

The Corporation of the City of Toronto - - - *Appellants*

v.

The Corporation of the Township of York (Respondent)
and the Attorney General for the Province of Ontario
and another (Interveners) - - - *Respondents*

FROM

THE COURT OF APPEAL, ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1938.

Present at the Hearing :

LORD ATKIN.
LORD THANKERTON.
LORD MACMILLAN.
LORD WRIGHT.
LORD MAUGHAM.

[*Delivered by LORD ATKIN.*]

This is an appeal from the Court of Appeal of Ontario dismissing an appeal from an order of the Ontario Municipal Board which ordered the appellants to make discovery of documents and to permit inspection of their waterworks system and ordered the appellants' Commissioner of Works to be examined on discovery. The Board made the order in pursuance of powers contained in the Ontario Municipal Board Act, 1932: and in the course of an application brought before them by the respondents the Corporation of the Township of York in pursuance of the Township of York Act, 1936. The contention of the appellants is

(1) that the Board is invalidly constituted as being a Superior Court constituted in violation of sections 96, 99 and 100 of the British North America Act;

(2) that in any case the power to make the order in question is one that could only be exercised by such a Court;

(3) that the Act of 1936 is invalid as purporting to vest the jurisdiction of a Superior Court in the Municipal Board.

A short statement of the circumstances leading to the dispute between the parties will suffice. In 1916 the Township entered into an agreement with the City whereby the City agreed to supply water to the Township on terms, including payment at the rate of 20 cents per 1,000 gallons. The agreement contained a provision that the rate might be

altered by agreement or by arbitration. An arbitration clause provided for arbitration by two officials of the respective corporations and in the event of disagreement by a County Court Judge. The agreement was confirmed by Statute of Ontario of 7 G. V (1917) ch. 98. In 1936 the Legislature of Ontario passed the Act 1 Ed. VIII (1936) clause 88, which provided that notwithstanding the provisions of the agreement of 1916:—

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 board on any such application shall be final and conclusive and shall not be subject to appeal.

Application was made by the Township to the Municipal Board in pursuance of this Act to vary the rate for water supplied: and it was in respect of that application that the order complained of was made.

It will be seen that the attack of the appellants is twofold. They dispute the validity of any Act of the Municipal Board as at present constituted, and if this contention fails they attack the validity of the Act of 1936.

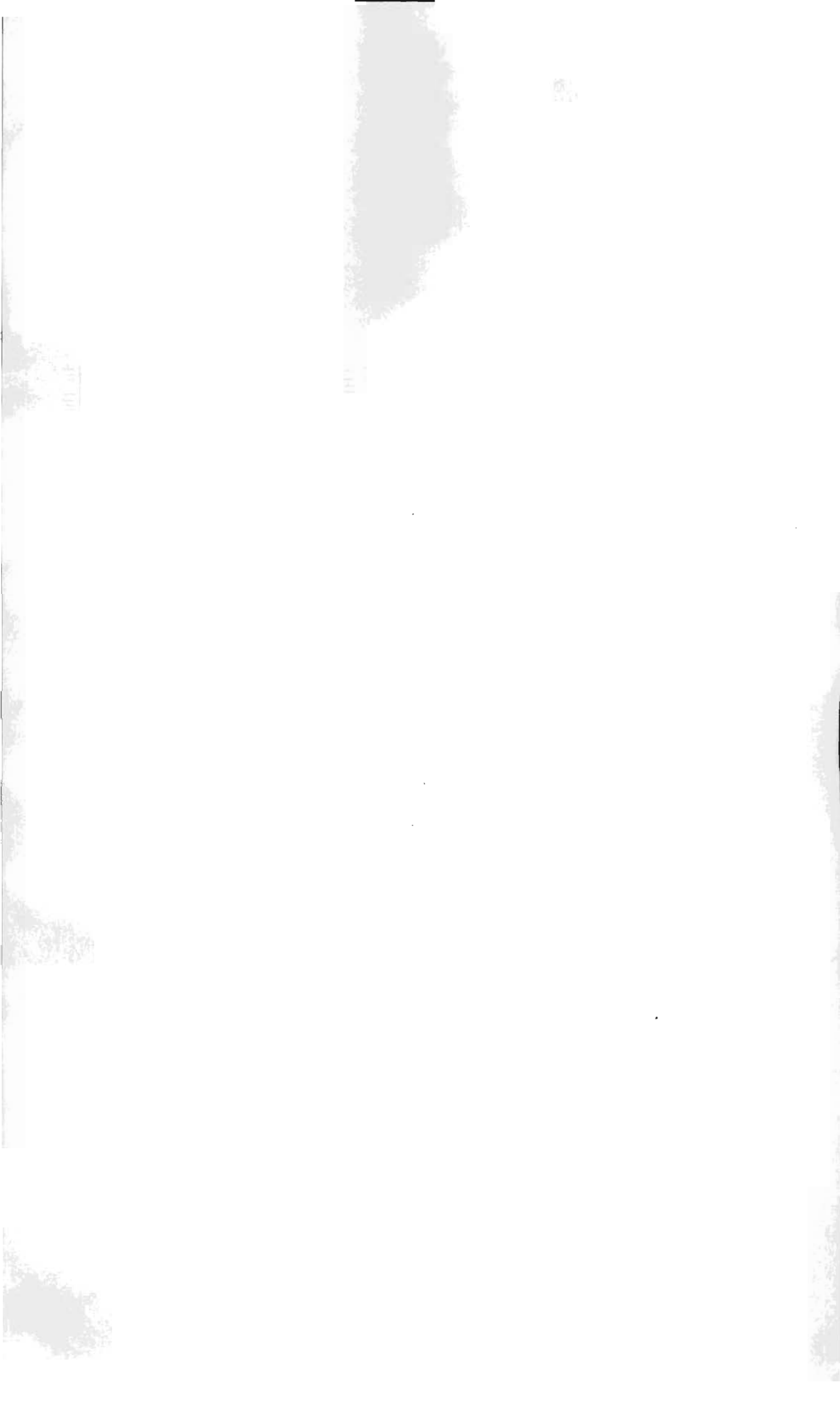
The first question touches a matter of first importance to the people of Canada. While legislative power in relation to the constitution, maintenance and organisation of Provincial Courts of Civil Jurisdiction, including procedure in civil matters, is confided to the Province the independence of the Judges is protected by provisions that the Judges of the Superior, District, and County Courts shall be appointed by the Governor-General (section 96) that the Judges of the Superior Courts shall hold office during good behaviour (section 99) and that the salaries of the Judges of the Superior, District, and County Courts shall be fixed and provided by the Parliament of Canada (section 100). These are three principal pillars in the temple of justice, and they are not to be undermined. Is then the Municipal Board of Ontario a Superior Court, or a tribunal analogous thereto? If it is, inasmuch as the Act of 1932 which sets it up observes none of the provisions of the sections above referred to, it must be invalidly constituted.

