

1966
*May 10, 11,
12, 13, 16, 17
June 28

CANADIAN WESTERN NATURAL
GAS COMPANY LIMITED (*De-*
fendant)

APPELLANT;

and

INTERNATIONAL UTILITIES COR-
PORATION, HORATIO RAY MIL-
NER and JOHN MAYBIN (*Defend-*
ants);

AND

CENTRAL GAS UTILITIES LTD. and
CENTRAL GAS UTILITIES (VUL-
CAN) LIMITED (*Plaintiffs*)

RESPONDENTS;

and

LAURENCE B. GIBSON,
E. O. PARRY, ERIC AVERY
and HARRY EDELSON (*Third Parties*).

ON APPEAL FROM THE SUPREME COURT OF ALBERTA,
APPELLATE DIVISION

*Companies—Purchase by one company of another company's gas distribu-
tion system—Claim that purchasing company was trustee of franchise
for distribution of natural gas—Conspiracy claim—Claims dismissed—
Fiduciary relationship not established.*

Central Gas Utilities Ltd. and Central Gas Utilities (Vulcan) Ltd. sued the defendants for a declaration that Canadian Western Natural Gas Co. Ltd. was a trustee for the plaintiffs of a franchise for the distribution of natural gas in the Town of Vulcan, and for damages for conspiracy to acquire for Canadian Western the gas utility plant of the Vulcan Company. The trial judge dismissed the action. On appeal it was held that Canadian Western must hold the franchise as trustee for the Vulcan Company but the dismissal of the conspiracy claim was affirmed. Canadian Western appealed to this Court from the declaration that it was a trustee and the respondents cross appealed from the dismissal of the conspiracy claim.

Central Gas Utilities (Vulcan) Ltd., which later became a wholly owned subsidiary of Central Gas Utilities Ltd., was incorporated for the purpose of distributing propane gas in the Town of Vulcan. (The two companies are hereinafter referred to as the Vulcan Company.) In July of 1953 the Vulcan Company entered into an agreement with

* PRESENT: Taschereau C.J. and Abbott, Judson, Ritchie and Hall JJ.

International Utilities Corporation as the only possible means of keeping going. Under this agreement International took over two options held by the Vulcan Company and also provided it with financial assistance. International also became a substantial minority shareholder of the Vulcan Company and during the subsequent years continued to feed in money to keep the company going. It had one nominee on the company's board of directors and it provided routine management and day-to-day administration.

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Following representations made to the provincial government on the part of the Town of Vulcan for service of natural gas, Canadian Western, a subsidiary of International, built a feeder line to the town in 1959. This company also got the franchise for the distribution of natural gas in Vulcan and in three neighbouring municipalities and after lengthy negotiations they bought the propane gas distribution system from the Vulcan Company.

After all this had been done and the arrangements ratified by the town and the Board of Public Utility Commissioners of Alberta, the Vulcan company repudiated the arrangements, their complaint being that Canadian Western should have actively promoted the acquisition of the franchise in the Town of Vulcan for them, and that because of their position they must hold the franchise for the Vulcan Company.

Held: The appeal should be allowed and the judgment at trial restored.

An examination of the prior negotiations showed that the purchase of the distribution system and the granting of the franchise were the result of hard bargaining at arm's length participated in not only by the two companies involved but by the town and with the knowledge of the Board of Public Utility Commissioners, which eventually approved both the sale and the grant of the franchise. There was no question here of the imposition of the will of the purchaser on a captive company.

The relationship between the two companies was not one that prevented Canadian Western from accepting the franchise and buying the distribution system. Canadian Western was not in a fiduciary position in relation to the Vulcan Company. There was no evidence that the former, as a corporate entity, ever undertook the obligations and duties of management of the latter. The control and direction of management of the Vulcan Company remained with its board of directors at all times.

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division¹, allowing in part an appeal from a judgment of Milvain J. Appeal allowed; cross-appeal dismissed.

Geo. H. Steer, Q.C., and *G. A. C. Steer, Q.C.*, for the defendant, appellant.

W. A. McGillivray, Q.C., and *R. A. Scott*, for the plaintiffs, respondents.

¹ (1965), 53 W.W.R. 705.

