

MAHLON WICKWAY BEACH AND OTHERS, EXECUTORS OF THE ESTATE OF MAHLON FORD BEACH (PLAINTIFFS)....	}	APPELLANTS;	1926 *Nov. 3, 4. *Dec. 1.
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AND

THE HYDRO ELECTRIC POWER COMMISSION OF ONTARIO (DE- FENDANT) .....	}	RESPONDENT;
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AND

IN THE MATTER OF A CERTAIN ACTION WHEREIN  
MAHLON WICKWAY BEACH AND OTHERS ARE PLAIN-  
TIFFS, AND THE HYDRO ELECTRIC POWER COMMISSION OF  
ONTARIO ARE DEFENDANTS;

AND

IN THE MATTER OF AN ARBITRATION BETWEEN  
THE SAID PARTIES PURSUANT TO AN AGREEMENT  
TO REFER THE MATTERS IN QUESTION IN SAID ACTION TO  
J. M. ROBERTSON, ESQUIRE.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME  
COURT OF ONTARIO

*Electric power—Power supplied to Hydro Electric Power Commission of Ontario—Dispute as to price—Suit against Commission—Attorney General's consent—Power Commission Act, R.S.O., 1914, c. 39, s. 16—Agreement by counsel to refer to arbitration—Counsel's authority—Resulting award not authorized by a reference to which counsel empowered to consent.*

Plaintiffs supplied power to defendant, the Hydro Electric Power Commission of Ontario, the price not being fixed. Plaintiffs claimed at the rate of \$16 per h.p. Defendant paid at the rate of \$12. Plaintiffs sued for \$8,190.78, as the balance due, at the \$16 rate, having obtained, on 30th January, 1922, the Attorney General's consent, pursuant to s. 16 of *The Power Commission Act* (R.S.O., 1914, c. 39), to bring an action "to recover the sum of \$8,190.78, being the balance alleged to be due \* \* \* for electric power supplied \* \* \*." Before trial counsel agreed to refer the matters in question to an arbitrator, the plaintiffs not to be prejudiced "by any claim made by them in the writ of summons or pleadings in this action." The arbitrator awarded plaintiffs \$51,861.75, taking into consideration an alleged element of compulsion, and basing his award on his estimate of cost to plaintiffs plus reasonable profit. Defendant moved to set aside the award, and

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\*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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plaintiffs sued on the award, having obtained the Attorney General's consent, dated 20th April, 1923, to bring an action "to recover the sum alleged to be due \* \* \* for electric power supplied. \* \* \* This consent is to be deemed to have been given as of the 30th day of January, 1922."

*Held*, having regard to s. 16 of *The Power Commission Act* and the terms of the Attorney General's consent to the first action, defendant's counsel had not authority to compromise by imposing on defendant, directly or indirectly, any liability greater than \$8,190.78, or any liability to be determined otherwise than by ascertaining what a fair price would be on the basis (as contemplated by the consent and presented in the pleadings) of a legal right arising from the supply and acceptance of power under a voluntary agreement; and the award could not be supported as authorized by a reference to which counsel was empowered to consent; the Attorney General's consent to the second action did not enlarge retrospectively the scope of the first action and counsel's authority therein.

Judgment of the Appellate Division of the Supreme Court of Ontario (57 Ont. L.R. 603) and of Wright J. (56 Ont. L.R. 35) affirmed in the result.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming in the result the judgment of Wright J. (2) allowing the defendant's motion to set aside an arbitrator's award, and dismissing the plaintiff's action upon the award.

The proceedings taken by the defendant by way of motion to set aside the award and by the plaintiffs by way of action to enforce the award were, by order of the Appellate Division, consolidated.

In 1915 Mahlon Ford Beach, deceased, the owner of a power plant, had a contract with the Rapids Power Co., Ltd., for the supply by Beach of electric power for one year, which expired on 31st March, 1916. The Rapids Power Co., Ltd., transferred its rights under this contract to the Hydro Electric Power Commission of Ontario, the defendant. At the expiration of the contract, negotiations were entered into for continuing the supply of power, but these negotiations failed to result in an agreement. It would appear that Beach desired a ten year contract at \$16 per h.p., but the defendant was unwilling to pay more than \$12. Without any definite agreement Beach, and after his death his executors, the plaintiffs, continued to

(1) (1925) 57 Ont. L.R. 603.

(2) (1924) 56 Ont. L.R. 35.

supply power to 1st May, 1919. The defendant was from time to time billed at \$16 per h.p., but paid only at the rate of \$12 without admitting further liability, nor, on the other hand, was there any admission of the sufficiency of the payments. Negotiations to settle the price failed, and the plaintiffs determined to enforce the claim by action. Faced with the provisions of *The Power Commission Act*, R.S.O., 1914, c. 39, s. 16, which reads

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Without the consent of the Attorney General no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office.

they applied to the Attorney General for his consent, and a written consent, dated 30th January, 1922, was given, headed "In the Supreme Court of Ontario—In the matter of a proposed action" between the plaintiffs and the defendant, and reading as follows:

Pursuant to the provisions of the Revised Statutes of Ontario, 1914, chapter 39, section 16, I hereby consent to Mahlon Wickway Beach, Benson Clothier Beach and Charles Asa Beach, executors of the estate of M. F. Beach of \* \* \* bringing an action against the Hydro Electric Power Commission to recover the sum of \$8,190.78, being the balance alleged to be due said estate for electric power supplied by said estate to The Hydro Electric Power Commission of Ontario.

Thereupon the plaintiffs issued a writ against the Commission claiming a balance due of \$8,190.78, calculated at the rate of \$16 per h.p. (It would appear that plaintiffs' counsel intended to move to amend by claiming a larger sum).

