

THE CITY OF SAINT JOHN (*Plaintiff*) .. APPELLANT;

1963

\*Feb. 25, 26  
Mar. 13

AND

IRVING PULP & PAPER LIMITED }  
(*Defendant*) ..... } RESPONDENT.ON APPEAL FROM THE APPEAL DIVISION OF THE  
SUPREME COURT OF NEW BRUNSWICK

*Contracts—Agreement to supply water to pulp mill—Validity of agreement—Whether beyond powers of City to make—An Act to Consolidate the Laws Relating to Sewerage and Water Supply, in the City of Saint John, and in Portions of the Parishes of Lancaster and Simonds, 1914 (N.B.), c. 83—Saint John City Assessment Act, 1948, 1948 (N.B.), c. 137.*

Under an agreement dated October 16, 1958, the appellant agreed to supply the respondent's mills with an estimated quantity of thirty million gallons of water per day, for which the respondent agreed to pay a fixed amount of \$35,000 per year, for a period of twenty-five years, and further agreed to pay a consumption charge of one cent per thousand gallons for the first nine million gallons and one-half cent per thousand gallons for consumption in excess of nine million gallons. Some time subsequent to the making of this agreement the appellant took the position that it was void and of no effect, as being beyond the powers of the appellant to make. On December 21, 1959, the Water Assessment Department of the appellant wrote to the respondent advising that as no agreement had been negotiated with that department, by the legislative authority vested in the department, under the direction of the department's head, the rate to be charged would be five cents per thousand gallons. Later, the appellant sued the respondent for moneys alleged to be due for water supplied. Judgment was given by the trial judge in favour of the respondent and this decision having been affirmed by the Appeal Division of the Supreme Court of New Brunswick, the appellant appealed to this Court.

*Held:* The appeal should be dismissed.

Section 70 of the *Saint John City Assessment Act, 1948, 1948 (N.B.), c. 137*, did not confer upon the Assessment Department the power to make the kind of agreement in question and it did not prevent the appellant, by its Common Council, from determining rates in relation to those special cases which were provided for in s. 5 of *An Act to Consolidate the Laws Relating to Sewerage and Water Supply, in the City of Saint John, and in Portions of the Parishes of Lancaster and Simonds, 1914 (N.B.), c. 83*.

Section 70 of the 1948 Act appeared in the same terms as s. 55 of the *Saint John City Assessment Act, 1942, 1942 (N.B.), c. 80*. Read against the background of earlier legislation, s. 55 was never intended to do anything more than to transfer to the Assessment Department those powers which, prior thereto, had been exercised by the Director of the Department of Water and Sewerage and which, before 1936, had been exercised by the Commissioner of Water and Sewerage,

\*PRESENT: Cartwright, Abbott, Martland, Judson and Ritchie JJ.

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together with the power of assessment and rate determination which, under s. 30 of the 1914 Act had been vested in the Common Council of the appellant, with, in some instances, the Councillors of the Parishes of Lancaster and Simonds.

It was significant that the power conferred upon the Assessment Department appeared in the *Assessment Act* and not in a statute amending the 1914 Act. The *Assessment Act* dealt specifically with the making of assessments and the imposition of rates. It was inconceivable that the Legislature, without any reference whatever to the wide powers of the Common Council conferred by s. 5 of the 1914 Act, and with no repeal thereof, could be deemed to have repealed s. 5 by implication and to have given those broad discretionary powers conferred upon the Common Council to a city department, under the direction of a departmental head who was, himself, appointed by and responsible to the Common Council.

Attention was also to be paid to the saving provision which appears at the end of s. 70 of the 1948 Act: "but all provisions of said Act and Acts mentioned and all amendments thereto, not inconsistent with this Act are to be construed as still in force and effect." The only provisions of the 1914 Act which could be preserved by this saving clause were those contained in s. 5.

