UNION GAS COMPANY OF CANADA LIMITED ..... APPELLANT;

AND

SYDENHAM GAS AND PETROLEUM COMPANY LIMITED..... RESPONDENT.

1956
*Oct. 12
1957
Jan. 22

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Franchises—Supply of natural gas—Powers and discretion of Ontario Fuel Board—"Public convenience and necessity"—Powers of Court on appeal—The Municipal Franchises Act, R.S.O. 1950, c. 248, ss. 8, 9, as amended and enacted by 1954, c. 60, ss. 2, 3—The Ontario Fuel Board Act, 1954 (Ont.), c. 63.

The respondent company applied to the Ontario Fuel Board for approval of a proposed by-law giving the respondent a franchise under *The Municipal Franchises Act* to construct works for the transmission of natural gas to the premises of one company in the town. This application was opposed by the appellant company, which held a franchise from the same municipality to bring in gas and distribute it in the town. The Board refused to approve the by-law, holding that the respondent had not established that public convenience and necessity required the approval. The respondent then appealed to the Court of Appeal under s. 8(4) of the Act, as enacted in 1954. The Court of Appeal reversed the finding of the Board and ordered that a certificate issue.

Held (Locke J. dissenting): The order of the Court of Appeal must be set aside and the order of the Board must be restored.

Per Kerwin C.J. and Abbott J.: The Court of Appeal had no power to substitute its opinion for that of the Board, treating the question of public convenience and necessity as a question of fact subject to review on the appeal. The right of appeal was limited to "any question of law or fact" and the Court was therefore confined to such particular questions as might be set out in the order granting leave to appeal. The jurisdiction of the Court did not include the substitution of its views as to public convenience and necessity for those of the Board.

Per Rand and Kellock JJ.: What the Court did was to exercise an administrative jurisdiction, substituting its judgment on the application for that of the Board. The determination of public convenience and necessity was not a "question of fact" but the formulation of an opinion, and the opinion must be that of the Board alone.

Per Locke J. (*dissenting*): The approval of the Board was required under subs. 2(*a*) of s. 9 of the Act, enacted in 1954, and not under subs. 2(*b*). The reasons delivered by the Board indicated that they did not appreciate this distinction but considered the matter as if the application had been made under subs. 2(*b*). The question whether public convenience and necessity required the approval of the application was one of fact in respect of which the Court of Appeal had jurisdiction and in this case it had rightly exercised that jurisdiction.

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

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APPEAL from a judgment of the Court of Appeal for Ontario (1), allowing an appeal from an order of the Ontario Fuel Board. Appeal allowed.

J. J. Robinette, Q.C., and *L. S. O'Connor, Q.C.*, for the appellant.

J. Sedgwick, Q.C., and *H. M. Carscallen*, for the respondent.

The judgment of Kerwin C.J. and Abbott J. was delivered by

THE CHIEF JUSTICE:—This is an appeal by leave of this Court by Union Gas Company of Canada Limited, from a judgment of the Court of Appeal for Ontario (1) reversing a decision of the Ontario Fuel Board, dated October 19, 1954. The respondent, Sydenham Gas and Petroleum Company Limited, had applied to the Board, as required by s. 9 of *The Municipal Franchises Act*, R.S.O. 1950, c. 249, as enacted by s. 3 of c. 60 of the statutes of 1954, for approval of By-law 1907 of the Town of Wallaceburg. The council of that municipality had given first and second reading to the by-law, which gives the respondent a franchise under *The Municipal Franchises Act* to enter on highways and construct works for the transmission of natural gas to the premises of Dominion Glass Company Limited. By By-law 1602 of the Town of Wallaceburg, which was read a third time and finally passed on April 1, 1947, after it had been assented to by the ratepayers of the municipality, the appellant secured the right and authority to enter upon the highways within the municipality to bring in gas to its distributing-system of mains and pipes and to distribute and sell it in the town, and for such purposes to lay, maintain, operate, renew and repair mains and pipes under the Town's highways. These rights were granted for the term of 25 years from April 1, 1947, or such less time as it should continue to provide an adequate supply of gas to the citizens of the municipality.

The respondent is a subsidiary of Dominion Glass Company Limited, and the latter desired to obtain a supply of gas for its works, if possible at cheaper rates than those charged by the appellant, although all rates are subject

(1) [1955] O.W.N. 781, [1955] 4 D.L.R. 41.

to approval of a provincial authority. The appellant's rates had been fixed by Mr. R. S. Colter, Q.C., who had been natural gas referee, by an order of November 26, 1948, pursuant to *The Natural Gas Conservation Act*, R.S.O. 1937, c. 49, s. 7. That Act was repealed by *The Ontario Fuel Board Act*, c. 63 of the statutes of 1954, but by s. 37 thereof every regulation and order made under *The Natural Gas Conservation Act* is to remain in force until rescinded or amended by the Board which was created pursuant thereto.

