

5, 1938

In the Privy Council

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.

Record of Proceedings

FRESHFIELDS, LEESE & MUNNS,
Solicitors for the Appellant.

GARD, LYELL AND COMPANY,
Solicitors for the Respondent.

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In The Privy Council

O.M.B.
No. 1.
Notice of
Application,
July 8, 1936.

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.

Record of Proceedings

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PART I.

Before the Ontario Municipal Board.

PLEADINGS AND PROCEEDINGS.

No. 1. Notice of Application on behalf of the Respondent.

1. The Applicant is a Municipal Corporation, lying to the north of and adjacent to the City of Toronto.
2. The Respondent is a Municipal Corporation, which owns and operates as a public utility a waterworks system deriving its supply of water from Lake Ontario.
3. Under the terms of an agreement made between the Corporation of the Township of York and the Corporation of the City of Toronto, dated the 18th day of July, 1916, the respondent undertakes to sell to the applicant a metered supply of water at a rate of 20 cents per thousand imperial gallons, delivered to the municipal boundaries of the Applicant. From this point the Applicant conveys the water in its own mains and delivers the same to the residences, factories and other points of consumption in the Township of York.
4. The Applicant says that the rate of 20 cents per thousand gallons charged by the Respondent for water purchased by the said Applicant is excessive and unjustified.

O.M.B.
No. 1.
Notice of
Application,
July 8, 1936.

5. The Applicant as authorized by the provisions of Section 2 of the Township of York Act, 1936, hereby makes application to the Board to reduce and to fix the rates charged for water supplied by the respondent to the Applicant under the agreement hereinbefore referred to on a basis which will be fair and equitable both to the respondent and to the Applicant.

6. This application will be heard by the Board after ten days from the service hereof, at such time and place and in such manner as the Board may order and direct.

7. This notice is given by Howard A. Hall, K.C., of the City of 10 Toronto, in the County of York, Solicitor for the Applicant.

DATED at Toronto this 8th day of July, 1936.

The Corporation of the Township of York,
By its Solicitor

HOWARD A. HALL, K.C.,
320 Bay St., Toronto.

To:

The Corporation of the City of Toronto.

O.M.B.
No. 2.
Reply,
July 30, 1936.

No. 2. Reply submitted on behalf of the Appellant.

1. The Reply of the above named Respondent to the Notice of Ap-20 plication of the above named Applicant.

2. The Respondent admits paragraphs Nos. 1, 2 and 3 of the Notice of Application.

3. The Respondent claims that sections 8 and 9 of a Statute Respecting the Township of York passed by the Legislature of the Province of Ontario in the sixth year of the reign of His Majesty, King George the Fifth, Chapter 100, and section 2 of a Statute Respecting the Township of York passed by the said Legislature in the seventh year of His Majesty's reign, Chapter 98, are *ultra vires* of the said Legislature, and, in any event, do not authorize the Corporation of the City of Toronto to 30 supply water to the Township of York. The Respondent further says that the Township of York Act, passed in the first year of the reign of His Majesty King Edward the Eighth, Chapter 88, is *ultra vires* of the said Legislature, and that, therefore, the Ontario Municipal Board has no jurisdiction to hear this application or to vary the rates to be charged for water supplied by the Respondent to the Applicant.

4. The Respondent further says that the Ontario Municipal Board has no jurisdiction to hear this application under the authority of the said Township of York Act passed in 1936, nor under any other Act.

5. The Respondent further says that the Legislature of the Province of Ontario has not the right to pass legislation altering or interfering with the terms of an Agreement dated the 18th day of July, 1916, made between the Respondent and the Applicant, after works have been constructed pursuant to the terms of such Agreement.

O.M.B.
No. 2.
Reply.
July 30, 1936.

6. The Respondent further says that the said Agreement does not provide for a change or variation of the rates to be paid by the Applicant for water supplied to it.

7. The Respondent further says that it was given the power and 10 duty to distribute water to the inhabitants of the City of Toronto, and was vested with the right to construct works and distribute water by Statutes passed by the Legislature of the Province of Ontario and entitled as follows: 35 Victoria, Chapters 78 and 79; 37 Victoria, Chapters 74 and 75; 39 Victoria, Chapter 64; 40 Victoria, Chapter 39, and 41 Victoria, Chapter 41, and such powers and duties having been carried out or in part performed, the Legislature of the Province of Ontario had no authority to alter or interfere therewith.

8. The Respondent further says that to the extent that the above mentioned Statutes passed in the years 1916, 1917 and 1936 conflict with 20 the Statutes named in paragraph 7 hereof, the said Statutes of 1916, 1917 and 1936 are void and the provisions of the earlier Statutes must prevail.

9. In any event the Respondent says that the rate of twenty cents per 1,000 Imperial gallons is a rate which is fair and equitable to the Applicant and the Respondent.

10. The Respondent further says that there is no ground for reducing the rate below that fixed between the parties when the Agreement was made on the 18th day of July, 1916.

11. The Respondent further says that the Applicant is not entitled to the relief or remedies sought in its application.

30 12. This Reply is made by C. M. Colquhoun, Esq., K.C., solicitor for the above named Respondent.

DATED at Toronto this 30th day of July, 1936.

The Corporation of the City of Toronto,

By its Solicitor, C. M. COLQUHOUN,
City Hall, Toronto.

To: HOWARD A. HALL, Esq., K.C.,
320 Bay Street,
Toronto,
Solicitor for the Applicant.

O.M.B.
No. 3.
Notice of
Application
for Discovery,
etc.
Sept. 15, 1936.

No. 3. Notice of Application for Discovery.

TAKE NOTICE that an application will be made by the Applicant, The Corporation of the Township of York before the Ontario Municipal Board at its Chambers, Parliament Buildings, Toronto, on Monday the 21st day of September, 1936, at the hour of 11 o'clock in the forenoon or so soon thereafter as the motion can be heard for an Order for the examination for discovery herein of R. C. Harris, Works Commissioner for the City of Toronto, and for an order for the production of documents and for inspection and for entry on and inspection of property of the respondent, and for such further and other order as to the Board may seem meet. 10

AND FURTHER TAKE NOTICE that on this application will be read the pleadings herein and such further and other material as counsel may advise.

DATED at Toronto this 15th day of September, 1936.



O.M.B.
No. 4.
Order,
Sept. 23, 1936.

No. 4. Order of Ontario Municipal Board.

THE ONTARIO MUNICIPAL BOARD.

BEFORE:

E. W. CROSS, Esq., M.A.,
Chairman, and

W. M. BRODIE, Esq.,
Vice-Chairman.

WEDNESDAY, THE 23RD DAY OF
SEPTEMBER, A.D. 1936.

20

BETWEEN:

THE CORPORATION OF THE TOWNSHIP OF YORK,
APPLICANT,

AND

THE CORPORATION OF THE CITY OF TORONTO,
RESPONDENT.

