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QUEBEC RAILWAY, LIGHT & POWER COMPANY (RESPONDENT). } APPELLANT;

*May 27.
*June 17.

AND

MONTCALM LAND COMPANY (PETITIONER) .....

AND

THE CITY OF QUEBEC (INTERVENANT) ..... } RESPONDENTS.

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

Railway—Street railway company—Originally a provincial body—Incorporated by Dominion Act—Provincial public service commission—Board of Railway Commissioners for Canada—Jurisdiction—Constitutional law—B.N.A. Act (1867) s. 91, sub. 29; s. 92, sub. 10—Art. 114 C.P.C.

A street railway company operating within a province, originally incorporated by a provincial legislature but whose undertaking was subsequently declared by a Dominion Act to be a work for the general advantage of Canada, is not subject to the jurisdiction of a public service commission created by the province, but the execution of its powers is, by the provisions of the *Railway Act*, within the jurisdiction of the Board of Railway Commissioners for Canada.

Per Anglin C.J.C. and Mignault, Newcombe and Lamont JJ.—The *Railway Act* of Canada applies in the present case notwithstanding an agreement between the railway appellant and the city of Quebec providing for the reconciliation of differences between them by way of appeal to the Quebec Public Service Commission; such a clause cannot be interpreted to confer authority on the commission to regulate and direct works and operations which are within the exclusive powers of the Dominion Parliament. Rinfret J. expressed the opinion that this point raised the question of the constitutionality of a provincial statute and could not therefore be heard unless a notice has been previously given to the Attorney-General (Art. 114 C.P.C.)

Per Anglin C.J.C. and Mignault, Newcombe and Lamont JJ.—It was in the exercise of exclusive legislative authority that the Parliament of Canada enacted the provisions of the *Railway Act* authorizing the Board to regulate the operations of railway companies: this plainly follows from the constitutional distribution of legislative powers by the *British North America Act* (s. 91, sub. 29, and s. 92, sub. 10). Moreover, the Quebec legislature has expressly limited the jurisdiction of the Quebec Public Service Commission to matters falling under the legislative authority of the province.

Per Rinfret J.—The intervention of the city of Quebec in support of the land company's complaint against the railway appellant before the Public Service Commission did not confer on the latter a jurisdiction which did not exist *ab initio*.

Judgment of the Court of King's Bench (Q.R. 43 K.B. 338) reversed.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1) affirming a decision of the Quebec Public Service Commission and dismissing a declinatory exception as to the jurisdiction of the Commission to hear a complaint by the Montcalm Land Company against the appellant railway.

The material facts of the case and the question at issue are fully stated in the judgments now reported.

L. A. Cannon K.C. for the appellant.

O. L. Boulanger K.C. and *Auguste Lemieux K.C.* for the respondent Montcalm Land Company.

Auguste Lemieux K.C. for the respondent the city of Quebec.

The judgment of the majority of the court (Anglin C.J.C. and Mignault, Newcombe and Lamont J.J.) was delivered by

NEWCOMBE, J.—The Montcalm Land Company, petitioner, now respondent, by its petition, dated 3rd June, 1926, to the Quebec Public Service Commission, sought to obtain from the Commission an order that the Quebec Railway Light and Power Co., now the appellant, should cause its tramcars to run more frequently, alleging that the appellant company was a public service within the meaning of the *Public Service Commission Act* of Quebec; that by contract of 24th March, 1925, between the city and the railway company, which was confirmed and validated by Act of the legislature of Quebec, c. 91 of 1926, the city had granted to the company, upon conditions provided by the contract, the renewal of its railway franchise within the city, upon the streets traversed at the date of the contract, or to which the company should extend its system with the consent of the city; that among these conditions was one which required the tramcars to run at intervals of not more than five minutes until 8 o'clock in the evening; that, subject to the contract and the statute, the appellant company carried on in the city, as part of its system, a service, known as St. Sacrement or Marguerite Bourgeoys, to serve that part of the city situated in the parish of St. Sacrement;

(1) (1927) Q.R. 43 K.B. 338.

that this was a growing and important part of the city; that the petitioner had large interests there, possessing taxable property valued at $51,650; that the appellant was bound by law and by its contract to provide on that circuit a five minute service as in other parts of the city; that it had failed to give such a service, and that it was in the general interest of the inhabitants of the district, and of the petitioner especially, that the appellant should be compelled to fulfil its obligations essential to the development and progress of that quarter of the city, and to give there a five minute service; and the petitioner submitted, by way of conclusion, that the Commission should order the appellant to provide upon the circuit in question a service at intervals of not more than five minutes up to 8 o'clock in the evening, and thereafter at intervals of not more than ten minutes. The appellant company pleaded a declinatory exception, dated 23rd June, alleging that the matter was not within the jurisdiction of the Quebec Public Service Commission because it (the appellant) was a corporation under the laws of the Dominion, by which its undertaking had been declared to be a work for the general advantage of Canada, and moreover that, by provision of the contract, it was stipulated that breaches of the appellant's obligations arising under it should be submitted to the Recorder's Court of the city of Quebec; that the city had not complained of the tramway service upon the St. Sacrement circuit, and that the petition should be dismissed.

