

Abitibi Power and Paper Company Limited - - *Appellant*

?

Montreal Trust Company and others - - - *Respondents*

The Attorney-General for Ontario - - - *Intervener*

FROM

THE COURT OF APPEAL FOR ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 8TH JULY, 1943

*Present at the Hearing :*

LORD ATKIN  
LORD THANKERTON  
LORD RUSSELL OF KILLOWEN  
LORD MACMILLAN  
LORD WRIGHT

[*Delivered by LORD ATKIN*]

This is an appeal from the Court of Appeal for Ontario who by a majority (Gillanders J. dissenting) dismissed the appeal of the appellant from an order of Middleton J.A. which ordered that all the property of the company should be sold by public auction. The question in the case is the validity of Acts of the Ontario Legislature, the Abitibi Power and Paper Co. Ltd. Moratorium Act, 1941, and a further Act the Abitibi Power and Paper Co. Ltd. Moratorium Act, 1942. The Acts were passed in the following circumstances.

The appellant company was incorporated in 1914 by Letters Patent of the Dominion of Canada to acquire the undertaking of the existing company The Abitibi Pulp and Paper Co. In 1928 it made an issue of first mortgage gold bonds due 1953, of which in the year 1932 \$48,267,000 with interest at 5 per cent. were outstanding. The bonds were charged on the whole property and undertaking of the company. There were also issued

\$1,000,000 in 10,000 shares of 7 per cent. cumulative preferred stock;  
\$34,818,000 in 341,818 shares of 6 per cent. cumulative preferred stock;  
1,088,117 common shares no par value upon which the book value placed was \$18,964,933.

As may be seen from the capital structure the company was a vast undertaking, dependent for its supply of pulp wood upon the crownlands of the Province of Ontario, which it obtained under agreements for 21 years, and dependent for its water power on leases and licences from the Crown. A convenient summary of the position is given by Robertson C. J. in his judgment giving leave to appeal in the present case.

" An essential part of the property covered by the mortgage consists of leases, licences, agreements, water power rights, privileges, franchises and concessions granted by the Province of Ontario. As is stated in the report of a Royal Commission that inquired into the affairs of the defendant company, whose report is before us and was referred to in argument, 'Abitibi is dependent for its supply of pulpwood upon the Crown lands of the Province of Ontario. It also requires large quantities of power, in respect of which it is dependent upon leases from the Province.' These licences, leases and other rights are granted in most, if not in all cases for

fixed terms of years, and some of these have expired or are about to expire. As to some others the company is in default either in payment or in the performance of its covenants. If the Province of Ontario should exercise its rights strictly, the mortgaged premises would hardly be saleable at any price. Mills in which large sums of money are invested would be worthless without power to run them or pulpwood to supply them. In the report of the Royal Commission to which I have referred there is set forth on pages 10 and 11 a long list of the defendant company's further requirements from the Province, as given by the receiver. No doubt the Province is in the habit of co-operating fairly with persons who invest their money in establishing and developing industries on the lands of the Crown and in opening them up to settlement, and improving them, but when, as here, there may be danger that many persons who have invested largely will lose their investment, the Government of the Province may have some concern. It may well be that on a sale for cash none but bondholders who can turn in their bonds in payment, will be in a position to buy, especially in view of the difficulty of raising large amounts of capital for such investment in war time. To avoid a result that may wipe out the investment of a great many people and that in such an event may cause some embarrassment to the Government in dealing with the property rights and interests of the Province, it is, to say the least, understandable that the proposed sale for cash should be the subject of some concern to the Legislature, whatever opinion one may have as to the power of the Legislature to enact the statute in question."

Subsidiary companies in which the company owned the majority of shares also carried on similar businesses in Manitoba and Quebec.

The gold bonds were secured by a trust deed in ordinary form dated June 1, 1928, made between the company and the present respondents, the Montreal Trust Co., whereby the company mortgaged and charged the whole of their property and undertaking to the Trust Company in trust for the holders of the first mortgage gold bonds. There was another party to the deed, the National City Bank of New York, as "authenticating trustee." They were not parties to the action and no further reference need be made to them.

In 1932 the company made default in payment of the half-yearly instalment of interest due on June 1st, and thereupon in pursuance of a power in the trust deed the Montreal Trust Co. Ltd., by writ issued on September 8th, 1932, commenced the ordinary debenture holders' action claiming administration of the trusts of the debenture trust deed, a declaration that the indenture and mortgage were a first charge on the undertaking of the company, to have an account of what was due on the mortgage, to have the undertaking property and assets of the company sold under the direction of the court, and for the appointment of a receiver and manager.

