on the basis that the dividends received by the trustee from the fifteen underlying companies referred to in Clause 13 of the trust agreement (hereinafter referred to as the underlying companies) did not, as and when paid to the certificate holders, lose their character as dividends and, by virtue of s. 27(1), were deductible and, therefore, not taxable income.

In this appeal it is contended on behalf of the Minister that the $737.26 was received by the administrator as a *cestui que trust* under the terms of the trust agreement and not as dividends from the underlying companies and, in any event, this amount was not dividends received by a corporation from another corporation within the meaning of s. 27(1).

The trust agreement provides that the administrator, with the funds received by him for investment, must purchase the number of shares of common stock specified opposite the names of the respective underlying companies and when the shares there specified have been purchased they constitute, within the terms of the agreement, a trust unit. The administrator, having purchased these shares constituting a trust unit, is required to deliver them to the trustee, who registers the common shares in his own name and issues to the respective investors certificates evidencing Trans-Canada Shares, Series "B". Each share represents a one-thousandth undivided interest in the trust unit.

Though the shares are held in the name of the trustee, "the right to vote or consent or otherwise act in respect of such shares of stock or other securities shall vest solely in the Administrator" and the trustee "shall, upon demand of the Administrator, execute . . . valid proxies or powers of attorney to vote or consent or otherwise act in respect of such shares of stock or other securities." Moreover, the administrator may, under the provisions of para. 25 of the agreement, direct the trustee to sell shares of stock. Para. 25 reads as follows:

> 25. If the Administrator at any time shall deem it advisable that the shares of stock of any one or more or all of the Underlying Companies or any other property forming part of the Trust Units should no longer be held by the Trustee hereunder, whether the same shall have been sold and repurchased and as often as any sale and repurchase thereof may or shall

have been made, the Administrator may, in its sole discretion, direct the Trustee to sell such shares of stock or other property, and the Trustee, upon receipt of such direction from the Administrator, shall sell such shares of stock or other property in the manner provided in Clause 22 hereof.

Whenever the trustee shall sell the shares of stock it shall, after making certain deductions, hold the proceeds of the sale in a capital account subject to the detailed directions contained in the agreement.

The trust agreement provides that "the Certificates may be fully registered Certificates without coupons, or may be bearer Certificates with coupons attached." They are transferable. The holder of the bearer certificates may deal with them as the absolute owner and "every Holder waives or renounces all his equities and rights in such Certificate in favour" of a purchaser from a holder. Further, the trustee and the administrator, in dealing with the party in possession of such certificates, is protected by the express terms of the agreement.

The forms of the certificates evidencing Trans-Canada Shares, Series "B" are contained and set out as schedules to the agreement.

Reverting now to a trust unit, it is, under the terms of the trust agreement, included in the phrase "deposited property," which is defined in the trust agreement as follows:

> The term "Deposited Property" shall mean all Trust Units held by the Trustee hereunder, including all shares of stock, securities and other property, and any cash received by the Trustee in respect thereof, and the amount of any reserve established pursuant to the provisions of Clause 32 hereof and the amount of any accumulated Net Income.

The agreement then provides in para. 17:

> The Trustee shall receive all income profits earnings dividends interest and distributions from and proceeds of the Deposited Property and shall apply distribute and deal with the same under the terms and provisions hereof and to the extent that may be necessary or proper to carry out the powers hereby granted.

* * *

The agreement then provides that the trustee will distribute and pay on March 1 and September 1 in each year "shares represented by the several Certificates, of the Net Income received by the Trustee during the half-yearly period ending respectively fifteenth February and fifteenth August next preceding the date of each such payment, less the deductions hereinafter specified."

1955

MINISTER OF NATIONAL REVENUE v. TRANS-CANADA INVESTMENT CORPORATION LTD.

Estey J.

The phrase "net income" is defined:

> The term "Net Income" shall mean the aggregate of (*a*) all cash received by the Trustee by way of dividends (except liquidating dividends) or interest in respect of the Deposited Property, and (*b*) the net cash proceeds received by the Trustee from the sale of any stock dividends (subject however as provided in Clause 19 hereof) subscription rights, warrants, securities and other rights and property, and (*c*) any interest allowed by the Trustee hereunder, after making the deductions from such aggregate authorized by Clause 31 hereof.

The deductions referred to in Clause 31 are the amount of the administrator's semi-annual fee provided for in the agreement, the amount of the trustee's semi-annual fee and expenditures also provided for in the agreement, as well as all necessary assessments and other governmental charges in respect of the "deposited property" or the income therefrom and also any amount set aside as a reserve fund.

