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THE ATTORNEY GENERAL OF CANADA (PLAINTIFF)..... ..... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—By-law—Water supply—Rates to consumers—Discrimination.

Under the authority given to municipal corporations to fix the rate or rent to be paid by each owner or occupant of a building, &c., supplied by the corporation with water, the rates imposed must be uniform. Patterson J. dissenting.

A by-law of the City of Toronto excepting Government institutions from the benefit of a discount on rates paid within a certain time is invalid as regards such exception. Patterson J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the City of Toronto.

The sole question to be decided by this appeal was as to the validity of a by-law of the City of Toronto fixing the rates to be paid for water supplied to the inhabitants so far as it discriminated between the Government and other institutions exempt from taxes and the general body of consumers.

The by-law in question contained the following provision:—

All such half-yearly rates paid within the first two months of the half year for which they are due, shall be subject to a reduction of

*PRESENT:—Strong C.J. and Taschereau, Gwynne and Patterson JJ.

(Sir W. J. Ritchie C. J., was present at the argument but died before judgment was delivered.)

(1) 18 Ont. App. R. 622. (2) 20 O.R. 19.

fifty per cent, save and except in cases of Government or other institutions which are exempt from city taxes, in which cases the said provisions shall not apply.

The Dominion Government paid the rates imposed for some years under protest, being refused the discount of fifty per cent, and then brought an action against the city to recover the amount of the rebate which would have been allowed but for the exception in the by-law, claiming that the city had no power to discriminate between consumers as to the rates to be paid.

The statutes of the Ontario Legislature bearing on the question are set out in the judgment of the Chief Justice.

The case was heard by Mr. Justice Ferguson who dismissed the action, and his decision was affirmed by the Court of Appeal.

Reeve Q.C. and *Wickham* for the appellant.

Christopher Robinson Q.C. for the respondents.

THE CHIEF JUSTICE.—The question presented for decision by this appeal involves the validity as applied to the crown representing the Dominion Government, of a by-law of the City of Toronto, passed on the 23rd of April, 1888. By this by-law it was enacted that all half-yearly water rates

paid within the first two months of the half year for which they are due shall be subject to a reduction of fifty per cent, save and except in the cases of Government or other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply.

The crown in right of the Dominion has vested in it certain public property in the city of Toronto, namely: The Custom House and Customs Warehouse, the Post Office, and the Inland Revenue and Receiver General's Offices; and for several years prior to the

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institution of this action water had been supplied to these buildings by the Water Works Department of the city of Toronto. From the date of the by-law of the 23rd of April, 1888, the Water Works Department refused to make any rebate on the payment by the Dominion Government of its water rates within the time prescribed for payment by the by-law and the full amount of these rates have been paid under protest. This action has been brought to recover back the amount of the discount or rebate claimed by the crown, equal to fifty per cent, or one-half of the whole amount paid.

It has been agreed between the crown and the respondent, as appears by a consent paper which has been filed with the registrar, that the determination of this appeal shall depend altogether on the validity of the by-law. All technical questions as to the right to recover back money paid under protest are, therefore, to be excluded from consideration.

The cause was heard on a motion for judgment on the pleadings before Mr. Justice Ferguson who dismissed the action, and this judgment has been affirmed by the Court of Appeal. The crown has now appealed to this court.

By the Ontario act (35 Vict. cap. 79), authority was given to the City of Toronto through the agency of certain commissioners to construct water works in and for the use of the city and its inhabitants. These water works were to be constructed by, vested in and managed by certain commissioners. By the 12th section of this act, it was enacted that :

> The commissioners shall have power and authority, and it shall be their duty, from time to time to fix the price, rate or rent which any owner or occupant of any house, tenement or lot, or part of a lot, or both, in, through or past which the water pipes shall run shall pay as water rate or rent, whether such owner or occupant shall use the water or not having due regard to the assessment and to any special benefit and advantage derived by such owner or occupant, or conferred upon

him or her or their property by the water works and the locality in which the same is situated.

And after a provision, not material here, the section proceeds thus:

And the water commissioners shall also have power and authority from time to time to fix the rate or rent to be paid for the use of the water by hydrants, fire plugs and public buildings.

