THE CITY OF WESTMOUNT (*Plaintiff*) APPELLANT; 1957

*Mar. 11, 12, 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 as to sharing cost of snow removal—Effect of special legislation—Whether contract terminated by special legislation—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.

By a contract made in 1893, the plaintiff, then the Town of Côte St. Antoine, granted to the Montreal Street Railway Company an exclusive franchise to operate street-cars in the municipality for 30 years. Subsequently, Montreal Tramways Company took over all the undertaking and rights of the Montreal Street Railway Company. By cl. 33 of the contract, it was provided that the company would pay one-half of the costs of ice and snow removal from the streets occupied by the tramway tracks; and by cl. 37, the Town had the right to expropriate the company's undertaking within its limits at the end of the 30 years, or of any subsequent 5-year period. The contract was amended in 1904 to extend the term of the franchise to 1934.

In 1918, a contract between the company and the City of Montreal was ratified by statute (8 Geo. V, c. 84), the company's franchise in the city of Montreal was replaced, and its term extended to 1953, but the franchise in the plaintiff municipality was not annulled. However, the right of the latter municipality to expropriate the undertaking was abrogated and given exclusively to the City of Montreal.

Under a statute of 1950, amended in 1951, the defendant Commission was established "to organize, own, develop and administer a general system of public transportation for the benefit of the population of the City and of the Metropolitan District", and the property and assets of the Montreal Tramways Company were vested in it.

In its action, the plaintiff municipality sought to recover one-half of the cost of snow removal for the period June 1951 to July 1952. The action was dismissed by the Superior Court and by the Court of Appeal.

Held (Rand and Cartwright JJ. dissenting): The appeal must be dismissed. The defendant was not bound by any conditions or obligations arising out of contracts previously in existence between the plaintiff and the Montreal Tramways Company. The statute creating the defendant Commission conferred upon it the right to operate in perpetuity a publicly-owned transportation system in the Montreal area, and that

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

1957

CITY OF WESTMOUNT v. MONTREAL TRANSPORTATION COMMN.

right was not made dependent upon any contractual rights theretofore existing between the Montreal Tramways Company and the various municipalities in the metropolitan area. The provisions of the preamble to the 1951 Act must be read into the City's by-law creating the Commission, even if they were not expressly enacted in it.

Per Rand and Cartwright JJ., *dissenting*: The appeal should be allowed for the reasons stated by Rand J. in *City of Outrèmont v. Montreal Transportation Commission, infra,* p. 75.

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.

J. L. O'Brien, Q.C., A. Weldon and *E. E. Saunders,* for the plaintiff, appellant.

Gustave Monette, Q.C., and *Edouard Asselin, Q.C.,* for the defendant, respondent.

TASCHEREAU J.:—Mon collègue M. le Juge Abbott a fait un sommaire complet de tous les faits qui ont donné naissance à ce litige. Pour les raisons qu'il donne, je suis d'opinion que le présent appel doit être rejeté avec dépens.

Je désire seulement ajouter que la principale raison qui me porte à arriver à cette conclusion est que, même si le contrat entre l'appelante et la Montreal Street Railway Company, devenue plus tard la Montreal Tramways Company, n'a pas été éteint et n'est pas devenu sans effet le 16 mai 1934, la loi autorisant la création de la Commission intimée y a mis fin. L'obligation de payer le coût de la moitié de l'enlèvement de la neige dans la cité de Westmount, n'a pas été assumée par l'intimée, et depuis le 16 juin 1951, quand tous les droits de la Montreal Tramways Company ont été acquis par l'intimée, en vertu du statut 14 Geo. VI, c. 79, tel qu'amendé par 14-15 Geo. VI, c. 124, l'entente pré-existante a été purgée, quant à l'intimée.

