THE CITY OF HAMILTON (DEFENDANTS) ..... } APPELLANTS;

AND

THE HAMILTON DISTILLERY COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

1906
*Nov. 5, 6.
*Nov. 8.
1907
*Feb. 19.

THE CITY OF HAMILTON (DEFENDANTS) ..... } APPELLANTS;

AND

THE HAMILTON BREWING ASSOCIATION (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Action for declaration and injunction—60 & 61 V. c. 34, s. 1(d.)—Municipal corporation—Water rates—Discrimination.

The Act 60 & 61 Vict. 34(D.) relating to appeals from the Court of Appeal for Ontario does not authorize an appeal in an action claiming only a declaration that a municipal by-law is illegal and an injunction to restrain its enforcement.

A by-law providing for special water rate from certain industries does not bring in question "the taking of an annual or other rent, customary or other duty or fee" under sec. 1(*d*) of the Act (R.S. 1906, ch. 149, sec. 48(*d*).

By 24 Vict. ch. 56, sec. 3 (Can.) the city council of Hamilton was "empowered from time to time to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said city from the said water works."

Held, affirming the judgment of the Court of Appeal (12 Ont. L.R. 75) which sustained the verdict at the trial (10 Ont. L.R. 280) that the rate for water supplied to any class of consumers must

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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be an equal rate to all members of such class and a by-law providing for a rate on certain manufacturers higher than that to be paid by others was illegal. *Attorney General* v. *City of Toronto* (23 Can. S.C.R. 514) followed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial (2) in favour of the plaintiffs.

By Act of the Ontario Legislature in 1856 (3), a Board of Water Commissioners for the City of Hamilton was established, and sections 9 and 10 provided that:—

(Section 9) "The Board of Commissioners for the time being shall regulate the distribution and use of the water in all places and for all purposes where the same may be required, and from time to time shall fix the prices for the use thereof and the times of payment, and they may erect such number of public hydrants and in such places as they shall see fit, and direct in what manner and for what purposes the same shall be used, all of which they may change at their discretion. * * ."

(Section 10) "The owner and occupier of any house, tenement or lot shall each be liable for the payment of the price or rent fixed by the Commissioners for the use of the water by such occupier, and such price or rent so fixed shall be a lien upon the said house, tenement or lot in the same way and manner as other taxes assessed on real estate in the said City of Hamilton are liens, and shall be collected in like manner if not previously paid to the Commissioners."

By an amendment in 1860 (4) it was provided that

(Section 1.) "The Water Commissioners for the City of Hamilton shall, in addition to the powers con-

(1) 12 Ont. L.R. 75.
(2) 10 Ont. L.R. 280.
(3) 19 & 20 Vict. ch. 64.
(4) 23 Vict. ch. 87.

ferred upon them by the said Act, have full power and authority to levy and raise such a yearly or other rate or assessment or water rent on all and singular the real property within the said City, whether owned by private individuals or bodies corporate, by, near or contiguous to which the water pipes may pass, and upon the stock in trade, household furniture and goods and chattels belonging to or in possession of the owners or occupants of such real estate (save and except always the property, real and personal, of any railway company) as shall, in the opinion of the Commissioners, be sufficient to pay the yearly interest, at a rate not to exceed four per centum per annum on the cost of the said water works and the yearly expenses thereof, or such portion of such interest and expenses as in their judgment should be levied and raised in each year and be borne by such owners and occupants; and the Commissioners shall have power and authority from time to time to fix the rate or rates such owner or occupant or both such owner and occupant shall pay, having due regard to the advantages derived by such owner or occupant or conferred upon him or his or their property by the water works and the locality in which the same is situated * * ."

In 1861 by the Act 24 Vict. ch. 56, the water works were vested in the City which was given all the powers formerly vested in the Commissioners. Sections 3 and 4 of that Act provide as follows:

(Section 3) "The Corporation of the City of Hamilton shall, through its Council, have full power and authority to exercise all the powers conferred upon the said Commissioners (save as aforesaid), and in addition thereto it shall be lawful for the said cor-

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poration, through its council, from time to time to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said City from the said water works; which said tariff of rents or rates shall be payable at the times and in the manner established in the said by-laws, by all proprietors, occupants or others supplied with water from the said works, or whom the said council may be prepared and ready to supply with water; which said tariff of rates shall and may be made payable by all such proprietors, occupants or others as well by those who refuse as by those who consent to receive into their houses, stores or other buildings the water-pipe to supply the said water; but such tariff of rents or rates shall not be payable by the proprietors or occupants of any such house, store or other building until after the said council shall have notified them that they are prepared and ready to supply the same with water, and if from the time of such notification to the next period appointed for the payment of such tariff, rents or rates there shall be any broken period, then such tariff shall be payable *pro ratâ* for such broken period as if accruing and due day by day * * ."

