

103, 1930

# In the Privy Council.

No. 103 of 1930.

## ON APPEAL FROM THE SUPREME COURT OF ONTARIO. (APPELLATE DIVISION.)

BETWEEN

THE STEEL COMPANY OF CANADA,  
LIMITED and JAMES T. ROGERS and  
GEORGE C. COPPLEY, on behalf of them-  
selves and all other holders of Preference  
Stock of the Defendant, The Steel Company  
of Canada, Limited ... .. (Defendants) Appellants,

AND

THOMAS RAMSAY and FRANCIS A. MAGEE,  
suing on behalf of themselves and all other  
holders of Ordinary Stock of The Steel  
Company of Canada, Limited ... .. (Plaintiffs) Respondents.

## CASE OF THE RESPONDENTS.

1. This is an appeal from a judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, given the 17th March, 1930, affirming a judgment of the Honourable Mr. Justice Orde, given the 23rd August, 1929, determining the respective rights of the holders of preference and ordinary shares in the Appellant Company.

2. By Letters Patent issued under the Companies' Act (Revised Statutes of Canada 1906, Chapter 79) and dated the 8th June, 1910, the Appellant Company was incorporated with an authorised capital of \$25,000,000 in \$100 shares, consisting of 100,000 preference shares and 150,000 ordinary shares of which 64,963 preference shares and 115,000 ordinary shares were in 1910 issued as fully paid up on the Company taking over certain subsidiary companies. No other shares have ever been issued, but by supplementary Letters Patent dated the 16th November, 1928, the splitting of each \$100 share into four \$25 shares and the making of the ordinary shares of no par value were authorised and effected without affecting the relative dividend rights of the two classes of shares.

Record.

p. 77.

p. 53.

pp. 79-84.

p. 83, ll. 23-28.

p. 12, ll. 3-12.

p. 29, ll. 3-7.

p. 12, l. 11.

p. 133, ll. 15-29.

p. 133, ll. 30-46.

Record.  
p. 83, ll. 33-43.

3. The Letters Patent provided that while the Company was a going concern the net profits distributed should be applicable first to the payment of a fixed cumulative preferential dividend at the rate of seven per cent. per annum on the capital paid up on the said preference shares and that the holders of such shares should participate rateably with the holders of the issued ordinary shares in the distribution of net profits after the holders of the ordinary shares should have received dividends equal to those paid on the preferred shares and that no dividends should be paid on the ordinary shares until after the Company should have created and have to the credit of a reserve fund a sum equal to at least one year's dividend on the then 10 issued preference shares.

pp. 84-85.  
p. 13, ll. 2-8.

4. From the Company's incorporation until 1928 the share certificates were in a form which was apparently not authorised by the Company and the origin of which is unknown but which stated :—

p. 84, l. 25.  
p. 85, l. 18.

“ If after providing for the payment in any year of the dividend on the Preference Shares and any balance due for cumulative dividends for preceding years, there remain any surplus net profits any and all such as are not in the opinion of the Directors required for the purposes of the Company will be applicable to dividends on the Ordinary Shares for such year to the extent of but not exceeding Seven Per Cent. (7%) on the capital paid up thereon when and as from time to time the same may be declared by the Directors. The remainder of any such surplus net profits shall then be applicable to the payment of further dividends equally per share upon both the Preference Shares and the Ordinary Shares, but no dividends shall be paid on the Ordinary Shares until after the Company shall have created and have to the credit of a reserve fund a sum equal to at least one year's dividend on the then issued Preference Shares the whole as provided in the Letters Patent incorporating the Company.”

pp. 136-138.  
pp. 137-139.

After 1928 the forms were changed and all certificates were indorsed with the provisions of the Letters Patent governing the relative rights of the two classes of shares.

5. The profits, dividends and accumulations of the Company were as follows :—

Year.	Net Profits.	Preference Dividend.	Ordinary Dividend.	Accumulated Profits.
p. 89. 1910 ...	\$473,288.83	3½%	nil	\$245,918.33
p. 91. 1911 ...	\$792,422.41	7%	nil	\$583,599.74
p. 93. 1912 ...	\$931,712.86	7%	nil	\$1,060,571.60
p. 95. 1913 ...	\$965,772.45	7%	nil	\$1,571,603.05
p. 97. 1914 ...	nil	3½%	nil	\$1,258,430.58
p. 99. 1915 ...	\$2,210,952.36	7%	nil	\$3,014,641.94
p. 101. 1916 ...	\$3,728,493.88	10½%	4%	\$4,647,497.64
p. 103. 1917 ...	\$4,141,584.36	7%	6%	\$6,197,854.47
p. 105. 1918 ...	\$2,429,758.54	7%	6%	\$7,322,872.01

Except the dividend on the ordinary shares in 1916 all dividends were paid in respect of each quarter. From 1919 to 1927 inclusive 7 per cent. per annum was paid on the shares of each class. By the 31st December, 1928, the accumulated profits amounted to \$12,042,376.30.

