

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 FINANCED  
LEGAL STUDIES

BETWEEN  
ABITIBI POWER & PAPER COMPANY LIMITED  
(Defendant) APPELLANT 30640  
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.

CASE FOR THE RESPONDENT

MONTREAL TRUST COMPANY.

RECORD

1.—This is an Appeal from the Order of the Court of Appeal for Ontario, dated 21st March, 1942, dismissing the Appellant's Appeal from the Order of Mr. Justice Middleton, dated 4th December, 1941, which ordered that all the real and personal property, assets and effects of the Appellant (the Defendant in the action), including its undertaking, rights, privileges and franchises, and including all property and assets in the possession of Geoffrey Teignmouth Clarkson, Receiver and Manager of the property of the Appellant, be sold under the direction of the Master of the Supreme Court of Ontario by public auction, subject to a reserve bid. pp. 51-2 pp. 39-40

10 2.—The Appellant was incorporated by Letters Patent of the Dominion of Canada dated the 9th February, 1914. By Indenture and Mortgage, dated as of June 1, 1928 (hereinafter referred to as "the said Indenture") made between the Appellant of the first part, this Respondent 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 pledged and charged to this Respondent by way of a fixed and specific first mortgage the property and assets therein described, and by way of a floating charge p. 22, l. 31 p. 15, l. 24 to p. 16, l. 25

- p. 34, ll. 19-21 all its other property and assets wheresoever situated, to secure an issue of First Mortgage Gold Bonds, Series A, due on the 1st June, 1953, and carrying interest at the rate of 5 per cent. per annum, payable half yearly. The Appellant made default in payment of the half-yearly interest due on the 1st June, 1932, on \$48,267,000, the aggregate principal amount of Bonds then outstanding under the said Indenture.
- p. 1  
p. 16, l. 39 to  
p. 17, l. 17 3.—On 8th September, 1932, this Respondent as Plaintiff, commenced this action against the Appellant to enforce its security under the said Indenture, claiming (1) a declaration that the holders of the said bonds were entitled to a first charge on the undertaking property and assets of the Appellant; (2) execution of the trusts of the said Indenture; (3) enforcement of the said security by sale foreclosure or otherwise; and other relief. 10
- pp. 2-5  
p. 15, l. 24 to  
p. 16, l. 25 4.—By Order of Mr. Justice Riddell, dated 10th September, 1932, Geoffrey Teignmouth Clarkson was appointed to be the Receiver of all the undertaking, property and assets of the Appellant comprised in the security created by the said Indenture, and also to manage the business and undertaking of the Appellant.
- pp. 6-9  
p. 7  
p. 8  
p. 9 5.—The said Geoffrey Teignmouth Clarkson has been in possession of all the undertaking and assets of the Appellant, and in receipt of the rents and profits therefrom since his appointment and is still in possession. 20
- pp. 9-10  
p. 11 6.—On 26th September, 1932, Mr. Justice Sedgewick made four Orders relating to the Appellant, three of which call for mention here. By one of these Orders the Appellant was adjudged bankrupt upon the petition of a creditor. By another of them leave was granted to extend, or apply to the Appellant The Winding-Up Act (Dominion), R.S.C., 1927, Ch. 213. By the third of them it was declared that the Appellant was an incorporated Company within the provisions of the said Winding-Up Act and was insolvent and liable to be wound up by the Court under the said Act, and it was ordered that it be wound up accordingly. 30
- p. 11 7.—By a further Order of the Master of the Supreme Court of Ontario, dated 25th November, 1932, Frederick Curzon Clarkson was appointed permanent Liquidator of the Appellant.
- pp. 11-13 8.—By Order of Mr. Justice Garrow, dated 7th December, 1932, and made pursuant to Section 21 of the Winding-Up Act, leave was granted to this Respondent to proceed with this action, notwithstanding the Winding-Up Order made by Mr. Justice Sedgewick as mentioned in paragraph 6 hereof.
- pp. 11-13 9.—The individual Respondents who composed a Committee representing Bondholders were added as Defendants in the action by Order of Mr. Justice Middleton, dated 13th September, 1935. 40

10.—Roy Sharvell McPherson was appointed permanent Liquidator pp. 13-15 ;  
in the place of Frederick Curzon Clarkson by Order of Mr. Justice McTague,  
dated 20th December, 1935.

