NORTHERN ALBERTA NATURAL GAS DEVELOPMENT CO..... APPELLANT;

1920
Nov. 3.
Dec. 17.

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA..... RESPONDENT.

IN RE THE PUBLIC UTILITIES ACT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Municipal corporation—Contract—Gas company—Maximum rate—"Existing rate"—"Public Utility"—"Public Utilities Act," (Alta.) s. (1915) c. 6, s. 20 (b) and s. 23 (c).

The maximum rate stipulated in a contract between a gas company and a municipal corporation, while the company has not yet by by-law or otherwise fixed any rates which it proposes to charge, is not an "existing rate" as used in section 23 (c) of the "Public Utilities Act" of Alberta; and the Board of Public Utility Commissioners has no jurisdiction to modify it.

Per Sir Louis Davies C.J. and Anglin J.—A gas company, which has a number of wells drilled and ready for operation but has not yet constructed pipe lines to carry their output, nor begun to render service to the public, is a "public utility," within the purview of the "Public Utilities Act." Idington J. *contra.*

Judgment of the Appellate Division (15 Alta. L. R. 416) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), allowing an appeal by the Attorney-General of the Province of Alberta from a decision of the Board of Public Utility Commissioners.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) 15 Alta. L. R. 416

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The Board had adjudged that it possessed jurisdiction under the "Public Utilities Act" of Alberta to make an order increasing the prices for the sale by the appellant of gas to consumers in the city of Edmonton beyond the maximum rates fixed by an agreement between the city and the company appellant whereby the company was granted its franchise by the city and which agreement was confirmed by chapter 29 of the Statutes of Alberta, 1916.

A. H. Clarke K.C. and *H. R. Milner* for the appellant.

Eug. Lafleur K.C. and *I. B. Howatt* for the respondent.

THE CHIEF JUSTICE.—After consideration I have reached the conclusion that this appeal must be dismissed.

I concur with the reasons for such dismissal stated by my brother Anglin.

IDINGTON J.—To maintain this appeal we must hold that a municipal corporation having, with the assent of the electors, known as burgesses, made a contract, of such an unusual and *ultra vires* character, with a company of adventurers, to make it legal required legislative ratification thereof, and then that the Legislature by enacting such merely ratifying legislation, impliedly enabled the Board of Public Utilities Commissioners to go a step further than had been given by either contract so ratified, or the legislation creating this Board; and hence, without the consent of said burgesses to a variation of the contract, by adding to the maximum price named in such a contract for the services to be rendered, although it might never come to be operative.

The company in question never got beyond the stage of expending some money in way of exploitation or construction, and never operated, nor was ready to operate, anything, yet claims that it is a public utility within the meaning of the definition thereof in the "Public Utilities Act," which reads as follows:—

(b) The expression "public utility" means and includes every corporation other than municipal corporations (unless such municipal corporation voluntarily comes under this Act in the manner hereinafter provided), and every firm, person or association of persons, the business and operations whereof are subject to the legislative authority of this province, their lessees, trustees, liquidators, or receivers appointed by any court that now or hereafter own, operate, manage or control any system, works, plant or equipment for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway, street railway, or tramway, or for the production, transmission, delivery or furnishing of water, gas, heat, light or power, either directly or indirectly, to or for the public; also the Alberta Government telephones, now managed and operated by the Department of Railways and Telephones.

The company in question pretends that it intends to supply gas. How such a company, merely exploiting the territory from which it expects to supply gas, can claim that it

owns, operates, manages or controls, any system,

within the meaning of said description, I am unable to understand.

And much less am I able to understand how a board merely given a possible jurisdiction to assent to the entry of such a company into a particular field to operate in, and then, when in operation, regulate its rates, can imagine that it has not only the powers duly assigned it, but also the power to override the legislative limitations of powers of contract, which a municipality has had imposed upon it by its charter, and extend those limited powers further than the legislative creator had seen fit to grant by special

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legislation, and in doing so to exceed not only the contractual power or the expression thereof, and the specific legislation, but also something far beyond the powers assigned the Board itself.

It seems to me as plain as the English language can make it, in the use thereof by a draftsman trying to express a Canadian legislator's meaning, that the Board can only deal with existent public utilities, and have nothing to do with the birth, growth, and finishing of same ready to be owned and used.

