THE CORPORATION OF THE DISTRICT OF SURREY, THE CORPORATION OF THE TOWNSHIP OF CHILLIWHACK, THE CORPORATION OF THE CITY OF CHILLIWACK ..... APPELLANTS;

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED ..... RESPONDENT.

1956
*Dec. 10
1957
Jan. 22

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—Jurisdiction of Public Utilities Commission to issue certificate of public convenience and necessity without consent of municipality affected—The Public Utilities Act, R.S.B.C. 1948, c. 277, ss. 12, 14—The Gas Utilities Act, 1954 (B.C.), c. 13, s. 3—The Municipal Act, R.S.B.C., c. 232, as amended.

The Public Utilities Commission of British Columbia has jurisdiction, under the *Public Utilities Act* and the *Gas Utilities Act*, to grant a certificate of public convenience and necessity for the operation of a public utility within the boundaries of a municipality, without the consent of the municipality affected.

Per Rand, Locke and Nolan JJ.: The words "if required" at the conclusion of the first sentence of s. 14 of the *Public Utilities Act*, must be construed as meaning "if required by law", and there is no provision requiring the municipality's consent in such circumstances.

APPEAL by the three municipalities from a judgment of the Court of Appeal for British Columbia (1), affirming the decision of the Public Utilities Commission of British Columbia to grant the respondent company a certificate of convenience and necessity. Appeal dismissed.

T. G. Norris, Q.C., for the municipalities, appellants.

Hon. J. W. deB. Farris, Q.C., A. Bruce Robertson, Q.C., and *R. Dodd*, for the respondent.

THE CHIEF JUSTICE:—This is an appeal by leave of the Court of Appeal for British Columbia from its decision (1) dismissing an appeal from a certificate of public convenience and necessity, dated December 13, 1955, granted by the Public Utilities Commission of that Province to the respondent, British Columbia Electric Company Limited.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Nolan JJ.

(1) 19 W.W.R. 49, 4 D.L.R. (2d) 29.

1957

DISTRICT OF SURREY, *et al.* *v.* B.C. ELECTRIC CO. LTD.

Kerwin C.J.

Although the application by the respondent to the Commission states that it was made under s. 12 of the *Public Utilities Act,* which is R.S.B.C. 1948, c. 277, it is quite apparent from what will be stated shortly and from a perusal of the two clauses of that section that that part of the application with which we are concerned is really under s. 12(*b*).

The respondent, among other things, carries on the business of manufacturing gas and has entered into a contract for the purchase of natural gas, with a view to its distribution. The territory in respect of which the respondent applied was divided into the Greater Vancouver area and the Fraser Valley area. A certificate of public convenience and necessity was granted as to the former on July 29, 1955, but decision was reserved with respect to the Fraser Valley area. Ultimately a certificate was also granted as to that area, subject to certain conditions, and the real dispute is as to the power of the Commission to grant this certificate without the consent of the appellant municipalities.

The only provisions of the *Public Utilities Act* requiring consideration are s. 12 and the first sentence in s. 14, which read as follows:

> 12. Except as hereinafter provided:—
>
> (*a*) No privilege, concession, or franchise hereafter granted to any public utility by any municipality or other public authority shall be valid unless approved by the Commission. The Commission shall not give its approval unless, after a hearing, it determines that the privilege, concession, or franchise proposed to be granted is necessary for the public convenience and properly conserves the public interest. The Commission, in giving its approval, shall grant a certificate of public convenience and necessity, and may impose such conditions as to the duration and termination of the privilege, concession, or franchise, or as to construction, equipment, maintenance, rates, or service, as the public convenience and interest reasonably require:
>
> (*b*) No public utility shall hereafter begin the construction or operation of any public utility plant or system, or of any extension thereof, without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction or operation (in this Act referred to as a "certificate of public convenience and necessity").
>
> 14. Every applicant for a certificate of public convenience and necessity under either of the clauses of section 12 shall, in case the applicant is a corporate body, file with the Commission a certified copy of its memorandum and articles of association, charter, or other document of incorporation, and in all cases shall file with the Commission such evidence

as shall be required by the Commission to show that the applicant has received the consent, franchise, licence, permit, vote, or other authority of the proper municipality or other public authority, if required. . . .