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The judgment of the Court was delivered by

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JUDSON J.:—Central Gas Utilities Limited and Central Gas Utilities (Vulcan) Limited sued Canadian Western Natural Gas Company Limited, International Utilities Corporation, H. R. Milner and John Maybin for a declaration that Canadian Western was a trustee for the plaintiffs of a franchise for the distribution of natural gas in the Town of Vulcan, and for damages for conspiracy to acquire for Canadian Western the gas utility plant of the Vulcan Company. The trial judge dismissed the action. On appeal¹ it was held that Canadian Western must hold the franchise as trustee for the Vulcan Company but the dismissal of the conspiracy claim was affirmed.

Central Gas Utilities (Vulcan) Limited is a wholly owned subsidiary of Central Gas Utilities Limited. It was incorporated for the purpose of distributing propane gas in the Town of Vulcan. The only other property owned by Central Gas Utilities Limited was a similar distribution system in the Town of Melville, Saskatchewan. It also held an option to buy another small distribution system in British Columbia. Lack of money soon compelled it to give up this option. I will refer from now on to these two companies as the Vulcan Company.

The Vulcan Company in July of 1953 entered into an agreement with International Utilities Corporation as the only possible means of keeping going. This agreement is set out in full in the reasons for judgment of Mr. Justice Milvain at trial². I will here attempt only a summary of the agreement and a statement of the reasons why it was made.

Under this agreement International Utilities took over two options held by the Vulcan Company and reimbursed that company for its deposits. These options were about to expire and would have required payment of \$135,000 and \$402,300 within a short time. The Vulcan Company because of lack of money could not possibly have taken them up.

The other main purpose of the agreement was to provide financial assistance to the Vulcan Company. International guaranteed an existing bank loan of \$21,500. It made an

¹ (1965), 53 W.W.R. 705. ² (1964), 49 W.W.R. 515.

immediate loan of \$50,000 to be applied on current liabilities and it promised that from time to time it would, in its discretion, make further loans as they were needed.

International also bought from one L. B. Gibson, who was a party to the agreement and a promoter of the company, 159,470 common shares of the Vulcan Company, which gave International approximately one-third of the voting power.

At the time when this agreement was made the Vulcan Company was insolvent. Its assets were the two distribution systems in the Towns of Vulcan and Melville. The consolidated financial statement for the year ending September 30, 1952, showed current assets of \$4,123.35 and current liabilities of \$163,519.84. In October 1952, the company borrowed \$75,000 on the security of a 120-day debenture. In January 1953, it borrowed \$200,000 on the security of another debenture. After a capital reorganization, the company made a public issue of 750,000 of its common shares but sold only 300,000 and realized the sum of \$300,000. What it realized was applied to pay off the secured indebtedness. A financial statement dated May 31, 1953 shows current assets of \$19,769.72 and current liabilities of \$55,045.70.

The evidence is that it was impossible for the company to raise money on any public capital markets. Such efforts had been made and had failed. If the financing agreement between the company and International had not been made in July of 1953, the company would not have long survived.

The agreement also provided that Gibson would resign as a director and officer of the Vulcan Company in favour of a nominee of International. This was also done and one Austin Brownie became a director and president of the Vulcan Company from 1953 until his death in January of 1956. He was succeeded in this office by the defendant H. R. Milner, who remained in that position until 1959. This agreement, pursuant to its terms, had to be submitted to the shareholders. This was done and the shareholders ratified the agreement.

Canadian Western is a public utility in the business of producing, purchasing and distributing natural gas in the City of Calgary and a large number of other communities in Southern Alberta. It is a subsidiary of the defendant

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International Utilities Corporation, which controls a number of other public utilities operating in the Province of Alberta.

Until the year 1958 nothing much happened in the Vulcan Company. The operation was routine. Until October 1956 the old manager, Edgar Robinson, remained in office. When he resigned he was replaced by one John Maybin, who was a member of what is called the Administrative Services Division of a number of subsidiaries of International in the Province of Alberta. The sales of propane gas did not expand as had been expected. Compared with other fuels, it was too expensive. The company lost money every year. It never had any working capital and International had to feed in money every year to keep it going. By October 1957 these loans amounted to \$190,000. There was, in addition, the bank loan of \$21,500 guaranteed by International.