The declinatory exception was heard before the Commission on 29th June. Subsequently the city pleaded an intervention, dated 30th June, though not served until 7th July, by which the city declared in support of the petition. The intervention referred to the appellant's contention that the matter was not within the jurisdiction of the Commission, and submitted that, by clause 59 of the contract, which will presently be quoted, the appellant company had accepted the Commission as the tribunal chosen for the decision of all questions relating to the interpretation and to the execution of the contract, and, moreover, repeated in substance the allegations of the petition, concluding as follows:

Pourquoi l'intervenante déclare appuyer la demande de la Montcalm Land Company Limited, afin de faire disparaitre tout doute quant

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à la juridiction de la Commission des Services Publics en la présente cause, et elle demande que les conclusions de la requête de la Montcalm Land Co. Ltd. soient accordées, et que la Quebec Railway Light & Power Company soit enjointe, par une ordonnance de cette Commission, à faire circuler ses tramways à des intervalles de pas plus de cinq minutes (sauf de huit heures du soir à une heure du matin, alors que le service se fera à des intervalles de pas plus de dix minutes) sur le circuit "Marguerite-Bourgeois," le tout avec dépens.

Apparently there was no further hearing before the Commission, but on 16th July it issued an order dismissing the declinatory motion. The order, after referring to the appellant company's Act of incorporation and to clauses 32 and 59 of the contract between it and the city, concludes as follows:

Lorsque cette motion a été présentée, la cité de Québec n'avait pas encore pris position dans cette cause et le président de la Commission, qui doit décider des questions de droit et de compétence, aurait été d'opinion que la motion de l'intimée était bien fondée, mais depuis cette date, savoir le 7 juillet, la cité de Québec est intervenue dans la cause et elle déclare appuyer la demande de la requérante afin de faire disparaître tout doute quant à la jurisdiction de la Commission. Les allégués de l'intervention sont au même effet que ceux de la requête, de sorte que la cité de Québec se joint à la requérante pour nous demander de rendre l'ordonnance indiquée aux conclusions de la requête.

La loi de la Commission, qui est le chapitre 17 des statuts refondus de 1925, a été amendée par le statut 16 Geo. V, chapitre 16. En vertu de cet amendement, il est déclaré à l'article 28h, paragraphe 12, que la Commission a jurisdiction sur toute matière référée à la Commission par entente entre un service public et une municipalité.

En présence de l'intervention de la cité de Québec, le président de la Commission est d'opinion que la Commission a jurisdiction pour entendre la présente demande et, en conséquence, la Commission renvoie la dite motion d'exception et ordonne aux parties de procéder au mérite dans le délai ordinaire.

I apprehend that the city must be taken to have intervened as a person interested in the event of the proceedings between the land company and the railway company, and that the intervention is admissible and affects those proceedings only in so far as the intervenant's presence and allegations are material to maintain the petitioner's case. It is the formal and declared purpose of the intervenant to support the petitioner's conclusion, and the intervention introduces no variation of the issue, although it is perhaps suggested by the order of the Commission that, in view of the intervention, the Commission has a jurisdiction which otherwise it would not have had. It is apparent that the sole project of the proceedings, both petition and intervention, is to make use of

the mandatory powers of the Commission to compel the railway company to render the service claimed, and it seems to be true, as averred in the joint factum of the two respondents, that

> the subject matter of the petition submitted to the Quebec Public Service Commission concerns nothing but the operation of the tramways in the streets of Quebec city exclusively.

From the order of the Commission the appellant appealed to the Court of King's Bench where different opinions were expressed. The appeal was heard before Greenshields, Dorion, Flynn, Allard and Howard JJ. Greenshields and Allard JJ. affirmed the jurisdiction of the Commission, holding that, in respect of the matter of complaint, the Commission had jurisdiction, notwithstanding the fact that the appellant company was incorporated by and derived its powers from the Parliament of Canada. Dorion J. considered that the decision of the Commission was not final, and therefore not appealable under the statute, and that the appeal should for that reason be rejected; while Flynn and Howard JJ. were of the opinion that the Commission was without jurisdiction and that the exception should be upheld. In the result, by the formal judgment it was found that there was no error in the judgment rendered by the Commission, and its decision was affirmed.

