1956
*Feb. 14, 15
*Mar. 28

THE CORPORATION OF THE TOWNSHIP OF SCARBOROUGH — APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO ..... — RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Annexation—Municipal Board—Power of Board—Failure to deal with conditions existing at time of adjudication—Municipal Act, R.S.O. 1950, c. 262—Municipality of Metropolitan Toronto Act, 1953, c. 73—Public Utilities Act, R.S.O. 1950, c. 320—Power Commission Act, R.S.O. 1950, 281.

In 1927, the City of Toronto expropriated certain lands in the Township of Scarborough on which it built a waterworks plant. Under legislation then in force, the City was exempt from taxation by the Township in respect of these lands, but in 1952, the exemption was removed by an amendment to the *Assessment Act*. Thereupon, the City applied to the Municipal Board for annexation of these lands under s. 20 of the *Municipal Act*. While the decision of the Board on this application was pending, the Metropolitan Corporation was created. The Corporation became vested with the water plant and liable to the payment of local taxes. The Municipal Board ordered the annexation and this order was affirmed by the Court of Appeal.

Held (Kerwin C.J. and Locke J. dissenting): That the appeal should be allowed and the matter remitted to the Board for further consideration.

*PRESENT: Kerwin C.J., Rand, Kellock, Locke and Cartwright JJ.

Per Rand, Kellock and Cartwright JJ.: The Municipal Board failed to deal with the circumstances and conditions existing at the time of its adjudication as it disregarded completely the new situation which was created when both the municipal function of water supply and the physical assets were transferred to the Metropolitan Corporation. This was a serious error in law.

Per Kerwin C.J. and Locke J. (dissenting): It cannot be said that the Board proceeded on a wrong principle of law. There is no warrant for the assumption that the Board did not consider and deal with the application on the footing that it should be determined upon the facts as they existed at the time of the making of the order.

The power of the Board given by s. 20 of the *Municipal Act* and preserved by s. 214(2) of the *Municipality of Metropolitan Toronto Act,* is not affected by ss. 117(1), 221(1) and 225(1) of the latter Act or by any of the provisions of the *Public Utilities Act* or the *Power Commission Act*. These provisions have not the effect of unalterably fixing the boundaries of the Township of Scarborough as of January 1, 1954.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming an order for annexation made by the Ontario Municipal Board.

H. E. Manning, Q.C. for the appellant.

F. A. A. Campbell, Q.C. and *W. R. Callow* for the respondent.

THE CHIEF JUSTICE (dissenting):—The Corporation of the Township of Scarborough applied to this Court for leave to appeal from the judgment of the Court of Appeal for Ontario dismissing its appeal from the Ontario Municipal Board and the following order was thereupon made:—

Assuming the appellant requires leave to bring to this Court for consideration the order of the Court of Appeal, the Court is unanimously of opinion that leave should be and it is hereby granted. The costs will be in the cause.

Mr. Manning's main argument was that the Board had proceeded upon a wrong principle of law,—referring especially to the following words in the Board's reasons for allowing the application to it by the Corporation of the City of Toronto for the annexation to the City of certain lands in the Township:—

Where, as in the present case, all the lands in question are owned and used for public purposes by the applicant municipality and the property is located immediately adjacent to one of its boundaries, annexation should not be refused unless there are exceptional circumstances.

(1) [1955] O.R. 281.

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He pointed out that by virtue of the combined operation of s. 37 of *The Municipality of Metropolitan Toronto Act,* 1953, and a by-law of The Metropolitan Council the lands in question are vested in the Metropolitan Corporation. This, of course, was well-known to the Board, as appears from a reading of all of its reasons. In my opinion, the extract quoted, and all others mentioned by Mr. Manning, when read in their context, and in view of all else that was said, means that the Board was taking into consideration the fact that before *The Municipality of Metropolitan Toronto Act,* 1953, came into force the lands had been owned by the City. It is also clear to me from a reading of the entire reasons that the Board was considering the circumstances as they existed at the time it gave its decision and not as of the time when the application by the City was first made.

This being so, I am unable to give effect to any of Mr. Manning's other arguments dealing with ss. 117 (1), 221 (1) and 225 (1) of *The Municipality of Metropolitan Toronto Act,* 1953, or with any of the provisions of *The Public Utilities Act,* R.S.O. 1950, c. 320, or of *The Power Commission Act,* R.S.O. 1950, c. 281. None of these provisions affects the proper construction of s-s. (2) of s. 214 of *The Municipality of Metropolitan Toronto Act,* 1953:—

> 214. (2) Nothing in this Act alters or affects the powers of the Municipal Board under, and the application of, section 20 of *The Municipal Act.*

Section 20 of *The Municipal Act* referred to, R.S.O. 1950, c. 243, empowers the Board by order, on such terms as it may deem expedient, to

> (*c*) annex the whole or any part or parts of any other municipality or municipalities to the municipality.

