



1957
*Mar. 13, 14
Dec. 19

CITY OF OUTREMONT (*Plaintiff*) APPELLANT;

AND

MONTREAL TRAMWAYS COMPANY }
(*Defendant*) } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC

Contracts—Franchise to operate street-cars—Exemption from municipal taxes—Effect of special legislation—Act to amend the charter of the City of Montreal, 1918 (Que.), c. 84.

By a contract made in 1906, the defendant company was granted (1) an exclusive franchise to operate street-cars in the plaintiff municipality for 30 years subject to certain conditions, and (2) a partial exemption from municipal taxes. The company also held a franchise in the City of Montreal. In 1918, by a contract between the City of Montreal and the defendant, ratified by the statute 8 Geo. V, c. 84, the company's franchise in the city of Montreal was replaced and its

*PRESENT: Taschereau, Rand, Cartwright, Fauteux and Abbott JJ.

¹Ante, p. 65.

term extended to 1953, but the franchise in the plaintiff municipality was not annulled. However, the right of the latter municipality to expropriate the undertaking of the company was abrogated and given exclusively to the City of Montreal.

In its action, the plaintiff municipality sought recovery of municipal taxes for the years 1936 to 1949, inclusive. The action was maintained by the Superior Court but dismissed by a majority in the Court of Appeal.

Held (Rand and Cartwright JJ. dissenting): The action must fail. For the reasons given in *City of Westmount v. Montreal Transportation Commission, ante*, p. 65, the effect of the 1918 statute was to continue in force, from 1936 until 1953, both the obligations of the company to operate its tramway system in Outremont and its corresponding rights to a franchise and tax exemption. The Court below disposed satisfactorily of the contention that (1) there was incompatibility as regards the tax-exemption provisions in the city of Montreal contract and the Outremont contract, and (2) the company was debarred from pleading the exemption because it had not taken steps at the proper time and by the proper procedure to contest its liability.

Per Rand and Cartwright JJ., *dissenting*: The exemption expired with the first period of 30 years. By the validation of the contract in 1906, the Legislature made it clear that there was no intention to deal with the validation of the exemption for any period beyond that which the municipality was already specially authorized to grant, that is, 30 years. The exemption clause was severable from the remaining provisions of the contract. The abrogation of the right of expropriation in 1918 did not terminate the exemption; the language of the statute clearly indicated that the remaining provisions were to be unaffected so far at least as was necessary to maintain the franchise.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec¹, reversing, Martineau J. dissenting, the judgment of Tyndale, Assoc. C.J. Appeal dismissed, Rand and Cartwright JJ. dissenting.

F. P. Brais, Q.C., and *L. P. Gagnon, Q.C.*, for the plaintiff, appellants.

Jules Deschenes, for the defendant, respondent.

TASCHEREAU J.:—For the reasons given by Mr. Justice Abbott, I would dismiss this appeal with costs.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J. (*dissenting*):—The issue in this appeal depends on the interpretation to be given the language of an agreement made between the parties, the by-law preceding which, no. 72, in identical terms, was confirmed by an Act of the Legislature. The agreement provided generally

¹ [1955] Que. Q.B. 605.

1957
 CITY OF
 OUTREMONT
 v.
 MONTREAL
 TRAMWAYS
 Co.
 Rand J.

for the construction and operation of a tramway line within the city of Outremont. Among the special provisions was one stipulating for exemption from general taxes. The franchise was subject to the right of expropriation of the undertaking at the end of 30 years or of any 5-year period thereafter. The question in dispute is whether the exemption expired with the first period of 30 years or continued during the operation of the undertaking until the year 1949; and it becomes necessary to examine closely the language used.