It is clear that the relevant part of respondent's application was not made under clause (*a*) of s. 12, because it had no "privilege, concession, or franchise" from the appellant municipalities. That part of the application being under s. 12(*b*), and the opening words of s. 14 referring to an application for a certificate under either of the clauses of s. 12, it is too clear for argument that the latter part of s. 14 refers only to a "consent, franchise, licence, permit, vote, or other authority" when one of them is required on an application under s. 12(*a*). The matter does not lend itself to extended discussion and it is unnecessary to deal with the judgment of the Court of Appeal for British Columbia in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1). Notwithstanding the various provisions of the *Municipal Act* to which counsel for the appellants drew our attention, the matter is left to the Commission to take into account the interests of all parties concerned, public and private, and this is corroborated by the provisions of the *Gas Utilities Act,* 1954 (B.C.), c. 13.

The appeal should be dismissed with costs.

The judgment of Rand, Locke and Nolan JJ. was delivered by

LOCKE J.:—The respondent company is a public utility within the meaning of that term, as defined in s. 2 of the *Public Utilities Act,* R.S.B.C. 1948, c. 277, and by a letter dated May 15, 1955, applied to the Public Utilities Commission, constituted under that statute, for a certificate of public convenience and necessity for a project for the supply of natural gas for a portion of the lower mainland area of British Columbia, which included the District of Surrey and the Township of Chilliwhack and the City of Chilliwack.

The application to the Commission was opposed by the present appellants. Lengthy public hearings were held, at which a similar application by a competing gas distributing company was also considered.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

1957

DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Locke J.

The respondent has for many years sold manufactured gas through various subsidiary companies in a number of municipalities in the greater Vancouver area. The project proposed was for the supply in additional areas in the lower mainland of the Province of natural gas brought by a pipeline company from the Peace River areas of Alberta and British Columbia.

By s. 2 of the *Gas Utilities Act*, 1954 (B.C.), c. 13, a "gas utility" is defined as a corporation which owns or operates in the Province facilities for, *inter alia*, the production, transmission or delivery of gas, a word defined to include natural gas, and the respondent company falls within this definition. By s. 3 of that Act, every such company to which a certificate of public convenience and necessity is thereafter granted under the *Public Utilities Act* shall in the municipality or area mentioned in such certificate be empowered to carry on, subject to the provisions of that Act, its business as a gas utility, including power to transmit, distribute and sell gas and to place its pipes and other equipment and appliances under any public street or lane in a municipality upon such conditions as the gas utility and the municipality may agree upon. If the parties fail to agree upon these terms, the Public Utilities Commission is empowered by s. 40 of the *Public Utilities Act* to settle them.

Section 12 of the *Public Utilities Act* provides for applications to the Commission for a certificate of public convenience and necessity in cases where a franchise has been granted to a public utility by any municipality or other public authority after the coming into force of the Act, and also in cases where no such franchise has been granted, these being dealt with in clauses (*a*) and (*b*) respectively. The respondent had not applied to any of the appellant municipalities for any concession or franchise to supply gas within their boundaries and, while the written application to the Commission merely states that it was being made under the provisions of s. 12 of the Act, it is clear that the application was made under clause (*b*) of that section.

According to s. 14 of the statute, upon an application for such a certificate under either of the clauses of s. 12, the applicant, if a corporate body, shall file a certified copy of its memorandum and articles of association or other docu-

ment of incorporation, and such evidence as shall be required by the Commission to show that the applicant has received the consent or permission of the municipality or other public authority *if required.*

It was the contention of the appellants that their prior consent or permission was a condition precedent to the right of the Commission to grant the certificate applied for and they contend that this construction of the statute is supported by the language of the section. For the company, it is said that the words "if required" should properly be construed as meaning "if required by law" and that, by virtue of the provisions of the *Public Utilities Act* and the *Gas Utilities Act,* no such consent is required.

