

37,1943

In the Privy Council.

No. 58 of 1942.

ON APPEAL FROM THE COURT OF APPEAL
FOR ONTARIO.

UNIVERSITY OF LONDON
VIC. I
23 OCT 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES.

30642

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.

CASE OF THE INTERVENER

THE ATTORNEY-GENERAL FOR ONTARIO.

Record.

1. This is an appeal from a majority judgment of the Court of p. 51.
20 Appeal for Ontario (Riddell, Fisher, Henderson, JJ.A. and Hogg, J.,
Gillanders, J.A., dissenting) dated 21st March 1942 dismissing an appeal p. 45.
by the Appellant Company from the Order of Middleton, J.A., dated
4th December 1941 declaring the Abitibi Power & Paper Company Limited
Moratorium Act 1941, Chapter 1 of 5 George VI, ultra vires the Ontario
Legislature and ordering that all the real and personal property, assets
and effects of the Appellant Company be sold under the direction of the
Master of the Supreme Court by public auction, subject to a reserve bid.

2. The substantial question for decision so far as the Intervener is
concerned is whether the said Act staying for a limited period and for a
30 special purpose an action against the Appellant in the provincial court was
ultra vires the provincial legislature.

p. 1. **3.** The action (called for convenience "the mortgage action") was commenced by Writ of Summons dated 8th September 1932 for :—

(1) The administration and execution by the Court of the Trusts of an Indenture and Mortgage dated as of the 1st day of June 1928 made between the defendant Abitibi Power & Paper Company Limited of the first part, the plaintiff of the second part and The National City Bank of New York of the third part, whereby the undertaking, property and assets of the defendant, Abitibi Power & Paper Company Limited, therein mentioned, were vested in, mortgaged, pledged and charged in favour of the plaintiff as trustee upon the trusts therein set forth and for the benefit of the holders of the First Mortgage Gold Bonds of the defendant, Abitibi Power & Paper Company Limited, for and with the payment of a principal amount of the said bonds and interest thereon and of all other sums from time to time due under the said Indenture and Mortgage and of all other moneys for the time being and from time to time owing upon or charged or chargeable under the said Indenture and Mortgage on the security thereof. 10

(2) A declaration that the said Indenture and Mortgage is a first charge on all the undertaking, property and assets of the defendant, Abitibi Power & Paper Company Limited. 20

(3) To have an account taken of what is due by the defendant Abitibi Power & Paper Company Limited to the plaintiff and to the holders of the said bonds.

(4) To have the undertaking, property and assets of the defendant Abitibi Power & Paper Company Limited comprised under or subject to the security of the said Indenture and Mortgage sold under the direction of the Court.

(5) For the appointment of a Receiver and Manager of the undertaking, property and assets of the defendant Abitibi Power and Paper Company Limited comprised in or subject to the trusts of the said Indenture. 30

p. 71, l. 1.

The position at the time of the issue of the Writ was that the Appellant had defaulted on 1st June 1932 upon \$48,267,000 5 per cent. First Mortgage Bonds secured by the Mortgage.

p. 2.

4. By Order of Riddell, J.A., dated 10th September 1932 Geoffrey Teignmouth Clarkson was appointed Receiver and Manager in the said mortgage action on behalf of the plaintiff, Montreal Trust Company, and all holders of the First Mortgage Bonds of the defendant, of all the undertaking, property and assets of Abitibi Power & Paper Company Limited comprised in and subject to the security or charge created by the Indenture and Mortgage dated 1st June 1928. 40

5. A Petition in Bankruptcy was filed against the Appellant Company by Canada Packers Limited, a creditor, on 15th September, 1932, and by Order of Sedgewick, J., dated 26th September, 1932, the Appellant Company was adjudged bankrupt and a Receiving Order was made and Frederick Curzon Clarkson was constituted custodian of the estate of the Appellant Company. At the same time an Order was made giving leave to apply the Winding Up Act to the Appellant Company, and a further order was made that the Appellant Company be wound up under the provisions of the Winding Up Act. By order of the Master, dated 25th November, 1932, Frederick Curzon Clarkson was appointed liquidator. By later order he was replaced by Roy Sharvell McPherson.

p. 6.
ll. 11-13.
p. 7.

p. 8.
p. 9.

pp. 9-10.
pp. 13-15.

6. By the Winding Up Act R.S.C. 1927, Chapter 213, Section 21, it is provided:—

“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.”

7. By Order of Garrow, J., dated 7th December 1932 in the proceedings under the Winding Up Act the Plaintiffs (the Respondents) were given leave to proceed with the mortgage action in the Supreme Court of Ontario against the Appellant Company notwithstanding the winding-up order referred to in paragraph 4 hereof.

p. 11.

