

104,1930

No. 28 of 1930.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF ONTARIO
(Appellate Division).

BETWEEN :—

FORT FRANCES PULP & PAPER COMPANY
LIMITED - - - (Plaintiff) *Appellant*

— AND —

10 SPANISH RIVER PULP & PAPER MILLS
LIMITED, ONTARIO PAPER COMPANY LIMITED,
CHARLES JACKSON BOOTH, JOHN FREDERICK BOOTH
and HELEN GERTRUDE FLECK, Executors and
Executrix of the Will of the late J. R. Booth,
ABITIBI POWER & PAPER COMPANY LIMITED,
BROMPTON PULP & PAPER COMPANY LIMITED, PRICE
BROS. & COMPANY LIMITED, ST. MAURICE PAPER
COMPANY LIMITED, CANADA PAPER COMPANY
20 LIMITED, DONNACONNA PAPER COMPANY LIMITED,
BELGO-CANADIAN PAPER COMPANY LIMITED and
BELGO-CANADIAN PULP & PAPER COMPANY
LIMITED - - - (Defendants) *Respondents*.

APPELLANT'S CASE.

RECORD.

1. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario dated 3rd May, 1929, affirming a judgment of The Honourable Mr. Justice Grant dated 31st December, 1927, which dismissed the action. p. 288. p. 271.

APPELLANT'S CASE.

RECORD.

2. The Appellant and Respondents are manufacturers of newsprint paper in Canada, the mills of the former being located at Fort Frances in Western Ontario and the mills of the latter being at more easterly points in Canada. The appeal arises out of a claim by the Appellant to an accounting in connection with the supply by Canadian manufacturers of newsprint paper to Canadian publishers during 1918 and 1919, when the supply and price of paper in Canada was under control under Orders-in-Council passed under the Canadian War Measures Act 1914 (5 Geo. V. cap. 2 sec. 6). The validity of the orders was questioned in *Fort Frances Pulp & Paper Co. Limited v. Manitoba Free Press Co. Limited* (1923 A.C. 695) and their validity was upheld.

pp. 290-298.

3. Control was made necessary by the excessive demand for newsprint paper in the United States. The Canadian manufacturers attempted to agree among themselves and with the Government for a supply of newsprint paper to Canadian publishers at reasonable prices but the attempt failed and control was established on 16th April, 1917.

p. 301.

p. 325.

p. 326, l. 18.

4. At first the Minister of Customs and later Mr. R. A. Pringle, K.C., as controller was authorised to fix the quantity and price of newsprint paper for Canada. Prices fixed by the Controller were until August 1918 subject to confirmation by Order-in-Council but in that month the necessity for confirmation was dispensed with and a paper control tribunal was established (to which three Superior Court Judges were appointed) to hear and determine appeals from any orders made by the controller.

p. 290.

5. From the beginning it was realized by the manufacturers that as a loss would be involved in supplying Canadian publishers instead of selling for export, an adjustment would have to be made amongst them so that each would bear a proportionate share of the loss. Money paid in settlement by the manufacturers who were short in their Canadian deliveries to those who were long came to be known as "differentials."

p. 25, l. 31.

p. 419.

6. A measure of price control was established in the United States by agreement with certain manufacturers but other manufacturers were free to sell in the United States at market prices. There was thus a controlled price and a market price in the United States. The controlled price when finally fixed was at all times higher than the Canadian price and the United States market price was still higher.

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7. All orders made by the controller before 26th September, 1918 contained a clause drafted by representatives of the manufacturers, reading as follows:—

p. 304, l. 20.
p. 356, l. 8.

10 “And whereas under existing conditions the supply of newsprint paper to
“Canadian publishers by the manufacturers is not proportionately distributed
“between them, and by reason of the fact that the prices fixed are considerably
“below those the manufacturers are receiving from export business I do order
“that each manufacturer should bear his due proportion of the cost so entailed
“in complying with the above, and that if arrangements are not made between
“the manufacturers for the pooling of such cost and for adjustment between
“themselves in proportion to the percentage of their output supplied to
“Canadian publishers that an accounting be made and the manufacturer or
“manufacturers who have supplied a greater or less percentage of Canadian
“tonnage than properly attributable to them shall be paid by the other manu-
“facturers sufficient to place them in the same position as the manufacturer or
“manufacturers who have not supplied their proper percentage of paper to the
“Canadian publishers.”

8. Orders containing the above clause were approved by Orders-in-Council passed under the War Measures Act.

p. 328, l. 30.
p. 344.
p. 349.

