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THE MINISTER OF NATIONAL  
REVENUE .....

APPELLANT;

1942

\* Feb. 18, 19.  
\* April 28.

AND

EMILY L. MERRITT ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Income tax—Assets and undertaking of company taken over by another company in 1937—Undistributed income of first mentioned company, earned prior to 1935, on hand at the time—Shareholder thereof receiving for her shares cash and shares in the other company—Shareholder assessed for income tax for year 1937 for a sum as being*

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\* PRESENT:—Rinfret, Kerwin, Hudson, Taschereau and Masten (*ad hoc*) JJ.

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her proportion of said undistributed income—Right to so assess—S. 19 (1) of *Income War Tax Act (Dom.)*, as enacted by s. 11 of c. 38, 1936—“Winding up, discontinuance or reorganization” of business of company—“Distribution in any form of the property of the company”—Effect of s. 22 of said Act of 1936, enacting that said s. 11 (and other sections) of that Act “shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods”—Question as to what is referred to (as applicable to said s. 11) by “income” in said s. 22.

The assets and undertaking of S. Co. as a going concern were acquired, and its liabilities assumed, by P. Co. under an agreement between said companies which was made and became effective in 1937. S. Co. had on hand undistributed income, all earned prior to 1935. Respondent, a shareholder of S. Co., received for her shares, in 1937, pursuant to the agreement and the consideration therein provided, a sum in cash and shares in P. Co. She was assessed for income tax for the year 1937, under the *Dominion Income War Tax Act*, for an amount which included a sum as being her proportion of said undistributed income. She disputed the right so to assess her.

By s. 11 of c. 38, 1936, s. 19 (1) of said *Income War Tax Act* was enacted as follows: “On the winding-up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.”

S. 22 of said c. 38, 1936, enacted that certain sections, including said s. 11, of said c. 38 “shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.”

*Held:* There was a “winding-up, discontinuance or reorganization of the business,” and a “distribution of the property,” of S. Co., within the meaning of said s. 19 (1); and further (reversing the judgment of Maclean J., [1941] Ex. C.R. 175; Masten J. (*ad hoc*) dissenting), the “income” mentioned in said s. 22 of c. 38, 1936, refers (as applicable to said s. 11 of c. 38, 1936) to the income of the taxpayer, and not to the “undistributed income” of the company in said s. 19 (1); and respondent was assessable for her proportionate part of said undistributed income of S. Co. (S. 19 (2) (as enacted by s. 11 of c. 38, 1936) and other provisions of the *Income War Tax Act* also referred to; and the history of the legislation relevant to the question in dispute, discussed).

APPEAL by the Minister of National Revenue from the judgment of Maclean J., President of the Exchequer Court of Canada (1), allowing the present respondent’s appeal from the Minister’s decision affirming the assessment of said respondent for income tax.

By an agreement dated March 24, 1937, between The Security Loan & Savings Company (hereinafter called the Security Co.) and The Premier Trust Company, the latter company acquired the assets and undertaking (except un-

called capital) of the Security Co. as a going concern as at the close of business on the 31st December, 1936, and assumed the liabilities and obligations (except any liability in respect of the capital stock) of the Security Co. The agreement was entered into provisionally, and was subsequently in that year (1937) approved by the said companies' respective shareholders and assented to (pursuant to s. 60 of the Ontario *Loan and Trust Corporations Act*) by His Honour the Lieutenant-Governor in Council.

The Security Co. had on hand undistributed income, all earned prior to 1935.

Respondent, a shareholder of the Security Co., received for her shares, in 1937, pursuant to said agreement, a sum in cash and a certain number of shares in The Premier Trust Company.

Sec. 19 of the *Income War Tax Act*, as amended by s. 11 of c. 38 of the Statutes of Canada of 1936, provided:

(1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

(2) Where a dividend is deemed to be received under subsection one of this section by a company incorporated or carrying on business in Canada, such dividend shall be taxable income of such incorporated company, \* \* \*

Sec. 22 of said c. 38, 1936 (which c. 38, by s. 11 thereof, enacted said s. 19 in form as above) provided:

22. Sections one, two, three, four, six, seven, eight, nine, ten, eleven, twelve, thirteen and sixteen of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

The amount claimed against the respondent for income tax in respect of her income for the year 1937 was calculated on an income increased by the sum of \$10,192.60 as being her proportion of the distributable surplus of the winding-up of the Security Co. The Minister affirmed the assessment on the ground

that section 19 provides that on the winding-up, discontinuance, or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income; that Security Loan and Savings Company as part of its winding-up proceedings entered into an agreement with Premier Trust Company whereby its assets and business as a going concern were sold to the said Premier Trust Company in consideration of

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the shareholders of said Security Loan and Savings Company receiving certain shares of Premier Trust Company and/or cash at the election of the shareholders; and that such payment by the Premier Trust Company to the shareholders of Security Loan and Savings Company was a distribution by Security Loan and Savings Company to its shareholders; that the trustees for the taxpayer received the sum of \$10,192.60 as her portion of the undistributed surplus of Security Loan and Savings Company, and by the provisions of section 19 of the Act this amount was taxable as income of the taxpayer. Therefore, by reason of the said section 19 and other provisions of the *Income War Tax Act* in that respect made and provided, the assessment is affirmed as being properly levied.

