

The Fort Frances Pulp and Paper Company, Limited - - *Appellants*

v.

The Manitoba Free Press Company, Limited, and others - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL. DELIVERED THE 25TH JULY, 1923.

Present at the Hearing :

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD SUMNER.

LORD PARMOOR.

LORD PHILLIMORE.

[*Delivered by* VISCOUNT HALDANE.]

This appeal raises questions of some novelty and delicacy.

The appellants are manufacturers of newsprint paper in Ontario, and the respondents are publishers of newspapers, carrying on business at various places in Canada. The action out of which the appeal arises was brought by the respondents against the appellants to recover sums the former had paid for paper delivered to them at controlled prices. These sums, which the respondents alleged to represent margins in excess of the prices regulated by law, they claimed to be repayable to them as the result of orders of the Paper Control Tribunal of Canada, the final order having been made on the 8th July, 1920. The sums represented the amounts due after an adjustment of accounts in accordance with the above-mentioned final order and previous orders which it modified. For the balance so arrived at the action was brought in the Supreme Court of Ontario. It was tried before Riddell, J., who gave judgment for the plaintiffs, the respondents.

No question was raised as to figures, and the learned Judge treated the question before him as being only whether the Paper Control Tribunal and the Paper Controller, from whose orders the Paper Control Tribunal was in effect a Court of Appeal, had been validly vested with power to make the orders in controversy. The judgment of Riddell, J., was made the subject of an appeal to the Appellate Division of the Supreme Court, which affirmed the judgment of the Trial Judge. There was a counterclaim by the appellants for the amount of the market prices of the paper delivered by them to the respondents, less the sums actually paid. This was dismissed by Riddell, J., the dismissal being consequential on his view that the orders were valid. The Court of Appeal did not think it necessary to go into this question of validity, for they considered that notwithstanding that pressure was put on the appellants to supply the paper at the prices fixed by the orders, they did send out invoices and supply it, and thereby in effect entered into contracts for such supply on the terms that the prices were provisional and to be finally adjusted in terms of the orders to be made by the Paper Control Tribunal. On that footing nothing was, in the event, due on the counterclaim. Whether the action of these Tribunals was legal or not, the Court of Appeal therefore held that the appellants, notwithstanding that they had acted under pressure, had bound themselves to accept the prices fixed and were liable.

Their Lordships have not been able to satisfy themselves that this view was a reliable one. The Tribunals exercised control not only over prices but over the supply of the paper itself, and were in a position to exercise, and did exercise, pressure which was practically irresistible. There is evidence of its character in the present case, and the appellants contend that if the case is to be decided on the footing on which it was decided by the Court of Appeal—a footing which would be material only on the hypothesis that the orders were invalid—it should be sent back for a new trial. Their Lordships think that this contention cannot be lightly overruled. But if the orders were not invalid but valid, and the Tribunals really possessed the powers they claimed to exercise, the question does not arise. It is therefore necessary to consider in the first place the validity of the legislation and Orders in Council by which the controlling Tribunals were set up and invested with the powers exercised.

Purporting to act under the provisions of the War Measures Act passed by the Parliament of the Dominion in August, 1914, the Governor-General made an Order in Council, dated the 16th April, 1917, authorising the Minister of Customs to fix the quantity and price of newsprint paper in sheets or rolls furnished or to be furnished to those who required it for publishing. The order was to be operative from the 1st March, 1917, to the 1st June in the same year. By further orders this power was extended to the 1st December in that year. Acting in accordance with these orders the Minister ordered deliveries and fixed prices, and

this procedure continued until Mr. R. A. Pringle, K.C., was, by Order in Council dated the 3rd November, 1917, appointed Controller as well as Commissioner, with power to fix the quantities to be delivered and the prices, such prices, however, to be approved by the Governor-General in Council.

By various orders Mr. Pringle fixed prices for a period extending from the 1st July, 1918, to the 1st December in that year. By Order in Council dated the 16th September, 1918, prices were directed no longer to be supervised by the Governor in Council, inasmuch as a new tribunal called the Paper Control Tribunal was set up, and a right of appeal to it from any order of the Controller was given. The Paper Control Tribunal made various orders on appeals from the Controller, and on the 8th July, 1920, made an order fixing a price for a period ending on the 31st December, 1919, and directing the appellants to refund all sums received in excess of the prices fixed. It was the amount of the excess that was the subject of the present action.

On the construction and validity of these orders points have been made in argument, but the most general question to be decided is definitely raised by the appellants, and is whether the Orders in Council, the statutory basis on which they rest, and the proceedings founded on them by the Controller and the Paper Control Tribunal, were *intra vires* of the Dominion executive and legislature.

