

The Fort Frances Pulp and Paper Company, Limited - - *Appellants*

v.

The Spanish River Pulp and Paper Mills, Limited, and others - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF
ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1930.

Present at the Hearing :

LORD BLANESBURGH.

LORD MERRIVALE.

LORD ATKIN.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

[*Delivered by LORD BLANESBURGH.*]

This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, affirming a judgment of Mr. Justice Grant by which the appellants' action had been dismissed.

The question at issue results from the control over the supply and prices of newsprint throughout the Dominion established on the 16th April, 1917, for the duration of the war. The parties to the action were all of them engaged in the manufacture of that commodity, and the proceedings relate to its controlled supply by them respectively from the 1st January, 1918, to the 31st December, 1919. The space of time covered by the action extends no further, because for the period up to the 31st December, 1917, claims of the appellants analogous to those now made were satisfied by the action of the Controller, and for the period of the control subsequent to the 31st December, 1919, they were met by some arrangement between themselves and two of the

respondents, which, while foreshadowed, had not been concluded in regard to the period now in question. In respect of that period the demands of the appellants have been neither recognised nor satisfied, and in the action which was commenced on the 17th December, 1924, long after control had come to an end, the appellants' principal claim—the claim which has been rejected by the Courts of Ontario—is for a declaration that such of the defendants as supplied less than their proper share of newsprint to Canadian publishers during the control period in question were liable to pay to the appellants the loss suffered by them in supplying to these publishers during the same period more than their own proper share.

The relevant facts are long and involved. They have been carefully sifted and fully detailed in the judgment of Grant J. It would be superfluous to set them forth at length again. But the most salient and significant of them must, their Lordships feel, be recalled if the foundation on which the conclusions of this judgment rest is to be made clearly apparent.

Newsprint is the trade description of a certain standard quality of paper used in the production of newspapers. Even before the War most of the Dominion newsprint found its way to the United States. Of Canada's total production, 85 per cent. was exported there for consumption, the remaining 15 per cent. sufficing for the needs of Canadian publishers. The supply, however, was always adequate to meet every demand upon it. Market prices on each side of the border were accordingly in correspondence, and Canadian publishers suffered no disadvantage by reason of the fact that so large a proportion of Canadian-produced newsprint was withdrawn from Dominion consumption.

But a state of things so satisfactory for the publishers did not long survive the outbreak of war. Consumption and demand in the United States increased enormously: prices there soared: no corresponding augmentation in the Canadian or other production of paper took place; contracts for supply at pre-war prices ran out, and manufacturers were not minded to renew them on terms less advantageous to themselves than those so readily obtainable elsewhere. In other words, the American market price became—as it was almost inevitable that it should become—the Canadian market price also, and it ultimately reached such a height that the Canadian publishers, unable longer to face it, represented to Government that, unless by prohibition of export and control of prices, or in some other effective fashion, their requirements for newsprint on reasonable terms could be secured, they must cease publication altogether.

Faced with this demand, the manufacturers sought in the first instance to meet it by agreement amongst themselves, and at a meeting on 21st February, 1917, the proposal was made that newsprint to a prescribed amount should be reserved by them for Canadian consumption at the price of \$50 a ton f.o.b. the supplying mill, and Mr. Montgomery, K.C., who was called as a witness at the

trial, was instructed to prepare for signature an agreement by the manufacturers whereby as between themselves the reimbursement of those who in the event provided more than their proper share or quota of the reserved newsprint (in the proceedings referred to as "the longs") should be made by those of them who provided either less than their quota or none at all—in the proceedings referred to as "the shorts"—and Mr. Montgomery duly prepared an agreement in that sense and his draft is in evidence.

Originally the appellants' case, in one alternative of it, was rested on the allegation that with reference to this subject of differentials—such was its appropriate description throughout the proceedings—agreement was actually reached between themselves and the respondents on the terms of Mr. Montgomery's draft. But that contention failed at the trial and it was not renewed before the Board. The draft was never signed, and it remained a draft only. Its terms—more particularly its provisions upon this matter of differentials—and the attitude towards it of the parties became merely incidents in the history, and as such they were taken advantage of by the appellants, as will duly appear in the sequel.