This power of the Board, preserved by s-s. (2) of s. 214 of *The Municipality of Metropolitan Toronto Act,* 1953, is not restricted by s-s. (1) of s. 221:—

> 221. (1) Except as provided in this Act, the Municipal Board, upon the application of any area municipality, The Corporation of the County of York of the Metropolitan Corporation, may exercise any of the powers conferred on it by clauses (*a*) and (*d*) of subsection 9 of section 20 of *The Municipal Act.*

Instead of restricting the powers of the Board, this enactment widens and extends them.

Sections 117 (1) and 225 (1) of *The Municipality of Metropolitan Toronto Act*, 1953, read as follows:—

117. (1) On and after the 1st day of January, 1954,

(*a*) the present high school district in the Township of Scarborough is enlarged to include the whole of the Township of Scarborough;

(*b*) the continuation school district of School Section No. 14 of the Township of Scarborough is dissolved;

(*c*) the whole of the Township of Scarborough is created a township school area;

(*d*) Union School Section No. 9 and 17 of the Townships of Markham and Scarborough and Union School Section No. 11 and 4 of the Townships of Scarborough and Pickering are dissolved, subject to the adjustment by arbitration of all rights and claims pursuant to section 32 of *The Public Schools Act*.

* * *

225. (1) Notwithstanding anything in *The Power Commission Act* or in *The Public Utilities Act* or in any other special or general Act, the whole of the Township of Scarborough, the whole of the Township of North York and the whole of the Township of Etobicoke shall each be deemed to be an area established under subsection 1 of section 66 of *The Power Commission Act*, and The Public Utilities Commission of the Township of Scarborough, The Hydro-Electric Commission of the Township of North York and The Hydro-Electric Commission of the Township of Etobicoke shall each be deemed to have been established for the whole of the said respective areas and the members duly elected.

By s. 227 it is provided that s. 225 comes into force on January 1, 1954.

In view of the express terms of s-s. (2) of s. 214, the argument cannot prevail that these have the effect of unalterably fixing the boundaries of the Township as of January 1, 1954. The provisions of s-s. (2) of s. 214 must be given their plain and ordinary meaning and effect.

The appeal should be dismissed with costs.

The judgment of Rand, Kellock and Cartwright JJ. was delivered by:—

RAND J.:—The issue in this appeal will be more clearly appreciated if a brief statement of the facts be given.

In 1927 the City of Toronto expropriated a parcel of land approximately 19 acres in extent lying in the southwest corner of the Municipality of Scarborough, including certain water lots running into Lake Ontario. At this point the westerly boundary of Scarborough coincides with the easterly boundary of the City. By reason of statutory provisions, the land as owned by the City was exempt from

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taxation by the Municipality. Later a large waterworks plant was built at a substantial cost to furnish the City with a water supply, and the plant was likewise tax exempt.

In April, 1952, legislation was passed which removed the exemption. Thereupon under s. 20 of *The Municipal Act* an application was made on August 7 to the Municipal Board for an order annexing the land to the City. Two other applications were at that time pending before the Board, one by the City and the other by the Town of Mimico, each looking to an amalgamation of a number of adjacent municipalities into a larger unit. S. 20(1) reads:

> 20. (1) Upon the application of any municipality authorized by by-law of the council thereof, or upon the application of the Minister of Municipal Affairs authorized by the Lieutenant-Governor in Council, or in respect of clause *d* upon the application of at least 25 male inhabitants, being British subjects of the full age of 21 years, the Municipal Board may by order on such terms as it may deem expedient,
>
> (*a*) amalgamate the municipality with any other municipality or municipalities;
>
> (*b*) annex the whole or any part or parts of the municipality to any other municipality or municipalities;
>
> (*c*) annex the whole or any part or parts of any other municipality or municipalities to the municipality; or
>
> (*d*) annex the whole or any part or parts of any unorganized township or townships to the municipality.
>
> and any such order may amalgamate or annex a greater or smaller area or areas than the area or areas specified in the application, whether or not the municipality, municipalities, unorganized township or unorganized townships in which the area or areas is or are located is or are specified in the application.

On the application here in question, a hearing was held on October 20 before two members of the Board, but in June, 1953 it was intimated that they were unable to agree and that there would be a rehearing.