The respondent's application to the Board was refused on the ground that the proposal would be a fundamental departure from the principles that had governed the gas industry in Ontario for at least the last 40 years, and that the respondent had not established that public convenience and necessity appeared to require that such approval be given. This was in pursuance of s. 8 of *The Municipal Franchises Act*, subss. (1) to (6) of which, as amended by s. 2 of c. 60 of the statutes of 1954, are as follows:

8. (1) Notwithstanding anything in this or in any other general or special Act, no person shall construct any works to supply or supply,

(*a*) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(*b*) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Fuel Board and such approval shall not be given unless public convenience and necessity appear to require that such approval be given.

(2) The approval of the Ontario Fuel Board shall be in the form of a certificate.

(3) The Ontario Fuel Board shall have and may exercise jurisdiction and power necessary for the purposes of this section and to grant or refuse to grant any certificate of public convenience and necessity, but no such certificate shall be granted or refused until after the Board has held a public hearing to deal with the matter upon application made to it therefor, and of which hearing such notice shall be given to such persons and municipalities as the Board may deem to be interested or affected and otherwise as the Board may direct.

(4) With leave of a judge thereof, an appeal shall lie upon any question of law or fact to the Court of Appeal from any decision of the Ontario Fuel Board granting or refusing to grant a certificate under this section; provided application for leave to appeal is made within 15 days from the time when such decision is given.

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Kerwin C.J.

(5) The Ontario Fuel Board shall not issue any certificate under this section until after the expiration of 15 days from the time its decision to grant the same is given or in the event of an appeal from such decision until after the time when such appeal is determined or leave to appeal is refused.

(6) Upon an appeal to the Court of Appeal its judgment thereon shall be final and not subject to further appeal therefrom, and the Ontario Fuel Board shall, if and as may be necessary, amend or vary its decision to conform to such judgment and grant or refuse to grant a certificate under this section accordingly.

An order was made by a judge of the Court of Appeal giving the respondent "leave to appeal to the Court of Appeal from the decision of the Ontario Fuel Board dated the 19th day of October, 1954 on the grounds set out in the motion for leave to appeal and on such further or other grounds as may be set out in the notice of appeal herein". Pursuant thereto a notice of appeal was given, asking for a reversal of the Board's order on the following grounds:

(1) The decision is wrong in law, and is against the evidence and the weight of evidence.

(2) The Board erred in holding on the evidence that there was any scarcity or potential scarcity of natural gas in this Province.

(3) The Board erred in taking into consideration, as affecting public convenience and necessity, the potential loss of revenue to the respondent, and in any event there was no evidence on which the Board could hold that the revenue derived from the appellant or its parent Company would, or could, affect the general rate structure of the respondent.

(4) The findings of the Board as to natural gas scarcity and as to the effect of the application on the rate structure of the respondent are inconsistent.

(5) The Board should have found on the evidence that "public convenience and necessity" required the approval by the Board of the application.

(6) Upon such further and other grounds as may appear from the evidence and the reasons of the Board and as counsel may advise and this Court may permit.

The Court of Appeal apparently considered that it had power to substitute its opinion for that of the Board, treating the question of public convenience and necessity as a question of fact. I am unable to agree with that view. While the Board had been newly formed and we were told that the respondent's application to it was the first to be heard since its creation, the Board was the successor, in many respects, to the jurisdiction formerly exercised by the referee. Its members would be in a position to exercise their judgment, in view of their general

knowledge, and, while provision is made for an appeal from its decision, it is, in the wording of the relevant statutory enactment, "upon any question of law or fact". The provision that the Court of Appeal's judgment should be final and not subject to further appeal could not, of course, affect the jurisdiction of this Court to grant leave to appeal from its decision. The Court of Appeal was confined to such particular questions of law or fact as might be set out in the order of the judge of the Court of Appeal, as required by subs. (4) of s. 8 of *The Municipal Franchises Act*. It is not merely a matter of procedure; it goes to the jurisdiction of the Court of Appeal, and that jurisdiction does not include the substitution of that Court's views as to public convenience and necessity for those of the Board, but is restricted to the determination of those questions of law or fact which have been particularized by the order of the judge of that Court.