In the result, however, the negotiations amongst the manufacturers came to nothing. Agreement was not reached. Control, in consequence, became inevitable: indeed, it was invited by the manufacturers themselves, and it was made effective, as has been seen, on the 16th April, 1917.

Before proceeding to consider the appellants' present claims in respect of differentials under that control, it will be useful to note the sharp contrast which in this matter existed between their position and interests and the position and interests of each of the respondents. The contrast colours the whole proceedings, and the case, their Lordships think, cannot be fully appreciated unless it is throughout kept prominently in mind.

To the respondents even a reasonable arrangement on the subject of differentials was never better than a doubtful advantage. From a business point of view every such arrangement had serious drawbacks, inasmuch as its existence was calculated to disturb the relations of nearly all of the respondents with their customers. Nor had they much to fear from the absence of a differential. Their mills in every instance were situate in Eastern Canada: the market there was indifferently open to all and the conceded requirements of the publishers within the area did not exhaust their aggregated quotas of the Dominion supply. A reasonably administered control, even without a differential, was accordingly not likely to impose upon any of them a serious excess of burden. Indeed, so doubtful in the working of the control had the advantage of a differential to any Eastern manufacturer become that in January, 1918, these manufacturers

by mutual agreement actually renounced as against each other all claims competent to them in that regard.

Very different was the position of the appellants in this matter. To them a proper arrangement on the subject was of the essence. For them a differential worked no inconvenience. It did not involve even temporarily the transfer of a single customer to any competitor. But, eliminate differential from the control, and there resulted an inevitable imposition upon the appellants, of a burden which, proportionately, greatly preponderated over that laid upon any other manufacturer.

The explanation is geographical. The mills of the appellants were the only mills in the West, and the conceded demands for newsprint of the Western publishers greatly exceeded any quota of the reserved supply properly assignable to them. But, if any f.o.b. supply of newsprint was in point of final cost to be made commercially available, these demands of the publishers had necessarily to be met by the appellants alone. High railway rates between East and West made the delivered price of Eastern newsprint to Western publishers prohibitive. Accordingly, if these publishers were to have their requirements met at the Dominion flat controlled rate—and it was the demand of Government that these should be so met—the appellants had to provide the supply. Hence the importance to them that from the excess of burden in the first instance necessarily thrown upon them, they should through a differential be relieved in due course by the other manufacturers.

This exceptional position of the appellants, it does appear, was from the beginning in the minds of those concerned, and to it is traceable the difference in outlook and interest, which before long became observable, between the appellants on the one hand and the Eastern manufacturers on the other. And in the result their exceptional position has meant much to the appellants. Indeed, the learned Trial Judge took the view on the evidence presented to him that, during the years 1918 and 1919 now in question, they were called upon by the Controller to supply and did supply to Western publishers at the controlled price more than their proper quota to an extent which involved them in a loss of \$10,000 a month. Possibly this estimate of loss is generous, but, whether correct or not, it must, their Lordships think, be taken that, except to the degree to which relief is obtainable by them in these proceedings, the appellants, during the period in question, will in relief of the respondents be left to bear to a preponderant extent the burden of the control. The learned Judge was impressed with the force of the appellants' claim so regarded. "If I could see my way clearly," he said, "to compelling an adjustment of the plaintiffs' claim by these defendants who shirked their fair share of the burden, I would do so without any hesitation. My difficulty lies in that I fear this Court has no jurisdiction so to do."

The control was brought about by means of Orders in Council passed under the Canadian War Measures Act, 1914, the Minister of Customs being the first Controller. He was appointed by an Order of the 16th April, 1917, which was in the following terms :—

“ His Excellency the Governor-General in Council, with a view to ensure to publishers of Canadian newspapers an adequate supply of newsprint paper at reasonable prices, and under and by virtue of the power in that behalf conferred by Section 6 of the War Measures Act, 1914, or otherwise vested in the Governor-General in Council, is pleased to make the following regulations respecting the price, sale, control, storage, distribution, export, transport, etc., of newsprint paper in sheets or rolls, and the same are hereby made and enacted accordingly :—

“ 1. The Minister of Customs is hereby authorised and empowered to fix the quantity and price of newsprint paper in sheets or rolls furnished or to be furnished to the publishers in Canada by the manufacturers from the 1st day of March, 1917, to June 1st, 1917.