In the meantime the prior applications of the City and of Mimico had on January 20, 1953 been dismissed. This was followed on February 25 by the introduction into the legislature of a bill for the creation of a comprehensive metropolitan district which became law on April 2 as *The Municipality of Metropolitan Toronto Act,* 1953. By this enactment a metropolitan municipal corporation was set up in which, among other things, were vested certain municipal utilities including their assets, powers and duties. Among them was that of the water supply for the metropolitan area; and as of January 1, 1954, the water plant in

question became the property of the Corporation. No compensation was payable to the City, but the Corporation assumed liability for all outstanding obligations related to the property.

As a further result, from and after that date the Corporation, as owner of all waterworks within the metropolitan area and charged with the duty of administering that municipal service, became liable to pay to the Municipality within which each such plant or property was situated sums of money equivalent to local taxes appropriate to it. This meant that those moneys referable to the land and works in Scarborough would, in the then existing situation, be payable by the Corporation to that municipality.

A rehearing of the application of August 7, 1952 took place on September 4, 1953. Judgment was reserved until June 22, 1954 when the Board handed down its decision by which it ordered the area of the land and works to be annexed to the City. That the Board, as of that date, had jurisdiction, on proper grounds, to make such an order under s. 20 does not admit of any doubt. But Mr. Manning's contention is that in coming to its conclusion the Board considered the matter from an improper point of view and disregarded material circumstances which were highly pertinent.

The reasons of the Board were set out in detail and from them it appears that, for the purpose of adjudication, it founded itself on the situation existing on August 7, 1952. That this is so is seen from the following excerpt of the language used:

> Where, as in the present case, all the lands in question are owned and used for public purposes by the applicant municipality and the property is located immediately adjacent to one of its boundaries, annexation should not be refused unless there are exceptional circumstances.

Other passages in the reasons confirm this interpretation. It is said:

> Under such circumstances the Board is quite satisfied that, had the present application been made at any time prior to the enactment of the 1952 legislation previously referred to, annexation would have been ordered almost as a matter of course and it is unlikely that the township would have raised any objection.

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The legislation of 1952 was that which restored in effect the liability of the property to taxation. Then the following:

> In the opinion of the Board, quite apart from any question of liabiilty for annual payments in lieu of taxation, any municipality which has acquired or built a valuable municipally-owned asset outside its boundaries pursuant to special or general legislation has a prima facie right to expect a favourable reception of a subsequent annexation application for the purpose of bringing the property in question within its own boundaries if there is no physical obstacle to such a change.

I am unable to agree that these clear and precise indications of the perspective in which the Board examined the matter are qualified by the general statement that

> in the opinion of the Board, the reasonable and natural desire of any municipality to adjust its boundaries so as to include not only the homes of its workers and the commercial and industrial areas where they obtain employment, but also the schools, public buildings, public works and parks which the municipality has supplied to serve them, should be given effect to by suitable boundary adjustments wherever reasonably possible, notwithstanding the incidental transfer of the benefits arising from the new and somewhat unexpected revenues made available by the legislation referred to.

The reference to legislation seems obviously to be to that in effect restoring taxability, and the passage clinches the meaning of what has been previously quoted.

The Board thus disregarded completely the new situation of January 1, 1954 in which both the municipal function of water supply and the physical plant and other assets associated with it had become transferred to a new municipal body, the Corporation. That these factors might very easily have led the Board to a different decision on the application is indisputable. The significance of the circumstance that the funds required for the purchase of land and the construction of plant had been furnished by a municipality was discussed by the Board in its reasons accompanying the dismissal in January, 1953 of the earlier applications made by the City and Mimico, and its possible effect upon a decision of the Board given in the light of the new situation is put beyond controversy in the following passage:

> Turning to the larger question of a general adjustment of assets and liabilities with respect to the assets to be taken over by the Metropolitan Council in the foregoing proposals, it is the considered opinion of the board, as previously stated in the specific proposals, that these assets should be taken over and operated for the benefit of the entire area without adjustment except for the assumption of outstanding indebtedness.

In the board's opinion, the true nature of these assets is often misunderstood. Although they have been built and financed by the various individual municipalities and their local boards, they are not in a legal sense the property of the residents or ratepayers for the time being resident within the municipality where the assets are located. They are, in every sense of the word, public property and are held in trust for the use and benefit of the present and future residents of the area within the jurisdiction of the local authority. But that area has no fixed and predetermined limits and it may be indefinitely enlarged or included with other areas for the purposes of local government at the will of the legislature. The municipal government is, after all, a government and not a commercial corporation which can wind up its affairs, sell its assets and distribute the proceeds among its shareholders. For this reason it seems to the board that so long as the residents of the particular area are not deprived of the beneficial use of the assets built or maintained for them by their local government, the management and operation of the asset by a new type of local government which will be, in effect, a new trustee, deprives them of no rights whatever, and entitles them to no individual or collective compensation.

