1923
*May 7, 8.
*Oct. 9.

THE CITY OF LETHBRIDGE (PLAINTIFF) APPELLANT;

AND

THE CANADIAN WESTERN NATURAL GAS, LIGHT, HEAT AND POWER CO., LTD. (DEFENDANT).... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Statute—Franchise—Supply of natural gas to municipality—Right to discontinue—Injunction to enforce continuance—Declaratory judgment—Mandatory order—Public Utilities Act—Remedies available thereunder—(Alta.) 1915, c. 6, ss. 20, 21, 23e, 27, 39, 40, 52 and seq., 64, 69 (2), 70—(Alta.) 1923, c. 53, s. 54 (2).

On July 30, 1912, the city appellant passed a by-law under which the respondent company obtained exclusive power to lay pipes in the streets of the city for the purpose of supplying natural gas at a certain price and for a period of fifteen years. Its terms and provisions were accepted by the respondent. On the 5th of April, 1922, the respondent company notified the city appellant that it would cease in the month of May to sell gas owing to the impossibility of continuing to sell it at the price fixed in the by-law and in view of the refusal by the city to grant any increase in rates. The city appellant then asked for an injunction to restrain the respondent from discontinuing the sale of gas and for a declaration that the respondent was bound to supply gas at the price and for the period stipulated. The judgment of the trial judge, maintaining the appellant's action, was reversed by the Appellate Division; and the appeal to this court was dismissed on equal division.

Per Davies C.J. and Anglin and Mignault JJ.—Although the courts may not have been denuded of jurisdiction to entertain the present action, they should decline to exercise it and should relegate the parties to the Board of Public Utilities which the legislature has constituted to deal with such cases and has clothed with powers adequate to enable it to do full and complete justice.

Per Idington, Duff and Brodeur JJ.—On the construction of the agreement between the parties, their reciprocal obligations were of a contractual character.

Per Idington and Brodeur JJ.—The case is one for remedy by injunction without the city appellant being obliged to submit the question of rates to the Board.

Per Davies C.J. and Anglin and Mignault JJ.—Under the circumstances, a merely declaratory judgment should not be rendered. Duff J. *contra.*

Per Duff J.—In view of the existing circumstances, the respondent is not entitled to raise before this court any question as to the propriety of a declaratory judgment.

Per Davies C.J. and Duff, Anglin and Mignault JJ.—It is not convenient, as it might otherwise have been just as between the parties, to grant appellant's claim for a mandatory order, as other interests may be affected by it.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

Per Duff and Brodeur JJ.—No provision in the Alberta "Public Utilities Act" deprives the Supreme Court of authority to deal with the questions raised in this case, Davies C.J. and Anglin and Mignault JJ. expressing no opinion as to whether the effect of that Act was to oust the jurisdiction of the ordinary courts.

Judgement of the Appellate Division ([1923] 1 W.W.R. 838) affirmed on equal division of the court.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge and dismissing the appellant's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Lafleur K.C. and *Johnstone K.C.* (*Ball* with them) for the appellant.

Hellmuth K.C. and *Savary K.C.* for the respondent.

THE CHIEF JUSTICE.—Not without much doubt I have reached the conclusion that this appeal must be dismissed with costs. I concur in the reasons for dismissal stated by my brother Anglin.

IDINGTON J.—The appellant is a municipal corporation endowed with all the corporate capacity and powers enabling it to enter upon such a contract as it contends was made between it and the respondent, which is a corporation engaged in the procuring of natural gas, and its distribution and sale, and also endowed with the corporate capacity and power to enter into such a contract as appellant contends was entered into between them, in respect of a supply of natural gas for use thereof by appellant and its inhabitants.

The long history leading up to the creation of the relations, whatever they are, between the said parties, has been set forth in great detail by the learned trial judge and in part so far repeated by the learned judges in the Court of Appeal, who heard the case there, that I do not see any useful purpose to be served by repeating same here.

Suffice it to say that the predecessors in title of the respondent had been in negotiation with appellant for the acquisition of a franchise from it to sell gas to it and its inhabitants for a term of years and had progressed so far

(1) [1923] 1 W.W.R. 838.

