

In the Privy Council.

No. 37 of 1937.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE CORPORATION OF THE CITY OF TORONTO ... *Appellant,*

AND

THE CORPORATION OF THE TOWNSHIP OF YORK ... *Respondent,*

AND

THE ATTORNEY-GENERAL OF ONTARIO *Intervener.*

CASE FOR THE INTERVENER THE ATTORNEY- GENERAL OF ONTARIO.

1. By an Act of the Legislature of the Province of Ontario, 6 Geo. V, 1916, Chapter 100, respecting the Township of York, section 8 provided that the City of Toronto shall permit the Township of York to connect water mains laid in the Township of York with the water system of Toronto, and supply water for the use of residents of such portions of the Township of York, and upon such terms and conditions as may be mutually agreed upon, or, in case of failure to agree as may be determined by The Ontario Railway and Municipal Board.

Record.

It was further provided by section 9, that the Township of York and
10 the City of Toronto be authorised to enter into an agreement in the form set out in Schedule A to the Act (6 Geo. V, 1916, Chapter 100.)

2. On the 18th day of July, 1916, the Corporation of the City of Toronto entered into an agreement with the Township of York to supply and sell water for the use of the inhabitants of the said Township upon certain terms embodied in the agreement.

p. 5, l. 19.

This water was to be paid for by the Township at the rate of twenty cents per thousand imperial gallons.

3. Clause 21 of the agreement provided that the rates may at any time be changed by mutual agreement or by arbitration and by Clause 23 any

Record. differences arising between the City and the Township as to the construction of the agreement, variation of the rates charged, or any matters relative thereto, may be determined by arbitration.

4. This agreement was confirmed and ratified by an Act of the Ontario Legislature, 1917, 7, *Geo. V, Chapter 98*, the said agreement being set out in Schedule A thereto.

5. By an Act of 1936 of The Ontario Legislature, 1, Edward VIII, Chapter 88—entitled an Act respecting the Township of York, it is provided as follows :—

Section 2: “ Notwithstanding the provisions of paragraphs 23 and 10
 “ 24 of an agreement made between the corporation of the City of
 “ Toronto and the Corporation of the township of York, dated the
 “ 18th day of July, 1916, a copy of which agreement is set out in
 “ Schedule ‘ A ’ of An Act Respecting the Township of York, being
 “ chapter 98 of the Statutes of Ontario, 1917, and notwithstanding the
 “ provisions of such Act, either party to the said agreement may from
 “ time to time apply to the Ontario Municipal Board to vary the rates
 “ to be charged for water supplied by the said City Corporation under
 “ the terms of the said agreement or to settle any differences arising
 “ between the parties to the said agreement as to the construction 20
 “ thereof, or as to any matters relating to or arising out of the agreement,
 “ and the Ontario Municipal Board shall have jurisdiction to vary and
 “ fix the said rates, and to hear and determine any such application,
 “ and the decision of the said board on any such application shall be
 “ final and conclusive and shall not be subject to appeal.”

6. The Ontario Municipal Board was incorporated in 1932 by the Provincial Act, 22, *Geo. V, Chapter 27*, in succession to the pre-existing Ontario Railway and Municipal Board, which was first brought into being in 1906 by Provincial Statute (*6 Edward VII, 1906, Chapter 31.*)

pp. 5-6. 7. On the 8th of July, 1936, The Township of York gave notice of an 30 application to the Ontario Municipal Board stating that the rate of twenty cents per thousand gallons charged by the City for water purchased by the County is excessive and unjustified, and the Township asks that the Board reduce the rate charged and fix the rate to be charged for water supplied under the agreement on a basis which would be fair and equitable to both parties.

pp. 6-7. 8. On the 30th day of July, 1936, the City of Toronto filed a reply to this application, setting out that the Board had no jurisdiction to hear the application or to vary the rates and that Section 2 of the Act of 1936, 1 Edward VIII, Chapter 88, is *ultra vires* of the Province of Ontario. 40

p. 8, l. 1. 9. On the 15th day of September, 1936, notice of an application by the Township for an Order for the examination of one R. C. Harris, Works Commissioner for the City of Toronto was given the City.

This was opposed by the City and the application resulted in an Order being made by the Board dated the 23rd day of September, 1936, directing the City to make discovery on oath of documents relating to matters in question in the application and amongst other things ordered the Commissioner of Works to attend for examination. Record.
pp. 8-9.