On September 10th, 1932, Riddell J.A. appointed G. T. Clarkson receiver and manager of the undertaking and gave leave to named members of a bondholders committee to attend the proceedings. Subsequently these gentlemen or some of them were by order of Middleton J.A., dated September 13th, 1935, added as defendants in the action, and are in addition to the plaintiff respondents to the present appeal.

So far the action was plainly a mortgagees' action brought in the Courts of Ontario affecting property in Ontario and the civil rights of the mortgagee and subject to the exclusive authority of the provincial courts and the provincial legislature. It has to be determined how far if at all this position was altered by subsequent proceedings. On September 15th, 1932, an unsecured creditor, Canada Packers Ltd. filed a petition in bankruptcy against the company, in breach of a provision of the order appointing a receiver that no proceeding should be taken against the company without leave of the Court. Their Lordships do not stay to examine the validity of this provision, for on September 26th on the application of the same creditor Sedgewick J. made four consecutive orders:—

(1) Granting leave to the creditor to proceed against the company under the provisions of the Bankruptcy Act and/or the Winding Up Act and confirming the petition dated September 15th.

(2) On the creditor's petition adjudicating the company bankrupt, making a receiving order against it, and appointing a custodian of the estate.

(3) Granting leave to the creditor to apply for a winding up order against the company.

(4) On the petition of the creditor declaring that the company was insolvent, and ordering it to be wound up.

On November 25th, 1932, F. C. Clarkson was appointed liquidator of the company, and so acted until December 20th, 1935, when he resigned, R. S. McPherson being appointed in his place. The Winding Up Act (a Dominion Act of R.S.C., 1927, c. 213, s. 21) provides "After the winding up order is made no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes."

The court referred to is the appropriate Provincial Court acting in this capacity as a Dominion Court with Dominion jurisdiction. On December 7th, 1932, the following order was made by Garrow J. and as controversy arises as to its effect it will be as well to set it out.

" IN THE MATTER OF THE WINDING UP ACT, being Chapter 213 of the Revised Statutes of Canada, 1927, and Amending Acts, and IN THE MATTER OF ABITIBI POWER & PAPER COMPANY LIMITED.

1. Upon the application of Counsel for Montreal Trust Company, the Plaintiff in an action commenced in this Court on the 8th September, 1932, against the above named Abitibi Power & Paper Company Limited for the enforcement of the trusts and security of a certain Deed of Trust and Mortgage dated as of 1st June, 1928, made by the said Abitibi Power & Paper Company Limited in favour of the said Montreal Trust Company and the National City Bank of New York as Trustees, in the presence of Counsel for F. C. Clarkson, Esquire, the Liquidator appointed herein, upon reading the Writ of Summons in the said Action and upon hearing what was alleged by Counsel aforesaid.

2. IT IS ORDERED that the said Montreal Trust Company shall be at liberty to proceed with the said action against the said Abitibi Power & Paper Company Limited notwithstanding the winding-up order made herein the 26th September, 1932.

' D'ARCY HINDS ',  
Registrar, S.C.O."

Thereupon the action proceeded leisurely as negotiations from time to time took place for a reconstruction and it was not till February 15th, 1937, that the statement of claim was delivered claiming the relief mentioned in the writ. On September 16th, 1937, the company delivered its defence, alleging on various grounds that the charge was not valid, and disputing the jurisdiction of the Provincial Court save for the purpose of determining the validity of the charge. On November 3rd Kingstone J. on the trial of the suit declared the charge valid and gave liberty to apply as to any further directions. On June 10th, 1940, Middleton J.A. on motion of the plaintiffs ordered a sale of the company's undertaking under the direction of the Master and gave leave to any bondholder to bid. In October the Master reported that he had received two bids of \$30,000,000 and \$40,300,000. The latter he rejected as not complying with the conditions of sale: but reported that neither bid was equal to the reserve which he had fixed. The sale therefore proved abortive.