The resolution of the Common Council, passed on October 17, 1957, agreeing in principle to the agreement between the appellant and the respondent, coupled with the resolution authorizing the execution of the agreement passed on October 8, 1958, with which resolution that agreement must be read, constituted a resolution of the kind provided for in s. 5. Thereafter the appellant was not entitled to increase the rates, during the twenty-five year period, above those provided by the resolution.

The joint meetings of the Common Council of Saint John and Councillors of Lancaster and Simonds provided for in s. 29 of the 1914 Act related only to those matters provision for which was made in s. 30; *i.e.*, the assessment and imposition of water rates. Section 5 stood by itself and dealt with a special situation. By its terms it referred only to a resolution of the Common Council of the City of Saint John and that Common Council alone had the power to pass a resolution for the purposes of that section. It could do so without the presence of any Councillors from the other municipalities whose territory was within the Water District.

APPEAL from a judgment of the Appeal Division of the Supreme Court of New Brunswick, affirming a judgment of Michaud C.J.Q.B.D. Appeal dismissed.

*J. P. Barry, Q.C.*, and *G. T. Clark, Q.C.*, for the plaintiff, appellant.

*A. B. Gilbert, Q.C.*, *D. M. Gillis, Q.C.*, and *W. E. Clarke, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:— This is an appeal from the unanimous judgment of the Appeal Division of the Supreme Court of New Brunswick, which had affirmed the decision of Chief

Justice Michaud, which gave judgment in favour of the respondent, with costs. The appellant sued the respondent for moneys alleged to be due for water supplied by the appellant to the respondent. The water, which had been supplied to the respondent from the appellant's Loch Lomond system, was billed on the basis of five cents per thousand gallons.

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In answer to the appellant's claim, the respondent relied upon an agreement between the parties dated October 16, 1958. The background of this agreement is set forth in its recitals as follows:

WHEREAS the Company operates a pulp mill in the City of Lancaster in the Saint John Water District and has been using water supplied by the City from its Spruce Lake watershed;

AND WHEREAS the said supply of water is inadequate for the purposes of the Company and the Company is also desirous of expanding its operations by the construction of an additional pulp mill, or kraft pulp mill;

AND WHEREAS the City has agreed to construct a pipeline to conduct water from its mains in the City across the Reversing Falls Bridge to the Company's property in the City of Lancaster to supply additional water to the said mill and to enlarge its pipeline and storage facilities from and at Loch Lomond and other lakes in the Water District.

This agreement went on to provide for the construction by the appellant of certain pipelines and the enlargement by it of its water storage facilities at Loch Lomond, so as to supply the respondent's mills with an estimated quantity of thirty million gallons of water per day.

The respondent agreed to pay to the appellant a fixed amount of \$35,000 per year, for a period of twenty-five years, and further agreed to pay a consumption charge for such water at the rate of one cent per thousand gallons for the first nine million gallons and one-half cent per thousand gallons for consumption in excess of nine million gallons.

Some time subsequent to the making of this agreement the appellant took the position that it was void and of no effect, as being beyond the powers of the appellant to make, and on December 21, 1959, the Water Assessment Department of the appellant wrote to the respondent, advising that:

As no agreement has as yet been negotiated with this department with respect to the charge to you for supply of water from this source (the Loch Lomond system), by the legislative authority vested in this department, under my direction, the rate to be charged shall be five cents per thousand gallons.

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The main question in issue in these proceedings is as to the validity of the agreement, as the appellant concedes that if it is valid the appeal must fail.

The appellant's main argument is that it had no legal authority to make the agreement because of the provisions of s. 70 of the *Saint John City Assessment Act, 1948*, c. 137, Statutes of New Brunswick 1948, the provisions of which will be cited later. It is further contended that, even apart from s. 70, the appellant had no authority to make the agreement.