10. From this Order by special leave, an application was made to the Supreme Court of Ontario (Appellate Division) for leave to appeal. pp. 9-10.

11. Leave was granted to appeal on the 6th day of October, 1936. p. 12.

12. The appeal came before the Court of Appeal for Ontario on the 27th day of October, 1936, and the grounds of appeal were :— pp. 9-10.

(1) That section 2 of the Township of York Act is *ultra vires* the Ontario Legislature.

(2) That the Ontario Municipal Board has no jurisdiction to hear and determine the application of the Corporation of the Township of York for reduction and variation of the water rates and therefore has no jurisdiction to make the Order dated the 23rd day of September, 1936.

(3) That the members of The Ontario Municipal Board have no jurisdiction to exercise judicial functions such as the making of the said Order when they were not appointed by the Governor General in accordance with the provisions of section 96 of The British North America Act. 20

(4) And upon such other grounds as counsel may deem advisable.

13. The Court of Appeal composed of Rowell, C.J.O. Riddell, Middleton Fisher and Henderson J.J.A. dismissed the appeal and delivered reasons for judgment on the 4th day of December, 1936. p. 14.
pp. 15-31.

14. On the 18th day of March, 1937, special leave was granted to the City of Toronto to appeal to the Judicial Committee of the Privy Council from the said judgment of the Court of Appeal for Ontario. pp. 31-32.

15. On the 29th day of July, 1937, special leave was granted to His Majesty's Attorney-General for the Province of Ontario to intervene in the said appeal to the Judicial Committee of the Privy Council. 30

THE POSITION OF THE ATTORNEY-GENERAL OF ONTARIO AND HIS CASE
IN REFERENCE TO THIS APPEAL.

16. The Attorney-General submits that this appeal involves consideration of the following matters :—

(1) Has the Legislature of the Province of Ontario power to create a Board and empower such Board to vary rates to be charged for water supplied by one municipality to another which had been fixed by agreement between the Municipalities and to enact section 2 of I, Edward VIII, 1936, Chapter 88—which did confer power on the Ontario Municipal Board to vary the rates to be charged for water supplied 40

Record.

by the City of Toronto to the County of York under an agreement dated, July 18th, 1916.

(2) Is the power conferred on the Board by section 2

“ to vary the rates to be charged for water supplied by the
“ said City Corporation under the terms of the said agreement ”
clearly severable from the other part of the section giving power to
the Board

“ 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.”

10

(3) Had the Board power to make the Order of September 23rd, 1936, and was the Board acting within its constitutional limitations.

WHAT THE ONTARIO COURT OF APPEAL FOUND.

p. 17, l. 9.

ROWELL, C.J.O.

(1) “ I am of the opinion that the Legislature had power to vary the
“ agreement of the 18th of July, 1916, so as to provide that the rates
“ to be charged for water supplied by the Appellant under the terms of
“ the said agreement should be varied or fixed by the Ontario Municipal
“ Board.

“ Both of the Corporations are subject to the jurisdiction of the 20
“ Ontario Legislature and fixing the rates to be charged for water
“ under such an agreement is a purely administrative function, and, as
“ such, may be competently conferred upon the Ontario Municipal
“ Board.

* * * * *

p. 18, l. 35.

“ It is also most important that the right of the Province to create
“ purely administrative tribunals and to confer upon them all the
“ powers necessary to enable them to discharge these duties effectively
“ should be maintained.”

Referring to the case of: “ *In re Town of Sandwich and Sandwich Windsor
and Amherstbury Railway Co.*—(1910, 2, O.W.N. p. 93), the Chief Justice 30
quotes with approval what Garrow, J.A. stated in delivering the judgment
of the Court—in which he said :—

p. 23, l. 10.

“ The Board, it must be remembered, is not a Court, but an adminis-
“ trative body, having, in connection with its primary duty, power to
“ construe the agreements which it is called on to enforce, but no
“ general power such as the Superior Courts possess, of adjudicating
“ upon questions of construction in the abstract.”

p. 23, l. 26.

The Chief Justice also quotes with approval from the judgment of
Meredith, C.J. in *Toronto Railway vs. City of Toronto* (1918) 44, O.L.R. 381,
at p. 391, *et seq.*

40

The Learned Chief Justice after reviewing the cases set out in his
judgment says :—

p. 24, l. 24.

