

MODÈLE DE COMPÉTENCE EXCLUSIVE
(pages 669-671)

Re Centra Gas Alberta Inc. and Town of Three Hills et al.

[Indexed as: Centra Gas Alberta Inc. v. Three Hills (Town)]

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Court File No. 9303 16126

Alberta Court of Queen's Bench, Berger J. January 4, 1994.

Public utilities — Boards and commissions — Jurisdiction — Applicant natural gas utility serving respondent town under board-approved contract — Town attempting to purchase applicant's franchise and property —

Applicant seeking declaration in respect of questions requiring interpretation of contract and relevant legislation — Statutory framework giving board obligation to regulate provision of public utilities — Board operating with unique knowledge and experience — Court refusing to exercise discretion and issue declarations because to do so would unduly restrict board's ability to exercise its jurisdiction.

Administrative law — Remedies — Applicant natural gas utility serving respondent town under board-approved contract — Town attempting to purchase applicant's franchise and property — Applicant seeking declaration in respect of questions requiring interpretation of contract and relevant legislation — Statutory framework giving board obligation to regulate provision of public utilities — Board operating with unique knowledge and experience — Statutory appeal from decisions on matters of law to Court of Appeal — Court refusing to exercise discretion and issue declarations because to do so would unduly restrict board's ability to exercise its jurisdiction.

The applicant owned and operated a natural gas utility which served the respondent town. The Public Utilities Board approved a contract between the applicant and the town and conferred a special franchise on the applicant to supply the town and its residents with natural gas. The town later advised the applicant that it intended to investigate the feasibility of purchasing the franchise and it subsequently proposed to purchase the applicant's property to serve the town. The applicant was not interested in selling the system. The town applied to the board for an order fixing the price and terms for the purchase of the natural gas utility owned by the applicant and for an order approving the sale subject to the town's acceptance of the price and terms. The applicant applied to the board for approval of a renewal of the agreement but was informed that the renewal application had to be made by the town.

The applicant sought a declaratory judgment relating to the interpretation of the agreement. The board argued that the court ought not to exercise its jurisdiction on the basis that it had the statutory jurisdiction to answer the questions that were in dispute.

Held, the application should not be granted.

By s. 28 of the *Public Utilities Board Act*, R.S.A. 1980, c. P-37, the board has the necessary jurisdiction and power to deal with public utilities, the owners thereof and related matters as they concern suburban areas adjacent to a city. Section 62 of the Act provides for an appeal of board decisions on questions of law or jurisdiction to the Court of Appeal. A privative clause in s. 67 protects all other decisions of the board.

The questions raised on the application were questions of law, being questions of construction of a contract and of the relevant statutory provisions. A superior court has inherent jurisdiction to determine the issues. However, the jurisdiction to make a declaratory judgment is discretionary. A court should be reluctant to exercise that discretion on a subject that has been statutorily left to a specialized tribunal. While the legislation did not explicitly give the board the jurisdiction to construe contracts and legislation, it was inherent in its powers of approval over contracts and legislation, it was inherent in its power of approval over contracts and renewals that it would interpret contractual and statutory provisions. Therefore, for the board to have jurisdiction to determine the issues in dispute, the issues must arise as part of the application before the board.

a The board was established as the administrative body charged with dealing with all public utilities and their owners. It operates with a unique knowledge and experience. It was in the best position to deal with the questions should they arise in the application. If the court dealt with these issues, it would unduly restrict the board's ability to exercise its discretion and jurisdiction. The court should not exercise its discretion to make a declaratory judgment.

b *Canada (Minister of Energy, Mines and Resources) v. Canada (Auditor General)* (1989), 61 D.L.R. (4th) 604, [1989] 2 S.C.R. 49, 40 Admin. L.R. 1, 97 N.R. 241, 16 A.C.W.S. (3d) 407, **apld**

