1923
*May 16.
*Oct. 9.

THE CITY OF HULL (DEFENDANT) . . . . . APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Statute—Construction—Municipal law—Hull city charter—Interpretation (Q.) 1908, 8 Edw. VII, c. 88, s. 392a.

With a view to the beautification of the cities of Ottawa and Hull, the Dominion Government passed an order in council providing that a commission be constituted consisting of at least six members, including the mayors of both cities, charged with the details of taking all necessary steps to perfect such plan, the cost of the plan to be borne by the government for one-half and by the cities of Ottawa and Hull proportionally to their population for the other half. This was communicated to the city appellant with a request that it state whether it was willing to pay its share of the expenses, and the city council at a special meeting passed a resolution approving of the project submitted and appointing a committee to confer with the government and the other bodies interested. Subsequently the city appellant passed another resolution that having heard the report of its representatives, it approved of the project as submitted. This was communicated to the government which thereupon by order in council appointed the commission, the mayor of Hull becoming a member. He was present at most meetings and copies of plans prepared by the commission were sent to the city which obtained leave to use parts thereof to advertise the city. The appellant's charter, as amended by 8 Edw. VII, c. 88 provides (s. 392*a*) that "no resolution of the council authorizing the expenditure of money shall be adopted or have any effect until * * * —and also that "the city shall not be liable for the price or value of work done * * * unless * * *" "—a certificate of the city treasurer is produced establishing that there are funds available appropriated for the particular object for which payment is sought; and no right of action shall exist against the city unless the foregoing formalities are strictly observed, notwithstanding that the city may have benefited by any such * * * work done * * * or other services rendered." By the present action, the government seeks to recover the city appellant's share, $6,500.32.

Held, Idington and Brodeur JJ. dissenting, that in the absence of such a certificate by the city treasurer, no right of action exists in favour of the government to recover from the city appellant the amount claimed.

Judgment of the Exchequer Court ([1923] Ex. C.R. 27) reversed, Idington and Brodeur JJ. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada (1) maintaining the respondent's action.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1923] Ex. C.R. 27.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

R. V. Sinclair K.C. for the appellant.

Nap. Champagne K.C. for the respondent.

IDINGTON J. (dissenting).—This is an appeal from a judgment of the Exchequer Court of Canada (1) in a case tried by Mr. Justice Audette wherein he adjudged that the appellant was liable to pay the respondent the sum of $6,560.32.

The relevant facts (which are undisputed) are fully set forth in the reasons of the said learned trial judge.

I agree in all the essential features of the reasoning of the said judge and therefore conclude that this appeal should be dismissed with costs.

I observe amongst the cases cited by the counsel for the appellant the case of *Larin* v. *Lapointe* (2), as disposed of at one stage in the Superior Court of Quebec.

That case ultimately came before this court (3) and the majority of us who heard it, relying upon much more stringent provisions in the charter of the city of Montreal than exist in appellant's charter, and are relied upon by counsel for the appellant herein, and applying said provisions, accepted the view taken by the Court of Review and allowed the appeal therein.

In due time that was appealed from to the Judicial Committee of the Privy Council. That court reversed us, as appears by the case of *Lapointe* v. *Larin* (4).

The court above, to put the result briefly, held that the council, having authorized what was done and complained of, the resolution was valid.

If that is applied to what is argued for herein by appellant's counsel it should, I submit respectfully, sweep aside the major part of his argument and reduce the question to the narrow compass of the necessity for a by-law which does not seem to me necessary to found such a piece of business as the contract in question herein.

(1) [1923] Ex. C.R. 27.
(2) [1909] Q.R. 36 S.C. 249.
(3) [1909] 42 Can. S.C.R. 521.
(4) [1911] A.C. 520.

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DUFF J.—The appeal should be allowed, and the action dismissed. Section 392 (*a*), c. 88, 8 Edw. VII, is in point and is conclusive. The legislature had no doubt good reasons for this stringent enactment, which makes it very difficult for the municipality to incur legal responsibility in respect of contracts for work and materials or for professional services. It is not for us to canvass the reasons for such an enactment nor to look for expedients for evading it.