La Cité de Montréal, en vertu du statut de 1918, avait le droit d'exproprier le réseau de la compagnie de tramways dans les limites de la cité de Westmount, et ce droit était nié à toute autre municipalité y compris Westmount. Quand la Commission de Transport de Montréal a été formée, en vertu du statut ci-dessus mentionné, et que tout l'actif de la Montreal Tramways Company a été transporté à l'intimée, il s'agissait également d'une expropriation, par

[1] [1955] Que. Q.B. 754.

l'opération de la loi, et je ne puis pas en arriver à la conclusion que l'intimée a plus d'obligation de payer la moitié du coût de l'enlèvement de la neige, que n'en aurait eu la Cité de Montréal, si elle avait décidé de procéder à l'expropriation de la compagnie. Un nouvel état de choses a été créé en vertu duquel l'intimée n'a que les obligations que lui impose le statut.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J. (*dissenting*):—The dispute in this appeal arises out of a by-law and contract granting a franchise to the predecessor in title of the respondent in terms almost identical with those considered in the appeals of the City of Outremont[1], judgments in which are being delivered simultaneously with this.

As in the case of Outremont the grant, by s. 2 of the by-law, was of an exclusive franchise from August 1, 1892; and by s. 37 it was agreed that

> . . . the present arrangement or contract . . . shall extend over a period of 30 years from the 1st of August, 1892. At the expiration of the said term of 30 years, and at the expiration of every term of 5 years thereafter the Town shall have the right after notice

to expropriate the property.

Section 33 provided:

> The Company shall, under instructions from the Town keep their track free from ice and snow and the Town may at its option remove the whole or such part of 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 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.

It is under this section that the City claims against the respondent for one-half the cost of snow removal for the period June 16, 1951, to July 10, 1952; and the question is whether that claim can be maintained.

As in the appeals of Outremont, I construe the franchise to be indefinite in time but marked by certain terms at the end of which the City was entitled to assume ownership of the undertaking. Throughout this entire period the provisions of the by-law and the contract embodying them apply unless their force has been destroyed by subsequent legislation or they have expired according to their intent

[1] [1958] S.C.R. 75, 82.

1957

CITY OF WESTMOUNT v. MONTREAL TRANSPORTATION COMMN.

Rand J.

and meaning; that s. 33 by its own terms continues indefinitely with the franchise cannot be disputed. The Act 8 Geo. V., c. 84, has been examined in the Outremont appeals and, apart from the fact that the provision of the contract contained in schedule A was repealed by the legislation of 1951, there is no suggestion that it affects the question here.

There remain 14 Geo. VI., c. 79, and 14-15 Geo. VI., c. 124. For the reasons given in the appeal of Outremont against the respondent[1], that legislation has not the effect of impliedly nullifying the by-law and agreement here and the same result follows that the claim under s. 33 is well founded.

I would, therefore, allow the appeal and direct judgment declaring the appellant to be entitled to recover from the respondent the amount claimed with costs throughout.

The judgment of Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—For some sixty years prior to June 1951 the tramway system in the city of Montreal and the surrounding area was operated by the Montreal Tramways Company and its predecessor company, the Montreal Street Railway Company. These companies operated under various franchises granted by the City of Montreal and by certain other municipalities which included the former Town of Côte St. Antoine, now the City of Westmount. On June 16, 1951, all the property undertaking and rights of the Montreal Tramways Company were acquired by respondent under the authority of the statute 14 Geo. VI, c. 79, as amended by 14-15 Geo. VI, c. 124, and respondent has operated its tramway system in appellant's territory since the said date.

Appellant's claim is for $20,475.55, representing one-half the cost of snow removal on certain streets in appellant's territory during the winter of 1951-52. Appellant claimed this amount under a specific provision of the franchise granted by the former Town of Côte St. Antoine under the authority of which it contends respondent is operating its tramways in the city of Westmount.

[1] [1958] S.C.R. 75.

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 terms and conditions of the franchise granted by the Town of Côte St. Antoine were set out in by-law 33 of the said Town, adopted August 7, 1893, and in a contract in almost identical terms between the Town and the Montreal Street Railway Company. The Town granted to the company the exclusive right, subject to specified conditions, to establish and operate lines of electric railway in particular streets in the municipality and the company undertook to establish and operate the lines of railway subject to the same conditions. The conditions to which the franchise was made subject were set out in the by-law, which contained forty-one sections, two of which, namely, s. 33 providing for payment by the company of one-half of the cost of removing ice and snow from the streets occupied by tramway tracks, and s. 37 providing for the term of the franchise, read as follows:

SECTION 33. The Company shall, under instructions from the Town keep their track free from ice and snow and the Town may at its option remove the whole or such part of 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 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.