Edmonton Catholic School District No. 7 v. Edmonton (City) (1977), 75 D.L.R. (3d) 443, [1977] 3 W.W.R. 603, 3 A.R. 151, **distd**

Other cases referred to

c *Lethbridge v. Canadian Western Natural Gas, L., H. & P. Co.*, [1923] 4 D.L.R. 1055, [1923] S.C.R. 652, [1923] 3 W.W.R. 976; *Les Terrasses Zarolega Inc. v. Olympic Installations Board* (1981), 124 D.L.R. (3d) 204, 23 L.A.C. 97, [1981] 1 S.C.R. 94, 38 N.R. 411; *Sogemines Ltd. v. Municipal District of Stony Plain No. 84*, [1971] 5 W.W.R. 481

Statutes referred to

d *Municipal Government Act*, R.S.A. 1980, c. M-26, ss. 279(1) [am. 1983, c. 38, s. 42; 1988, c. T-3.5, s. 52(6)], (3), 280, 281(1) to (3)
Public Utilities Board Act, R.S.A. 1980, c. P-37, ss. 28, 62, 67

Rules and regulations referred to

Alberta Rules of Court, Alta. Reg. 390/68, Rule 410(e)

e APPLICATION for a declaration of rights in respect of a contract between a municipality and a natural gas utility.

Janet Franklin, for applicant.

N. Tainsh and V. Howard, for respondent, Town of Three Hills.

Grant S. Dunlop, for respondent, Public Utilities Board (Alberta).

f BERGER J.:—

Introduction

g This is an application, pursuant to Rule 410(e) of the Alberta Rules of Court for a declaratory judgment. Centra Gas Alberta Inc. seeks a determination of three issues in dispute between itself and the Town of Three Hills. The second respondent to the application, the Public Utilities Board (the Board), argues that the court should not exercise its jurisdiction in this matter, and should refuse to grant the declarations requested. It submits that the Board is given the statutory jurisdiction by the *Public Utilities Board Act*, R.S.A. 1980, c. P-37, and the *Municipal Government Act*, R.S.A. 1980, c. M-26, to answer the following questions in dispute:

- h** 1. Having regard to the provisions of Part 6 of the *Municipal Government Act* and, in particular, of Section 281(2), is Clause 12 of that certain contract as approved by the Public Utilities Board of Alberta under

Board Order #E84219 and entered into between Centra Gas Alberta Ltd. and the Town of Three Hills under date of November 26, 1984, a valid provision, binding on the parties?

2. Having regard to the agreed facts and circumstances, should the dispute as to the appropriate interpretation and application of Clause 12 of the contract be referred to arbitration as provided for in Clause 14 of the aforesaid agreement? a
3. Having regard to section 284(1) of the *Municipal Government Act* should the Application of the Town dated January 15, 1993, for an Order fixing the price and terms of purchase of the Applicant's gas utility system, be advertised pursuant to Section 324 of that Act? b

The facts

The parties have agreed to the following statement of facts:

1. Centra Gas Alberta Inc. and its predecessors in name ("Centra") have owned, operated and maintained a natural gas utility, serving the Town of Three Hills (the "Town") under franchise from the Town since September 1959. c
2. On the 15th day of August, 1984, the Town made application to the Public Utilities Board for approval of an agreement, and on October 29, 1984, by Order No. E84129, the Public Utilities Board approved a contract and conferred a special franchise (the "Disputed Agreement") to supply the Town and its residents with natural gas in accordance with the terms and conditions of the Disputed Agreement. d
3. On November 26, 1984, the Disputed Agreement was formalized between the parties.
4. By specific provisions of the Disputed Agreement: e
 - (a) The term of the contract and franchise was the period from the date of approval of the contract by the Public Utilities Board to September 25, 1989;
 - (b) There was provision that the contract would be renewed for a further ten (10) year term if written notice of the Town's intention to purchase the property of Centra serving the Town was not provided to Centra by June 27, 1989 (Clause No. 12); f
 - (c) The Town agreed to complete all legal requirements relating to the confirmation and validation of the Disputed Agreement pursuant to the provisions of applicable legislation;
 - (d) Any dispute during the term of the contract relating to the construction, meaning, or effect of the Disputed Agreement, not within the jurisdiction of the public utilities Board was to be referred to arbitration. g
5. By letter of December 1, 1988, Centra, at the request of Campbell, Ryder Consulting Group Ltd. (the "Town's Consultant"), forwarded to it plans and other information concerning the system serving the Town of Three Hills. Again, by letter of April 3, 1989, Centra, at the request of the Town's Consultant furnished further and other information concerning the operation of the gas utility system. h
6. Based upon information obtained from Centra, the Town's Consultants prepared and furnished to the Town on May 11, 1989 a valuation of and a report concerning the gas transmission and distribution system of Centra serving the Town of Three Hills.

