

In The Privy Council

No. 37 of 1937.

On Appeal from the Judgment of the Court of Appeal for Ontario

BETWEEN :

THE CORPORATION OF THE CITY OF TORONTO,

Appellant,

—AND—

THE CORPORATION OF THE TOWNSHIP OF YORK,

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The Attorney General for the Province of Ontario Respondent.
Intervener

Appellant's Case

1. This is an appeal by special leave from a Judgment of the Court of Appeal for Ontario dated 4th December, 1936, whereby it was held that an order of the Ontario Municipal Board dated 23rd September, 1936, which directs the Appellant to make discovery on oath of documents; authorizes the respondent to enter upon and inspect the Appellant's water-works system; and directs the Appellant's Commissioner of Works to submit to be examined *viva voce* upon oath touching his knowledge of the matters in question on a pending application before the Board, is valid notwithstanding that the Court held that the section of the Act conferring jurisdiction was in part *ultra vires* as an attempt to confer judicial powers on the Board. Record, p. 14.

2. The Appellant is a municipal corporation and the Respondent is the Corporation of an adjacent municipality to which the Appellant supplies water in circumstances hereafter referred to.

3. The Ontario Municipal Board is constituted under an Act of the Legislature of Ontario and is now governed by "The Ontario Municipal Board Act, 1932" (Chapter 27) and amending Acts. It is composed of three members appointed by the Lieutenant-Governor in Council (Section 8) who hold office during pleasure (Section 10). The Chairman when

present presides and his opinion on any question of law prevails. (Section 16). The Board may hold private or public sessions but complaints shall, on application of any party thereto, be publicly heard (Section 26). Their salaries are fixed by the Lieutenant-Governor in Council (Section 35) and are paid monthly out of the Consolidated Revenue Fund of the Province (Section 38).

4. PART III of the Act under the heading "General Jurisdiction and Powers" contains *inter alia* the following sections:

41. The board shall for all purposes of this Act have all the powers of a court of record and shall have an official seal which shall be judicially noticed. 10

42. The board shall as to all matters within its jurisdiction under this Act have authority to hear and determine all questions of law or of fact.

43. The board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act.

44. The board shall have jurisdiction and power to,—

(a) hear and determine all applications made, proceedings instituted and matters brought before it under the provisions of this Act or of any other general or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the board under such Act; and

(b) perform such other functions and duties as are now or shall hereafter be conferred upon or assigned to the board by statute or under statutory authority.

(c) order and require or forbid, forthwith or within any specific time and in any manner prescribed by the board, the doing of any act, matter or thing or the omission or abstention from doing or continuance of any act, matter or thing, which any person, firm, company, corporation or municipality is or may be required to do or omit to be done or to abstain from doing or continuing under this or any other general or special Act, or under any order of the board or any regulation, rule, by-law or direction made or given under any such Act or order or under any agreement entered into by such person, firm, company, corporation or municipality; and 30 40

(d) make, give or issue or refuse to make, give or issue any order, directions, regulation, rule, permission, approval, certificate or direction, which it has power to make, give or issue.

45. The board for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, shall have all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property; enforcement of its orders and all other matters necessary or proper therefor.

10 46. Where by the provisions of any Letters Patent or supplementary Letters Patent of any corporation heretofore or hereafter issued under The Companies Act or any other general or special Act, any jurisdiction is conferred upon the board, or it is provided that any matter in any way may be referred to the board, it shall with respect thereto have power to inquire into, hear and determine all matters and things necessary or incidental to the due exercise of such jurisdiction and reference and to make and give orders, directions, regulations, rules, permissions, approvals, sanctions and certificates as to the board may seem proper.

20 48.—(1) The Board may, of its own motion, and shall, upon the request of the Lieutenant-Governor in Council, inquire into, hear and determine any matter or thing which it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have and may exercise the same powers as, upon any application or complaint, are vested in it.

(2) Any power or authority vested in the board under this Act or any other general or special Act may, though not so expressed, be exercised from time to time, or at any time, as the occasion may require.