(Section 4) "The council shall not have power to impose a special rate as provided for by (section 1, 23 Victoria, chapter 87), other than the water rate or rent hereinbefore referred to; but any sum required to pay the interest of the debentures issued for the said water works and the yearly expenses thereof, which the water rents may be insufficient to meet, shall be levied by a general assessment in the same manner as assessments for other purposes under the general assessment laws."

In 1902 the city passed two by-laws which occa-

sioned the litigation in these cases. The first was by-law No. 224, which provides that—

"(1). From and after the first day of January, 1903, all water supplied to manufacturing establishments in the City of Hamilton that apply for meters under this by-law, or now have meters approved by the manager of the water works, shall be charged for at the rate of seven and one-half cents per thousand gallons, as shewn by meters supplied by the city corporation, the applicants for such meters to pay for them and for their introduction, and also to pay meter rent, to cover the cost of inspection and repairs as follows:

For $\frac{1}{2}$ inch and $\frac{3}{4}$ inch meters..$3.00 per annum.
For 1 inch meters.....$3.40 per annum."
Etc., etc.

"(3). Railway premises, breweries, distilleries and premises where aerated waters are made shall not be included under the term manufacturing establishments used in this by-law, and in the case of any applicant for the supply of a meter under this by-law, where there is a doubt as to the premises in respect of which it is applied for being a manufacturing establishment within the meaning of this by-law, the Assessment Commissioner shall make an investigation and shall report the result to the manager of the water works."

At the time of the passing of this by-law the respondents had a water meter on their premises approved of by the manager of the water works, and which had been put in and maintained at the expense of the respondents.

And by-law No. 237 was as follows:

"(1). From and after the first day of January,

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1903, all waters supplied to breweries, distilleries and premises where aerated waters are made shall be charged for at the rate of 12 cents per thousand gallons, as shewn by the meters supplied by the City Corporation, the occupants of the premises to pay for such meters and for their introduction, and also to pay meter rent to cover the cost of inspection and repairs at the rate specified in By-law No. 224: the water rates and meter rents imposed by this by-law to be payable in the manner and at the times mentioned in section 7 of said By-law No. 224, and to be subject to the penalties therein provided."

The respondents paid, under protest, the rates imposed under the latter by-law for the years 1903 and 1904, and in December, 1904, they respectively took action against the city by which they prayed—

(1) That it be declared by this Honourable Court that by-laws numbers 224 and 237 of the defendant Corporation are illegal and invalid in so far as they authorized the defendant Corporation to levy and collect from the plaintiffs water rates in excess of the general rates charged by the defendant Corporation to manufacturers in the City of Hamilton.

(2) And that it may be declared that the defendant Corporation has no power or authority to levy and collect water rates at the rate specified in such by-laws.

(3) A mandamus commanding the defendant Corporation to repeal such by-laws or the portions thereof complained of.

(4) And an injunction to restrain the defendant Corporation from levying on or seeking to collect from the plaintiffs water rates calculated at a higher rate than that charged generally to other manufacturers in the City of Hamilton.

(5) And such further and other relief as may be just.

Mr. Justice Street, who tried the case, was of opinion that the city was bound to supply water to all consumers without discrimination as to rates as decided in *Attorney-General* v. *The City of Toronto*(1), and gave judgment declaring the by-laws illegal in so far as they purported to authorize the city to collect from the plaintiffs a higher rate than that imposed on other manufacturers and restraining the city from levying or seeking to collect any higher rate (2). This judgment was affirmed by the Court of Appeal for the same reasons(3). The city appealed to the Supreme Court of Canada.

Blackstock K.C. and *Rose*, for the appellants.

Shepley K.C. and *Bell*, for the respondents, were heard on the merits and also raised the question of jurisdiction to hear the appeals.

The judgment of the court on the question of jurisdiction was delivered by

MACLENNAN J.—The appeals are by the City of Hamilton from judgments in these cases, in similar terms, declaring to be invalid certain by-laws of the city authorizing the levying and collecting from the respondents, water rates, at a higher rate than those imposed upon other manufacturers in the city, and restraining the city from recovering or levying from the respondents, respectively, any greater rates.

(1) 23 Can. S.C.R. 514. (2) 10 Ont. L.R. 280.
(3) 12 Ont. L.R. 75.

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The judgments appealed against are of the Court of Appeal for Ontario whereby judgments at the trial were affirmed.