Record.

pp. 107, 109,  
111, 113, 115,  
117, 119, 121,  
123.

p. 125, l. 32.

6. By two resolutions of the 19th December, 1928, the Directors decided to pay dividends which would make a total of 8 per cent. for the year on all shares both common and preferred. Holders of ordinary shares objected that the holders of preference shares having received dividends at the rate of 7 per cent. from the beginning, were not entitled to participate in any further distribution of net profits until the holders of ordinary shares had received not only 7 per cent. for the year 1928 but also dividends equal to those paid on the preferred shares in earlier years. This action was then brought to determine the participating rights of the preferred shareholders.

p. 135, l. 16.

p. 135, l. 3.

p. 134, ll. 12-  
27.

p. 1, l. 4.

7. The action was tried before the Honourable Mr. Justice Orde on the 27th May, 1929, and on the 23rd August, 1929, he gave judgment upholding the contentions of the ordinary shareholders, the present Respondents.

p. 53.

8. In the reasons for his judgment the Honourable Mr. Justice Orde gave the history of the Company showing that down to the 31st December, 1927, the preference dividends amounted to 122½ per cent. or \$122.50 per \$100 share and the ordinary dividends to 79 per cent. or \$79 per \$100 share. After stating general principles governing the declaration of dividends his Lordship examined the language of the Letters Patent and held that the rights of ordinary shareholders were not limited as contended by the present Appellants. Words are used inconsistent with such a limitation, which would place the directors in a position to work the grossest injustice to the ordinary shareholders by the simple method of periodically declaring no dividend to them. If the provisions of the Letters Patent fail explicitly to give to preferred shareholders the right of participation for which they contend or are ambiguous they ought not to be so interpreted as to increase the preference already expressly given and to cut down the equitable right of the ordinary shareholders. The language of the share certificates cannot alter or affect rights conferred by the Letters Patent and acceptance of such certificates creates no estoppel and is not a "contemporaneous exposition" of the shareholders' rights. Accordingly the learned Judge granted appropriate relief.

pp. 40-53.

p. 42, l. 15.

p. 42, l. 26.

p. 47, l. 3.

p. 48, l. 5.

p. 48, ll. 36-  
40.

p. 48, ll. 41

*et seq.*

p. 49, ll. 3-35.

p. 49, ll. 41-  
46.

p. 51, l. 44.

p. 52, ll. 5-9.

p. 52, l. 20.

9. The present Appellants appealed and the appeal was heard by the First Divisional Court of the Supreme Court of Ontario on the 25th, 26th and 27th November, 1929. On the 17th March, 1930, the Court by a majority (Sir William Mulock C.J.O. and Justices Magee and Middleton; Justices Hodgins and Grant dissenting) dismissed the appeal.

p. 54.

p. 77.

10. The Chief Justice of Ontario (with whom Mr. Justice Magee agreed) thought the Letters Patent free from ambiguity and perfectly plain, giving ordinary shareholders the right to receive dividends equal in amount to all those paid to preference shareholders before the latter become entitled to

pp. 55-58.

p. 58, l. 9.

p. 56, l. 23.

Record.

p. 56, l. 36. more than 7 per cent. per annum. Dividends mean not yearly dividends but  
 p. 57, l. 1. merely distributions of profit without regard to any period of time. He agreed  
 p. 57, l. 40. with Mr. Justice Orde that the rights of the shareholders as declared by the  
 Letters Patent are not affected by the form of certificate.

p. 58, l. 26. **11.** Mr. Justice Hodgins held that there is in the provisions of the  
 Letters Patent an implication that the surplus of the net profits determined  
 to be distributed over and above the 7 per cent. preferred dividend per  
 annum will be paid to the ordinary shareholders to such an extent that they  
 shall get dividends equal to those paid on the preferred shares, but this  
 p. 58, l. 30. refers to the per annum payment and is confined to the action of the Directors 10  
 p. 58, l. 42. at one time and in relation to one sum of profits then to be distributed. If  
 p. 59, ll. 1-13. read otherwise curious results would follow and the Court should lean against  
 p. 59, l. 26. such a construction. The absence of any charge or declaration in favour  
 p. 60, l. 11. of ordinary shareholders upon capital and surplus in winding up leads to the  
 p. 60, l. 26. conclusion that they have no right to a cumulative dividend. The equality  
 to which they are entitled is only an equality in the 7 per cent. dividend  
 paid to the preference shareholders for the period which the dividend covers.  
 p. 62, l. 19. If the language is ambiguous, as in this case, the intention of the parties  
 p. 63, l. 1. may be elucidated by the conduct they have pursued. The issue and  
 p. 63, ll. 30-41. retention of the share certificates and manner of paying dividends makes 20  
 it not unreasonable to draw the conclusion that the terms in which both the  
 Company and all its shareholders understood the meaning of the words  
 "equal dividends" involved equality of the rate and nothing beyond.