UPON THE APPLICATION of the Applicant, The Corporation of the Township of York,

1. IT IS ORDERED that the Respondent The Corporation of the 30 City of Toronto, do within ten days after the service of this Order make discovery on oath of the documents which are or have been in its posses-

sion or power relating to any matters in question in this application and do produce to and deposit the same with the Secretary of the Board at Toronto for the usual purposes.

O.M.B.
No. 4.
Order,
Sept. 23, 1936.

2. AND IT IS FURTHER ORDERED that the Applicant, by such persons, not more than three in number, as may be authorized in writing under the hand of the Clerk of the Applicant Corporation, may at any time and from time to time enter on and inspect any and all properties of the Respondent Corporation comprising any part of the Waterworks System of the said Respondent Corporation.

10 3. IT IS FURTHER ORDERED that R. C. Harris, Commissioner of Works for the above named Respondent, do attend before W. J. McWhinney, Esquire, or some other Special Examiner, at such time and place as he shall by writing appoint, but not sooner than ten days after the service of this Order on the Respondent and submit to be examined viva voce upon oath touching his knowledge of the matters in question in this application.

E. W. CROSS,
Chairman.

Before the Court of Appeal for Ontario.

20

PROCEEDINGS.

No. 5. Notice of Application by Appellant for leave to appeal to the Court of Appeal for Ontario.

TAKE NOTICE that by special leave of His Lordship, The Chief Justice of Appeal, the Court will be moved on behalf of the Appellant, The Corporation of the City of Toronto at Osgoode Hall, Toronto, on Friday, the 2nd day of October, 1936, at 11.00 o'clock in the forenoon or soon thereafter as counsel can be heard, for an order pursuant to the provisions of Section 157(1) of The Ontario Municipal Board Act, 1932, 22 George V, Chapter 27, granting leave to appeal from the Order of the Ontario Municipal Board dated the 23rd day of September, 1936, and staying the execution of the said order pending the appeal therefrom or for such other order as may seem just.

Court of Appeal
No. 5.
Notice of
Application for
Leave to
Appeal,
Sept. 25, 1936.

The appellant desires to appeal from the said Order of the Ontario Municipal Board upon the following grounds:

1. That Section 2 of the Township of York Act, 1936, 1 Edward VIII, Chapter 88, is ultra vires the Ontario Legislature.

Court of Appeal
No. 5.
Notice of
Application for
Leave to
Appeal,
Sept. 25, 1936.

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.

4. And upon such other grounds as counsel may deem advisable. 10

AND TAKE NOTICE that in support of such motion will be read the Affidavit of James Palmer Kent, filed, and the exhibits therein referred to.

DATED at Toronto this 25th day of September, 1936.

Court of Appeal
No. 6.
Affidavit of
J. P. Kent,
Sept. 28, 1936.

No. 6. Affidavit of J. P. Kent.

I, JAMES PALMER KENT, of the City of Toronto, in the County of York, Solicitor, make oath and say as follows:

1. I am Assistant City Solicitor in the office of Mr. C. M. Colquhoun, K.C., and as such have knowledge of the facts herein stated.

2. An application was made by the Corporation of the Township of 20 York to the Ontario Municipal Board to reduce and fix the rates charged for water supplied by the Corporation of the City of Toronto to the Corporation of the Township of York pursuant to an agreement dated the 18th day of July, 1916.

3. The respondent herein claims that such application was authorized by the provisions of Section 2 of the Township of York Act, 1936, 1 Edward VIII, Chapter 88.

4. The agreement hereinbefore referred to dated the 18th day of July, 1916, is set out in Schedule "A" of the Township of York Act, 1917, 7 George V, Chapter 98. The Appellant has been since the date of the said 30 agreement supplying water to the Respondent under the terms thereof at a rate of 20 cents per thousand gallons. The amount of water so supplied

during 1935 was 1,257,512,103 gallons, which at the said rate would amount to \$251,502.42.

Court of Appeal
No. 6.
Affidavit of
J. P. Kent,
Sept. 28, 1936.

5. The Notice of Application to the Ontario Municipal Board dated the 8th day of July, 1936, is attached hereto and marked Exhibit "A" to this my affidavit. The reply of the Corporation of the City of Toronto to the said application dated the 30th day of July, 1936, is attached hereto and marked Exhibit "B" to this my affidavit.

6. Attached hereto and marked Exhibit "C" to this my affidavit dated September 1, 1936, is a communication from the solicitors for the Corporation of the Township of York to the solicitor for the Corporation of the City of Toronto.

7. Attached hereto and marked Exhibit "D" to this my affidavit is a copy of the reply dated September 11, 1936, to the above-mentioned communication.

8. Attached hereto and marked Exhibit "E" to this my affidavit is an Order made by the Ontario Municipal Board dated the 23rd day of September, 1936, upon the application of the Corporation of the Township of York and the Corporation of the City of Toronto desires leave to appeal from the decision and jurisdiction of the Ontario Municipal Board to make this Order.

9. Section 8 of The Ontario Municipal Board Act, 1932, 22 George V, Chapter 27, provides in part "That the Board shall be composed of three members to be appointed by the Lieutenant-Governor-in-Council" and I am informed and believe that the members of the Ontario Municipal Board have been appointed by the Lieutenant-Governor in Council.

SWORN before me at the City of Toronto, in the County of York, this 28th day of September, 1936.

30 "J. B. Sherring"
A Commissioner, etc.

"J. P. Kent"

No. 7. Order Court of Appeal granting leave to Appeal.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE THE CHIEF JUSTICE IN APPEAL.	}	Tuesday, the sixth day of October, A.D. 1936.
THE HONOURABLE MR. JUSTICE FISHER.		
THE HONOURABLE MR. JUSTICE MACDONNELL.		

IN THE MATTER OF AN APPEAL FROM
THE ONTARIO MUNICIPAL BOARD.

BETWEEN:

THE CORPORATION OF THE CITY OF TORONTO,

APPELLANT, 10

AND

THE CORPORATION OF THE TOWNSHIP OF YORK,

RESPONDENT.

Court of Appeal
No. 7.
Order grant-
ing Leave to
Appeal,
Oct. 6, 1936.

UPON MOTION made this day unto this Court by counsel for the Corporation of the City of Toronto, the Appellant, for an Order granting leave to the Appellant to appeal to this Court from an Order of The Ontario Municipal Board dated the 23rd day of September, A.D. 1936, and upon hearing read the Affidavit of James Palmer Kent, filed, and the Exhibits thereto, and upon hearing Counsel for the Corporation of the Township of York, the Respondent, The Ontario Municipal Board not 20 being represented, although duly notified,

(1) IT IS ORDERED that the Appellant be granted leave to appeal from the Order of The Ontario Municipal Board herein dated the 23rd day of September, A.D. 1936,

(2) AND IT IS FURTHER ORDERED that the hearing of the said appeal be expedited,

(3) AND IT IS FURTHER ORDERED that the costs of this application be costs in the appeal.

D'Arcy Hinds,

Registrar. S.C.O. 30

No. 8. Notice to Attorney-General of Canada and Attorney-General of Ontario.

Court of Appeal
No. 8.
Notice to
Attorneys-
General,
Oct. 8, 1936.