30 49.—(1) The Lieutenant-Governor in Council may from time to time, upon the request of the board, or of his own motion, appoint counsel to appear before the board and conduct any enquiry or hearing or to represent the board upon the argument of any appeal to the Court of Appeal of the Supreme Court or to any other court in an appeal from the Court of Appeal, in cases where any such appeal may lie.

(2) The board may direct that the costs of such counsel shall be paid by any party to the application, proceeding or matter, or by the Treasurer of Ontario.

40 50. The board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.

53.—(1) The board may appoint or direct any person to make an inquiry and report upon any application, complaint or dispute before

the board, or upon any matter or thing over which the board has jurisdiction.

(2) The board may order by whom and in what proportion the costs and expenses incurred in making such inquiry and report shall be paid, and may fix the amount of such costs and expenses.

54. The board may order and require any person or company, corporation or municipality to do forthwith or within or at any specified time, and in any manner prescribed by the board, so far as is not inconsistent with this Act, any act, matter or thing which such person, company, corporation or municipality is or may be required to do under this Act, or under any other general or special Act, or any regulation, order, direction, agreement or by-law, and may forbid the doing or continuing of any act, matter or thing which is in contravention of any such Act or of any such regulation, order, direction, agreement or by-law. 10

57. If default is made by a person, company, corporation or municipality in the doing of any act, matter or thing, which the board has authority, under this or any other general or special Act, to direct and has directed to be done, the board may authorize such person as it may see fit to do the act, matter or thing, and in every such case the person so authorized may do such act, matter or thing, and the expense incurred in the doing of the same may be recovered from the person, company, corporation or municipality in default as money paid for and at his or its request, and the certificate of the board of the amount so expended shall be conclusive evidence thereof. 20

58. The board shall also have power to enforce its orders and directions respecting any public utility in the manner and by the means provided in section 261 of The Railway Act.

59. The board, inspecting engineer, or person appointed under this Act to make any inquiry or report may,— 30

(a) 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 it or him requisite;

(b) inspect any works, structure, rolling stock or property of the company;

(c) require the attendance of all such persons as it or he thinks fit to summon, and examine and require answers or returns to such enquiries as it or he thinks fit to make;

(d) require the production of all books, papers, plans, specifications, drawings and documents, relating to any matter before it or him; 40

(e) administer oaths,

and shall have the like power to summon witnesses and enforce their attendance, and compel them to give evidence and to produce books, papers or things which they are required to produce, as is vested in any court in civil cases.

5. PART VIII under the heading "Practice and Procedure" contains the following sections:

152. The board may make general rules regulating its practice and procedure.

10 154.—(1) In determining any question of fact the board shall not be concluded by the finding or judgment of any other court in any action, prosecution or proceeding involving the determination of such fact, but such finding or judgment shall, in proceedings before the board, be *prima facie* evidence only.

(2) Subject as in this Act is otherwise provided the pendency of any action, prosecution or proceeding in any other court involving questions of fact shall not deprive the board of jurisdiction to hear and determine the same questions of fact.

(3) The finding or determination of the board upon any question of fact within its jurisdiction shall be binding and conclusive.

20 155.—(1) The board may, at the request of the Lieutenant-Governor in Council, or of its own motion, or upon the application of any party, and upon such security being given as it directs, state a case in writing for the opinion of the Court of Appeal of the Supreme Court upon any question which, in the opinion of the board, is a question of law.

(2) 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.

30 156. The Lieutenant-Governor in Council may, at any time, upon petition of any party, person or company interested, all parties interested having been first heard, vary or rescind any order, decision, rule or regulation of the board, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order which the Lieutenant-Governor in Council may make with respect thereto shall be binding upon the board and upon all parties.