“ These authorities establish (1) that the Province is competent
“ to create and appoint an administrative tribunal, and to confer upon
“ it all the powers necessary to enable it to discharge effectively the
“ administrative duties imposed upon it ; and (2) the Province is not

“competent to confer upon a tribunal created and appointed by it Record.
 “power to determine purely judicial questions such as are normally
 “determined by Courts of justice.”

17. RIDDELL, J.A., after a discussion in his judgment of the Rules p. 26, l. 33.
 made by the Board as to procedure, says :— p. 27, l. 14.

“There is nothing in the order complained of which goes beyond
 “the authority expressly given ; and, after an examination of the many
 “cases cited, I find myself unable to detect anything which is a usurpa-
 “tion of the powers of a Court so as to be beyond the powers of persons
 10 “not appointed by His Excellency the Governor-General under the
 “B.N.A. Act, 1867.”

18. MIDDLETON, J.A. After dealing with rules made by the Board p. 27, ll. 20
 on the 20th of March, 1928, and finding they are identical with the powers et seq.
 possessed by the Ontario Railway and Municipal Board under earlier legisla-
 tion—which rules provide for examinations for discovery, and the production
 of documents, under which rules the Board made the Order in question
 in this Appeal—and dealing with the objections as to jurisdiction raised
 says :—

20 “The Province has undoubted jurisdiction over Municipal Institu- p. 29, l. 12.
 “tions and has, I think, unquestionable power to enact the general
 “Act establishing the Municipal Board. The Legislature having this
 “wide power over Municipal Institutions and having also the power
 “over property and civil rights within the Province it has power, I
 “think, to direct that the terms of an agreement between Municipalities
 “within Ontario shall be set aside and disregarded or be varied as it
 “may see fit, and it had power to confer upon the Municipal Board
 “power to regulate the rates to be charged under any agreement between
 “Municipalities by the Board, instead of by Arbitrators.”

* * * * *

30 “As a matter of policy the Provincial Government has of recent p. 29, l. 35.
 “years endeavoured to concentrate the determination of purely munici-
 “pal questions in the Municipal Board rather than leaving these
 “questions to be dealt with by special acts and by the several Ministers
 “having charge of different departments of Provincial Government,
 “and it seems to be impossible to doubt its jurisdiction.

40 “To secure uniformity the Board has been endued with great and
 “very drastic powers. It may disregard and override agreements
 “which in its view conflict with public policy. It is given far greater
 “powers than ever possessed by any Court in that it may disregard the
 “terms of agreements which are legally binding, and fix the rates
 “quite irrespective of the terms of the agreement.

“In all this there is nothing beyond the jurisdiction of the Ontario p. 30, l. 3.
 “Legislature.”

* * * * *

“All that is here sought is a readjustment of the rate to be charged. p. 30, l. 11.
 “This was a matter over which no Court ever had any jurisdiction, and it

Record. “ is not the subject matter properly falling within the jurisdiction of
“ the Court.”

Dealing with section 2 of I, Edward VIII, Chapter 88, as to severability,
the learned Judge says :—

p. 30, l. 14. “ The powers of the Board, I think, are clearly severable and all
“ that is now sought to be done is to regulate the rate to be charged by
“ the City of Toronto for the water supplied.

“ In fixing this rate the Board has all the powers conferred upon it
“ by the rules and has not gone beyond that which was authorized.”

19. HENDERSON, J.A., in his judgment, says :— 10

p. 30, l. 33. “ In my opinion both the construction and enforcement of any
“ contract between subjects, is a matter for the Courts, and further in
“ my opinion the cardinal principle which enables us to uphold the
“ order in question here is because it is made in exercise of a power
“ given by the Statute to the Board to set aside the contract between the
“ parties, and impose upon them terms which they have not contracted
“ for—something which no Court has jurisdiction to do.”

SUBMISSION OF THE ATTORNEY-GENERAL FOR ONTARIO.