By s. 12 the grant was made:

The above-mentioned lines of railway are to be constructed and operated . . . and such other lines as the Company may erect, construct and operate in the Town are to be so constructed and operated . . . throughout the hereinafter mentioned period, in consideration of the Town granting as it now does for thirty (30) years reckoning from the said Eighth of February last past (1906) to the Montreal Street Railway Company, its representatives and assigns AN EXCLUSIVE FRANCHISE for operating Street Railways by electric power, or such other motive power as may be agreed upon on a ground surface for passengers, freight and mails within the limits of the Town and in further consideration that the Company shall be exempt from the payment of all municipal taxes and rates which the Town may now or hereafter have the power to levy upon the Company, its moveable or immoveable property or franchise: provided always that if the Company establish a power house or a car shed or a car shop or other building except waiting rooms, the same shall be subject to all municipal taxes imposed by the Town upon immoveable property; . . . provided that the said Town will grant to the said Company such extension of its present franchise in the said Town as will make it terminate at the same date as any extension which may be granted by the said City of Montreal to the said Railway of its franchise in said City.

and by s. 41 the period of its continuance was specified:

It is agreed between the Town and the Company that the present arrangement or contract for the establishment and operation of the said electric railway shall extend over a period of Thirty (30) years reckoned from the said Eighth day of February last (1906) (the date of the Deed of Contract first above mentioned). At the expiration of the said term of Thirty (30) years and at the expiration of every term of five (5) years, thereafter the Town shall have the right, after a notice of six (6) months to the Company, to be given within the twelve (12) months preceding the expiration of the said Thirty (30) years, and also after a like notice to be given six (6) months before the expiry of each subsequent period of Five (5) years, to assume the ownership of the said railway and all its real estate, appurtenances, plant and vehicles belonging to the said Company situate in the Town of Outremont and necessary for the operation of its line, on payment of their value to be determined by Arbitrators to be appointed as follows: . . .

In 1918, by 8 Geo. V., c. 84, the transportation system of the respondent, serving the city of Montreal and the surrounding municipalities was brought under the general

authority, for construction, operation and maintenance purposes, of the tramways Commission. Uniformity of operation was the main objective and the arrangement was to continue until 1953 at which time or at specified periods thereafter the City of Montreal might expropriate the entire undertaking. Items of special nature touching municipal interests other than of transportation between the company and Montreal were dealt with. Concerning matters essentially of transportation the expression "within and without the limits of the City" was uniformly used, but provisions for matters of municipal interest were expressly limited to Montreal; the existing arrangements on such matters between the company and outside municipalities were left untouched.

1957
 CITY OF
 OUTREMONT
 v.
 MONTREAL
 TRAMWAYS
 Co.
 ———
 Rand J.
 ———

The duration of the new arrangement was formulated in language similar to that before us. Paragraph 8 of art. 92 of the contract, for example, provides:

On March 24, 1953 (the date of expiration of the first named period of 35 years) and at the expiration of every subsequent five-year period, the City shall have the right, after six (6) months' notice given to the Company . . . to appropriate for itself the Railway of the said Company, etc. . . . The purchase price shall also include all privileges, rights and franchises of the Company in any municipality wherein the said assets so acquired are situated, but the City shall not pay for the value of such privileges, rights and franchises, and shall further have the right to operate the system of tramways so purchased in any municipality wherein the same is located.

No municipality other than the City shall have the right to purchase the railway system of the Company in whole or in part.

By s. 75 of the statute it was declared that

every provision of any contract, agreement or arrangement entered into between the Montreal Tramways Company and any municipal corporation outside of Montreal . . . which may be inconsistent with the said contract of the 28th of January, 1918 shall be and remain without effect from the date of the coming into force of the said contract.

The confirmation of by-law no. 72 was made by 6 Ed. VII., c. 52, in these words:

11. Whereas by-law No. 72 of the town granting to the Montreal Street Railway Company an exclusive franchise and exemption from taxes for thirty years, was unanimously adopted by the council on the 20th December, 1905, and unanimously approved by the electors who are proprietors on the 8th January, 1906; and whereas doubts have now arisen as to the right of the town to grant such exclusive franchise and it is expedient to remove such doubts; it is enacted that the aforesaid by-law No. 72 is hereby declared legal and valid and ratified to all intents and purposes.

1957

In 1915 there was a further confirmation:

CITY OF
OUTREMONT
v.
MONTREAL
TRAMWAYS
Co.
Rand J.