“ 2. The Minister of Customs is further authorised and empowered to make such order or orders as he may deem necessary or advisable for the distribution and delivery of such newsprint paper in sheets or rolls by the manufacturers to the publishers.

“ 3. All orders and regulations made by the Minister under this authority shall have the force of law, and shall be enforced by such officer or officers as shall be appointed by Order in Council.

“ 4. Any person who contravenes or fails to observe any of the provisions of this Order in Council, or any regulation or order made thereunder, shall be guilty of an indictable offence, and liable upon indictment and conviction to a fine not exceeding \$5,000 or to imprisonment for any term not exceeding three years, or to both fine and imprisonment as specified ; and any director or officer of any company or corporation who assents to or acquiesces in the contravention or non-observance by such company or corporation of any of the provisions of these regulations shall be guilty individually and collectively with his company or corporation, and with his co-directors or associate officers.”

On the same day a second Order in Council was made, appointing Mr. R. A. Pringle, K.C., as a Commissioner under the Inquiries Acts, to conduct an enquiry into and concerning the manufacture, sale, price and supply of newsprint within Canada, and appointing him an officer under Section 6 of the War Measures Act for the due enforcement of all orders and regulations made by the Minister of Customs under the Order just stated. The Minister of Customs (the term of whose authority was extended from time to time) made various orders covering the period from the 1st March, 1917, to the 20th November, 1917, and on the 3rd November, 1917, Mr. Pringle was himself, by Order in Council of that date, appointed Controller, with full power to carry out all the terms and conditions of the Minister's different orders, and he was authorised to fix the quantity and price of newsprint paper and other classes of paper to be furnished by the manufacturers to the publishers in Canada during the continuance of the War, the prices to be first approved by the Governor in Council. Mr. Pringle was further authorised and empowered to make such order or orders as he might deem necessary or advisable for the

distribution and delivery of paper by the manufacturers to the publishers; and it was provided that all orders and regulations made by the Controller under that authority should have the force of law and should be enforced by such officer or officers as the Controller might appoint.

Mr. Pringle made his first order as Controller on the 17th November, 1917. It was operative for the period from the 20th November, 1917, to the 20th January, 1918. It covered accordingly a portion of the two years to which the appellants' action relates. From time to time Mr. Pringle made other orders fixing prices for periods which together cover the whole two years of the appellants' claim, but the orders made in relation to the period subsequent to the 30th September, 1918, were in form different from those which had previously been made. As this difference may have an all-important effect upon the appellants' claim, attention will now be drawn to it in some detail.

All the orders which were made by the Minister of Customs and those which were made by Mr. Pringle down to and including an order made by him on the 30th August, 1918, were in a form of which that last mentioned may be taken as a type. It runs as follows:—

“Whereas by Order in Council dated 3rd November, 1917, I am authorised and empowered to make such order or orders as I may deem necessary or advisable for the distribution of paper by the manufacturers to the publishers, and I am further empowered to fix prices (such prices to be subject to the approval of the Governor-in-Council).

“And whereas it has become necessary to fix prices to prevail from the date of the expiration of my order of the 27th day of June, 1918, fixing prices from 1st July to 1st September, 1918.

“Now, therefore, under and by virtue of the powers given to me by the said Order in Council of 3rd November, 1917, I do order and direct that the manufacturers of newsprint paper do supply to the newspapers throughout Canada, newsprint paper in rolls at the rate of \$2.85 per 100 pounds, in car-load lots; \$3.25 per 100 pounds in sheets in car-load lots, and \$3.50 per 100 pounds in sheets in less than car-load lots of two tons and over, f.o.b. the mills of the various manufacturers, for a period of one month from the 1st day of September, 1918, to the 1st day of October, 1918, subject to the condition that if the price fixed by this order is too high or too low there will be a revision of price from May 1st, 1918, and the manufacturers or publishers will be required to pay into such chartered bank as may be designated by me any sum or sums of money which may be found to be due by them owing to such revision.