Throughout this litigation the respondent relied upon the decision in *Baker* v. *Archer-Shee* (1). There the wife (Lady Archer-Shee) of the taxpayer, under the will of her father, Alfred Pell, who died domiciled in New York, was entitled, as tenant for life, to the income from an estate consisting of foreign government securities, foreign stocks and shares in other foreign property. This property was held in trust by the Trust Company of New York which received the income, made certain deductions, including sufficient to pay government taxes, and paid the balance to the order of Lady Archer-Shee into Morgan's Bank in New York. The majority of their Lordships, upon the assumption that the United States law was the same as that of England, held as expressed by Lord Wrenbury, that Lady Archer-Shee had "an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she is tenant for life . . . Her right under the will is 'property' from which income is derived." Lord Atkinson, who agreed with Lord Wrenbury, stated that her life interest had become "vested in her." In the opinion of the majority the trustee, in making the deductions, was acting as agent for Lady Archer-Shee.

In order to bring the facts of this case within the principle enunciated in *Baker* v. *Archer-Shee,* the respondent contended that the dividends received from the underlying companies retained their character as such, notwithstanding

(1) [1927] A.C. 844.

the manner in which they were dealt with by the trustee, until the latter paid them out, less deductions, to the certificate holders. It would seem that an examination of the provisions of the trust agreement indicates that such is untenable.

The intervention of a trustee or of more than one beneficiary will not, in circumstances such as existed in *Baker* v. *Archer-Shee,* destroy the identity of the dividends or cause them to lose their character as such. In the case at bar, however, there is much more. Under the trust agreement the trust unit provides the basis upon which the Trans-Canada Shares, Series "B" are issued. Constituted of shares of stock of varying proportions in fifteen underlying companies, this unit, in the hands of the trustee, becomes a part of the "deposited property" and the other sources of revenue specified, less deductions, constitute "net income" (the definition of which is above quoted) and it is "the proportionate part attributable to the Series B. Shares" thereof to which the holders of Trans-Canada Shares, Series "B" are entitled. That this "net income" may consist of items other than the dividends from the shares of stock in the underlying companies is evident from the definition of "net income," but, when regard is had to the responsibility of the administrator, in certain circumstances, to sell the shares in the underlying companies, this difference is particularly emphasized. Further, not only is there no express provision giving the certificate holders an interest in the dividends as received by the trustee, but the scheme, considered as a whole, would indicate an intention that the certificate holders should have a claim against the "net income" and only to "the proportionate part attributable to the Series B. Shares." With these factors in mind it would seem that the very purpose of the scheme, the importance therein of the "trust unit," the "deposited property" and the "net income," as well as the fact that the certificates evidencing Trans-Canada Shares, Series "B" are transferable, disclose a situation entirely distinguishable from that before the court in the *Archer-Shee* case. The certificate holder may, in the case at bar, direct the trustee as to in what manner it should deliver his return out of the proportionate part of the "net income" attributable to Trans-Canada Shares, Series "B", but, with respect to the dividends received from the underlying companies, they become a part of the fund out of

1955

MINISTER OF NATIONAL REVENUE v. TRANS-CANADA INVESTMENT CORPORATION LTD.

Estey J.

which "net income" is derived and with respect to which the trustee must follow the directions of the trust agreement. Under this latter the control of these dividends remains at all times with the trustee and is never subject to change or direction on the part of the certificate holders. This trust agreement, read as a whole, with particular emphasis upon the portions already referred to, with great respect to those who hold a contrary opinion, does not contain language to support a construction that either a legal or an equitable right is created in favour of the certificate holders in respect to the dividends received by the trustee from the underlying companies.

The provisions of para. 34 of the agreement have been stressed as indicating that the certificate holders have an equitable interest in these dividends. Under para. 34 it is provided that

> At any time prior to the termination of this Agreement, the Holder of Certificates representing in the aggregate 200 Series B. shares, or any multiple thereof shall be entitled to receive
>
> * * *
>
> (*b*) Certificates duly endorsed and other instruments in proper form for transfer representing $\frac{1}{5}$th, or any multiple thereof as the case may be being the proportionate part thereof applicable to the shares of stock, securities and other property held by the Trustee which constitute one Trust unit.

