Case name	Metropolitan Toronto v. Forest Hill (Village)
Collection	Supreme Court Judgments
Date	1957-06-26
Report	[1957] SCR 569
Judges	Kerwin, Patrick; Taschereau, Robert; Rand, Ivan Cleveland; Locke, Charles Holland; Cartwright, John Robert; Fauteux, Joseph Honoré Gérald; Abbott, Douglas Charles
On appeal from	Ontario
Subjects	Municipal law

Supreme Court of Canada
Metropolitan Toronto v. Forest Hill (Village), [1957] S.C.R. 569
Date: 1957-06-26

The Municipality of Metropolitan Toronto *(Respondent) Appellant;*

and

The Corporation of the Village of Forest Hill *(Applicant) Respondent.*

1957: March 21, 22; 1957: June 26.

Present: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporations—Powers—Special statutory provisions—Provision of "pure and wholesome" water supply—The Municipality of Metropolitan Toronto Act, 1953 (Ont.), c. 73, s. 41.

By s. 41 of *The Municipality of Metropolitan Toronto Act, the* council is empowered to pass by-laws, *inter alia,* "to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water".

Held (Kerwin C.J. and Locke J. dissenting): Neither this provision nor any applicable provision of any other statute empowers the appellant municipality to provide for the fluoridation of the metropolitan water supply with the object of preventing or lessening the incidence of tooth decay.

APPEAL from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a judgment of F.G. MacKay J.A.[2] Appeal dismissed.

H.E. Manning, Q.C., and A.P.G. Joy, for the appellant.

J.J. Robinette, Q.C., and J. Ragnar Johnson, Q.C., for the respondent.

THE CHIEF JUSTICE *(dissenting):*—By leave of this Court the appellant, the Municipality of Metropolitan Toronto, appeals from a judgment of the Court of Appeal for Ontario[1] reversing that of F.G. MacKay J.A.[2], and quashing the appellant's By-law 278, passed June 14, 1955. By *The Municipality of Metropolitan Toronto Act, 1953* (c. 73 of the Ontario statutes of 1953), hereinafter called "the Act", the inhabitants of the metropolitan area were constituted a body corporate; the respondent, the Corporation of the Village of Forest Hill, is an "area munic-

[Page 570]

ipality" within the limits of the metropolitan district. The council had previously adopted report no. 8 of its Works Committee recommending that the Commissioner of Works be authorized to take the necessary steps to undertake the fluoridation of the metropolitan water supply and by By-law 278 that action was ratified and confirmed. Clause 2 of the by-law provides:

> 2. That the said Commissioner of Works and all other appropriate officials of the Municipality be and they are hereby authorized and directed to take the necessary steps, forthwith, to undertake the treatment of the Metropolitan water supply by fluoridation and to obtain all approvals required by statute for the installation of the equipment necessary for such treatment.

Part III of the Act is headed "Metropolitan Waterworks System". By virtue of the earlier provisions of this Part the appellant became a provider of water at the wholesale level to the area municipalities. Then comes the important section, s. 41:

> 41. The Metropolitan Council may pass by-laws for regulating the time, manner, extent and nature of the supply of water from its waterworks system, and every other matter or thing related to or connected therewith which it may be necessary and proper to regulate in order to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water, and to prevent the practising of frauds on the Metropolitan Corporation with regard to the water so supplied.

In these proceedings the Court is, of course, confined to the material filed so far as it may be relevant. On behalf of the appellant an affidavit was filed, sworn to

by Professor Joslyn Rogers. Professor Rogers was a member of the Association of Professional Engineers and a graduate of the University of Toronto in chemistry; he had been the Professor of Analytical Chemistry at the University from 1918 to 1954 and was a toxicologist of over forty years' experience and was currently practising as a consulting chemist. From his knowledge and experience he was able to state that chemically pure water does not occur in nature and cannot be produced artificially except in small quantities and with considerable difficulty and that, accordingly, water is classified as pure if it is suitable for human consumption and agreeable in taste, smell and appearance. Paragraphs 4, 5 and 6 of his affidavit read:

> 4. All natural waters contain minerals and such waters would not for that reason alone be classified as impure if the quantity of minerals present does not render the water unpleasant to the senses or prejudicial to health.

