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*May 19.
*June 18.

THE CITY OF ST JOHN (DEFENDANT) .... APPELLANT;

AND

NEW BRUNSWICK POWER COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Statute—Application—Retroaction—Order of court—Commission of Public Utilities—Finality of proceedings—10 Geo. V, c. 53; 14 Geo. V, c. 74 (N.B.).

In 1920 by 10 Geo. V, c. 53, the Board of Commissioners of Public Utilities, under another name, was created in New Brunswick and authorized to make a contract with any municipality for supplying electrical energy therein. In 1924 by an amending Act it was given power, when a corporation had constructed, or desired to construct, works for distributing electricity on a highway on which were similar works of another corporation, to make an order approving of the location and of construction of the works of the new works which shall then be deemed lawful and may be operated by such corporation incurring liability to any other; nothing done by the Board in this respect is open to judicial review and no court shall by injunction or otherwise restrain the construction or operation of works so approved. By sec. 61, subsection 2, the Act of 1924 does not apply to pending litigation "unless otherwise ordered by the court before which such litigation may be pending." In 1923 litigation started between the N.B. Power Co. and the city of St. John. The city, under statutory authority and a contract with the Board, was constructing works for supplying electricity within its limits and the Power Co., which had carried on the same business for some years applied for an injunction and damages alleging a wrongful interference with its property and operation of its system. The action came on for trial in 1924 when the Act of that year above referred to was in force and the trial judge, under the provisions of sec. 61 (2) ordered that it should apply to such litigation on condition that the city should promptly apply to the Board for approval of its works. The Appeal Division set aside this order holding that the judge had no power to make it and granted the injunction and damages.

Held, that the legislature had delegated to the court the legislative authority to declare the Act applicable and that the trial judge had properly exercised the power so delegated.

Held also, that the Power Co. was entitled to damages for injury incurred prior to the Board's approval of the enterprise of the city.

Qu. Was the order of the trial judge open to review?

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick reversing the order at the trial directing that a statute of the province should be retroactive.

The facts are fully set out in the above head-note.

PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

Baxter K.C. for the appellant.
Fred. R. Taylor K.C. for the respondent.
The judgment of the court was delivered by

DUFF J.—This appeal arises out of a dispute between the city of Saint John and the New Brunswick Power Company—a company which, with its predecessors in title, has for a number of years been carrying on the business of distributing electric current through the city of Saint John and the surrounding district. In 1920, the legislature of New Brunswick passed an Act (c. 53 of the statutes of that year) authorizing the appointment by the Lieutenant-Governor in Council of a commission, to be known as the "New Brunswick Electric Power Commission," and providing, *inter alia,* for contracts between the Commission and the municipalities for the supply by the Commission of electrical energy for the production of light, heat and mechanical power.

By amendments in 1922 and 1923, municipalities entering into such contracts may

acquire land and real and personal property and erect, construct and operate works for the transmission and distribution of electrical power or energy in the municipality.

By chapter 74 of the statutes of 1922, sec. 1, it was provided that it should be lawful for the city of Saint John to engage in the business of supplying electric light, heat and power and "any and all other forms of use of electrical energy" to persons and corporations within the limits of the municipality.

The appellant municipality, having entered into a contract with the provincial Power Commission within the meaning of this clause, proceeded to construct a distribution system in the city of Saint John. This action was brought in March, 1923, claiming an injunction and damages on the ground that in the construction of its distribution system the appellant municipality was, in violation of the respondent company's rights, wrongfully interfering with the respondent company's property and with the operation of its system.

The action was tried before Mr. Justice White in August and September, 1923, and judgment was delivered on the 28th of October, 1924. The learned trial judge held that the respondent company had established the existence of

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the wrongful interference alleged and stated that, in his opinion, the company would have been entitled to an injunction in respect of the wrongful acts of the appellant municipality had it not been for a certain statute which in the meantime had been enacted by the New Brunswick legislature; and some account of this legislation (c. 26 of the statutes of 1924) is necessary to make intelligible the character and effect of the judgment of the learned trial judge, as well as that of the Court of Appeal.

It is best to permit the legislation to speak for itself. The pertinent provisions are in these words:—

59. (1) Where a corporation has constructed or desires to construct works for conducting, furnishing or distributing electricity for light, heat or power purposes, in, under or upon any highway, or part of highway in, under or upon which any other corporation has already constructed and has works for the like purposes, or any of them, upon the application of the first mentioned corporation and after notice to the other and hearing any objection which it may make, the Commission may, if it is of opinion that the location and mode of construction of such works are proper, approve of the same, and all works which such first mentioned corporation has constructed or may thereafter construct, the location and mode of construction of which have been so approved, shall be deemed to have been constructed under statutory authority and to be lawfully constructed and may be maintained and operated by such corporation without its incurring any liability to any other corporation in respect of the construction, maintenance or operation of such works, any statute or law to the contrary notwithstanding, provided that the location and mode of construction, maintenance and operation are maintained up to the standard approved by the Commission.

(5) The powers conferred by this section may be exercised from time to time as occasion may require.

(6) The provisions of this section shall apply to works of a corporation constructed at any time before, as well as after the passing of this Act.