p. 65, ll. 15-22. **12.** Mr. Justice Middleton held that the only preference given to the  
 preference shareholders was a dividend of 7 per cent. per annum cumulative  
 and that the Company and its directors are not given any power by delaying  
 the declaration of dividends upon common stock to give any greater right  
 p. 65, ll. 23-47. to the holder of the preference stock. The form of certificate cannot over-  
 ride the charter and if the argument is put forward as an estoppel there are  
 four obvious answers. 30

p. 70, ll. 31-40. **13.** Mr. Justice Grant considered that the Respondents were in effect  
 contending that the ordinary shareholders were entitled to a cumulative  
 dividend of 7 per cent. per annum, an unusual right requiring clear language  
 p. 74, ll. 39 for its support, which is not to be found in the charter. Under the relevant  
 et seq. Companies Act the only shares which could be given any special rights or  
 p. 71, ll. 30-33. privileges were preference shares. The rights of the ordinary shareholders  
 p. 73, ll. 22-25. are in respect only of such portion of the net profits as the directors may  
 p. 76, l. 33. from time to time determine to distribute. The learned Judge was not  
 convinced that the Court was entitled to look at or consider the form of the  
 stock certificate and so expressed no opinion in that regard. 40

**14.** The Respondents respectfully submit that Justices Hodgins and  
 Grant were wrong in treating the Respondents' contentions as an attempt  
 to find in the Letters Patent words apt to give to the ordinary shareholders  
 the right to a cumulative dividend of 7 per cent per annum. The ordinary  
 shareholders are entitled to all profits not expressly given to the preference

shareholders and the Letters Patent are concerned only to define the rights of the preference shareholders. These rights are to a cumulative dividend and also (but only when a condition precedent has been fulfilled) to participation in other profits. The condition precedent is that the ordinary shareholders shall have received dividends equal to those paid to the preference shareholders. The Letters Patent do not provide for per annum payments but only for payments at a rate per annum and the language is inconsistent with a mere equality of rate on the particular occasion on which a dividend is declared. Every quarter dividends have been separately declared by  
 10 resolution without any general resolution for the year and without any general bylaw providing when dividends shall be paid.

Record.

p. 33, l. 16.  
p. 12, l. 20.

15. It is further respectfully submitted that Mr. Justice Hodgins was wrong in construing the Letters Patent by reference to the form of share certificate. The shareholders are not parties to the Letters Patent and the learned Judge therefore misapplied cases relating to the ascertaining of the intention of an instrument from the conduct of the parties to it. By the combined effect of Sections 8 and 47 of the Companies Act (Revised Statutes of Canada, 1906, Chapter 79) the Company could not by bylaw alter the provisions of the Letters Patent and still less could it do so by the form of its  
 20 certificates. Moreover the certificates expressly referred to the provisions of the Letters Patent. The Appellants relied on an estoppel but there was no evidence to support an estoppel and no Judge has found that an estoppel exists.

16. The Respondents submit that the judgments of Mr. Justice Orde and of the majority of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario were right for the following amongst other

## REASONS.

- 30 1. Because the Letters Patent entitle preference shareholders to participate in surplus profits only after the ordinary shareholders have received dividends equal to those paid on the preferred shares.
2. Because unless regard is had to all dividends previously paid the directors have power by not distributing profits to change the relative rights of the classes of shareholders, whereas the Letters Patent were intended definitely to fix such rights.
- 40 3. Because it would require the clearest language to confer such a power on the directors and the power is not conferred.
4. Because the Letters Patent give the directors a discretion to determine when and what profits shall be distributed, and although the preference dividend is to be at the rate

of 7 per cent. per annum there are no words to restrict the references to dividends to annual dividends, and the use of the words "cumulative" and "rate" clearly shows that dividends other than annual dividends were contemplated.

5. Because rights given by the Letters Patent cannot be altered by the mere form of share certificate issued by the Company.
6. Because the share certificates incorporated by reference the relevant provisions of the Letters Patent and cannot be 10 used to estop holders from relying on such provisions.
7. Because any construction of the Letters Patent other than that adopted by the Courts below would do violence to the language and produce injustice.
8. For the other reasons given by Mr. Justice Orde, Sir William Mulock C.J.O. and Mr. Justice Middleton.

R. S. ROBERTSON.

FRANK GAHAN.



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*On Appeal from the Supreme Court of Ontario.  
(Appellate Division.)*

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BETWEEN

THE STEEL COMPANY OF CANADA, LIMITED  
and JAMES T. ROGERS and GEORGE C.  
COPPLEY, on behalf of themselves and all other  
holders of Preference Stock of the Defendant, The  
Steel Company of Canada, Limited  
*(Defendants) Appellants,*

AND

THOMAS RAMSAY and FRANCIS A. MAGEE,  
suing on behalf of themselves and all other holders  
of Ordinary Stock of The Steel Company of Canada,  
Limited ... .. *(Plaintiffs) Respondents.*

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CASE OF THE RESPONDENTS.

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