

37, 1943

In the Privy Council.

No. 58 of 1942.

ON APPEAL FROM THE COURT OF  
APPEAL FOR ONTARIO.

UNIVERSITY OF LONDON  
W.C.1.  
23 OCT 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN  
ABITIBI POWER & PAPER COMPANY LIMITED  
(Defendant) - - - - -

*Appellant* 30639

AND

MONTREAL TRUST COMPANY (Plaintiff) -

*Respondent*

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AND

JOSEPH P. RIPLEY, STANTON GRIFFIS,  
MILTON C. CROSS, W. H. SOMERVILLE,  
ROBERT H. REID, ANDREW FLEMING  
and W. A. ARBUCKLE (Defendants) - -

*Respondents*

AND

THE ATTORNEY-GENERAL FOR ONTARIO -

*Intervener.*

CASE FOR THE APPELLANT.

Record.

1. This is an appeal from a judgment of the Court of Appeal for Ontario (Riddell, Fisher, Henderson, J.J.A. and Hogg, J., Gillanders, J.A., dissenting) dated the 21st March 1942 dismissing an appeal by the Appellant from the order of the Supreme Court of Ontario (Middleton, J.A.) dated 4th December 1941, directing the sale by public auction subject to a reserve bid of the property, assets and undertaking of the Appellant. p. 51. p. 39.

2. By an indenture of mortgage dated the 1st June 1928 between the Appellant of the first part, the Respondent Montreal Trust Company as Canadian trustee of the second part and The National City Bank of New York as "authenticating trustee" of the third part, the Appellant mortgaged to Montreal Trust Company specified property and assets and also charged all its other property and assets, present and future, as a p. 92, l. 17. (Exhibit "A" to affidavit of John F. Hobkirk dated the 20th May, 1940); p. 15, l. 24—p. 16, l. 15.

first floating charge for the benefit of the holders of the Appellant's first mortgage gold bonds and to secure payment of the principal and interest on the bonds from time to time outstanding, the security to be enforceable if default in the payment of any interest should have continued for 60 days. The indenture of mortgage also provided that in the event of a liquidator, receiver or trustee in bankruptcy being appointed to the Appellant the principal of all outstanding bonds, with interest thereon, should immediately become due and payable.

p. 16, ll. 19-25.

p. 93, ll. 37-45.

**3.** At all material times there were outstanding 5 per cent. bonds to the amount of \$48,276,000, and the Appellant on the 1st June 1932 failed to pay the half-yearly interest then due on the bonds, and has not since paid any interest thereon. 10

p. 1.

**4.** The Order now under appeal was made in an action commenced by a writ of summons in the Supreme Court of Ontario issued by Montreal Trust Company on the 8th September 1932 claiming :—

(A) the administration and execution by the Court of the trusts of the indenture and mortgage

(B) a declaration that the indenture and mortgage is a first charge on the Appellant's whole undertaking property and assets

(C) an account of the amount due under the bonds 20

(D) sale of the Appellant's undertaking property and assets under the Court's direction

(E) the appointment of a receiver and manager of the Appellant's undertaking property and assets.

pp. 15-17.

The statement of claim delivered the 15th February 1937 claimed substantially the same relief.

pp. 2-5.

p. 2, l. 13.

p. 3, ll. 7-10.

**5.** By order dated the 10th September 1932 the Supreme Court of Ontario (Riddell, J.A.) appointed Geoffrey Teignmouth Clarkson receiver and manager of the property, assets and undertaking of the Appellant and it was further ordered that no action or other proceeding should be taken or continued against the Appellant or the receiver and manager without leave of the Court first being obtained. 30

**6.** On the 26th September 1932 the Supreme Court of Ontario (Sedgwick, J.) made the following orders :—

p. 6.

(A) an order granting a creditor, Canada Packers Limited, leave to take proceedings against the Appellant under the Bankruptcy Act (Revised Statutes of Canada, 1927, Chapter 11) and the Winding-up Act, (Revised Statutes of Canada, 1927, Chapter 213) or either of these Acts ;

(B) an order under the provisions of the Bankruptcy Act p. 7.  
adjudging the Appellant bankrupt upon the petition of the said  
creditor ;

(C) upon the application of the said creditor an order under p. 8.  
the provisions of the Bankruptcy Act granting leave to apply the  
provisions of the Winding-up Act to the Appellant ;

(D) an order for the winding-up of the Appellant under the p. 9.  
Winding-up Act.