11.—The action was tried by Mr. Justice Kingstone in October, 1937 pp. 21, 22  
By Judgment pronounced on 3rd November, 1937, it was declared and  
ordered that this Respondent and the holders of the Bonds issued under  
the said Indenture were entitled to a first charge upon the undertaking, p. 15, l. 24 to  
property and assets of the Appellant for the payment of all moneys secured p. 16, l. 25  
by the said Indenture and by the Bonds issued and outstanding thereunder,  
and that the trusts of the said Indenture ought to be performed and carried  
10 into execution.

12.—Upon the application of this Respondent Mr. Justice Middleton pp. 28, 29  
made an Order on 10th June, 1940, that the undertaking, property and  
assets of the Appellant be sold under the direction of the Master of the  
Supreme Court of Ontario. The sale was held but proved abortive, the pp. 33, 34  
reserve not being reached, as appears by the Report of the Master of the  
Supreme Court of Ontario, dated 24th October, 1940.

13.—This Respondent then applied for an Order for sale without reserve, p. 54, ll. 2-5 ;  
but at the request of the Attorney-General for Ontario, Mr. Justice and p. 34,  
Middleton postponed the application *sine die*, with leave to any party ll. 32-36  
20 to bring it on upon one week's notice at any time. Meanwhile, on  
1st November, 1940, the Lieutenant-Governor-in-Council had appointed a p. 35, ll. 18-34  
Royal Commission to enquire into the affairs of the Appellant, with a view  
to recommending an equitable plan for solving its financial difficulties.

14.—The Royal Commission made a Report, dated 17th March, 1941, p. 35, l. 34 to  
recommending a plan, and on 9th April, 1941, The Abitibi Power & Paper p. 36, l. 8  
Company Limited Moratorium Act, 1941 (5 George VI, Chapter 1), was pp. 34-37  
enacted by the Legislature of Ontario, to come into force on a day to be  
named by the Lieutenant-Governor by his proclamation. No steps have  
30 been taken by the Liquidator or by any other party concerned to put  
forward a proposal based upon the plan so recommended.

15.—This Act recites the default of the Appellant under the said p. 34, ll. 19-21  
Indenture, various proceedings in this action, the said Report of the Royal p. 34, ll. 22-27  
Commission, including the statement therein “ that existing legislation p. 35, l. 34 to  
“ relevant to the re-organization of Companies is inadequate to meet the p. 36, l. 8  
“ situations that arise when Companies are in financial difficulties.” p. 35, ll. 36-38

The Act also contains the following recital :—

“ And Whereas it is deemed desirable to stay any action p. 36, ll. 9-15  
“ now pending or that may hereafter be taken under the provisions  
40 “ of the above mentioned Bond Mortgage ” (i.e. the said  
Indenture) “ for the sale of all the property and assets of the

“said Company” (i.e. the Appellant) “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.”

16.—Sections 1 and 2 of the Act read as follows:—

p. 36 ll. 19-32

“1. In so far as any property, real or personal, in Ontario is concerned no further proceedings shall be taken or continued under a certain Order” (i.e. the Order mentioned in paragraph 12 hereof) “made in the Supreme Court of Ontario by the Honourable Mr. Justice Middleton on June 10th, 1940, directing the sale of all the undertaking, property and assets of Abitibi Power & Paper Company Limited under a certain Mortgage” (i.e. the said Indenture) “made by Abitibi Power & Paper Company Limited of the first part to Montreal Trust Company as Trustee for the bond holders under the said Mortgage of the second part and the National City Bank of New York the authenticating Trustee of the third part dated the 1st day of June, 1928, and filed in the Department of the Provincial Secretary on the 14th day of August, 1928, and indexed in the Bills of Sale and Chattel Mortgage Register as Number M125.”

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20

p. 36, ll. 33-39

“2. Excepting the operation of section 1 hereof without the consent in writing of the Attorney-General no new action shall be brought for the purpose of realizing on the security situate in the Province of Ontario under the said Mortgage and no further step shall be taken or order made in the action now pending in the Supreme Court of Ontario under the said Mortgage.”

p. 38, ll. 27-8

pp. 34-37  
pp. 37, 38

p. 38, ll. 23-42

17.—This Respondent renewed its motion (mentioned in paragraph 13 hereof), for sale without reserve by notice of motion, dated the 9th October, 1941. On the same day the said Abitibi Power & Paper Company Limited Moratorium Act, 1941, was proclaimed by the Lieutenant-Governor to come into force on 11th October, 1941. Notice was then given by this Respondent to the Attorney-General for Canada and to the Attorney-General for Ontario that upon the motion for sale the constitutional validity of the above Act would be brought in question.