20 9. The controlled prices in Canada were all f.o.b. prices at the mill and if freight charges from any of the Respondents' mills in Eastern Canada to any point in the prairie provinces (Manitoba, Saskatchewan and Alberta) were added the resulting cost to Western publishers would be prohibitive. The Appellant, owing to its proximity to the prairie provinces, supplied throughout the whole period or control paper in excess of its proper proportion based on output. The paper tribunal by Order dated 18th August, 1919 made on an appeal from the controller directed that \$72,507.12 should be paid by certain of the Respondents to the Appellant for differentials
30 for the ten months ending 31st December, 1917. The present claim is for differentials for the years 1918 and 1919.

p. 304, l. 18.

p. 107, l. 18.

p. 397.

10. On 26th September, 1918, the paper controller decided to fix a Canadian price for newsprint paper for October and November 1918, which price was in excess of the controlled price then prevailing in the United States. In the order then made it was unnecessary to include the differential clause and it was accordingly omitted. The order then made was renewed by the controller from time to time for later periods as appeals regarding prices were pending before the paper tribunal.

p. 364.

p. 419, l. 36.

p. 406, l. 23.

40 11. Later, as the result of orders made on appeals both in the United States and Canada, the controlled price on each side of the

p. 419, l. 38.

RECORD.

boundary was changed, resulting in the Canadian price from and after 1st October, 1918, being at all times lower than the United States price as it had been before. Throughout 1918 and 1919 there was great delay in fixing the ultimate prices that were to govern in Canada and in determining the basis on which differentials should be adjusted and paid. Owing to this delay the Appellant from time to time refused to continue supplying paper in excess of its proportionate share but on being assured by the controller that the differentials would ultimately be adjusted and paid it continued the supply. Tentative orders regarding differentials were drafted and discussed and a draft order was submitted to the Appellant and later a copy of the order as signed dated 17th July, 1919, was forwarded to it but it is claimed the order was never effectively issued. The original document duly signed was found with Mr. Pringle's papers after his death which occurred on 10th January, 1922.

p. 345, l. 46.
p. 388, l. 11.
pp. 66-72.

p. 43, l. 28.
p. 145, l. 13.
p. 393.

p. 388.

12. By a Statute passed on 7th July, 1919 (9-10 Geo. V. cap. 65) the powers, jurisdiction and authority of the controller were confirmed and extended to such extent as might be necessary to enable him to fully complete all work begun by him prior to the declaration of peace and to determine all questions and to make all necessary orders with respect to matters begun by or coming before him prior to the publication of a proclamation declaring the war to be at an end. Similar provisions were made with respect to the paper control tribunal.

p. 420, l. 24.

p. 421.

p. 422.

p. 59.

13. On 16th January, 1920, the controller wrote the Minister of Finance asking to be relieved from the distribution of newsprint but pointing out that he had certain duties to discharge under the Statute of 1919 which he would attend to at as early a date as possible. On 22nd January, 1920, an Order-in-Council was passed accepting the "resignation" of Mr. Pringle and appointing Mr. Breadner controller. On 23rd January, 1920, Mr. Pringle made an order directing the accountant who was assisting him to prepare a statement of differentials down to January, 1920, but it was impossible to make this order effective because some of the Respondents by that time were refusing to furnish necessary statements or submit their books for inspection.

p. 425.

p. 426.

14. On 29th January, 1920, the Order-in-Council appointing Mr. Breadner was rescinded and the office of controller was declared vacant, but the office was to continue. On the same date an Order-in-Council was passed purporting to authorize the Board of

Commerce, established under 9-10 Geo. V. cap. 37, to act as controller giving the Board a modified and extended jurisdiction. This Order was held to be *ultra vires* by the Supreme Court of Canada on 6th April, 1920 (*Price v. Board of Commerce*, 60 S.C.R. 265). No person was subsequently appointed controller.

15. Manufacturers of newsprint having mills in Eastern Canada found it to their advantage to agree to a settlement of differentials as among themselves but the Appellant was not a party to the settlement and no adjustment has been made of differentials due to the Appellant for 1918 and 1919. p.181, l. 44.
p. 427, l. 42.

16. The action was tried by the Hon. Mr. Justice Grant in May 1927, and judgment was pronounced on 31st December, 1927, dismissing the action. The learned Judge reviewed the various proceedings and reached the conclusion that the Appellant had in 1918 and 1919 supplied more than its proper proportion of newsprint paper in Canada resulting in a loss which he had no reason to doubt amounted to as much as \$10,000 a month as claimed. He said:— p. 250.