So far as the relevant legislation of the Parliament of the Dominion is concerned, this consists of two statutes. The first of these is the War Measures Act, 1914. It enacts that the provisions of Section 6 (to be presently referred to) are only to be in force during war, invasion or insurrection, real or apprehended. The issue of a Government Proclamation is to be conclusive evidence that these exist and are continuing, until the issue of a subsequent proclamation declaring them to exist no longer. War is to be deemed to have existed since the 4th August, 1914. By Section 6 the Governor in Council is to have power to do and authorise such acts and things and to make such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada. These powers are to extend, among other matters, to trading, exportation, importation, production, manufacture, and also to appropriation, control, forfeiture, and disposition of property and of its use.

By a later Act of the Dominion Parliament, passed on the 7th July, 1919, relating to paper control, after referring to certain of the Orders in Council already mentioned and to the War Measures Act of 1914, on the recital that there had been investigations and work begun by the Paper Commissioner and Controller which were not completed, and with respect to which appeals would lie to the Paper Control Tribunal, and that there

were then matters pending before and undetermined by that Tribunal, it was enacted that the powers, jurisdiction and authority of the Commissioner and Controller of Paper were confirmed and extended so as to enable him to complete all work and investigations begun by him prior to the declaration of peace, and to determine all questions and to make all necessary orders with respect to matters coming before him prior to the publication in the *Canada Gazette* of a Proclamation by the Governor in Council declaring the war to no longer exist.

It was further enacted that the powers, jurisdiction and authority of the Paper Control Tribunal were so confirmed and extended as to enable it to determine finally after the declaration of peace all matters pending before and not finally determined by it at the date of such declaration, and to dispose of all appeals brought before it subsequent to such declaration from any act done by or order or decision of the Commissioner and Controller under the Act. It was also provided that, except for the purpose of finally completing all matters undertaken, and determining all matters arising prior to the declaration of peace, the powers, authority and jurisdiction of the Commissioner and Controller of Paper and of the Paper Control Tribunal should cease upon the publication of the said proclamation.

It is not clear that any such proclamation as above defined was issued. There was an order made by His Majesty in the Imperial Privy Council on the 9th February, 1920, and published in the *Canada Gazette* on the same date, declaring the 10th January, 1920, as the date of the termination of the war with Germany. But there was war with other countries to which this Order did not relate, and of a proclamation as to these no evidence has been produced.

Their Lordships do not, however, consider this to be in itself important. For it is clear that on the 8th July, 1920, the Paper Control Tribunal when it made the order under which the claim in this action arose, made it on an appeal from an order of Mr. Pringle, the Controller, dated the 24th December, 1919. The order on appeal of the 8th July, 1920, disposed of matters down to 31st December, 1919. It altered certain prices governing periods, which prices the Controller had fixed in the past, increasing some of these and diminishing others, and directed any excess thus brought out of amounts charged by the appellants to be repaid, subject to set-off.

Their Lordships think that the effect of these orders, assuming the Dominion Government and legislature had authority to make them, was to render the appellants liable to account for the balance of the prices received by them from time to time up to the end of 1919 in excess of what was ultimately allowed, on the footing of being money had and received to the use of the respondents. No question arises as to figures, and the orders are in such a form that they must be taken as intended to operate retrospectively.

The question, therefore, becomes one of constitutional law,

as to whether the procedure thus established had a valid basis. This depends, in the first place, on whether the two statutes already quoted were *intra vires* of the Dominion Parliament.

It is clear that in normal circumstances the Dominion Parliament could not have so legislated as to set up the machinery of control over the paper manufacturers which is now in question. The recent decision of the Judicial Committee in the *Board of Commerce Case* ([1922] 1 A.C. 191), as well as earlier decisions, show that as the Dominion Parliament cannot ordinarily legislate so as to interfere with property and civil rights in the Provinces, it could not have done what the two statutes under consideration purport to do had the situation been normal. But it does not follow that in a very different case, such as that of sudden danger to social order arising from the outbreak of a great war, the Parliament of the Dominion cannot act under other powers which may well be implied in the constitution. The reasons given in the *Board of Commerce Case* recognize exceptional cases where such a power may be implied.

In the event of war, when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires Section 91 to be interpreted as providing for such an emergency. The general control of property and civil rights for normal purposes remains with the Provincial legislatures. But questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole.