90. By-law No. 72 of the city, granting to the Montreal Street Railway Company an exclusive franchise and exemption from taxes for thirty years, which was unanimously adopted by the council on the 30th of December, 1905, and unanimously approved by the electors who are proprietors on the 8th of January, 1906, and which has already been ratified by the act 6 Edward VII, chapter 52, section 11, (but which act is hereinafter repealed), is hereby declared legal and valid, and ratified to all intents and purposes.

In 1900 by 63 Vict., c. 55, s. 22, Outremont was authorized, by resolution, to

exempt from the payment of municipal taxes, for a period not exceeding thirty (30) years, any person who carries on any industry, trade or enterprise whatsoever, as well as the land used for such industry, trade or enterprise, or agree with such person for a fixed sum of money payable annually for any period not exceeding thirty (30) years, in commutation of all municipal taxes.

This section was repealed in 1915 by 5 Geo. V., c. 93, s. 91. Section 518 of the *Cities and Towns Act*, 3 Ed. VII, c. 38, specified a limit of 20 years for the exemption from taxation of any "industry, trade or enterprise", reproducing in substance art. 4559 of R.S.Q. 1888. The authority of Outremont in 1905-6 was, therefore, an exception to the general law.

The contention made by Outremont is this: it was expressly authorized to exempt an enterprise for 30 years but not more; such a limitation is a basic principle of municipal law and in the case of the City a special indulgence of an additional 10 years over the general act was permitted. The exemption has invariably been treated as a strictly collateral benefit for a limited time which would be exhausted as part of the terms of any franchise or contract when its statutory period expired.

The by-law and the contract clearly contemplate an unbroken continuance of operations from the beginning to the termination of the franchise, an indefinite period divided into terms, a contract, in short, for a continuous franchise from its commencement to its indefinite end. If within that period a provision, on its proper interpretation, is to continue only for a limited time, the expiration of that particular time and of the provision affects nothing else; by its nature the latter simply ceases to have force as a

provision, the contract becomes so far fully performed as was intended, and the remaining provisions continue as from the beginning.

The right of expropriation by Outremont was abrogated by the legislation of 1918 and that power transferred to Montreal; and as in the case of Montreal the option to purchase might never be exercised. The question is, then, whether the by-law is to be interpreted as providing the tax exemption for the indeterminate period of the franchise.

The purpose of the validation in 1906 is made clear by the recital to s. 11: "and whereas doubts have now arisen as to the right of the town to grant such exclusive franchise and it is expedient to remove such doubts". With that in mind as its purpose and in view of the fact that the recital mentions the exemption from taxation as being for 30 years, the Legislature by that language has made it clear that there was no intention to deal with the validation of the exemption for any period beyond that which Outremont was already authorized to grant. Neither the contract nor the by-law was annexed to the statute; and the only representation to the Legislature, so far as appears, was that contained in the recital. The exemption for 30 years being within the authority of the City did not need validation and its inclusion with the doubtful exclusiveness of the franchise cannot modify the proper construction of the by-law. So to interpret either the by-law or the clause of validation would be to attribute to the City an intention to ask for and to the Legislature an intention to grant a perpetual exemption from taxation by language that conceals rather than discloses such an intention. After the repeal of the 1900 legislation in 1915, the only power of exemption remaining to the City was that contained in the *Cities and Towns Act* for a period of 20 years; and that circumstance furnishes an additional consideration against such a construction either of the by-law or the validating Act.

Mr. Deschenes argues that the exemption clause is inseparably bound up with the total consideration of the contract and is not severable; and that when the by-law contemplates a continuance beyond 30 years of the franchise it has in mind a continuance of the then existing arrangement. For the reasons given, I cannot agree with this. Tax exemption is essentially a temporary benefit

1957
 CITY OF
 OUTREMONT
 v.
 MONTREAL
 TRAMWAYS
 Co.
 Rand J.

intended to assist enterprise in its early stages granted within a long legislative tradition of time limitation. Franchises, particularly those of such public services, may be, as here, virtually perpetual and only in extraordinary circumstances, for unique reasons and in express and unequivocal language, as in the case of works with a national interest, such as, for example, the western section of the Canadian Pacific Railway, has a perpetual exemption ever been created.