7. On May 26, 1989, the Town forwarded a letter to Centra requesting a meeting to "discuss some of the options available to the Town".

a 8. In response to the above letter, a meeting was held September 28, 1989; pursuant to which the Respondent indicated that it would provide to the Town's Engineering consultant, information relating to the Respondent's physical plant (at Three Hills) no later than October 31, 1989.

b 9. By letter of October 11, 1989, directed to the Town of Three Hills in reference to the above meeting, Centra's representatives confirmed the Company's undertaking to provide information to the Town's Consultants with the following admonishment:

"As suggested at that time, we are not ever a willing participant in the sale of any part of our system; however, at the request of the Town, we will provide Campbell, Ryder Consulting Group Ltd. with information relating to our physical plant no later than October 31, 1989."

c 10. Centra has provided updated information from time to time to the Town's Consultant pursuant to requests made by the Town Council or Manager and as a consequence the Town's Consultant has presumably updated its initial evaluation of May 11, 1989.

d 11. On August 22, 1990, Centra received a further communication from the Town to the effect that it was the Town's intent to investigate the feasibility of purchasing the Three Hills franchise and requested that the Town be given a firm purchase price in writing.

e 12. On May 11, 1992, the Town passed By-Law No. 1051-92 without advertisement, which authorized the Town to initiate formal negotiations or other procedural steps to ascertain price and terms for the purchase of Centra's property serving the Town prior to ultimate approval by the Town of the purchase.

f 13. On June 2, 1992, the Town, through its solicitors, provided written notice to Centra of the formal authorization above noted, requesting negotiation discussion and, in anticipation of the completion of such purchase, of their intention to terminate the Disputed Agreement effective January 1, 1993.

14. By letter of September 18, 1992, the Town proposed to offer \$875,000.00 for the purchase of Centra's property serving the Town. That letter indicated that if Centra was "prepared to enter into serious negotiations", it should contact the Town's solicitors.

g 15. Centra has, in response to the Town's request for negotiations, indicated to the Town that it was not interested nor willing to sell the system serving the Town. Centra, in a letter to the Town's Mayor dated September 28, 1992, summarized its position in these words:

h "With regard to the sale of the Three Hills facility, your letter proposes to make us an offer which is less than fifty (50%) percent of the valuation we have received on the system. Our position has not changed; the natural gas system serving the Town of Three Hills is not for sale. If it is the intention of the Town to proceed under Section 281(2)(c) of the *Municipal Government Act*, our position is that in the absence of sufficient or any notice as required under the terms of the contract, the franchise must be renewed for an additional ten (10) years."

16. On November 6, 1992, Centra applied to the Public Utilities Board for approval of the ten (10) year renewal of the Disputed Agreement.

17. On November 20, 1992, the Public Utilities Board informed Centra that the renewal application would need to be made by the Town.

18. The Town has made no application to the Public Utilities Board for such renewal approval. a

19. On January 15, 1993, the Town applied to the Public Utilities Board for an order fixing the price and terms of purchase for the acquisition by the Town of all of the rights of Centra under the Disputed Agreement. The particulars of that application were never advertised.