By 40 Vict. cap. 39, sec. 9, the commissioners were empowered to place meters upon any service pipes or connections within or without any house or building as they might deem expedient.

By 41 Vict. cap. 3, the water-works and the powers of the commissioners were transferred to and vested in the Corporation of the city of Toronto.

By R.S.O. 1887, cap. 192—(the General Water-works Act), it was by section 2 enacted that:

The corporation of every city, town or incorporated village, shall have power to construct, build, purchase, improve, extend, hold, maintain, manage and conduct water-works and all buildings, materials, machinery and appurtenances thereto belonging in the municipality and in the neighbourhood thereof as hereinafter provided.

Section 19 was as follows:

Subsection 1: The corporation 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 purpose the same shall be used: all which they may change at their discretion, and may fix the rate or rent to be paid for the use of the water by hydrants, fire plugs and public buildings.

By section 20 of the same act corporations are empowered to make by-laws for the management and conduct of the water-works and for the collection of the water rent, and also for allowing a discount for pre-payment.

By the General Municipal Act of Ontario (R.S.O. 1887, cap. 184, sec. 480, subsec. 3), it is made obligatory on a municipal corporation which has con-

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structed water-works, where there is a sufficient supply of water, to supply with water all buildings within the municipality situate upon land lying along any supply pipe of the corporation, upon the same being requested by the owner or occupant or other person in charge of the building.

Both the courts below were of opinion that the buildings belonging to the Dominion Government, to which water was supplied, were public buildings within the meaning of 35 Vict. cap. 9 section 12, and of section 19 of the general act R.S.O. cap. 192. It was also hold that these buildings were "Government institutions" within the terms of the by-law.

From these conclusions I see no grounds for differing and I therefore adopt them as well as the reasons upon which they are founded. I also agree that the by-law is not to be considered as imposing a tax upon the Dominion Government, and I do not understand the appellant's case to be rested on any such ground. The learned counsel for the appellant, in his factum as well as in the argument at this bar, impugned the decision under appeal not as sanctioning the imposition of a tax upon the Dominion, but as supporting a by-law which contravened public policy in rendering nugatory to some extent the general law and an express provision of the British North America Act exempting the property of the Dominion from taxation, by making that exemption the ground for a discrimination against the crown in the price charged to it for water; that is by refusing to allow it the benefit of the discount. This I consider something very different from an imposition of a tax. It is not to tax the crown but to make the crown pay a higher price for the supply of an element which the city was bound to furnish to it, for the reason that the property to which it was supplied was by law and in the public

interest exonerated from taxation. The authority to enact the by-law allowing a discount is to be found in subsection 2 of section 20 of the general Water-works Act of 1887, having originated in the general act of 1882. I consider the authority to pass a by-law to regulate the price of the water is to be derived from section 19 of the general act. This section, it seems to me, supersedes section 12 of the local act of 1871-1872. This is not a matter of much importance. The reason that I refer to it is that the 12th section of the latter act directs that the water rates shall be fixed with a due regard to the assessment of the property supplied, meaning of course the assessment for the purpose of general taxation. Even if we are to treat the special act as being still in force, and are to attribute this by-law to the powers contained in it, this can make no difference as this reference to the assessment and to any special benefit which might be derived from the water-works applies only to the case of private owners or occupants, and has no reference whatever to the case of public buildings, the provision relating to which forms an independent branch of the same section. I am of opinion, however, that the 12th section of the special act is altogether superseded by the 19th section of the general act.

A good deal has been said in argument, and some allusion was also made to it in the judgments below, about the reasonableness of charging differential rates against persons not paying taxes. I am unable to recognize any force in this argument. 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. The provision embodied in section 480, subsection 3 of the Municipal Act (which is referred to above) has a most important bearing upon this. That provision

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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 exorbitant prices in particular cases, evade the duty imposed by this section. In other words, the city, like its predecessors in title the water-works commissioners, is in a sense a trustee of the water-works, not for the body of rate-payers 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. This obligation is to be enforced by subjecting the by-laws indispensable for the legal enforcement and collection of rates, and which the city council have power to pass, to a judicial scrutiny in order to ascertain whether they comply with the conditions which, as before stated, it is a fair implication from the statute they were intended to be subjected to, and also whether they conform to the requisites essential to the validity of all municipal by-laws in being, so far as the power to enact them is left to implication, consistent with public policy and the general law, uniform in operation, fair and reasonable. A writer of high authority on the law of Municipal Corporations (1), thus states the law on this head:

(1) Dillon ed. 4, sec. 319.