[Page 571]

> 5. Water containing fluorides in concentrations of up to two or three parts per million, which occurs naturally in many parts of North America, is not considered impure because of the presence of the fluoride. If the fluoride was introduced mechanically the water would still be considered pure as the ion added is the same in both cases and is offered to the human body in the same state.
>
> 6. To confirm my opinion respecting the classification of water I would refer to the 5th Edition of "The Examination of Waters and Water Supplies" by Thresh, Beale and Suckling at pages 84, 85, 86 and 87 in the Chapter entitled "What Constitutes a 'Pure and Wholesome Water' " which accurately represent my views.

As he indicates, an examination of the pages of the book referred to confirms his opinion.

While it is notorious that chlorine is added to many water supplies, it is argued that the addition of fluoride to a supply otherwise pure and wholesome is really treating it for a medicinal effect. In view of the above evidence I cannot treat any statement of counsel as an admission that the supply here in question before the addition of the fluoride was pure and wholesome. However, even assuming that this supply when treated with chlorine would be pure and wholesome, the only other evidence in the record bearing upon the point is the affidavit of Dr. Andrew

L. Chute, Pediatrician-in-Chief of the Hospital for Sick Children, Toronto, and Professor of Pediatrics at the University of Toronto. Paragraphs 3, 4, 5 and 6 of his affidavit read:

> 3. Tooth decay, by affecting the majority of people in a community, has come to be recognized by the Medical and Dental Professions as one of the major health problems of our time.
>
> 4. I have been associated with others in the consideration of the effect of fluoridation of public or communal water supplies.
>
> 5. Studies covering a period of over thirty years under a wide variety of controlled conditions have established the effects of the consumption by human beings of fluoridated water.
>
> 6. I am convinced from a thorough perusal of these studies that the addition of fluoride in the proportion of one part per million to a public water supply which is deficient in that constituent is a safe measure and is free from any systemic ill-effects. Such treatment renders the water more wholesome as it is effective in reducing tooth decay to the extent of approximately 60% where consumption of such water begins at an early age and continues during childhood and adolescence. The benefits extend into adult life.

These paragraphs indicate that certainly water is rendered more wholesome through the addition of fluoride in the proportion named and, always presuming that the council acts in good faith, I cannot read s. 41 of the Act

[Page 572]

in such a way as to declare that in enacting By-law 278 the council of the appellant exceeded its authority. The good faith of the appellant's council was not impugned. I have not overlooked that Dr. Chute states in para. 7 of his affidavit:

> 7. In my opinion fluoridation is a most valuable measure in preserving the teeth and as a result a valuable measure in maintaining health.

This does not alter my opinion that in proceeding as it did the council of the appellant was not invading the realm of public health and, therefore, it is unnecessary to consider the provisions of *The Municipal Act,* R.S.O. 1950, c. 243, *The Public Health Act,* R.S.O. 1950, c. 306, or any other statute referred to. A decision in the contrary sense would raise the question as to the powers so to

do, under the relevant statutes, of other municipalities who have added fluoride to their water supplies, but I refrain from discussing their position and restrict myself to a consideration of the power of the appellant's council under the provisions of s. 41 of the Act.

The appeal should be allowed, the order of the Court of Appeal set aside and the judgment of the judge of first instance restored, with costs throughout.