ANGLIN J.—Seldom, if ever, has a public body presented in this court a defence so palpably devoid of merit as that put forward in this case. That the council of the defendant municipality solemnly undertook by resolution to pay its proportionate share of the cost of the work and services for which it now repudiates liability, that such work and services were duly rendered, and that the municipality has had the benefit of them there has been no attempt to deny. That the city council could now, if so minded, legitimately and properly provide an appropriation to cover the debt which it morally owes to the plaintiff and could thus enable a certificate to be given by the city treasurer

> that there are funds available appropriated for the particular object for which payment is sought,

is not seriously controverted. But the city council is not so minded. It sets up in answer to the plaintiff's demand the following special provision, added to its charter in 1908 (8 Edw. 7, c. 88) as s. 392a:

> No resolution of the council authorizing the expenditure of moneys shall be adopted or have any effect until a certificate of the city treasurer is produced establishing that there are funds available and at the disposal of the city for the service and purpose for which such expenditure is proposed, in accordance with the provisions of this charter.
>
> No contract or agreement whatever shall be binding on the city unless it has been approved by the council.
>
> *The city shall not be liable for the price or value of work done,* materials supplied, goods or effects furnished of any kind whatever, nor for any fees for professional services, salary, wages or other remuneration, without the special authorization of the city council, nor *unless* in any case *a certificate of the city treasurer is produced establishing that there are funds available appropriated for the particular object for which payment is sought; and no right of action shall exist against the city unless the foregoing formalities are strictly observed, notwithstanding that the city may have benefited by any such* contract, agreement, *work done,* materials supplied, *or other services rendered.*

In making this statutory provision the legislature no doubt intended to provide a means which would enable the municipal council to resist claims arising out of ill-advised and unauthorized undertakings entered upon by unwise officials. It had confidence that the privilege so conferred would not be taken advantage of for the repudiation of liabilities incurred by the authority of the council itself and to which the municipality had no moral defence. That confidence was misplaced.

With deep regret that any Canadian municipal council should be found willing to take a position so humiliating, I find myself constrained to uphold the defence put forward and to allow the city's appeal because effect must be given to the plain and explicit terms of the statute that, without the city treasurer's certificate

that there are funds available, appropriated for the particular object for which payment is sought * * * no right of action shall exist.

The contract now before us does not concern one of those unimportant matters of frequent occurrence, to which Viscount Haldane alludes in the *Mackay Case* (1), and in which " convenience almost amounting to necessity " has been held to dispense from compliance with formalities prescribed by statutory provisions not dissimilar in their purport and scope to Art. 392a of the appellant's charter.

The appeal must, therefore, be allowed and the action dismissed.

BRODEUR J. (dissenting).—En 1913, le Conseil Privé du Canada a recommandé la nomination d'une commission qui préparerait des plans d'ensemble pour l'ouverture et l'embellissement de parcs et de boulevards dans les cités d'Ottawa et de Hull et il a suggéré que le gouvernement fédéral payât la moitié du coût de ces plans et que l'autre moitié fût payée par Ottawa et Hull proportionellement à leur population. Cet ordre en conseil fut transmis aux autorités de Hull et le conseil de cette municipalité, après avoir délibéré deux fois sur cette proposition du gouvernement fédéral, décida de l'approuver le 18 juillet 1913.

La proposition du gouvernement ayant été acceptée par les deux villes intéressées, un contrat s'est alors implicite-

(1) [1920] A.C. 208, at p. 213.

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ment formé par lequel le gouvernement paierait la moitié du coût des plans et l'autre moitié serait payée par les deux cités proportionnellement à leur population.

Le 12 septembre 1913, la commission était nommée par ordre en conseil du gouvernement et le maire de Hull en était nommé l'un des membres.

Des plans auraient été préparés par la commission dans les années suivantes et sur demande du maire des copies de ces plans auraient été remises à la cité de Hull en 1916.

La cité de Hull refuse maintenant de payer sa proportion du coût de ces plans en disant que la résolution qu'elle avait adoptée était *ultra vires* parce qu'elle n'avait pas eu au préalable un certificat de son trésorier établissant qu'elle avait des fonds disponibles à cette fin. Elle invoque à ce sujet l'article 392a de sa charte qui a été adopté en 1908 et qui se lit comme suit:—

> Nulle résolution du conseil, autorisant la dépense de quelques sommes d'argent, ne pourra être adoptée ou n'aura d'effet tant qu'un certificat du trésorier de la cité n'aura pas été produit, établissant qu'il y a fonds disponibles et à la disposition de la cité pour le service et les fins pour lesquels cette dépense est proposée, conformément aux dispositions de la présente charte.
>
> Aucun contrat ni arrangement quelconque ne liera la cité à moins qu'il n'ait été approuvé par le conseil.
>
> La cité ne sera pas responsable du prix ou de la valeur des travaux faits, matériaux fournis, marchandises ou effets vendus de quelque sorte que ce soit, ni d'honoraires pour services professionnels, salaires, gages ou autre rémunération, sans l'autorisation spéciale du conseil de la cité, ni, à moins, dans chaque cas, qu'un certificat du trésorier de la cité ne soit produit, établissant qu'il y a des fonds disponibles et effectés aux fins spéciales pour lesquelles le paiement est demandé; et aucun droit d'action n'existera contre la cité, à moins que les formalités ci-dessus n'aient été strictement observées, bien que la cité puisse avoir bénéficié de tel contrat, arrangement, travaux faits, matériaux fournis et autres services rendus.