In England the subjects upon which by-laws may be made were not usually specified in the King's Charter, and it became an established doctrine of the courts that every corporation had the implied or incidental right to pass by-laws; but this power was accompanied with these limitations, namely: that every by-law must be reasonable and not inconsistent with the charter of the corporation, nor with any statute of Parliament; nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the right of private property. In this country the courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have always declared that ordinances must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state.

And this is not new law for we find the same principle applied to the by-laws of a municipal corporation created by Royal Charter in a case reported in Hobart (1).

The first objection to this by-law is that it expressly contravenes the general policy of the law in disregarding an express enactment of the paramount legislature as well as a well defined rule of the common law. By the 125th section of the British North America Act it is enacted that:

No lands or property belonging to Canada or any province shall be liable to taxation.

Again, by an ancient and well established rule of the common law, the property of the crown is not subject to a tax imposed by a general law, and in no case unless expressly made so liable by statute (2). I entirely agree that this by-law does not attempt directly to contravene these provisions of the statute and the general law by imposing a tax or anything in the nature of a tax upon the property of the Dominion; but it does, in my judgment, contravene the general policy of the law embodied in this enactment and rule, when

(1) *Norris* v. *Staps Hobart* (Ed. 1724) p. 210.

(2) Chitty's Prerogatives of the Crown, p. 377.

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it makes the exemption conferred by paramount legislation and lawful prerogative the condition for discriminating against the crown and compelling it to pay an enhanced price for the water required for use in its public buildings. I can conceive no stronger case of a by-law conflicting with the policy of the law.

Then, a distinct ground for holding this by-law bad, irrespective altogether of the ground before stated, is that it is unreasonable and unfair in making an unwarranted discrimination against a particular consumer of water. In the case of the *Red Star Steamship Co.* v. *Jersey City* (1) a by-law of a water board requiring certain consumers of water to put in expensive meters, not making such requirement uniform and general, was held bad on this ground. The cour in its judgment says:

> The by-laws of a board of managers of city waterworks for the supply of water to the citizens must be consistent with the charter, and they must not conflict with any constitutional, statutory or common law rights of property of the citizen. This I understand to be the meaning of the proviso in section 87 of the charter, that the by-laws, rules and regulations are not to be inconsistent with the constitution and laws of the State of New Jersey or of the United States. They cannot make unwarranted discrimination in particular cases, or arbitrary charges, with the penalty of forfeiture of the right to use the water provided at the public expense for the benefit of all the citizens making a fair compensation for its use.

In this case the charter expressed the limitation that the by-laws were to be consistent with the constitutions and laws, but this does not make it any the less an authority in the present instance, for here the same qualification must be implied.

In another New Jersey case, *Dayton* v. *Quigley* (2) the Chancellor says:

> The water-works belong to the municipality and are for the benefit of the inhabitants of the city. The inhabitants are entitled to the use of the water on compliance with reasonable regulations.

(1) 45 N. J. L. R. 246. (2) 29 N. J. Eq. R. 77.

If these cases are correct exponents of the law, and I have no reason to doubt that they are approved as they have been by the distinguished jurist in whose work I find the reference to them, it is impossible that this by-law can be maintained.

Had the Provincial legislature possessed plenary powers of legislation, unfettered by any provision in the British North America Act, I should have considered that the by-laws which it empowered first the water-works commissioners and then the city to make must have been fair, reasonable and uniform regulations as regards rates. Of course in the case just supposed the exact case presented here could not have arisen, but even so, and assuming that the Provincial legislature could confer unlimited authority to impose arbitrary and discriminating rates for the water, they would not be deemed to have intended to do so from a power to make by-laws expressed in general terms. But the power of the legislature of Ontario was not in this respect unfettered; it was bound to have regard to the provision of the British North America Act, and even if it had in so many words provided directly and immediately, without any delegation to the commissioners or to the city to pass by-laws, that the property of the Dominion Government should be excepted from the benefit of any by-law which might be made in exercise of the power to allow a discount such a provision would have been palpably unconstitutional and invalid. The Provincial legislature, however, has not done this and we must intend that they did not mean to attempt to confer any such power upon the corporation, either to assume to delegate a power to do that by by-law which they could not themselves have done directly, or any other power which conflicted in any way with those conditions which in the absence of express words are

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always implied in a grant of power to a municipal corporation to make by-laws.