The respondent disputed the right to assess her in respect of the said sum of \$10,192.60. She contended that what she received was the payment of the purchase price upon the sale of her shares in the Security Co. by her to The Premier Trust Company and that she received nothing from the Security Co. in the way of a payment or distribution in any shape or form; that she did not receive "on the winding-up, discontinuance or reorganization" of the business of the Security Co. any "distribution" of the "property of the company," within the meaning of said s. 19 (1). She further contended that said s. 22 of c. 38, 1936, on its proper construction and application, limited the "undistributed income" mentioned in said s. 19 (1) to "the income of the year 1935 and fiscal periods ending therein and of all subsequent periods," and that the Security Co. had no undistributed income earned during the year 1935 (or any fiscal period ending therein) or subsequent years; that, there being no undistributed earnings of the Security Co. for the year 1935 *et seq.*, there can be no liability under said s. 19 (1).

Macleay J. (1) was of opinion that there was a "winding-up" of the business of the Security Co., and held that in any event there was a "discontinuance" of the business of that company; and that what was done with that business fell within the words "winding-up, discontinuance or reorganization" within the meaning of said s. 19 (1); and that there was a distribution of the property of that company among its shareholders, in the sense contemplated by s. 19 (1), under the terms of the agreement; that it was immaterial that the consideration received by the present respondent for her shares happened to reach her directly from The Premier Trust Company and not through the medium of the Security Co.; and that, therefore, upon

admission as to the accumulated undistributed income of the Security Co. on hand at the material time, and upon a consideration only of s. 19 (1), his conclusion would have been that the present respondent was liable for the tax. But he held that s. 19 (1) (as enacted by s. 11 of the amending Act of 1936) and said s. 22 (of the amending Act of 1936) should be read and construed as meaning that the "undistributed income," mentioned in s. 19 (1) and taxable as a dividend, is limited to that portion of the income of the year 1935 and subsequent periods that was undistributed, and was not intended to include income earlier earned but undistributed and on hand. It being conceded (as appears by recital in the formal judgment in the Exchequer Court) that no income was earned by the Security Co. during 1935 and subsequent years, the present respondent's appeal was allowed.

The Minister appealed to this Court.

*W. J. Beaton K.C.* and *E. S. MacLatchy* for the appellant.

*H. G. Stapells K.C.* and *W. S. Sewell* for the respondent.

The judgment of the majority of the Court (Rinfret, Kerwin, Hudson and Taschereau JJ.) was delivered by

KERWIN J.—The respondent, who is domiciled and resident in Ontario, duly filed an income tax return for the year ending December 31st, 1937, and remitted the tax payable on the basis of that return. The Department of National Revenue added to the respondent's income, as reported, the sum of \$10,192.60 and levied an assessment for additional income tax thereon together with interest. The respondent objected to this assessment and ultimately the matter came before the President of the Exchequer Court who allowed the respondent's appeal from the decision of the Minister affirming the assessment, and the latter now appeals to this Court.

The respondent was the owner of shares of the capital stock of The Security Loan & Savings Company. In the year 1937 an agreement was entered into between that company and The Premier Trust Company, in pursuance of which the respondent received a certain sum of money and a number of shares of the capital stock of the Trust Company in exchange for the delivery of her shares in the Loan Company. It is admitted that the Loan Com-

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pany had on hand, at the time, undistributed income which had been earned prior to the year 1935 and that the respondent's proportion of that income is the sum of \$10,192.60 mentioned above. The two specially relevant statutory provisions are section 11 (which enacted section 19 of the *Income War Tax Act*) and section 22 of chapter 38 of the 1936 statutes. These sections are as follows:

Section 11 of chapter 38 of the 1936 statutes:—

11. Section nineteen of the said Act, as amended by section four of chapter twenty-four of the statutes of 1930, by section eleven of chapter forty-one of the statutes of 1932-33 and by section ten of chapter fifty-five of the statutes of 1934, is repealed and the following substituted therefor:—

"19. (1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

(2) Where a dividend is deemed to be received under subsection one of this section by a company incorporated or carrying on business in Canada, such dividend shall be taxable income of such incorporated company, and where such a dividend is paid to a company incorporated outside of Canada and not carrying on business in Canada, the company which is being wound up, discontinued or reorganized (excepting companies specified in section two, paragraph (p) and section four, paragraph (k)) shall deduct from such dividend a tax at the rate in force for corporations in the year in which such dividend is paid and shall pay the same to the Receiver General of Canada."

Section 22 of chapter 38 of the 1936 statutes:—

Sections one, two, three, four, six, seven, eight, nine, ten, eleven, twelve, thirteen and sixteen of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

It was first contended on behalf of the respondent that, within the meaning of subsection 1 of section 19 of the *Income War Tax Act* as above enacted, there was no distribution of the property of the Loan Company and no winding up, discontinuance or reorganization of its business. The learned President decided against this contention and on that point I agree with his statement of the facts and with his conclusions and have nothing to add.