The following is a table of the company's current assets, current liabilities and losses, year by year, from 1952 to 1958:

	Current Assets	Current Liabilities	Loss
1952	\$ 4,123.35	\$163,519.84	\$14,095.33
1953	26,475.95	85,468.40	82,745.85
1954	29,658.87	145,889.68	56,297.98
1955	38,141.45	191,510.58	40,909.80
1956	33,039.44	202,331.27	19,542.64
1957	26,246.00	211,807.00	14,319.00
1958	22,662.00	216,241.00	10,534.00

Counsel for the Vulcan Company made much of the tight control exercised over the company during this period. The head office was transferred to the head office of Canadian Western. Robinson, until his resignation in 1956 and after that date Maybin, carried on their duties from their desks in the common office. This was an economy measure. The company was in arrears with its rent. Routine administration, such as billing and collecting, was also done in this office at no charge to the Vulcan Company until Robinson left. When Maybin took over the administration a charge of \$400 per month was made for these services and accommodation. There is no suggestion anywhere that this charge was excessive. I have no doubt also that Maybin exercised control over the banking arrangements. This was only to be

expected when the company was being kept going on steady and increasing loans from International. I can see nothing in this period which puts International or Canadian Western in a fiduciary relation with the Vulcan Company. International was a substantial creditor and shareholder. It had one nominee on the Board of Directors and it provided routine management and day-to-day administration.

The year 1958 was a significant year in the relations between the companies. In October of that year an Alberta Gas Trunk Line from Pincher Creek to Princess was completed. The Town of Vulcan was forty miles north of this line. If the town was to be served with natural gas, it would be necessary to construct a feeder line from Shaughnessy going through the small municipalities of Barons, Carmangay, Champion, with Vulcan at the end. Canadian Western at first did not think that the three municipalities of Barons, Carmangay and Champion alone would justify the building of the extension. They estimated that they would get approximately 400 customers from these places. Vulcan had 400 potential customers. However, they did conclude late in 1958 that the three municipalities alone would be sufficient to justify the building as far as Champion. There was another fourteen miles to go from Champion to Vulcan and this part of the line would cost approximately \$190,000.

In 1958, knowing of the construction of the gas trunk line, the Town of Vulcan began to agitate for service of natural gas. They made representations to the provincial government. The Vulcan extension line was built by Canadian Western in 1959 at its own expense. This company also got the franchise for the distribution of natural gas in Vulcan and the other three municipalities and after lengthy negotiations they bought the propane gas distribution system from the Vulcan Company.

After all this had been done and the arrangements ratified by the town and the Board of Public Utility Commissioners of Alberta, the Vulcan Company repudiated the arrangements, their complaint being that Canadian Western should have actively promoted the acquisition of the franchise in the Town of Vulcan for them, and that because of their position they must hold the franchise in

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trust for the Vulcan Company. In an action against them for specific performance of the agreement for the sale of the Vulcan distribution system, they pleaded this as a defence. They also started an action for a declaration to this effect and also for damages for conspiracy. It is the judgment of the Court of Appeal in this action that is now under appeal. This makes it necessary to examine in some detail the purchase of the distribution system by Canadian Western and the acquisition of the franchise.

The position towards the end of 1958 was this. The Vulcan Company had a non-exclusive licence in the town for the distribution of propane gas but not natural gas. When the town granted this licence in 1951 it stated that it was not granting a licence for the distribution of natural gas although when the Vulcan Company installed its propane system, it did so in such a way that it was suitable for the distribution of natural gas.

The problem facing everybody was twofold. Who was going to build and finance the construction of a forty-mile extension line costing approximately \$900,000 to the Town of Vulcan, and who was going to distribute natural gas in the town? It is obvious that the insolvent company could not finance the extension line and the town was urging its claims to an immediate service.

As far as the franchise was concerned there was the same difficulty. An insolvent company unable to build the extension line could have no chance of getting a franchise from any municipal council which was alert to the interests of its citizens. Nevertheless, the claim of the Vulcan Company against Canadian Western is that this company, having brought natural gas to the town limits, could not acquire the franchise and could not purchase the distribution system without holding both in trust for the Vulcan Company. This, in fact, is the effect of the judgment of the Court of Appeal.

