Privy Council Appeal No. 152 *of* 1917.

The Minister of Justice for the Dominion of Canada - - - *Appellant*

v.

The City of Levis - - - - - - - - - - *Respondents*

FROM

THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC (SITTING IN REVIEW).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER, 1918.

Present at the Hearing:

LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.

[*Delivered by* LORD PARMOOR.]

This is an appeal by special leave, by an Order in Council of November 27th, 1917, from a judgment of the Superior Court of Quebec in review, affirming a judgment of the Superior Court of Quebec, which dismissed a petition of the appellant for an order of mandamus against the respondents. The City of Levis, in pursuance of powers which it possessed, constructed a system of waterworks and drainage in 1904 at a cost of about $500,000. The Council of the City had authority, originally, by sections 396 and 398 (3) of the Cities and Towns Act, 1903, and afterwards under the Cities and Towns Act, 1909, Arts. 5651 and 5653 (3), to impose by bye-law a special tax with the object of meeting the interest on the sums expended in construction of waterworks, &c., and of establishing a sinking fund, and in addition to establish a rate for water. By Art. 5655 it was provided that both the special tax and the water rate, as well as all other taxes due for water, or for meters, were to be levied in accordance with the rules and

in the manner prescribed for general taxes. On the 14th January, 1904, the Council of the City provided by bye-law for the imposition and levy of a special annual tax not exceeding $17,000.00 on the assessed value of every house, shop, or other like building, to meet the interest on the sums expended on the construction of water-works, &c. On the 3rd January, 1907, the Council of the City made a further bye-law imposing an annual tax of 12½ per cent. on properties of the annual value of $50 and upwards, and of 7½ per cent. on properties of the annual assessed value of less than $50, appearing on the assessment roll. The said bye-law contains a provision that the taxes thereby imposed shall be payable before any water has been supplied at the office of the City Treasurer in two instalments on the 1st October and the 1st April; or at such other times, and in such other manner, as the Council shall think right to fix and declare.

The Government of Canada is the owner of a building situate at the corner of Commercial Street and the Avenue Laurier within the area served by the respondents' system of waterworks and drainage. The building was erected in or about the year 1906, and in the first instance was occupied as a Post Office. In 1907 an agreement was made between the Government of Canada and the respondents by which it was provided that the Government would pay the sum of $250 per annum in respect of the water supply to the Post Office, but would not make any payment in respect of drainage. Subsequently further portions of the building were occupied for the purpose of an office of Customs, and an office of Inland Revenue, and a question arose as to the additional payment which should be made by the Government of Canada for the supply of water to these offices. Ultimately the respondents offered to supply water to the new offices for an inclusive sum of $50 a year, in addition to the agreed sum of $250 a year for supply to the Post Office, making a total charge of $300 a year, but the Government, without admitting any liability to pay, insisted that the sum of $35 a year would be a fair sum to charge for the water supply to the whole building. Their Lordships, see no reason to question the finding in the Superior Court, confirmed by the judgment of the Superior Court in review, that $300 did not constitute an excessive demand. No arrangement was made as to the sum which the Government of Canada should pay for the supply of water to the Government building, and on or about the 16th February, 1916, in default of the acceptance by the Government of the arrangement proposed by the respondents, the respondents cut off the water supply from the Government building. The express power given by Article 5661 of the Cities and Towns Act, 1909, is: "If any person . . . refuses or neglects to pay the rate lawfully imposed for the water supplied to him . . . the municipality may cut off the water and discontinue the supply as long as the person is in default." By letter of June 22nd, 1916, the respondents offered to supply the whole of the Government building with water and drainage on terms that the Government should pay the arrears, then unpaid, of the sum of $250 a year