The over-riding powers enumerated in Section 91, as well as the general words at the commencement of the section, may then become applicable to new and special aspects which they cover of subjects assigned otherwise exclusively to the Provinces. It may be, for example, impossible to deal adequately with the new questions which arise without the imposition of special regulations on trade and commerce of a kind that only what the emergency has created places within the competency of the Dominion Parliament. It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within Section 91 because in their fulness they extend beyond what Section 92 can really cover. The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole. For it is not one that can be reliably provided for by depending on collective action of the legislatures of the individual Provinces agreeing for the purpose. That the basic instrument on which the character of the entire constitution depends should be construed as providing for such centralised power in an

emergency situation follows from the manifestation in the language of the Act of the principle that the instrument has among its purposes to provide for the State regarded as a whole, and for the expression and influence of its public opinion as such. This principle of a power so implied has received effect also in countries with a written and apparently rigid constitution such as the United States, where the strictly federal character of the national basic agreement has retained the residuary powers not expressly conferred on the Federal Government for the component States. The operation of the scheme of interpretation is all the more to be looked for in a constitution such as that established by the British North America Act, where the residuary powers are given to the Dominion Central Government, and the preamble of the statute declares the intention to be that the Dominion should have a constitution similar in principle to that of the United Kingdom.

Their Lordships, therefore, entertain no doubt that however the wording of Sections 91 and 92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the Provinces of Canada, yet in a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole. The enumeration in Section 92 is not in any way repealed in the event of such an occurrence, but a new aspect of the business of Government is recognised as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the legislatures of the Provinces as individual units. Where an exact line of demarcation will lie in such cases it may not be easy to lay down *à priori*, nor is it necessary. For in the solution of the problem regard must be had to the broadened field covered, in case of exceptional necessity, by the language of Section 91, in which the interests of the Dominion generally are protected. As to these interests the Dominion Government, which in its Parliament represents the people as a whole, must be deemed to be left with considerable freedom to judge.

The other point which arises is whether such exceptional necessity as must be taken to have existed when the war broke out, and almost of necessity for some period subsequent to its outbreak, continued through the whole of the time within which the questions in the present case arose.

When war has broken out it may be requisite to make special provision to ensure the maintenance of law and order in a country, even when it is in no immediate danger of invasion. Public opinion may become excitable, and one of the causes of this may conceivably be want of uninterrupted information in newspapers. Steps may have to be taken to ensure supplies of these and to avoid shortage, and the effect of the economic and other disturbance occasioned originally by the war may thus

continue for some time after it is terminated. The question of the extent to which provision for circumstances such as these may have to be maintained is one on which a Court of Law is loathe to enter. No authority other than the central government is in a position to deal with a problem which is essentially one of statesmanship. It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in over-ruling the decision of the Government that exceptional measures were still requisite. In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton v. The Kentucky Distillery* (251 U.S. S.C. 146).

When then, in the present instance, can it be said that the necessity altogether ceased for maintaining the exceptional measure of control over the newspaper print industry introduced while the war was at its height? At what date did the disturbed state of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became *ultra vires*? It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence at the dates on which the action in question was taken by the Paper Control Tribunal. No doubt late in 1919 statements were made to the effect that the war itself was at an end. For example, in the Order in Council made at Ottawa on the 20th December, 1919, it is stated that it must—

“be realised that although no proclamation has been issued declaring that the war no longer exists, actual war conditions have in fact long ago ceased to exist, and consequently existence of war can no longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security of Canada.”

The Order in Council then goes on to say that in consequence of the armistice of November, 1918, the Expeditionary Force had since been withdrawn and demobilised, and the country generally is devoting its energies to re-establishment in the ordinary avocations of peace. In these circumstances, it states, the Minister of Justice considers that the time has arrived when the emergency Government legislation should cease to operate. (This was in December, 1919). The order then goes on to declare repealed all orders and regulations of the Governor in Council which depend for their sanction upon Section 6 of the War Measures Act, 1914, and repeals them as from 1st January, 1920. But from this repeal it expressly excepts, among other orders

and regulations specified, those relating to paper control, which are to remain in force until the end of another Session of Parliament.

It will be observed that this Order in Council deals only with the results following from the cessation of actual war conditions. It excepts from repeal certain measures concerned with consequential conditions arising out of war, which may obviously continue to produce effects remaining in operation after war itself is over.

Their Lordships find themselves unable to say that the Dominion Government had no good reason for thus temporarily continuing the paper control after actual war had ceased, but while the effects of war conditions might still be operative. They are, therefore, unable to accept the propositions submitted to them in the powerful argument for the appellants. The reasons which bring them to this conclusion are not those of the Court of Appeal of Ontario, which proceed on the hypothesis of a contract entered into by the appellants, an hypothesis which their Lordships are unable to entertain on the mere materials before them. Their reasons are more nearly those of the Trial Judge, Riddell, J., although they desire to guard themselves from being regarded as accepting the suggestion made by that learned Judge that "all the powers exercised by Minister, Controller and Tribunal were *intra vires* and valid, even in a state of profound peace."

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs. A petition by the appellants for leave to adduce further evidence will also be formally dismissed with costs.



In the Privy Council.

THE FORT FRANCES PULP AND PAPER
COMPANY, LIMITED,

v.

THE MANITOBA FREE PRESS COMPANY,
LIMITED, AND OTHERS.

DELIVERED BY VISCOUNT HALDANE.

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