Indexed as:
Kingston (City) **v. Ontario (Energy Board)**

Between
The Corporation of the City of Kingston, appellant, and
The Ontario Energy Board and Union Gas Limited, respondents

[2001] O.J. No. 3485
Court File No.415/00

Ontario Superior Court of Justice
Divisional Court
Lane, B. Wright and Aston **JJ.**

Heard: June 25, 2001.
Judgment: September 4, 2001.
(25 paras.)

Counsel:

Guy J. Pratte and Kevin LaRoche, for the appellant.
Patrick Moran, for The Ontario Energy Board, and Glen Leslie and Sharon Wong, for Union Gas Limited, respondents.

The following judgment was delivered by

THE COURT (endorsement):— NATURE OF THE APPEALS

¶ 1 The City of Kingston appeals the June 23, 2000 decision of the Ontario Energy Board whereby the Board

(1) renewed and extended for a period of fifteen years the right of Union Gas to operate works for the distribution of natural gas in the former Township of Pittsburgh (now part of the City of Kingston),

(2) granted Union Gas the right to add to and extend its gas distribution system within that territory, and

(3) found that in future Kingston needs a Certificate of Public Convenience and Necessity to provide natural gas in parts of Kingston that were formerly the municipal Township of Pittsburgh and, further, that the City may need such a Certificate even within the City of Kingston as it existed prior to municipal amalgamation in 1998.

¶ 2 The respondent, Union Gas, moves for an order varying an order dated December 20, 2000, in which ODriscoll J. found that Kingston did not need leave to appeal the decision of the OEB, and that he would have granted leave if leave were required. The respondent therefore seeks an order requiring Kingston to obtain leave

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to appeal.

Did the Board en in deciding it did not have jurisdiction under s. 10(2) of the Municipal Franchises Act (MFA) to allow the City of Kingston to provide the gas service using the assets of Union Gas, on the terms proposed by Kingston, on the ground it amounted to an "expropriation" which was beyond its powers?

¶ 3 Kingston's proposal to the OEB would allow Union to retain ownership of all the gas distribution assets, and be paid the same rate of return it receives on all its other utility assets for the remaining useful life of those assets. However, Kingston would take possession and control of the assets, maintaining them at its expense, in order to assume responsibility for providing gas service to the former Township of Pittsburgh.

¶ 4 The Public Utilities Act vests in municipalities, in the first instance, the right to establish and operate municipal gas utilities. Private companies may only provide this service under authority of a municipal by-law and according to a franchise agreement under the Municipal Franchises Act, approved by the OEB and by the electors of the municipality. Union entered into two such franchise agreements with the former Township of Pittsburgh, dating back to 1955. Unsuccessful in its request to the newly expanded City of Kingston for renewal of the latest agreement, it applied to the OEB under section 10 of the MFA which provides as follows:

> 10(1) Where the term of a right referred to in clause 6(1)(a), (b) or (c) that is related to gas or of a right to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.
>
> (2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it. may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

¶ 5 Provision of natural gas is a public utility and ownership of assets by Union does not give it the right to operate or use those assets without a franchise. In this case the franchise expired in 1997, though it had been temporarily extended, on consent, up to the time of the OEB decision of June 23, 2000. Section 10(2) of the MFA and s. 23 of the Ontario Energy Board Act confer broad power on the OEB in meeting its responsibility of protecting the public interest in the supply of natural gas. For example, the Board could probably require Union to continue to operate its gas distribution services even if Union did not want to do so.

¶ 6 However, in our opinion, the Board's power to order Union to continue to provide services does not extend to ordering Union to make its assets available, against its will, to some other party for that purpose. Union itself is ready, willing and able to provide those services on terms and conditions determined by the OEB. The proposal of Kingston may fall short of a formal "expropriation". Nevertheless, it takes away from Union a property right it otherwise enjoys, namely, the ability to deny to others the possession, use and enjoyment of its property. There is no express language in any legislation giving the municipality the ability to take away or extinguish property rights in this manner so that it can take over the provision of the service, nor does that power arise by necessary implication in the language of the legislation.