“And whereas under existing conditions the supply of newsprint paper to Canadian publishers is not proportionately distributed between them, and by reason of the fact that the prices fixed are lower than the manufacturers are receiving from export business, I do order that each manufacturer should bear his due proportion of the cost so entailed in complying with above, and if arrangements are not made between the manufacturers for the pooling of such cost and for adjustment between themselves in proportion to the percentage of their output supplied to Canadian publishers, then an accounting be made and the manufacturer or manufacturers who have supplied a greater percentage of Canadian tonnage than properly attributable to them shall be paid by the manufacturer or manufacturers sufficient to place them in the same position as the manufacturer or manu-

facturers who have not supplied their proper percentage of paper to the Canadian publishers.

" I do further order that the manufacturers shall when called upon furnish accurate figures showing the total tonnage of newsprint paper produced and shipped by them during such period as directed and the tonnage so produced and shipped for the Canadian market and export market respectively together with the prices f.o.b. at the mills both for paper for export and paper for Canadian trade.

" This order is subject to approval by the Governor-in-Council and is without prejudice to such adjustments in price as may require to be made under order of January 21st, 1918, as varied by Order in Council dated February 18th, 1918.

" Dated at Ottawa this 30th day of August, A.D. 1918.

" (Signed) R. A. PRINGLE,

" Controller."

The recital which follows the clause fixing prices, and the two ordering provisions which follow that recital, were referred to in the argument before the Board, and may be conveniently referred to here as the differential clause. Upon that clause contained, as has been seen, in all the orders of control down to that of the 30th August, 1918, the appellants rely as supporting their case both in whole and in part. First of all, pointing out what seems to be true that the clause embodies the pith of the provisions on the subject contained in Mr. Montgomery's draft, they show upon the evidence that it was in no way owing to the presence there of these provisions that the draft did not become an agreement. The necessity for differential provisions in any agreement to which they were to be parties was, they insist, never questioned by the other manufacturers, who did not fail to appreciate their exceptional situation, as already explained. Upon these considerations, with the addition of other converging circumstances, to which reference must later be made, the appellants rested the submission which lies at the root of their present claim that in connection with what was throughout in effect an enforced reservation of newsprint for the benefit of Canadian publishers, the basis on which it was in the first instance negotiated and upon which during the period of the control it was enforced, whether so expressed or not, was that embodied in the declaration they seek.

But they refer to the differential clause in these orders for a second and more limited purpose. After the manufacturers other than the appellants had arranged all questions of differentials up to January, 1918, and after they had agreed, as has been seen, that there should be no further differential as between themselves, this question became one solely between the appellants on the one side and the remaining manufacturers on the other. The Controller, so the appellants say, accepted that position, and they point to an order of his of the 6th August, 1918, which, expressly based upon the differential clause, declared that the appellants were entitled to receive from the respondents therein named the differentials which had been ascertained by the report

of an accountant in respect of the period ending the 31st December, 1917, and ordered the amounts so ascertained—amounting in the aggregate to over \$100,000—to be paid to the appellants. This order was appealed from as will later appear, but pending appeal that sum, no doubt largely because of the fear that non-payment might jeopardize their export licences, was paid by those ordered to make it to the Controller direct, and \$80,000 of it was in fact received from him by the appellants in December, 1918.

Further reference to this payment of \$80,000 must be made later—some adjustment in respect of it may be called for—but, apart from that, this order of the 6th August, 1918, quantifying the differential provisions of the orders with reference to which it was made and in no way affected in principle by the modifications in it made on appeal, shows, as the appellants say, that so far at all events, as the supplies of newsprint made by them under the orders up to the 30th August, 1918, are concerned, the declaration which they seek cannot be denied them.

But the orders of the Controller covering the period subsequent to the 30th September, 1918, cannot be relied upon by the appellants in the same way. They were all of them different in form from the earlier orders, and the nature of the alterations made demands careful consideration.

The first of these later orders is dated the 26th September, 1918, and covers the period of two months from the 1st October, 1918, to the 1st December, 1918. That order was renewed from time to time, and may be taken as the standard form governing the whole of the period in question in the action subsequent to the 30th September, 1918. It runs thus :—

“Whereas by Order in Council dated 3rd November, 1917, I am authorised and empowered to make such order or orders as I may deem necessary or advisable for the distribution of paper by the manufacturers to the publishers, and I am further empowered to fix prices :

“And whereas it has become necessary to fix prices to prevail from the date of the expiration of my order of the 30th day of August, 1918 :

“And whereas in my previous orders there was a provision that if the price fixed was too high or too low there would be a revision of price from May 1st, 1918, and the manufacturers or publishers would be required to pay into such chartered bank as might be designated by me, any sum or sums of money which may be found to be due by them owing to such revision.