The respondent also argued that the "undistributed income" referred to in subsection 1 of section 19 of the *Income War Tax Act* is confined to income of the Loan Company earned in the year 1935 or later, and that, therefore, the \$10,192.60 payment could not be deemed to be the payment of a dividend. In other words, the respond-

ent contended that the "income" in section 22 of chapter 38 of the Statutes of 1936 refers to the "undistributed income" in subsection 1 of section 19 of the *Income War Tax Act*. The trial judge determined that that contention was well-founded but, with respect, I am unable to agree.

Section 19 is part of the *Income War Tax Act*. By virtue of section 9 of that Act, the respondent was subject to income tax upon her income during the year 1937. By section 3 "income" includes the dividends or profits directly or indirectly received from stocks. A winding up, discontinuance or reorganization of the Loan Company's business and a distribution of its property occurred in 1937 and, therefore, under subsection 1 of section 19 of the *Income War Tax Act* as enacted in 1936, the sum of \$10,192.60 is to be deemed the payment of a dividend to the respondent. So far, I assume that, the first contention of the respondent being decided adversely to her, no question could really be raised as to the liability of the respondent to be taxed on such amount.

The learned President, however, experienced difficulty in construing section 22 of the 1936 Act. It is advisable to set out once more the provisions of that enactment:

22. Sections one, two, three, four, six, seven, eight, nine, ten, eleven, twelve, thirteen and sixteen of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

Of the various sections referred to, eleven is the one which enacts section 19 of the principal Act.

Mr. Stapells urged that prior to 1940, in which year a definition of "fiscal period" appeared in the *Income War Tax Act*, individuals were subject to assessment to tax on income in a calendar year only, and not on income in a fiscal period; and that, therefore, the insertion of the words "fiscal periods" in section 22 indicated that Parliament had in mind the "undistributed income" of an incorporated company. This argument overlooks the provisions of subsection 2 of section 19 (as enacted by section eleven of the 1936 Act) under the terms of which "where a dividend is deemed to be received under subsection one of this section by a company incorporated or carrying on business in Canada, such dividend shall be taxable income of such incorporated company." Both subsections of section 19 must be looked at to visualize what Parliament was there dealing with.

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Furthermore, section 22 does not state that part only of section eleven shall be applicable to the income for the year 1935 and fiscal periods ending therein and of all subsequent periods. It provides, so far as relevant, that the whole of section eleven shall be so applicable. And section eleven, after repealing earlier provisions, enacts two subsections of section 19 of the principal Act, and it is to both of those subsections that we must direct our attention. The other sections of the 1936 Act referred to in section 22 thereof are concerned with matters of an entirely different nature, but, reading section 22 of the 1936 Act in connection with the whole of section 19 of the *Income War Tax Act* as enacted in 1936 and with the other provisions of the *Income War Tax Act*, I conclude that the "income" mentioned in section 22 refers (as applicable to section 11) to the income of the taxpayer.

The trial judge derived assistance in coming to his conclusion from an examination of the history of the relevant provisions of the *Income War Tax Act*. That history is rather involved, but I must state at once that my review of it has strengthened the opinion I have already expressed. In view of this difference of opinion as to the deductions to be drawn from this legislative history, it is necessary to refer to the matter in some detail.

The *Income War Tax Act* was first enacted in 1917. By section 5 of chapter 46 of the 1924 statutes, what is now subsection 1 of section 19 was enacted as subsection 9 of section 3 in the following words:—

(9) On the winding up, discontinuance or reorganization of the business of any incorporated company the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

Section 8 of the 1924 Act provided:—

(1) Sections one, two and three hereof shall be deemed to be applicable to the income for the taxation period 1923 and subsequent periods.

(2) Sections four, five and six hereof shall be deemed to be applicable to the income for the taxation period 1921 and subsequent periods.

As to subsection 2 of section 8, the President considered that the word "income" therein must have been intended to relate to the "undistributed income" mentioned in section 5. It is unnecessary to express any opinion upon the



question because, whatever one might think, it appears to me to be beside the point in view of the subsequent history.

Subsection 9 of section 3 of the *Income War Tax Act* as enacted in 1924 appeared as section 19 of chapter 97 of the Revised Statutes of Canada, 1927. It was pointed out by Mr. Stapells that according to Appendix I to the Revised Statutes of 1927, section 8 of the 1924 Act was not repealed nor consolidated. Whatever the effect of this may be, it has, I think, no bearing upon the matter under review.

By section 4 of chapter 24 of the 1930 Statutes, section 19 of chapter 97 of the Revised Statutes was repealed and two subsections substituted therefor. Section 4 read:—

4. Section nineteen of the said Act is repealed and the following is substituted therefor:—

"19. (1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income earned in the taxation period 1930 and subsequent periods.

(2) Notwithstanding anything in the Act contained, where a dividend is deemed to be received under subsection one by a company incorporated or carrying on business in Canada, such dividend shall be taxable income of such incorporated company, and where such a dividend is paid to a company incorporated outside of Canada and not carrying on business in Canada, the company which is being wound-up, discontinued or reorganized shall deduct from such dividend a tax at the rate in force for corporations in the year in which such dividend is paid and shall pay the same to the Receiver General of Canada."

