

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
W. J. McFarland v. The Bank of Montreal
and The Royal Trust Company, from the
Court of Appeal for Ontario; delivered the
1st November 1910.*

PRESENT AT THE HEARING:

LORD MACNAGHTEN.

LORD ATKINSON.

LORD SHAW.

LORD MERSEY.

[DELIVERED BY LORD MACNAGHTEN.]

In this case the Appellant, who was a shareholder in the Ontario Bank (now in liquidation), having been placed on the list of contributories calls upon the liquidator to dispute the accounts of the Bank of Montreal, claiming to be a creditor, and in fact the only creditor of the Ontario Bank.

The claim of the Bank of Montreal amounts to a very large sum. It covers the whole of the liabilities of the Ontario Bank at the time of its suspension. The claim is made up and brought in on the basis of an arrangement between the Ontario Bank and the Bank of Montreal, which is embodied in a deed under seal executed on the 15th, but bearing date the 13th of October 1906.

No objection is taken to the form of the application, or to the competence of the Appellant in his individual capacity to impeach

a deed made between the Bank of Montreal and the Corporation of which he was a member. The argument at the Bar was confined to the consideration of the meaning and effect of the instrument itself. Was it or was it not a sale by the Ontario Bank of the whole or part of its assets? If it was a sale then the transaction, as the Appellant contends, was *ultra vires* and void. The Bank Act R. S. C. 1906, chapter 29, authorises the sale by one bank to another of the whole or part of its assets but it prescribes certain conditions which in this case admittedly have not been complied with, and declares that until those conditions are fulfilled the agreement of sale is "of no force or effect."

The Ontario Bank had been incorporated in 1857 by a special Act of the Legislature of the late Province of Canada. According to the annual report of 1906 it had a capital of \$1,500,000, with a rest of \$700,000. Its head office was in Toronto. It had 31 branches in Canada, and it was in good credit with its customers and the public up to the 13th of October 1906.

In the early part of September 1906 Mr. Pope, the acting chief accountant of the Ontario Bank, reported to the directors serious defalcations on the part of one Charles McGill, the general manager. The position of the Bank was found to be critical. Thereupon the directors reopened negotiations with the directors of the Royal Bank who had at one time proposed an amalgamation with the Ontario Bank. The directors of the Royal Bank investigated the affairs of the Ontario Bank and declined to proceed further. Then the directors of the Ontario Bank took counsel with Mr. Clouston, the President of the Canadian Bankers Association, and the managers of the the principal chartered banks in Toronto. On the evening of Friday the 12th of October 1906 there was a meeting at the private residence of

Mr. Coulson, the general manager of the Bank of Toronto. The President of the Bankers' Association and the managers of the principal banks, with the exception of the Bank of Montreal, were present. A statement of the assets and liabilities of the Ontario Bank as on the 29th of September was produced. The meeting lasted from 8 p.m. to 2 a.m. on the following morning. All that night the various branches of the Ontario Bank were ringing up Mr. Pope over the telephone "asking for funds, asking for instructions, and asking what they were to do." It was plain that without immediate assistance the Ontario Bank would be unable to open its doors on Saturday morning. No result was arrived at at that meeting. No substantial offer of assistance was made. All present were convinced that their only hope was the Bank of Montreal. No other Bank would or could come to the rescue. The manager of the Bank of Commerce intimated that he was authorised to say that assistance might be expected from the Bank of Montreal. So a committee was appointed to meet the representatives of the Bank of Montreal who were to arrive at Toronto very early in the morning. The meeting took place at the King Edward Hotel. Mr. Braithwaite, the manager of the Bank of Montreal at Toronto, confirmed what had been said at the previous meeting by the manager of the Bank of Commerce. "That is no use Mr. Braithwaite," said Mr. Pope, who appears to have taken the leading part on behalf of the Ontario Bank, "Can I put 'Bank of Montreal' on the windows and doors of the Ontario Bank?" Mr. Braithwaite said "Yes, you may." The question was asked twice, and twice the assurance was given. So the name of the Bank of Montreal was put up in all the branches of the Ontario Bank, before the Bank opened on Saturday, the 13th of October. The