On opening of the appeals, objection was made by the respondents to the jurisdiction of this court to hear the appeals, no leave having been obtained from the Court of Appeal, or from this court.

No relief is sought in the action but the declaration and injunction above mentioned; and no return of rates already paid is sought. Therefore, the only clause of the Act, 60 & 61 Vict. ch. 34, regulating the right to appeal to this court from the Court of Appeal for Ontario which could be invoked, as possibly permitting an appeal, is clause (*d*), which allows it:

> Where the matter in question relates to the taking of an annual or other rent, customary and other duty or fee, or a like demand of a general or public nature, affecting future rights.

We are of opinion that these cases cannot be held to come within the language of that clause, and that, without leave, this court has no jurisdiction.

We, however, allow the appeals to stand to afford the appellants an opportunity, if so advised, to apply to the Court of Appeal for leave to appeal.

The appellants afterwards filed an order of the Court of Appeal granting leave to appeal to this court, and on a subsequent day judgment was given on the merits as follows.

THE CHIEF JUSTICE.—I am of opinion that these appeals should be dismissed with costs.

DAVIES J.—I think these appeals must be dismissed. I recognize the force of much that was said

on argument in support of the principle that a municipality constructing water works and providing dwelling houses, manufactories and citizens generally with such supplies of water as they found necessary for their domestic or trade or other purposes should have the same power to regulate their water rates as an ordinary incorporated water company has in supplying its customers.

That argument, however, is one to be directed more to the legislature which confers the powers and determines their extent and limits than to this court whose duty it is simply to construe the language the legislature has used.

I do not see what bearing the case of *Fortier* v. *Lamb*(1) can have on these cases, and I do not agree that it in any way modifies or affects the judgment of this court in *Attorney-General of Canada* v. *City of Toronto*(2).

As to the latter case I agree that there is much in the reasoning of the court there which is applicable to the cases at bar. But I do not think that case absolutely concludes those now before us because the question arose on a statute differently worded and presented a somewhat different point for decision.

Alike, however, in that case as in these there is involved the validity of a city by-law claiming in one way or another to confer upon the city the power to differentiate or discriminate in the prices actually charged as between different members of the same class of customers for water supplied.

As to the power of the legislature to confer such powers upon a civic corporation I do not entertain any doubt. It falls within those plenary powers vested

(1) 25 Can. S.C.R. 422. (2) 23 Can. S.C.R. 514.

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in those bodies by the "British North America Act, 1867," and if any of them in attempting to confer such powers used apt and proper language I conceive it would be the duty of this court to give the language its full and proper effect. The question would be and ought to be simply whether such language has been used as confers the power claimed.

To determine whether it has been used in the legislation under discussion is the duty now before us. We have been referred to the history of the legislation with regard to the water works of Hamilton and I have gone carefully over the several statutes to which our attention has been called.

It seems to me, however, that the power of the city if found anywhere must be found in the statute of 24 Victoria, ch. 56. The 3rd section of this statute while expressly retaining to the city council power and authority to exercise all the powers of the former Commissioners goes on to say: "And in addition thereto it shall be lawful for the said corporation through its council from time to time to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said city from the said water works." The section goes on to enact provisions necessary to enable the general words I have quoted to be effectively carried out.

The 4th section declares that "the council shall not have power to impose a special rate as provided for by section 1 of 23 Vict. ch. 87, other than the water-rate hereinbefore referred to, but any sum required to pay the interest for the debentures issued for the said water works and the yearly expenses thereof which the water rates may be insufficient to meet shall be levied by a general assessment in the same manner

as assessments for other purposes under the general assessment laws."

Comparing these two sections with the previous legislation conferring powers upon the former Commissioners, it seems clear to me that the power to pass the by-laws in question must be found in these sections and in these alone.

It was pressed strongly upon us by Mr. Blackstock that the use of the phrase "tariff of rates or rents" by the legislature indicated a clear intention of giving to the municipal council the powers of differentiating or discriminating claimed by them. In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in *Kruse* v. *Johnson*(1), at p. 99, a "benevolent construction," and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication. I cannot, however, find in the special phrase quoted or in any other of the language used, anything which by any fair and reasonable construction could be held by implication to contain the power to discriminate as between manufactories in establishing the tariff of rents or rates. I have assumed all through my argument that the appellants' factories were manufacturing establishments within the meaning of these words as used in the by-laws. The argument that they were not was not strongly pressed, and

(1) [1898] 2 Q.B. 91.