It will be observed that the new subsection 1 of section 19 is the same as the previous section 19 except for the words at the end "earned in the taxation period 1930 and subsequent periods." Section 7 of the 1930 Act provided:—

7. This Act shall be deemed to have come into force at the commencement of the 1929 taxation period and to be applicable thereto and to fiscal periods ending therein and to subsequent periods, except section four hereof which shall be deemed to have come into force at the commencement of the 1930 taxation period and to be applicable thereto and to fiscal periods ending therein and to all subsequent periods.

The learned President, in his judgment, referred only to the first limb of this section and for that reason found a conflict between it and subsection 1 of section 19 as enacted in section 4. It is, of course, the latter part of section 7 that applies to section 4 and the conflict mentioned by the President does not exist. A difficulty different from that

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envisaged by him might have occurred in view of the legislation in force (R.S.C., 1927) prior to the enactment of the 1930 Act, but, as the events with which we are concerned did not occur in that period, I do not pause to elaborate.

A proviso was added to subsection 1 of section 19 in the Statutes of 1932-33 but this amendment is not relevant. In 1934, the Act was further amended by chapter 55, section 10 whereof provided:

10. Subsection one of section nineteen of the said Act, as enacted by section four of chapter twenty-four of the statutes of 1930 and amended by section eleven of chapter forty-one of the statutes of 1932-33, is repealed and the following is substituted therefor:—

“19. (1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

Provided, however, that this subsection shall not apply to the distribution of the property of a private investment holding company to the extent that its undistributed income is made up of income from British and foreign securities and interest bearing securities of Canadian debtors when the business of such holding company is and has been carried on in Canada, and all of its shares (less directors' qualifying shares) are and have been beneficially owned since its incorporation by a non-resident individual, or by such an individual and his wife or any member of his family, or by any combination of them. In determining the extent to which the undistributed income of any such private investment holding company on hand at the date of winding up is made up of income received by way of dividends from Canadian companies, all dividends or disbursements of such holding company which have been paid or made prior to the date of winding up shall be deemed to have been paid out of income received from British and foreign securities and interest bearing securities of Canadian debtors.”

It will be observed that this 1934 amendment removed from subsection 1 of section 19 the words at the end thereof that had been included for the first and only time in 1930, “earned in the taxation period 1930 and subsequent periods”. Then, in 1936, came sections 11 and 22 of chapter 38, which have already been transcribed.

In view of this history of the legislation, it appears to me that the proper conclusion to be drawn from the fact that the words “earned in the taxation period 1930 and subsequent periods” were dropped in 1934 is that Parliament intended to alter the law as it existed under the 1930 legislation. The respondent must, therefore, account for her proportionate part of the undistributed income of The Security Loan & Savings Company which that company had on hand. In my view, that conclusion follows

from a consideration of the two relevant sections as well as from a consideration of the history of the *Income War Tax Act*. It appears to me to be not only in accord with the letter but also the spirit of that Act.

The appeal should be allowed, the judgment of the Exchequer Court set aside and the assessment made by the Minister affirmed, with costs throughout.

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MASTEN J. (*ad hoc*) (dissenting)—This is an appeal by the Minister of National Revenue from the judgment of the Honourable Mr. Justice Maclean dated the 19th March, A.D. 1941, whereby he allowed the appeal of the respondent from the certificate of the Minister disallowing an appeal by the respondent (under the provisions of sec. 58 of the *Income War Tax Act*) from her assessment by the Commissioner of Taxation.

There is no conflict in the evidence; the facts are not in dispute; and they are so lucidly and adequately detailed in the reasons of judgment of the learned President of the Exchequer Court that I refrain from repeating them at length. Accordingly, I mention only such outstanding matters as appear essential to an understanding of this judgment.

(1) The transaction out of which arises the present claim for income tax was a sale by The Security Loan and Savings Company (hereinafter called the Security Company) to The Premier Trust Company (hereinafter called the Trust Company) of all its assets and undertaking as a going concern.

(2) Under *The Loan and Trust Corporations Act*, R.S.O., 1927, c. 223 (hereinafter more fully referred to), the initial proceeding toward a transfer of assets between companies like the present, consists in the execution of a provisional agreement of sale containing the proposed terms and conditions of the transfer. Such an agreement was signed on the 24th day of March, 1937. The parties to it were the two companies above mentioned. No shareholder in either company was a party to the agreement. It contains, among other, the following provisions which appear to be relevant to the two questions arising on the present appeal.