TAKE NOTICE that the Appellant has been granted leave pursuant to the provisions of Section 157 of The Ontario Municipal Board Act (1932) 22 Geo. V., Chapter 27, to appeal from an Order of The Ontario Municipal Board dated the 23rd day of September, 1936, and this appeal will be placed on the list of appeals to be heard by the Court of Appeal for Ontario and will be heard on or after Monday, the 19th day of October, 1936.

10 The Appellant claims that The Ontario Municipal Board had no jurisdiction to make the said Order upon the following grounds:

(1) THAT Section 2 of the Township of York Act, 1936, 1 Edward VIII, Chapter 88, 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 make and enforce the said Order when they were not
20 appointed by the Governor-General in accordance with the provisions of Section 96 of The British North America Act.

DATED at Toronto this 8th day of October, 1936.

No. 9. Affidavit of E. J. Lemaire.

Court of Appeal
No. 9.
Affidavit of
E. J. Lemaire,
Oct. 16, 1936.

I, ERNEST JOSEPH LEMAIRE, of the City of Ottawa in the County of Carlton, Esquire, make oath and say as follows:

1. I am the Clerk of the King's Privy Council for the Dominion of Canada and as such have knowledge of the appointments made by the Governor-General-in-Council.

2. The members of The Ontario Municipal Board were not appointed
30 as such by the Governor-General-in-Council.

SWORN before me at the City of Ottawa, in the County of Carlton, this 16th day of October, 1936.

"John J. Connolly"
A Commissioner, etc.

"E. J. Lemaire"

Court of Appeal
 No. 10.
 Order,
 Dec. 4, 1936.

No. 10. Order of Court of Appeal for Ontario.

IN THE SUPREME COURT OF ONTARIO

THE COURT OF APPEAL FOR ONTARIO

THE HONOURABLE THE CHIEF JUSTICE OF ONTARIO.	} Friday the 4th day of December, 1936.
THE HONOURABLE MR. JUSTICE RIDDELL.	
THE HONOURABLE MR. JUSTICE MIDDLETON.	
THE HONOURABLE MR. JUSTICE FISHER.	
THE HONOURABLE MR. JUSTICE HENDERSON.	

IN THE MATTER OF AN APPEAL FROM THE ONTARIO
 MUNICIPAL BOARD 10

BETWEEN :

THE CORPORATION OF THE CITY OF TORONTO,
APPELLANT,

AND

THE CORPORATION OF THE TOWNSHIP OF YORK,
RESPONDENT.

UPON motion made by special leave unto this Court on the 27th day of October, 1936, by Counsel for the Corporation of the City of Toronto by way of appeal from an order of The Ontario Municipal Board herein, dated the 23rd day of September, 1936, upon hearing read 20 the said order, the Notice of Appeal and the Order of this Court made on the 6th day of October, 1936, granting leave to appeal, and upon hearing what was alleged by Counsel for the Appellant and for the Respondent, and for the Attorney-General of Ontario, no one appearing for the Attorney-General of Canada although duly served with Notice of Appeal, and the Court having been pleased to direct that this motion stand over for judgment, and the same having come on this day for judgment;

1. THIS COURT DOTH ORDER AND ADJUDGE that the said Appeal be and the same is hereby dismissed.
2. AND THIS COURT DOTH FURTHER ORDER AND AD- 30
 JUDGE that the Appellant do pay to the Respondent its costs of the Appeal, forthwith after taxation thereof.
3. AND THIS COURT doth not see fit to make any Order as to the costs of the Attorney-General of Ontario.

D'ARCY HINDS,
 Registrar,
 S.C.O.

No. 11. Reasons for Judgment.

Court of Appeal
No. 11.
Reasons for
Judgment,
Dec. 4, 1936.

THE CORPORATION OF THE CITY OF TORONTO

v.

THE CORPORATION OF THE TOWNSHIP OF YORK.

Copy of Reasons for Judgment of Court of Appeal (Rowell, C.J.C., Riddell, Middleton, Fisher and Henderson, J.J.A.), delivered December 4th, 1936.

C. M. COLQUHOUN, K.C., and J. P. KENT, for the Appellants, The Corporation of the City of Toronto.

10 G. W. MASON, K.C., and HOWARD A. HALL, K.C., for the Respondents, The Corporation of the Township of York.

C. R. MAGONE, for the Attorney-General of Ontario.

Argued 27th October, 1936.

ROWELL, C.J.O.:—This is an appeal by the Corporation of the City of Toronto, by special leave of this Court granted on the 6th day of October, 1936, from an order of the Ontario Municipal Board dated 23rd day of September, 1936.

The respondent applied to the Ontario Municipal Board to reduce and fix the rates charged for water supplied by the appellant to the
20 respondent, pursuant to an agreement dated 18th July, 1916, made between the appellant and the respondent, and in furtherance of that application, applied for and obtained the order appealed from, which provides (1) that the appellant do, within ten days after the service of the order, make discovery on oath of the documents which are or have been in its possession, or power, relating to the matters in question in the application, and do produce and deposit the same with the Secretary of the Board at Toronto for the usual purposes; (2) that the applicant, by such
30 persons, not more than three in number, as may be authorized in writing under the hand of the Clerk of the respondent Corporation, may at any time and from time to time enter on and inspect any and all properties of the appellant Corporation comprising any part of the waterworks system of the appellant Corporation; and (3) that R. C. Harris, Commissioner of Works for the appellant Corporation, do attend before a special examiner to be examined, and submit to be examined *viva voce* upon oath touching his knowledge of the matters in question in the application.

A copy of the said agreement of the 18th July, 1916, is set out in Schedule "A" to an Act Respecting the Township of York, being Chapter

Court of Appeal
No. 11.
Reasons for
Judgment,
Dec. 4, 1936.

98 of the statutes of 1917. By the said agreement the rates to be paid for water by the respondent are fixed, subject to the following provisions:—

“21. The rates provided for in this agreement may, at any time, be changed by mutual agreement, or by arbitration, as hereinafter provided.

23. Any differences arising between the said City and the said Township, as to the construction of this agreement, the variation of the rates to be charged, or any matters relative thereto, shall be determined by arbitration as follows:—

24. The Commissioner of Works shall act as arbitrator for the said City, the Township Engineer for the said Township, and in the event of 10 their failure to agree, the said Commissioner and Engineer shall select an umpire who shall be a County Judge of the County of York, whose determination shall be final and binding on all parties. Should said Commissioner and Engineer fail to agree in the choice of a County Judge, such officer shall be chosen by a Judge of the High Court, upon application of either of the parties to this agreement.”

By an Act of the Legislature of the Province of Ontario, entitled An Act Respecting the Township of York, passed 1 Edw. VIII, Chapter 88, it is provided by section 2 thereof:—

“2. Notwithstanding the provisions of paragraphs 23 and 24 of an 20 agreement made between the Corporation of the City of Toronto and the Corporation of the Township of York, dated the 18th 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 thereof, or as to any matters relating to or arising out of the agreement, 30 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.”