It is further provided that the certificate holder is also entitled to the benefits which have accrued in respect of his shares. Under this para. 34 the certificate holder has a privilege or an option which he may exercise at any time. However, he may never exercise that option and neither the administrator nor the trustee, nor any other person, can compel him to do so. It is, moreover, a privilege which can be exercised only by those holding in the aggregate 200 Series B. shares or any multiple thereof. Under this clause, until such time as the holder may exercise his privilege or option, he has no property interest thereunder, equitable or otherwise. The language of Channell B. is appropriate:

> . . . when the position of things is that one party has a right to require a legal interest to be executed at his option and the other party has not a right to have the legal interest executed there then is no equitable interest until the option has been exercised. *Drury* v. *Rickard*, (1).

With great respect to those who hold a contrary opinion, it would appear that para. 34 does not create any equitable

(1) (1899) 63 J.P. 374 at 376.

rights in the certificate holder until he has exercised the privilege or option. Moreover, his rights are then with respect to the shares and whatever amounts may, as aforesaid, be attributable thereto, rather than to the dividends with which we are, in this litigation, concerned.

The appeal should be allowed with costs.

LOCKE J.:—The circumstances under which the shares in what have been referred to as the "underlying companies" were deposited with the Yorkshire and Canadian Trust Limited are described in the reasons for judgment of the learned trial judge. I respectfully agree with his conclusion and with his reasons for reaching that conclusion.

The matter to be determined is the proper interpretation of s. 27(1)(*a*) of the *Income Tax Act* of 1948. It is conceded that the underlying companies were of the nature defined in that portion of the section and, accordingly, if the respondent had been itself registered as the shareholder, the dividends would not have been subject to taxation in its hands. Since, however, the respondent did not receive payment of these dividends directly from the underlying companies but from the trustee, it is said that liability to tax attaches. If this argument were carried to its logical conclusion and a corporation shareholder of such a company should direct that instead of issuing dividend cheques to itself they be paid to its solicitors on its behalf or to its credit in a bank, the tax would apply since the dividend would not be "received" directly by the shareholder from the underlying company.

I think no such meaning is to be assigned to the language of the section. As pointed out by Cameron J., the shares in the underlying companies representing the trust unit were kept separate from all others by the trustee, and when dividends were received they were immediately placed in a special trust account and all distributions made out of that account. No question arises as to the portion of these moneys to which the respondent was entitled as administrator, income which would, of course, be subject to taxation in its hands. Indeed the fact that the respondent was named as the administrator with the functions described in the agreement of September 1, 1944 is an irrelevant circumstance in determining the present matter. From the

1955

MINISTER OF NATIONAL REVENUE v. TRANS-CANADA INVESTMENT CORPORATION LTD.

Locke J.

funds so received, the trustee was entitled to deduct its own charges, any taxes or other governmental charges, and at its option an amount for any contingent tax liability: the balance of the dividends were held in trust for the respondent and in due course paid over to it.

I agree with the learned trial judge that the respondent was the beneficial owner of these shares, and I am quite unable to understand how the character of these moneys became changed through the intervention of the trustee or by the fact that by the agreement it was entitled to make the deductions I have mentioned before paying over the amount to the respondent.

I would dismiss this appeal with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—For the reasons given by the learned trial judge I agree with the conclusion at which he has arrived. I wish, however, to add a few observations as an argument, which is not referred to expressly by the learned trial judge, was addressed to us, i.e., that the terms of s. 58 of The Income Tax Act require a construction of s. 27 (1) different from that adopted by the learned trial judge.

If the words of s. 27 (1) alone are considered it would be my opinion that the words—"from a corporation that (*a*) was resident in Canada in the year and was not by virtue of a statutory provision, exempt from tax under this Part for the year"—constitute an adjectival phrase qualifying the word "dividend" and not an adverbial phrase qualifying the word "received". If this be the correct view, it follows that in applying the words of the section to the facts of this case the question to be answered is not, from whose hand did the appellant receive actual payment of the sum of $737.26, but rather, of what did such sum consist, and, in my opinion, the reasons of the learned trial judge make it clear that the answer to such question is that it consisted of dividends of the sort described in the phrase above quoted and that the mere interposition of a trustee between the dividend-paying companies and the beneficial owner of the shares did not change the character of such sum. The

finding of the learned trial judge that the appellant was the beneficial owner of the shares in the underlying companies was not questioned before us.

It is argued, however, that, assuming that this would be the correct construction of s. 27 (1) read by itself, when read with the rest of the Act, and particularly with s. 58 it must be construed as having no application to a case in which a corporation receives a dividend of the sort described through the medium of a trustee. It is said that s. 58 is a code dealing exhaustively with all cases in which income is received in the first instance by a trustee and paid over by it to a beneficiary, and that as s-s. 7 expressly provides the manner in which an individual beneficiary may avail himself of the provisions of s. 35 in respect of the part of the income received by him from the trustee which consists of income from the shares of the capital stock of taxable corporations and the section is silent as to corporate beneficiaries it must be inferred that a corporate beneficiary is left without relief in respect of such income received by it through the medium of a trustee.