4. Provided, however, that, notwithstanding anything herein contained, the Vendor and the Purchaser, until this Agreement shall become

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effective are each to be at liberty to and shall carry on business in the same manner as heretofore so as to maintain each as a going concern and for the purpose of carrying on as aforesaid each may sell, assign, exchange, convey, appropriate, lease, surrender, charge, mortgage, pay out or otherwise deal with its property and enter into contracts or engagements in the usual and ordinary course of its business in such manner as to each may seem best, but from and after the date of this Agreement the Vendor shall not accept subscriptions for, allot or issue any shares of its capital stock nor issue any debentures nor declare any dividend except with the consent of the Purchaser \* \* \*

5. The consideration for the assets and property hereby agreed to be sold and purchased will be as follows:—

(a) The Purchaser shall within thirty (30) days after the date when this Agreement shall become effective allot and issue and/or pay to each shareholder of the Vendor of record as of the close of business on such date or his respective nominee,

(i) Fully paid shares of the par value of \$100 each of the capital stock of the Purchaser at the rate of one and a half such shares for each fully paid share of the capital stock of the Vendor held by such shareholder: fractions of shares of the Purchaser resulting therefrom to be adjusted by payment in cash at the rate of \$102 per full share, or;

(ii) At the option of such shareholder of the Vendor, exercisable by written notice delivered to the Purchaser within such period of thirty (30) days, cash and fully paid shares of the capital stock of the Purchaser at the rate of \$102 cash and one-half share for each fully paid share of the capital stock of the Vendor held by such shareholder; any fractions of shares of the Purchaser resulting therefrom to be adjusted by the issue in respect of each fraction of one fully paid share and the proportionate reduction (at the rate of \$102 per full share) of the said cash payment.

The second option as quoted above was accepted by the respondent on September 14th, 1937.

(3) The provisional agreement of sale appears to have been duly confirmed by the shareholders in accordance with the provisions prescribed by sections 55 to 64 of *The Loan and Trust Corporations Act*, R.S.O., 1927, c. 223, by which the procedure and ensuing rights of the parties are governed.

Section 60 of that Act provides that after its approval by the shareholders the agreement shall be submitted to the Lieutenant-Governor in Council for his assent, and subsection 3 of section 60 reads as follows:

(3) After the assent of the Lieutenant-Governor in Council thereto the agreement or offer shall be deemed to be the agreement and act of union, amalgamation and consolidation of the corporations, or the agreement and deed of purchase and acquisition of the assets of the selling corporation by the purchasing corporation.

Section 63 provides, in part, as follows:

(1) In the case of a purchase and sale of assets so assented to the assets of the selling corporation shall become absolutely vested in the

purchasing corporation on and from the date of such assent without any further conveyance and the purchasing corporation shall thereupon become and be responsible for the liabilities of the selling corporation.

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(5) Where the Lieutenant-Governor in Council assents to an agreement for the sale of the assets of a corporation, or to an agreement for the amalgamation of two or more corporations, the selling corporation, or the several corporations amalgamated, as the case may be, shall, from the date of such assent, be dissolved except so far as is necessary to give full effect to the agreement.

(4) The Order in Council providing for the assent of the Lieutenant-Governor to the agreement was passed on the 23rd day of June, 1937, and it would consequently appear that on that date all the assets and undertaking of the Security Company passed to the Premier Trust, as more fully appears from the certificate of the Attorney-General, which reads as follows:

#### DEPARTMENT OF INSURANCE

##### PROVINCE OF ONTARIO

IN THE MATTER of the Loan and Trust Corporations Act and in the matter of the sale under the said Act of the assets of the Security Loan and Savings Company, St. Catharines, to The Premier Trust Company.

THE ACTING ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO, being the Minister under whose direction the Loan and Trust Corporations Act of the said Province is administered, HEREBY CERTIFIES THAT, Pursuant to the said Act an agreement for the sale of the assets of the Loan Corporation known as The Security Loan and Savings Company, St. Catharines, to the Trust Company, known as The Premier Trust Company, bearing date the 24th day of March, 1937, and duly executed by the Directors of The Security Loan and Savings Company, St. Catharines, and ratified and confirmed by the shareholders thereof on the 15th day of May, 1937, also duly executed by the Directors of The Premier Trust Company and ratified by the shareholders on the 15th day of May, 1937, was by Order in Council approved on the 23rd day of June, 1937, by His Honour the Lieutenant-Governor in Council, and that on, from and after the 15th day of May, 1937, the said agreement took effect as the sale, transfer and conveyance to the said The Premier Trust Company to its own use of all the assets, business, rights, property and good will of the said The Security Loan and Savings Company, St. Catharines, as in the said agreement more fully set out; and that on, from and after the said 15th day of May, 1937, all terms, provisions, and conditions of the said agreement and of the said The Loan and Trust Corporations Act relating thereto went into full force and effect. A copy of the said agreement is annexed hereto and forms part of this certificate.

THIS CERTIFICATE is given under Section 61 of the said The Loan and Trust Corporations Act, being Chapter 223 of the Revised Statutes of Ontario, 1927.

GIVEN in triplicate under my hand and seal of office this 6th day of July, 1937.

H. C. NIXON,

Acting Attorney-General.

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(5) Among the assets sold and transferred to The Premier Trust Company was a sum of \$212,431.41, accumulated and undistributed income of the Security Company, no part of which accrued during 1935 or in any subsequent year, as is admitted by the appellant.

(6) The proportionate share of this accumulated income to which the respondent would have been entitled on its distribution by the Security Company was \$10,192.60, no part of which accrued in 1935 or later.

(7) This sum of \$10,192.60 was paid by The Premier Trust Company to the respondent on October 5th, 1937, as a portion of its cheque of that date for \$26,690.75 made in favour of the trustees of the respondent.

(8) The Minister of National Revenue claims in this proceeding the sum of \$3,454.80 as income tax on the said sum of \$10,192.60.