But a study of the provisions of the Municipal Board Act read in the light of its history as a successor to the Ontario Railway and Municipal Board (see sections 6 and 7) leads their Lordships to the conclusion that the Board is primarily, in "pith and substance," an administrative body. Parts IV, V, VI and VII are almost entirely administrative: and though some of them are now repealed and the duties of the Board transferred to other administrative channels their existence assists to reveal the original legislative intention. Mr. Gershom Mason in his argument for the respondents gave a survey of the multifarious administrative duties

which from time to time had been imposed upon the Board and its predecessor by legislation of the Province. It is unnecessary to review the statutes: it is sufficient to say that in respect of Municipal Institutions, Highways, Railways, Public Utility Acts dealing with Water, Gas and Electricity, Telephones and apparently other matters as well, the Board is entrusted with duties of supervision and decision which are purely administrative and in their totality would appear to make it one of the most important parts of administrative machinery in the Province. Primarily, as has been said, its function is administrative. But Mr. Tilley, for the appellants, emphasized with much force the provisions in Part III of the Act especially sections 41-46, 54 and 59 as indicating that the Board was entrusted with the jurisdiction and powers of a Superior Court: and within the purview of those sections was in fact constituted a Superior Court. It is difficult to avoid the conclusion that whatever be the definition given to Court of Justice, or judicial power, the sections in question do purport to clothe the Board with the functions of a Court, and to vest in it judicial powers. But making that assumption their Lordships are not prepared to accept the further proposition that the Board is therefore for all purposes invalidly constituted. It is primarily an administrative body: so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority: so far as the Act therefore purports to constitute the Board a Court of Justice analogous to a Superior, District or County Court it is pro tanto invalid: not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers: nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of sections 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect. They are, however, severable: there is nothing to suggest that the Board would not have been granted its administrative powers without the addition of the judicial powers complained of. The objection to the validity of the Board as such therefore fails. Their Lordships have found it unnecessary to discuss in detail how far some of the powers alleged to be judicial are in fact merely administrative. The question does not arise in the present case: and in accordance with their Lordships' usual practice in constitutional matters they will not embarrass future discussion when if ever such a dispute arises.

The remaining parts of the case seem to present little difficulty. The powers of examination, inspection

and discovery of documents even though couched in terms of similar powers of a Court of Justice are not inconsistent with the powers of an administrative body whose duty it may be to ascertain the facts with which they are dealing. The powers in this case seem to be in substance identical with those in the Combines Investigation Act, R.S.C. 1927, chapter 26, the validity of which was affirmed in *Proprietary Articles Trade Association v. A.G. for Canada* [1931] A.C. 310, and the existence of which was held not to make a commissioner armed with them a Court of Justice in *O'Connor v. Waldron* [1935] A.C. 76. The only remaining question is whether the Act of 1936 was valid. Their Lordships agree with the judgment of the Chief Justice of Ontario on this point. Assuming that the first part of the section purports to confer judicial function on the Board it is clearly inoperative: but the second part relates to an administrative function and appears to their Lordships clearly severable. The result is that the order complained of was a valid order; the order of the Court of Appeal affirming it was right: and this appeal should be dismissed. Their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of this appeal.



In the Privy Council

THE CORPORATION OF THE CITY OF
TORONTO

2.

THE CORPORATION OF THE TOWNSHIP
OF YORK (Respondent) and the ATTORNEY
GENERAL FOR THE PROVINCE OF
ONTARIO AND ANOTHER (Interveners)

DELIVERED BY LORD ATKIN

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