The appeal should be allowed and the judgment of the Court of Appeal set aside. Since the order of the Board was made over two years ago, it is preferable that that order be restored, leaving it to the respondent, if so advised, to make a new application. The appellant is entitled to its costs of the appeals to the Court of Appeal and to this Court.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.:—The Ontario Fuel Board, acting under the authority of *The Municipal Franchises Act*, R.S.O. 1950, c. 249, as amended by 3 Elizabeth II (1954), c. 60, s. 3, refused an application by the Town of Wallaceburg for the approval of a by-law authorizing construction by the respondent of a pipeline to convey gas through the streets of the town on the ground that public convenience and necessity for the work were not shown.

An appeal from that refusal was taken to the Court of Appeal under s. 8(4) of *The Municipal Franchises Act*, which allows an appeal, with leave of a judge of the Court, on any question of law or fact. The Court in dealing with the matter entered upon a re-examination of the facts and considerations before the Board, and a reassessment of their weight and value, and came to the opinion

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Rand J.

that a case of public convenience and necessity had been made out. The judgment accordingly directed the Board to issue the certificate.

What the Court did was to exercise an administrative jurisdiction and to substitute its judgment on the application for that of the Board. In this I think it exceeded its powers. We were referred to no precise or material issue in the appeal on any question of fact or law on which the Court was asked to or did make a finding or a ruling. It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. In the notice of appeal references to certain findings were made, but what the present respondent sought and obtained was a judgment on the entire controversy. That remedy was, in my opinion, misconceived and the judgment likewise.

I would, therefore, allow the appeal and restore the order of the Board with costs in this Court and in the Court of Appeal.

LOCKE J. (*dissenting*):—Sydenham Gas and Petroleum Company Limited was incorporated in Ontario by letters patent issued under the provisions of *The Companies Act* of that Province in the year 1952. Among its declared objects was the transportation of natural gas. The company is a wholly-owned subsidiary of Dominion Glass Company Limited which owns and operates very extensive works for the manufacture of glass and glass products in the town of Wallaceburg, Ontario. It is the principal industry in that place, furnishing employment to a substantial proportion of the inhabitants, and its continued and successful operation is a matter of moment to the community.

Natural gas is the most desirable fuel for glass manufacture in Ontario and for several years the Dominion Glass company carried on an extensive search in an endeavour to locate natural gas in the portion of Ontario adjacent to its factories. This proved unsuccessful. The

natural gas required for its operations meanwhile was purchased by it from the appellant, a company having available supplies and a franchise from the Town entitling it to supply this commodity to the inhabitants of Wallaceburg. This franchise had been granted by a by-law of the Town approved by the ratepayers. It is to be noted that the franchise or right granted was not exclusive and thus did not preclude the granting of similar rights to others.

On May 14, 1954, the Sydenham company entered into a contract with Imperial Oil Limited, which held oil and gas leases in the township of Sombra, for the supply from the Bickford Pool of a minimum of 237,250 thousand cubic feet of natural gas yearly until December 31, 1966, or until 12,800,000 m.c.f. of gas had been delivered. The purpose of the company in entering into the contract was to supply the needed natural gas for the operations of the Dominion Glass company, and for that purpose alone. The Sydenham company did not propose to enter into the business of either selling to or transporting natural gas for persons or corporations other than what may be described as its parent company.

The Bickford Pool is situate some 10 miles from Wallaceburg and, in order to transport the gas to the Dominion Glass company plant, it was necessary to lay pipelines through two intervening municipalities and through part of the town of Wallaceburg. The necessary by-laws permitting the construction of the pipeline through the townships of Sombra and Chatham were duly passed by the councils of these municipal bodies and on July 6, 1954, the council of the town of Wallaceburg passed a by-law granting to the Sydenham company:

a franchise within the meaning of The Municipal Franchises Act, to enter upon the highways within the corporate limits of the Town of Wallaceburg, for the purpose of laying down, maintaining and using pipes and other necessary works for the transmission of natural gas on, in, under, along and across any such highway, for the purpose of conveying natural gas to the lands of Dominion Glass Company Limited situate within the said Town of Wallaceburg, upon and subject to the conditions, hereinafter mentioned or contained.

By s. 3 of *The Municipal Franchises Act*, R.S.O. 1950, c. 249, it is provided, *inter alia*, that a municipal corporation shall not grant to any person the right to construct or operate any public utility in the municipality or to

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Locke J.

supply to the corporation or to the inhabitants of the municipality or any of them, gas, steam or electric light, heat or power, unless a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted has been assented to by the municipal electors.

Section 8 provided that no person should, without the approval of the Lieutenant-Governor in council, construct any works to supply or supply

(*a*) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas

and that no approval should be given under the section unless the Ontario Municipal Board should certify in writing to the Lieutenant-Governor that public convenience and necessity appeared to require that such approval be given.