The appellant appeals against the said order on the following grounds:—“(1) That section 2 of the Township of York Act above quoted 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 40 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.”

Court of Appeal
No. 11.
Reasons for
Judgment,
Dec. 4, 1936.

Assuming the statute 1 Edw. VIII, Chap. 88, to have been validly enacted, I am of the opinion, for the reasons set forth in the opinion of my brother Riddell, that the Ontario Municipal Board had power to make the order appealed from.

The crucial question raised in this appeal is, had the Legislature of Ontario power to enact section 2 of 1 Edw. VIII, Chap. 88.

I am of the opinion that the Legislature had power to vary the agree-
10 ment of the 18th July, 1916, so as to provide that the rates to be charged for water supplied by the appellant under the terms of the said agree-
ment should be varied or fixed by the Ontario Municipal Board. Both of the Corporations are subject to the jurisdiction of the Ontario Legisla-
ture 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.

In addition to authorizing the Board to vary the rates to be charged for water supplied by the appellant, section 2 authorizes the Board, on the application of either party to the agreement, “to settle any differences
20 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, and the Ontario Municipal Board shall have jurisdiction . . . to hear and determine any such application, and the decision of the Board on any such application shall be final and conclusive, and shall not be subject to appeal.” The appellant contends that these are judicial functions and the whole section is therefore invalid. The relevant sections of the British North America Act are section 92, subsections 8, 13 and 14, and sections 96, 99 and 100.

By section 92 the Province has exclusive competence to legislate in
30 relation to municipal institutions in the Province (head 8), property and civil rights in the Province (head 13) and the administration of justice in the Province, including “the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts.” (Head 14). By section 96 the judges of the Superior, District and County Courts are appointed by the Governor-General. By section 99 the Judges of the Superior Courts shall hold office during good behaviour and shall be removable by the Governor-General on address of the Senate and the House of Commons. By section 100, salaries and allowances of the Judges shall
40 be fixed and provided by the Parliament of Canada.

The combined effect of section 92, head 14, and section 96 is that both the Dominion and the Province must concur in the establishment of courts

of justice. The Province creates the courts and the Dominion appoints the Judges. It is obvious the framers of our constitution sought by this method to avoid the difficulties and the expense necessarily incidental to two systems of courts, one federal and the other provincial, which was characteristic of the American system of judicature. Our system has worked most satisfactorily, but its continued success depends upon a faithful observance of the fundamental principle that purely judicial functions shall be conferred only upon tribunals, the judges of which are appointed by the Governor-General under section 96 of the British North America Act.

10

The importance of maintaining the federal jurisdiction under sections 96, 99 and 100 is clearly and forcefully set forth in the opinion of Lord Blanesburgh in *Martineau v. City of Montreal* [1932] A.C. 113, at p. 120:

“Once again, as so often before, is the question raised whether, in reference to the administration of justice, Provincial legislation has overrun the limits of Provincial competence. The case made by the appellant company is that in the statutes to which reference will be made in a moment, the legislature of Quebec has trespassed upon the power given to the Governor-General in the matter of the appointment of judges by section 96 of the British North America Act, 1867. A very serious question 20 is thereby raised, for it cannot be doubted that the exclusive power by that section conferred upon the Governor-General to appoint the judges of the Superior, District and County Courts in each Province is a cardinal provision of the statute. Supplemented by section 100, which lays upon the Parliament of Canada the duty of fixing and providing the salaries, allowances and pensions of these judges, and also by section 99, which provides that the judges of the Superior Courts shall hold office during good behaviour, being removable only by the Governor-General on address of the Senate and House of Commons, the section is shown to lie at the root of the means adopted by the framers of the statute to secure 30 the impartiality and the independence of the Provincial Judiciary. A Court of construction would accordingly fail in its duty if it were to permit these provisions and the principle therein enshrined to be impinged upon in any way by Provincial legislation.”

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. It is in the light of these two principles that one must approach the consideration of the statute in question.

In considering the question of whether section 2, 1 Edw. VIII, Chap. 40 88, confers judicial powers upon the Ontario Municipal Board, one must look at the powers of the Board under the Ontario Municipal Board Act, as well as section 2. By section 8 the Board is composed of three members, to be appointed by the Lieutenant-Governor in Council. By section

10 they hold office during pleasure. By section 41 the Board has, for the purposes of the Act, all the powers of a court of record, and shall have an official seal, which shall be judicially noticed. By section 42 the Board shall, as to all matters within its jurisdiction under the Act, have the right to hear and determine all questions of law and of fact. By section 45 the Board, for the due exercise of its jurisdiction and powers, shall have all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, additions or substitution of parties, attendance and examination of witnesses, production and inspection
 10 of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper thereto. By section 147 a certified copy of any order or decision made by the Board under the Act, or any general or special Act, may be filed in the office of the Registrar of the Supreme Court, and shall thereupon become and be as enforceable as a judgment of the Supreme Court to the same effect. By section 152 the Board may make general rules relating to its practice and procedure. It appears from the copy of the rules filed that they are similar to the rules of practice made under the Judicature Act, and are no doubt modelled upon them. By section 154, subsection 3, the finding or determination of the Board as to any fact shall be binding and conclusive. By
 20 section 155 the Board may state a case in writing for the opinion of the Court of Appeal or the Supreme Court, upon any question which, in the opinion of the Board, is a question of law, and the Court of Appeal shall hear and determine such special case and remit the same to the Board with the opinion of the Court thereon. By section 157, subject to the provisions of Parts V and VI, an appeal shall lie from the Board to the Court of Appeal or the Supreme Court upon any question of jurisdiction, or upon any question of law. By subsection 6 of this section, where the amount involved exceeds the sum or value of \$4,000, and in certain other
 30 cases enumerated in the section, an appeal shall lie from the Court of Appeal to His Majesty in His Privy Council, but no appeal shall lie to His Majesty in His Privy Council in any other case, except by leave of the court. By section 168 the Board has discretion to award costs against any party to proceedings before it.

It is to a Board so constituted and having those large powers that is committed the 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."

40 It is at times a matter of real difficulty to draw the line between legislation which the Province may competently enact under section 92 of the British North America Act in reference to the powers of an administrative tribunal, and legislation which is beyond its competence by reason of section 96. In one of the earliest cases, *Reg. v. Coote* (1873) L.R. 4 P.C. 599, it was held that certain statutes of the Province of Quebec appointing officers named fire marshals, with power to examine witnesses under oath, and to inquire into the cause and origin of fires, and to arrest

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and commit for trial in the same manner as a Justice of the Peace, were within the competence of the provincial Legislature. On the other hand, in *Burk v. Tunstall* (1890) 2 B.C.R. 12, it was held by Drake, J., that while it was within the competence of the Province to create mining courts and to fix their jurisdiction, it was not within its competence to appoint any officers thereof with other than ministerial powers. This case was approved by the Privy Council in *Martineau v. City of Montreal* [1932] A.C. 113, at p. 121. The same conclusion was reached by this Court in *Attorney-General of Ontario re McLean Gold Mines Ltd.*, 54 O.L.R. 573. The Court held that the provisions of the Mining Act of Ontario, 10 R.S.O. 1914, which conferred upon the Mining Commissioner appointed by the Lieutenant-Governor in Council jurisdiction to determine every claim, question or dispute relating to any patent, right, privilege or interest conferred by or under the authority of the Act, and more particularly all claims, questions and disputes arising before or after patent between contesting claimants, were *ultra vires*. Hodgins, J.A., at p. 574, said:

“To appoint a commissioner and then to invest him with powers exercisable by a Superior Court, as that term is to be understood in the British North America Act, 1867, is to enable the Province in effect to 20 appoint a judge of a Superior Court, for what else is he, notwithstanding his designation, if in fact he exercises the jurisdiction, powers and functions of a Superior Court judge.”