There can be no practical difficulty now in providing for uniform rates for all public buildings since the corporation have the power at their will to affix meters either in the inside or to the outside of any public building in which water is consumed.

It was insisted at the argument that this by-law could not be attacked in a collateral proceeding like this, but that an application should have been made to quash it. Whatever force there may have been in this objection has become immaterial since the parties have consented that the appeal should depend exclusively on the validity of the by-law, and have asked the court to dispose of the case on that ground.

The appeal must be allowed and judgment entered for the crown for the amount of the rebate claimed. The crown must also have costs in both courts below.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—That the places mentioned to have been supplied with water and in respect of which the question in this case arises are within the exception contained in the by-law of the City of Toronto under consideration cannot, I think, admit of any doubt and the only question in the case appears to me to be, whether the city council had any power to enact such an exception.

There can be no doubt that the corporation had a sufficient supply of water to enable them to supply, for they did supply, the buildings in question with water. They were therefore under the obligation imposed upon them by subsec. 3 of sec. 480 of ch. 184 R.S.O. 1887 to supply the buildings with water. Now that obligation must be construed, as it appears to me, as extend-

ing to this, that they must supply these buildings, although they are the property of the Dominion of Canada and are not assessable for city taxes, at the same rate or rent for the water consumed upon the premises as for the like service owners of buildings which are liable to be assessed for city taxes are supplied with water. There are two descriptions of water rates which are quite distinct, the one from the other, the one in the nature of an ordinary tax, and which whether water be or be not supplied for consumption is imposed upon all assessable real property in the municipality for raising a fund for the purpose of receiving payment of debentures issued for a large sum of money, the cost of construction and maintenance of the water-works, the other which is charged as a rent or rate for water actually supplied and consumed upon the premises to which it is supplied, and which is charged for at a rate fixed in proportion to the size of the building to which it is supplied, and to the purposes for which it is required—the number of baths, boilers and such like things for which it is supplied. Now as to the rate imposed upon the assessable property, it must be imposed equally upon all the property liable to such assessment in proportion to the assessed value of such property. With that rate we have nothing to do—there is none in the present case for the property of the Dominion, which the buildings here are, is not assessable for city taxes. The only questions therefore which appear to exist in the present case, are: 1st. As to the water rate charged for water actually supplied and consumed upon the premises to which it is supplied, can the corporation in any manner, directly or indirectly, impose upon one consumer of water whom they are under statutory obligation to supply with water, a greater rate or rent for the water supplied than under like circumstances, that is to say as to water supplied for

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consumption, they impose upon other consumers? and 2nd. Does a by-law which entitles one consumer to a reduction of the amount of the rate or rent due by him for water supplied to him by payment in advance of a reduced rate, and which denies to another the like reduction of the amount of rate or rent due by him for water supplied to him, constitute such inequality in the rate or rent charged for the water supplied as makes this distinction so made between the consumers of water illegal? By ch. 192, R.S.O. 1887, secs. 19 and 20, it is enacted that the corporation 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 items of payment, and they may fix the rate or rent to be paid for the use of the water by hydrants, fire-plugs and public buildings and for the collection of the water rent and water rate, and for fixing the times when and the places where the same shall be payable, and also for allowing a discount for pre-payment and in case of default of payment may enforce payment, &c.