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pp. 39-44

18.—The Motion was heard by Mr. Justice Middleton. By his Judgment delivered on 4th December, 1941, he held that Sections 1 and 2 of the Act were *ultra vires* the Legislature of Ontario, and accordingly ordered that the property and assets of the Appellant be sold under the direction of the Master of the Supreme Court of Ontario by public auction, but subject to a reserve bid.

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p. 45

19.—The Appellant appealed from the above Order to the Court of Appeal for Ontario (Riddell, Fisher, Henderson and Gillanders, J.J.A.,

and Hogg, J.). By Order, dated 21st March, 1942, the Appeal was dismissed pp. 51, 52  
 Gillanders, J.A., dissenting. In view of the time that had elapsed, a later p. 52, ll. 12-14  
 date, namely 18th June, 1942, was fixed for the sale under the said Order.

20.—Riddell, J.A., accepted the reasoning and conclusions of Mr. pp. 53, 54  
 Justice Middleton and was of opinion that the Legislature had interfered in  
 matters beyond its control.

Fisher, J.A., was of the view that the power to regulate the rights of pp. 54-59  
 a secured creditor of an insolvent is within the legislative jurisdiction of  
 the Dominion as ancillary to its power over bankruptcy and insolvency.  
 10 He thought the Act was in conflict with Dominion legislation, particularly pp. 34-37  
 with Section 21 of the Winding-Up Act. The whole aim and object of the  
 Act, in his view, was to prohibit a particular action already commenced  
 under a valid power conferred by Dominion legislation.

Henderson, J.A., agreed with the conclusion of Middleton, J.A., that pp. 59-63  
 the Act was *ultra vires*. In his view the object and purpose of the Act was pp. 34-37  
 not to legislate upon the subject of property and civil rights within the  
 Province.

Hogg, J.'s, opinion was that the control of an action and the staying pp. 63-71  
 or ending of its progress at any time up to its final conclusion, when such  
 20 action is against a company which has become insolvent and has been  
 brought within the provisions of the Dominion Winding-Up Act, is removed  
 from the jurisdiction of Provincial legislation.

Gillanders, J.A., (dissenting) did not think that the legislation related pp. 71-6  
 to the field of bankruptcy and insolvency. He thought that in pith and  
 substance it dealt with property and civil rights.

21.—The Appellant applied to the Court of Appeal for leave to appeal p. 76, l. 37 to  
 to His Majesty in Council from the said Judgment and Order of the 21st p. 77, l. 1  
 March, 1942, and by Order, dated the 16th May, 1942, the Court of Appeal pp. 51, 52  
 purported to admit the Appellant's appeal to His Majesty in Council. pp. 76, 77  
 30 By Section 1 of the Privy Council Appeals Act (R.S.O., 1927, Cap. 86),  
 it is provided :

“ Where the matter in controversy in any case exceeds the p. 83, ll. 33-37  
 “ sum or value of \$4,000, as well as in any case where the matter  
 “ in question relates to the taking of annual or other rent, customary  
 “ or other duty, or fee, or any like demand of a general and  
 “ public nature affecting further rights, of what value or amount  
 “ soever the same may be, an Appeal shall lie to His Majesty in  
 “ His Privy Council, and, except as aforesaid, no appeal shall lie  
 “ to His Majesty in His Privy Council.”

40 The said Order of Mr. Justice Middleton, dated the 4th December, pp. 39-40  
 1941, which was affirmed by the said Order of the 21st March, 1942, was pp. 51, 52  
 an interlocutory Order, and it was and is submitted by this Respondent that  
 the matter in controversy neither exceeds the sum or value of \$4,000, nor  
 relates to any of the specific subjects mentioned in the said Section 1 ;

that there is no provision in the said Act giving the Court power to admit an Appeal on the ground of importance in cases not falling within the terms of the said Section 1 ; and that the Court of Appeal had accordingly no jurisdiction to admit this Appeal. Nevertheless, the Court of Appeal did so admit it, on the ground, as expressed by Robertson, C.J.O., that "the matter is of importance and one proper for submission to the Privy Council," and, as expressed by Masten, J.A., that "there exist such special circumstances as warrant this Court in admitting the Appeal though the Order in question is interlocutory."