It was the view of Martineau J. in the Court of Queen's Bench¹ that on the abrogation, in 1918, of the right of expropriation, the consideration for the franchise came to an end with the consequence that the grant thereupon terminated, and with it, the tax exemption. I am unable to attribute that effect to the legislation; the language clearly indicates that the remaining provisions were to be unaffected so far at least as was necessary to maintain the franchise: otherwise the many provisions for regulating services "within and without the City" would have been abortive; and I cannot construe the right of expropriation given Montreal to be of an undertaking illegally occupying the streets. Assuming that the abrogation gave some remedial right to Outremont, on well established principles, that right, even to rescission, was one the exercise of which could be waived; and that it was waived is conclusively established by this proceeding. This view of the continuance of the franchise becomes of importance to the enforcement of other terms of the contract such as that for the payment of part of the cost of snow removal.

For these reasons, the appeal must succeed. The judgment of the Court of Queen's Bench should be reversed and that of the trial judge restored with costs in this Court and in the Court of Queen's Bench.

The judgment of Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—Appellant's claim is for \$19,594.78, representing municipal taxes and assessments for the years 1936 to 1949 inclusive. Respondent denied liability on the ground that it was exempt from the payment of such taxes in virtue of the contract governing its relations with appellant.

¹[1955] Que. Q.B. 605.

Appellant is successor to the Town of Outremont and respondent is successor to the Montreal Street Railway Company. The terms and conditions of a franchise granted by the Town of Outremont to the Montreal Street Railway Company are set out in by-law 72 of the said Town, adopted December 20, 1905, which was ratified by the Quebec Legislature, and in a contract implementing the said by-law executed March 12, 1906.

1957
 CITY OF
 OUTREMONT
 v.
 MONTREAL
 TRAMWAYS
 Co.
 Abbott J.

The Town granted to the company for a period of thirty years terminating February 8, 1936, an exclusive franchise to establish and operate lines of electric railway in particular streets in the municipality, subject to the conditions specified in the by-law and the contract. During this period of thirty years, the company was granted two principal rights: (1) an exclusive franchise and (2) a partial exemption from municipal taxes and rates. Section 12, relating to the term of the franchise and the tax exemption, reads as follows:

The above-mentioned lines of railway are to be constructed and operated at the rate of one fare, and such other lines as the Company may erect, construct and operate in the Town are to be constructed and operated at the rate of one fare for the conveyance of passengers to and from points in the Town of Outremont, to and from points on the Company's Montreal System of tracks throughout the hereinafter mentioned period, in consideration of the Town granting as it now does for thirty (30) years reckoning from the said Eighth of February last past (1906) to the Montreal Street Railway Company, its representatives and assigns, AN EXCLUSIVE FRANCHISE for operating Street Railways by electric power, or such other motive power as may be agreed upon, on a ground surface for passengers, freight and mails within the limits of the Town and *in further consideration that the Company shall be exempt from the payment of all municipal taxes and rates which the Town may now or hereafter have the power to levy upon the Company, its moveable or immoveable property or franchise: provided always that if the Company establish a power house or a car shed or a car shop or other building except waiting rooms, the same shall be subject to all municipal taxes imposed by the Town upon immoveable property; nevertheless in the event of the Company at any time agreeing with the City of Montreal to reduce the rate of fares at present in force in the City of Montreal, the Company binds itself to reduce the rate of fares in the Town of Outremont, to the same rate as in Montreal: provided that the said Town will grant to the said Company such extension of its present franchise in the said Town as will make it terminate at the same date as any extension which may be granted by the said City of Montreal to the said Railway of its franchise in said City.*

(The italics are mine.)

1957
 CITY OF
 OUTREMONT
 v.
 MONTREAL
 TRAMWAYS
 Co.
 Abbott J.

It will be noted from the terms of the section which I have quoted that the tax exemption applies, generally speaking, only to that portion of the company's property and assets situated on the streets of the appellant.