And, despite the resistance of the Attorney General for the province and the unanimous opinion of the Supreme Court thereof specifically designated by the legislation creating the said Board as the only authority which is to determine the limits of the jurisdiction of the Board, the company comes here asking us to overrule such determination, notwithstanding said court has pointed out many other insuperable objections in the way of the Board exercising such autocratic powers as the company desires it to exercise.

The company of course, is entitled to say that it got leave from this court to come here, but that is no more conclusive as to our jurisdiction than any leave, given by a single judge, for example, under the Winding-Up Act, or another court inadvertently giving leave to appeal in a case over which we never have been given jurisdiction.

Although appearing of record in this case as a party to the order granting leave, I wholly dissented therefrom for reasons assigned in writing.

I hold that we are not here to pass upon mere administrative acts of any branch of government, unless expressly assigned that duty by Parliament, as, for example, in regard to appeals from the Board of Railway Commissioners for Canada.

I have, however, in deference to what is assumed to be the contrary opinion of the majority of the court, set forth above what seem to me amply sufficient reasons for dismissing the appeal as well as that of want of jurisdiction.

I think the appeal should be dismissed with costs.

DUFF J.—I agree with the conclusion of the Appellate Division. The judgment of the Board in which the question of jurisdiction is fully discussed sets forth as follows:—

> Any jurisdiction the Board may possess so far as increasing rates is concerned is derived from s.s. c. of section 23 of the "Public Utilities Act." That section provides that the Board may after hearing fix "just and reasonable" rates * * * whenever the Board shall determine any existing individual rate * * * to be unjust or unreasonable, insufficient or unjustly discriminatory or preferential.

The order of the Board, having regard to the circumstances, which it is unnecessary to recapitulate, in effect is simply an order authorizing the company to exact charges exceeding the limit fixed by the agreement between the company and the municipal corporation of Edmonton and by the statute confirming the agreement. The company is providing no services, it is in no position to provide any services; consequently it is not in fact exacting any rate and it has not by any corporate act fixed the rates it is to charge. The order is therefore an order changing the limits fixed by the agreement between the company and the municipality ratified as already mentioned by statute in respect of tolls and it is nothing else.

The question is: Does the provision quoted sanction such an exercise of authority by the Board?

If such be the purpose of the provision the language is not apt; it is a provision for substituting just and reasonable rates for rates which have been held by

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the Board on investigation to be unreasonable or insufficient. The provision does not appear to contemplate orders which merely expand or restrict the limits fixed by a statutory contract in respect of tolls and charges. Whether in exercising authority under the section the Board may disregard the limits fixed by such contracts is another question. The language in my opinion is not sufficiently precise to support an order which merely changes such limits.

ANGLIN J.—The appellant company has not yet established a service. While it has a number of wells drilled and ready for operation it has not constructed pipe lines to carry their output. By its agreement with the city of Edmonton, whereby it obtained its franchise, certain maximum rates of charge for its services are established. That agreement has been validated and confirmed by statute. The company, however, has not, by by-law or otherwise, fixed any rates which it proposes to charge.

Alleging that the maximum rates specified in the agreement with the city are quite inadequate, the company applied to the Board of Public Utilities Commissioners to fix increased rates for its future services. The Board heard and granted this application, notwithstanding the intervention of the Attorney General contesting its jurisdiction. On an appeal taken under the provisions of the statute the Board's order was vacated by the Appellate Division as made without jurisdiction, and from that decision the present appeal has been brought by leave of this Court.

Three objections are taken to the jurisdiction of the Board:—

(a) that because it has not begun to render service to the public the appellant company is not yet a

"public utility" within the purview of the "Public Utilities Act"; (b) that the Board's jurisdiction is confined to increasing, reducing or approving of existing rates, and a maximum rate is not an "existing rate"; and (c) that, except for the reduction of excessive rates, provided for by s. 20 (b) of the statute, the Board has no power to interfere with rates fixed by the terms of a contract between a public utility and a municipality.

The status of the appellant company to apply to the Board and to assert the present appeal depend alike upon its existence as a public utility. Objection (a) should therefore be dealt with whatever view may be taken of objections (b) and (c). I am, with respect, of the opinion that it should not prevail. If it is sound a company ready to operate cannot obtain the sanction or approval of the Board to the rates it proposes to charge before actually commencing to do business, but must wait until it is in actual operation and actually charging such rates before it can legally apply for such sanction or approval. That this was the intention of the legislature seems highly improbable. The appellant company, in my opinion, "owns, * * or controls * * works, plant or equipment * * for the production or furnishing of gas * * to or for the public" and is therefore within the definition of "public utility" found in clause (b) of s. 2. Nothing in that clause imposes actual operation or even complete readiness to operate as a condition precedent to such a company as the appellant attaining the status of a "public utility." On the contrary the tenor of the Act, taken as a whole, appears to contemplate that in the stage of development which the appellant's works, plant and equipment have reached that status should be accorded to it.