result was that in a large number of the branches the depositors were satisfied at once. In some of the city branches, where the daily papers had circulated all kinds of rumours, there was a run, but the run was met by the Bank of Montreal which on that day afforded assistance to the amount of about a million dollars. And thus by the courage and promptitude of the managers of the Bank of Montreal, and in consequence of the unlimited confidence which the public had in its position, the imminent danger of a commercial panic was averted, and an immense service was rendered to the community as well as to the Ontario Bank. Such is the account of the transaction given in the oral evidence. So far there seems to be no suggestion or hint of a sale or purchase. Of course the Bank of Montreal took up the matter as a business transaction expecting a fair remuneration for their services. But the transaction as described in the oral evidence is simply a financial operation, unusual and extraordinary no doubt, but not beyond the scope of legitimate banking.

In the minutes of the meeting of the directors of the Ontario Bank held at 9 a.m. on the 13th of October 1906, the transaction is recorded in the following terms:—

“It was unanimously resolved to ask the Bank of
 “ Montreal to re-discount the loans of this Bank and to
 “ undertake to meet the demands of the depositors, and in
 “ consideration of its doing so this Bank absolutely and un-
 “ conditionally transfers said loans and all documents
 “ representing or relating to same, including all securities
 “ held as collateral, and sells, assigns, and transfers and
 “ sets over absolutely all its right, title, and interest in all
 “ debts and choses in action which it may possess or be
 “ entitled to, and agrees to hold same to the Bank of
 “ Montreal and authorises the Bank of Montreal to act
 “ for and represent the Ontario Bank in reference to
 “ same and to receive and grant acquittances for all
 “ monies payable in respect thereof, and the Ontario
 “ Bank agrees to guarantee and indemnify the Bank of
 “ Montreal in the premises, that is to say, guarantees

“ payment of the debts and obligations so discounted and to
“ indemnify against loss in any way in consequence of
“ having entered into the transaction. It is also resolved
“ and agreed that this Bank discontinue the business of
“ banking and permits and authorises the Bank of Montreal
“ to enter its premises and offices wherever situated and
“ use the same together with its books and other appliances
“ for the conducting of banking business. Also that the
“ members of the staff of the Bank may be dismissed and
“ engaged by the Bank of Montreal at any time when the
“ representative of the Bank of Montreal considers it
“ necessary.

“ It was further unanimously resolved that the President
“ be authorised to execute under the corporation seal of the
“ Bank a form of agreement with the Bank of Montreal
“ which was submitted, read, and approved to carry out the
“ purpose of the above Resolution on the details and figures
“ being filled in the blanks thereof.”

It will be observed that there is nothing in this resolution pointing to a sale. There is nothing from which it can be inferred that a sale or a purchase was within the contemplation of either party.

A second meeting of the Board of Directors of the Ontario Bank was held on the same day at 4 o'clock p.m. at which the minutes of the previous meeting were read and confirmed and Mr. Braithwaite was appointed general manager in the place of McGill, who was dismissed.

At a meeting of the directors held on the 15th of October 1906 the form of agreement referred to in the resolution of the 13th of October as completed was approved and duly executed under the seal of the Bank of Ontario. As already stated it bears date the 13th of October.

At a second meeting on the same day it was resolved that the Ontario Bank do suspend payment of its liabilities and that notice of its suspension be given to the President of the Canadian Bankers' Association who was requested to appoint a Curator pursuant to the Bank Act Amendment Act, 1900, and the By-laws of the Canadian Bankers' Association.

A Curator and an Advisory Board were accordingly appointed, and at a special general meeting of the shareholders of the Ontario Bank held on the 11th of December 1906 the old directors retired and a new Board composed of gentlemen connected with the Bank of Montreal was duly elected.