20. The Attorney-General for the Province of Ontario submits that the
judgment of the Court of Appeal for Ontario, extracts of which are set out²⁰
above, is right and that the said judgment of the Court of Appeal for Ontario
dated the 4th day of December, 1936, should be affirmed for the following
among other

REASONS

1. Because legislation dealing with rights arising under contracts
or agreements falls exclusively to the Provinces under Head
13 of section 92 of the B.N.A. Act, 1867—being “ Property
and Civil Rights within the Province,” and the Legislature
of a Province has exclusive power over Property and Civil
Rights within the Province. 30
2. Because contracts can be varied by the legislation of a
Province, and this power is exclusive.
3. Because Municipalities in the Province are creatures of Pro-
vincial Statutes, and their creation for the management of
Municipal affairs is within the competence of a Provincial
Legislature.
4. Because the Provincial Legislatures derive exclusive authority
to deal with Municipal Institutions, not only under section
92 (8) of the B.N.A. Act, 1867, but also by section 92 (13)
“ Property and Civil Rights within the Province ” and 40
section 92 (16) “ generally all matters of a merely local or
private nature in the Province.”

- 5 Because regulation, control and supervision of Municipal administration in all its aspects and particularly in reference to agreements between municipalities, including agreements which fix terms for the supply of water by one municipality to another, are matters vested exclusively by the B.N.A. Act, 1867, in Provincial Legislatures.
- 10 6. Because a Provincial Legislature is competent to employ such inferior agencies as it sees fit, and empower such agencies to deal with matters that such Legislature is competent to deal with, and the legislature of the Province of Ontario is competent to authorize the Ontario Municipal Board to vary the rates to be charged for water supplied by the City of Toronto to the County of York under the terms of an agreement.
7. Because it is a matter for the Legislature and not the Courts to decide how far a Legislature shall seek the aid of subordinate agencies and how long it shall continue them.
- 20 8. Because the pith and substance of section 2 of the 1936 Act that gives power to the Ontario Municipal Board to vary the terms of the agreement in respect to charges for water rates, falls exclusively within the constitutional capacity of the Province under section 92 (8), (13) and (16) of the B.N.A. Act, 1867, also
- Sec. 92 (8) "Municipal Institutions"
- (13) "Property and Civil Rights within the Province" and
- (16) "generally all matters of a merely local or private nature in the Province."
- 30 9. Because the Province is competent to create and appoint an administrative tribunal, and to confer upon it all the powers necessary to enable it to discharge effectively the administrative duties cast upon it.
- 40 10. Because section 2 of the 1936 Act which gives power to the Board to vary and fix the rates to be charged for water supplied by the City of Toronto to the County of York under the terms of the agreement of 18th July, 1916, should be read as merely dealing with matters relating to control, administration and regulation of the affairs of municipalities and deal with matters that are merely of a local nature within the Province, and absolute jurisdiction is vested in the Province to so legislate.
11. Because even though it may be contended that the added powers given to the Board by section 2 of the Act of 1936,
- "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,”

empowers the Board to usurp the proper functions of the Court and so are beyond the Provincial jurisdiction, yet the powers of the Board to vary the rates to be charged for water supplied by the City to the County under the terms of the agreement are clearly severable. The provisions of section 2 giving power to the Board to vary and fix rates in the agreement or to settle differences are distinct powers, one not being dependent on the other. 10

12. Because there are no grounds for presuming that the Legislature would not have passed the Act without the clauses objected to.
13. Because the Board created by the Legislature of the Province of Ontario and exercising the power given it by section 2 of the 1936 Act to vary and fix water rates under the agreement between the Municipalities, is not functioning in such a manner as to usurp the jurisdiction of a Superior, District or County Court, because no court ever had jurisdiction to set aside a contract between parties and impose terms upon 20 them which they have not contracted for.
14. Because the power of the Board to so fix rates and alter the agreement under section 2 of the 1936 Act does not involve in any way the exercise of judicial functions and is not a usurpation of the power of the Courts because the Courts never had such jurisdiction.
15. Because an administrative Board may have quasi judicial duties to perform does not convert it into a Court and the appointment of its members does not, therefore, invade the Dominion power with respect to the appointment of Judges. 30
16. Because the Board exercises certain powers of a purely administrative character which it is competent for the Legislature of Ontario to confer on it, and the mere circumstance that the Legislature may have purported to confer upon the Board powers of a judicial character which might be assumed to be *ultra vires*, the Legislature of Ontario did not invalidate their term of office.
17. Because under the Statute, 22 Geo. V, Ontario, Chapter 27, the Board has power in its administrative capacity to make rules and deal with procedure in such a matter as the subject 40 of this appeal.
18. Because the Judgments in the Court of Appeal of Ontario are right.

I. A. HUMPHRIES.

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