20 "At the close of the trial the impression had been clearly made upon my mind, that the plaintiff company has an honest and substantial claim. By reason of its geographical position, plaintiff's mill was compelled to bear the burden which, in all fairness, ought to have been shared by the others. p. 266, l. 42.

"The official authority which compelled the plaintiff company to carry the load, ought to have been exerted to compel the others to bear their share. There is no satisfactory evidence before me, that an equitable adjustment could not have been accomplished by compelling the mills which were not supplying their Canadian quota, to place the requisite quantity of paper at the disposal of the mills that were doing so.

30 "The offers of some of the Eastern mills, to supply Western publishers were quite obviously insincere, as they well knew that the heavy and additional freight rates, made the price prohibitive. The attitude and course adopted by some of the defendants, under the very unusual conditions which obtained in Canada at that time, do not commend themselves to one who has no interest on either side. If I could see my way clearly, to compelling an adjustment of the plaintiff's claim, by those defendants who shirked their fair share of the burden, I would do so without any hesitation. My difficulty lies in that I fear this Court has no jurisdiction so to do."

After considering the authorities he concluded:—

40 "In the case at bar there was no contract, nor was there any obligation in law, unless and until an order would be issued by the Controller creating the p. 270, l. 31.

RECORD.

“obligation, which, in my view, cannot be created in any other way, under the facts of the case.

“For this reason, therefore, I am of opinion that the plaintiff must fail. In my judgment, also, the plaintiff must fail upon the broad principle, that, having no claim otherwise than under the War Measures' Act and the Orders-in-Council made thereunder, by the rule laid down in the authorities cited above, the only remedy open to them, is the one given by the Orders upon which the claim depends for its existence. In other words, in my view, this Court has no jurisdiction in the matter. I confess frankly that I have come to this conclusion with reluctance, as I am satisfied that the plaintiff has not been fairly treated, and I should be pleased if another Court can come to a different conclusion.”

17. The Appellant appealed to the Appellate Division of the Supreme Court of Ontario and on 3rd May, 1929, the Court dismissed the appeal.

p. 276.

Mr. Justice Orde, with whom Latchford, C.J., and Fisher, J.A., concurred, agreed with the Trial Judge that the controller had made no valid order for the payment of differentials. In his view the general direction regarding differentials inserted in all orders down to 1st October, 1918, placed the Appellant's claim for relief as to that period on a somewhat higher ground than the claim for the remaining fifteen months, but in his view this general direction indicated merely an intention on the part of the controller to make a specific order for payment later and did not of itself form the basis of a legal right capable of being enforced. He also agreed with the Trial Judge that the Court had no jurisdiction.

p. 287.

Riddell, J.A., did not think the Court was one of the tribunals designated by the Statute to deal with the matter and being unable to find any sound basis upon which to found jurisdiction concurred in dismissing the appeal.

The Appellant submits that the appeal should be allowed for the following among other

REASONS.

1. Because the Companies in Canada manufacturing news-print paper were as a class required to withhold from export the paper needed in Canada and to sell it at the Canadian controlled price.
2. Because the Companies that delivered to Canadian publishers more than the share they were required to

withhold from export were entitled to be compensated by those that delivered less.

3. Because Orders-in-Council having the force of law under the War Measures Act recognized the right to differentials.
4. Because the right to compensation was finally determined as between the Appellant and the Respondents by the judgment of the paper control tribunal dated 18th August, 1919, and the matter is *res judicata*.
- 10 5. Because effective orders were made for the payment of the so-called differentials.
6. Because the Court had jurisdiction to determine the question of liability and to ascertain the amount.

W. N. TILLEY.

C. F. H. CARSON.

IN THE PRIVY COUNCIL,

**ON APPEAL
FROM THE SUPREME COURT OF ONTARIO
(Appellate Division).**

BETWEEN—

**FORT FRANCES PULP & PAPER COMPANY
LIMITED (Plaintiff) Appellant**

— AND —

**SPANISH RIVER PULP & PAPER MILLS
LIMITED, ONTARIO PAPER COMPANY
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LIMITED, DONNACONNA PAPER COMPANY
LIMITED, BELGO-CANADIAN PAPER
COMPANY LIMITED and BELGO-CANADIAN
PULP & PAPER COMPANY LIMITED
(Defendants) Respondents.**

APPELLANT'S CASE.

LAWRENCE JONES & Co.,
Lloyd's Building,
3/4 Lime Street,
London, E.C.3.