This is a persuasive argument but I do not think it is entitled to prevail. In Statutes of Canada, 1948, 11-12 George VI c. 52, s. 58 ended with s-s. 6. As it then stood the effect of the section was to provide that a trustee in computing its income should deduct such part thereof as was payable to a beneficiary who in turn was required to add such part in computing his income. In so far as such part consisted of dividends from taxable corporations the beneficiary if an individual would have been entitled to the benefits of s. 35 and if a corporation to the benefits of s. 27, unless it could be maintained that the character of so much of such part as consisted of dividends had been changed by passing through the hands of the trustee and, in my opinion, the reasons of the learned trial judge make it clear that this could not be successfully maintained.

It does not appear to me that the fact that Parliament, by Statutes of Canada, 1949, 13 George VI, c. 25, s. 27, added s-s. 7, prescribing an arithmetical formula for apportioning between a trustee and an individual beneficiary the dividends from taxable corporations received in the first instance by the trustee and did not add a corresponding

1955

MINISTER OF NATIONAL REVENUE v. TRANS-CANADA INVESTMENT CORPORATION LTD.

Cartwright J.

sub-section as to a corporate beneficiary constitutes a sufficient reason for construing s. 27 (1) in a manner contrary to what appears to me to be the plain meaning of the words in which it is expressed or for introducing the anomaly that the interposition of a trustee between a dividend-paying taxable corporation and the beneficial owner of its shares should leave unaffected in the case of an individual beneficial owner but destroy in the case of a corporate beneficial owner that protection against multiple taxation which it was the clear intention of Parliament to afford to all receipients of dividends from taxable corporations. As was pointed out by Fauteux J. in *Attorney General for Quebec* v. *Bégin* (1), the rule *expressio unius est exclusio alterius* must be applied with caution in construing a statute. To apply it in this case would, in my opinion, defeat the intention of Parliament.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *T. E. Jackson.*

Solicitors for the respondent: *Campbell, Meredith & Murray.*

8 Tax A.B.C. 220

TRANS-CANADA INVESTMENT CORPORATION LIMITED

Appellant,

and

MINISTER OF NATIONAL REVENUE

Respondent

Tax Appeal Board
R. S. W. Fordham, Q.C.
Judgment: April 9, 1953

Counsel: Kenneth E. Meredith, for the Appellant.
T. E. Jackson, for the Respondent.

A new and interesting point is raised in this appeal, heard at Vancouver. It calls for consideration of the following part of Section 27(1) of the Income Tax Act:

> "27. (1) Where a corporation in a taxation year received a dividend from a corporation that (a) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year, an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporation's income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income."

This section, of which the foregoing is only a small part, is the successor to Section 4(n) of the Income War Tax Act which provided that dividends received by an incorporated company from another company incorporated in Canada should not be liable to taxation.

On or about September 1, 1944, an investment trust was created by the appellant in an 83-page agreement (Exhibit A-1) bearing that date and in which

the appellant was described as the administrator. The Yorkshire & Canadian Trust Limited was made the trustee. The general plan of operation was that the administrator (appellant) purchased a number of the shares of fifteen carefully-selected corporations, caused certificates of these to be deposited with the trustee and then arranged for the sale to various individuals and corporations of units or shares evidenced by printed certificates in which the terms of the trust, the names of all the corporations and the rights of holders of certificates were fully set out. These rights did not include the right to vote at meetings of shareholders of the companies whose stock had been purchased. Such right was vested solely in the appellant in its capacity as administrator. Clause 32 of the agreement permits the trustee to deduct from all dividends received by it:

(a) the administrator's semi-annual fee;

(b) the trustee's semi-annual fee and certain expenditures;

(c) all taxes, assessments and other governmental charges and

(d) any amount set aside as a reserve fund. The balance remaining was payable to the certificate holders.

In 1950, the appellant had some funds of its own on hand for which it was seeking investment. It was concluded to purchase a unit of the investment trust mentioned and this was done, a Trans-Canada Shares Series "B" certificate for 1,000 shares being issued by the trustee to the appellant. A blank form thereof forms part of Exhibit A-4. A consequence was that in the same year the appellant received the sum of $737.26 from the trustee as its share of the income earned on the stocks held by the Trust. Appellant adopted the position that this sum represented a dividend received by it from a Canadian corporation and was therefore exempt from taxation in its hands by virtue of the section set out above. The Minister declined to accede to this

treatment of the amount received and ruled that it was not a dividend received from a Canadian corporation within the meaning of the said section. This appeal then ensued.

