CITY OF OUTREMONT (*Plaintiff*) .....APPELLANT; 1957

*Mar. 13
Dec. 19

AND

MONTREAL TRANSPORTATION COMMISSION (*Defendant*) ..... } RESPONDENT.

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

Contracts—Franchise to operate street-cars—Clause for sharing cost of snow removal—Effect of special legislation—Whether contract terminated by special legislaton—An Act to amend the Charter of the City of Montreal, 1918 (Que.), c. 84—An Act concerning the City of Montreal, 1950 (Que.), c. 79, as amended by the Act respecting the Montreal Transportation Commission, 1951 (Que.), c. 124.

The plaintiff claimed the recovery of one-half of the cost of snow removal on certain streets in its territory for the period June 1951 to January 1953, under a contract made in 1906 between it and the Montreal Street Railway Company. The provisions of this contract were similar to the provisions of the contract interpreted in *City of Westmount v. Montreal Transportation Commission, ante,* p. 65.

Held (Rand and Cartwright JJ. dissenting): The claim must fail for the reasons given in the *Westmount* case, since the provisions of the contract and the questions of law involved were the same in both cases.

Per Rand and Cartwright JJ., *dissenting*: There was nothing in the powers conferred on the City of Montreal by the statute 14 Geo. VI, c. 79, as amended, abrogating the franchises in the various municipalities and leaving the Commission to act at large. The City of Montreal replaced the Montreal Tramways Company as the owner and operator of the tramway. *Western Counties Railway Company v. Windsor and Annapolis Railway Company* (1882), 7 App. Cas. 178 at 188, applied. By the vesting of the property of the company in the City the latter became subject in all respects to the liabilities and obligations of the company, which thereafter were to be enforced against the Commission as its mandatary. The substitution of the *lien de droit* from the company to the City was required by the principles laid down in the *Western Counties Railway* case, *supra.*

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming the judgment of Salvas J. Appeal dismissed, Rand and Cartwright JJ. dissenting.

L. P. Gagnon, Q.C., for the plaintiff, appellant.

Gustave Monette, Q.C., and *G. Monette, Jr.*, for the defendant, respondent.

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

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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 here arises out of the contract considered in the appeal of *City of Outremont v. Montreal Tramways Company*[1], which, entered into on March 12, 1906, embodied the provisions of by-law No. 72 of December 20, 1905. The suit was brought against the respondent as the successor in title to the tramways company under clause 37:

> The Company shall keep its tracks free from ice and snow to a depth not exceeding eight (8) inches from the ground surface and the Town may at its option remove the whole or such part of the ice and snow from curb to curb as it may see fit from any street or part of street in which cars are running, including the snow from the tracks and from the roofs of houses thrown or falling into the streets and that removed from the sidewalks into the streets, with the consent of the Town, and the Company shall be held to pay one half of the cost thereof.

Clause 41 deals with the duration of the franchise:

> 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 date of the contract to be based on the present By-law. 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, . . .

I have already construed that language to mean this; a franchise for an indefinite period, subject to expropriation of the undertaking at the end of 30 years or of each subsequent 5-year period thereafter. Clause 37 deals with a matter obviously annexed to the operation of the undertaking without limit of time.

The legislation of 1918, 8 Geo. V., c. 84, in what appears as a more or less standard form used in relation to this particular undertaking, supports that view; and with its relation to and effect on the contract before us, I have dealt in the other appeal.

[1] [1958] S.C.R. 82.

A new element is injected, however, by legislation enacted in 1950 and 1951. By 14 Geo. VI., c. 79, with amendments in 14-15 Geo. VI., c. 124, the entire tramways system serving Montreal and its environs was reorganized. Authority was given Montreal to create by by-law the respondent Commission, and to acquire by expropriation either the total capital stock of Montreal Tramways Company or its total undertaking. Acting under this authority the property has been acquired and is now being administered by the respondent.

The contention is made that by this legislation the respondent as the mandatary of the City has been given powers which enable it to operate the system in Outremont as well as other municipalities regardless of previous contractual arrangements or terms, in fact without any regulations whatever except what it may from time to time itself prescribe, or to which it may, in its operations, by some other law, not so far mentioned, be subject: and that the grant of such comprehensive powers is incompatible with the retention of any vestige of the original franchise. Such a view must depend upon the authority given the Commission and the general basis, within the language of the legislation, on which the future operations were to be conducted. In examining that question a clear distinction should be made, as in the 1918 legislation, between purely transportation or operating matters and matters affecting municipal interests as such.