40 Section 157 of The Ontario Municipal Board Act, 1932, provides that, subject to the provisions of Parts V and VI, an appeal shall lie from the board to the Court of Appeal of the Supreme Court upon a question of jurisdiction or upon any question of law, upon leave to appeal being first obtained from such court, and that an appeal shall lie from the decision of such court to His Majesty in His Privy Council when the matter in con-

troverly exceeds the sum or value of \$4,000 or relates to the duration of a privilege to operate a railway along a highway, or to the construction of an agreement between a railway company and a municipal corporation, or to any demand affecting the rights of the public or to any demand of a general or public nature affecting future rights, but no appeal shall lie to His Majesty in His Privy Council in any other case, except by leave of His Majesty. The section further enacts that, save as provided in it, "every decision or order of the board shall be final, and no order, decision or proceeding of the board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any court."

By section 158 the Board has complete jurisdiction over costs.

6. The said Board made rules, including the following:

5. Where any matter is not expressly provided for by these rules, the rules and practice under The Judicature Act shall be followed as far as the same are applicable in the discretion of the Board.

6. The provisions of The Interpretation Act and the interpretation clauses of The Judicature Act and of The Railway Act, shall apply to these rules unless there is something in the subject or context repugnant thereto.

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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 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.

24. The costs of and incidental to any proceeding before the Board, shall be in the discretion of the Board, and may be fixed at a sum certain or may be taxed by the proper taxing officer on the High Court, County Court or Division Court scale as the Board may direct.

7. Sections 96, 99 and 100 of The British North America Act, 1867, under the heading "Judicature" read as follows:

96. The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons.

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100. The salaries, allowances and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate

in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

8. The Appellant has for many years operated a system of waterworks for supplying water to the inhabitants of the City of Toronto. The original waterworks were constructed and operated by private interests but in 1857 legislation was enacted by the Province of Canada (20 Vict., Ch. 81) authorizing the Appellant to erect waterworks and providing that the Water Commissioners of the City of Toronto should fix the prices for the use of water. This legislation did not become effective and later in 1872 a similar Act (35 Vict., Ch. 79) was passed by the Legislature of Ontario, upon petition of the Appellant, which Act also provided that the Commissioners should fix the prices for the use of the water. Under the authority of this latter Act the Appellant constructed its waterworks system which has from time to time been extended as required by the growth of the City. By subsequent special legislation in 1878 (41 Vict., Ch. 41) it was provided that all the powers and duties, rights and privileges of the waterworks commission were vested in the Appellant.

9. In 1916 the Legislature of Ontario, upon petition of the Respondent, passed an Act (6 Geo. V., Ch. 100) by the terms of which the Appellant was required to supply water to the Respondent. The Act authorized the parties to enter into an agreement in the form set out in Schedule A which contained a clause whereby differences arising under the agreement were to be submitted to the Ontario Municipal Board (then called the Ontario Railway and Municipal Board) for settlement, but this provision for the settlement of differences was not adopted.

10. The Appellant subsequently entered into an agreement in writing with the Respondent, dated the 18th day of July, 1916, by which the Appellant agreed to supply water to the Respondent upon the terms and conditions therein provided at the rate of 20 cents per 1,000 imperial gallons, which the Respondent agreed to pay. This agreement contained 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 (the Appellant) 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:—

40 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 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.

Record, p. 10,
1. 32.

11. The agreement was by statute of Ontario (7 Geo. V., Ch. 98) upon the petition of the Respondent ratified and confirmed and declared to be binding on the parties thereto. The Appellant since the making of the agreement has continuously supplied water to the Respondent as agreed. The quantity so supplied during the year 1935 was 1,250,512,108 gallons, which at the agreed rate, required payment by the Respondent to the Appellant of \$250,102.40. 10

12. The Respondent in 1935 made representations to the Appellant's Mayor and Board of Control with the object of securing a reduction in the rates payable under the agreement. The Respondent, however, took no steps to arbitrate under the terms of the agreement, but instead petitioned for an Act of the said Legislature known as The Township of York Act, 1936 (1 Edw VIII, Ch. 88). Section 2 of the Act reads:

2. Notwithstanding the provisions of paragraphs 23 and 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* 20 *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, 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 30 board on any such application shall be final and conclusive and shall not be subject to appeal.