Cette disposition de la charte est extrêmement sévère et restreint considérablement les relations d'affaires que la cité est tenue d'avoir, et même dans certains cas elle pourra nuire à son crédit, mais il ne nous appartient pas d'en scruter les motifs et de connaître les circonstances qui ont donné lieu à cette législation. Elle n'est d'ailleurs que la reproduction presque textuelle des articles 336 et 337 de la charte de la cité de Montréal. (62 Vic., c. 58).

Cette corporation, avec ses nombreux échevins et officiers, était exposée à encourir des dettes que le conseil municipal lui-même n'aurait pas sanctionnées; et alors le

législateur a cru devoir la protéger en décrétant que le conseil municipal seul pourrait lier la corporation et que même dans certains cas les résolutions du Conseil seraient sans effet si le trésorier ne certifiait pas qu'il y avait des fonds disponibles.

Dans le cas actuel, nous avons une résolution du conseil de Hull approuvant le contrat qui s'est fait entre le gouvernement fédéral et les cités d'Ottawa et de Hull par lequel des plans devaient être préparés pour l'embellissement de ces deux municipalités. Etait-il nécessaire que le conseil de Hull eût un certificat de son trésorier avant d'approuver ce contrat?

L'appelante prétend que oui et elle se base particulièrement sur le troisième paragraphe de l'article 392 a.

Je ne crois pas cette prétention bien fondée. Cet article nous met on présence de trois cas distincts; 1. autorisation du conseil pour un paiement d'argent; 2. confection de contrats par la cité; 3. travaux qui peuvent donner lieu à une réclamation *quantum meruit.* Il est généralement admis que le premier cas ne se présente pas dans la cause actuelle. Le conseil, par sa résolution du 18 juillet 1913, n'ordonnait pas le paiement d'aucune somme d'argent, et par conséquent, le certificat du trésorier n'était pas nécessaire.

Si on voulait étendre cette première partie de l'article à toutes les conventions ou à tous les règlements qui pourraient occasionner une dépense d'argent, on atteindrait un résultat bien étrange. Ainsi, par exemple, la cité est autorisée, je crois, à acheter du pouvoir électrique pour éclairer ses rues et ses édifices. Il est important que ces contrats d'éclairage couvrent plusieurs années. Comment pourrait-elle avoir un certificat de son trésorier pour toute le période du contrat? Ce serait impossible, vu que les revenus disponibles ne sont que pour les dépenses d'une année.

Des contrats de la nature de celui qui nous occupe sont valides sur simple approbation du conseil municipal et il n'est pas nécessaire qu'il y ait un certificat du trésorier. C'est ce que le législateur a voulu couvrir en disant dans la deuxième partie de son article 392 (a) "aucun contrat ni arrangement quelconque ne liera la cité à moins qu'il n'ait été approuvé par le conseil."

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Alors si le conseil l'approuve, la cité est liée. C'est ce qui s'est produit dans le cas actuel.

Par la troisième partie de l'article, le législateur a voulu éviter ces réclamations nombreuses qui devaient se faire contre la corporation et qui donnaient lieu à l'action *quantum meruit* parce que la cité en avait profité et parce que certains échevins ou officiers zélés avaient fait faire certains travaux ou ordonné l'achat de certains matériaux. La législature a voulu mettre fin à ces abus. Voilà toute la portée, suivant moi, de ce dernier paragraphe.

En tant que les contrats sont concernés, l'article n'enlève le droit d'action que dans le cas où ils n'ont pas été approuvés par le conseil.

Il n'y a pas de doute que par les dispositions de la charte la cité avait le droit de faire des plans non-seulement pour améliorer son propre territoire mais aussi en dehors (arts. 92 et 144).

L'appelante prétend aussi qu'un règlement aurait dû être adopté pour autoriser ce contrat. Je ne vois pas de grande différence entre la résolution qui a été adoptée et la disposition qui se trouverait incorporée dans un règlement.