8. Thereafter the action was continued and was tried on 26th October 1937 before Kingstone, J., who made an order on 3rd November 1937 declaring that the plaintiffs (Respondents) were entitled to the declaration asked for and that the said Indenture and Mortgage ought to be performed and carried into execution.

p. 21.

9. By Order of Middleton, J.A., dated 10th June 1940 the undertaking, property and assets of the Appellant Company were ordered to be sold under the direction of the Master of the Supreme Court of Ontario.

p. 21.

10. An auction held under the above order proved abortive because the amount bid was less than the amount of the reserve bid fixed by the Master.

p. 33.

11. Upon Motion made before Middleton, J.A., on 29th November 1940 for an order authorizing the sale of the property and assets of the Appellant Company without a reserve bid being fixed, it was ordered that the said motion be adjourned sine die with leave to bring it on upon one week's notice.

p. 35,
ll. 18-34.

12. In the meantime by Order of the Lieutenant-Governor-in-Council for Ontario, dated 1st November 1940, a Royal Commission was appointed 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 rights, flooding 10 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.”

p. 35, l. 34.
p. 36, l. 8 ;
p. 95,
ll. 31-33.
p. 79, ll. 1-8.

The Royal Commission reported to the Lieutenant-Governor-in-Council for Ontario on 17th March 1941.

13. The Appellant Company was a vast concern. In 1932 its capital structure was :

First mortgage bonds secured by mortgage of June 1, 1928	\$48,267,000.00	20
7% cumulative preferred stock	1,000,000.00	
6% cumulative preferred stock	34,818,000.00	
Common shares of no par value but of a book value of	18,964,935.43	
	<hr/>	
	\$103,049,935.43	

p. 85,
ll. 3-38.

The position of the company in 1942 was as follows: The Company depended for its supply of pulpwood upon the Crown lands of Ontario and for power on leases from the province. In 1942 some of the leases and licences had expired or were about to expire. As to others the company was in default. If the Province exercised its rights the mortgaged 30 premises (viz. the assets of the company mortgaged to the first mortgage bondholders) “ 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,” and the affairs of the company were a matter of concern to the Province.

p. 79,
ll. 20-24.

14. Though in the earlier years of the receivership the operations of the Appellant Company were not profitable, in more recent years the position had steadily improved and in 1941 a sum of \$6,274,710.00 was paid by the receiver for distribution among bondholders in reduction of capital, and a later order of the Court provided for similar payments, 40

though accrued interest in 1942 was \$24,000,000.00. The improvement may be indicated as follows :

10 months ending October 31, 1940.

Earnings, prior to depreciation and interest ..	\$6,626,896.95	p. 106, ll. 2-12.
Working capital	17,154,275.10	
Cash and bonds	6,809,388.39	

10 months ending October 31, 1941.

Earnings, prior to depreciation and interest ..	\$7,721,626.07	p. 109, ll. 3-18.
Working capital	20,029,216.66	
10 Paid to bondholders	6,274,710.00	
Cash and bonds after payment to bondholders	7,537,080.76	

The requirements for bond interest and depreciation and interest on arrears were approximately \$5,000,000 in 1940 and less after the payments set out above. p. 101,
ll. 36-38.

15. It was under these circumstances that The Abitibi Power and Paper Company Limited Moratorium Act was passed by the Ontario legislature in 1941, 5 George VI, Chapter 1. Section 1, provides :— pp. 34-37.

20 “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 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 and Paper Company Limited under a certain Mortgage made by Abitibi Power and 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 M.125.”

30 and by Section 4 of the said Act it is provided that the Act shall come into force by proclamation and when so proclaimed shall remain in force until the 31st day of December 1942, unless sooner repealed by the Lieutenant-Governor in Council. The Act was proclaimed to come into force on 11th October 1941. pp. 37-38.

16. The Motion referred to in paragraph 11 for an order authorizing the sale of the property and assets of the Appellant Company without a reserve bid being fixed was renewed by Notice of Motion dated 9th October 1941, returnable before Middleton, J.A., on 18th October 1941, but was 40 adjourned until 27th November 1941, and before the return of the said Motion a notice was served upon the Attorney-General for Ontario pursuant to the provisions of The Judicature Act, R.S.O., 1937, Chapter 100, Section 32, that the constitutional validity of the Abitibi Power and p. 38, l. 28,
p. 39, l. 6.
p. 38, l. 20.