“Now therefore under and by virtue of the powers given to me by the said Order in Council of 3rd November, 1917, I do order and direct that the manufacturers of newsprint paper within the Dominion of Canada (with the exception of the Fort Frances Pulp & Paper Co., Ltd.) do supply to the newspapers throughout Canada, newsprint paper in rolls at the rate of \$3.45 per 100 pounds in car-load lots ; \$3.25½ per 100 pounds roll news in less than car-load lots ; sheet news in car lots at \$3.80 per 100 pounds ; sheets in less than car-load lots of two tons and over, \$3.92½ per 100 pounds—all to be f.o.b. at the mills of the various manufacturers, for a period of two months from the first day of October, 1918, to the first day of December, 1918, subject to the condition that if the prices fixed

by this order are any time found upon investigation to be either too high or too low, there will be a revision of price from July 1st, 1918, and in the event of such revision the manufacturers or publishers will be required to pay into such chartered banks as may be designated by me, any sum or sums of money as may be found to be due by them owing to such revision.

"The Fort Frances Pulp & Paper Co., Ltd., are entitled to the following prices:—Roll news in car lots at \$3.65 per 100 pounds f.o.b. mill; roll news in less than car-load lots, \$3.80 per 100 pounds f.o.b. the mill. These prices are, however, subject to reduction in the event of the Fort Frances Pulp & Paper Co., Ltd., being relieved of payment of duty on sulphite imported into Canada, and also in the event of present freight rates on ground wood being reduced, and are subject to revision clause set out above.

"The maximum commission for jobbers or other middlemen selling newsprint obtained from any of the manufacturers of newsprint in Canada shall be as follows:—15 c. per 100 pounds on car-load lots; 40 c. per 100 pounds on less than car-load lots; 60 c. per 100 pounds in less than ton lots. The commission shall be added to the actual cost of paper at the mill or at the warehouse. The cost at the warehouse will be the net mill price plus freight cartage and other reasonable necessary expenses incurred in getting the paper to the warehouse. In billing customers these items and the commission shall be stated separately.

"All of above prices shall date from 1st July, 1918, and the publishers are required to pay to the manufacturers the difference between the prices fixed in my prior orders and the prices fixed in this order from the 1st day of July, 1918, up to the present date.

"All manufacturers will be required to supply paper to publishers as directed by myself as Controller in order to receive the benefit of this Order.

"I do further order that the manufacturers shall, when called upon furnish accurate figures showing the total tonnage of newsprint paper produced, sold and shipped for the Canadian market and export market respectively, together with the prices obtained f.o.b. the mills.

"Any parties desiring to appeal from this Order to the Paper Control Tribunal will serve notice of such intention to appeal within thirty days of the date hereof.

"Dated at Ottawa this 26th day of September, A.D. 1918.

"(Signed) R. A. PRINGLE,

"Controller."

The differences introduced will be at once apparent. It is notable that the prices permitted to the appellants are now more generous than those allowed to the other manufacturers. But the most striking change of all is in the omission repeated in all subsequent orders of the differential clause altogether. As to the real reason for this omission various inconsistent explanations were put forward. In the result no explanation completely convincing was forthcoming, and the matter is not one upon which their Lordships are at liberty to speculate. They must take the orders and determine the rights of the parties under them as they stand.

Upon this the appellants seek to show that, so far at all events as Mr. Pringle was concerned, he did not regard the omission of the clause from the orders as having affected in any way their position. They point out that over the whole period

covered by the orders they were being constantly called upon by the Controller to maintain a supply of newsprint to Western publishers far in excess of their proportionate share of Dominion requirements. From time to time, dissatisfied with existing conditions as to prices, they threatened to discontinue this excess supply, and they were only induced to go on by assurances by and on behalf of the Controller that differentials would ultimately be adjusted and paid. And the appellants point to two orders of his—the first dated the 17th July, 1919, and the second dated the 23rd January, 1920, as significant in this connection. Neither of these orders, they admit, was effective as such. The first because although its existence was notified by the Controller to them, it was never promulgated; the second, because it was both dated and published by Mr. Pringle after his resignation as Controller had in fact been accepted. But the appellants point to both orders as being indicative of what in this matter of differential underlay the orders now under consideration.