The problem was never as simple as its statement by the Vulcan Company. There were not merely two competing companies involved. There was a municipality with a mind and interests of its own, and a provincial public utility commission which had to approve all arrangements made for construction, franchises and rates and which had given

the town assurance in 1951 that by granting the non-exclusive licence for the distribution of propane gas, its hands would not be tied if, at a later date, it wished to obtain a supply of natural gas from another company. The legal position cannot be in doubt. No one had any claim of right to this franchise. It was wide open to competition, including competition from Canadian Western, unless that Company's relations with the Vulcan Company raised a disability.

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I come now to the offers made by Canadian Western to purchase the distribution system in the Town of Vulcan. The first offer was dated April 10, 1958 and was for \$75,000. I am dealing here with the assets in the Town of Vulcan only. The Board of Directors rejected this offer on two grounds. They thought the price was too low, and they also suggested that they might purchase natural gas from Canadian Western and distribute it themselves until such time as the plant in Melville had been disposed of when they might be in a better position to appreciate the true worth of the Vulcan property. The next offer was dated May 7, 1958. It was for \$70,000 plus whatever salvage might be realized from the sale of assets not needed for the distribution of natural gas. Again, the Vulcan Company suggested that it should distribute the gas and purchase wholesale from Canadian Western.

On April 7, 1958, the town had given first reading to a by-law granting a franchise to Canadian Western. This became known to the Board of Directors when they considered the second offer and they made representations to the Board of Public Utility Commissioners that they were being ignored. The Chairman of the Board stated at this time, in June 1958, that any application for approval of a franchise would be held in abeyance until Vulcan had had a chance to negotiate with Canadian Western. The result of all this was that nothing was done by way of construction of the extension line in the year 1958. It became essential that it be constructed early in 1959 and that plans be made well ahead of time.

Canadian Western made a third offer on February 11, 1959, offering a price of \$105,375. This increased offer had the concurrence of the Town of Vulcan before it was made

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to forestall any complaint about possible inflation of the figures for a rate base. This offer was subject to these conditions:

- (a) approval by the shareholders not later than March 16, 1959;
- (b) approval by the Board not later than June 29, 1959;
- (c) the acquisition by Canadian Western not later than June 29, 1959, of franchises for the distribution of natural gas in Vulcan and the three other small municipalities.

Judson J. These conditions were not met and the offer lapsed, although it is the one that was subsequently accepted. The reasons for the delay were that the company was still hopeful that it would be able to do its own distribution and purchase gas wholesale. It was also having trouble with the Saskatchewan Power Corporation, which was expropriating the distribution system in Melville and offering what was considered to be a very low price.

On March 20, 1959, at a directors' meeting, the lapsed offer was renewed. H. R. Milner resigned as president and director. The directors referred the offer to a shareholders' meeting to be called and they recommended that it be accepted. The shareholders' meeting was held on April 8, 1959, and passed a resolution authorizing the acceptance of the offer. The votes cast numbered 356,220—195,171 in favour, 161,049 against. International voted its own block in favour. Immediately following the shareholders' meeting the directors accepted the offer.

The minority group complained to the Board of Public Utility Commissioners. On May 1, 1959, the Board made two orders approving the sale and the execution of a franchise agreement between the town and Canadian Western. The town then passed its by-law to grant the franchise. This was then approved by a vote of the electors, as required by statute, and the franchise agreement was executed on June 8, 1959.

I have set out these negotiations in some detail because they show that the purchase of the distribution system and the granting of the franchise were the result of hard bargaining at arm's length participated in not only by the two companies involved but by the town and with the knowledge of the Board of Public Utility Commissioners, which eventually approved both the sale and the grant of the franchise. There is no question here of the imposition of the will of the purchaser on a captive company. Any inferiority

in the position of the Vulcan Company was not the result of management or control by Canadian Western but came from its total inability to make any contribution towards anything that would bring natural gas to the town. The Board of Vulcan was an independent board, which, when it saw that it could not purchase gas wholesale, sold its assets at a good price—more than double what it would have cost Canadian Western to duplicate the existing system and far higher proportionately than they were able to get in Saskatchewan, and they got this price with the consent of the town and the board, who both knew that this high price would affect the rates. Yet the judgment of the Court of Appeal decides that Canadian Western Natural Gas Company Limited holds the natural gas franchise of the Town of Vulcan as trustee for the Vulcan Company and, subject to reasonable operation charges, is accountable to the Vulcan Company for the profits of the operation of the franchise.