Record, p. 5.

13. The Respondent under said section 2 applied to the Board to reduce and to fix the rates charged for water under the agreement.

Record, p. 6.

14. The Appellant in answer to the application pleaded, among other things, that section 2 of The Township of York Act, 1936, was *ultra vires* the Legislature of Ontario, and that the Ontario Municipal Board had no jurisdiction to hear the application or to vary the rates.

Record, p. 8.

15. The Respondent subsequently applied to the Board for an order for the examination for discovery of R. C. Harris, Works Commissioner 40 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 Appellant. Counsel for the Appellant opposed this application on the grounds set out in paragraph 14 and further contended that the Board had no juris-

diction to make any order for discovery or for production or inspection of documents. The Board, however, on the 23rd day of September, 1936, Record, p. 8. made an order containing provisions as follows:

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.

10 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 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.

20 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 in 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.

16. The Appellant thereupon applied to the Court of Appeal for Ontario Record, p. 12. for leave to appeal to it from the said order and leave was granted on 6th October, 1936. The appeal was heard on the 27th day of October, 1936, in presence of counsel for the Appellant and for the Respondent and for the Attorney-General for Ontario, both the Attorney-General for Ontario and the Attorney-General for Canada having been notified of the hearing as is required when a question of the constitutionality of a statute is Record, p. 12. raised. (R.S.O., 1927, Ch. 88, Sec. 32).

17. The Court of Appeal by a judgment delivered on the 4th day of December, 1936, dismissed the Appellant's appeal. Record, p. 14.

ROWELL, C.J.O., with whom Fisher, J.A. agreed, held that the Ontario Municipal Board had power to make the order appealed from if section 2 of the Township of York Act was *intra vires*. He decided that the section in so far as it authorized 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" conferred judicial functions rather than administrative duties, and in that respect Record, p. 15. was *ultra vires*; but he said: "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 that we 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."

Parts IV and VI of the Ontario Municipal Board Act on which the learned Chief Justice in part based his conclusion were before the passing of section 2 of the Act of 1936 repealed by the Ontario Municipal Board Amendment Act, 1935, Ch. 51, sections 3 and 5. Powers somewhat similar to those conferred on the Board by Part VI were in 1935 conferred on a department of Government by The Department of Municipal Affairs Act, chapter 16 of 1935. 10

Record, p. 25. RIDDELL, J.A., reached the conclusion that "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."

Record, p. 27. MIDDLETON, J.A., said: "The Act of 1936 however goes far beyond 20 conferring this power (determining purely municipal questions) and purports to give to 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 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 30 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."

Record, p. 30. HENDERSON, J.A., concurred with the Chief Justice, Riddell, J.A. and Middleton, J.A.

18. The Appellant submits that the judgment of the Court of Appeal should be reversed and that the order of the Board should be set aside for the following amongst other

REASONS.

1. Because the Ontario Municipal Board Act, 1932, confers judicial functions on the Board the members of which are not appointed by the Governor-General as required by section 96 of The British North America Act, 1867, and is *ultra vires*.
2. Because section 2 of the Township of York Act, 1936, attempts
10 to confer additional jurisdiction on the Board so improperly constituted.
3. Because section 2 is itself *ultra vires*.
4. Because the Court of Appeal erred in holding that section 2 could be regarded as *ultra vires* in part and *intra vires* as to the balance.
5. Because the rules made by the Board under which it acted relate to the exercise of its judicial rather than to any administrative functions vested in it.
6. Because the Board had no jurisdiction to make the order in question because if a Court it was not properly constituted and if an administrative body it was not properly authorized.
- 20 7. Because the order of the Board and the Judgment of the Court of Appeal were wrong and should be reversed.

All of which is respectfully submitted.

W. N. TILLEY.

C. M. COLQUHOUN.

J. P. KENT.

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Intervener

Appellant's Case

Treshfields, Leeds & Munns
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Appellant's Solicitors.