The order of the 17th July, 1919, was found amongst Mr. Pringle's papers, after his death, signed and complete. Its first six paragraphs are in terms identical with the corresponding paragraphs of the order of the 6th August, 1918; the sixth paragraph reciting—quite wrongly, of course—that each of the orders covering the period between January 1st and July 1st, 1919, contains the differential clause.

The order of the 23rd January, 1920, is even more striking, in that while its recitals are in all respects the same as those in the order of the 6th August, 1918, no reference whatever is made to the order of the 17th July, 1919, and the effective order similar to that of the 6th August, 1918, proceeds on the narrative—again, of course, quite mistaken—that the differential clause is contained in all orders to date.

Their Lordships return now to the narrative of events. By Order in Council dated the 16th September, 1918, a Paper Control Tribunal was established to which appeals might be taken from any decision or order of the Controller including expressly the Controller's Order, already summarised, of the 6th August, 1918. The other manufacturers accordingly duly presented to the Paper Control Tribunal an appeal against the Order of the 6th August, 1918, and that Tribunal by order of the 18th August, 1919, reduced the sum payable from \$100,000 to \$72,507.12. \$80,000 of the original \$100,000 had been received by the appellants. The result of the order of the Tribunal accordingly was that on this account they had been overpaid to the extent of \$7,492.88 but no more. This the learned Trial Judge found.

He describes what followed. Application was made to the Controller for an order directing repayment of that sum by the appellants, but he declined to make such an order, stating in effect that there would be a much larger sum to become

payable by the respondents to the appellants when his further orders for payments of differentials would issue. The learned Judge, disclaiming jurisdiction himself to make any such order, refused in these proceedings to direct repayment either of these moneys or of some sulphide duties allowed to the appellants, subsequently rebated by Government, but not thereafter, as was alleged, accounted for by the appellants. The learned Judge, however, intimated that these sums would be sums to be adjusted if any account in respect of any subsequent period were by any Appellate Court conceded to the appellants.

This privilege of the respondents was not questioned by the appellants at the hearing, the correctness of the terms in which the reservation was made by the learned Judge at the close of his judgment was not canvassed before the Board and the reservation will remain present in their Lordships' minds throughout the case.

On the 16th January, 1920, Mr. Pringle addressed to the Minister of Finance a letter which, whether so intended or not, was regarded by the Minister as a resignation of his office of Controller. On the 22nd January the resignation was accepted by a Committee of the Privy Council, and on the same day Mr. R. W. Breadner was appointed Controller. On the following day—the 23rd January, 1920—Mr. Pringle, never perhaps having intended to resign, and certainly in ignorance that his resignation had been accepted, promulgated his order of that date, to which reference has already been made. On the 29th January, 1920, Mr. Breadner's resignation was accepted, and the office of Controller was declared vacant. On the same day an Order in Council was made in the following terms:—

“ His Excellency the Governor-General in Council on the recommendation of the Minister of Finance, is pleased to order and it is hereby ordered that until the publication of a proclamation by the Governor-General in Council under the authority of The War Measures Act, 1914, declaring that war no longer exists, the Board of Commerce of Canada shall:—

“ (a) Have, exercise and perform all powers, jurisdiction, authority and duties which were heretofore or are exercisable by the Commissioner and Controller of Paper, provided that the Orders of the said Board with respect to newsprint paper, sulphate and sulphide, shall be effective and have the force of law as and when made and shall not require confirmation by Order in Council, nor shall the exercise by the said Board of any of the said powers or the performance by the said Board of any of said duties be subject to appeal except as by the Board of Commerce Act provided;

“ (b) Be appointed such Commissioner and Controller of Paper;

“ (c) Have jurisdiction, power and authority to direct, require and compel shipment by manufacturers of newsprint paper of such quantities of newsprint paper as, in the opinion of the Board, are necessary and can be provided from any paper mill or persons, place or places in Canada;

“ (d) Have power and jurisdiction to order and direct that the breach or non-observance by any person or corporation of any order or direction which the said Board may make or give under authority of this Order shall entail the same consequences and liability for the same penalties as are provided by Section 20, Subsection (2), of the Combines and Fair Prices

Act, including the cumulative responsibility of co-directors and associate directors and officers of companies and corporations, and that all other provisions of law as to the jurisdiction of courts and otherwise as to procedure to enforce orders as set forth in the said Acts shall apply to all matters hereunder; and shall have all powers and authority to continue and carry on to completion all business and proceedings now pending in the office of the Commissioner and Controller of Paper."

