

5, 1938

No. 37 of 1937.

# In the Privy Council.

## ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE CORPORATION OF THE CITY OF  
TORONTO - - - - - *Appellant*

AND

10 THE CORPORATION OF THE TOWNSHIP OF  
YORK - - - - - *Respondent*

AND

THE ATTORNEY-GENERAL OF ONTARIO - - *Intervener.*

## Case for the Respondent.

RECORD.

1. This is an appeal, by special leave, from a judgment of the Court of Appeal for Ontario (Rowell, C.J.O., Riddell, Middleton, Fisher and Henderson, J.J.A.), dated 4th December, 1936 dismissing an appeal by the Appellant from an order of the Ontario Municipal Board, dated 23rd September, 1936, whereby the Appellant was ordered to make discovery on oath of relevant documents and to permit inspection of the waterworks system of the Appellant and the Commissioner of Works of the Appellant was ordered to attend for examination for discovery.

pp. 31-33.  
p. 14.

pp. 8-9.

2. By Statute 7 George V, Ontario, chapter 98, section 2, an agreement made between the parties, dated July 18, 1916, was confirmed by the Legislature of Ontario. Paragraph 6 of the agreement, which is schedule "A" to the said Statute, provided for payment by the Respondent to the Appellant for water supplied by the Appellant to the Respondent, at the rate of 20c. per thousand Imperial gallons. Paragraph 21 provided

RESPONDENT'S CASE

that the rates might be changed at any time by mutual agreement or by arbitration as in the agreement provided. Paragraph 23 provided that any differences arising as to the construction of the agreement or the variation of the rates to be charged or any matters relevant thereto should be determined by arbitration. Paragraph 24 provided for the appointment of the arbitrators.

3. By Statute 1 Edward VIII, Ontario, Chapter 88, section 2, it was provided that notwithstanding the provisions of paragraphs 23 and 24 of the said agreement either party might apply to the Ontario Municipal Board to vary the rates to be charged for water supplied or to settle any differences arising as to the construction of the agreement or as to any matters relating to or arising out of the agreement and that the said Board should have jurisdiction to vary and fix the said rates and to hear and determine any such application, and that the decision of the said Board should be final and conclusive and not subject to appeal. 10

pp. 5-6. 4. On 8th July, 1936, the Respondent applied to the said Board to reduce the rates charged for water supplied and to fix the same on a basis fair and equitable to both parties and on 23rd September, 1936, upon the application of the Respondent, the Board made the order referred to in paragraph 1. 20

pp. 8-9. 5. The information and data required to be placed before the Board to enable them to fix fair and equitable rates for the supply of water were entirely within the knowledge and control of the Appellant because of the provisions of the agreement confirmed by the Statute 7 George V, Ontario, Chapter 98.

pp. 9-10. 6. The Appellant applied to the Court of Appeal for Ontario for leave to appeal from the said order pursuant to the provisions of section 157 (1) of the Ontario Municipal Board Act, 1932, 22 George V. (Ontario), Chapter 27, and such leave was granted. p. 12.

pp. 9-10. 7. The grounds of appeal were :— 30

(1) That section 2 of the Statute 1 Edward VIII, Ontario, Chapter 88 is ultra vires the Ontario Legislature ;

(2) That the Ontario Municipal Board has no jurisdiction to hear and determine the said application and, therefore, no jurisdiction to make the order dated 23rd September, 1936 ;

(3) That the members of the Ontario Municipal Board have no jurisdiction to make and enforce the order, not having been appointed by the Governor-General in accordance with the provisions of section 96 of The British North America Act.

8. The Court of Appeal for Ontario dismissed the Appellant's appeal on 4th December, 1936 (1937 Ont. R. 177). The Chief Justice of Ontario was of opinion that the Legislature had power to vary the agreement so as to provide that the rates for water supplied should be varied or fixed by the Ontario Municipal Board; that both the Appellant and the Respondent were subject to the jurisdiction of the Ontario Legislature and that the fixing of the rates to be charged was a purely administrative function; and that while he thought the conferring upon the Board of power "to settle any differences arising between the parties to the said agreement as to the construction thereof, or as to any matters relating to or arising out of the agreement" was ultra vires the Ontario Legislature the Court would not be justified in concluding that the Legislature would not have passed the Act without the clause quoted but that on the contrary there was strong ground for believing that the Legislature would have passed the Act without such clause; and that the objectionable portion of the Act was clearly severable from the remainder thereof.

Mr. Justice Riddell reviewed the Rules of Practice and Procedure issued by the Board and thought there was nothing in the order of the Board which went beyond the authority expressly given and that there was nothing which was a usurpation of the powers of a court so as to be beyond the powers of persons not appointed under the British North America Act.

Mr. Justice Middleton was of opinion that the Province had undoubted jurisdiction over municipal institutions and unquestionable power to enact the general Act establishing the Board; that the Legislature having this wide power over municipal institutions, also the power over property and civil rights within the Province, had power to direct that the terms of the agreement be set aside or disregarded or varied as it should see fit and that it had power to confer on the Board power to regulate the rates to be charged under any agreement between municipalities; that all that was sought by the application was a readjustment of the rate which was a matter over which no court ever had any jurisdiction; that the powers of the Board under the Act of 1936 were clearly severable and that all that was sought to be done was to regulate the rate to be charged for the water supplied; and that in fixing this rate the Board has all the powers conferred upon it by the Rules and has not gone beyond what was authorised.