Maclaren and Magee, J.J.A., agreed with Hodgins, J.A., Ferguson, J.A., at p. 577, said:

“The clear effect, meaning and intent of these two sections (referring to sections 16 and 125 of The Mining Act), and particularly of the amending Act, 1921, was to take jurisdiction from the Superior Court of this Province and vest it in a Commissioner (Judge) named, appointed, paid and subject to dismissal by the Province. In my opinion, this is 30 contrary to the provisions of sections 96, 99 and 100 of the British North America Act and *ultra vires* of the Provincial Legislature; and, therefore, the judgment appealed from is without force and effect as being pronounced by one having no power or jurisdiction in the premises.”

Similar questions have arisen in Australia. Under sections 71 and 72 of the Australian constitution the Judicial powers of the Commonwealth are vested in a federal Supreme Court, and in such other courts as Parliament invests with federal jurisdiction. The justices of these courts are to be appointed by the Governor-General in Council, and shall not be removed except by the Governor-General on an address 40 from both Houses of Parliament. In the *British Imperial Oil Co. v. Federal Commissioner of Taxation* (1925) 35 C.L.R. 422, the plaintiffs challenged the validity of the Income Tax Assessment Act of 1922 because by this Act a Board of Appeal was established to hear appeals from the

Commissioner of Taxation, and it was contended by the plaintiffs that the Board as so constituted exercised part of the judicial power of the Commonwealth, and was, therefore, a tribunal contrary to sections 71 and 72 of the Constitution of Australia in that its members were to be appointed, not for life, but for a period of seven years. The High Court, after reviewing the provisions of the Act conferring powers upon the Board, held that the Act was *ultra vires* in that it purported to confer judicial power upon the Board of Appeal, which was not appointed as required by section 72 of the Constitution. The Income Assessment Act was subsequently amended, and there was substituted for the Board of Appeal a Board of Review, with powers and functions different in several respects from those of the Board of Appeal. Having regard to amendments made in the Act, the High Court held that the Board of Review was not a court exercising the judicial powers of the Commonwealth, but an administrative tribunal. *Shell Oil Company of Australia Limited v. Federal Commissioner of Taxation*, 38 C.L.R. p. 153. The plaintiffs appealed to the Privy Council, (1931) A.C. 275. The judgment was delivered by Lord Sankey, L.C. In discussing the meaning of judicial powers, Lord Sankey said (p. 295):—

20 “What is ‘judicial power’? Their Lordships are of opinion that one of the best definitions is that given by Griffith, C.J., in *Huddart, Parker & Co. v. Moorehead*, where he says: ‘I am of opinion that the words ‘Judicial power’ as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.’ ” After reviewing the provisions of the Amending Act and
30 noting the changes made, the Privy Council dismissed the appeal, holding that the Board of Review, with the more limited powers, was an administrative tribunal and was not exercising judicial power.

One of the most important cases dealing with this question is *Martineau v. City of Montreal* [1932] A.C. 113. In this case the appellant’s property having been expropriated by the City of Montreal under the provisions of its charter, the compensation payable was assessed under the charter by the President of the Quebec Public Service Commission, established by R.S.Q. 1925, chapter 17, as subsequently amended. The appellant brought an action in the Superior Court of the Province to annul
40 and set aside the expropriation proceedings on the ground (1) that the Quebec Public Service Commission Act and Article 429 of the charter of the City were unconstitutional and *ultra vires* the Province in that the members of the Commission were appointed by the Lieutenant-Governor in Council, whereas they exercised Judicial functions and therefore, under section 96 of the British North America Act, 1867, could be appointed only by the Governor-General. The Trial Judge dismissed the action,

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holding that the legislation in question was *intra vires*, and on appeal to the Court of King's Bench, the appeal was dismissed. The appellant then appealed to the Privy Council, which dismissed the appeal. The judgment was delivered by Lord Blanesburgh, who pointed out that the exclusive legislative powers of the Province under section 92, head 13 and head 14, make it extremely difficult in many cases to draw the line between legislation which is within the competence of the Province under section 92 of the Act, and legislation which is beyond its competence by reason of section 96, and illustrated this difficulty by referring to both the Canadian and Australian cases above referred to. Lord Blanesburgh said (p. 122): 10

“In the present case, however, it will be found, as their Lordships think, that difficulties serious in other cases are resolved by reason of its special circumstances which are found latent in the statutory procedure regulating, at Confederation, the compulsory acquisition of property by the city of Montreal. That procedure, it is suggested, as the result of bringing to bear upon it the relevant provisions of the British North America Act, thereby became and, with the modifications that have later been introduced, thenceforth remained a matter of provincial concern alone.”

After reviewing the history of the legislation from 1851 (14 and 15 Vict. 128, consolidating the provisions of the statutes incorporating the 20 City) down to the most recent legislation dealing with the matter, it is pointed out that “No court of the Province has ever had the right either to make or to inquire into the merits of any compensation award in expropriation proceedings originated by the City,” and that “Neither before Confederation or since has the duty of assessing compensation been discharged by any Judge of the Province, whether of a Superior, District or County Court.” “This is not one of his judicial duties.” They also lay stress upon section 122 of the British North America Act continuing all existing courts, legal commissions, powers and authorities, and held that the commissioners whose appointments were authorized prior to Confed- 30 eration were not judges “either of Superior, District or County Courts of the Province.” The jurisdiction to award compensation was not vested in any of these judges. In view of these considerations the appeal was dismissed.

Light is also thrown on the question by the cases in which the validity of the Ontario Railway and Municipal Board Act has been challenged, on the ground that the Board must be regarded as a Superior Court within the meaning of section 96 of the British North America Act, and not a mere administrative tribunal.

In *Re Town of Sandwich and Sandwich, Windsor and Amherstburg 40 Railway Co.* (1910) 2 O.W.N. p. 93, the Railway Company appealed from an order of the Board made upon the application of the Town Corporation complaining that proper service was not being furnished by the Railway, and asking that the agreement between the parties might be con-

strued, and the Railway ordered to furnish further service; the Board considered it convenient to make what might be called an interim order, construing the agreement and retaining the rest of the application until the opinion of the Court of Appeal could be obtained upon the question of construction. The Railway contended the order was invalid on the ground that the Board was a court and not an administrative body. It was necessary to construe the agreement in order that the Board might direct the services which the Railway was to perform. The judgment of the Court was delivered by Garrow, J.A., in the course of which he said:

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10 “The Board, it must be remembered, is not a court, but an administrative 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.”