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that the appellant had passed a by-law relative thereto in 1910 pursuant to agreement with said parties.

That was entered into under circumstances which rendered it of necessity largely conditional.

About eighteen months later the respondent having acquired such rights as its predecessors in title had, and other interests which opened up for it much brighter prospects and possibilities, approached appellant with a view to bringing about a contract much more favourable for it, the respondent induced appellant to amend its said by-law and by revote of the electors they duly assented thereto.

That amending by-law and its terms and provisions were duly accepted and agreed to by the respondent, in the following letter:—

128 Seventh Avenue East,
Calgary, Alta., 1st August, 1912.

To the Mayor and Council
of the city of Lethbridge, Alta.

Gentlemen,—We beg respectfully to acknowledge receipt of a certified copy of by-law No. 154 of the city of Lethbridge, being a by-law to amend by-law No. 99 of the said city, such by-law No. 99 being a by-law to grant a franchise to lay pipes through the city of Lethbridge for the distribution of natural gas.

We hereby notify you that we consent and agree to the amendments set forth in said by-law No. 154 and will conform to and fulfil all the matters and provisions therein referred to and contained.

Given in behalf of the Canadian Western Natural Gas, Light, Heat and Power Company, Limited, at Calgary, this first day of August, 1912.

EUGENE COSTE,
President.

JOHN BAIN,
Secretary.

[Seal]

Both parties having acted in conformity therewith for nearly ten years, except in one particular to which I will presently refer, respondent in a notice, dated 5th April, 1912, gave to the parties who had been using its gas in Lethbridge, that it would on the tenth of May following cease to supply same. The only excuse given was that it could not, except at a future loss, continue to supply at the agreed upon rates. A novel reason, it seems to me, for breach of contract by leave of a court of justice ignorant of the profits hitherto reaped.

There had been a previous failure to supply manufacturers which, I incline to think, was so far tacitly assented

to by the appellant that possibly an injunction in that respect might, if applied for, have been well refused.

In all other respects I see no reason, if contracts are to be observed at all, why the respondents can claim to be relieved so long as the supply of gas is available.

The question raised herein is whether or not there ever has been a contract between the parties or anything beyond the mere concession of a franchise which respondent can abandon at will.

I consider that there clearly was a contract which constituted an obligation and bound respondent to observe all the matters and provisions therein referred to and contained, from which nothing but an absolute failure of supply of gas, cost what it may, can relieve them.

I fail to see the analogy in law between the cases of railway franchises such as came in question in the *Great Western Railway Company* v. *The Queen* (1); *York and North Midland Railway Company* v. *The Queen* (2), or the more recent case of *Darleston Local Board* v. *London & North-Western Railway Co.* (3), and others cited by respondent's factum, and this case.

Respondent's counsel when citing, at the end of a long list of decisions, the case of *La Ville de St. Jean* v. *Molleur* (4), comes, accidentally I imagine, on a decision much more closely in point than any other he cites.

That decision arose out of an attempt the converse of which is attempted herein, but in principle I submit should destroy (although the converse attitude of the parties was there involved) any claims of respondent to pretend that the relation of the parties herein was other than contractual and implied an obligation upon the party obtaining from a municipality such a franchise as herein involved to give the promised consideration therefor.

At least for my part in that case I tried, perhaps at too great length, to demonstrate that the nature of the relation was contractual.

In that I see I referred to the English law as well as the Quebec Code, for it arose out of the application of

(1) [1883] 1 E. & B. 874, 118 E.R. 663.
(2) [1883] 1 E. & B. 858, 118 E.R. 657.
(3) [1894] 2 Q.B. 694.
(4) [1908] 40 Can. S.C.R. 629.

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municipal laws which are much alike and only that the Quebec code gave specifically a remedy if the nature of the relation created could be held contractual as it was in that case by this court.

I agree so fully with the dissenting judgment of Mr. Justice Stuart in the court below that I need not waste effort here to repeat same reasoning.