(9) His claim is based on section 19 (1) of the *Income War Tax Act* as enacted by section 11 of chapter 38 of the Statutes of Canada for the year 1936. That section provides that:

(1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

Along with sec. 11 of c. 38, 1 Edward VIII, is to be read sec. 22 of that Act, as follows:

22. Sections one, two, three, four, six, seven, eight, nine, ten, eleven, twelve, thirteen and sixteen of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

The contention of the respondent in answer to the claim of the Minister is twofold: First, that by section 22 of the Statute of 1936, the operative scope of section 19 (1) is limited to income accumulated during the year 1935, or during any subsequent year; Secondly, that the transaction in question, so far as it relates to the respondent and to the shares in question, does not fall within the provisions of section 19 (1) quoted above, as a distribution resulting from the winding-up, discontinuance or reorganization of the business of the Security Company, but was a separate and independent transaction between the Trust Company and the respondent by which the

Trust Company purchased from the respondent the shares in question and paid for them with its own money and not as a distribution of the assets of the Security Company.

The learned President of the Exchequer Court agreed with the first mentioned contention of the respondent and dismissed the claim of the Minister, but at the same time he expressed the view that the second ground of defence failed. I agree with both of the opinions so expressed by the learned President, and also with the grounds stated by him, but I desire to add certain further observations.

The grounds of appeal as set forth by the appellant are as follows:

1. The appellant respectfully submits that the learned trial judge was correct in holding that the shares and cash received by the respondent constituted a distribution on the winding up, discontinuance or reorganization of the Security Loan & Savings Company within the meaning of section 19 (1) of The Income War Tax Act, but contends that he was in error in holding that section 22 of chapter 38 of the statutes of 1936 had the effect of limiting the deemed dividend to undistributed income earned in 1935 and subsequent years.

2. The sole point at issue is, therefore, whether income of Security Loan & Savings Company *earned prior to 1935* and on hand and undistributed in 1937 was subject to taxation in the hands of the respondent upon a distribution within the meaning of section 19 (1) of The Income War Tax Act.

On the argument in this Court counsel for the respondent sought to maintain both of the grounds of defence above mentioned, and I proceed first to consider the respondent's claim that section 19 (1) deals exclusively with income accumulated during and after 1935.

In his reasons for judgment the learned trial judge traces from the year 1920 down to 1936 the history of income tax legislation so far as it culminated in section 19 of the statute of that year. He finds himself thereby assisted toward a construction of the statute limiting its operation to 1935 and succeeding years. The result of his historical review may not be legally conclusive, though it may be morally persuasive, and is not to be disregarded in seeking to ascertain the intention of Parliament in a doubtful case.

The right to examine the pre-existing law in order to clear up any doubt as to the meaning of an Act is supported by the highest authority, and is generally recognized as a proper method of assisting in ascertaining the true intent of the legislature. I refer to Craies on Statute Law, 4th Ed., p. 94, where the general rule is stated and the cases in its support are cited.

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Limitations on this general rule appear to be indicated in recent judgments of the House of Lords and of the Privy Council. I refer to the observation of Lord Chancellor Simon in *Barnard v. Gorman* (1); to that of Lord Atkin in *Windsor Education Board v. Ford Motor Co. of Canada Ltd.* (2), and to that of Lord Chancellor Simon in *Hoani Te Heuheuk Tukino v. Aotea District Maori Land Board* (3).

I have carefully considered these recent observations with the result that, while I think that in the present case we are warranted in examining the legislative history of section 19 for the purpose of securing, if possible, a side-light on the intention of Parliament, yet I am firmly of the opinion that the rights of the parties must in the end be determined by reading together and construing sections 11 and 22 of c. 38 of the Statutes of 1936.

The history of section 19, so far as relevant, appears to be that the statute of 1930 changed the former law and placed a limitation on the period of accumulation. That law remained in force until 1934 when the law was again changed and the unlimited period of accumulation was restored. The statute of 1934, making the period of accumulation unlimited, remained in force and unrepealed until the statute of 1936 came into force, and simultaneously with its repeal sections 11 and 22 came into force, prescribing once more, in my view, a limited period for accumulation.

These oscillations in the course of legislation afford little assistance in construing the statute which governs the transaction in question. They do, however, establish that at times Parliament recognized that undistributed income or profits accumulated during earlier years might subsequently, during years of depression, become dissipated and lost and so undistributable, while at other times this point of view was either overlooked or negatived. It may, perhaps, be suggested that these alternating legislative acts indicate a readiness to change the unlimited provision of 1934 to a limited provision in 1936. That seems to be about all that can be derived from the historical process.

Turning, then, to a consideration of sections 11 and 22. I quite agree with Mr. Justice Kerwin that section 22

(1) [1941] A.C. 378, at 384.

(2) [1941] A.C. 453, at 461.

(3) [1941] A.C. 308, at 322.



applies equally to both subsections of section 19. If it had been intended to apply solely to one or the other subsection, section 22 would have specified to which of them it was applicable, but, as it stands, section 22 applies to both subsections of section 19 as enacted by section 11 of chap. 38. The question then is, are we warranted in saying that, notwithstanding that section 22 purports to apply to the whole of section 11, nevertheless the intention of Parliament was to confine its operations to subsection (2)?