7. On the 25th November 1932 Frederick Curzon Clarkson was pp. 9-10.  
10 appointed Permanent Liquidator of the Appellant by the Supreme Court  
of Ontario, and on the 20th December 1935 Frederick Curzon Clarkson pp. 13-15.  
was removed as Liquidator and Roy Sharvell McPherson was appointed  
Liquidator, both of the orders being made under the Winding-up Act.  
The Appellant appears in these proceedings by the said Roy Sharvell  
McPherson, its Liquidator.

8. On the 7th December 1932 an order was made by the Supreme p. 11.  
Court of Ontario (Garrow, J.) under the Winding-up Act allowing the  
Respondent Montreal Trust Company to proceed with its action in the  
Supreme Court of Ontario against the Appellant notwithstanding the p. 9.  
20 winding-up order of the 26th September 1932.

9. Joseph P. Ripley, Stanton Griffis, Milton C. Cross, W. H. Somerville,  
Edward E. Reid (for whom Robert H. Reid was later substituted), Andrew  
Fleming and W. A. Arbuckle representing certain of the bondholders and  
known as and hereinafter called " the Bondholders Protective Committee,"  
were added as defendants in the action by Order of the Supreme Court pp. 11-13.  
of Ontario (Middleton, J.A.) dated the 13th September 1935. In the pp. 17-18.  
action the Bondholders Protective Committee supported the Respondent  
Montreal Trust Company.

10. The action came on for trial before Kingstone, J., who by his p. 21.  
30 judgment dated the 3rd November 1937 declared Montreal Trust Company  
and the bondholders under the indenture and mortgage to be entitled to  
a first charge upon the Appellant's undertaking property and assets for  
the payment of all moneys secured thereby and by the outstanding bonds  
thereunder and ordered that the trusts thereof be performed and that the  
receiver and manager be continued and granted liberty to all parties to  
apply and reserved further directions and costs. The judgment, which  
is not under appeal, did not, however, authorise the sale of the Appellant's  
property undertaking and assets.

11. In 1937 before the trial of the action the Bondholders Protective  
40 Committee submitted a plan for the reorganisation of the Appellant p. 100, l. 38—p. 101,  
l. 5.

(Exhibit "E" to affidavit of Richard G. Meech).

based on the balance sheet of the Appellant as at the 31st December 1936. This plan made provision for the rights of creditors and shareholders, but was not carried into effect.

p. 93, ll. 17-19  
(Exhibit "N" to affidavit of John F. Hobkirk dated the 20th May, 1940).

**12.** In the following years there was a very great improvement in the Appellant's financial position. At the 31st December 1936 the net working capital of the Appellant amounted to \$2,241,301.38, which as a result of the operations of the Appellant was increased to \$13,066,990.44 at the 30th April 1940. Similarly there was a marked increase in the net earnings of the Appellant which for the fiscal year ended the 31st December 1936 as shown by the report of the receiver and manager with proper adjustments and before providing for depreciation and bond interest, amounted to \$2,185,188.76 whereas its calculated net earnings for the month of May, 1940 on the same basis were at the rate of approximately \$10,000,000 per annum, which was double the annual requirements for bond interest and depreciation. 10

p. 101, l. 15.

p. 93, ll. 17-19  
(Exhibit "N" to affidavit of John F. Hobkirk dated the 20th May, 1940).

p. 101, ll. 33-40.

**13.** In March 1939 the Bondholders Protective Committee put forward a plan for the purchase of the Appellant's assets on behalf of the bondholders and in May 1940 the Committee requested Montreal Trust Company to take proceedings in the action for the sale of the Appellant's undertaking, property and assets by order of the Court at as early a date as possible. Montreal Trust Company accordingly obtained from the Supreme Court of Ontario (Middleton, J.A.) an Order dated the 10th June 1940 for sale under the direction of the Master. The making of the Order was opposed by the Appellant and by committees for the general creditors, the preferred shareholders, and the common stockholders. 20

p. 99, ll. 30-35.

p. 93, l. 46—p. 94, l. 6.

pp. 28-29.

p. 31, ll. 37-41.

**14.** Pursuant to the Order of 10th June 1940 the property assets, and undertaking of the Appellant were offered for sale by the Master, Supreme Court of Ontario, subject to a reserve bid fixed by him, on 16th October 1940. The reserve bid was not reached, the sale therefore proved abortive. 30

p. 33.

p. 35, ll. 23-34.

**15.** On the 1st November 1940 the Lieutenant-Governor in Council for the Province of Ontario appointed a Royal Commission pursuant to The Public Inquiries Act (Ontario)

"to enquire into the affairs and financial and corporate structure of the Abitibi Power & Paper Company, Limited 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, water power 40

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.”