The distinction here drawn is most important.

The question came before this Court again in *Toronto Railway v. City of Toronto* (1918) 44 O.L.R. 381. The Toronto Railway Company appealed from an order of the Ontario Railway and Municipal Board which imposed a penalty upon the Company for failure to comply with a former
20 order of the Board requiring the Railway Company to place in operation upon its system one hundred additional cars. Among the grounds of appeal was that the Board is a superior court under section 96 of the British North America Act. The principal judgment of the Court was delivered by Meredith, C.J., and after a careful review of the authorities, and after quoting with approval the passage from the judgment of Garrow, J.A., above set forth, said (at page 391): “. . . and in my opinion, the body which was created under the authority of the Ontario Railway and Municipal Board Act is, to use the expressive language of Lord Watson, ‘in pith and substance’ not a Court, but an administrative body,
30 having, as incidental to the performance of its administrative powers, jurisdiction to construe contracts.”

On appeal to the Privy Council, (1920) A.C. 446, the judgment of the Appellate Division was reversed, but their Lordships intimated that in consequence of the view taken by them on other points of the case, it became unnecessary for them to consider the fourth point raised on behalf of the appellants, that having regard to the powers conferred by the statute on the Railway and Municipal Board that Board must be regarded as a “superior court” within the meaning of section 96 of the British North America Act, and their Lordships expressed no opinion on the point.

40 The question was also raised and discussed in *Re County of Welland v. City of Niagara Falls* [1935] O.W.N. 470, and in *The King on the relation of the Township of Stamford* [1934] O.R. 662; [1935] O.R. 109. In the latter case, by a motion in the nature of *quo warranto*, initiated by

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the Township of Stamford, as relator, it was contended that the members of the Ontario Municipal Board, as to at least some of the duties imposed upon them by the Ontario Municipal Board Act, exercised the jurisdiction of judges of a Superior or County Court, and that by virtue of section 96 of the British North America Act, the members of the Board must be appointed by the Governor-General of Canada, and not by the Lieutenant-Governor in Council of Ontario. The motion was heard by Hope, J., who expressed the opinion that in view of the decision of this Court in *McLean Gold Mines Limited v. The Attorney-General of Ontario* (1924) 54 O.L.R. 573, and of the Privy Council in *Shell Company of Australia Limited v. Federal Commissioner of Taxation* [1931] A.C. 275, the Ontario Municipal Board, as now constituted, is functioning as a Superior Court, but that in view of the prior decisions of this Court he was precluded from so finding. From this order an appeal was taken to this Court. The appeal was dismissed, the Court holding that the Board was exercising certain powers of a purely administrative character which it was competent for the legislature of Ontario to confer upon it; that the respondents were lawfully in office *qua* the exercise of such powers as the Legislature of Ontario was competent to delegate, and that the mere circumstance that the legislature may have purported to confer upon the Board powers of a judicial character which might, for the purpose of the motion, be assumed to be *ultra vires* the legislature of Ontario, did not invalidate their tenure of office.

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 power to determine purely judicial questions such as are normally determined by courts of justice.

30

It is settled by the decisions of this Court, that the Province may confer upon an administrative tribunal power to construe an agreement where such construction is necessary to enable the tribunal to perform the primary administrative duty imposed upon it, but the Province is not competent to confer upon such a tribunal the power, such as the Superior Courts possess, of adjudicating upon questions of construction in the abstract.

Applying the principles and tests laid down in these cases to section 2 of the Act in question, I am of the opinion that conferring upon the Board 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 conferring upon the Board judicial functions rather than administrative duties, and is, therefore, *ultra vires* the legislature of Ontario. The construction or interpretation of an agreement between parties has always been the function of a court

of law in this Province. The power to construe the agreement in question was not to enable the Board to perform the primary administrative duty imposed upon it, but to construe the agreement quite independently of any such consideration. To construe an agreement would be the exercise of judicial power as defined by Lord Sankey in the passage above quoted in the *Shell Oil* case.

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Counsel for the respondent, however, contends that even if conferring such a power is *ultra vires*, these clauses in the section are clearly severable from the power conferred on the Board to vary or fix the rates to
10 be charged for water supplied, and he relies on the statement of Lord Justice Lindley in *Strickland v. Hayes* (1896) 1 Q.B. 290, at p. 292, where he says: "There is plenty of authority for saying that if a by-law can be divided, one part may be rejected while the rest may be held to be good." The principle laid down by Lord Justice Lindley has been applied repeatedly to statutes in our own Courts, and also in the American courts. The appellant, however, contends that in the case at bar the section cannot be divided—that the whole is bad—and relies upon *In re Employment of Aliens*, 63 S.C.R. 293, affirmed (1924) A.C. 203, and
20 Court considered the invalid portions were not properly severable from the other portions of the Act.

The question is, is the portion which is good clearly severable from that which is bad? In considering this question it should not be overlooked that under the Ontario Municipal Board Act the Legislature has conferred upon the Board very large powers of an administrative and supervisory character in relation to the municipalities of the Province. Parts IV, V and VI of the Act deal with the powers of the Board in relation to municipalities, and, having regard to the policy of the Legislature in conferring these powers on the Board, I am of the opinion we
30 would not be justified in concluding that the Legislature would not have passed the Act without the clauses objected to, but, on the contrary, I see strong ground for believing that the Legislature would have passed the Act. I am of the opinion, therefore, that the portions of the section which are open to objection are severable from the balance of the section.

The result is that the appeal fails and should be dismissed with costs. No order should be made as to the cost of the Attorney-General, who intervened in the matter.

FISHER, J.A.: I agree and have nothing to add.

RIDDELL, J.A.: These two corporations made an agreement, in 1916,
40 whereby the City was to supply the Township water at a rate agreed upon. Now an application has been made to the Ontario Municipal Board to reduce this rate, claiming that such application was justified by the provisions of the Township of York Act, (1936) 1 Edw. VIII, Chap. 88,

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section 2, and justifying the application on the ground alleged that the 20 cents per 1,000 gallons, the existing rate, was excessive and unjustified. The City resists the application on the ground, *inter alia*, that the legislation relied upon is *ultra vires* the Provincial Legislature, and the Legislature had no power to alter or interfere with the terms of the existing agreement. It says, that in any case, the rate existing is fair and equitable. Solicitor for the Township desired to examine the Commissioner of Works of the City for discovery, also to examine the records, etc., of the Water Works Department of the City, etc. The application for this purpose to the City was rejected, and an application was made to the Board in the 10 matter. The Board, September 23rd, 1936, made an Order in the following terms:

“UPON THE APPLICATION of the Applicant, the Corporation of the Township of York,

“1. IT IS ORDERED that the Respondent, The Corporation of the City of Toronto, do within ten days after the service of this Order make discovery on oath of the documents which are or have been in its possession or power relating to any matters in question in this application and do produce to and deposit the same with the Secretary of the Board at Toronto for the usual purposes. 20

2. AND IT IS FURTHER ORDERED that the Applicant, by such persons, not more than three in number, as may be authorized in writing under the hand of the Clerk of the Applicant Corporation, may at any time and from time to time enter on and inspect any and all properties of the Respondent Corporation comprising any part of the Waterworks System of the said Respondent Corporation.