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I could see little ground to support it. If they were, the question became reduced to the simple one of the power of the city under the two sections of the statute I have specially quoted to discriminate in its charges for water as between one manufacturing establishment and another. As I have already said, to possess such power by the city the legislature must either have expressly conferred it or used language which fairly and reasonably implied it. I cannot find it has done either and so must hold the by-law which assumes the power and attempts to exercise it, invalid to the extent it professes to discriminate.

By-laws passed by municipalities in Canada which are partial and unequal in their operation as between the classes affected by them must to be held *intra vires* be supported by legislation which expressly or by necessary implication sanctions and authorizes the inequality.

IDINGTON J.—These cases both depend on the validity of the same by-laws of the appellants, for both respondents come within the class specially singled out for what is claimed by them to be an illegal discrimination in regard to water rates.

They fall so far within the principles upon which the decision of this court in *The Attorney-General of Canada* v. *The City of Toronto*(1), proceeded, that I am surprised to find an appeal here on the subject.

The by-law in question in that case was attempted to be supported upon the ground that service of water to those who did not pay the ordinary taxes of the municipality could not be expected at the same rates as in the cases of those who bore the taxes, and out of

(1) 23 Can. S.C.R. 514.

those taxes the risks and burthen of procuring and vending or supplying the water.

Mr. Justice Osler, who wrote the judgment of the Court of Appeal for Ontario in that case, said therein:

> I also agree with the learned judge below, that the price, rent or rate paid for the water is not a tax or in the nature of a tax, at all events, where it is actually supplied to a consumer and not attempted to be charged upon property under sec. 12 of the 35 Vict. ch. 79, whether used or not. Under the by-laws in question the water is sold and what is paid by or charged to the consumer is the price.

These sentences put tersely the reasons why the Court of Appeal did not think the by-law, in the Toronto case, infringed the principles of law that forbid a municipal corporation passing an unreasonable or discriminating by-law.

Though plausible, these reasons did not prevail here nor in the Privy Council.

The appellants have not been able to put forward here, in support of the by-law now in question, anything possessing even the semblance of such plausibility. There is in Hamilton a general water rate that is based on a percentage, according to the assessed value of the property, and is imposed upon all property which is upon the appellant's mains, and can be served by appellants therefrom.

The respondents must pay that water-rate, even though they should have the facility to get their supply of water elsewhere at a cheaper rate.

But if they want water they cannot, being of a specified class, get it by paying the water-rate until they have installed a meter to measure it. And when they have so installed the meter, they cannot get the water unless they pay a special rate far beyond the general water rate, and nearly double what any other

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class of manufacturers (save those of aerated waters) have to pay.

And yet it is urged that there is no *improper* discrimination.

Some people would no doubt be glad to make the test for discrimination rest upon religious faith, or want of faith, and be able to shew, or at least to argue, that there was no improper discrimination in that.

In Hamilton they seem to apply the test of the relative profits, derivable from the different kinds of manufacturing business, or possibly the relative moral character of each, or perchance the relative economic results from the point of view of the production of general material wealth.

None of these, or any other grounds I have heard suggested, justify in law the clear discrimination that exists in the provisions of this by-law.

It was urged, however, that inasmuch as the origin of the city owning these works was that a company long ago had built and owned the works, or part of them, now in question, and had powers given them which, it is alleged, would uphold such discrimination, and these powers were, with the transfer of the works by a process needless to dwell upon, acquired therewith by the city, hence the discrimination in question can and must be upheld.

I do not unreservedly accede to the proposition that such a general and comprehensive transfer of powers (as alleged and in language appears here) to a municipal corporation would, regardless of the general purview of the statutes transferring plant and powers, of necessity transfer and invest the municipal corporation with something in the nature of a power that in its hands might become most oppres-

sive, though innocuous in the hands of the private corporation.

I must also be permitted to doubt the existence, in a private corporation of the character of the one in question, which was intended to serve the public in a way that gave it a practical monopoly, of any very wide powers of discrimination.

The purview of its character manifestly was against such a power of reckless or unlimited discrimination. Unless given, by more express terms than appears, in the statutes in question for consideration in this case, I would not be disposed to hold it was intended to be given. I think entirely too much importance was attached in argument to this transfer of powers and to the use of the word "tariff," and the plural terms "prices," "rents," and "rates" in these statutes.

Analagous terms appeared in the statutes in question in *The Attorney-General of Canada* v. *The City of Toronto*(1). Moreover, the general history of the development of the water supply, powers and duties, was much alike in the two cases.

First a private company, and then water commissioners and then the municipal corporation, are in each case parallel leading features.