The judgment of Rand, Taschereau and Fauteux JJ. was delivered by

RAND J.:—The question in issue is whether the Municipality of Metropolitan Toronto, under its power, given by s. 41 of its charter[3] to pass by-laws

> for regulating the time, manner, extent and nature of the supply of water from its waterworks system, and every other matter or thing related to or connected therewith which it may be necessary and proper to regulate in order to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water, and to prevent the practising of frauds on the Metropolitan Corporation with regard to the water so supplied

can bring about what is called the "fluoridation" of its metropolitan water supply. The process, so-called, is simply the introduction into the water of a minute portion of fluorine, say, one part in one million, for the purpose of promoting the health of the teeth and in particular the elimination of caries, by building up in the bone substance

[Page 573]

a greater resistance to the inroads of decay by foreign matter within the mouth. In the water the fluorine effects no chemical change but becomes merely diffused in solution.

Mr. Manning's contention is short and precise: the duty and the authority of the municipality is to furnish "pure and wholesome water"; admittedly the addition of fluorine does not affect its quality, otherwise wholesome; by its authority to regulate the "nature" of the supply it may introduce into the particular supply such substances as are generally found in water and in its judgment are beneficial to the health of the users; and in regarding such an object we must distinguish

between ends and means, that is, the end being wholesome water, the means, an agency of promoting health, rather than the end being to serve a health purpose superimposed on a functional or water means.

Notwithstanding the attractiveness of this argument, I am unable to agree with it. The word “nature” can be satisfied by other and more accustomed meanings than that of a medicinal addition for another than a water purpose. The nature of the supply is too well known for question: it may be taken from a lake, a river or a stream, accumulated in a reservoir, obtained from artesian wells or collected directly from rainfall. Although the exact role of water in the physiological economy was not gone into, the matter of furnishing that indispensable aliment to life has too long been the subject of discussion to leave much doubt of what it means to furnish it in a wholesome quality. That a municipality may purify it, that is, reduce objectionable foreign matter in it by means harmless to its consumers, is universally understood. In the settled understanding, also, a “water supply” comes from natural sources which show differences in their degree of purity. “Purity” itself is well understood although partaking of the impreciseness of any general term. Solutions of different substances are invariably present, but the human body has evolved in an adaptation to them in their normal or subnormal quantities.

Does it lie, in such terms of authority, with a local government to furnish a supply of synthetic water by approximating the ordinary or normal components? If its object was

[Page 574]

to obtain the ordinary or natural composition of substances in solution so as to furnish what the body has become adapted to receive as water there would be grounds for justifying such a measure; and if it were a matter of choice between a natural supply containing normal quantities of fluorine and one lacking that element, I have no doubt the choice could not be challenged. These involve the matter of furnishing water for its accepted purposes only.

But it is not to promote the ordinary use of water as a physical requisite for the body that fluoridation is proposed. That process has a distinct and different purpose; it is not a means to an end of wholesome water for water’s function but

to an end of a special health purpose for which a water supply is made use of as a means.

The method proposed does not appear to be the only feasible mode of making available to the public what is considered by the municipality to be a desired health ministration. Fluoridation apparently can be provided otherwise than by making it general in the water supply. If that is so, there is here neither that accepted desirability for its use nor an unobjectionable manner of supplying it which in other situations might be influential considerations in the determination of the question raised.

I would, therefore, dismiss the appeal with costs.

LOCKE J. *(dissenting):*—The appellant is a body corporate constituted by c. 73 of the statutes ofOntario, 1953. The expression “Metropolitan Corporation” is defined by the Act to mean theMunicipality of Metropolitan Toronto and, by s. 3, it is provided that the powers of the corporation shall be exercised by its council and, except where otherwise provided, its jurisdiction confined to the metropolitan area. The area so defined includes the municipality of the Village of Forest Hill, which is one of the area municipalities referred to throughout the Act.

Of the various powers and duties vested in and imposed upon the appellant, this matter concerns only those dealt with in Part III of the statute under the subheading “Metropolitan Waterworks System”.