20. The Public Utilities Board had an advice and direction meeting on April 26, 1993 and agreed to defer hearing the Town of Three Hills application pending this Court application. b

Jurisdiction

For the reasons that follow, I need only deal with the question of jurisdiction raised by the Board. c

The Board argues that the statutory provisions give it jurisdiction to determine the issues raised in this application, and that the court should therefore decline to exercise its jurisdiction in this regard.

The Board's authority is granted by the *Public Utilities Board Act*, s. 28: d

28(1) The Board has all the necessary jurisdiction and power

(a) to deal with public utilities and the owners thereof as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act. e

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and shall be deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 281(2)(c) of the *Municipal Government Act* f

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent. g

Section 62 of the Act provides that an appeal of the Board's decision on questions of law or jurisdiction lies to the Court of Appeal. A privative clause in s. 67 of the Act protects all other decisions of the Board. h

The questions raised by the application are questions of law — questions of construction of the contract and of the relevant statutory provisions. A superior court clearly has the inherent jurisdiction to determine these issues; however, the jurisdiction to make a declaratory judgment is discretionary. The Supreme Court

a of Canada has said that the courts should be reluctant to exercise that discretion on a subject that has been statutorily left to a specialized tribunal: *Lethbridge v. Canadian Western Natural Gas, L., H. & P. Co.*, [1923] 4 D.L.R. 1055, [1923] S.C.R. 652, [1923] 3 W.W.R. 976; *Les Terrasses Zarolega Inc. v. Olympic Installations Board* (1981), 124 D.L.R. (3d) 204, 23 L.A.C. 97, [1981] 1 S.C.R. 94.

b In *Canada (Minister of Energy, Mines and Resources) v. Canada (Auditor General)* (1989), 61 D.L.R. (4th) 604 at pp. 638-9, [1989] 2 S.C.R. 49, 97 N.R. 241, Dickson C.J.C. discussed the rationale underlying a discretionary refusal to exercise jurisdiction where there is an alternative remedy:

c I do not, however, read *Terrasses Zarolega*, as laying down a completely non-discretionary rule of this sort [the putative rule that if a statute provides a remedy, that is the exclusive remedy, ousting the courts' jurisdiction]. *It still falls to the courts to determine the adequacy of the statutory remedy . . . It may well be that once the alternative remedy is found to be adequate discretionary relief is barred, but this is nothing but a reflection of judicial concern to exercise discretion in a consistent and principled manner.*

d *Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised.* It is for the courts to isolate and balance the factors which are relevant to the inquiry into adequacy. That said, the degree to which a statutory remedy is clearly linked to a right in the same Act will be relevant by virtue of indicating the view of Parliament as to an appropriate way to vindicate the right. Further, the extent to which the remedy can be said to form part of a comprehensive remedial scheme or code will also be a relevant indication that Parliament directed its attention to appropriate remedies. However, when Parliament fails to state explicitly that a statutory remedy is the sole or exclusive remedy, it will always be the case that exclusivity cannot be automatically assumed.

f (My emphasis.)

In both *Sogemines Ltd. v. Municipal District of Stony Plain No. 84*, [1971] 5 W.W.R. 481 (Alta. S.C.), and *Edmonton Catholic School District No. 7 v. Edmonton (City)* (1977), 75 D.L.R. (3d) 443, [1977] 3 W.W.R. 603, 3 A.R. 151 (S.C.), O'Byrne J. and

g Miller J. (as he then was) chose to exercise their jurisdiction to make a declaratory judgment in regards to the interpretation of the respective statutes involved. In the latter case, the separate school board sought a declaratory judgment that certain decisions by the Court of Revision were based on errors of law. An appeal

h from these decisions was available and pending before the Alberta Assessment Appeal Board. Notwithstanding the availability of the appeal, Miller J. concluded that (at p. 449):