In considering the question of the jurisdiction of the Commission which is thus presented it becomes necessary to refer to the legislation affecting the case, and I shall endeavour to do so with as much brevity as possible. There are no admissions in the record, nor is there any evidence, except as arising from the statutes and the scheduled contract.

It appears that the Quebec, Montmorency and Charlevoix Railway Company was incorporated by the legislature of Quebec, by c. 44 of 1881, with power to build and work a railway from a point in the city of Quebec to the Saguenay river, and to construct and work branch lines, also to build bridges, wharves and all other works necessary for the construction and working of its line. Additional powers were conferred by subsequent Acts of the province, including power to sell, lease or amalgamate with any other railway company, to use electricity or other motive power besides steam, to extend the line of

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its railway westerly towards St. Sauveur, and, by c. 71 of 1894,

to extend and operate its railway in the city of Quebec and the neighbourhood thereof by building branch and connecting lines in connection with its main line, and for this purpose to cross or run along any of the streets of the city of Quebec or roads in the neighbourhood thereof, and for the purpose thereof, to erect above ground all necessary constructions, including posts and other supports essential for the working of an electric railway, the whole to be subject to the consent of the council of the city of Quebec and of the Quebec North Shore Turnpike Road Trustees, and upon the conditions to be agreed upon between them and the company, with respect to the streets and roads under their respective control.

In the following year, c. 59 of 1895 of the Dominion, upon the recitals that the Quebec, Montmorency and Charlevoix Railway Company had been incorporated by Act of the legislature of Quebec, 44 and 45 Vict. c. 44, and that this Act had been amended by the Acts to which I have referred; that it was expedient to embody in one Act the provisions remaining in force and applicable to the company, and that the company had by its petition prayed for such consolidation, and that it be declared a body corporate within the jurisdiction of the Parliament of Canada, the undertaking of the Quebec, Montmorency and Charlevoix Railway Company was declared to be a work for the general advantage of Canada, and

the company as now organized and constituted under the said Acts of the province of Quebec is hereby declared to be a body corporate and politic within the legislative authority of the Parliament of Canada; and this Act and *The Railway Act* of Canada shall apply to the company and its undertaking, instead of the said Acts of the province of Quebec and *The Railway Act* of Quebec; provided that nothing in this section shall affect anything done, any rights or privileges acquired, or any liability incurred under the said Acts of the province of Quebec prior to the time of the passing of this Act,—to all which rights and privileges the company shall continue to be entitled and to all of which liabilities the company shall continue to be subject.

It is also enacted that the company may use and employ electricity and provide for the operation and maintenance of its line as an electric system, either in whole or in part; and may lay out, construct, equip and operate the lines of railway along, over and throughout all or any of the streets in the city of Quebec, or roads in the neighbourhood thereof, or in the adjoining parishes on the north shore of the river St. Lawrence, but that no such power is to be exercised within the limits of the jurisdiction of the city of Quebec, the Quebec North Shore Turnpike

Trustees or any municipality, except with the prior consent of the city, trustees or municipality respectively, and upon such conditions as they may severally consent to and agree upon. It is moreover provided, by s. 15, that

the company may enter into an agreement with the city of Quebec for the acquiring of the franchises, rights, immunities and privileges necessary for the construction and maintenance of a system of electric railway upon and throughout the streets of the said city;

also that

the company may acquire the privileges, franchises, railways, works, plant, equipment and materials, of the Quebec Street Railway Company and the St. John Street Railway Company, and may convert the lines of the said companies into an electric system, and may conduct and manage their affairs in such manner not inconsistent with the provisions of this Act, as appears to the company most advantageous, and as is sanctioned by the city of Quebec.

Section 17 provides that:

17. The municipal council of any city, town, village or municipality through which the said railway is constructed may, subject to the provisions of this Act, make and enter into an agreement with the company relating to the construction of the said railway, for the paving, macadamizing, repairing and grading of the streets or highways occupied by the line of railway and the construction, opening of and repairing of drains or sewers, and the laying of gas and water-pipes in the said streets and highways, the location of the railway and the particular streets along which it shall be laid, the pattern of rails, the time and speed of running the cars, the amount of fares to be paid by passengers, and the rates to be paid on freight, the time in which the works are to be commenced, the manner of proceeding with the said works and the time for completion, and generally for the safety and convenience of passengers.