Paper Company Limited Moratorium Act 1941 would be brought into question on the ground that it deals with matters that fall under the heading of "Bankruptcy and Insolvency" under Section 91 of the British North America Act.

p. 39. **17.** By his judgment dated 4th December 1941, Middleton, J.A.,
pp. 41-44. declared The Abitibi Power and Paper Company Limited Moratorium Act to be ultra vires the Ontario Legislature. He was of the opinion that leave was obtained by the Plaintiff, The Montreal Trust Company to proceed with its mortgage action under the Dominion Winding Up Act and that a direction was given as to the mode of procedure, to wit: it was stated by implication that it was to be in accordance with the orders and rules of practice that were in existence at the date of the application. 10

pp. 45-46. **18.** Application for leave to appeal from the Judgment of Middleton,
pp. 47-51. J.A., was heard by Roach, J., and leave was granted on 2nd January 1942.
p. 50, l. 38. He concluded his reasons for judgment as follows: "As already stated
"leave was obtained by the Plaintiff under Section 21 (of the Dominion
"Winding Up Act) to continue this action. The Court having charge
"of the winding-up is a Dominion Court; the Court in which this action
"was pending is a Provincial Court. The Dominion Court having granted
"leave to the plaintiff to invoke the jurisdiction of the Provincial Court, 20
"I should think that the plaintiff in that forum must submit to such rules
"and regulations as to procedure as the Provincial Legislature which has
"jurisdiction might thereafter impose. If that proposition is sound
"and if the 1941 Provincial Act is an Act relating to procedure then the
"plaintiff is bound by it."

p. 51. **19.** In the Judgment of the Court of Appeal for Ontario (Riddell,
Fisher, Henderson, J.J.A., and Hogg, J., Gillanders, J.A., dissenting)
delivered on 31st March 1942, the Judgment of Middleton, J.A., declaring
the Abitibi Power and Paper Company Limited Moratorium Act to be ultra
vires the Ontario Legislature was upheld. 30

p. 53, l. 21. Riddell, J.A., was of the opinion that the Judgment of Middleton, J.A.,
was right for the reason stated by him.

p. 54, l. 40. Fisher, J.A., after stating that the right of a mortgagee to realize
his security is primarily within the legislative jurisdiction of the Provincial
Legislature under its power over property and civil rights, and that the
power to regulate rights of a secured creditor of an insolvent is within the
legislative jurisdiction of the Dominion as ancillary to its power over
bankruptcy and insolvency, the learned Judge expressed the opinion that
by Section 21 of the Winding-Up Act the Dominion has dealt with all
causes of action against an insolvent company to which the provisions 40
of that Act apply. He concludes as follows: "after giving consideration
"to the real character of the Act, my conclusion is, that the Act is not
"based on, nor does it deal with, property and civil rights, but that it enters

“ the field of bankruptcy and insolvency legislation, and not only interferes
 “ with the Dominion Company in the course of its winding-up proceedings,
 “ but gives to the Attorney-General of the Province in the exercise of his
 “ discretion, the absolute right to stay the present action for the enforce-
 “ ment of the security, or to proceed with a new action, and that it is
 “ ultra vires the Province and absolutely void.”

Henderson, J.A., was of the opinion that the Act in question is not
 legislation upon the subject of property and civil rights within the Province
 and that this is made clear by the recitals in the Act and that by the
 10 Act Abitibi Power & Paper Company Limited is singled out and Montreal
 Trust Company, the Plaintiff in the action, is forbidden to proceed with
 its action, notwithstanding the order of the Court made in bankruptcy
 proceedings, that the action may proceed. He said (inter alia) that : p. 59, l. 38.
 “ Legislation enacted by the Provincial Legislatures purporting to be p. 63, l. 5.
 “ passed in respect to property and civil rights in the Province must, in
 “ my view, when examined, be found to be in truth and in fact legislation
 “ affecting property and civil rights in the Province, and besides, must
 “ not be legislation aimed at a particular person or corporation, but must
 “ be general in character.” He concludes as follows : “ In my view the p. 63, l. 22.
 20 “ Legislature is not competent to deny access to His Majesty’s Courts in
 “ an individual case. This does not, of course, mean that a Moratorium
 “ Act of general application may not be validly passed, within limits.”

Hogg, J., was of the opinion that the action after leave to proceed p. 63, l. 41.
 was granted was not taken out of the field of insolvency legislation, and
 did not agree with the position taken by the Province that the mortgagee
 is outside of and not affected by the winding-up proceedings. After
 stating that the control of an action against a company which has become
 insolvent and which has been taken within the provisions of the Dominion
 Winding-up Act, is removed from the jurisdiction of provincial legislation
 30 he concludes : “ Only Parliament, if it should consider such further control p. 70, l. 41.
 “ of the action necessary, in the winding-up of an insolvent company
 “ could enact such legislation it being in respect to a matter which is
 “ within the subject of one of the exclusive powers of legislation given
 “ to the Dominion Parliament by Section 91 of the British North America
 “ Act, and in a field of legislation occupied by the Dominion.”