The realisation of the assets was carried on by the Board of the Ontario Bank in due course and meetings of the shareholders of the Ontario Bank were regularly held at which full information as to the progress of the liquidation was afforded and the proceedings substantially approved.

On the 15th of July 1908 an order for the winding up of the Ontario Bank was made on the petition of the Bank of Montreal as creditor and one Polson, a shareholder in the Bank.

Notice of the proceedings which have given rise to this Appeal was given on the 8th of May 1909.

It is not necessary to set forth at length all the clauses of the deed of the 13th October 1906 on which the Appellant founds his contention or to analyse its provisions. The deed seems to be quite in conformity with the resolution of the meeting of the directors held on the 13th of October 1906. In substance it adds nothing to the terms of that resolution beyond (1) defining the remuneration of the Bank of Montreal which may or may not have been settled when the Bank of Montreal agreed to take over the outside obligations of the Ontario Bank; and (2) adding a provision for the payment by the Bank of Montreal in a certain event of a sum in respect of the goodwill of the Ontario Bank.

The deed of the 13th of October 1906 begins by setting forth a statement of assets and liabilities of the Ontario Bank as on the 29th of September 1906, and then, after a guarantee of

the accuracy of that statement, it declares in Clause 2 that :—

“ In consideration of the premises the Bank of Montreal
 “ hereby agrees to purchase by way of discount and
 “ re-discount at the rate of six per cent. (6 per cent.) all
 “ the call and current loans and overdue debts of the Ontario
 “ Bank existing at the close of business on the 12th day of
 “ October A.D. 1906, the amount thereof to be ascertained
 “ as soon as possible, it being understood that the Bank of
 “ Montreal shall be entitled to the benefit of and immediate
 “ transfer of all and every security and securities held for
 “ all or any of such loans and overdue debts.”

The deed ends by providing (Clause 16) that :—

“ If the terms and conditions of this agreement are
 “ capable of being and are, in fact, carried out by the
 “ Ontario Bank, as and in the manner herein contemplated
 “ and agreed then for the indirect benefit thereby accruing
 “ to the Bank of Montreal, it agrees to pay to the Ontario
 “ Bank or to allow and credit on the final adjustment of
 “ accounts the sum of one hundred and fifty thousand
 “ dollars (\$150,000).”