It is necessary, for the consideration of this submission, to consider chronologically certain of the statutory provisions relating to the supply of water by the appellant. In 1914 there was enacted, as c. 83 of the Statutes of New Brunswick 1914, *An Act to Consolidate the Laws Relating to Sewerage and Water Supply, in the City of Saint John, and in Portions of the Parishes of Lancaster and Simonds*. The relevant portions of that statute, which will herein-after be referred to as the "1914 Act", were as follows:

1. In this Act the expression "City" shall mean the City of Saint John.

"Commissioner" shall mean the Commissioner of Water and Sewerage of the City of Saint John.

Section 1 further defined "Water District" as including the whole of the City of Saint John and certain defined portions of the Parishes of Lancaster and Simonds.

4. The city is hereby authorized to take, hold and appropriate and to convey through the Parishes of Lancaster and Simonds to, into and through the Water District, all the water of Menzie's Lake, Ludgate's Lake and Spruce Lake, so called, in the Parish of Lancaster, and of Loch Lomond, Lake Robertson, Mispec River, Lake Latimer, and Little River in the Parish of Simonds, and the waters which may flow into and from the same, and any other ponds and streams within the distance of four miles from the same, and any water rights connected therewith; and also to take and hold, by purchase, expropriation or otherwise, any lands or real estate necessary for creating lakes and reservoirs, and for laying up and maintaining pipes, mains and conductors of water for carrying, discharging, disposing of and distributing water, and also any land on and around the margin of the said lakes, reservoirs and river, and on and around the said other ponds and streams, so far as may be necessary for the preservation and purity of the same, for the purpose of furnishing within the said Water District a supply of pure water, and the said City, for the purpose aforesaid, may connect the waters of any of said lakes together, may erect and maintain dams to raise and retain the water therein, may distribute the water throughout the Water District, and may supply and dispose of the same by agreement, outside of said Water District, and for these purposes may lay down pipes to any house or building within the said Water District, and may regulate

the use of the said water within and without the said Water District; and the said City, for the purposes aforesaid may, within and without said Water District, carry any pipes under or about any highway or other way, in such manner as not to obstruct or impede travel thereon, and may enter upon and dig up any such road, street or way, for the purpose of laying down pipes beneath the surface thereof, or of repairing them when laid down, not obstructing or impeding travel as aforesaid, and in general may do any other acts and things necessary, convenient or proper for the purposes of this Act.

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5. In supplying water to any company or companies, corporation or corporations, or any individual or individuals, either within or without the said Water District, for the purpose of carrying on manufacturing, or a manufacturing business, or that may be supplied to any factory and factories, mill and mills, manufactory and manufactories, or other building used for manufacturing purposes, the amount of water provided may be as large in quantity and may be furnished at such rates, and upon such terms, conditions and limitations as the City shall determine, by resolution of Common Council, upon petition of any such person or corporation, but such resolution shall not be, nor shall it be construed to be a contract to supply water, and the City shall not be entitled to increase such rates for a period not exceeding twenty-five years, to be set forth in such resolution, and all the rules and regulations concerning the water supply of the said Water District now lawfully made, or that hereafter may lawfully be made, shall apply and extend to the said petitioners and each of them, and their and each of their successors, and the said premises and the said business carried on therein, and to all persons and corporations using such water, to the full extent that such rules and regulations are or may or can be applicable thereto, and the said City is hereby authorized and empowered to make such rules and regulations with regard to supplying water to and the use of the same by the said petitioners, or any of them, or their successors, both within and without said water district, as the said City may deem necessary and expedient.

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29. The Councillors of the Parishes of Lancaster and Simonds, representing such Parishes in the Municipal Council of the City and County of Saint John shall, as such Councillors, represent their said respective Parishes at all meetings of the Common Council of the City of Saint John at which rates are fixed or any matters are considered appertaining to the supply of water within their respective Parishes. Each Councillor shall have one vote, and each member of the Common Council shall have three votes at such meetings. The said Councillors shall vote only upon the fixing of rates and upon matters appertaining to the supply of water within their respective Parishes.