On November 1st, 1940, a Royal Commission was appointed by Order in Council in Ontario, consisting of three commissioners "to inquire into the affairs and financial structure of the company with a view to recommending an equitable plan for solving the financial difficulties of the company so that the company may be in a position to meet conditions, regulations and restrictions which the Lieutenant-Governor-in-Council may consider necessary upon the grant or renewal of the hereinbefore recited leases, licenses, waterpower rights, flooding rights, licenses of occupation and other rights, powers or privileges, and generally to make such recommendations in the premises as appear to be in the best interests of all



parties concerned, including the Province of Ontario." On March 17th, 1941, the Commission reported. It is unnecessary to discuss their findings and recommendations in detail. They criticised the present Dominion legislation in so far as it dealt with schemes of reconstruction of such large concerns as the present: they stated that the Government and the public had a huge stake in the pulp and paper industry: and that no price could be obtained for the undertaking and assets under present conditions which would begin to approach the amount of the outstanding bonds with interest thereon, and they outlined a plan whereby the maturity of the bonds was extended for 25 years with provisions for maintaining the rights of the bondholders, and in the absence of default for payment by instalments of some portion of the ordinary creditors' claims. They recognised that to secure this object recourse would have to be had to Dominion legislation.

Meantime on November 25th, 1940, the plaintiff had given a further notice of motion for sale which was ordered to stand over pending the report of the Royal Commission. After the Report of the Royal Commission the Legislature on April 9th, 1941, passed the Act of which the validity is questioned in these proceedings. It recites the various motions for sale, and recites a summary of the Report of the Royal Commission and finally recites whereas it is deemed desirable to stay any action now pending or that may hereafter be taken under the provisions of the above mentioned bond mortgage for the sale of all the property and assets of the said company situate in Ontario in order that an opportunity may be given to all parties concerned to consider the plan submitted in the Report of the said Royal Commission, and then proceeds to enact (S. 1) that as far as any property in Ontario is concerned no further proceedings should be taken or continued under the order of Middleton J.A. of June 10th, 1940 [This, in fact, was already exhausted]. (S. 2) that without the consent of the Attorney General no new action should be brought for the purpose of realising on the mortgage, and no further step should be taken in the action then pending. The Act was to come into force on a day to be named by the Lieutenant-Governor, and by Order in Council its operation might be determined at any time, but otherwise it was to remain in force until December 31st, 1942.

On October 9th, 1941, the notice of motion for sale which was then standing over was renewed: and on the same day the Lieutenant-Governor made a proclamation bringing into force the Moratorium Act. On October 17th the plaintiff gave notice that at the hearing of the motion for sale the validity of the Moratorium Act would be disputed on the ground that it dealt with matters that fall under the head Bankruptcy and Insolvency under S. 91 of the British North America Act. The motion was heard on November 27th, 1941, by Middleton J.A. when counsel for all parties interested and the Attorney General for Ontario were heard. In his considered judgment, given on December 4th, 1941, Middleton J.A. held the Act to be ultra vires and ordered the sale of the property and assets of the company to take place under the direction of the Master and subject to a reserve bid, with liberty to the bondholders to bid. On appeal this order was affirmed by the Court of Appeal on March 21st, 1942, Gillanders, J.A. dissenting.

The objection to the Act that was expressed by Middleton J.A. and by the members of the Court of Appeal may be summarised by saying that leave to continue the action had been given under the powers of the Dominion Act (Winding Up Act, S. 21) and that the Legislature could not thereafter interfere with the proceedings in the action without encroaching upon the exclusive Dominion powers to legislate on the class of subjects Bankruptcy and Insolvency. The right to take away the cause of action, said Fisher, J.A., is vested in the Dominion unless the Dominion has not seen fit to deal with it: and S. 21 of the Winding Up Act does deal with it. Henderson, J.A., went further and was of opinion that legislation in the Province passed in respect to property and civil rights in the Province must not be legislation aimed at a particular firm or corporation but must be general in character. "The legislature is not competent to deny access to His Majesty's Courts in an individual case."