pp. 76-7  
p. 84, ll. 2, 3  
p. 90, ll. 26-8

This Respondent will, as a preliminary objection, contend that this Appeal should be quashed on the ground that the Court of Appeal had no jurisdiction to admit it. 10

22.—As has already been mentioned the said Abitibi Power & Paper Company Limited Moratorium Act, 1941, recites *inter alia* that the "Royal Commission has reported to The Honourable the Lieutenant-Governor-in-Council, *inter alia*, that existing legislation relevant to the reorganization of companies is inadequate to meet the situations that arise when companies are in financial difficulties." It is pointed out that in fact existing Dominion legislation (as stated in the next four paragraphs of this Case), contains elaborate provisions for the solution of the financial difficulties of companies upon conditions therein prescribed. The adequacy and the policy of such legislation are, it is submitted, matters for Parliament and not for the provincial legislature. 20

pp. 34-7  
p. 35, ll. 34-8

23.—The Dominion Statute, the Companies' Creditors Arrangement Act, 1933 (23-24 George V. Chap. 36), provides that where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the Court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of such creditors or class of creditors ; and, if the Court so determines, the shareholders of such company are to be summoned in such manner as the Court directs (Sec. 4). Similar provision is made with respect to a compromise proposed in the case of unsecured creditors (Sec. 3). 30

If a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings, agree to any compromise or arrangement either as proposed or as modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the Court, and if so sanctioned shall be binding on all the creditors and on the Company, and in the case of a company which is in course of being wound up under the Winding-Up Act, shall also be binding on the Liquidator and contributories of the company (Sec. 5). 40

The provisions of the Act are to be in extension and not in limitation of the provisions of any instrument governing the rights of creditors and

shall have full force and effect notwithstanding anything to the contrary contained in any such instrument (Sec. 7).

"Court" means, in Ontario, the Supreme Court (Sec. 2 (a)).

Notwithstanding anything in the Bankruptcy Act or in the Winding-Up Act contained, whenever an application shall have been made under the Companies' Creditors Arrangement Act in respect of any Company, the Court, on the application of any person interested in the matter, may, on such notice to any other person, or without notice, as it may see fit, make an Order staying until such time as the Court may prescribe or until further  
 10 Order all proceedings taken or which might be taken in respect of such company under the Bankruptcy Act, the Winding-Up Act, or either of them, and the Court may restrain further proceedings in any action, suit or proceeding against the company upon such terms as the Court sees fit, and the Court may also make an Order that 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 shall impose (Sec. 10).

24.—Further, the (Dominion) Companies Act (24–25 George V., Chap. 33), contains provisions for a compromise or arrangement with respect to  
 20 shareholders of a company (Sects. 122 and 123).

25.—Again, the (Dominion) Winding-Up Act, R.S.C. 1927, Chap. 213, makes provision for a compromise or arrangement in the case of a company in course of being wound up under such Act (Sects. 63 to 68). It also contains provisions relating to secured creditors (Sects. 78 to 84) and for the distribution of the company's assets (Sects. 93 to 95). The Winding-Up Act confers upon the Court broad powers to stay proceedings against the company before a winding-up Order is made and in relation to the winding-up after the Order is made (Sects. 17 and 18). After the winding-up Order is made, no action or other proceedings shall be proceeded with or  
 30 commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes (Sect. 21).

26.—The Bankruptcy Act, R.S.C. 1927, Chap. 11, which is applicable to corporations as well as individuals, contains provisions with respect to compositions, extensions of time and schemes of arrangement (Sects. 11 to 22). It also provides for stays of proceedings and the rights of secured creditors (Sects. 24, 106 to 113).

27.—The conditions upon which secured creditors of an insolvent company may be compelled to accept a compromise of their rights have thus been clearly defined by Parliament. If such conditions are not met and  
 40 the proposal fails, the Dominion legislation imposes no further compulsion upon secured creditors. Although, as is humbly submitted, the legislative field with respect to such matters has been fully occupied by the Dominion, the said Abitibi Power & Paper Company Limited Moratorium Act purports  
 pp. 34–37

to impose further interference, inasmuch as, in the absence of the consent of the Attorney-General for Ontario, the secured creditors are debarred during the prescribed period from proceeding to enforce their security.