30. Within the Water District, the owners in fee or the leaseholders, either in perpetuity or for renewable terms of any lands or tenements through or along which, or within seven hundred feet of which mains for the supply of water shall pass, and also the owners of or traders in all stocks in trade, wares and merchandize in the said Water District shall, whether the water be taken or used on the premises respectively or not, be assessed for the purpose of this Act, in each year, at a rate and rates to be fixed and determined by a majority of the Common Council of said City with the Councillors of the said respective Parishes, as provided by the thirtieth section of this Act, in each year in their discretion according to the Schedule (B) appended to this Act, and being part thereof, and when pipes for the supply of water are laid to any premises

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then, at a rate and rates to be fixed and determined by the said Common Council with the Councillors as aforesaid, in each year in their discretion, according to the Schedule (C) also appended to this Act, and being part thereof, excepting steam mills, manufactories, public baths, hotels, and all places for which and where a large quantity of water is required, which shall be rated by agreement with the Commissioner and the parties requiring supply, and which shall be payable quarterly. The owner of a dwelling house or other occupied building, in front or along which, or in any street or thoroughfare near to which a main for the supply of water shall pass shall, whether the water be taken or used upon or in the premises or not, be assessed at the same rate according to Schedule (C) of this Act, as if service pipes for the supply of water were laid to such premises and the water actually taken and consumed thereon; provided only that the Commissioner shall have a discretionary power, partly or wholly to exempt any such owner as last mentioned when, in his opinion, it may be impracticable or very expensive to introduce the water into the premises, and in such case may decline to carry in a service pipe. Property owned by the City shall not be liable to assessment against the City. In making up the assessment hereunder, the valuation of real estate within the City made by the Board of Assessors of Taxes for the said City in the year in which such assessment for water supply is made, shall be adopted so far as it may be practicable to do so.

The reference in s. 30 to "the thirtieth section of this Act" is clearly an error. The reference should have been to the twenty-ninth section of the Act.

At the time this Act was passed the Common Council of the City of Saint John consisted of a Mayor and four Elective Commissioners, each Commissioner being responsible for certain aspects of City administration, one of whom was the Commissioner of Water and Sewerage referred to in the 1914 Act. In 1936 this form of government was changed, the Commissioners being replaced by six Councillors, by c. 94, Statutes of New Brunswick 1936. Section 14 of that Act provided as follows:

14. (1) Subject to the further provisions of this Act, the Common Council shall exercise all the powers formerly vested in the Commissioner of Finance and Public Affairs, the Commissioner of Public Safety, the Commissioner of Public Works, the Commissioner of Water and Sewerage (save and except that such powers and duties as are vested in the Commissioner of Water and Sewerage by Chapter 83 of 4 George V (1914), An Act to Consolidate the Laws Relating to Sewerage and Water Supply, in the City of Saint John, and in portions of the Parishes of Lancaster and Simonds, in the City and County of Saint John, and amendments thereto, shall be vested in and exercised by the Director of the Department of Water and Sewerage) and the Commissioner of Harbours and Ferries and Public Lands.

(2) For the more efficient administration of the municipal services the Common Council shall with all convenient speed organize and co-ordinate the following departments:

\* \* \*

(b) The Department of Assessment, or Board of Assessors of Taxes, in respect to the management of the levying and assessing of rates and taxes, subject to the provisions of the Saint John City Assessment Act; 1963  
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(g) The Department of Water and Sewerage, in respect to the management of water supply and sewage disposal; v.  
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(3) The Common Council shall appoint a person having suitable qualifications to be administrative head of each such department and known as the "Director" or as he may be otherwise called by the Common Council. Such person shall devote his whole time to the business of the City and be paid a salary to be determined by the Common Council. He shall hold his appointment during the pleasure of the Common Council, and be responsible to the Common Council for the efficient administration of the services entrusted to him or his department.