SECTION 37. It is agreed between the Town and said 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 from the first of August, eighteen hundred and ninety-two (1892). At the expiration of the said term of thirty years, and at the expiration of every term of five years thereafter, the Town shall have the right after a notice of six months to the Company, to be given within the twelve months preceding the expiration of the said thirty years, and also after a like notice of six months at the end of every subsequent five years, to assume the ownership of the said railway and all its real estate, appurtenances, plant and vehicles belonging to the Company, situate in Côte St. Antoine, and necessary for the operation of its line on payment of their value to be determined by arbtirators, together with an additional ten per cent

[1] [1955] Que. Q.B. 754.

1957

CITY OF WESTMOUNT v. MONTREAL TRANSPORTATION COMMN.

Abbott J.

thereon, said arbitrators, to be appointed as follows. Viz: One by the Company, one by the Town, and third by a Judge of the Superior Court, sitting in and for the District of Montreal.

The franchise was amended and extended by by-law 144 of the Town of Westmount and by a contract between the Town and the company dated May 17, 1904. Aside from certain changes in the conditions of the original contract, which are not relevant in the present appeal, the new by-law and contract extended the term of the franchise until May 17, 1934, but maintained in force the conditions set out in ss. 33 and 37 above quoted. Both by-law 33 and by-law 144, with the contracts implementing them, were ratified by the Quebec Legislature.

Until the passing of certain legislation in 1918, to which I shall refer in a moment, I am satisfied that under the provisions of s. 37 of the contract above quoted, in the event of the City of Westmount failing to exercise its right of expropriation on May 17, 1934, the respective rights and obligations of the parties under the contract were to continue for an indefinite period after that date, subject to termination by either party at its option in the following manner:

(a) By the City of Westmount exercising its right of expropriation at the end of each five-year period subsequent to May 17, 1934, upon giving the notice called for in the contract;

(b) By the tramways company, at the end of each such five-year period, failing expropriation by the City.

This position was changed, however, in 1918.

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

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

Article 92.

Paragraph 8. Expropriation.

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

* * *

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

CONTRACTS WITH MUNICIPALITIES OUTSIDE OF THE CITY.

Article 95.

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

As I have stated, one effect of this statute was to take away from appellant the right of expropriation given to it under s. 37 of the franchise and to vest that right in the City of Montreal.

The City of Montreal had, of course, an obvious interest in the continued operation of the tramway system in the city of Westmount since that municipality is completely surrounded by the city of Montreal.

It cannot be assumed that the Legislature in granting this right of expropriation to the City of Montreal was granting an empty right. It would seem clear therefore that in passing the 1918 statute the Legislature intended that the right of the tramways company to operate in Westmount under its contract with that municipality and its obligations under that contract were to be continued until March 24, 1953, subject to termination

1957

CITY OF WESTMOUNT v. MONTREAL TRANSPORTATION COMMN.

Abbott J.

(a) by the City of Montreal exercising its right of expropriation at that date or at the end of each five-year period thereafter, upon giving the requisite notice;

(b) by the tramways company on March 24, 1953, or at the end of each five-year period thereafter failing expropriation by the City of Montreal.

It follows that up to June 11, 1951, the date upon which its assets were acquired by the Montreal Transportation Commission, the tramways company was operating in the city of Westmount in virtue of the contract of August 11, 1893 as amended, and was liable to the City for a share of the cost of snow removal as provided for in that contract. In fact as appears from the stated case the tramways company paid its share of the snow removal costs in accordance with s. 33 of by-law 33 up to the month of June 1951 when its assets were acquired by respondent but the latter has denied any liability therefor since that date.

Respondent's liability for the amount claimed depends upon the effect to be given to the acquisition by respondent of the property and assets of the tramways company pursuant to the authority contained in the statute 14 Geo. VI, c. 79, as amended by 14-15 Geo. VI, c. 124.