By c. 85 of 1899 of the Dominion, the name of the Quebec, Montmorency and Charlevoix Railway Company was changed to "The Quebec Railway, Light and Power Company", and the statute of 1895 was further amended; also the acquisition by the company of the Quebec District Railway, by deed of 29th June, 1898, and of the Montmorency Electric Power Company's property was ratified and confirmed.

By notarial contract of 24th March, 1925, between the city of Quebec and the Quebec Railway, Light and Power Company, which is ratified and confirmed by and made part of c. 91 of 1925 of Quebec, entitled an Act to amend the charter of the city of Quebec, it is recited that the company has built, operates and maintains a system of tramways in the city of Quebec in accordance with the

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provisions of a contract of 17th July, 1895, and that it is proposed to renew the franchises of the company, and it is agreed that it

> shall be lawful for the company to operate, maintain and extend under the conditions hereinafter set forth, a railway to carry passengers run by electricity or otherwise, except by steam, in the streets or parts of the streets where the tramways are presently running.

Many details are set forth in the contract affecting the construction and operation of the company's railway, and the relations between the company and the city touching the terms and conditions of renewal of the franchise. These include, among other terms, provisions for the extension of the railway lines to other streets at the request of the city; the carriage of freight; supervision and approval by the city engineer of construction upon the streets; guage of the railway; approval of the pattern of rails to be used; removal of excavated material; indemnity to the city for costs of repair to the streets; removal of excavated material; expedition in the performance of any works undertaken by the company upon the streets; removal of snow and ice; to ensure that the cars shall not be obstructed by other vehicles; double tracks where necessary; to prevent the crowding of cars; time tables; protection against accidents; light and heat; fares; the use of Montmorency Park for the construction and working of an elevator for the company's purposes; preference in the company's employment of resident taxpayers of the city; that the company's wages shall be paid every two weeks; hours of labour; conformity to city by-laws; establishment of work-shops within the city; manufacture of rolling stock within the city; that the company shall not transfer its railway or franchises without consent of the city; that the city shall not authorize competing lines within the city; the privileges granted by the contract to endure for thirty years; procedure and expropriation in case of renewal, or failure to renew, the franchises; insolvency of the company; payment to the city every year of 5 per cent. of the company's gross receipts within the city; water and school taxes; free carriage of members of the city police force, fire brigade and signal service; transfer to the city of a parcel of land which is described, also of a public right of way upon another parcel.

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Clauses 31 and 32 contain the stipulations for the alleged breach of which the proceedings were taken; they provide that:

31. The cars shall run from 5 o'clock a.m. until 1 o'clock a.m. on all the company's lines.

32. The cars shall follow each other at intervals of not more than five minutes, except from 8 o'clock at night until 1 o'clock in the morning, during which space of time they shall follow each other at intervals of not more than 10 minutes. The council may by resolution modify the hours fixed for the tramway service in the various sections. This last provision shall be applicable only in the parts of the city where such circulation is required for the needs of the public.

By clause 54, if the company neglect to comply with or infringe any of the conditions or obligations imposed by the contract, it shall incur a penalty not exceeding $100 for every day of neglect, or during which it shall infringe, and it is provided that the penalty shall be recovered before the Recorder's Court of the city in the same manner as any other fine or penalty.

By clause 13 it is recited that the company is using the system known as the trolley system and provided that in the event of a better system coming into general use the company shall, at its expense, be bound to adopt it, subject to the decision of three arbitrators to be named.

By clause 50 it is provided that the company shall be entitled to renewal of its contract for a further period of thirty years, unless the city prefer to expropriate the railway system by paying the value, plus 10 per cent, which is to be ascertained by arbitrators to be appointed. The city relies upon clause 59 to justify its intervention; it is thereby provided as follows:

59. Unless it is expressly provided for in one of the clauses of the present deed, it is expressly understood that in the event of any difficulty or difference of opinion arising between the parties, or in the event of any disagreement between them, with reference either to this deed, or to any one or all the conditions herein stipulated, or with reference to the interpretation thereof, or with reference to the execution of any or all the obligations assumed by the parties respectively, or with reference to any cause or matter relating thereto, be it foreseen or not foreseen by the present deed, the parties shall go before the Quebec Public Service Commission which they choose as a court elect, and to whose jurisdiction they shall be submitted for all the purposes hereinabove set forth.

Should this court cease to exist, and in the event of another court being established to take its place, the latter court shall have the powers and jurisdiction of the former for the purposes of these presents.

If from now until then a tramway commission for the city is established, or if a provincial tramway commission is established, either one or the other of these tribunals shall have jurisdiction.