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(4) It shall be the duty of such administrative head of each department, in addition to such other duties as may be prescribed by the Common Council, to attend the meetings of the Council when and as required to do so by it, and to recommend to it from time to time such measures as he shall deem necessary or expedient for it to adopt. He shall furnish any information respecting his department when required by the Council, and at least once a month present to the Council a summary report on the administrative work of his department.

Following the enactment of this statute, therefore, those powers which, under the 1914 Act, had been vested in the Commissioner of Water and Sewerage became vested in the Director of Water and Sewerage. Unlike the Commissioner, who had been an elected officer and a member of the Common Council, the Director was an appointed official, appointed by the Common Council, holding his appointment during the pleasure of the Common Council and responsible to it.

It is against this background that in 1942 s. 55 of the *Saint John City Assessment Act, 1942*, c. 80, Statutes of New Brunswick 1942, was enacted. This statute dealt with the assessing and levying of rates for taxes in the City, dealing with such matters as the assessment and taxation of real estate, personal property and business, providing a machinery for the making of assessments and for appeals therefrom. One portion of the Act is headed "ASSESSORS' DEPARTMENT", and s. 37 provides for a Board of Assessors of Taxes for the City of Saint John, consisting of one or more persons to be appointed by the Common Council. Section 55 of that Act provided as follows:

55. Notwithstanding anything contained in the Acts of Assembly 4 Geo. V. (1914) Chapter 83 and amendments thereto, all rates, assessments and agreements for water supply within or without the City of Saint John shall be made by the Assessment Department under the

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direction and control of the Director of that department, but all provisions of said Act and Acts mentioned and all amendments thereto, not inconsistent with this Act are to be construed as still in force and effect.

Martland J. In 1948 the 1942 Act, as amended from time to time, was consolidated in the *Saint John City Assessment Act, 1948*, in which there appeared s. 70 in the same terms as s. 55 of the 1942 Act above quoted. It is upon this section that the appellant chiefly relies, in contending that the agreement between the appellant and the respondent was void and of no effect.

The appellant's contention is that, after the enactment of s. 55 of the 1942 Act, only the Assessment Department of the appellant had the power to impose rates and assessments for water supply and to make agreements for such supply. This involves the contention that the effect of s. 55 was to repeal, by implication, s. 5 of the 1914 Act. It is said that, since s. 55 covered all rates, assessments and agreements for water supply, no powers remained in the Common Council, under s. 5, to make provision for the supply of large quantities of water to factories, mills, manufacturing and buildings used for manufacturing purposes; that all such powers now reside solely in the Assessment Department, under the direction of the Director of that Department; that as the respondent's agreement was not made with the Assessment Department, it had no effect, and the Assessment Department, on the direction of the Director, had the authority to impose the rate of five cents per thousand gallons of water delivered to the respondent from the appellant's Loch Lomond system.

I am unable to agree with this submission. Read against the background of the earlier legislation, it does not appear to me that s. 55 of the 1942 Act was ever intended to do anything more than to transfer to the Assessment Department those powers which, prior thereto, had been exercised by the Director of the Department of Water and Sewerage and which, before 1936, had been exercised by the Commissioner of Water and Sewerage, together with the power of assessment and rate determination which, under s. 30 of the 1914 Act, had been vested in the Common Council of the appellant, with, in some instances, the Councilors of the Parishes of Lancaster and Simonds.

Under the 1914 Act, s. 30 was the one which made provision for assessment for water rates, for the fixing of such rates and, in the case of steam mills, manufactories, public baths, hotels and places where a large quantity of water is required, for the fixing of rates by agreement with the Commissioner. Section 5 was a special provision enabling the Common Council, by resolution, to make provision for water supply to factories, mills, manufactories and buildings used for manufacturing purposes, in large quantities and at special rates.