Out of respect to the majority opinion I may say I am quite unable to see how the appellant can be forced to have recourse to the local Board of Commissioners unless and until the legislature sees fit to go further and adopt the more modern fashion of regulating things by commission.

I do not think that the injunction granted under the circumstances and limited to the causes calling for it after ten years mutual observance of the contract, exceeds the bounds of such relevant law as it rests upon.

It is not the case of an attempt to enforce specific performance *ab initio* when it might have been met by the fatal objection of involving too much supervision of the due performance of obedience to the injunction granted.

Certainly it is not a case where damages could be allowed at all adequate to the breach of the contract involved.

I would allow the appeal with costs here and in appeal and restore the judgment of the learned trial judge.

DUFF J.—I am unable to escape the conclusion that paragraph two of by-law 154 gives expression to the terms of a contract on behalf of the company, to which contract the company gave its adherence by the acceptance of the by-law, to supply on demand the demand for gas of the city and the inhabitants thereof along the line of the five miles of pipe referred to in the preceding limb of the paragraph. I am unable to concur with the view that the company can get rid of this obligation of its own mere motion by going through the form of abandoning its rights under the by-law. It may well be that the termination of those rights under the terms of the contract, by the operation, for example, of article 13, would put an end to the personal obligation under paragraph two; but that it is unnecessary to consider for the purposes of this appeal.

The appellant municipality is, I think, entitled to a declaration to the above effect.

The propriety of a declaratory judgment was not disputed by the defendant, either in the pleadings or at the trial. Judgment having gone in favour of the plaintiff municipality, the trial judge having construed the contract in accordance with the plaintiff municipality's contention, the respondent company appealed to the Appellate Division, not upon the ground that there was any impropriety in the trial judge entertaining the action and deciding the questions raised upon their merits, but actually asking for a decision in its favour on the construction of the contract, a decision on the merits of the issues raised. Having asked for and got such a decision, it is not competent to the respondent company in answer to the plaintiff municipality's appeal to raise any question as to the propriety of a declaratory judgment. To entertain such an objection in such circumstances would be contrary to settled principles as well as to authority. *Bickett* v. *Morris* (1); *Burgess* v. *Morton* (2); *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* (3).

The claim for a mandatory order stands on a different footing. Interests other than the interests of the plaintiff municipality may be affected by such an order, and the Board of Public Utilities has ample power to protect such interests. In these circumstances it is not "convenient," although it might otherwise have been "just," as between the parties, to grant such a mandatory order.

I have examined with care the provisions of the Alberta statute establishing the Board of Public Utilities, and can find nothing in that statute depriving the Supreme Court of Alberta of authority to deal with the questions in controversy in this action in accordance with the course of the court.

ANGLIN J.—The appellant is a municipal corporation; the respondent, a public utility subject to the legislative jurisdiction of the province of Alberta.

By s.s. 2 of s. 54 of "The Public Utilities Act of Alberta, 1923," c. 53, it is provided that, in the absence of a filed

(1) [1866] L.R. 1 H.L. Sc. 47. (2) [1896] A.C. 136 at p. 143.
(3) [1921] 2 A.C. 438.

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consent to the contrary, all statutory provisions applicable prior to the enactment to the statute to contracts made before the 1st day of May, 1923, and to the price to be charged for the supply of a commodity or service thereunder shall remain applicable thereto. The contract in question in the present case was made in 1910 and amended in 1912. The question at issue must, therefore, be determined under the Public Utilities Act of 1915, c. 6, and amendments thereto made prior to the 21st of April, 1923.

By s.s. 2 of section 69, of the Public Utilities Act of 1915, which constituted the Board of Public Utilities Commissioners of Alberta, it is provided that:

> The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act.

Section 21 declares that:

> The Board shall have a general supervision over all public utilities subject to the legislative authority of the province.

By clause " c " of section 23, the board is given power to fix just and reasonable rates, tolls, and charges

> whenever the Board shall determine any existing individual rate, joint rate, toll charge, etc., to be unjust, insufficient or unjustly discriminatory, or preferential.