The contention that the utility cannot carry on its activities in a municipality without its consent is based upon certain provisions of the *Municipal Act,* R.S.B.C. 1948, c. 232, which, standing alone, would indicate that such consent was required. By s. 58 of that statute a municipality is authorized to pass by-laws regulating the operations of a wide variety of businesses and other activities and prohibiting the carrying on of certain of them, other than by leave and licence of the municipality. Thus, by cl. 55 of that section, by-laws may be passed

> For regulating the construction, installation, repair and maintenance of pipes, valves, fittings, appliances, equipment, and works for the supply and use of gas:

and by cl. 109 for licensing and regulating any gas company and authorizing the use of the public highways by such company. Section 328 of the Act, by cl. 29, fixes the payment to be made by gas companies semi-annually for the licences held by them, failure to pay which renders the licence liable to cancellation. The provisions for the licensing and regulation of gas companies by municipalities in British Columbia have been for many years part of the municipal law of the Province: see *Municipal Clauses Act,* R.S.B.C. 1897, c. 144, s. 50(36); *Municipal Act,* R.S.B.C. 1911, c. 170, s. 53(92); *Municipal Act,* R.S.B.C. 1936, c. 199, s. 59(99).

The *Public Utilities Act* was first enacted in 1938 and was designed to place the operations of persons engaged in the production, generation, transmission or sale of gas and electricity and a wide range of other undertakings designed

1957

DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Locke J.

to render service to the public, under the control of a commission constituted by the Act. The statute imposes upon every public utility the obligation, *inter alia,* to supply to all persons who apply therefor and are reasonably entitled thereto suitable service without discrimination or delay, to maintain its property and equipment in proper condition to enable it to furnish adequate, safe and reasonable service, to obey all orders of the Commission made pursuant to the Act in respect of its business or service and to refrain from demanding unjust or discriminatory rates for its service. By Part V of the Act the Commission is given general supervision of all public utilities falling within the definition in the Act and is empowered, *inter alia,* to make such regulations or orders regarding equipment, appliances, safety devices and extensions of works as are necessary for the safety, convenience or service of the public. Further wide powers of supervision and control are given over the rates which may be imposed, the manner in which money can be raised by the sale to the public of shares or bonds and over the mortgage, sale or licensing of the utilities' property. No utility to which a certificate of public convenience and necessity has been issued and which has commenced operations may cease operating without the Commission's consent.

The whole tenor of the Act shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and as to the manner in which they should operate, was a duty vested in the Commission. It is quite impossible, in my opinion, to hold that these powers and those which might be asserted by a municipality to regulate the operations of such companies under s. 58, cls. 55 and 109, were intended to co-exist.

It is unnecessary for the determination of this matter to decide whether, apart from the provisions of the *Gas Utilities Act,* the appellant municipalities might insist that a licence under the licensing provisions of the *Municipal Act* was a condition precedent to the granting of a certificate under s. 12(*b*) of the *Public Utilities Act.* The language of s. 3 of the *Gas Utilities Act* is clear and free from ambiguity.

The words "if required" at the conclusion of the first sentence of s. 14 must be construed, in my opinion, as meaning "if required by law". The municipality, of necessity, being a statutory body could only require its licence or consent if authorized by statute to do so and, from the date the *Gas Utilities Act* became the law, no such licence or consent was necessary. The effect of s. 3 of that statute was, in my opinion, to impliedly repeal the licensing provisions of the *Municipal Act* relating to such utilities.

In discharging its important duties under the *Public Utilities Act* the Commission is required to consider the interests not merely of single municipalities but of districts as a whole and areas including many municipalities. The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission, subject, *inter alia,* to the right of municipalities of insuring a supply of gas by municipal enterprise of the nature referred to in the reasons delivered by the Chairman of the Public Utilities Commission. This right the Commission was careful to preserve.

Reliance was placed by the appellants on certain passages from the judgments delivered by the Court of Appeal in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1), but I think what was there said does not affect the present matter. The provisions of the *Gas Utilities Act* of 1954 are decisive, in my opinion.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—At the conclusion of the argument I had doubts as to whether the provisions of the *Gas Utilities Act* and the *Public Utilities Act* manifest a clear intention on the part of the Legislature to confer power on the Public Utilities Commission to authorize the respondent to carry on operations in the appellant municipalities without their consents, which consents would otherwise have been necessary under sections of the *Municipal Act* which have not been expressly amended or repealed.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

1957

DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Cartwright J.

I cannot say that these doubts have been entirely dispelled but as the other members of this Court and the unanimous Court of Appeal are satisfied that the relevant statutory provisions should be so construed, I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the Corporation of the District of Surrey, appellant: Norris & Cumming, Vancouver.

Solicitor for the Corporation of the Township of Chilliwhack and the Corporation of the City of Chilliwack, appellants: F. Wilson, Chilliwack.

Solicitor for the respondent: A. Bruce Robertson, Vancouver.