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It is in my view of the case unnecessary to determine precisely the application and effect of this clause. It is preceded by two clauses stipulating for the determination of questions of fact by arbitrators, and it is intended I think to provide for the reconciliation of differences which may arise between the railway company and the city within the scope of the capacity or powers with which the Commission is, by the provincial statute, competently endowed; there can be no doubt that, within these limits, the variety of the provisions of the contract, which I have endeavoured briefly to outline, affords material for the working of the clause; but it cannot be assumed, nor scarcely imagined, that the parties or the legislature intended, in framing or sanctioning such a clause, to confer authority to regulate and direct works and operations which are within the exclusive powers of Parliament. Indeed, as will presently appear, the legislature has expressly limited the jurisdiction of the Commission to matters falling under the legislative authority of the province.

The provisions with regard to the constitution and jurisdiction of the Quebec Public Service Commission are to be found in the *Public Service Commission Act* of Quebec, R.S.Q., 1925, c. 17, as amended by c. 16 of 1926. The Commission is a body consisting of not less than three nor more than four members, appointed by the Lieutenant Governor in Council, and it has enumerated powers of regulation and control over public services within the province. " Public Service ", within the definition of the statute, includes every corporation other than a municipal or school corporation, that owns, operates, manages or controls any system, works, plant or equipment for the conveyance of passengers or goods over a railway or tramway; but it is declared that the application of the Act, and the jurisdiction of the Commission, extend only to matters falling under the legislative authority of the province. By division IV of the Act, as enacted by c. 16 of 1926, no public service is to begin the construction or operation of any line, plant or system without first having obtained the approval of the Commission, which is to be granted whenever, after investigation, it finds that such construction or operation is necessary or convenient for the public benefit. Charges demanded or received by any

public service shall be just and reasonable, and schedules of rates, fares and tolls, and classifications and rules pertaining to the service, are to be forwarded to the Commission. The Commission has power to regulate or determine these, also the extent of the services to be rendered, and the terms and conditions upon which a public service may enter or do business within a municipality, also contestations between a public service and a municipality with regard to the performance of agreed terms and conditions; the commission having authority to change such terms and conditions as may be in its opinion necessary or desirable. The Commission also has jurisdiction in any dispute relating to tramway rates and operations that a tramway company, other than the Montreal Tramways Company, and one or more municipalities agree by resolution to submit to it, whether or not a contract exist between them, also

in all matters referred for the decision of the Commission by agreement between any public service and any municipality or other interested party, and the decision of the Commission shall then be binding upon the parties.

Generally it is enacted that the Commission shall have supervision over all public services as defined by the statute

and may make such orders regarding quality of service, equipment, appliances, safety devices, extension of works or systems, reporting, rules, regulations, requirements and practices affecting or pertaining to its charges or service and other matters, as are necessary for the safety or convenience of the public, or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

The Commission may also conduct all inquiries necessary for the obtaining of information as to the manner in which any public service complies with the law, or as to any other matter or thing within the jurisdiction of the Commission.

Rigorous powers are conferred upon the Commission for the enforcement of its orders, and it may for this purpose forcibly or otherwise enter upon, seize and take possession of the whole or part of the moveable or immoveable property of a disobedient public service, with its books and offices; assume and take over the powers, rights and functions of the directors and officers of the public service, including powers of employment and dismissal of officers and servants, for such time as the Commission continues

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to direct the management, and all officers and servants are required to render obedience to the Commission, or those whom it places in authority in the management of all departments of the undertaking. Moreover, if it be proved that a public service has not complied with an order given by the Commission, and if the Commission be of the opinion that there are no effectual means of compelling the public service to obey such order, it shall transmit to the Attorney General a certificate of default, which, after public notice in the Quebec Official Gazette, shall be ground for an action to dissolve the public service, or to annul the letters patent incorporating it.

The decision of the Commission upon any question of fact within its jurisdiction is final, but, by leave of a judge, an appeal lies to the Court of King's Bench, in conformity with art. 47 of the Code of Civil Procedure, from any final decision of the Commission upon any question as to its jurisdiction or upon any question of law, except in expropriation matters.