There may be cases wherein the cost of supplying the water may render an even rate per gallon most inequitable. I can conceive of cases, where the uniform charge of a flat rate per gallon might be in itself a grave discrimination against some of those supplied, in possession of properties having great natural advantages, and in favour of those whose properties had corresponding natural disadvantages, to supply whom might cost double that of the former.

(1) 23 Can. S.C.R. 514.

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I will not go further than to say that I have not overlooked possible modifications of rates that might exist and yet not be improperly discriminating in character.

If the "uniformity of rates" spoken of by Sir Henry Strong in his judgment in the *Toronto Case*(1) excludes the possibility of giving due consideration to such possible conditions, then I cannot in that regard agree with it. I do not, however, so read it. The general principles it enunciates, and at some length elucidates, I heartily agree in. I would regret to see them impaired.

I think these appeals must be dismissed with costs.

MACLENNAN J.—The question in these appeals is whether or not the City of Hamilton, in administering its water works, can lawfully charge one class of manufacturers a higher price for water supplied than another, both classes being supplied by meter, and the only difference between them being the nature of their business.

The city has passed by-laws assuming to charge the one class 7½ cents per thousand gallons, and the other class, of which the plaintiffs are two, twelve cents per thousand gallons.

The waterworks were constructed, and are maintained and administered, at the expense of the city, and as one of its departments. It is not an independent company selling a commodity to customers, and which can sell to one and refuse to sell to another or which can sell at one price to one customer and exact a different price from another. The works and the water are the property of the inhabitants, who are

(1) 23 Can. S.C.R. 514.

the corporation, maintained and provided for their benefit, and ought to be administered with all possible equality; and it would in my opinion require very clear and unambiguous language on the part of the legislature to authorize the discrimination attempted by these by-laws.

In *Attorney-General of Canada* v. *City of Toronto* (1), it was held that under the authority given to municipal corporations to fix the rate of rent to be paid by each owner or occupant of a building supplied by the corporation with water, the rates imposed must be uniform.

The language of the Acts governing that case gave the city power

> from time to time to fix the price rate or rent which any owner, etc., shall pay as water rates, or rent * * * from time to time shall fix the price for the use thereof and the times of payment,

while in the present case the power conferred is

> from time to time to establish by by-law a tariff of rents or rates for water supplied, or ready to be supplied in the said city from the said water works. 24 Vict. ch. 56, s. 3 (Can.).

I am unable to perceive that the power conferred in the present case is any wider, or more extensive, than in the *Toronto Case* (1), and I think the words fall far short of conferring the power of fixing one rate for one kind of business, and another rate for another kind of business.

In that case Strong C.J. used the following language, at page 519:

> The water works were not constructed for the benefit of the rate-payers alone, but for the use and benefit of the inhabitants of the city generally whether tax payers or not.

(1) 23 Can. S.C.R. 514.

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And referring to section 480(3) of the "Municipal Act," he adds:

> That provision makes it a duty obligatory upon the city to furnish water to all who may apply for it, thus treating the corporation not as a mere commercial vendor of a commodity but as a public body entrusted with the management of the water for the benefit of the whole body of inhabitants, and compelling them as such to supply this element, necessary not merely for the private purposes and uses of individuals but indispensable for the preservation of the public health and the general salubrity of the city. It must, therefore, have been intended by the legislature that the water was to be supplied upon some fixed and uniform scale of rates, for otherwise the city might by fixing high and exhorbitant prices in particular cases, evade the duty imposed by this section. In other words, the city * * * is in a sense a trustee of the water works, not for the body of ratepayers exclusively, but for the benefit of the general public, or at least of that portion of it resident in the city; and they are to dispense the water for the benefit of all, charging only such rates as are uniform, fair and reasonable.

To the like effect and with equal emphasis, is the judgment of Mr. Justice Gwynne in the same case, at pages 525-6, holding that in such a case there may not be any inequality or discrimination in price.

It was argued that the power to establish a tariff of rents or rates distinguished the present from the *Toronto Case*(1), and imported a power to discriminate between users of water. But even tariffs of customs, for example, do not discriminate in the duty exacted upon goods of the same kind and quality, but only upon those of different kinds or qualities.

I am clearly of opinion that these appeals must be dismissed, with costs both here and below.

DUFF J. concurred in the judgment dismissing the appeals with costs.

(1) 23 Can. S.C.R. 514.

Appeals dismissed with costs.

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Solicitors for the appellants: *Francis Mackelcan.*

Solicitors for the respondents,
Hamilton Distillery Company: *Crerar, Crerar & Bell.*

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Solicitors for the respondents,
Hamilton Brewing Association: *J. J. Scott.*