That the Board as an administrative body, in such a case as the present, must deal with the circumstances and conditions as, at the time of its adjudication, they may be, is axiomatic: there is no question of determining rights as of the time of commencement of proceedings: there are no rights or obligations except those arising from the order made. The analogy of the enforcement of common law rights is wholly inappropriate.

What faced the Board after January 1, 1954 was then extremely simple. The City had ceased to be the owner of the property in Scarborough; it was no longer concerned with liability for the obligations of the water system; the complete control of the water supply throughout the metropolitan area had become the duty of the Corporation to be exercised and operated in such a manner whether as an entirety or in local units as the Corporation might decide. The property lay within the area of Scarborough; as between the City and Scarborough, the only substantial interest involved was the benefit of the tax equivalent payments for which the Corporation had become liable: would they be paid to Scarborough or to the City? This benefit the latter sought through an extension of its boundaries. In these circumstances, to make what was in substance an adjudication *nunc pro tunc* and to disregard the radical change of conditions that had since the prior time been brought about was a serious error in law; and the error was

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accentuated by drawing from those previous but then non-existent circumstances a presumption, conceivably appropriate in past or other circumstances, to which the subsequent and transformed situation could furnish no answer. But it was on such a basis that the Board acted.

As Mr. Manning succeeds on this ground, it is neither necessary nor desirable to consider any of the other points raised by him.

I would allow the appeal, set aside the judgment of the Court of Appeal and remit the matter to the Board for further consideration. In accordance with s. 98(3) of the *Ontario Municipal Board Act,* the judgment will certify the opinion of the Court to be that in acting in the light only of the situation as it existed on August 7, 1952 the Board erred in law: and that on the reconsideration of the application it should take into account circumstances and conditions then existing as well as any other circumstances pertinent to the issue raised. The appellant is entitled to its costs in this Court and in the Court of Appeal.

LOCKE J. (dissenting):—This is an appeal pursuant to leave granted by this Court from a judgment of the Court of Appeal dismissing the present appellant's appeal from an order of the Ontario Municipal Board dated June 22, 1954. The appeal from that order to the Court of Appeal was taken pursuant to leave granted under the provisions of s. 98 of the *Ontario Municipal Board Act* (c. 262 R.S.O. 1950).

The appeal to the Court of Appeal permitted by that section is limited to questions of law including that of jurisdiction and s-s. 3 provides that that Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board and are necessary in determining the question of jurisdiction or law, as the case may be.

The facts necessary to be considered in determining this appeal are stated in the decision of the Board and in the reasons for the unanimous judgment of the Court of Appeal delivered by the learned Chief Justice of Ontario.

The application for the order annexing the property in question to the City of Toronto was authorized by a by-law passed by the City Council on June 24, 1952, and the first

hearing of the application which was concluded on October 20, 1952 proved abortive, owing to the failure of the two members of the Board, by whom the matter was heard, to agree. That application was renewed on September 4, 1953 and judgment was reserved and it was during the time that the matter was under consideration by the Chairman and the two other members by whom it had been heard that the *Municipality of Metropolitan Toronto Act* (c. 73, S.O. 1953) came into force.

The main objection by the appellant to the order made is that the Board allegedly erred in law in determining that the application should be disposed of by considering matters as they stood as of the date the application was first heard, rather than as of the date the order was made and without regard to the changes authorized and brought about under the 1953 legislation.

The only support that I am able to find in this record for that contention is a passage from the reasons for judgment delivered by the Board which reads:—

> Where, as in the present case, all the lands in question are owned and used for public purposes by the applicant municipality and the property is located immediately adjacent to one of its boundaries, annexation should not be refused unless there are exceptional circumstances.

Standing by itself, this might appear to indicate that the Board had completely overlooked the fact that theretofore, by the steps authorized by the *Municipality of Metropolitan Toronto Act,* the title of the property in question had vested in the Metropolitan Corporation thereby constituted.

The passage quoted appeared, however, as the concluding sentence of a paragraph dealing solely with an argument advanced on behalf of the Township that the amendment made in 1952 (c. 3) to the *Assessment Act* (c. 24, R.S.O. 1950), which in effect removed the exemption theretofore enjoyed by municipalities in respect to public utility properties owned by them and not located within their own boundaries, should by implication be construed as having prohibited subsequent annexations of such properties. As to this, the Board, rejecting the argument, said in part:—

> On the contrary, it seems to the Board that nothing in the 1952 legislation can be found which restricts the discretionary power of the Board to order an annexation whenever it appears to the Board that the

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objectives of the applicant municipality and its reasons for seeking an adjudgment of its boundaries are sound and are supported by the evidence adduced.