¶ 7 Section 62 of the Public Utilities Act once empowered a municipality to acquire a privately-owned gas

distribution system at a price calculated according to a legislated formula. That provision was repealed, effective January 1, 1999. Kingston should not be permitted to now do indirectly what the Legislature has expressly

renounced with the retroactive repeal of s. 62 of the Public Utilities Act.

¶ 8 Even if the franchise agreement of 1977 contained a specific provision allowing Kingston to acquire the assets of Union on the expiry or termination of the franchise, the result would be the same. See, Corporation of the City of Sudbury v. Union Gas Limited, [2001] O,J. No. 2099, Ontario Court of Appeal docket C34115, heard January 26, 2001, decision released June 6, 2001. In that case Sudbury asserted a contractual right to acquire Union's gas distribution assets on the pending expiry of the franchise agreement. Union successfully argued Sudbury's right of acquisition did not arise until the end of any extension ordered by the OEB or until such an extension had been refused. In this case, Kingston does not have the contractual right to acquire Union's gas distribution assets or even to use those assets.

¶ 9 Under s. 10(2) of the Municipal Franchises Act, the OEB may, as a matter of "public convenience and necessity",

(1) make an order renewing or extending the right to operate works for the distribution of gas upon such terms and conditions as it prescribes, or

(2) make an order refusing a renewal or extension of that right.

It has wide ranging power to impose terms and conditions if it renews or extends the right. However, if it refuses to renew or extend the right, there is no apparent authority to impose terms and conditions on a party such as Union that formerly had obligations to provide that public utility.

¶ 10 We are therefore of the opinion that the Board did not err in deciding it lacked jurisdiction under s. 10(2) of the MFA to allow Kingston to become the gas supplier using the assets of Union, Whether Kingston's proposed compensation was fair, or even generous, and whether Kingston's proposal is accurately described as an "expropriation" is beside the point.

Did the Board en in deciding it had jurisdiction under s. 10(2) of the MFA to authorize Union Gas to add to or extend the gas utility works in the former Township of Pittsburgh?

¶ 11 Counsel for Kingston does not dispute that use of the word "construct" in the 1977 franchise agreement necessarily included the ability of Union to extend the gas distribution system. Indeed, it did so between 1977 and 1997. Although s. 9 of the MFA distinguishes between "the right to construct" and "the right to extend or add to the works" in subclauses (1)(a) and (c), it is illogical, in our opinion, to limit the powers of the OEB under s. 10(2) of the MFA to the maintenance of an existing system. If the franchise agreement itself provides for geographic extensions and additions, surely the OEB has the authority to include that right when it makes an order "renewing or extending the term" of rights contained in such a franchise agreement. This is consistent with the recently released Court of Appeal decision in the City of Sudbury case referred to above. At paragraph 22 the Court addressed the power of the OEB under s. 10 of the MFA and recognized "under that section, the OEB has the power to order the renewal or extension of the bundle of rights granted to Union by the franchise agreement" (emphasis added).

¶ 12 In deciding that Union had the ability to add to or extend the gas utility works, the Board did not decree Union had the exclusive right to expand into territory not now being serviced. Now that the former Township of Pittsburgh is part of Kingston, the City can present its own plan to extend its own gas distribution system when and if the situation arises.

¶ 13 This leads to a consideration of the last issue raised by Kingston.

Did the Board en in deciding that Kingston needed to apply for and obtain a Certificate of Public Convenience and Necessity if it were to construct any new facilities?

¶ 14 Pursuant to the 1997 municipal Restructuring Order, Kingston's municipal jurisdiction now encompasses the area within its original city boundaries together with the former Townships of Pittsburgh and Kingston. That order also provides "all assets ... and responsibilities" of the former City of Kingston are transferred to the newly constituted City of Kingston. Kingston submits one consequence of this municipal restructuring is that it is exempt from the requirement of a Certificate of Public Convenience and Necessity to construct gas works anywhere within its reconstituted boundaries because it has been supplying natural gas to Kingston since long before April 1, 1933.