It is said by Martineau J., delivering the reasons of the Court of Queen's Bench[1], that the transfer of franchises and rights mentioned in s. 52 of 1950, c. 79 must be taken to be rights of a class not clearly indicated, but not, in any case, to include those under which the previous operations were carried out. This view is based on the initial assumption that independent powers of a transcending character are vested in the Commission by which the previous franchises are superseded and the City of Montreal is given *carte blanche* to exercise powers which formerly the other municipalities, including the appellant, could not, even within their own bounds, exercise without specific legislative authority. The operation of a tramway affects not only the rights of a municipality but those of the public

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and the creation of a public nuisance in city streets, as such an unauthorized operation would be, must have legislative warrant to legalize it.

I can find no such paramount authority in the legislation mentioned. The contrary seems envisaged by s. 52:

> From the day on which the arbitration award shall be final, the city shall be absolute and inalienable owner of all the proprety included in the expropriation, as well as of all franchises, servitudes, rights of way and other rights of the Company concerning the expropriated undertaking.

In that provision the basic authority for the operation by the respondent is to be found; and in its absence there is nothing to furnish the substance of the terms, conditions and regulations which, it is argued, were impliedly superseded.

A brief review of the provisions of the two enactments will make this apparent. By s. 16 of the 1951 Act, the Commission is given the status of a corporation and is authorized to acquire and to own all property and to exercise all powers necessary for the execution of the statute; by s. 17 it may acquire and administer on behalf of the city "a public transportation system for travellers by tramways, by autobuses and other vehicles of the same type"; s. 18*b* provides for the vesting of absolute ownership of the property and "of all rights mentioned in section 52"; s. 19 enables the expropriation of any immoveable which may be required by the general system. Among the special features is that called "previous possession", that is, possession prior to the acquisition of title and by s. 47 during that possession the Commission may "exercise all franchises, servitudes, rights of way, and other rights of the Company [the Tramways Company] concerning its transportation system"; s. 47*b* speaks of "all the property moveable and immoveable and rights mentioned in section 52"; s. 48 gives the Commission the right to the possession of all the company's books, records and documents relating to the undertaking; s. 52 has already been set out; by s. 53 all property of the Commission shall be exempt from municipal taxes; by 53*a* the provisions of the contract between the City of Montreal and the tramways company contained in a sched. to 8 Geo. V., c. 84 cease to apply to the undertaking upon its acquisition; s. 56 deals with rates and makes any decision of the Commission subject to revision by the Public Service Board. By s. 57 "with the cooperation of

any interested city or town" the Commission may do whatever surface work it deems necessary to improve the conditions of transportation, including the widening of streets, the building of tunnels, grade separations at street intersections, the establishment of new lines and any other work calculated to relieve traffic congestion and provide the public with an adequate system of mass transportation, but it is not to undertake the construction of underground or elevated lines or express-ways; the Commission may also

> on its own authority, establish new lines, replace tramway lines by autobus or control bus lines, change their routes, and for any such purpose use any public street which it deems necessary or expedient in the territory of the city or of the metropolitan district.

Section 58 authorizes the City of Montreal "and the other cities or towns in the territory served by the Commission's transportation system" to guarantee the reimbursement of loans made by the Commission for the organization, etc., of the system. By s. 60 the Commission may, by by-law made under s. 20, which deals with expropriation, "adopt any other provisions and ordain any other measures which may be consistent with this act, in order to assure complete and equitable execution thereof".

I find nothing in these powers abrogating generally the agreements regulating the franchises in the various municipalities and leaving the Commission to act at large in the manner claimed. That construction would write s. 52 and the several references to it out of the legislation. In Outremont the City of Montreal is simply the owner and operator of the tramway in replacement of the Montreal Tramways Company: and to treat this restricted language as impliedly putting an end in their entirety to these agreements, of which there are a number, touching as they do the local arrangements that have harmonized the operation of the tramways with widespread municipal administration, would be an unwarranted extension of its plain meaning. When uniformity in municipal relations was intended, it was expressly provided as in s. 53 exempting all the property taken over from "all municipal taxes".