(I rather incline to agree with Mr. Justice Clarke that the construction put on this latter clause in *Northern Alberta Natural Gas Development Co.* v. *Edmonton* (1), was too narrow.)

By s. 27 the board is empowered to require every public utility (*a*) to conform to the duties imposed upon it by any municipal by-law or by any agreement with any municipality, and (*b*) to furnish adequate and proper service, etc.

Section 39 empowers a municipal council by resolution to authorize an application to the board whenever it deems that the interests of the public in the municipality, or a considerable part thereof, are sufficiently concerned; and s. 40 provides for action by the board on such application. Other sections confer on the board plenary powers for redressing grievances and enforcing rights in all matters in respect of which it is given jurisdiction. *Vide* s.s. 52 *et seq.*

The decision of the board is made final and *res judicata* (s. 64) and, subject to a restricted right of appeal (s. 70),

(1) 15 Alta. L.R. 416.

binding and conclusive on all companies and persons and municipal corporations and in all courts. (S. 69 (1)).

While a great deal may be said for the view that the effect of this legislation was to oust the jurisdiction of the courts in regard to such matters as are presented in this action, the present appeal may be disposed of without so deciding.

For reasons stated by my brothers Duff and Mignault, I agree that the mandatory order sought should in no event be granted. I am also, with my brother Mignault, of the opinion that a merely declaratory judgment should not be pronounced.

The avowed intention of the legislature was that the board should exercise general supervision over all public utilities; jurisdiction, when conferred upon it, is declared to be exclusive; the enforcement of agreements between public utilities and municipalities is expressly made a subject of the jurisdiction of the board; the board is empowered to determine all matters of law and of fact requisite for the decision of questions within the ambit of its jurisdiction and to order and require any company, person, or municipal corporation to fulfil any obligation imposed by any agreement or by any order or direction of the board. Having regard to these provisions of the statute and also to the fact that no order for concrete relief would follow upon any judgment declaratory of the rights of the parties to this action, I am of the opinion that a merely declaratory judgment could not prove other than embarrassing to the board, to whose jurisdiction the parties must ultimately have recourse. Out of respect to the legislature and to carry into effect the spirit, if not the letter, of its policy, as expressed in the Public Utilities Act, the courts, although they may not have been denuded of jurisdiction to entertain such an action as that now before us, should, I think, decline to exercise that jurisdiction, if they possess it, and should relegate the parties to the board which the legislature has constituted to deal with such cases and has clothed with powers adequate to enable it to do full and complete justice in the premises.

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Subject, therefore, to the reservation indicated in the conclusion of Mr. Justice Clarke's opinion, I would, solely for the foregoing reasons, dismiss this appeal with costs.

BRODEUR J.—The most important issue in this appeal is whether by the agreement between the parties the respondent company is bound to supply gas to the city of Lethbridge.

In 1910 and 1912, by-laws were passed by the council of the city by which the respondent company obtained exclusive power to lay pipes in the streets of the city for the purpose of supplying natural gas within the city to the plaintiff corporation and its inhabitants at a certain price and for a period of fifteen years.

It is claimed on the part of the plaintiff that by the agreements which have been passed between the city and the gas company and which are based on the above by-laws, the gas company is bound and obliged to supply gas at the price mentioned for the above period of fifteen years. On the part of the defendant gas company, it is contended that there is no obligation on its part to supply gas for a definite period, that it could relinquish the privilege which it possessed to use the streets of the city at any time it desired and that their contractual relations would then come to an end.

On the fifth of April, 1922, the gas company notified the city of Lethbridge that it would cease in the month of May to sell natural gas within the city because of the impossibility of continuing to sell gas at the price fixed by its franchise and the refusal of the city to any increase in rates.

Then the present action has been instituted by the city for an injunction to restrain the gas company from discontinuing the sale of gas and for a declaration that the company is bound to supply gas to the city and its inhabitants at the price and for the period stipulated in the agreements.

The trial judge decided in plaintiff's favour but his decision was reversed in appeal.