It is significant that the power conferred upon the Assessment Department appears in the *Assessment Act* and not in a statute which amends the 1914 Act. The *Assessment Act* is dealing specifically with the making of assessments and the imposition of rates. I cannot conceive that the Legislature, without any reference whatever to the wide powers of the Common Council conferred by s. 5 of the 1914 Act, and with no repeal thereof, can be deemed to have repealed s. 5 by implication and to have given those broad discretionary powers conferred upon the Common Council to a City Department, under the direction of a departmental head who is, himself, appointed by and responsible to the Common Council.

Attention must also be paid to the saving provision which appears at the end of s. 70 of the 1948 Act: "but all provisions of said Act and Acts mentioned and all amendments thereto, not inconsistent with this Act are to be construed as still in force and effect." The only provisions of the 1914 Act which could be preserved by this saving clause are those contained in s. 5 and, in my opinion, they were preserved by it.

I am, therefore, of the opinion that s. 70 of the *Saint John City Assessment Act, 1948* did not confer upon the Assessment Department the power to make the kind of agreement which is in question here and that it did not prevent the appellant, by its Common Council, from determining rates in relation to those special cases which are provided for in s. 5 of the 1914 Act.

The next submission of the appellant is that, in any event, s. 5 of the 1914 Act does not contemplate nor authorize the execution by the appellant of any agreement. Re-

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liance is placed on the words in that section "but such resolution shall not be, nor shall it be construed to be a contract to supply water".

Section 5 of the 1914 Act enables the appellant, by resolution of its Common Council, to arrange for the supply of water to factories, mills, manufactories and buildings used for manufacturing purposes, in as large a quantity, at such rates and upon such terms, conditions and limitations as the resolution provides. The only limitation is that the resolution shall not be, nor be construed to be, a contract to supply water. The rates set by such resolution cannot be increased for the period set forth in the resolution, not exceeding twenty-five years. The purpose of the restrictive provision in this section is to prevent the City from becoming obligated as a matter of contract by such a resolution to supply water and thereby to prevent an action in damages against the appellant in the event that it is unable to supply the quantities provided for in the resolution.

The respondent points out that s. 5 does not, by its terms, preclude the appellant from making a contract, but merely provides that the resolution itself shall not constitute a contract to supply water. The respondent further contends that the appellant, as a Royal Charter corporation, had, in law, the right to make any contracts which it saw fit to make, provided that the same were not illegal.

Whether or not this contention is sound, I agree with McNair C.J. in the Court below that the resolution of the Common Council, passed on October 17, 1957, agreeing in principle to the agreement between the appellant and the respondent, which had been discussed at that meeting and which is set forth in the minutes of the meeting, coupled with the resolution authorizing the execution of the agreement passed on October 8, 1958, with which resolution that agreement must be read, constitute a resolution of the kind provided for in s. 5 of the 1914 Act, and that thereafter the appellant was not entitled to increase the rates, during the twenty-five year period, above those provided by the resolution.

Finally the appellant contended that, as the respondent's mill was in Lancaster and as the agreement related to the supply of water there, the meeting which passed the resolu-

tion was not properly constituted, as there were no Council-  
lors present from the City of Lancaster as required by s. 29  
of the 1914 Act.

In my view, s. 29 is to be read in conjunction with s. 30  
and the joint meetings provided for in s. 29 relate only to  
those matters provision for which is made in s. 30; i.e., the  
assessment and imposition of water rates. Section 5 of the  
1914 Act, in my opinion, stands by itself and deals with a  
special situation. By its terms it refers only to a resolu-  
tion of the Common Council of the City of Saint John,  
and, in my opinion, that Common Council alone has the  
power to pass a resolution for the purposes of that section.  
It could do so without the presence of any Councillors  
from the other municipalities whose territory is within the  
Water District.

For these reasons, in my opinion, the appeal should be  
dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: H. D. Hopkins  
and J. P. Barry, Saint John.*

*Solicitors for the defendant, respondent: W. E. Clarke,  
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