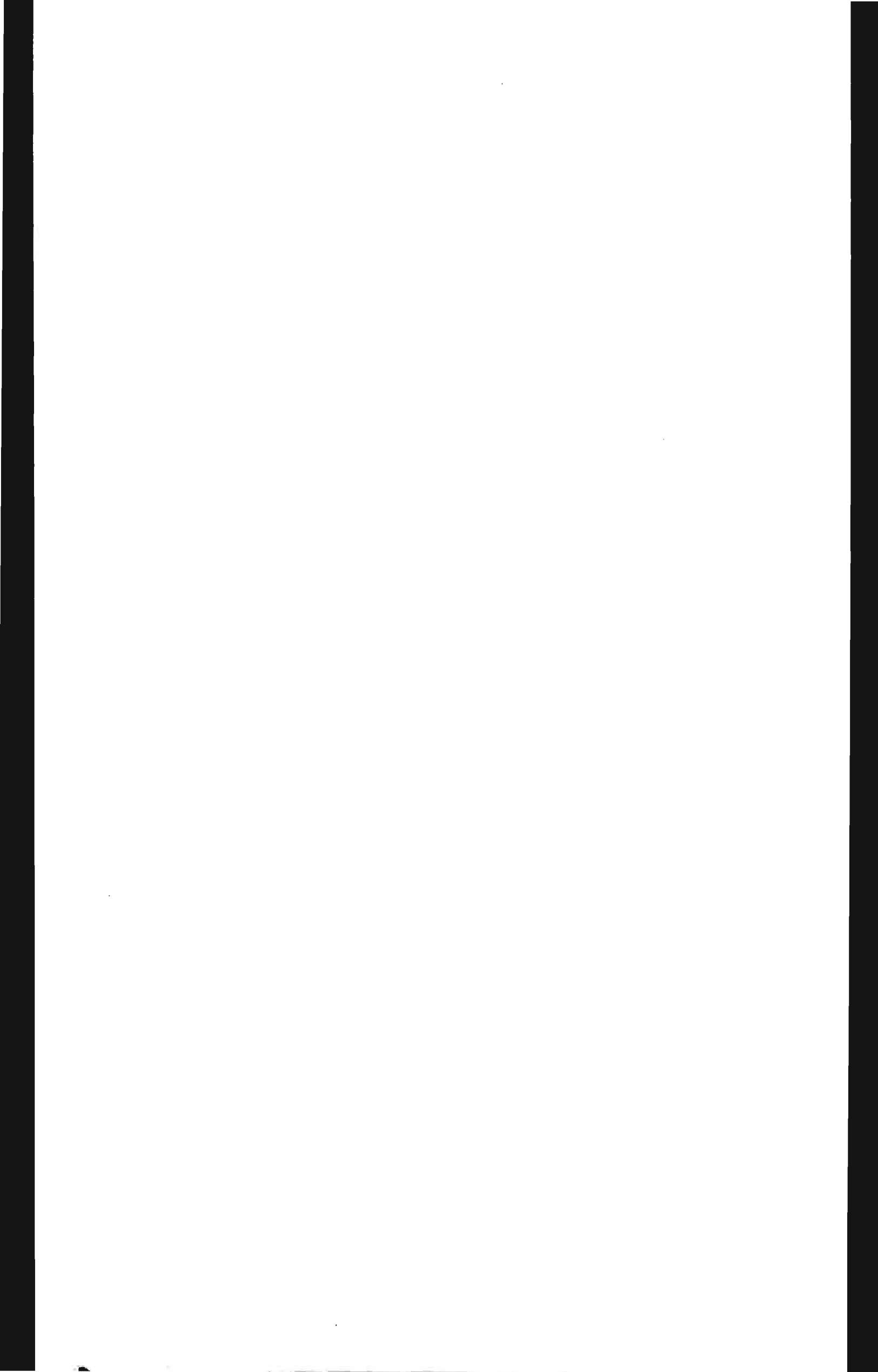
The argument on the part of the Appellant turned mainly on those two clauses. It was said that the use of the word “ purchase ” in Clause 2 shews that there was a sale of at least part of the assets of the Ontario Bank within the meaning of the Bank Act, and that at any rate there was a sale of the goodwill which, in reality, was the only asset the Ontario Bank possessed. It is, however, clear that the Bank of Montreal did not purchase or intend to purchase the call and current loans and overdue debts of the Ontario Bank for its own profit as a matter of bargain. Read in the light of the circumstances in which the deed was made, the expression merely means that those loans and debts were made over absolutely to the Bank of Montreal as the agents and attorneys of the Ontario Bank for the purpose of discharging that Bank's obligations to its outside creditors. It cannot be doubted that on the construction of the deed if there had

been any profit on that part of the transaction, which was most improbable, if not impossible, the profit would not have enured to the benefit of the Bank of Montreal.

As regards the payment in respect of goodwill, it is clear that there was no agreement on the part of the Ontario Bank to sell the goodwill or to bind itself to do or to forbear from doing anything in order to secure the goodwill (such as it was) to the Bank of Montreal, though no doubt the Bank of Montreal acquired an indirect benefit by taking upon itself and fulfilling the obligations of the Ontario Bank to its customers and taking over such of the premises of the Ontario Bank as it chose to purchase.

On the whole their Lordships agree with the Courts of Ontario in thinking that the deed of agreement of the 13th of October 1906 does not offend against the provisions of the Bank Act, and they will humbly advise His Majesty that the Appeal must be dismissed.

The Appellant will pay the costs of the Appeal. The Liquidator will have his costs as well as the Bank of Montreal.



In the Privy Council.

W. J. McFARLAND

v.

THE BANK OF MONTREAL AND THE
ROYAL TRUST COMPANY.

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