As I said before, there were two by-laws passed by the city; the first one was passed in 1910 and was of a tentative nature. It provided for the granting of the franchise in the future because the owners of the gas wells were

still in the experimental stage and would not make a formal and binding contract for the supplying of gas during a certain period of time. But the by-law and the contract of 1912 were more explicit. The experimental stage had passed away and now the respondent company felt that it could stipulate more explicitly as to the supply and the period of the exclusive franchise. A price was agreed upon and the period of fifteen years determined.

By section 2 of the contract, the company agreed to construct its pipe line in the city before January, 1913, and to supply the demand for gas to the city and its inhabitants.

By section 9 it is provided that the franchise shall be used subject to the terms hereof by the company until the expiration of fifteen years.

By section 10 the price for the supplying of gas for domestic purposes is fixed.

With such provisions, is it possible for a company to withdraw from the field before the period of fifteen years has elapsed, on the assertion that the supplying of gas at the price stipulated is not a paying proposition? I cannot agree with such a contention.

The franchise obtained was for a period of fifteen years and was with the obligation on the part of the company to supply gas at a certain price. The transaction involves the very essence of reciprocal obligation of a contractual character.

In two cases which came before this court some years ago, viz., *La ville de Chicoutimi* v. *Légare* (1), *and La ville de St. Jean* v. *Molleur* (2), it was decided that the franchises for waterworks in these two municipalities constituted contractual relationships which created for both sides rights and obligations.

In this case the gas company obtained the exclusive right for fifteen years to lay its pipes in the city limits, but with the obligation during that period to supply the inhabitants with gas at the price agreed upon.

The contractual relations cannot now be changed without the consent of both parties.

It was urged on the part of the respondent company that the ordinary courts of the land had no power to deal with

(1) [1897] 27 Can. S.C.R. 329. (2) 40 Can. S.C.R. 629.

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the question but that the Public Utilities Commission had an exclusive jurisdiction in that matter. This point was not raised by the company in its plea but was brought up in the Appellate Division by some of the learned judges and seems to be the ground upon which they relied to decide in favour of the gas company.

The statute of Alberta as to the Public Utilities does not, in my opinion, give the board the right to adjudicate with respect to rights arising out of past transactions, but its power seems to be limited to directing what is to be done in the future and the board is not empowered to deal with the breaches of agreements which might be urged. It may be—and I do not decide that point—that contractual relations may be the subject of decisions by the board; but it does not dispossess the ordinary courts of the land of the right of dealing with the result of contractual obligations which might have been stipulated between the parties.

For those reasons the appeal should be allowed and the judgment of the trial judge restored, with costs of this court and of the Appellate Division.

MIGNAULT J.—The injunction which the learned trial judge granted to the appellant against the respondent was to restrain the latter

from shutting off its supply of natural gas from the plaintiff (appellant) or the inhabitants of the city of Lethbridge or in any way interfering with the supply of the same to the said city or its inhabitants or from discontinuing the supply of the same to the said city or its inhabitants at the price or prices or upon the terms set out in by-laws 99 and 154 of the city of Lethbridge and the defendant's (respondent's) letter of August 1, 1912, directed to the mayor and council of the said city, until the expiration of the term of fifteen years from the said 30th day of July, 1912.

This injunction was accompanied by a declaration

that the plaintiff city is entitled to a supply of natural gas from the defendant company sufficient for the requirements of the city and its inhabitants for a continuous period of fifteen years from the 30th day of July, 1912, at a price or prices not greater than those set forth in by-law 99 as amended by by-law 154 of the said city.

The injunction in the terms in which it was granted is equivalent to an order to the respondent to continue the supply of natural gas to the city of Lethbridge and its inhabitants at the prices fixed by the by-law until the end of the fifteen-year period mentioned therein. Quite in-

dependently of the question whether the court should make such an order,—and I must frankly say that I think it objectionable—there can be no doubt, even admitting that the respondent violated its contract with the appellant, that the court should not exercise its extraordinary powers and grant such an injunction, if another convenient and equally effective remedy is available to the appellant.