At the hearing of the appeal the appellant's counsel made the following principal submissions:

(a) That the dividends on the various stocks did not lose their identity as such by reason only of the intervention of a trustee.

(b) That the holders of units of the investment trust are the actual and true recipients of dividends from the shares of Canadian corporations held by the trustee within the true intent and meaning of the Act.

I propose dealing with each of these in the foregoing order.

With regard to (a), it is provided in clause 16 of the agreement that all share certificates relating to stock forming part of the deposited property shall be registered in the name of the trustee. Clause 17 provides that the trustee shall have and may exercise the rights and privileges of an owner, subject to the voting rights being vested in the administrator. Section 77 of the Companies Act (British Columbia) R.S.B.C. 1948, Chap. 58, provides for the recording in the register of all share-holdings. Section 84(1) thereof provides that no notice of any trust, expressed, implied or constructive, shall be entered on the register. Section 90 provides that a certificate under the common seal of the company, specifying any shares held by any member, shall be prima facie evidence of the title of the member to the shares. In these respects the British Columbia Act is substantially the same as the various other companies Acts in force in Canada. It is clear from the provincial statute mentioned that where shares are recorded in the name of a member in the register, that member is ordinarily to be viewed as the owner of

the shares. The evidence herein does not suggest that appellant's name appeared in any relevant share register. Under the said agreement, only the trustee's name could so appear. Hence, any dividends declared were not payable to the appellant, but to the trustee. The latter alone had any rights against the paying companies. Thus, the dividends were paid to the trustee in the first instance. Where they went to afterwards was no concern of the paying companies, who were entitled to a discharge on paying to the trustee any dividends earned.

Turning to (b), that submission appears to me to be only partly correct, in point of fact, and for the reason already indicated above. The dividends were received intact by the trustee. He deducted the proper proportion of the several charges described above and later relayed the balance to the appellant at half-yearly intervals. Such balances were not received by appellant as a shareholder, but as a cestui que trust that derived its rights under the agreement. I do not think that these balances can properly be termed dividends.

Moreover, the amount paid to each certificate-holder by the trustee half-yearly was not called a dividend by it, but a "semi-annual distribution of income". This wording appears on a cancelled Trans-Canada Shares Series "B" cheque that forms part of Exhibit A-5. There is no mention of the word "dividend".

Section 27(1) creates somewhat of an exemption from the usual incidence of income taxation and I think the old rule applies that, to obtain the benefit of such a provision, a taxpayer must come squarely and unquestionably within its terms. Here I do not consider that this requirement has been met, as it appears to me that Section 27(1) does not embrace the situation disclosed in this appeal. Appellant's contentions are both ingenious and attractive, but cannot prevail.

The following authorities to which counsel referred the Board have been examined: *Gilhooly v. Minister of National Revenue*, [1945] 4 D.L.R. 235, [1945] C.T.C. 203; *Kemp v. Minister of National Revenue*, [1948] 1 D.L.R. 65, [1947] C.T.C. 343; *Syme v. Commissioner of Taxes*, [1914] A.C. 1013 at p. 1020; *Lord Sudeley v. The Attorney-General*, [1897] A.C. 11 and *Archer-Shee v. Garland*, [1931] A.C. 212.

It appears to me that, in view of the considerations outlined above, this part of the appeal should be dismissed.

As an alternative, the appellant has submitted that, in any event, it is entitled to depletion allowance that may be claimable in respect of any of the stocks involved and referred the Board to Section 58(6B) of the Act. This phase of the matter has occasioned me much anxious thought. The right to depletion allowance is a statutory one and not lightly to be taken from a taxpayer. Such allowance is authorized by Section 11(2) of the Act and one finds therein reference to certain regulations. Part XIII of these is applicable in the present instance. It contains no reference, however, to a "beneficiary or other person beneficially interested" in a trust, which are the words found in Section 58(6B). Instead, only a "shareholder who receives a dividend from a corporation" is mentioned. I am forced to the conclusion that, apart from an operator, a shareholder and no other can deduct depletion allowance and that, therefore, the right thereto is denied to the appellant in the circumstances revealed in this appeal. It may be added that, even if depletion allowance could be had, its amount would only be discoverable from the trustee. The appellant could hardly calculate it without reference thereto. I reluctantly conclude that this part of the appeal should also be dismissed.

Appeal dismissed.