The appellants took no steps to have the order of the 23rd January, 1920, confirmed or ratified by either of Mr. Pringle's successors in the office of Controller, or to have some order to the like effect by some Controller substituted for it. Mr. Pringle died on the 22nd January, 1922. The Board of Commerce has ceased to function, and there is no Controller now in existence. No application has apparently ever been made to Government to have the office resuscitated, if only that the present claim still undisposed of might then be dealt with under the control procedure. In the result there is in existence no order by any Controller for the payment to the appellants of any differentials in relation to the period in question in these proceedings, and it is upon that footing that the appellants' claim must be dealt with and disposed of.

Their claim is first of all put forward as one based upon an independent right to contribution from the respondents in respect of excess payments made by the appellants towards satisfaction of a statutory burden imposed upon them all in common.

Their Lordships recognise the strength of the general case made by the appellants on this head. They have already summarised it, and in their statement of the facts they have indicated the incidents in the history which have impressed them. But their Lordships cannot forget that their case, on this basis, is put forward by the appellants only after they have to acknowledge that the constant attempts by the parties themselves to reach agreement upon it failed; also after their reliance upon Mr. Pringle's assurances has turned out to be misplaced. Nor does it appear that the appellants at any time were either relying upon or supposed that there existed for their benefit any general underlying obligation to which recourse could be had if agreement could not be reached or if executive action was not forthcoming.

As the result of it all their Lordships, in agreement with both Courts in Ontario, have reached the conclusion that the general claim is not well founded. For this purpose their Lordships will assume, without analysing the exact wording and effect of the orders, that they were effective to impose upon all the Canadian manufacturers as one body the obligation of satisfying the total demands of all the Canadian publishers for newsprint over a given time; and they will further assume that apart from the orders some means exist by which the proper proportion of each manufacturer of those total demands can be ascertained, *i.e.*, either by reference to the actual

amount of newsprint sold by a mill during the time or to actual production during the time or to possible production during the time or in some other way. Nevertheless, their Lordships feel themselves unable to accede to the appellants' claim. The right of contribution is a right in an individual to be recouped by those who have not parted with their full share the quantum of money or goods provided by him in excess of his share of a common liability. It is not a right to damages, which is the essence of the plaintiffs' claim; nor is it a right to participate in any profit which may have accrued to the persons who have not borne their full share of the common burden. So far as the appellants' claim is based independently of the control orders that claim must, in their Lordships' opinion, fail.

In so far as their claim depends upon the contents of the control orders, it rests upon the exercise of a special executive power authorised by special legislation; and different considerations must apply to (a) the period before the 1st October, 1918, and (b) the period subsequent to the 30th September, 1918.

What their Lordships have said with reference to the appellants' general claim governs also their claim in regard to the latter period. There is no differential clause in any order relating to any portion of it, and the absence of the clause must be held to be fatal to the appellants, whatever may have been Mr. Pringle's private or personal reservations on the subject. The special executive power was not exercised. Their Lordships are unable to imply any such clause in the orders or, in its absence, to assign to the appellants rights against the respondents which could only be justified by its presence.

It now remains to consider whether the appellants' claim in respect of the first nine months of the year 1918 is well founded.