La question est venue devant le conseil à deux reprises différentes. Nous ne savons pas d'ailleurs si le conseil de ville a décrété que deux ou trois lectures des règlements municipaux devaient être faites avant leur passation ainsi qu'elle y était autorisée par l'article 4400 S.R.P.Q. (1908).

Il s'agirait tout au plus, si un règlement était requis. d'une insuffisance de désignation qui ne saurait invalider dans l'esprit général de la loi la décision du conseil. (arts 4185 et 4186 S.R.P.Q.).

Pour toutes ces raisons, je considère que l'appelante a été légalement condamnée à payer la somme qui lui est réclamée.

L'appel doit être renvoyé avec dépens.

MIGNAULT J.—The facts of this case are not in dispute.

On June 5, 1913, an order in council was adopted by the Dominion Government on a memorandum submitted by the Minister of Finance who stated that he had had under consideration the need for the adoption of a comprehensive scheme or plan looking to the future growth and develop-

ment of the cities of Ottawa and Hull and their environs, particularly providing for the location, laying and ornamentation of parks and connecting boulevards, the location and architectural characteristics of public buildings and adequate and convenient arrangements for traffic and transportation within the area in question. And the minister recommended that a commission be constituted, consisting of at least six members, including the mayors of Ottawa and Hull, charged with the duty of taking all necessary steps to draw and perfect such a plan for the purpose of the beautification and systematic development of the two cities, to carry out which plan the cities of Ottawa and Hull and the Ottawa Improvement Commission together with the transportation and traffic companies would be required to cooperate with a view to its gradual completion. It was added that it would seem equitable that the Government should pay half the cost of preparing such a plan and that the other half should be paid by the two cities jointly and ratably according to population. The minister therefore recommended that the civic authorities of the respective cities be invited to express their views as to the proposals made, to say whether they were willing to bear half of the expense involved and to assent to the appointment of their respective mayors on such commission.

The minister sent a copy of this order in council to the mayor of Hull, requesting that the city council express its view as to the proposals made, and if the proposals met with its approval to say whether the city was willing to bear its proportion of the expense as suggested and to consent to the appointment of a representative of the city on the commission as proposed.

A special meeting of the city council of Hull took place on June 20, 1913, and the council adopted a resolution expressing its approval of the scheme and named a committee to meet with the members of the committee of the city council of Ottawa, the Ottawa Improvement Commission and the members of the Privy Council in order to discuss the proposals, this committee to report to the council.

The committee met the bodies referred to and reported to the Hull council, and at a meeting of the latter on July 18, 1913, the following resolution was adopted:

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Que ce conseil, après avoir entendu le rapport verbal du comité spécial chargé de rencontrer les représentants du gouvernement fédéral relativement à l'embellissement des cités d'Ottawa et de Hull, approuve le projet tel que soumis par le ministre aux membres du comité, et que copie de cette résolution soit envoyée au Ministre des Finances, à Ottawa.

A copy of this resolution was sent to the Minister of Finance by the city clerk.

Thereupon another order in council was adopted on September 12, 1913, creating an honorary commission composed of the mayors of Ottawa and Hull and of four other members, to take all necessary steps to draw up and perfect the scheme or plan as proposed in the first order in council, the commission being authorized to employ clerical and other assistants, to engage city planners, landscape gardeners, architects, engineers and other experts, to summon before them witnesses and generally to take such steps as might be necessary to accomplish the objects of the commission.

The mayor of Hull acted on this commission which prepared an elaborate report, translated and printed in French and in English, with plans, etc., Hull duly receiving copies thereof. The city of Hull asked permission to use the plans and plates for the advertisement of the city, and this permission was granted and presumably the plans were used by it.

The total cost amounted to $75,809.08, of which the Government assumed one half, and the other half, to wit $37,904.54, was payable by Ottawa and Hull jointly and ratably according to their population, Ottawa's share was $31,344.22 and Hull's $6,560.32. The accounts were duly sent to both cities in August, 1918. Ottawa has paid its full share. Hull, in reply to numerous requests, put off payment on one pretext or another, until at last this action was taken by the Government to compel payment.

It is admitted by the appellant that if there be any legal liability on its part to pay the respondent anything, the amount payable by it is $6,560.32, with interest from the 20th August, 1918.

The plea of the city of Hull is a purely technical one. It does not pretend that the expenditure was not incurred in conformity with the orders in council and the approval it had expressed, but in order to escape payment, it invokes

certain provisions of its charter, and the failure by it to take the measures prescribed before a financial liability can be incurred by the city.