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The Vulcan Company's argument in support of the judgment of the Court of Appeal was fourfold. The first ground was based on management. The three other grounds were that Canadian Western lulled the shareholders of the Vulcan Company into a false sense of security; that contrary to its duty, it planned the eventual destruction of the Vulcan Company from the outset, and that it took active measures to destroy the company. The last three grounds have been rejected both at trial and on appeal in the dismissal of the conspiracy claim and I do no more here than to repeat the charges and agree with their dismissal.

To establish its claim the Vulcan Company must rely on its first ground. It comes down to management and it must be from this that the fiduciary position arises which, according to the Court of Appeal, makes necessary the imposition of the constructive trust. Throughout these reasons I have avoided using the term "fiduciary relationship". I have preferred to outline what the relationship was in fact and, in my opinion, it was not a relationship that prevented Canadian Western from accepting the franchise and buying the distribution system.

I agree with the conclusions of Milvain J. at trial and I quote only the following paragraph from his judgment:

However, there is no evidence that Canadian Western, as a corporate entity, ever undertook the obligations and duties of management. Its board

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of directors, so far as the evidence goes, never was called upon to make decisions and direct the persons who managed the affairs of Central. It is clear on the evidence that the control and direction of management remained at all times in the board of directors of Central. While this was going on it was only natural that International would continue a careful daily interest in the day-to-day functions of Central. That such should be the case is obvious for two reasons. In the first place, International had an interest as a large shareholder, not as a majority shareholder but as a very large minority one, and as an ever increasing creditor for moneys advanced. In the second place, by virtue of the agreement, Ex. 1, it was provided that further assistance to Central would be made from time to time, only if such met with the opinion of the directors of International. It is common knowledge that International did continue financial assistance so it is obvious and sensible that careful track would be kept of Central's activities. When this is realized, we see the need for detailed communications which make up the bulk of 196 exhibits filed on the trial of this action. Naturally, International and the individuals responsible to it and to them, as individuals, wanted up-to-date reports and the opinions and thoughts of the reporting people. It is natural that many such people were connected in some way with Canadian Western, the inter-company group, and other companies and organizations in which International had an interest. However wide the informational net, it did not embrace Canadian Western as a corporate entity in a fiduciary position, or remove legal control from the Central directors.

The dissenting judge in the Court of Appeal also accepted this interpretation of the relationship.

The progress of this litigation requires some mention. Canadian Western wrote on July 9 to enquire whether the Vulcan Company intended to perform its contract. Following this letter there were negotiations between the two companies and Canadian Western offered, subject to the approval of the Town of Vulcan and the Board of Public Utility Commissioners, to assign the franchise to the Vulcan Company and to supply natural gas wholesale to that company. The town refused to approve this settlement. Canadian Western then sued for specific performance of the agreement on August 25, 1959.

The defendant in its statement of defence offered to submit to specific performance but only on condition that Canadian Western was a trustee for it. The filing of this defence was a repudiation of the agreement of sale which was an agreement to convey free and clear of all encumbrances. Canadian Western so accepted this defence and discontinued its action. The Vulcan Company then, on September 8, 1959, began its action for its declaration of trust.

I would allow the appeal with costs both here and in the Court of Appeal and restore the judgment at trial dismissing the action. The Vulcan Company in this Court also

cross appealed on its claim for damages for conspiracy. In this it has been unsuccessful throughout. On another branch of the cross-appeal the Vulcan Company asks for a declaration that Canadian Western held the whole Vulcan extension as trustee for it. This claim, of course, fails in view of what I have written. The cross-appeal should be dismissed with costs.

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Appeal allowed with costs and judgment at trial dismissing the action restored. Cross-appeal dismissed with costs.

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Solicitors for the defendant, appellant: Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.

Solicitors for the plaintiffs, respondents: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.