3. IT IS FURTHER ORDERED that R. C. Harris, Commissioner of Works for the above named Respondent, do attend before W. J. McWhinney, Esquire, or some other Special Examiner, at such time and place as he shall by writing appoint, but not sooner than ten days after 30 the service of this Order on the Respondent and submit to be examined *viva voce* upon oath touching his knowledge of the matters in question in this application.”

This order it is sought to justify by The Ontario Railway and Municipal Board Rule of Practice and Procedure, published March 20th, 1928, No. 17, which reads thus:—

“17. Ten days after the service of the notice of application on the Respondent orders for production of documents, for inspection, for examinations for discovery, for the examination of witnesses who cannot attend the hearing by reason of sickness or other unavoidable cause, and for the 40 examination of witnesses resident out of Ontario, may be made by the Board, or a member thereof, as the nature of the application may require,

and upon such terms as to costs or otherwise as the Board may order or direct.”

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This and other Rules are, it is said, authorized by the Act R.S.O. 1927, Chap. 225, section 42, which reads: “The Board may make general rules regulating its practice and procedure”.

Then section 20(4) reads:

“The Board shall, as respects the amendment of proceedings, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of
10 property, and other matters necessary or proper for the due exercise of its jurisdiction, or otherwise for carrying this Act or any other general or special Act into effect, have all such powers, rights and privileges as are vested in the Supreme Court.”

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 usurpation of the powers of a Court so as to be beyond the powers of persons not appointed by His Excellency the Governor-General under The B.N.A. Act, 1867.

I would dismiss this motion with costs.

20 MIDDLETON, J.A.: An appeal by the City of Toronto from the Order of the Ontario Municipal Board dated September 23rd, 1936, directing the City of Toronto to make discovery on oath of one of its officers of the documents in its possession, and to authorize the respondent by its agents to inspect the properties of the appellant, comprising its water works system, and directing R. C. Harris, the Commissioner of Works of the appellant, to attend before a special examiner and submit to be examined for discovery.

30 On the 18th day of July, 1916, the Corporation of the City of Toronto agreed with the Corporation of 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. This water was to be paid by the township at the rate of twenty cents per thousand imperial gallons. This agreement was validated by an Act of the Ontario Legislature, 7 Geo. V, Chap. 98.

By an Act of 1936, 1 Edward VIII, Chap. 88, it is provided that notwithstanding the provisions of the agreement in question, and notwithstanding its confirmation by the Act of the Legislature of Ontario, “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
40 by the said city corporation under the terms of the said agreement or to

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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, 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”.

On the 8th of July, 1936, the Township of York gave notice of an application to the Ontario Municipal Board stating that the rate of twenty cents per thousand gallons charged by the respondent for water purchased by the applicant is excessive and unjustified, and the Township asks that 10 the Board reduce the rate to be charged and fix the rate to be charged for water supplied under the agreement on a basis which would be fair and equitable both to the respondent and to the applicant.

The Ontario Municipal Board was incorporated in 1932 by the Provincial Act, 22 Geo. V, Chap. 27, in succession to the pre-existing Ontario Railway and Municipal Board. Among other things it was given power to make general rules regulating its practice and procedure (Sec. 152), and is given power to appoint any person to enter upon and inspect any place, building or works being the property or under the control of any company, the entry or inspection of which appears to the Board to be 20 requisite, and to order the inspection and production of books, papers, specifications and documents which in its discretion it thinks requisite, (Sec. 59).

Pursuant to these powers general rules were passed and promulgated on the 20th of March, 1928. These bear date before the Act to which I have for convenience referred, but the powers in these respects are identical with the powers possessed by the Ontario Railway and Municipal Board under earlier legislation. These rules provided for examinations for discovery, and the production of documents. In pursuance of these powers the order in question was made by the Board. 30

The making of the order was opposed by the City of Toronto upon the grounds, *inter alia*, that the Act of 1936 authorizing the Ontario Municipal Board to vary the rates to be charged for water supplied is *ultra vires* of the Ontario Legislature and the Board having affirmed this jurisdiction and made the order this appeal is had.

The grounds of appeal are stated to be, (1) That sub-section 2 of the Township of York Act, 1936, 1 Edw. VIII, Chap. 88, is *ultra vires* of 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 water rates, and there- 40 fore has no jurisdiction to make the order dated 23rd 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 B.N.A. Act.

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I should have mentioned that the original agreement between the City and the Township provides that any difference arising between the city and the township as to the construction of this agreement, the variation of the rates to be charged or any matters relative thereto shall be determined by arbitration, the Commissioner of Works, the Township Engineer and a County Judge being the arbitrators, and the Act of 1936 specifically refers to the clause in the agreement so providing, and directs that the
10 procedure therein outlined shall govern notwithstanding these provisions of the contract.

The Province has undoubted jurisdiction over municipal institutions 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
20 agreement between municipalities by the Board, instead of by arbitrators.

The elected council of municipalities is a body elected for one year only and has, speaking generally, only power to direct the affairs of the municipality for the one year. It is forbidden to attempt to bind the inhabitants of the municipality for any longer period. Special power is given by special Acts in certain cases, and ratifications are not infrequent of contracts made by municipalities extending far beyond the year. These contracts are ratified when it is deemed expedient by special Acts of the Legislature. The agreement here is an indefinite agreement contemplating the annexation of portions of the Township of York to the City from time
30 to time and providing that the rate to be charged may be varied from time to time by mutual agreement or by arbitration. From small beginnings it has become an agreement of importance for the amount to be annually paid amounts to in the neighbourhood of a quarter of a million dollars the amount supplied during 1935 being 1,250,512,108 gallons.

As a matter of policy the Provincial Government has of recent years endeavoured to concentrate the determination of purely municipal 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
40 doubt its jurisdiction. 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

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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 Legislature.

The Act of 1936 however goes far beyond conferring this power and purports to give the Board power to settle any differences arising between the parties to the agreement and as to the construction thereof, or any other matters relating to or arising out of the agreement. It is said that these added powers are usurping the proper functions of the Courts and so are beyond the Provincial jurisdiction. It may be so, but I do not think that this question here arises. All that is here sought is a readjustment of the rate to be charged. This was a matter over which no Court ever had any jurisdiction, and it is not the subject matter properly falling within the jurisdiction of the Court. 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.

In my view the appeal should be dismissed. The Corporation of the City of Toronto will pay the costs of the Corporation of the Township of York. No order will be made concerning the costs of the Attorney-General who intervened upon this motion.

HENDERSON, J.A.: I have had the privilege of reading the opinion of my Lord, the Chief Justice, and those of my brothers Riddell and Middleton, in which I concur.