I cannot help regretting that the city of Hull has seen fit to raise this technical objection in order to resist payment of its share of the expenditure incurred. Its excuse is that it did not take the steps required by its charter in order to assume this obligation. It could easily have taken these steps, and could do so now, and its neglect in that regard is deliberate. The city of Ottawa has paid its full share, nearly five times greater than that of Hull, of the expenditure which both Ottawa and Hull authorized by their city councils, thus establishing a painful contrast between the conduct of the two cities. This, however, does not dispose of the difficulty, nor would it justify the court in disregarding the provisions of the charter of the appellant corporation which the plea invokes, if these provisions are an answer to the action of the respondent.

It therefore remains to be seen whether, in view of the statutory provisions invoked by the city of Hull, the action of the Government can be maintained.

The city of Hull was incorporated under a statute of the province of Quebec, 56 Victoria, ch. 52, to which many amendments have since been made. By 8 Edward VII, ch. 88 (1908), section 392a, which read as follows, was added to the charter:

392a. No resolution of the council authorizing the expenditure of any moneys shall be adopted, or have any effect until a certificate of the city treasurer is produced, establishing that there are funds available and at the disposal of the city for the service and purposes for which such expenditure is proposed, in accordance with the provisions of this charter.

No contract or agreement whatever shall be binding upon the city, unless it has been approved by the council.

The city shall not be liable for the price or value of work done, materials supplied, goods or effects furnished of any kind whatever, nor for any fees for professional services, salary, wages or other remuneration, without the special authorization of the city council, nor unless, in every case, a certificate of the city treasurer is produced establishing that there are funds available appropriated for the particular object for which payment is sought; and no right of action shall exist against the city, unless the foregoing formalities are strictly observed, notwithstanding that the city may have benefited by any such contract, agreement, work done, materials supplied or other services rendered.

Here the approval of the city council was given by the resolutions adopted on June 20 and July 18, 1913. What

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was wanting was a certificate of the city treasurer establishing that there were funds available and at the disposal of the city for the service and purposes for which the expenditure was proposed. That the appellant could have observed this formality is beside the question, for if the omission of the certificate that funds were available for the expenditure contemplated is a fatal omission, if in the words of section 392a

> no right of action shall exist against the city, unless the foregoing formalities are strictly observed, notwithstanding that the city may have benefited by any such contract, agreement, work done, materials supplied or other services rendered,

there is no escape from the conclusion that the respondent's action cannot be maintained.

After the most anxious consideration, I cannot place any meaning on section 392a other than that it is an absolute bar to any claim to hold the appellant liable for the expenditure incurred under the orders in council. In my opinion, with deference, the debt claimed by the respondent cannot be treated, as the learned trial judge somewhat suggested, as a "judicial obligation" within the meaning of section 393 of the appellant's charter, which authorizes the city council in cases of urgent necessity, either for the purpose of meeting a "judicial obligation" or for other unforeseen or uncontrollable causes, to procure the necessary funds to meet obligations of that character by such means as it may deem advisable. There can be no "judicial obligation" without a judgment enforcing a liability, and there can be no judgment against the city in a case where the statute states that no right of action shall exist.

It may be added that the appellant corporation has a very wide power to provide by by-law for municipal services of all kinds which entail the expenditure of public moneys (sect. 92 of the charter), and an appropriation of the amounts necessary for these purposes is made yearly in the month of February (sect. 390). To such by-laws, paragraph 1 of section 392a does not apply, for its whole scope is to guard against resolutions (and not by-laws) authorizing the expenditure (and not merely the payment) of public moneys. Paragraph 2 of section 392a requires the approval of the city council before any con-

tract or agreement whatever shall be binding on the city, and should be read with paragraph 3. The latter paragraph, in the case of work done, materials supplied, goods or effects furnished of any kind whatever, or fees for professional services, salary, wages or other remuneration, requires two formalities before the city can be held liable, viz., the special authorization of the city council and the production of a certificate of the city treasurer that funds are available. The special authorization of the city council would generally form a contract between the city and the person or corporation performing the work or furnishing the goods or materials, but, notwithstanding what is stated in paragraph 2, and saving the case of by-laws under section 92, it would still be necessary to obtain the certificate of the city treasurer. I think, as I have said, that paragraph 2 must be read with paragraph 3, and not given such an effect as to render in most cases the latter paragraph meaningless.

The result is that the appeal must be allowed and the respondent's action dismissed.

Appeal allowed with costs.

Solicitor for the appellant: *J. W. Ste. Marie.*

Solicitor for the respondent: *Napoléon Champagne.*