¶ 15 Union contends that because the "new" Kingston did not exist on April 1, 1933, it could not have been supplying gas on that date and it is therefore not entitled to rely on the exemptions in subsections 8 (1)(a) and (b) of the MFA.

¶ 16 We are of the opinion that Kingston's ability to provide gas service within its original 1933 boundaries is a right, or "asset", seamlessly transferred to the "new" Kingston, obviating the necessity of a Certificate within that geographic area. However, prior to restructuring, the former Kingston had no right to construct works within the geographic boundaries of the two townships and, therefore, the former City could not transfer such a right to the new City. Nor could the former Township of Pittsburgh transfer such a right to the newly-constituted municipality, because the township did not provide natural gas service before April 1, 1933.

¶ 17 We therefore agree with the Board's conclusion that Kingston needs to apply for a Certificate under s. 8 of the MFA if it wishes to supply natural gas in the former townships. However it does not require such a certificate with respect to land included in the City's boundaries as of April 1, 1933.

¶ 18 Union already holds a subsisting Certificate of Public Convenience and Necessity under s. 8 of the MFA respecting the lands which were formerly the Township of Pittsburgh. The municipal restructuring does not alter or restrict its ability to supply gas in that entire territory.

Did the City of Kingston need to obtain leave for this appeal?

Union moves in this appeal for an order varying O'Driscoll J.'s decision of December 20, 2000. In his decision, O'Driscoll J. decided that Kingston did not require leave to appeal the decision of the OEB.

¶ 19 However, O'Driscoll J. stated that, if he was in error and leave to appeal is required, he would grant leave to appeal. In his view, the question of whether leave to appeal is required merited the attention of the Divisional Court.

¶ 20 Although the issue of leave to appeal in this case is moot by reason of the fact that we have heard the appeal, we will consider the issue because it is still a live issue for future appeals.

¶ 21 It is Union's position that leave to appeal is required pursuant to s. 11 of the MFA. Kingston submits that the provisions of the OEB Act override s. 11 of the MFA and, therefore, leave to appeal is not required.

¶ 22 The sections of the two Acts relied on by the parties are:

MFA-s. 11

11. With leave of a judge thereof, an appeal lies upon any question of law or fact to the Divisional Court from any certificate granted under section 8 or any order made under section 9 or 10 if application for

leave to appeal is made within fifteen days from the

date of the certificate or order, as the case may be, and the rules of court apply to any such appeal. R.S.O. 1990, c. M.55, s. 11.

ORB Act -ss. 20, 33 and 128

20. Subject to any provisions to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act.

33.0) An appeal lies to the Divisional Court from any rule made under Part Ill or any order of the Board.

(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the rule or order.

128.0) In the event of conflict between this Act and any other general or special Act, this Act prevails.

¶ 23 With respect to s. 20 of the ORB Act, Union argues that s. 11 of the MFA is a contrary provision which takes precedence. Kingston submits that s. 20 deals only in respect to matters being heard by the ORB and has nothing to do with appeals from decisions of the ORB. We agree with Kingston's submission. In our view s. 20 has nothing to do with the issue of leave to appeal.

¶ 24 Union further submits that the right to appeal differs between the ORB Act and the MFA. Under the ORB Act an appeal is upon a question of law or jurisdiction, whereas, under the MFA, an appeal is upon any question of law or fact. Therefore, Union submits that leave to appeal a decision of the ORB under the MFA is required pursuant to s. 11 of the MFA.

¶ *25* Kingston submits that s. 128 of the ORB Act governs. Although the MFA is a special Act which conflicts with the ORB Act, s. 128 provides that the provisions of the ORB Act prevail. We agree s. 11 of the MFA is overridden by s. 1280) of the ORB Act. The motion to vary O'Driscoll J.'[5] decision is therefore dismissed.

LANRJ.
B, WRIGHT J.
ASTON J.

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