Before the trial of the action, an agreement was made between counsel for plaintiffs and defendant as follows:

The parties hereto agree to settle and compromise this action upon the following terms and conditions.

1. The parties have agreed that the matters in question in this action shall be referred to J. M. Robertson of the city of Montreal, engineer, to determine what reasonable and just price shall be paid to the plaintiffs for the power furnished by them to the defendants from April 1, 1916, to May 1, 1919, and to fix the amount due the plaintiffs by the defendants after deducting the sum already paid the plaintiffs by the defendants.

2. It is understood and agreed between the parties hereto that in determination of these matters the plaintiffs shall not be prejudiced by any claim made by them in the writ of summons or pleadings in this action.

\* \* \*

4. It is understood between the parties that the provisions of the Ontario Arbitration Act, R.S.O., 1914, chapter 65, do not apply herein and the said arbitrator herein may proceed informally and if he so desires is not required to take evidence under oath.

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5. The decision of the said arbitrator shall be final and binding upon both parties.

An arbitration was accordingly had, and an award was made, dated February 15, 1923, for the payment by defendant to plaintiffs of \$42,249.70 and interest, making in all \$51,861.75. The arbitrator took into consideration an alleged element of compulsion in the supply of power, and held that the basis of Beach's remuneration should be the cost to him plus a reasonable profit, and based his award accordingly, taking into account what he considered to be the various elements, and the amounts in regard thereto, that should be included in estimating the cost of the supply of power.

The defendant disputed the validity of the award and moved to set it aside, and the plaintiffs, having procured a consent of the Attorney General, brought this action to recover the amount of the award. The Attorney General's consent just mentioned was dated 20th April, 1923, it was headed "In the Supreme Court of Ontario—In the matter of a proposed action" between the plaintiffs and the defendant, and read as follows:

Pursuant to the provisions of the Revised Statutes of Ontario, 1914, chapter 39, section 16, I hereby consent to Mahlon Wickway Beach, Benson Clothier Beach and Charles Asa Beach, executors of the estate of M. F. Beach, of \* \* \* bringing an action against the Hydro Electric Power Commission of Ontario to recover the sum alleged to be due said estate for electric power supplied by said estate to the Hydro Electric Power Commission of Ontario.

This consent is to be deemed to have been given as of the 30th day of January, 1922.

Both the motion to set aside the award and the action upon it came on before Wright J., who allowed the defendant's motion, and dismissed the plaintiffs' action, on the ground that the arbitrator erred both in fact and in law, and that such error appeared upon the face of the award (1). An appeal from his judgment was dismissed by the Appellate Division (2) on the grounds that the consent given by the Attorney General dated 30th January, 1922, would not justify an action for a larger sum than that therein mentioned; that there was no power to settle the action by agreeing to a proceeding which might in the result

compel the payment of a much larger sum; that the reference to arbitration was *ultra vires* and the award a nullity *ab initio*; that this nullity was not given life by the terms of the Attorney General's consent of 20th April, 1923; that, even were the submission to arbitration valid and the arbitrator allowed by law to make a valid award, the award could not stand, for, without deciding whether or not the arbitrator based his award upon a mistake of fact, it was obvious that he "approached the consideration of the questions to be decided from a wrong angle \* \* \*."

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The plaintiffs appealed to the Supreme Court of Canada.

*G. F. Henderson K.C., J. M. Godfrey K.C. and L. W. Mulloy* for the appellants.

*W. N. Tilley K.C. and Sir W. H. Hearst K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—This appeal seems to fail upon a ground which can be stated at no great length.

The authority of counsel for the Commission to compromise the first action cannot be ascertained without reference to s. 16 of *The Power Commission Act* and the terms of the consent given under that enactment. By the enactment, the consent of the Attorney General was a necessary condition of the right to bring the action. The consent given was strictly limited, first, as to amount; and secondly, as to the character of the claim. The claim contemplated was a claim of a sum "alleged to be due said estate for electric power supplied by said estate" to the Commission, and it was a claim for the sum of \$8,190.78.

Obviously, the claim authorized to be put in suit was one based upon a legal right arising from the supply and acceptance of power. As presented in the pleadings, the actual claim was for the sum mentioned, and it was based upon an alleged agreement to pay \$16 per h.p. for power supplied; the defendants denying that there was any express agreement as to the price, and alleging that a fair price was \$12 per h.p. Admittedly, the issue on the plead-

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ings was what price (limited by the maximum of \$16) was a fair price to pay for power supplied under an agreement between the parties, the price for which was not fixed. It seems too clear for argument that in these circumstances counsel for the Commission (regard being had to s. 16 of *The Power Commission Act* and to the terms of the Attorney General's consent) was not endowed with authority to compromise by imposing on the Commission, directly or indirectly, any liability greater than the sum named, or any liability to be determined otherwise than by ascertaining what a fair price would be on the footing mentioned. He could have no authority, for example, to consent to the determination of that liability on the footing that the purchase was a compulsory purchase, or to the enhancement of the liability by reference to some circumstance of coercion or intimidation supposed to have the effect of bringing into play rules and principles inapplicable in the case of a sale by voluntary agreement.

Yet this is precisely what is done by the award, which proceeds professedly upon the reference to arbitration to which counsel agreed by way of compromise of the action. The award, therefore, cannot be supported as authorized by a reference to which counsel was empowered to consent.

Nor does there appear to be any basis for a finding of ratification. The subsequent consent of the Attorney General (of April 20, 1923) has been invoked as a consent to the present action, and necessarily so; otherwise the action must have failed for want of compliance with s. 16. It cannot at the same time serve to enlarge retrospectively the scope of the earlier action and the authority of counsel engaged in that action.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Godfrey, Lawson & Corcoran.*

Solicitors for the respondent: *Hearst & Hearst.*