I am in complete concurrence with the position taken by the learned trial Judge in the *Sogemines* case for it seems to me to be quite logical in this case to attempt to settle the legal principles upon which the Assessment Appeal Board is to determine the issues prior to the Board reaching their decision,

rather than going through the whole procedure and forcing one, or the other, of the parties to bring the matter before the Court, then having to refer it back for rehearing if the Court finds that the Board proceeded on a wrong basis in law. a

Miller J. did not analyze the legislative intent in establishing a statutory scheme whereby appeals of decisions by the Court of Revision would be to the Alberta Assessment Appeal Board. The issue raised before him, however, was likely unique. The Court of Revision, in lengthy reasons in a complex matter, laid out eight principles of law upon which it proceeded. The separate school board was anxious for a speedy resolution because of the financial implications; and the decision would have far-ranging consequences for taxpayers. One could apply the factors discussed by Dickson C.J.C. to conclude that the alternative of resorting to the Alberta Assessment Appeal Board was inadequate in the circumstances. b

Judicial deference to legislative choice is integral to the determination of whether to exercise jurisdiction. Legislative intent may be ascertained, in this case, by an examination of the statutory scheme in place. c

The Board has, by virtue of the public utilities scheme established in the *Municipal Government Act* and the *Public Utilities Board Act*, "all the necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority". Its decisions, are protected by a privative clause, except for decisions on questions of law and jurisdiction, which are appealable to the Court of Appeal. The legislature has directed its mind to the jurisdiction of the Board, and to the function the courts should play in reviewing the Board's decisions. It requires judicial deference to substantive decisions, and has chosen that where the Board, in performing its statutory duties, makes determinations of law or jurisdiction, those determinations are reviewable by the Court of Appeal. The remedies for errors made by the Board are adequate. d

The applicant argues that the Board does not have the jurisdiction to make these determinations. The legislation does not explicitly give the Board the jurisdiction to construe contracts and legislation. The *Municipal Government Act* reads: e

279(1) A council, with the approval of the Public Utilities Board, may f

- (a) enter into a contract with a person undertaking to provide the municipality and its residents or part of the municipality and the residents of that part with a supply of transportation, light, power, natural gas, artificial gas, water and heat, or any of them, and g
- (b) confer a special franchise on that person in respect to the subject matter of the contract, h

for any period not in excess of 20 years.

- a** (3) The provisions of section 324 relating to the requirement of advertising and if necessary submitting the matter to a vote of the proprietary electors apply, with all necessary modifications, to a by-law passed pursuant to this section.

- b** 280. A council, with the approval of the Public Utilities Board, may enter into a contract with any person to supply light, power, natural gas, artificial gas or water to the municipality for the use of the municipal public utility for any period not in excess of 20 years.

- c** 281(1) An application for approval by the Public Utilities Board of any contract, together with any special franchise conferred in respect thereto, entered into pursuant to section 279(1) or section 280, or pursuant to a municipal charter, or any renewal of such a contract or special franchise, shall be made to the Board prior to or forthwith after the first reading of the by-law.

(2) Any such contract entered into pursuant to section 279(1) or section 280, whether or not it contains an express provision to that effect, is subject to the following conditions:

- d** (a) that the contract or special franchise conferred in respect thereto may not be altered or renewed without the approval of the Public Utilities Board;
- (b) that any renewal may be for a period not exceeding 10 years from the expiration of the contract;
- e** (c) that, if either party refuses to renew the contract, or if the parties fail to agree as to the conditions of the renewal, then the council, subject to the consent of the Public Utilities Board, may purchase all the rights of the contractor in all matters and things under the contract and in all apparatus and property used for the purposes thereof, for the price and on the terms that may be agreed on with the contractor or failing agreement, then for a price and on the terms fixed and settled by the Public Utilities Board on the application of either of the parties.
- f**

(3) If any such contract is not renewed on or before the expiration of the original term, or of any renewal thereof, or if the council does not complete the purchase of the subject matter thereof, then the contract continues in effect until the time either party, with the approval of the Public Utilities Board, terminates it on 6 months' written notice to the other.