Mr. Justice Henderson concurred in these opinions expressing the view that the Board has no jurisdiction to construe an agreement and directed attention to the powers conferred by section 45 of the Ontario Municipal Board Act, 1932, Ontario Chapter 27.

9. The Respondent submits that the appeal should be dismissed and the judgment of the Court of Appeal for Ontario, dated 4th December, 1936, affirmed, for the following, among other,

## REASONS.

- (1) BECAUSE the Legislature of Ontario had power to vary the agreement contained in schedule " A " to the Statute 7 George V, Ontario, chapter 98.

*Florence Mining Company, Limited vs. Cobalt Lake Mining Company, Limited*, (1909) 18 Ont. L.R. 275, particularly at 279, 292, 293 and (in the Privy Council) (1910) 43 Ont. L.R. 474, particularly at 476.

*Township of Sandwich vs. Union Natural Gas Company*, (1924) 56 Ont. L.R. 399, particularly at 402 to 405 inclusive. Affirmed on appeal (1925) 57 Ont. L.R. 656. 10

- (2) BECAUSE if the Ontario Legislature has power to vary the agreement, it can vary the said rates, or validly authorize others to do so, having authority as plenary and as ample within the limits prescribed by section 92 of the British North America Act as the Imperial Parliament in the plenitude of its powers possessed and could bestow.

*Hodge vs. The Queen*, 9 App. Cas. 1884, 117, 20 132.

*Township of Sandwich East vs. Union Natural Gas Company*, (1924) 56 Ont. L.R. 399, particularly at 404 and 405.

- (3) BECAUSE under the British North America Act municipal corporations are within the jurisdiction of the Province and one of the ordinary functions of the municipality is the supply of water. This is shown by Provincial legislation over a long period of years, including the Public Utilities Act, Revised Statutes of Ontario, 1927, 30 Chapter 249.

- (4) BECAUSE the fixing of rates does not involve the exercise of judicial functions and does not take away from any court the exercise of any function that otherwise would have rested in such court. The agreement made by the parties provided for the changing of the rates by a board of arbitrators.

*re Town of Sandwich and Sandwich, Windsor and Amherstburg Railway Company*, (1910) 2 Ont. W.N. (Court of Appeal) 93 at 98. 40

*Shell Company of Australia vs. Federal Commissioner of Taxation*, 1931 A.C. 275.

re *Toronto Railway Company and City of Toronto*, (1918) 44 Ont. L.R. 381 ; 1920 A.C. 446 at 454, 455.

*O. Martineau & Sons, Ld. vs. Montreal City*, 1932 A.C. 113 at 128.

- 10 (5) BECAUSE even if on occasion the Board may have acted as a court, which is not admitted, it should not be regarded as always acting as a court because when acting as an administrative tribunal it is not acting as a court.

*Huish vs. Liverpool*, 1914 1 K.B. 109 at 116.

- (6) BECAUSE even if the Ontario Municipal Board Act, 22 George V. Ontario, Chapter 27, gives to the Board any powers which are ultra vires the Legislature of Ontario, this does not invalidate the tenure of office of members of the Board.

*The King Ex Rel. The Township of Stamford vs. McKeown*, 1935 Ont. R. 109 at 110 and 111.

- 20 (7) BECAUSE bodies that are not courts have power to examine witnesses on oath and to order production and discovery and the exercise of such powers does not constitute a body a judicial body. Such powers have been exercised in Ontario for many years.

*Regina vs. Coote* (1873) L.R. 4 P.C. 599 at 605.

*St. John vs. Fraser*, 1935 S.C.R. 411 at 448.

Land Titles Act, Revised Statutes of Ontario 1927, chapter 158, sections 135 and 136.

- 30 Public Inquiries Act, Revised Statutes of Ontario 1927, chapter 20, section 2.

- (8) BECAUSE the Ontario Municipal Board has power, under the Statute 22 George V, Ontario, Chapter 27, to make general rules regulating its practice and procedure and has in fact made such rules which provide for discovery and production and also power, for the due exercise of its jurisdiction and powers, to exercise the same powers, rights and privileges as are vested in the Supreme Court of Ontario as to production and inspection of documents, entry upon and inspection of property and other matters.
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- (9) BECAUSE the words appearing in Statute, 1 Edward VIII, chapter 88, section 22 "or to settle any differences arising between the parties to the agreement as to the construction thereof," either with or without the following words "or as to any matters relating to or arising out of the agreement," can be omitted entirely from said section 2 without affecting either the sense or the grammatical construction of the remainder of the section, and the application of the Respondent to the Ontario Municipal Board relates entirely to the portion 10 of the section which would remain.
- (10) BECAUSE, for the reasons expressed by the Chief Justice of Ontario and Mr. Justice Middleton, any portions of the section which may be open to objection are severable from the rest of the section.

*Strickland vs. Hayes*, 1896 1 Q.B. 290 at 292.

*Pickering vs. Ilfracombe Railway Company*, (1868) L.R. 3 C.P. 235 at 250.

*Regina vs. Lundie*, (1861) 31 L.J.M.C. 157.

*British Imperial Oil Company, Limited vs. Federal Commissioner of Taxation*, (1925) 35 Commonwealth Law Reports 422.

*Brooks-Bidlake and Whittall, Limited vs. Attorney-General for British Columbia*, 1923 A.C. 450 at 458.

Corpus Juris, Vol. 59, page 639.

- (11) BECAUSE the judgments in the Court of Appeal for Ontario are right.

GERSHOM W. MASON.

HOWARD A. HALL.

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**Case for the Respondent.**

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