The Municipal Franchises Act was amended by c. 60 of the statutes of 1954. Subsections 1 and 2 of s. 8 which contained the provisions last above referred to were repealed and the following was substituted:

(1) Notwithstanding anything in this or in any other general or special Act, no person shall construct any works to supply or supply,

(*a*) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(*b*) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Fuel Board and such approval shall not be given unless public convenience and necessity appear to require that such approval be given.

(2) The approval of the Ontario Fuel Board shall be in the form of a certificate.

By the amendment, s. 9 was added which, so far as relevant to the issue, reads as follows:

(2) No by-law granting,

(*a*) the right to construct or operate works for the distribution of natural gas;

(*b*) the right to supply natural gas to a municipal corporation or to the inhabitants of a municipality;

(*c*) the right to extend or add to the works mentioned in clause *a* or the services mentioned in clause *b*;

(*d*) a renewal of or an extension of the term of any right mentioned in clause *a* or *b*,

shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for which such right is to be granted, renewed or extended have first been approved by the Ontario Fuel Board.

The Ontario Fuel Board referred to in these amendments was constituted by c. 63 of the statutes of 1954 which repealed, *inter alia, The Natural Gas Conservation Act,* R.S.O. 1950, c. 251, and the Acts which amended that statute. The Board thus constituted under the new statute was given broad powers which included those given to the natural gas referee under the repealed statute.

The application made by the Sydenham company to the Ontario Fuel Board if made in writing does not appear in the printed record but, according to the order of J. K. Mackay J.A. granting leave to appeal to the Court of Appeal, it was for approval of the by-law above referred to, "being a by-law authorizing the transportation and distribution of natural gas to the lands of Dominion Glass Company Limited". While approval was apparently also asked for the by-laws of the townships of Sombra and Chatham, that was decided to be unnecessary since there was to be no distribution of gas within their boundaries and it is unnecessary to further refer to these matters.

While the Sydenham company did not, in the terms of s. 3 of *The Municipal Franchises Act* as amended, propose to supply natural gas to "a municipal corporation or to the inhabitants of a municipality", but merely to transport gas to the parent company the Dominion Glass company, the application was dealt with not merely as involving permission to the Sydenham company to lay its gas-mains under the streets of Wallaceburg in order to obtain access to the glass company's premises, but also involving the question as to whether, in view of the fact that the Union Gas company was then supplying the Dominion Glass company with natural gas at a price theretofore approved as reasonable by the natural gas referee under the provisions of *The Natural Gas Conservation Act,* R.S.O. 1937, c. 49, public convenience and necessity appeared to require that the by-law be approved.

The word "gas" as defined in s. 1(*b*) of *The Municipal Franchises Act* includes natural gas and, as s. 3 requires the approval of the electors to a by-law granting permission to any person to supply gas to "the inhabitants of

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Locke J.

a municipality *or any of them*", it was necessary that the by-law should be submitted to them. By virtue of subs. 2(*a*) of s. 9 the approval of the Ontario Fuel Board was required. This procedure, it may be noted, would have been necessary if the Dominion Glass company had proposed to lay the pipeline itself from the Bickford Pool rather than to have that done by its wholly-owned subsidiary.

Subsection 2(*b*) of s. 9 deals with a quite different right, being the right to supply natural gas to a municipal corporation "*or to the inhabitants of a municipality*". The words "or any of them" which appear after the word "inhabitants" in s. 3 were omitted in s. 9(2)(*b*). I have no doubt that this was by design and not by accident. Where a corporation proposes to exercise a franchise to operate a public utility selling gas to a municipal corporation or to a community generally, many matters would require consideration by the Fuel Board which would be quite irrelevant in deciding upon an application under subs. 2(*a*). The reasons delivered by the Fuel Board in refusing its approval indicate, in my opinion, that the members of that body did not appreciate this distinction. The application was for the approval of the by-law and all that was proposed by it was that the Sydenham company might lay its pipelines under certain of the streets of the town to connect with the premises of the glass company. A passage in the reasons delivered reads:

> In effect, the granting of this application would be to create the situation of two distributing companies in the same area . . .

But this, in the sense that the term "distributing company" was used, was, with respect, inaccurate. The term would have been apt had the Sydenham company's application been made under subs. 2(*b*) of s. 9 to approve a by-law authorizing the supply of gas to the municipal corporation or to its inhabitants generally. The by-law in question granted no such rights.