**16.** Evidence was taken by the Royal Commission and on 17th March 1941 it delivered its Report recommending *inter alia* a plan for the reorganisation of the Appellant which recognised the existence of a valuable equity for the shareholders, and containing as part of its recommendations the following :—

p. 105, ll. 35-40.  
p. 95, l. 31  
(Exhibit “A” to affidavit of John F. Hobkirk dated the 9th October, 1941).

10 “ The important thing at the moment is co-operative action on the part of the Ontario Government so that the greatest good may be obtained for the greatest many. The whole newsprint industry is much in the same position. Confidence must be restored and this can best be assured by constructive and sympathetic government action which recognises a vested interest in the investments of the public. It is our hope that the 1940 volume of earnings will be maintained and if that proves to be the case, the shareholders will eventually have a real interest. At the present time we do not think it equitable that they should be shut out from the opportunity.”

20 The Report also pointed out that the Appellant is dependent for its supply of pulpwood upon Crown lands in Ontario under pulpwood cutting agreements with the Government and that the Appellant is also dependent upon leases from the Government for large quantities of power which the Appellant requires.

p. 35, ll. 38-42.

**17.** On the 9th April 1941 the Legislature of the Province of Ontario enacted The Abitibi Power & Paper Company Limited Moratorium Act 1941 providing (A) that so far as any property in Ontario was concerned no further proceedings should be taken or continued under the Order of Middleton, J.A., dated the 10th June 1940, directing the sale of the Appellant’s property ; (B) that without the consent of the Attorney-General for the Province of Ontario no new action should be brought for the purpose of realising on the security situate in the Province of Ontario and no further step taken or order made in the pending action ; and (C) that the Act should come into force upon proclamation of the Lieutenant-Governor in Council and, subject to the termination of the operation thereof by Order-in-Council, should remain in force until 31st December 1942. This Act came into force on 11th October 1941 by Proclamation of the Lieutenant-Governor in Council. By The Abitibi Power & Paper Company Limited Moratorium Act 1942 it was provided *inter alia* that the Act should remain in force and have effect until 30th June 1943.

pp. 34-37.

p. 36, ll. 19-32.

p. 36, ll. 33-39.

p. 37, ll. 7-12.

p. 37, l. 16 ; p. 38, l. 2.

p. 38, l. 20.

**18.** On the 17th October 1941 Montreal Trust Company served notice on the Attorneys-General for Canada and Ontario of its intention to contest the validity of The Abitibi Power & Paper Company Limited Moratorium Act 1941 on the hearing of a motion of which notice had originally been given on the 25th November 1940 for the sale of the Appellant's property assets and undertaking without reserve. The motion was heard on the 27th November 1941 and counsel representing the Protective Committee for the General Creditors, the Preferred Shareholders Protective Committee and the Common Shareholders Protective Committee respectively joined with counsel for the Appellant and counsel for the Attorney-General for the Province of Ontario in opposing the Plaintiff's application for the sale of the property, assets and undertaking of the Appellant, and subsequently supported the Appellant's appeal to the Court of Appeal for Ontario from the Order made thereon. By this Order made by Middleton, J.A., on the 4th December 1941, it was directed that the property, assets and undertaking of the Appellant be sold on the direction of the Master by public auction subject to a reserve bid on 18th February 1942. Middleton, J.A., in his reasons for judgment did not deal with the arguments advanced on behalf of the Appellant and the various Committees representing its shareholders and unsecured creditors that the property should not be offered for sale under the then existing war conditions, but dealt only with the validity of The Abitibi Power and Paper Company Limited Moratorium Act 1941, which he held to be *ultra vires* the Legislature of Ontario.

p. 39, l. 6.  
p. 39, ll. 6-13.

p. 51, ll. 20-25.

pp. 39-40.

pp. 41-44.

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p. 109, ll. 8-13.

**19.** On the 31st October 1941 the net working capital of the Appellant amounted to \$20,029,216.66 after payment by the receiver and manager of the sum of \$6,274,710.00 to Montreal Trust Company for application on account of principal moneys due on First Mortgage Gold Bonds of the Appellant and the net earnings of the Appellant for the ten months ended the 31st October 1941, exclusive of the earnings of two subsidiary companies, and before providing for depreciation and bond interest amounted to \$7,721,626.07. On the 31st October 1941 the receiver and manager of the Appellant had in cash and Dominion of Canada bonds the sum of \$7,537,080.76 after payment to the Plaintiff of the aforesaid sum of \$6,274,710.00.

p. 109, ll. 3-7.

p. 109, ll. 14-18.