Under the statute 14 Geo. VI, c. 79, assented to April 5, 1950, the Quebec Legislature authorized the City of Montreal by by-law to establish a corporation to be known as the Montreal Transportation Commission "to organize, own, develop and administer a general system of public transportation for the benefit of the population of the City and of the Metropolitan District".

As authorized by the said statute, the Commission was created in August 1950, by by-law 1981 of the City of Montreal. The by-law in fact recited all the relevant provisions of the statute 14 Geo. VI, c. 79, although in my opinion it was not necessary to do so in order to constitute the Commission a corporation with all the powers set forth in the statute.

From the statute itself it seems clear that the Legislature conferred upon the Commission when established the right to operate in perpetuity a publicly-owned transportation system in the Montreal area, and in my opinion the right to do so was not made dependent upon any contractual

rights theretofore existing between the Montreal Tramways Company and the various municipalities in the metropolitan area. This seems evident from the terms of s. 57, para. 3, as enacted by the Act 14-15 Geo. VI, c. 124, which reads as follows:

57. Para. 3.

It [the Commission] may also, on its own authority, establish new lines, replace tramway lines by autobus or trolleybus 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.

It was argued on behalf of appellant that s. 57 as amended cannot apply to the Commission by reason of the fact that the amending provisions (which include para. 3) were not adopted by a by-law of the City but I do not think this contention is a valid one. Under the provisions of the original statute, it was declared (s. 2) that the by-law of the City creating the Commission should be "subject to the following provisions", and then followed ss. 3 to 61 inclusive relating to the Commission and its powers. The amending Act, 14-15 Geo. VI, c. 124, which is intituled "An Act respecting the Montreal Transportation Commission" was assented to on March 14, 1951. It contains the following preamble:

WHEREAS by the Act 14 George VI, chapter 79, the city of Montreal was authorized to establish a commission designated under the name of "Montreal Transportation Commission" to organize, own, develop and administer a general system of public transportation and such Commission was created by by-law No. 1981 of the city of Montreal passed by the council on the 24th of August, 1950.

Whereas it is necessary to amend such act in order to give additional powers to such commission to enable it to achieve the objects for which it was constituted;

(The italics are mine.)

In my opinion it is quite clear therefore that on June 16, 1951, when the Montreal Transportation Commission became vested with the property and assets of the Montreal Tramways Company, s. 57 of the statute 14 Geo VI, c. 79, as amended, was applicable and the Commission had all the powers conferred under that section.

It is true that under the terms of s. 52, upon acquiring the assets of the tramways company, the City is declared to be the "absolute and inalienable owner of all the property included in the expropriation as well as of all

1957

CITY OF WESTMOUNT v. MONTREAL TRANSPORTATION COMMN.

Abbott J.

franchises, servitudes, rights of way and other rights of the company concerning the expropriated undertaking". As Mr. Justice Martineau has pointed out in the Court below, it is not too clear just what the Legislature had in mind in using the words "franchises, rights of way and other rights of the company" but it might be noted in passing that under s. 37, in establishing the amount of the indemnity to be paid for the company's property, no value was to be placed upon goodwill, franchises, servitudes, rights-of-way or other rights of a similar nature. Be that as it may, it seems to me to have been the clearly expressed intention of the Legislature that the Montreal Transportation Commission when created should acquire the transportation facilities theretofore owned and operated by the Montreal Tramways Company and that it should thereafter operate them as a publicly-owned transportation system for the benefit of the population in the Montreal area by virtue of the authority conferred in the statute without regard to any limitations which might have been imposed under contracts entered into by the tramways company with the various municipalities in the area served.

I am therefore in agreement with the unanimous view expressed in the Courts below that any contractual relationship which existed between the appellant and the Montreal Tramways Company terminated on June 16, 1951, and that since that date the Montreal Transportation Commission has operated the public transportation system in the area concerned exclusively in virtue of the authority conferred by the statute 14 Geo. VI, c. 79, as amended, and that it is not bound by any conditions or obligations arising out of contracts previously in existence between the appellant and the Montreal Tramways Company.

I would dismiss the appeal with costs.

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

Attorneys for the plaintiff, appellant: Duquet, Mackay, Weldon & Tetrault, Montreal.

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