The Board is an administrative body and wide powers are vested in it by the statute of 1954 by which it was established. These include power to control and regulate drilling for, distributing and using natural gas for industrial purposes and to make regulations subject to the approval of the Lieutenant-Governor in council, *inter alia*, as to the

manner in which pipelines for the transmission of gas may be laid, for the conservation of natural gas and oil and for the issue of permits for the use of natural gas for industrial purposes. The regulations made by the Board pursuant to these powers include a provision that natural gas shall be supplied to consumers in a defined order of precedence and, in the order thus prescribed, gas required for residential purposes and the heating of dwellings and commercial buildings takes precedence over that required for industrial purposes.

There is nothing in the record to suggest that any order of the Board or of the Minister made under *The Natural Gas Conservation Act,* R.S.O. 1950, c. 251, restricted in any way the purchase by the Sydenham company of gas from the Bickford Pool and its transmission to Wallaceburg for industrial use by the plant of the Dominion Glass company, or that there was any shortage of natural gas in Ontario, or that the gas from this pool was required for any preferred purpose of the nature referred to in the regulations.

No considerations of this nature affected the determination by the Board of the application in question. There was on the other hand, as pointed out in the unanimous judgment of the Court of Appeal, ample evidence that obtaining a supply of natural gas for its operations at approximately half the rate the Dominion Glass company now pays to the appellant company was a matter of great importance in ensuring the continued operation of all the manufacturing activities of that company and that these operations provide employment to a substantial proportion of the inhabitants of the town of Wallaceburg.

Subsection 4 of s. 8 of *The Municipal Franchises Act,* as amended, provides that an appeal shall lie to the Court of Appeal from any decision of the Ontario Fuel Board granting or refusing to grant a certificate under the section upon any question of law or fact. These provisions are made applicable to applications for approval under s. 9 by subs. 4 of that section. The order of Mr. Justice Mackay granted leave to the Sydenham company to appeal upon *inter alia* the grounds that the decision was wrong in law, that it was contrary to the evidence and that public convenience and necessity required the approval of the application.

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Locke J.

I respectfully agree with the learned Chief Justice who delivered the unanimous judgment of the Court of Appeal allowing the appeal and directing that the required certificate should issue, that the latter question is one of fact. If there were doubt as to the meaning to be assigned to the expression "public convenience and necessity" in the statute, and I think there is none, the question as to its interpretation would be one of law which the legislation would also require the Court to determine.

The fact that the main functions of the Ontario Fuel Board are administrative cannot limit the jurisdiction of the Court of Appeal to determine a question such as this. Like other boards constituted by various statutes, both Dominion and Provincial, in discharging its functions the Fuel Board must come to its conclusions upon its view of the facts and of the law affecting the matters before it. The Legislature has seen fit to impose upon the Court of Appeal the duty of deciding questions brought before it of either nature.

In this matter the Board, apparently considering that the by-law was of the nature referred to in subs. 2(*b*) of s. 9, decided that public convenience and necessity did not require it to give its approval. The principal ground assigned for doing so was the Board's opinion that the appellant was one of the public utility distributing companies in Ontario which had built up their systems under a fixed rate structure "on the basis that they had and would continue to have a monopoly in their respective franchise areas". This was followed by the statement that the result of granting the application would be that there would be two distributing companies in the same area. As to the argument that the Dominion Glass company must effect economies in its operations to enable it to continue the manufacture of certain of its lines of glassware in Wallaceburg, the Board expressed the opinion that it ought to pursue some other course in order to obtain relief.

To give effect to this reasoning, as pointed out by the learned Chief Justice of Ontario, would be to give the franchise of the appellant the effect of being exclusive in the area, whereas in fact and in law the respondent had no such exclusive right and a further effect would be to

deprive the municipality of the power to permit another public utility to supply industrial natural gas in the area, notwithstanding the local necessity for it. As I have pointed out, the Dominion Glass company had made extensive efforts to locate natural gas by drilling and, had those efforts proven successful, to apply the principle acted upon by the Board would have prevented the use of the gas so found if it was in a location which would require the laying of pipes under the streets of Wallaceburg in order to utilize it.

The distinction between by-laws granting rights of the nature referred to under subss. 2(*a*) and 2(*b*) of s. 9 is not referred to in the reasons for judgment, but all of the reasons advanced for the unanimous conclusion of the Court that public convenience and necessity required the approval of the Board to be given to the by-law apply with even greater force to an application under subs. 2(*a*).

I respectfully agree with the conclusion reached by the Court of Appeal and with the reasons assigned for those conclusions by the learned Chief Justice of Ontario and I would dismiss this appeal with costs.

Appeal allowed with costs, LOCKE J. *dissenting.*

Solicitors for the appellant: McNevin, Gee & O'Connor, Chatham.

Solicitor for the respondent: Joseph Sedgwick, Toronto.