The *Railway Act* of the Dominion, c. 68 of 1919, applies to all railway companies and railways, except government railways, within the legislative authority of the Parliament of Canada, and the word "railway" is by this Act defined to mean any railway which the company has authority to construct or operate, and, except when the context is inapplicable, includes street railway and tramway. It provides for the constitution of the Commission known as the Board of Railway Commissioners for Canada. Jurisdiction is conferred upon this Board to enquire and to hear and determine any application by or on behalf of any party interested complaining that any company or person has failed to do any act, matter or thing required to be done by this (the general) Act or the special Act. There are comprehensive provisions authorizing the Board to regulate the operations of railway companies subject to the legislative authority of Canada, including, among others, s. 35 whereby it is provided that:

35. Where it is complained by or on behalf of the Crown or any municipal or other corporation or any other person aggrieved, that the company has violated or committed a breach of an agreement between the complainant and the company—or by the company that any such corporation or person has violated or committed a breach of an agreement between the company and such corporation or person,—for the provision, construction, reconstruction, alteration, installation, operation, use

or maintenance by the company, or by such corporation or person, of the railway or of any line of railway intended to be operated in connection with or as part of the railway, or of any structure, appliance, equipment, works, renewals or repairs upon or in connection with the railway, the Board shall hear all matters relating to such alleged violation or breach, and shall make such order as to the Board may seem reasonable and expedient, and in such order may, in its discretion, direct the company, or such corporation or person, to do such things as are necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as constitute a violation or a breach thereof.

Decisions or orders of the Board may be made a rule, order or decree of the Exchequer Court, or of any superior court of any province of Canada, and shall be enforced in like manner as any decree or order of such court, and any rule, regulation, order or decision of the Board shall, when published by the Board, or by leave of the Board, for three weeks in the Canada Gazette, and while the same remains in force, have the like effect, as if enacted in the *Railway Act,* and all courts shall take judicial notice thereof.

Therefore, if the appellant company have the powers which the respondents are endeavouring to compel it, by the authority of the Quebec Public Service Commission, to execute, the execution of these powers by the company is, by the provisions of the *Railway Act,* within the jurisdiction of the Board of Railway Commissioners for Canada to direct and regulate subject to the provisions of that Act. It was in the exercise of exclusive legislative authority that the Parliament of Canada enacted these provisions of the *Railway Act;* this plainly follows from the constitutional distribution of legislative powers. It was said by Lord Atkinson, pronouncing the judgment of the Judicial Committee of the Privy Council in *City of Montreal* v. *Montreal Street Railway,* (1),

> Now the effect of subsection 10 of s. 92 of the *British North America Act* is, their Lordships think, to transfer the excepted works mentioned in sub-heads (*a*), (*b*) and (*c*) of it into s. 91, and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament.
>
> These two sections must be read and construed as if these transferred subjects were especially enumerated in s. 91, and local railway as distinct from federal railway were specifically enumerated in s. 92.

See also *Madden* v. *Nelson and Fort Sheppard Railway Company* (2); *Toronto* v. *Bell Telephone Company* (3),

(1) [1912] A.C. 333, at p. 342. (2) [1899] A.C. 626.
(3) [1905] A.C. 52, at p. 57.

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Moreover, not only are the works, including railways, described in clause 10 of s. 92 of the *British North America Act, 1867*, thus affirmatively declared to be within exclusive Dominion authority, but it is expressly provided by clause 29 of s. 91 that they are excluded from the matters assigned to the legislatures.

Now the principal argument of the respondents rests upon the ground that, when, in 1895, by c. 59 of the Dominion, the undertaking of the Quebec, Montmorency and Charlevoix Railway Company was declared to be a work for the general advantage of Canada, the Quebec Electric Street Railway did not, it is said, form part of that undertaking or work, and that the tramway, being in its nature a local work, was not affected by the declaration, and therefore never became subject to the legislation or powers of Parliament. I find it difficult to realize however that the operation of any street railway at Quebec which the company was authorized to construct or acquire was not intended to be embraced in the declaration. It is certainly not open to question that at the time of the declaration the provincial undertaking of the company included powers to construct and operate by electricity a railway upon the streets of Quebec, and it appears by recital in the scheduled contract that the system of appellant's tramways had been built and was being operated and maintained under the provisions of a contract of 17th July, 1895, a date five days antecedent to the Act, c. 59 of 1895 of Canada, by which the company became a Dominion corporation, and by which its undertaking was declared to be a work for the general advantage of Canada.

But I do not find it necessary to determine the scope of these powers, or the extent of the declaration, or whether it includes the tramway as subsequently acquired or constructed. The Dominion statutes relating to the appellant company are so expressed as to confer or recognize the electric tramway powers which the appellant company is exercising, and, by the legislation of 1895, the company had acquired Dominion capacity and powers with which the provincial legislature could not interfere.