Now by this power so conferred upon the corporation the legislature must, I think, be understood to have intended and enacted that the rate or rent charged to consumers of water for the water supplied to and consumed by them must be an equal rate charged to all consumers upon the like principle and just as the rate imposed upon assessable property must be an equal rate imposed upon all liable to assessment. and in my opinion the corporation has no power to impose a greater rate or charge for water supplied to a consumer who is not liable for or subject to the assessable rate upon real property than under like circumstances they do impose upon consumers of water who are subjected to such assessable rate; and I cannot but think that a by-law which purports to

give an allowance of fifty per cent by way of deduction from the rate or rent due for the water supplied and consumed to consumers who are also assessable rate-payers of the municipality and who shall pay such reduced amount of the half-yearly rate charged to them for water supplied within the first two months of each half year, that is to say so much in advance, but denies and refuses the like abatement for like payment in advance upon the amounts due as half-yearly rent or rate upon the water supplied to other consumers and because they are not subject to assessment for ordinary municipal rates, for that is what the by-law under consideration does, constitutes an inequality in the rate charged for water supplied which is not authorized by the statute.

It is idle to say that such an inequality in the amounts payable by such respective consumers of water for the water consumed by them, however equal in other respects the rate may be, is not inequality in the rates charged to such respective consumers of water for the water supplied to them. I am of opinion, therefore, that a by-law which professes to authorize such a distinction is *quoad* the distinction *ultra vires* of the corporation and invalid.

PATTERSON J.—I have not been able to see any reason for doubting the correctness of the judgment in this case.

The charge for water is not a tax.

The Provincial legislature cannot tax Dominion property.

Therefore, if this was a tax, and if the city is obliged to supply the Dominion officers with water, it would have to be supplied free from any charge.

That position is not taken by the appellant. On the contrary it is expressly disclaimed in his factum.

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Nor is it asserted that in this matter any peculiar duty towards the crown exists.

The crown has no more right to insist upon being supplied with water than has the owner of any building in the city.

It is the duty of the city (1) to supply with water,

> All buildings within the municipality situate upon land lying along the line of any supply pipe of the said corporation, upon the same being requested by the owner, occupant or other persons in charge of such building.

but it is not its duty to supply it free of charge, or free from restrictions as to the quantity to be used, or the mode in which, or the purposes for which, it may be used (2).

> The Corporation shall regulate the distribution and use of 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 time of payment * * and may fix the rate or rent to be paid for the use of water by hydrants, fire plugs and public buildings, and from time to time make and enforce necessary by-laws, rules and regulations for allowing a discount for prepayment.

The water-works have been constructed at the cost of the ratepayers of the city (3) by levying a rate upon all ratable property in the city of Toronto.

We look at the assessment act (4) and we find a formidable list of buildings, institutions, and property of other kinds exempt from taxation.

Buildings belonging to the Dominion Government are in the general category. The circumstance that they do not owe their exemption solely to this provincial legislation does not distinguish them from churches, schools, hospitals, poor houses, scientific institutions, orphan asylums, or any other of the long list.

(1) R.S.O. 1887, c. 184, s. 380, subs. 3.

(2) R.S.O. 1887, c. 192, s. 19.

(3) 35 V. c. 9; 37 V. c. 75; 39 V. c. 4; 41 V. c. 40.

(4) R.S.O. 1887, c. 193, s. 7.

The common feature is that they are exempt; they are not ratable property and contribute nothing to the costs of the water-works.

When therefore the city, fixing a uniform price for water supplied to buildings, provides that ratepayers may have an abatement if they pay promptly, no principle that I understand to apply to the case is violated by that provision.

Inequality and discrimination are denounced as odious and unjust but the appellant's denunciation of them is rather an inverted argument. It is in effect insisted that there shall be discrimination in favour of the properties that bear no share of the ordinary municipal burdens. Those properties enjoy the benefit of the municipal outlay to which they do not contribute, in matters which are common to all the inhabitants, roads, lights, police, &c., &c., and it is claimed that in respect of this special service of water they shall be made better off than the ratepayers by receiving the same abatement of price while they pay nothing towards the expenses of the construction of the works.

We have no question of the reasonableness or unreasonableness of the prices charged. The matter is contested as one of principle, and once we divest ourselves of the notion of a tax and set aside theories on that subject I cannot understand on what principle the claim can be supported.

I am of opinion that we should dismiss the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Macdonell & Wickham.*

Solicitor for respondents: *C. R. W. Biggar.*