With regard to this period, the Controller's orders, containing as they do the differential clause, are quite express as to the terms on which alone they were made. It was on the face of these orders clear that provision by any manufacturer of newsprint beyond his quota made in obedience to an order from the Controller would be adjusted by the account referred to in the clause. And, indeed, it is not now seriously contended that any order actually made by the Controller himself with reference to this period and in the terms of his order of the 6th August, 1918, would on principle have been open to challenge. But it is said—and this is the ground upon which in respect of this period the appellants have so far been refused the account they claim—that here is a case of a liability, not existing at common law, with a special and particular remedy for its enforcement prescribed by or in pursuance of the enactment to which it owes its existence. In such a case the particular remedy must, it is contended, be followed; no other is open, and reliance is rightly placed on Willes J.'s well-

known judgment in *Wolverhampton New Waterworks Coy. v. Hawkesford*, 6 C.B. N.S. 336—where the rule is stated in rigid terms—and reference is also made to Lord Tenterden's exposition in *Doe & Bishop of Rochester v. Bridges*, 1 B. & A. 847, and to Lord Halsbury's comments upon the rule in *Pasmore v. Oswaldtwistle Urban District Council* [1898], A.C. 387.

Now, their Lordships recognise fully the existence of this general rule. They recognise further that in the present case, as was in fact shown by his order of August 6th, 1918, the Controller contemplated that he himself might take the account referred to in the differential clause. But while this procedure is doubtless within the terminology of the clause, and may even be directly pointed at there, the Board on any fair reading of its terms, are unable to find that the account must be taken by the Controller or that it may not just as naturally be taken by any tribunal to which, in ordinary course of law, any manufacturer who is "long" may have recourse in order to have worked out against the other manufacturers who are "short" the rights thereby secured to him. And in this connection their Lordships would refer to the decision of this Board in *Fort Frances Pulp & Power Coy. v. Manitoba Free Press Coy.* [1923], A.C. 695, where their Lordships, with reference to just such a sum as the \$7,492·88 already referred to, ordered those in the position of the present appellants to repay it to those in the position of the present respondents, as money had and received to their use. It is not without significance that the learned Trial Judge, who refused any account to the appellants, even in respect of this period, was of opinion, clearly for the same reasons, that it was beyond his jurisdiction to order repayment of the \$7,492·88. Their Lordships think that both he and the Supreme Court—who recognised that this portion of the appellants' claim stood in a different position from the rest of it—were here under a misapprehension, and while recognising the compelling authority of the decisions cited in all circumstances to which they are applicable, their Lordships have reached the conclusion that the terms of the differential clause and the account therein referred to are not such as to make them applicable here; and that to the limited extent now to be stated the appellants may be given relief in these proceedings.

In their Lordships' judgment, an order in the following terms would be appropriate :—

1. A declaration that such of the respondents as supplied less than their proper share of newsprint to Canadian publishers during the period from 1st January, 1918, to 30th September, 1918, are liable in terms of the differential clause contained in the Controller's orders in respect of that period to recoup to the appellants the sums lost to them by reason of their own excess supplies.

2. An account in accord with such declaration—the accounting parties, on the taking of such account being at liberty to

bring in, by way of set-off, but not otherwise, any sums for which the appellants remain accountable to them or to any of them in respect of (1) the overpayment of \$7,492.88 actually received by them under the order of the 6th August, 1918, as corrected by that of the 18th August, 1919, and (2) any duties since rebated, for which credit was originally given to the appellants by the Controller in his said Order of the 6th August, 1918, to the extent, if any, to which these rebates were not charged against the appellants by the Paper Control Tribunal in arriving, by its said Order of the 18th August, 1919, at the reduced sum of \$72,507.12 as being alone due to the appellants.

3. Payment by the respondents respectively in the amounts to be certified of the sum or of the balance, if any, found on the account, when taken, to be due to the appellants.

There will be liberty, if the Supreme Court deems their presence to be necessary on the taking of the account, to serve the defendants, E. B. Eddy Company, Limited, and the News Pulp & Paper Company, Limited, notwithstanding their dismissal from the action in the course of the hearing, with notice that the account has been directed to be taken and that they are required to attend the proceedings.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed; that the judgment of the Trial Judge, except in so far as it dismissed the action against the E. B. Eddy Company, Limited, and the News Pulp & Paper Company, Limited, and the judgment of the Appellate Division be discharged, and that an order in the terms just stated be made in lieu of the judgments discharged.

Appellants and respondents must each bear their own costs of the proceedings in Canada and of this appeal. The costs of the account now directed, if it be proceeded with, will be reserved to be dealt with by the Supreme Court.

In the Privy Council.

THE FORT FRANCES PULP AND PAPER
COMPANY, LIMITED,

2.

THE SPANISH RIVER PULP AND PAPER MILLS,
LIMITED, AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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