Now, as I have said, the object of the respondents proceedings is to invoke the statutory powers of the Public Service Commission of Quebec for the purpose of com-

pelling the appellant railway to operate its trams in accordance with the requirements of the local Act of 1925, as interpreted by the Commission. The jurisdiction invoked is that of the local statutory Board, not that of the ordinary tribunals, and that jurisdiction, with the extraordinary powers which the Commission possesses, is set in motion against the Dominion corporation for the regulation of railway powers conferred by the Dominion, or which Parliament professes to confer. If, as would seem to follow from the respondent's argument, these tramway powers be *ultra vires* of the Dominion, the petition and intervention fail because the appellant company cannot, by authority of a statute of Quebec, be compelled to execute powers which do not belong to it; while, if the powers exist and may be exercised, they are Dominion powers and not within the authority of the legislature of Quebec. There is an apposite passage in the judgment of the Lord Chancellor in *Madden* v. *Nelson and Fort Sheppard Railway Company* (1),

> It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the provincial parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them and is, therefore, manifestly *ultra vires*.

One must look to what the respondents' claim involves; it is nothing less than provincial statutory compulsion of a Dominion railway corporation, either to exercise powers which Parliament has not conferred, or, in the exercise of its competent Dominion powers, to submit to provincial review and regulation, followed in either case by the consequence that, for failure to comply with the provincial order, the company may forcibly be deprived of its property, powers, rights and management, and ultimately subjected to an action for its dissolution; and this notwithstanding what is undoubtedly true that neither the constitution and powers of the company nor its authorized undertaking is subject to the legislative authority of the province. It is needless to say that these things cannot be done.

This conclusion disposes of all the grounds upon which the respondents rely in support of the petition, and it is

(1) [1899] A.C. 626, at p. 628.

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unnecessary to make any observations upon that part of the appellant's case which is concerned with the Recorder's Court of Quebec.

The respondents raised a preliminary point that this Court had not jurisdiction to entertain the appeal. It was said that the judgment of the Court of King's Bench was not pronounced in a judicial proceeding, and was not final. The answer is to be found in the definition of "judicial proceeding" and of "final judgment" as contained in the *Supreme Court Act*, see c. 32 of 1920, s. 1. The Court of King's Bench in disposing of the appeal from the Public Service Commission was not exercising merely regulative, administrative, or executive jurisdiction, and the judgment of that court determined a substantive right of the appellant which was in controversy in that proceeding.

The appeal should be allowed and the petition and intervention should be dismissed, with costs throughout.

RINFRET J.—The Quebec Railway, Light & Power Company est une corporation fédérale soumise à l'autorité législative du Parlement du Canada et, en particulier, au contrôle de la Commission des Chemins de fer du Canada.

The Montcalm Land Company, par voie de requête, s'est adressée à la Commission des Services Publics de Québec pour obtenir de cette dernière un ordre enjoignant à The Quebec Railway Company de faire circuler ses tramways sur un circuit désigné à

des intervalles de pas plus de cinq minutes, sauf de huit heures du soir à une heure du matin, alors que le service se fera à des intervalles de pas plus de dix minutes.

La Commission des Services Publics de Québec, qui est un corps créé par la législature de Québec et investi de pouvoirs exclusivement provinciaux (R.S.Q. 1925, c. 17), n'avait pas juridiction pour connaître de cette requête.

The Quebec Railway Company déclina donc la compétence de la Commission par voie d'exception déclinatoire.

Là-dessus, la cité de Québec, invoquant un contrat entre elle et The Quebec Railway Company, intervint volontairement dans l'instance pour

appuyer la demande de The Montcalm Land Company Limited, afin de faire disparaître tout doute quant à la juridiction de la Commission des Services Publics en la présente cause,

et demanda

que les conclusions de The Montcalm Land Company Limited soient accordées.

Sur quoi le président, au nom de la Commission des Services Publics, rendit une ordonnance en date du 16 juillet 1926 déclarant que, sans l'intervention de la cité de Québec, il eût

été d'opinion que l'exception déclinatoire était bien fondée,

mais que l'intervention de la cité de Québec avait remis les choses au point.

Le contrat entre la cité et The Quebec Railway Company prévoit que.

les parties devront s'adresser à la Commission des Services Publics de Québec, qu'elles choisissent comme tribunal élu et à la juridicition de laquelle elles seront soumises pour toutes les fins ci-haut exprimées.

En plus, depuis le statut 16 Geo. V, chapitre 16, la Commission a juridiction

sur toutes matières référées à la commission par entente entre un service public et une municipalité ou autre partie intéressée, et sa décision est alors obligatoire pour les parties.

Le président décida donc que, en présence de l'intervention de la cité de Québec, la Commission avait juridiction en l'espèce.