20. Gillanders, J.A., in a dissenting judgment after reciting that p. 71, l. 15.
 the plaintiff sought to make no claim to share in the rateable distribution
 of the debtor’s assets or to seek to avail itself of the provisions of The
 Winding-up Act to share, along with other creditors, in the equitable
 40 distribution of the insolvent’s assets, continued as follows : “ Prima facie p. 72, l. 40
 “ the Act in question, purporting to stay proceedings under the order for
 “ sale now in appeal, and further proceedings to that end for a limited time
 “ is not, I think, legislation relating to or falling in the field of bankruptcy p. 73, l. 26.
 “ and insolvency.” Later he said : “ The Act in question when passed

“ did not affect property then available in any way to the creditors of the
 “ debtor company, or within the control of the liquidator. Where property
 “ is left to go where it will according to ordinary contractual or property
 “ rights, can it be said that a Province cannot legislate concerning that
 “ property, and the contractual or property rights affecting it, merely
 “ because under Dominion legislation the property might have been
 “ affected ? I think not.” He was of the opinion that the Act in question
 was within at least two of the powers vested in the Legislature under
 Section 92 of the British North America Act clause 5, “ The Management
 “ and sale of public lands belonging to the Province and the timber and
 “ wood thereon,” and clause 13 : “ Property and civil rights in the
 “ Province.” 10

p. 74,
 ll. 28-32.

p. 75, l. 44.

He concludes as follows : “ It was pointed out that this is the largest
 “ undertaking of its kind in the Province ; that the company holds more
 “ leases, licenses and rights of similar kind than any other company in
 “ Ontario ; that its affairs are therefore the intimate concern of the
 “ Government, and that the legislation is, as indicated by the recitals
 “ concerned with and directed to the management of public lands and
 “ rights within the Province and is not legislation respecting a com-
 “ promise or distribution of the company’s assets among its creditors, 20
 “ but is mainly directed to the rights of the Province which is the owner
 “ of the property rights and licenses on which the continued operation of
 “ the company is so largely dependent. It may possibly be that the
 “ creditors of the Abitibi Company will gain some benefit from the delay
 “ imposed by the Act, but if it is not legislation actually invading
 “ bankruptcy and insolvency, and its pith and substance is to deal with
 “ property and civil rights in the Province and the management of Crown
 “ Lands and property, then, although incidentally some benefit may
 “ accrue to the creditors of the company, as a whole I think the expression
 “ of that charitable hope among the recitals does not affect the substance 30
 “ of the legislation.

“ If the legislation lies within the powers given to the Legislature by
 “ Section 92 of the British North America Act, the question as whether
 “ the effect of the Act is equitable or inequitable is not open to consideration
 “ here. It has been held that within the ambit of its authority the power
 “ of the Legislature is supreme.”

21. It is respectfully submitted by the Attorney General for Ontario
 that the Abitibi Power & Paper Company Limited Moratorium Act 1941
 is in its pith and substance an Act in relation to one of the following
 classes of subjects over which the Provincial Legislature has exclusive 40
 legislative jurisdiction under Section 92 of The British North America
 Act, that is to say :—

(5) The Management and Sale of the Public Lands belonging
 to the Province and the Timber and Wood thereon.

(13) Property and Civil Rights in the Province.

(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in these Courts.

(16) Generally all Matters of a merely local or private Nature in the Province.

10 **22.** The Attorney-General for Ontario, therefore, submits that the judgment of the trial judge (Middleton, J.A.) and the judgment of the majority of the Court of Appeal for Ontario were wrong and should be reversed for the following among other

REASONS.

(1) BECAUSE the Abitibi Power & Paper Company Limited Moratorium Act 1941 is legislation in relation to one or more of the matters coming within the classes of subjects assigned by the British North America Act exclusively to the Provincial Legislature set out in paragraph 21 hereof.

20 (2) BECAUSE the Act is not legislation in relation to Bankruptcy and Insolvency.

(3) BECAUSE the Act does not conflict with any valid legislation of the Parliament of Canada passed in relation to matters ancillary to bankruptcy and insolvency legislation.

(4) BECAUSE the mortgage action to which the Act relates is an action taken by virtue of Provincial Laws in a Provincial Court in relation to property situate within the Province.

30 (5) BECAUSE unconditional leave to continue the action having been given in the winding up proceedings the provisions of the Winding Up Act ceased to have any application thereto.

(6) BECAUSE the Dominion Winding-up Act does not confer any right of action.

(7) BECAUSE the impugned Act deals with the security held by a creditor and its enforcement under the relevant provincial law and has no relation to the administration of assets in bankruptcy or in a winding up.

WILFRID BARTON.

C. R. MAGONE.

FRANK GAHAN.

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