I, however, have some comment to make upon the case of *Re Town of Sandwich and Sandwich, Windsor and Amherstburg Railway Co.* (1910) 2 O.W.N. 93, referred to in the opinion of my Lord, the Chief Justice.

I am unable to agree that the Ontario Railway Board—an administrative body and not a court—obtains jurisdiction to construe an agreement or to adjudicate upon the rights of the parties to it because, in the exercise of its administrative functions it is given power to enforce the agreement. 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.

There would seem to be little left to distinguish an administrative body from a court if the legislature of the Provinces can validly legislate

to give such bodies power to enforce contracts, and if the power to enforce contracts carries with it jurisdiction to determine the rights of the parties to contracts.

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In the exercise of the powers of the Board conferred by section 45 of The Ontario Municipal Board Act, 1932, chapter 27, the Board has made certain rules of practice and procedure, including a rule providing for the production and inspection of documents, examinations for discovery, and the taking of evidence by Commission, but although given power by that section with respect to the entry on and inspection of property, it does **10** not appear to have exercised that power by the making of any rule, and so much of the order in question as provides for entry on and inspection of property of the City of Toronto, does not appear to be provided for by its rules. Nevertheless this would not appear to render the order beyond its powers, in view of the provisions of the section referred to.

IN THE PRIVY COUNCIL.

No. 12. King's Order granting leave to appeal.

(SEAL)

AT THE COURT AT BUCKINGHAM PALACE.

The 18th day of March, 1937.

20

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT

LORD AMULREE

LORD STEWARD

MAJOR TRYON

MARQUESS OF ZETLAND

SIR HARRY EVE

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 23rd day of February 1937 in the words following, viz.:—

Privy Council
No. 12.
King's Order,
March 18, 1937.

30 "WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Corporation of the City of Toronto in the matter of an Appeal from the Court of Appeal for Ontario between the Petitioners Appellants and the Corporation of

Privy Council
No. 12.
King's Order,
March 18, 1937.

the Township of York Respondents setting out (amongst other matters) that the Petitioners are a Municipal Corporation and the Respondents are the Corporation of an adjacent Municipality; that the Petitioners desire to obtain special leave to appeal from a judgment of the Court of Appeal for Ontario dated the 4th December 1936 whereby it was held that an Order of the Ontario Municipal Board dated the 23rd September 1936 directing the Petitioners to make discovery on oath of documents and to deposit same with the Secretary of the Board "for the usual purposes"; authorising the Respondents by not more than three persons to enter upon and inspect properties comprising the Petitioners' water works system; and directing the Petitioners' Commissioner of Works to submit to be examined *viva voce* upon oath before a Special Examiner of the Supreme Court of Ontario touching his knowledge of the matters in question on an application before the Board is valid notwithstanding that the Board's jurisdiction in the premises is derived from a section (No. 2) of an Ontario Statute (1936 Chap. 88) which the Court finds is *ultra vires* in part as an attempt to confer judicial powers on the Board; and reciting the facts of the dispute between the parties; that the Petitioners submit that the questions raised are of grave and general importance and have been the subject of controversy for many years; that the decisions of the Provincial Courts in reference to the status of the Ontario Municipal Board and similar bodies have not been uniform; that the decision from which an Appeal is sought creates uncertainty as to the powers of the Board under general and special legislation affecting it and that it is in the public interest that questions as to the Board's status and powers should be finally settled: And humbly praying Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Court of Appeal for Ontario dated the 4th December 1936 or for such further Order as to Your Majesty may appear proper:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Court of Appeal for Ontario dated the 4th day of December 1936 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"And Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof

and to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution.

Privy Council
No. 12.
King's Order,
March 18, 1887.

Whereof the Lieutenant-Governor of the Province of Ontario for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

“M. P. A. HANKEY”

PART II.

EXHIBITS.

Exhibit C to
affidavit of
J. P. Kent,
filed on behalf
of appellant.

Exhibits to Affidavit of J. P. Kent.

Exhibit C. Letter from respondent's solicitor to appellant's solicitor.

Toronto, September 1, 1936.

Starr, Hall and Starr,
320 Bay Street

C. M. Colquhoun, Esq., K.C.,
Solicitor, City of Toronto,
City Hall, Toronto.

10

Dear Sir:

Re Township of York vs. City of Toronto

Re Application to reduce and fix water rates

In this matter, as intimated to you to-day, we desire at an early date to examine for discovery Commissioner of Works Harris. I understand from you that Mr. Harris is absent from the City at the present time. I would be glad, however, if you would consult with him after his return and let me know a convenient date for his attendance for examination.

You will recall that at the hearing before the Municipal Board early 20 in July, it was suggested by the Chairman that we could probably agree with you on a date which would be mutually convenient for the examination of Mr. Harris, and also that we could in all probability further agree on the question of production of documents, inspection, etc., in which event it would be unnecessary to ask the Board to make a formal order.

In order that we may properly prepare our case and facilitate the hearing before the Board, we think it essential that our experts and auditors should have access to and inspection of the various books, records and documents in the possession of the Works Department or other Departments of the City from which they may ascertain the required information. 30

We think it important for instance that they should ascertain the capital cost of the various component parts of the City's water works system, the annual cost of maintenance, depreciation, etc. as well as particulars of gallonage of water pumped from the various pump houses to supply the different sections of the City and other areas furnished with water.

The foregoing is, of course, only an outline of some of the information which will naturally be required, and it occurs to me that if you are prepared to authorize our experts and auditors to inspect and examine the various books and records at the City Hall from which they can obtain the information required in preparation for the hearing of this case, that it will facilitate the matter for both parties. I assume, of course, in this connection that the City Officials would facilitate such examination by indicating to our experts the books and records from which the information desired might be readily found.

Exhibit C to affidavit of J. P. Kent, filed on behalf of appellant.

10 I should be glad if you would advise me as to your attitude with respect to the above matters.

Yours truly,

“H. A. Hall”

This is Exhibit “C” to the affidavit of James Palmer Kent sworn before me at the City of Toronto, in the County of York, this 28th day of September, A.D. 1936.

“J. B. Sherring”

20 A Commissioner, etc.

Exhibit D to affidavit of J. P. Kent Letter from applicant's solicitor to respondent's solicitor.

Exhibit D to affidavit of J. P. Kent, filed on behalf of the appellant.

September 11, 1936.

H. A. Hall, Esq., K.C.,
320 Bay Street,
Toronto 2.

Dear Sir:

Township of York v. City of Toronto

Re Application to reduce and fix water rates.

30 I beg to acknowledge receipt of your letter of the first instant.

Mr. Harris has now returned to the City and I have had an opportunity of discussing this matter with him.

Exhibit D to
affidavit of
J. P. Kent,
filed on behalf
of the
appellant.

The City is not prepared to comply with your request as to discovery
and production.

Yours truly,

“C. M. Colquhoun”
City Solicitor.

CMC:K

This is Exhibit “D” to the Affidavit of James Palmer Kent sworn before me at the City of Toronto, in the County of York, this 28th day of 10 September, A.D. 1936.

“J. B. Sherring”
A Commissioner.