and interest, and that the question of payment for the water supply and drainage for the whole of the building should be agreed within four months, or, in default of agreement, that the respondents should be entitled to cease to afford a water supply from the system of waterworks. This offer was not accepted by the Government. The appellant in July, 1916, presented a petition for a writ of mandamus to order the respondents to supply water to the whole of the building and at the same time deposited in Court the sum of $250 to answer the charge for the supply of water to April 30th, 1916. The appellant claims that he is entitled to an order for a mandamus on the ground that the respondents are under a legal obligation to supply the Government building with water without exacting any annual tax in respect thereof or any payment at all, or (alternatively) any payment other than such as the parties may agree, or in default of agreement such as may be a fair payment having regard to the quantity of water from time to time consumed, and that the respondents had no right to cut off the water supply as the appellant had not refused or neglected to pay any rate lawfully imposed on him. The respondents do not claim to be entitled to impose on the Government of Canada any tax, in respect of a supply of water or drainage to the Government building, or any portion thereof. They admit that the Government is free from all liability to taxation, but claim that the water supplied is in the nature of a merchantable commodity, and that, though the Government is free from all taxation, it is not entitled to claim a supply of water without payment, or to continue to receive it without payment, but that it is bound, if and so long as it requires a supply of that commodity, to pay therefor a fair and reasonable sum.

The first question which arises for the decision of their Lordships is whether the Government of Canada is entitled to demand a supply of water from the waterworks of the respondents without payment. Section 125 of the British North America Act, 1867, relates only to exemption from liability to taxation, and the respondents do not claim to impose any charge in the nature of a tax. The appellant bases his claim for exemption of payment for water supplied to Government buildings, on Article 5729 of the Cities and Towns Act, 1909. This article exempts from taxation the property of the Federal and Provincial Governments of Canada and also certain other property, held and occupied for the purpose for religion, education, or charity. The proprietors or occupiers of property of the latter class are, however, taxable for any special tax or assessment made for the purpose of works required for the opening and maintenance of streets, watercourses and public lighting under the bye-laws, as well as for the payment for the use of water. It was argued that the expression of this special liability to pay for the use of water, in the specified instances, gave rise to the implication that there was no liability on the Government of Canada to pay for the use of water as supplied to Government buildings. The language of the article does not justify any such inference. The article

places a limitation on the general exemption as applied to certain specified properties. In respect of these properties a special tax or assessment is imposed in respect of works required for the opening and maintenance of streets, watercourses, &c., under the bye-laws as well as for the payment of water, but the respondents do not claim to impose any tax or assessment on the Government of Canada for the payment of a water supply. The article does not in any way affect the question of the liability of the Government of Canada to make some payment for the water which the respondents supply to the municipality. Water supplied at the cost of the municipality from artificially constructed waterworks is in the nature of a merchantable commodity, and their Lordships are of opinion, that unless some statutory right is established, the Government of Canada cannot claim to have a supply of water for the Government building, unless it is prepared to pay and to continue to pay in respect thereof a fair and reasonable price. The Chief Justice states in his judgment that this obligation has been recognised throughout the whole Dominion, and the correspondence which has passed between the Government of Canada and the respondents in the present case, indicates that the main contention which has arisen is not a claim to have water supplied without payment but as to the amount which, under the conditions, would be a fair and reasonable price.

The question remains to be considered whether the appellant is entitled to the order for mandamus which he claims in his petition. There is no article which in terms imposes upon the respondents an obligation to give a water supply to any of the houses or other buildings within the area of supply, and there is an absence of any general provision either as to the method or system of supply, or as to the quality of the water. The appellant, however, relies on an implication to be inferred both from the articles, and from the conditions which apply where water is supplied from statutory waterworks, that all owners or occupiers of houses or other buildings within the area of supply are entitled to demand a supply of water from the respondents. In all cases in which the owners or occupiers of houses or other buildings, within the area of supply, are so entitled, it is specially provided by Art. 5657, that the water supplied shall be introduced into houses or other buildings by and at the expense of the municipality.