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But objection (b) seems to me to be fatal to the jurisdiction of the Board whose powers are purely statutory. Sec. 20 (b) clearly does not apply. Nobody suggests that the maximum rates authorized by the agreement with the municipality of Edmonton are excessive. Sec. 23 (c) is the only other provision which purports to confer direct jurisdiction over rates. But the operation of that section is by its terms confined to cases where "the Board shall determine any existing rate * * to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential." It may be that it is not necessary to have a rate in actual use and in course of collection to render this clause of the statute applicable. But there must at least be a fixed rate which the company has determined, by by-law or in some other proper method, to impose and charge whenever it shall render the service for which such rate is prescribed. A rate merely stipulated as the maximum which the company may exact, but which has not yet been charged or authorized by the company and may never be so charged or authorized is not an "existing rate." I am therefore of the opinion that the case before us does not fall within s. 23 (c).

The only other suggestion offered in support of the appellant's position which seems to call for observation is that the Board has jurisdiction under s. 37 to deal with and prescribe the rates to be charged by a public utility as a condition of giving approval to a "privilege or franchise" granted to it by the municipality. But, in view of the explicit provisions of the statute empowering the Board to deal with rates and delimiting its jurisdiction in that connection, s. 37 in my opinion, cannot be invoked for that purpose. The principle of the decision in *Fort William*

Grand Trunk Pacific Railway Co. v. *Property Owners* (1) seems to be in point. The conditions authorized to be imposed by s. 37 are

> conditions as to construction, equipment, maintenance, service or operation.

"Operation" is the only word in this group which could possibly cover the fixing of rates. I had occasion to consider its meaning and scope in the recent case of *Ottawa Electric Railway* v. *Township of Nepean* (2). As used in the statute now before us, in my opinion, it does not include the fixing or regulation of rates or charges.

Mr. Clarke pressed for an expression of opinion upon objection (c) whatever view should be taken with regard to objections (a) and (b). But, having regard to my conclusion that objection (b) is well taken and is fatal to the company's application, I think objection (c) should not now be passed upon. It is not only unnecessary to deal with it but any expression of opinion upon it might well be regarded as purely academic.

Moreover, we were informed by counsel that an appeal is actually pending under a similar statute in the appellate court of another province in which this very question is presented for decision, in the case of a public utility in actual operation and charging fixed rates or tolls. We should not embarrass the presentation or determination of that appeal by any expression of opinion here which could be regarded as unnecessary or premature.

Because the appellant's application does not fall within s. 23 (c) owing to their being no "existing rates" the Board in my opinion was without jurisdiction to entertain it and to make the order reversed by the Appellate Division. Solely on this ground I would affirm the judgment *a quo* and dismiss the appeal with costs.

(1) [1912] A.C. 224. (2) 60 Can. S.C.R. 216, at p. 244.

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MIGNAULT J.—On the ground that the so-called rate which the appellant seeks authority from the Board of Public Utilities Commissioners of Alberta to increase is not an "existing rate" within the meaning of section 23, s.s. (c) of the "Public Utilities Act" (Alberta), my opinion is that this appeal fails and should be dismissed. The appellant's franchise agreement with the city of Edmonton fixes no rate, but establishes a maximum price for gas which the appellant cannot exceed. Under this agreement and within this maximum the appellant must by by-law determine the price to be paid by the consumers of gas, and then only will there be an existing rate. It has not yet done so for it has not yet laid down the pipe lines through which the gas will be supplied. There is therefore no existing rate, but merely a maximum agreed upon by the appellant and the city, and it is this contractual maximum which the appellant seeks to have increased. In my opinion, the condition required for the exercise of the Board's jurisdiction is wanting. Looking at the whole situation and the changed conditions since the agreement was made, it would seem that resort should be had to the Legislature rather than to the Board whose powers clearly do not extend to a case like this one.

Appeal dismissed with costs.

Solicitors for the appellant: *Hyndman, Milner & Matheson.*

Solicitor for the Attorney General of Alberta: *Irving B. Howatt.*

Solicitor for the city of Edmonton: *J. C. F. Bown.*