

57, 1938

In the Privy Council.

No. 3 of 1938.

ON APPEAL FROM THE COURT OF APPEAL
FOR ONTARIO.

BETWEEN

NORTHERN ONTARIO POWER COMPANY LIMITED

(Plaintiff) Appellant

AND

LA ROCHE MINES LIMITED (No Personal Liability) and
F. L. HEARD, Liquidator of La Roche Mines Limited

(Defendants) Respondents

AND BETWEEN

LA ROCHE MINES LIMITED (No Personal Liability) and
F. L. HEARD, Liquidator of La Roche Mines Limited

(Defendants) Appellants

AND

NORTHERN ONTARIO POWER COMPANY LIMITED

(Plaintiff) Respondent

(Appeals consolidated by Order dated 15th of November, 1937).

CASE

FOR LA ROCHE MINES LIMITED AND
F. L. HEARD, LIQUIDATOR OF LA ROCHE
MINES LIMITED.

1. These consolidated appeals are from a judgment of the Court of Appeal for Ontario delivered 20th July, 1937, allowing an appeal by the Plaintiff from a judgment of the Honourable Mr. Justice Greene delivered 28th January, 1937, dismissing the action. RECORD.
p. 73.
p. 63.

2. The Northern Ontario Power Company Limited, Plaintiff in this action, is a public utility corporation incorporated under Part XIII of The Ontario Companies Act, R.S.O. 1927, chapter 218. The defendant, La Roche Mines Limited, is an Ontario Corporation and the Defendant F. L. p. 86.
p. 156.

RECORD. Heard, is a Liquidator appointed under the Voluntary Winding-up Provisions (Part XIV) of The Ontario Companies Act.

p. 91.
pp. 2-3. 3. The action arises out of a contract between the Plaintiff and the Defendant Company, dated 30th December, 1931, for the supply of power by the Plaintiff to the Defendant Company. The Plaintiff claimed a declaration that it was entitled to damages for breach of the power contract and was entitled to rank as a creditor of the Defendant Company in respect of its claim, amounting to \$524,163.24.

p. 95, l. 32. 4. The power contract required the Defendant Company to pay and it did pay for a minimum quantity of 50 H.P. for the first year. There was 10
p. 65, l. 9. no obligation on the Defendant Company to take or pay for any further power. The contract was to extend for "the mining life of the properties
p. 95, l. 28. now or hereafter operated or owned or controlled by" the Defendant Company in the Porcupine District. There was also a provision that
p. 94, l. 1. during the continuance of the contract no system of electricity other than that furnished by the Plaintiff was to be used on the premises.

p. 48, l. 26. 5. The Plaintiff, having claimed damages based on an estimate that the mining life of the properties was 25 years, has appealed from the judgment
p. 81. of the Court of Appeal holding that the duration of the contract was limited by legislation to 10 years. The Defendants, denying breach of contract 20
p. 82. and maintaining that the action should be dismissed, have cross-appealed.

p. 56, l. 29. 6. The Defendant Company owned two gold mining claims, H.R. 1001 and H.R. 1002 in the Township of Deloro, in the District of Cochrane, Province of Ontario, and had since the date of its incorporation, 15th March, 1928, carried on development work on its properties intermittently until the month of May, 1932. At this time the Company was without funds and could obtain no further money by the sale of stock. The results from
pp. 56-57. the development work had been disappointing.

p. 58, l. 22. 7. The Company then sought assistance from other mining companies and succeeded in 1933 in having an option taken on its claims by Noranda 30
Mines Limited which owned adjoining claims to the east, south and west. After doing certain exploration work in May and June, 1933, the Noranda
p. 58, l. 45. Company concluded that the Defendant Company did not have a mine and that because of the dip of the vein the property was of no value without the properties to the north. The Plaintiff supplied to the Noranda Company the electrical power required in connection with its exploration work and received payment of \$1036.27 from the Noranda Company for such power.

p. 145. 8. In June, 1934, Sylvanite Gold Mines Limited obtained from the Defendant Company and one, H. E. Martin, an option to purchase the Com- 40
pany's properties and the Martin Claim H.R. 944 to the north. Subsequently
p. 150. Erie Canadian Mines Limited, assignee of the contract and a subsidiary of the Sylvanite Company, exercised the option and formed a company known as Delnite Mines Limited, to acquire and develop the claims of the

Defendant Company and Martin. The Defendant Company received in exchange for its properties 840,000 shares in the capital stock of the Delnite Company. After the transaction had been completed the Defendant Company notified the Plaintiff by letter dated 30th November, 1934, that it had sold its claims and would be no longer responsible for power supplied to the properties.

9. The Delnite Company acquired two additional claims to the north and carried on extensive exploration and development work which cost down to 31st July, 1936, \$199,252. It was estimated that the cost of bringing the properties into production would be over \$600,000.00. The Plaintiff received the sum of \$12,106.17 from the Delnite Company for power supplied to the properties from October, 1934, to January, 1936.

10. Having disposed of its properties, the Defendant Company on 13th November, 1934, commenced voluntary winding-up proceedings under Part 14 of The Ontario Companies Act (R.S.O. 1927, Cap. 218). The sale of the properties and the winding-up proceedings were bona fide and it was so held by the trial Judge and the Court of Appeal.

11. The learned Trial Judge was of opinion that the Defendant Company, being without funds to carry on the development of its properties and acting in good faith, was entitled to wind up its affairs and distribute its assets free from any claim of the Plaintiff, and dismissed the action with costs.

12. The Court of Appeal for Ontario found that the Defendant Company was not precluded by the contract with the Plaintiff from selling its properties but was of opinion that "the sole question is whether the *prima facie* liability arising out of the contract is still existent" and resolved this question in favour of the Plaintiff. The Court held, however, that by reason of Section 22 of The Public Utilities Act (R.S.O. 1927, Cap. 249) the duration of the contract must be limited to ten years from 30th December, 1931.

13. Section 22 reads as follows:

"The Corporation may, from time to time and upon such terms as may be deemed advisable, enter into contracts for the supply of a public utility to any person for any period not exceeding ten years."

By sections 54 and 59 the above provision is made applicable *mutatis mutandis* to a company incorporated for the purpose of supplying any public utility.

14. The Defendants, therefore, respectfully submit that the appeal of the Plaintiff should be dismissed and that the cross-appeal of the Defendants should be allowed for the following amongst other

REASONS

1. Because at the date of the sale by the Defendant Company of its mining properties, the properties did not have a mining life within the meaning of the power contract.

2. Because the Defendant Company did not agree that it would continue in business for the mining life of the properties.
3. Because the Defendant Company did not guarantee that future owners of the properties would purchase their power from the Plaintiff on the terms of the power contract.
4. Because the Defendant Company was not bound to use or pay for any power after the first year of the contract and when it ceased to need power, it was entitled to sell its assets and cease business.
5. Because a dissolution of the Defendant Company was not in the 10 circumstances a breach of the contract nor did it entitle the Plaintiff to recover any moneys under it.
6. Because if the contract was subject to section 22 of The Public Utilities Act, it was void *ab initio*.
7. Because the judgment of the learned trial Judge was right for the reasons stated therein.

W. N. TILLEY.

R. F. WILSON.

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LIMITED - - - - (Plaintiff) Respondents
(Consolidated Appeals).

CASE

**FOR LA ROCHE MINES LIMITED AND
F. L. HEARD.**

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