If not, then I think that assistance in ascertaining the intention of Parliament may be gained by a consideration of the new law enacted in 1936 contemporaneously with the repeal of the prior law. Reading the substance of section 22 in immediate juxtaposition to section 19, subsection 1, the enactment would run as follows:—

On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income; and this provision shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

It seems to me that, so read, the words are strongly indicative of an intention to limit the period of accumulation of income to 1935 and succeeding years. *Mentio unius exclusio alterius*. In other words, the specific mention of the period "1935 and succeeding years" to which section 19, subsection 1, is to apply, excludes an unlimited period of accumulation.

In *Young v. Mayor, etc., of Leamington* (1), Lord Blackburn said that the Courts "ought in general, in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law." Much more, therefore, must it be taken that the Legislature carried in mind the wide general provision of section 19 (1) as set forth in section 11 of the Act of 1936 when it enacted the succeeding section 22, and must be assumed to have intended a limitation on its generality. Standing by itself, section 19 (1) covered all income accumulated either before or after 1935. Hence in making section 22 applicable to section 11 it must be

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assumed that the Legislature intended to do something, viz., to modify the generality of section 19 (1) by providing that its ambit should be limited to the period specified in section 22, for if not, then section 22, so far as the action of Parliament in passing it relates to section 19 (1), was futile and wholly ineffective.

Supplementing the foregoing, which I take to be the principal argument of the appellant, I note, at page 9 of the factum, the following paragraphs:

It is, therefore, submitted that section 22 of chapter 38 of the statutes of 1936 was merely an enabling section, and Parliament did not intend that the words of this section 22 be read as a proviso to section 19. Section 22 was for the purpose of making the amendment retroactive to the taxation year 1935; otherwise it would have become effective on the date the Act received Royal Assent, on June 23rd, 1936. Therefore, as the distribution in connection with the sale of the Security Loan & Savings Company did not take place until 1937, section 22 of the Act of 1936 should be disregarded for the purposes of this appeal.

In any event, it is submitted that section 12 makes it quite clear that dividends shall be taxable income for the year in which they are paid or distributed, and, as this undistributed income was paid in 1937, it is, by section 19 (1), deemed to be a dividend in that year, and is income of the year 1937, and hence does not offend against section 22.

With reference to the argument that as section 22 was enacted for the sole purpose of making the amendment retroactive to the taxation year of 1935 since otherwise it would have become effective only on the date when the Act received the Royal Assent, it is sufficient to point out that there is no indication of any such limited application contained in the words of section 22. To repeat it once more, "section 11 of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods." These words are general. There is nothing in them to indicate that they came to an end as soon as the year 1935 was over, nor are they limited to subsection 2 of section 19. They apply equally to subsection 1 of section 19, and create the law governing the present transaction.

With reference to the appellant's contention that, in any event, the \$10,192.60 received by the respondent in 1937 was a dividend and became taxable under section 12 when it was paid, it suffices to point out that, prior to the discontinuance or reorganization of the Security Company, this sum was capital available to the Security Company for any of its operations. Moreover, it could not be trans-

formed into dividend available to a shareholder except by a declaration to that effect by the directors of the Security Company and no such declaration was ever made. As between the Security Company and the respondent, it passed to her as part of her proportionate share of the net assets of the Security Company, that is to say, as capital, while, as between *the respondent and the Minister of National Revenue for purposes of taxation only*, this sum of \$10,192.60 is to be treated as if it were a dividend; but solely by force of section 19. Hence it follows that the Minister's claim arises solely under section 19, and if, by virtue of section 22 of chapter 38 of the 1936 statutes, section 19 does not apply, then the appellant's claim must fail, for the sum in question never became a dividend and section 12 has no application.

Any suggestion that the limitation period "1935 and succeeding years" prescribed by section 22 has reference to the date when the winding-up, discontinuance or reorganization might occur and not to the period during which the income in question is accumulated, seems to me to be met by the very words of section 22, which on their face relate to the income of 1935 and succeeding years, and not to its distribution.

But if not conclusive, the statute is at least doubtful and ambiguous, and according to the rule well-established by the decisions cited by the respondent it is ineffective to warrant the imposition of the tax in question on the respondent.

It remains to consider the second defence raised by the respondent.

The provisional agreement here in question involved two main objectives (the other provisions being collateral and subsidiary). *First*, the transfer to the Trust Company of the assets and undertaking of the Security Company. *Second*, the distribution to the shareholders of the Security Company of the consideration for the sale.

A consideration of those provisions of *The Loan and Trust Corporations Act* and of the provisional agreement as hereinbefore quoted leads me to the conclusion that when on the 23rd day of June, 1937, the Lieutenant-Governor by Order in Council sanctioned the provisional agreement of sale, all the assets and undertaking of the Security Company passed absolutely to the Trust Com-

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pany. What remained to be done under the provisional agreement was to distribute the consideration among the parties entitled.