In the case of the owners or occupiers of taxable property, there is a general obligation imposed upon all such owners or occupiers to pay the special tax imposed, although not availing themselves of the water from the waterworks (Art. 5652). It is a reasonable implication that, in return for this liability, the owners or occupiers of taxable property should have the right to demand a water supply, in respect of such property. There are, moreover, provisions in the bye-laws which define the conditions attached to such right. Article 43 of the bye-law of January 3rd, 1907, provides that taxes imposed under the bye-law shall be payable before any water has been supplied at the offices of the City

Treasurer. Article 47 of the same bye-law directs that in every case of non-payment of taxes, charges or compensation, imposed by this bye-law, within 30 days of their accruing due, the Council or their authorised officer may discontinue the supply of water in any building, for which such charges or compensation are due, or to any person who makes default in payment of the said taxes, charges, or compensation. It is further provided that the discontinuance of the supply of water shall not prevent the liability of the owner or occupier to pay the taxes, charges or compensation, and that the supply of water to a person in default shall not be renewed, until all arrears have been paid. These articles are clearly framed on the basis of an obligation to supply, and their Lordships cannot doubt that this obligation is imposed on the municipality in respect of taxable properties within the area of supply, although no monopoly of supply, which would prevent any owner or occupier from providing an independent supply, has been vested in the respondents. These articles, however, do not apply to the Crown, or to any person requiring a supply of water who is not the owner or occupier of taxable property, and the respondents cannot rely upon them to justify their action in cutting off the water supply from the Government building.

In the case of the Crown no implication of an obligation upon the respondents to give a water supply can be based on liability to water taxation, since the Crown is admittedly not liable to such taxation. The respondents, moreover, have not the monopoly of water supply, so that the implication of an obligation cannot be supported on the ground that the Government of Canada has been deprived of the right to supply water to the Government building. It must be recognised, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply Government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred by statute a position of great and special advantage, and they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class, who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation. Their Lordships are therefore of opinion that there is an implied obligation on the respondents to give a water supply to the Government building provided that, and so long as, the Government of Canada is willing, in consideration of such supply, to make a fair and reasonable payment. The case stands outside of the express provisions of the statute, and the rights and obligations of the appellant are derived from the circumstances and from the relative positions of the parties. The question, therefore, arises whether the respondents have

made any such default in their obligation to supply water to the Government building, as would entitle the appellant to an order for a mandamus.

The facts show that the respondents have not refused to supply water provided that the Crown is willing to pay a reasonable amount. An arrangement was made in 1906 under which the respondents supplied water to a portion of the Government building used as a Post Office in consideration of an annual payment of $250. This arrangement remained in force over a series of years, but an additional payment was subsequently claimed, when the rest of the building was used as an office of Customs and Inland Revenue. After negotiation, the respondents offered to supply the whole building for an annual payment of $300, but Mr. P. Hearson Gregory, writing on behalf of the Government, declared that the proposed charge was absolutely absurd and repeated a former offer, without prejudice, that a flat rate be entered into, for the whole of the service of the building, at $35 per annum, as a sum in every way fair for the amount of water consumed. The Superior Court of Quebec, and the Superior Court in review, have found that the sum claimed by the respondents, and which the Crown was not willing to pay on the ground that it was absolutely absurd, was not excessive having regard to all the conditions, and the charges imposed on the owners or occupiers of taxable property. The result is that at the time when the petition was presented for an order for mandamus the respondents were not in default, since the Government of Canada at that time was not willing to pay a price for the supply of water which had by a concurrent finding of two Courts been held not to be excessive. The respondents were therefore no longer bound to supply a commodity for which the appellant as their customer was no longer willing to pay, and equally they were entitled to discontinue the supply, not as an exercise of an express power to cut it off, but as an implied correlative right, arising because the appellant was no longer prepared to perform his reciprocal obligation. Their Lordships concur in the judgment of the Superior Court of Quebec, confirmed by the judgment of the Superior Court in review, that the order for a mandamus should under these circumstances be discharged.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

THE MINISTER OF JUSTICE FOR THE DOMINION OF CANADA

v.

THE CITY OF LEVIS.

DELIVERED BY LORD PARMOOR.

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