28.—If such legislation is valid, it would follow that the period of interference could be extended from time to time at the will of the Provincial Legislature and by refusal of the Attorney-General to give his consent. Indeed the Legislature has already sought to extend the period of interference, namely, until 30th June, 1943, by The Abitibi Power & Paper Company Limited Moratorium Act, 1942, 6 George VI, Chap. 3 (assented to 27th March, 1942). Although the said Act of 1941 expresses its purpose to be to give all parties an opportunity to consider a plan of compromise submitted by a Royal Commission of Provincial creation, such legislation, if valid, may well have the effect of imposing compulsion for the adoption of such plan. 10

29.—Sect. 21 of the (Dominion) Winding-Up Act, reads as follows :—

“ 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.”

It will be remembered that under the Order of Mr. Justice Garrow, dated 7th December, 1932, mentioned in paragraph 8 hereof, this Respondent was given leave in the winding-up to proceed with the present action, and that Judgment in the action was pronounced by Mr. Justice Kingstone on the 3rd November, 1937, as mentioned in paragraph 11 hereof, declaring that this Respondent was entitled to a first charge upon the Appellant's undertaking and assets, and directing that the trusts of the Mortgage be performed and carried into execution. The said Act of 1941 has the effect of rendering nugatory the leave granted to this Respondent to proceed with the action to enforce its security, unless and until the Attorney-General for Ontario gives his consent ; in effect, it substitutes the consent of the Attorney-General for the leave of the Court. 20 30

30.—Whenever any application is made under the Companies' Creditors Arrangement Act, the Court has under Sec. 10 thereof broad powers to stay proceedings against the company. The powers conferred upon the Attorney-General by the said Act of 1941, are in conflict with the said Sec. 10 and are broad enough to be made use of to prevent any such application being made, and in particular any application proposing a plan other than that of the Royal Commission.

31.—The said Act, it is submitted, cannot be justified under head 14 of Sec. 92 of The British North America Act, as relating to “ the administration of Justice in the Province.” Neither can it be justified under head 13 as relating to “ Property and Civil Rights in the Province.” It is not legislation of general application but is devoted solely to the 40



Appellant. In its pith and substance it is legislation relating to "Bankruptcy and Insolvency," a field assigned exclusively to Parliament by head 21 of Sec. 91.

32.—This Respondent, Montreal Trust Company, respectfully submits pp. 51, 52 that the Judgment appealed from is right, and that this Appeal should be dismissed, for the following among other

### REASONS

- 10 1. Because the Appellant is now in bankruptcy and the rights of its creditors, secured and unsecured, and of its shareholders, preferred and common, are subject to the exclusive jurisdiction of Parliament under head 21 of Sec. 91 of The British North America Act—"Bankruptcy and Insolvency."
2. Because in pith and substance, the Act is bankruptcy and insolvency legislation and does not relate to property and Civil Rights in the Province (head 13 of Sec. 92), the Administration of Justice in the Province (head 14) or to any other subject matter assigned to the Province by Sec. 92.
- 20 3. Because the Act interferes with matters that fall under the head "Bankruptcy and Insolvency" and is *ultra vires* the Provincial legislature.
4. Because the Act invades the field already occupied by valid Dominion legislation, in particular the Companies' Creditors Arrangement Act, the Winding-Up Act, the Bankruptcy Act and the Dominion Companies' Act, under which the Appellant was incorporated.
5. Because the Act is in conflict with such valid Dominion legislation.
6. Because the Legislature has no power to bar the subject from seeking justice in His Majesty's Courts.
- 30 7. Because the Order of Mr. Justice Middleton is complementary to the Judgment pronounced in the action and this Respondent and the holders of the bonds issued by the Appellant are entitled to realize upon their security.
8. Because the Order of Mr. Justice Middleton, in directing sale upon the terms therein set forth, was properly made in the exercise of his discretion and the Court of Appeal was right in maintaining it.
9. Because the Judgments below (other than the Judgment of Gillanders, J.A.), were right for the reasons therein assigned.

D. N. PRITT.

C. F. H. CARSON.

In the Privy Council.

No. 58 of 1942.

ON APPEAL FROM THE COURT OF APPEAL FOR  
ONTARIO.

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BETWEEN

ABITIBI POWER & PAPER COMPANY  
LIMITED ... (*Defendant*) *Appella*

AND

MONTREAL TRUST COMPANY  
(*Plaintiff*) *Responde*

AND

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

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CASE FOR THE RESPONDENT  
MONTREAL TRUST COMPANY.

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LAWRENCE JONES & CO.,  
Winchester House,  
Old Broad Street, E.C.2,  
*Solicitors for the Respondent,  
Montreal Trust Company.*