60. The Commission shall have exclusive jurisdiction as to all matters in respect of which authority is, by the next preceding section, conferred upon it, and nothing done by the Commission within its jurisdiction shall be open to question or review in any action or proceeding or by any court.

61. (1) No court shall have authority to grant or shall grant an injunction or other order restraining, either temporarily or otherwise, the construction, maintenance or operation of any works the location and mode of construction of which have been approved by the Commission, if the same are being, or have been, constructed in the place and according to the mode which have been so approved.

(2) Notwithstanding anything contained herein, the provisions of this Act shall not apply to any litigation now pending in any court, unless otherwise ordered by the court before which such litigation may be pending.

By the same statute it was provided that the designation of the Commission created by the Act of 1920 should

be altered, and should thereafter be the "Board of Commissioners of Public Utilities."

The learned trial judge by his judgment exercising the powers vested in him by sec. 61 (2), ordered that the provisions of the statute should apply to all cases of alleged interference in respect of which relief was asked in the action, provided that an application were made by the appellant municipality within thirty days to the Board for "approval and allowance of the location and construction" complained of by the respondent company.

The appellant municipality made application to the Board, and accordingly, on the 28th of January, 1925, an order was made by the Board to the effect that the location and mode of construction of the works of the appellant municipality be altered in conformity with the report of Professor Baird, which the Commission had before it, subject to the approval of an inspector, to be appointed by the Board; and, for the purpose of effecting this, the appellant municipality was authorized to affix insulators and other appliances to the poles of the New Brunswick Power Company, and to attach the wires of the municipality to the said insulators or other appliances.

The respondent company having appealed to the Court of Appeal, it was held by that court that the learned trial judge had improperly exercised the authority conferred by subsection (2) of section 61. The court accordingly reversed the judgment of the learned trial judge, granted the injunction prayed, and directed a reference as to damages. The reasons for judgment were delivered by Mr. Justice Crockett, and the view taken appears to have been that the legislature had expressed its intention that the statute should not apply to any litigation then pending in any court, and that the authority under which the learned trial judge acted was an authority "to reverse at its will" this "clearly expressed intention."

The legislature appears to have left it to the court before which the litigation might be pending to determine whether or not the statute should apply to matters in dispute in that litigation—that is to say, whether, in such matters, the Board should have jurisdiction. The legislature did not express its intention that the statute should not apply to such matters, and left the whole matter to the court, but

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did not, in express language at all events, indicate any rule or principle by which the court was to be guided.

The first subsection of section 59 leaves no room for doubt that the situation which has given rise to the present litigation is precisely the kind of situation in which the Act was intended to operate. Had there been no litigation pending between the parties, there could have been no manner of doubt as to the authority of the Board to approve, under such conditions as it might see fit to prescribe, of the "location and mode of construction" of the appellant municipality's works; or that, the directions of the Board being observed in respect of the construction, maintenance and operation of those works, no liability would be incurred by the appellant municipality thereunder in respect of anything done thereafter, in compliance with the orders of the Board. It is equally clear, also, that the jurisdiction of the Board is an exclusive jurisdiction, and that neither the Board nor the parties to any proceedings authorized by the statute are subject in respect of such proceedings to any control by any court.

The proper view of the statute would appear to be that, in the absence of some such provision as subsection (2) of section 61, the existence of pending litigation would not affect the authority of the Board as to future acts. Due effect can be given to the enactment without allowing it to create immunity from damages sustained before the approval of the works, and it ought not to be construed retrospectively beyond the limit to which the language of it necessarily extends. See per Bowen L.J., in *Reid* v. *Reid* (1). As to future acts, the subsection mentioned appears rightly to have been considered necessary in order to qualify the rigour of the other provisions of the statute, and the order of the learned trial judge appears to have been consonant with the general policy of the Act.

The Court of Appeal seems rightly to have held that this authority with which the Supreme Court was invested, to determine the applicability or non-applicability of the statute, was, in its nature, a delegated legislative authority; and there is much to be said for the view that the character of the authority itself gives rise to a presumption that the

(1) 31 Ch. D. 402 at pages 408-9.

exercise of it was not to be open to review. It is not necessary to decide that question. The order of the learned trial judge seems in the whole to have been the proper order. The Board is much better equipped than any court of law to do complete justice to all parties concerned; and the learned trial judge rightly assumed that the rights of the respondent company would be protected and its legitimate interests not overlooked by the Board.

The judgment of the Court of Appeal, in so far as it directs a reference as to damages, and as to costs, should not be disturbed, but in other respects the judgment of the trial judge should be restored, but modified as to costs in the manner now to be mentioned.

In the very special circumstances of this case the appellant municipality should have no costs of this appeal, and should pay all the costs of the action down to and including the trial.

Our intention has been called to a statute of the New Brunswick Legislature passed since the date of the judgment of the Court of Appeal. This is a declaratory Act, and it is unnecessary to consider whether or not its provisions ought to be noticed by this court in deciding upon the questions in controversy on the appeal, and no opinion is expressed upon that point. This is unnecessary, because the purport of the statute is, by legislative declaration, to affirm the decision of the learned trial judge in so far as concerns the jurisdiction of the Public Utilities Board.

Appeal allowed without costs.

Solicitor for the appellant: *J. B. M. Baxter.*
Solicitor for the respondent: *Fred. R. Taylor.*