The passage first quoted referred only to the contention that, from the date the amendment of 1952 became effective, there could be no annexation by a municipality of property of the nature referred to in the amendment under s. 20 (now s. 14(2)) of the *Municipal Act* (c. 243, R.S.O. 1950). As of that date the respondent had owned the property in question and the Board was speaking of its rights at that time and thereafter which, in its opinion, had not been affected by that legislation. While it would have been conducive to clarity if the Board had said simply that the power to order such an annexation was unaffected by the 1952 amendment to the *Assessment Act,* that this is what was intended appears to me to be made clear by what followed when the effect of the 1953 legislation was considered independently.

To treat that portion of the reasons as relating to the situation created by the subsequent legislation would be to assume that the members of the Municipal Board had ignored the fact that the effect of steps taken authorized by that legislation had been to vest title to the water works property in the Metropolitan Board. I see no warrant for any such assumption. That the Board considered and dealt with the application on the footing that it should be determined upon the facts as they existed as at the time of the making of the order appears to me to be clear from the following passage in their reasons, which includes and supplements that portion quoted by the learned Chief Justice in his judgment and which should, I think, be read together with it:—

> It is clear, therefore, that the real basis of the township's objection to the present application is the loss of the very substantial annual revenues which it hopes to receive at the expense of either the city or the Metropolitan Corporation as a result of the 1952 legislation if the present application is dismissed and the property remains within the township. It was argued that the Board, as an administrative tribunal, would be justified in considering the relative impact of the loss of this annual revenue upon the economy of the township as compared with that of the city. It was pointed out that the amount, although large, was only a fraction of one percent of the total tax revenue of the city while it amounted to about four percent of that of the township. Although this argument is persuasive, the Board, after full consideration, prefers to base its decision upon principles which are capable of general application in

similar cases. In the opinion of the Board, the reasonable and natural desire of any municipality to adjust its boundaries so as to include not only the homes of its workers and the commercial and industrial areas where they obtain employment, but also the schools, public buildings, public works and parks which the municipality has supplied to serve them, should be given effect to by suitable boundary adjustments wherever reasonably possible, notwithstanding the incidental transfer of the benefits arising from the new and somewhat unexpected revenues made available by the legislation referred to. For the above reasons the application will be granted and an order will be issued providing for the annexation to the City of Toronto of the lands in the Township of Scarborough occupied by the R. C. Harris Water Purification and Pumping Plant, more particularly described in By-law 18664 of the city and in Schedule "A" to this order.

It was further urged that the powers of the Board under s. 20 of the *Municipal Act*, expressly reserved to it by s. 214(2) of the *Municipality of Metropolitan Toronto Act*, might not be invoked to alter the boundaries of the appellant as they existed as of the date that Act came into force. This is based upon the fact that by s. 117(*a*) and (*c*) of the Act it is provided that, on and after the 1st day of January 1954, the present high school district in the Township of Scarborough is enlarged to include the whole of the township and the whole of the township is created a township school area, and further, that by s. 225(1) it is provided, *inter alia*, that the whole of the township shall be deemed an area established under s-s. 1 of s. 66 of the *Power Commission Act*. From this, it is argued that the Legislature has thus indicated that the boundaries of the township as of the date mentioned were to remain fixed as they then were. It is quite impossible to reconcile this argument with the express provisions of s. 214(2). Construed, as it must be, as a whole, the powers of the Board extend in this respect, in my opinion, to the respondent township in the same manner as they do to the other municipalities referred to in, and affected by, the legislation.

The contention that in some manner s. 214(2) is restricted by the terms of s-s. 1 of s. 221 should also, in my opinion, be rejected. The latter subsection appears to me to be intended to extend the powers of the Board under s. 20 of the *Municipal Act* rather than to restrict them.

In my opinion, the jurisdiction of the Board to make the order is undoubted and I respectfully agree with the learned Chief Justice of Ontario that it has not been shown that there has been any error in law on its part in dealing

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with the matter. This being so, the question as to whether the powers given to it by s. 20 of the *Municipal Act* and by the *Ontario Municipal Board Act* (c. 262, R.S.O. 1950) should be exercised in the circumstances as they existed in June of 1954 was one for the Board and for the Board alone.

I would dismiss this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Manning, Mortimer & Mundell.*

Solicitor for the respondent: *W. G. Angus.*