This calls for the consideration of the provisions of the Alberta Public Utilities Act (chapter 6 of the statutes of 1915) referred to in the judgment of Mr. Justice Clarke in the appellate court.

The object of this statute is to create a body, called the Board of Public Utility Commissioners, clothed with full jurisdiction and power to deal with all questions relating to public utility services, such as the furnishing of water, light, gas, heat or power, as well as with disputes between public utility corporations and the municipalities and persons who are entitled to these services. That the respondent is a "public utility" within the meaning of section 2, subsection (*b*), of the statute can admit of no doubt. And it is equally certain that a contract to supply natural gas to a city and its inhabitants is one with respect to which the jurisdiction of the board can be exercised.

The powers and jurisdiction of the board are set out in sections 20 and following of the Act. Thus under section 27, the board has power, after hearing, upon notice, by order in writing to require every public utility

(*a*) to comply with the laws of this province and any municipal ordinance or by-law affecting the public utility, and to conform to the duties imposed upon it thereby, or by the provisions of its own charter or by any agreement with any municipality or other public utility.

By section 39 it is provided that

every municipal council, whenever it deems that the interest of the public in a municipality or in a considerable part of a municipality are sufficiently concerned, may by resolution authorize the municipality to become a complainant or intervenant in any matter within the jurisdiction of the board; and for that purpose the council is authorized to take any steps and to incur any expense and to take any proceedings necessary to submit the question in dispute to the decision of the board, and if necessary to authorize the municipality to become a party to an appeal therefrom.

Section 40 enacts that

if the Attorney General, a municipality or any party interested makes a complaint to the board that any public utility, municipal corporation,

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company or person has unlawfully done or unlawfully failed to do, or is about unlawfully to do, or unlawfully not to do, something relating to a matter over which the board has jurisdiction as aforesaid, and prays that the board do make some order in the premises, the board shall, after hearing such evidence as it may think fit to require, make such order as it thinks proper under the circumstances.

To the same effect, as conferring the widest jurisdiction on the board and providing for the enforcement of its orders, sections 52 and following may be mentioned without quoting them at length, and by section 64 it is provided that

> the decision of the board upon any question of fact or law within its jurisdiction shall be final and be *res judicata*.

Without going to the length of holding that the jurisdiction of the ordinary courts is ousted by this statute, as this court held it was ousted by such a statute as the Ontario Workmen's Compensation Act, *The Dominion Canners Co.* v. *Costanza* (1), I think that when the extraordinary jurisdiction of the court is appealed to, it is quite a pertinent inquiry whether the complainant cannot obtain full redress under such a statute as the Alberta Public Utilities Act by applying to the board created by that statute. And because I am convinced that this appellant can do so in order to enforce its rights under the contract it made with the respondent, and that the remedy provided by the statute is a convenient and effective one, I do not think that the appellant has made out a case which would justify this court in restoring the mandatory injunction which was set aside by the appellate court.

Mr. Lafleur, on behalf of the appellant, pressed for at least a declaration of the asserted right of the appellant to a continuation, during fifteen years, of the services of the respondent upon the terms and at the prices stipulated in by-law no. 99 as amended by by-law no. 154 of the city of Lethbridge. I think the whole matter had better be left to the determination of the board of public utility commissioners, without any pronouncement on the rights, contractual or otherwise, of the appellant, but I do not wish to be taken as acquiescing in the view, entertained by some of the learned judges of the appellate court, that there was no binding contractual obligation on the part of the re-

(1) [1923] S.C.R. 46.

spondent to continue the service of natural gas during the fifteen years upon the terms and at the prices mentioned in the by-law, or that the respondent could, by abandoning its franchise, escape from any such obligation. I would leave all these questions to be finally determined by the board whose decision, the statute states, is final and constitutes *res judicata*.

The right to resort to the jurisdiction of the board to obtain redress is reserved to the appellant under the judgment appealed from, and all the rights and proper remedies of the appellant are thus safeguarded.

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

Appeal dismissed, no costs.

Solicitor for the appellant: *W. S. Ball.*

Solicitors for the respondent: *Savary, Fennerty & McLaurin.*