Section 36 declares that, for the purpose of supplying to the area municipalities water for their use, the metropolitan corporation shall have all the powers conferred by

[Page 575]

any general Act upon a municipal corporation and by any special Act upon an area municipality or local board thereof respecting, *inter alia,* the establishment, maintenance and operation of a waterworks system.

Section 37(1) reads:

> The Metropolitan Council shall before the 1st day of December, 1953, pass by-laws which shall be effective on the 1st day of January, 1954, assuming as part of the metropolitan waterworks system all works for the production, treatment and storage of water vested in each area municipality or any local board thereof and all trunk distribution mains connected therewith, and on the day any such by-law becomes effective the works and mains designated therein shall vest in the Metropolitan Corporation.

By s. 39 it is declared that where all the works of an area municipality for the production, treatment and storage of water are assumed by the metropolitan corporation, the area municipality shall not thereafter establish or operate any such works.

Section 41, so far as it is relevant to the present matter, reads:

> The Metropolitan Council may pass by-laws for regulating the time, manner, extent and nature of the supply of water from its waterworks system, and every other matter or thing related to or connected therewith which it may be necessary and proper to regulate in order to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water…

By a written report dated May *2,* 1955, the Works Committee of the appellant municipality, after an investigation, details of which were disclosed in it, recommended to the council that the Commissioner of Works be authorized to take the necessary steps to undertake the fluoridation of the metropolitan water supply. By a by-law enacted on July 14, 1955, the municipality directed the Commissioner of Works to take the necessary steps forthwith

> to undertake the treatment of the Metropolitan water supply by fluoridation and to obtain all approvals required by statute for the installation of the equipment necessary for such treatment.

Section 101 of *The Public Health Act,* R.S.O. 1950, c. 306, requires the council of any municipality contemplating, *inter alia,* any change in an existing waterworks system to submit the plans, specifications and an engineer's report of the water supply and the works to be undertaken, together with such other information as may be deemed necessary by the Department of Health, to that Depart-

ment, and declares that no such works shall be proceeded with until the source of supply and the proposed works have been approved by the Department.

The Commissioner of Works applied under the provisions of this section for approval of a change in the existing waterworks system of the metropolitan corporation to provide for the addition of one part per million of fluoride to the water supply. By a certificate dated July 11, 1955, signed by the Minister of Health, the Provincial Sanitary Engineer and the Deputy Minister of Health, it was certified that "the installation of equipment for fluoridation of the water supply" at the waterworks plants of the appellant and the source of water supply and the proposed works had been approved by the Department as required.

The respondent, by notice of motion given as permitted by s. 293 of *The Municipal Act,* R.S.O. 1950, c. 243, applied for an order to quash for illegality the by-law referred to "on the grounds, inter alia, that such by-law is ultra vires and beyond the competence of the said Council". While other grounds of attack were suggested, the only one argued has been that in passing the by-law the council exceeded its powers.

The application was dismissed by Mr. Justice F.G. MacKay[4]. That learned judge was of the opinion that it was for the council acting in good faith to determine what treatment, if any, should be given to the water to most effectively carry out its statutory obligation. He was of the opinion that the arguments advanced as to the advisability of adding fluoride were irrelevant and should not be considered, except for the purpose of determining whether it had been shown that the council was not so acting. In his opinion, the evidence supported his view that good faith had been shown.

The unanimous judgment of the Court of Appeal, delivered by the Chief Justice of Ontario[5], reversed this order and directed that the by-law be quashed. In the reasons it is stated that it had been admitted in the Court of Appeal that the water, without the addition of fluoride, was pure and wholesome. Accepting the admission as establishing that fact, it was said that nothing in

The Municipality of Metropolitan Toronto Act, The Public Health Act, The Public Utilities Act, R.S.O. 1950, c. 320, or *The Municipal Act* conferred upon any of the area municipalities power to add some chemical to a pure and wholesome water supply and that the question to be decided was as to whether the respondent had power to do so "for a medicinal purpose". With great respect, I disagree and think the judgment appealed from is based upon a false premise.