Cette décision ne fut pas mise de côté par la Cour du Banc du Roi par suite des circonstances suivantes: un juge fut d'avis que la décision n'était pas finale et que le droit d'en appeler n'existait pas. Deux des juges furent d'avis que la Commission était compétente sur la requête de la seule compagnie Montcalm et indépendamment de l'intervention de la cité. Les deux autres juges, au contraire, exprimèrent l'opinion qu'il y avait défaut absolu de juridiction sur la requête de la compagnie Montcalm, même avec l'appui de la cité de Québec.

La question nous est maintenant soumise, à la suite d'une permission spéciale octroyée par la Cour du Banc du Roi.

Je suis d'avis que le pourvoi en appel de The Quebec Railway Company doit être accueilli pour la raison qui suit:

La Commission des Services Publics de Québec n'est pas compétente à connaître de la requête de la compagnie Montcalm, parce qu'elle prend des conclusions et demande des injonctions contre une compagnie fédérale et en des matières qui relèvent de l'autorité législative fédérale. Il

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ne s'agit ici nullement de la référence à la commission par entente entre un service public et une municipalité prévue au paragraphe 12 de l'article 28h de la loi de 1926 (16 Geo. V, c. 16). Cet article ne pourrait d'ailleurs avoir son effet qu'entre le service public et la municipalité qui auraient convenu de la référence.

L'intervention de la cité de Québec n'a pu modifier le caractère originaire de l'instance. D'une requête concluant à l'émission d'ordres impératifs, elle n'a pu faire une référence. Et si la commission manquait de la juridiction nécessaire pour connaître de l'instance originaire, l'intervention de la cité de Québec à l'appui de cette instance et pour faire accorder les conclusions de la requête de la compagnie Montcalm n'a pu conférer à la Commission une juridiction qui faisait défaut *ab initio*. L'intervention n'a pas transformé la nature de la demande.

Ainsi, (dit Glasson, Procédure Civile, éd. de Tissier, vol. 1, p. 940), si l'instance principale est annulée, par exemple pour nullité de l'ajournement ou pour cause d'incompétence, l'intervention tombe avec l'instance principale.

De même Japiot, dans son Traité de Procédure, p. 517, no. 828:

L'intervention est une demande *principale*, mais *non introductive d'instance*, et par suite non soumise au préliminaire de conciliation. Mais elle suppose un procès déjà engagé et constitue un développement, une extension de l'instance pré-existante; elle en implique la validité; les juges ne pourraient pas prononcer sur la prétention de l'intervenant, si la demande originaire était repoussée pour incompétence du tribunal ou pour vice de forme antérieur à l'intervention.

Pour ces raisons, je crois que l'intervention de la cité de Québec n'a pu apporter à la Commission des Services Publics une juridiction qui lui faisait défaut dès le début de l'instance. La requête de la compagnie Montcalm devait être rejetée faute de compétence et l'intervention tombait avec elle.

Je crois donc l'appel bien fondé. Il devrait être accordé avec dépens devant cette cour et devant la Cour du Banc du Roi et l'exception déclinatoire devrait être maintenue.

Le jugement ainsi formulé ne prononce pas sur une simple question de procédure. Il s'agit ici d'une question de juridiction. Et la solution est suffisante pour trancher le point en litige.

J'ai pris connaissance du jugement de mon collègue, M. le juge Newcombe, auquel j'ai compris que la majorité de la cour avait décidé de se rallier. A mon humble avis,

ce jugement exprime des vues sur la validité de la clause de référence contenue dans le contrat entre la cité et la compagnie (clause 59) et dans la loi de la Commission des Services Publics (16 Geo. V, c. 16, art. 28h, par. 12).

Le contrat entre la cité de Québec et la Quebec Railway Company est devenu loi de la province (1925, c. 91, art. 5). Cette cour, exerçant sa juridiction d'appel, doit rendre le jugement qui aurait dû être prononcé par le tribunal dont est appel (Loi de la Cour Suprême, art. 51). Dans le présent cas, la Cour du Banc du Roi de la province n'aurait pu adjuger sur la validité de l'article discuté de la Loi des Services Publics ou de la clause du contrat sans qu'un avis fût donné au Procureur-Général, conformément au Code de Procédure Civile, art. 114. La prescription est impérative (*Le Roi* v. *Carrier*), (1) et n'a pas été suivie en l'espèce. Très respectueusement, je crois que l'avis au Procureur-Général était une condition préalable obligatoire, avant de mettre en question la validité de ces lois.

Appeal allowed with costs.

Solicitors for the appellant: *Taschereau, Cannon, Parent & Taschereau.*

Solicitor for the respondent Montcalm Land Company: *Oscar Boulanger.*

Solicitors for the respondent The City of Quebec: *Chapleau & Thériault.*