In some respects the respondent may act without the concurrence of the appellant as under s. 57; that deals with the establishment of new lines and the rearrangement or

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replacement of the existing facilities, but it does not touch the terms of operations thereafter. No right, liberty, franchise or privilege of any sort or description has been suggested in the Court of Queen's Bench or in this Court that furnishes any subject-matter for the language of s. 52 other than these contracts which embody the prior franchises and in that situation I find it quite impossible to exclude either them or the terms and conditions annexed to them.

The principle of law which applies in such a case is well exemplified in *Western Counties Railway Company v. Windsor and Annapolis Railway Company*[1]. At p. 188 Lord Watson states it in these words:

> The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of the respondent company, unless it appear, by express words, or by plain implication, that it was the intention of the Legislature to do so. That principle was affirmed in *Barrington's Case*, 8 Rep. 138 a., and was recognised in the recent case of *The River Wear Commissioners v. Adamson*, 2 App. Cas. 743. The enunciation of the principle is, no doubt, much easier than its application. Thus far, however, the law appears to be plain—that in order to take away the right it is not sufficient to shew that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right, it must also be shewn that the Legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights.

It is said finally that there is no *lien de droit* between the parties. But if the terms and conditions of the franchise embody an obligation annexed to its exercise, the transfer of the rights of the franchise by an Act of the Legislature effects a transfer as well of the correlative obligations. It cannot be imagined that where the legislation leaves in force cl. 37, and provides for the assumption of capital obligations and for the payment of operating costs, those of snow removal are excepted. By s. 53*e* of 1951, c. 124, in case of the expropriation of the capital stock of the company, when the total amount of the price has been paid, the Lieutenant-Governor in Council is authorized by proclamation to cancel the company's charter; and although no such provision seems to follow the expropriation of the undertaking, it cannot be inferred that the Legislature would intend the tramways company to continue under liability for a service with which it has no concern. By s. 53 "All the Commission's revenues shall be used to meet its

[1] (1882), 7 App. Cas. 178.

obligations and to operate, maintain and improve the transportation system of which it has the administration"; and by s. 18*a* all claims relating, among other things, to the operation, administration or control of the property entrusted to the Commission shall be made, and proceedings for their recovery brought, against the Commission. This necessarily implies that by the vesting of the property in the City the latter became substituted in all respects to the liabilities and obligations of the tramways company, which thereafter are to be enforced against the Commission as its mandatory. *Western Counties Railway v. Windsor and Annapolis Railway Company, supra,* is a good example of the legislative effect of such a transfer and the substitution of the *lien de droit* from the Tramways Company to the City is required by the principles laid down in that case.

I would, therefore, allow the appeal, set aside the judgments below and declare that the Commission is bound by the terms of cl. 37 of the contract of 1906. The City will have its costs in all courts.

The judgment of Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—Appellant's claim is for $23,781.08, representing one-half the cost of snow removal on certain streets in appellant's territory during the period from June 16, 1951, to January 20, 1953. Appellant claimed this amount under a specific provision of the franchise granted by the former Town of Outremont (now the City of Outremont) under the authority of which it contends respondent is operating its tramways in the said city.

The claim was submitted to the Superior Court in a stated case in accordance with the terms of art. 509 of the *Code of Civil Procedure* of the Province of Quebec. The present appeal is from a judgment of the Court of Queen's Bench[1] confirming the judgment of the learned trial judge, the Honourable Mr. Justice Elie Salvas, which declared that respondent was not indebted to appellant in the amount claimed.

The provisions of the contract between the Town of Outremont and the Montreal Street Railway Company (now the Montreal Tramways Company) dated March 12, 1906, are similar to, although not identical with, the

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provisions of the contract between the said company and the City of Westmount, which was considered by this Court in the appeal of the *City of Westmount v. Montreal Transportation Commission*[1] and which was argued before this Court immediately before the hearing of the present appeal.

Counsel for both parties to this appeal agreed that the same questions of law are involved in the determination of both appeals and this appeal was submitted on that basis without further argument.

For the reasons which I have given in the appeal of the *City of Westmount v. Montreal Transportation Commission*[1], which need not be repeated here, I would therefore dismiss the present appeal with costs.

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

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

Attorney for the defendant, respondent: E. Asselin, Montreal.