In deciding the question whether the by-law was *intra vires* of the council, it was, of course, necessary to determine the exact nature of the action which the by-law assumed to authorize. The uncontradicted evidence is that "a physically or chemically pure water does not occur in nature and has defied all efforts to obtain it". This is the opinion of Joslyn Rogers, a chemical engineer of long experience whose affidavit was filed on the application. Mr. Rogers further said that it cannot be produced artificially, except in small quantities and with considerable difficulty. The admission that the water was pure—if intended as an admission of fact—was, therefore, inaccurate. If intended as meaning that it was "pure" within the meaning of the appellant's Act of incorporation, that was a question of law for the decision of the Court and not to be decided upon the admission of counsel. It should be said that no such admission was made in this Court.

In the extracts from the work of E.V. Suckling, M.B., to whose opinions in this respect Joslyn Rogers subscribes, it is said that wholesomeness is purely a medical question while purity must be physical and chemical. Apart from such evidence, the accuracy of the statement seems obvious. In view of the evidence to the contrary, I would decline in a matter of such moment to act on an admission of counsel in the Court of Appeal that the water supply was, without any addition, either pure or wholesome. That question, which, in my view, is only relevant to the issue as to whether the members of the council have acted in good faith in the exercise of their statutory duties, is to be decided on the evidence adduced upon the application.

[Page 578]

The only evidence on the question is that of Dr. A.L. Chute, the Pediatrician-in-chief of the Hospital for Sick Children in Toronto and Professor of Pediatrics at the University of Toronto. His affidavit states that tooth decay, by affecting the majority of people in a community, has come to be recognized by the medical

and dental professions as one of the major health problems of our time. After saying that studies covering a period of over 30 years under a wide variety of controlled conditions had established the effects of the consumption by human beings of fluoridated water, the affidavit reads:

> 6. I am convinced from a thorough perusal of these studies that the addition of fluoride in the proportion of one part per million to a public water supply which is deficient in that constituent is a safe measure and is free from any systemic ill-effects. Such treatment renders the water more wholesome as it is effective in reducing tooth decay to the extent of approximately 60% where consumption of such water begins at an early age and continues during childhood and adolescence. The benefits extend into adult life.
>
> 7. In my opinion fluoridation is a most valuable measure in preserving the teeth and as a result a valuable measure in maintaining health.

As an exhibit to this affidavit, there is a list of some 65 municipalities in Ontario where natural fluorides are contained in the water supply in concentrations varying from .01 to 2.5 parts per million.

The requirement that the water supply shall be “pure and wholesome” would appear to have originated in the early English statutes. Thus, by s. 35 of the *Waterworks Clauses Act,* 1847, 10 Vict., c. 17, the undertakers operating waterworks are required to provide “a Supply of pure and wholesome Water, sufficient for the domestic Use of all the Inhabitants of the Town or District within the Limits of the special Act”. Apparently in recognition of the fact that, as stated in the evidence in this matter, chemically pure water does not occur in nature and cannot be produced artificially except in small quantities and with difficulty, the *Public Health Act, 1936,* 26 Geo.V and I Edw. VIII, c. 49, by s. 111, imposes on the local authority the duty to provide “a sufficient supply of wholesome water for domestic purposes”.

The word “wholesome” is used in more than one sense. One of the definitions in the Oxford Dictionary reads:

> Promoting or conducive to health; favourable to or good for health; health-preserving…

The definitions in Webster's New International Dictionary include the following:

> Promoting physical well-being; beneficial to the health or the preservation of health;… healthful…

The material does not assume to say what are the causes of tooth decay. The evidence, however, shows that the use of fluoridated water does materially reduce tooth decay where consumption begins at an early age, that these benefits extend into adult life and that it is a valuable measure for maintaining health. As the article from Suckling's work shows, water is treated with chlorine, lime and other chemicals or substances for the purpose of rendering it sterile and I would draw the inference from the statements made that doing so renders it less likely to cause typhoid fever or other water-borne diseases.