- g** According to this scheme, the Board's approval is required to enter into the contract, to renew the contract, to purchase the utility or to terminate the contract. The Board's authority to regulate and supervise is therefore extensive. In approving contracts, renewals and purchases, it will incidentally interpret contractual and statutory provisions. The legislation gives it jurisdiction to do so, subject to appeal to the Court of Appeal. This jurisdiction, however, is incidental to, or corollary to, its jurisdiction to approve contracts, renewals, termination of contracts and purchases, and does not exist outside of the statutory framework.
- h** Therefore, for the Board to have jurisdiction to determine the

issues in dispute, they must arise as part of the application before the Board.

The Board has before it an application by the Town of Three Hills for an order fixing the price and terms for the purchase of the natural gas utility owned by Centra Gas and for an order approving the sale subject to the town's acceptance of the price and terms. The Board has deferred hearing Three Hills' application pending the result of this application.

Whether or not a particular issue will or will not be raised in an application cannot be the test. While it is likely that the interpretation of cls. 12 and 14 would be at issue, and certainly possible that the question of advertising would be raised, it cannot be that the court must first determine that these questions *will* be raised. It is neither appropriate nor prudent for the court to make such a determination in advance. The question must be whether the Board would have the jurisdiction to deal with these issues if they were raised in the application.

Centra Gas has argued in this application, and would likely argue in the application before the Board, that cl. 12 imposes a condition that the town must give Centra Gas at least 90 days' notice before the expiration of the contract before it may seek an order from the Board. Clause 14 of the contract provides for arbitration of any dispute not within the jurisdiction of the Board. Before reaching a decision in the application, the Board would have to determine what its jurisdiction is. If it determines that its jurisdiction includes the interpretation of cl. 12 as a preliminary matter in setting the price and terms of purchase, necessarily, the dispute is not arbitrable. Before the Board could decide whether to grant the order fixing price and terms, it would have to determine whether cl. 12 does impose such a condition, and whether it is valid and binding on the parties. Its jurisdiction to do so, it seems to me, is implicit in the statutory scheme that gives it the authority "to perform any duties that are assigned to it by statute or pursuant to statutory authority". It is given statutory authority to set the terms and price of a purchase and to approve the sale; in order to set the terms and price, and to grant approval, it must first determine whether the conditions necessary for purchase have been met.

The Board might also conclude that it does not have jurisdiction. This is a determination it is entitled to make, subject to review by the Court of Appeal.

The legislature has established a statutory framework intended to govern and regulate the provision of public utilities. The Public Utilities Board was established as the administrative body charged with dealing with all public utilities and their owners. The Board

- operates with a unique knowledge and experience in these matters. It approved the contract in question, and has approved many others. It frequently interprets and deals with the provisions of the Acts in question. It has knowledge of the industry practice, and past experience with other municipalities. It is in the best position to deal with these questions should they arise in the application. If the parties find fault with the decision, the legislature has indicated that an appeal may be taken to the Court of Appeal.
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- Were the court to deal with these issues at this point, it would unduly restrict the Board's ability to exercise its discretion and jurisdiction on these matters — discretion and jurisdiction given to it by the legislature. The parties have asked the court, in effect, to tie the Board's hands. Centra Gas, on the one hand, asks the court to declare that there has been a renewal of the contract; on the other hand, the town seeks a declaration that it has the right to purchase the utility. These are the kinds of issues contemplated in the statutory scheme as being within the jurisdiction of the Board. It would be overly technical to focus only on the actual questions raised in the notice of motion, while ignoring the effect such declarations would have on the application.
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- I conclude that the legislature has given the Board the jurisdiction, or at least the preliminary jurisdiction, to answer the issues raised in the notice of motion when and if they present in the course of an application before it. Therefore, the court should not exercise its discretion to make a declaratory judgment.
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Application dismissed.