Their Lordships are unable to agree with the decision in the Ontario Courts. It has to be remembered that this action when commenced was subject solely to the laws of the Province, which at any time in pursuance of the sovereign power entrusted to the Legislature in this respect might be altered as the Legislature thought fit. When the company was ordered to be wound up the bondholders might in pursuance of SS. 78 to 84 claim in the winding up as secured creditors: they would in that case have had to put a specified value on the security: and the liquidator could have consented to the retention by the creditors of their security or could have required the transfer to him at the specified value to be paid out of the estate when he had realised the security. The bondholders in this case made no claim at all in the winding up. Their security was known to be insufficient to meet the mortgage debt, and they deliberately remained outside: and proceeded to continue to exercise what may be called their provincial rights against the provincial property. They were required by S. 21 of the Winding Up Act to get leave to continue their action, a provision which is not directed to secured creditors alone but is applicable to all claims against the company whether in contract or tort or otherwise. In view of the circumstances the leave to proceed was *ex debito justitiae*. The court could not rightly have refused it. Once granted the action proceeded as a provincial action: subject to the provincial law regulating the rights in such an action, and subject to the sovereign power of the Legislature to alter those rights in respect of property within the Province. It could not be denied that the action proceeded subject to the possibility of being stayed under the ordinary rules of procedure as for instance for security for costs, default in pleading or discovery or any special circumstances which the court might think demanded a stay. Middleton J.A. appreciated this position: but expressed the opinion that the action would proceed in accordance with the orders and rules of practice that were in existence at the date of the application. The limitation to existing rules is significant: their Lordships can see no ground for such a restriction. If the rules of procedure were subsequently altered before the action came to an end it must proceed thereafter subject to the rules as amended. The Province therefore could enact rules in the course of the action imposing a further ground of stay: and if it can thus impose what may be a general moratorium there is no reason why its sovereign power should be so limited as not to enable it to impose if it so desired a moratorium limited to a special class of action or suitor or to one particular action or suitor. There appears to be no authority and no reason for the opinion that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. The Legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not in any case subject to control by the courts. The short answer therefore to the contentions of the plaintiff is that the action though continued by leave of the Winding Up Court never became a proceeding in the winding up, and that the temporary interference with it by the Legislature to which it was subject was not an intrusion into the field of bankruptcy and insolvency. It was pressed upon their Lordships that the real substance of the legislation was an attempt to coerce the bondholders into accepting a plan of reconstruction and that arrangements such as were contemplated by the report of the Royal Commission were within the exclusive field of Dominion legislation. So they are, but this Board must have cogent grounds before it arising from the nature of the impugned legislation before it can impute to a provincial legislation some object other than what is to be seen on the face of the enactment itself. In the present case their Lordships see no reason to reject the statement of the Ontario Legislature contained in the preamble to the Act that the power to stay the action is given in order that an opportunity may be given to all the parties concerned to consider the plan submitted in the report of the Royal Commission. That the Act was renewed in March, 1942, by another temporary Act expiring in June, 1943, affords no reason for modifying this view: nor does the fact that the plan suggested by the Royal Commission involves recourse to Dominion

legislation. The pith and substance of this Act is to regulate property and civil rights within the Province. It was contended that the Act was passed in relation to the management and sale of the Public Lands belonging to the Province and of the timber and wood thereon; but in view of what has been said on the topic of property and civil rights in the Province, it is unnecessary to discuss this further ground for supporting the validity of the Act. A preliminary objection was taken to the regularity of the order of the Court of Appeal on the ground that the case did not fall within S.1 of the Privy Council Appeals Act, R.S.O., 1937, c. 98, giving an appeal where the matter in controversy in any case exceeds the sum or value of \$4,000. It was said that the order under appeal was an interlocutory order, and the appeal was granted because there were exceptional circumstances by reason of the importance of the constitutional question. Their Lordships intimated at once that if necessary in view of the constitutional question they would give leave to file a petition for special leave in favour of which they would report, and counsel for the respondents very reasonably did not further press the objection. Their Lordships are, however, satisfied that the order in question which forms one of the final orders asked for in the statement of claim, whether it were interlocutory or not, relates to a matter in controversy which exceeds the sum in value of \$4,000. If a litigant is to be deprived by order of the court of any rights over a property worth \$30,000,000, as he is by an order of sale to which he objects, it would appear reasonable to hold that there is a matter in controversy raised by the appeal exceeding the sum of \$4,000. On this ground the preliminary objection fails. For these reasons the appeal should be allowed and the orders of Middleton, J.A., and the Court of Appeal be set aside and the motion for sale should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The Montreal Trust Company must pay the costs of the company in the Ontario Courts and on this appeal.





In the Privy Council

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ABITIBI POWER AND PAPER COMPANY  
LIMITED

2.

MONTREAL TRUST COMPANY  
AND OTHERS  
THE ATTORNEY-GENERAL FOR  
ONTARIO

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DELIVERED BY LORD ATKIN

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