Not only did its assets and undertaking pass from the Security Company but under section 63 of the statute the Security Company became emasculated of all its corporate rights and powers "*except so far as is necessary to give full effect to the agreement.*" What remained to be done was the distribution of the consideration to the parties entitled. The Security Company continued its corporate existence emptied of all assets and deprived of all corporate rights and powers save only the right to distribute among its shareholders the consideration for the sale. The shareholders themselves held no contractual rights against the Trust Company. They were not parties to the provisional agreement, but the Security Company, though deprived of everything else, still retained its corporate existence and the right and duty to see that each of its shareholders received his proportionate share of the consideration. Its duty was similar to that of a liquidator in a voluntary winding-up. Had the consideration consisted wholly of cash, the normal method would have been for the Trust Company to pay over the purchase price to the Security Company, leaving it to make the distribution.

Owing to the alternate options which the agreement gave to shareholders, this course was not practicably convenient. Nonetheless, the consideration payable by the Trust Company was the property of the Security Company and was not the property of its shareholders. The directors of the Security Company would plainly have been guilty of a breach of trust if they had agreed to give away the assets of their solvent company for nothing. The provisional agreement as drawn is elliptical and confusing. The draftsman might have met the difficulty by a clause declaring that from and after the passing of the Order in Council approving the agreement the Trust Company held the stipulated consideration as trustee for the Security Company and as its agent for distribution of that consideration to the shareholders of the Security Company. I think that is what both parties did in fact agree, and, in effect, it is what they carried out; also I think that to this elliptical agreement such a construction can be given without undue straining of the words used.

The result is that the sum of \$10,192.60 here in question was received by the respondent from the Security Company as a distribution of its property on a reorganization or discontinuance of its business, but as it consisted of income wholly accumulated prior to 1935, it is not taxable.

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I ought, perhaps, to add a word respecting the suggested sale of shares by the respondent to the Trust Company. The handing over of the share certificate to the Trust Company appears to me to have been an idle ceremony. No power-of-attorney to transfer was given, and no transfer in the share register of the Security Company ever took place. When the last of the Security shareholders received his proportion of the consideration, the provisional agreement was completely executed and the Security Company was, in the words of section 63, "dissolved", and with it the shares in question perished.

The foregoing reasons were prepared on the assumption that "income" in section 19 is identical in its meaning and content with "income" in section 22, and that in both sections this term (income) meant a surplus over and above the original capital; which surplus accrued to the Security Company as earnings or profits arising from its operations, and in the present case amounted to \$212,431.41; I also assumed that this was not in controversy, but I now realize that my assumptions were incorrect and that appellant's suggestion is that, while "income" in section 19 (1) relates to surplus earnings, profits or accretions to the capital assets of the company, "income" in section 22 relates to income to shareholders by way of dividends, and that this income accrued to the respondent in 1937 within the period prescribed by section 22.

I understand also that it is now suggested on behalf of the appellant that section 19 makes the sum of \$10,192.60 here in question a dividend *for all purposes* and not merely a sum subject to income tax as if it were a dividend.

After most respectful consideration of the above suggestions I find myself unable to agree.

Apart from the inherent difficulty of ascribing to the term "income" occurring in two co-related sections of the same Act, such widely different meanings, it seems to me that section 22 must relate to the income of the company,

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not to the income of the respondent shareholder, for an individual shareholder does not have fiscal periods such as are mentioned in section 22.

With respect to the \$10,192.60 received by the respondent as portion of the cheque for \$26,690.75, I think it was not originally income or dividend and never became such. It could be created a dividend only by a resolution of the directors of the Security Company. The Parliament of Canada when enacting an income tax Act cannot make that a dividend which is not dividend any more than it can make a woman a man. What it can do is to impose a liability for income tax on the shareholder in respect of the whole or any portion of the \$26,690.75 received by her, but it cannot make that sum or any part of it a dividend, because that sum plus the shares in the Trust Company received by the respondent was and remains her proportionate share of the purchase price received by the Security Company from the Trust Company.

This will more clearly appear from a consideration of the procedure under which the transaction in question was carried on. When the provisional agreement of March, 1937, was executed, the undistributed surplus of \$212,431.41 was an asset of the Security Company owned by it as a corporate entity. No shareholder had any property in it. The Security Company sold it to the Trust Company and it passed to the Trust Company along with and as part of the undertaking of the Security Company, and the Security Company received as consideration the obligation of the Trust Company already described. Then in pursuance of that obligation the Trust Company transferred to the respondent her proportionate share of the purchase price due by it to the Security Company.

It is quite true that the respondent received the benefit of her proportion of the undistributed surplus, but she did not get it as income or as dividend. She got her proportionate share of the purchase price, on a portion of which, if it had accrued in 1935 or subsequently, section 19 imposed an income tax, for which purpose (and for that alone) it is "deemed to be a dividend".

But the statute does not purport to do the impossible and make that a dividend which is in fact a part of the purchase price.

For these reasons, I am of opinion that "income" means the same in sections 19 and 22; that the sum of \$10,192.60 never became income or dividend; that sections 3, 9 and 12 of the Act have no application, and that this appeal should be dismissed with costs.

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*Appeal allowed with costs.*

Solicitor for the appellant: *W. S. Fisher.*

Solicitor for the respondent: *H. G. Stapells.*

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