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p. 45.  
pp. 45-46.

**20.** Notice of Appeal from the Order of the 4th December 1941 was served by the Appellant on the 18th December 1941 and in addition on 2nd January 1942 leave to appeal therefrom was obtained from Roach, J.

p. 51, l. 14.

**21.** The appeal was heard on the 5th and 6th February 1942 and was dismissed by a majority judgment of the Court of Appeal for Ontario Riddell, Fisher, Henderson, J.J.A., and Hogg, J., Gillanders, J.A.,

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dissenting) delivered on 21st March 1942, upholding the judgment of Middleton, J.A., declaring The Abitibi Power & Paper Company Limited Moratorium Act 1941 *ultra vires* the Province of Ontario and fixing a new day for the sale of the property, assets and undertaking of the Appellant. (This day has now passed and the sale has not been held.) Riddell, J.A., adopted the reasons and conclusions of Middleton, J.A., Fisher and Henderson, J.J.A., and Hogg, J. found that the legislation was not legislation dealing with property and civil rights within the Province, that it entered the field of bankruptcy and insolvency legislation and was in conflict with the Winding-up Act. Gillanders, J.A. (dissenting) found that the operative part of the Act indicated that its pith and substance was dealing with property and civil rights and with Crown lands and property in the Province and that it was *intra vires* the Province of Ontario.

p. 51.

p. 54, ll. 31-35.

p. 54, l. 40;

p. 59, l. 38;

p. 63, l. 41.

pp. 71-76.

**22.** The Appellant respectfully submits that the Order of Middleton, J.A., and the majority judgment of the Court of Appeal for Ontario were, wrong and should be reversed for the following among other

## REASONS.

- 20 (1) Because a sale of the Appellant's property was not ordered at the trial and therefore cannot now be ordered in the same action.
- (2) Because in view of existing conditions the Court should not have ordered a sale of the Appellant's property.
- 30 (3) Because the proposed sale which has been ordered in proceedings taken at the request of the Bondholders Protective Committee and in furtherance of a "Plan of Procedure on behalf of Bondholders for the purchase of Assets of Abitibi Power & Paper Company Limited by a New Company" is in essence a foreclosure of the property by the Bondholders, and is inequitable.
- (4) Because the Order for sale is invalid by reason of The Abitibi Power & Paper Company Limited Moratorium Act 1941 which is legislation in relation to one or more of the following matters coming within the classes of subjects assigned exclusively to the Provincial Legislature namely: the Management or Sale of Public Lands belonging to the Province and the Timber and Wood

thereon ; Property and Civil Rights in the Province ; Administration of Justice in the Province including the Constitution, Maintenance and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction and including Procedure in these Courts and Generally all Matters of a merely local or private Nature in the Province.

- (5) Because The Abitibi Power & Paper Company Limited Moratorium Act 1941 is not legislation in relation to Bankruptcy and Insolvency, nor does it conflict with any valid legislation of the Parliament of Canada ancillary to Bankruptcy and Insolvency legislation. 10
- (6) Because the Act relates to a mortgage action commenced in a provincial court in Ontario by virtue of provincial laws.
- (7) Because the said Act deals with the security of a secured creditor and not with the property of a debtor falling within bankruptcy administration.
- (8) Because the Dominion Winding-up Act only became applicable to the Appellant by virtue of an order in the Supreme Court of Ontario as a provincial court and in any event does not confer any right of action on Montreal Trust Company. 20
- (9) Because the stay imposed by the operation of the Dominion Winding-up Act having been withdrawn by the Supreme Court of Ontario sitting as a Dominion Court and administering the said Dominion Winding-up Act, the action proceeded as a provincial action subject to the control of the Provincial Legislature.

*[Handwritten signature]*

D. L. McCARTHY.

FRANK GAHAN.



ON APPEAL FROM THE COURT  
OF APPEAL FOR ONTARIO.

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BETWEEN

ABITIBI POWER & PAPER  
COMPANY LIMITED (Defendant) *Appellant*

AND

MONTREAL TRUST COMPANY  
(Plaintiff) - - - - - *Respondent*

AND

JOSEPH P. RIPLEY, STANTON  
GRIFFIS, MILTON C. CROSS,  
W. H. SOMERVILLE, ROBERT  
H. REID, ANDREW FLEMING  
AND W. A. ARBUCKLE  
(Defendants) - - - - - *Respondents*

AND

THE ATTORNEY-GENERAL FOR  
ONTARIO - - - - - *Intervener.*

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CASE FOR THE APPELLANT.

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