With respect for differing opinions, I consider that the appellant in discharging its duty to supply water that is wholesome may treat the water with chlorine, lime or other substances to render it sterile and less likely to cause typhoid, or with fluoride to render it less likely to be injurious to the health by contributing to tooth decay.

It is, in my opinion, a necessary inference from the evidence that the water supply in the metropolitan district of Toronto, whatever it may be, is in its natural state lacking in the element fluoride and thus less wholesome than it would be if that were added, to the extent mentioned. If the supply in its natural state contained fluoride to the extent of 2.5 parts to a million, as does the water obtained from the Boone River by the municipality of Essex, and if, in the opinion of the council acting in good faith, it was considered advisable to reduce the fluoride content to one part in a million, I think it would be within the power of the municipality to do so. Indeed, I find it hard to understand why it can be fairly contended that this would be beyond the municipal powers any more than to add chlorine to render the water more wholesome by rendering sterile and harmless some existing constituent in it. If the argument which succeeded in the Court of Appeal is carried to its logical conclusion, it would be *ultra vires* of the appellant to use water of the character used by the municipality of Essex

or the 64 other municipalities referred to by Dr. Chute since such waters, in their natural state, contain fluoride in varying proportions.

In my opinion, nothing more is required to sustain the present by-law than the clear provisions of s. 41 of the appellant's Act of incorporation. It is, of course, not suggested that the council has not acted in good faith in attempting to discharge the duties imposed upon it by that section and it is not disputed that the introduction of fluoride, to the extent proposed, will render the water supply more wholesome, assigning to that word the meaning above quoted. The Legislature has deputed the responsibility of determining what steps should be taken to obtain a pure and wholesome water supply to the metropolitan council and not to the Courts.

I would allow this appeal with costs and restore the order of Mr. Justice MacKay.

CARTWRIGHT J.:—I am in general agreement with the reasons of my brother Rand and those of the learned Chief Justice of Ontario, and will add only a few words.

The question is as to the power of the council to enact the impugned by-law, and the answer depends upon the nature of the subject-matter to which it relates. If, on the evidence in the record, it could properly be regarded as action by the council to provide a supply of pure and wholesome water or to render more pure and wholesome a supply of water already possessing those characteristics I would hold it to be valid. But, in my opinion, it cannot be so regarded. Its purpose and effect are to cause the inhabitants of the metropolitan area, whether or not they wish to do so, to ingest daily small quantities of fluoride, in the expectation which appears to be supported by the evidence that this will render great numbers of them less susceptible to tooth decay. The water supply is made use of as a convenient means of effecting this purpose. In pith and substance the by-law relates not to the provision of a water supply but to the compulsory preventive medication of the inhabitants of the area. In my opinion the words of the statutory provisions on which the appellant relies do not confer upon the council the power to make by-laws in relation to matters of this sort.

In view of the difference of opinion in the Courts below and in this Court, it is fortunate that this is a case in which if we have failed to discern the true intention of the Legislature the matter can be dealt with by an amendment of the statute.

I would dismiss the appeal with costs.

ABBOTT J.:—For the reasons given by brothers Rand and Cartwright, with which I am in agreement, the appeal should be dismissed with costs.

Appeal dismissed with costs, KERWIN C.J. and LOCKE J. dissenting.

Solicitor for the appellant: C. Frank Moore, Toronto.

Solicitor for the respondent: J. Ragnar Johnson, Toronto.

[1] [1956] O.R. 367, 2 D.L.R. (2d) 570.
[2] [1955] O.R. 889, [1955] 5 D.L.R. 621.
[3] *The Municipality of Metropolitan Toronto Act, 1953* (Ont.), c. 73.
[4] [1955] O.R. 889, [1955] 5 D.L.R. 621.
[5] [1956] O.R. 367, 2 D.L.R. (2d) 570.