In consideration of the exclusive franchise and of the tax exemption, the company undertook to establish and operate lines of tramway for the conveyance of passengers in the streets specified in the contract. In other words the obligation on the part of the company to establish, maintain and operate was subject to the reciprocal obligations of the Town to grant it the exclusive franchise and the tax exemption.

On January 28, 1918, the Montreal Tramways Company and the City of Montreal entered into a contract which was ratified by a statute of the Quebec Legislature, 8 Geo. V, c. 84. The contract appears as Schedule A to the said Act. The company's franchise in the city of Montreal was expressly annulled and replaced but the company's franchise in the city of Outremont was not annulled. Its conditions were modified in certain respects, which are not relevant to the issue in this appeal, and, in addition, the right of the City of Outremont under the contract of March 12, 1906, to expropriate the company's undertaking within its limits was abrogated.

The relevant sections of the 1918 statute (para. 8 of art. 92 and art. 95 of Schedule A) read as follows:

Article 92.

Paragraph 8. Expropriation.

On March twenty-fourth (24th) nineteen hundred and fifty-three (1953), and at the expiration of every subsequent five-year period, the City shall have the right, after six months notice given to the Company within the twelve months immediately preceding March twenty-fourth (24th) nineteen hundred and fifty-three (1953), and also after a similar notice of six months and on the same conditions at the end of each subsequent five-years period, to appropriate for itself the railway of the said company as well as the immoveables and dependencies, plant and cars belonging to it and necessary for the operation of the said railway, situate within and without the limits of the said City, by paying the value thereof, to be fixed by arbitrators, and ten per cent. (10%) over and above the estimate. Such arbitrators shall be appointed as follows: One by the City, one by the Company, and the third by a judge of the Superior Court sitting in and for the district of Montreal.

* * *

No municipality other than the City shall have the right to purchase the railway system of the Company, in whole or in part.

CONTRACTS WITH MUNICIPALITIES OUTSIDE OF THE CITY.

Article 95.

All the provisions of the contracts, compacts or agreements passed between the Company and any municipal corporation outside of the City, inconsistent with the provisions of this contract, shall be and shall remain without effect from the time of the coming into force of the present contract.

1957
 CITY OF
 OUTREMONT
 v.
 MONTREAL
 TRAMWAYS
 Co.
 Abbott J.

One effect of this statute was, therefore, to take away from appellant the right of expropriation given to it under the franchise and to vest that right in the City of Montreal.

Although not identical, the provisions of the contract between the Town of Outremont and respondent are similar to those of the contract which has just been considered by this Court in the appeal of *City of Westmount v. Montreal Transportation Commission*¹. For the reasons which I have given in that appeal, which need not be repeated here, I am of opinion that in passing the 1918 statute, 8 Geo. V, c. 84, the Quebec Legislature intended that the reciprocal rights and obligations of the tramways company and the City of Outremont under the contract of March 12, 1906, were to be continued until March 24, 1953, except to the extent that such rights and obligations may have been modified by the said statute. The effect of the statute was therefore to continue in force from February 8, 1936, until March 24, 1953, both the obligation of the respondent to operate its tramway system in Outremont and its corresponding rights to a franchise and tax exemption.

The points raised by appellant (a) that there is incompatibility as regards the tax exemption provisions in the city of Montreal contract and the Outremont contract and (b) that respondent was debarred from pleading its tax exemption because no steps were taken at the proper time and by the proper procedure to contest its liability, have been satisfactorily disposed of, in my opinion, by the Court below.

For the reasons which I have given and also for those expressed by Bissonette and Gagné JJ., with which I am in respectful agreement, I would dismiss the appeal with costs.

¹ Ante, p. 65.

1957
CITY OF
OUTREMONT
v.
MONTREAL
TRAMWAYS
Co.
Abbott J.

*Appeal dismissed with costs, RAND and CARTWRIGHT JJ.
dissenting.*

*Attorneys for the plaintiff, appellant: Sauvé, Gagnon
& L'Heureux, Montreal.*

*Attorneys for the defendant, respondent: Létourneau,
Monk, Tremblay, Forest & Deschenes, Montreal.*
