

Privy Council Appeals Nos. 7 and 8 of 1922.

The Montreal Tramways Company - - - - - *Appellants*
v.
The City of Montreal and another - - - - - *Respondents.*

Same - - - - - *Appellants*
v.
Same - - - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC
(APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 3RD MAY, 1923.

Present at the Hearing :

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD PARMOOR.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* THE LORD CHANCELLOR.]

These two appeals have been heard together, and each of them raises a question as to the amount of the capital value of the appellant company, the Montreal Tramways Company, for the purposes of its contract with the City of Montreal. The contract was dated 28th January, 1918, and was validated by statute. By that contract the company agreed to work the tramway system in the City of Montreal on certain terms; and one of the terms, contained in Article 92 of the contract, was that the company should apply its revenue in a certain order. The revenue

was to be applied first to the payment of operating expenses and taxes, then to maintenance and renewals, and, thirdly, to the payment of 6 per cent. upon the capital value of the company. After those payments there were to be payments for city rentals and a reserve, and the surplus income was to be divided between the improvement of the system, the company and the City in certain proportions which are not material. In view of that provision it was obviously important to ascertain from time to time the amount of the capital value of the company ; and power was given to a body called the Montreal Tramways Commission to determine that and other questions, subject to an appeal to the Quebec Public Service Commission and to a further appeal on points of law to the Courts.

The contract contained certain provisions relating to capital value. In Article 1 it was provided that the words " capital value " should mean, for the purpose of the contract, the sum of \$36,286,295, and should comprise any addition that might be made thereto. Then in paragraph 3 of Article 92 it was provided :

" The capital value of the tramways system is hereby fixed at the sum of thirty-six millions, two hundred and eighty-six thousand, two hundred and ninety-five dollars (\$36,286,295), such sum including all physical assets added to the system up to December 31st, 1917. As its usual return upon the capital value so fixed, the company shall receive in quarterly payments out of gross revenues a sum equal to 6 per cent. on such capital value. From time to time hereafter as money is needed for betterments, additions to and extensions of plant required by this contract or approved by the Commission, such money, except to the extent that moneys for such purposes are payable at the time from the maintenance and renewals fund as hereinabove provided, shall be supplied by the company, and the amounts so supplied and actually expended for such purposes under the supervision of the Commission shall, plus net interest expenses during construction, be added to capital value, and the company shall receive out of the gross revenues an annual return of six per cent. on such amount."

Then there was a provision for ascertaining within sixty days the money expended by the company upon physical assets added to its system after the 31st December, 1917, and for the addition of that sum to capital value ; and then there was this provision :

" As the capital hereinbefore established at the sum of thirty-six millions, two hundred and eighty-six thousand, two hundred and ninety-five dollars (\$36,286,295), does not include any working capital, it is agreed that any working capital required shall, as and when ordered by the Commission, be furnished by the company. Upon such working capital so furnished the company shall receive a return at the rate of 6 per cent. (6%) per annum."

Before leaving the contract it is necessary to mention that there was annexed to the contract a valuation of the fixed assets. Article 1 of the definition clause in the contract provided that :—

" The word ' valuation ' shall mean the valuation made by L. A. Herdt, D. W. Ogilvie and A. H. Lapierre, of the physical assets of the company, and shall represent, for the purposes of this contract, the value of such physical assets at the thirtieth of June, one thousand nine hundred and seventeen."

A copy of that valuation was annexed to the contract. The total amount of the valuation was reduced by the deduction of certain cars, trailers and spare equipments which were not in the possession of the company at the date of the valuation : and the amount of the valuation as so reduced was \$36,286,295, being the exact amount set out in the contract as the capital value.

The first of these two appeals relates to a claim of the company to add to the capital value, and to receive interest upon, a sum of \$234,458, representing certain plant (consisting of generators, transformers and so on), which had been ordered by the company before the 30th June, 1917, but which was actually delivered to or became the property of the company after the 1st January, 1918 ; and it would appear that the real question to be determined is whether the money spent on that plant was, within the meaning of paragraph 3 of Article 92 of the contract, money needed for betterments, additions to or extensions of the plant required by the contract or approved by the Commission, and supplied by the company for that purpose. In one sense no doubt the plant was added to the assets in the possession of the company after the 1st January, 1918, for it was only after that date that it was brought upon the company's premises or made the property of the company ; but in another sense it may be said to have been part of their plant before that date, because it had been actually ordered by the company before that date. The question is whether it was an addition to the plant within the meaning of this contract. For the purpose of deciding that question their Lordships are entitled to look at all the facts which were proved in evidence in the case. Among those facts is the fact that this particular plant was included by clear description in the valuation referred to, and that its value as there defined was included in the total of \$36,286,295 shown by the valuation. Now it is impossible for any reasonably minded person looking at the documents to doubt that the valuation was the basis of the capital value as defined by the contract. The valuation is referred to in the contract. The amount of the valuation is identical with the amount of the capital value as stated in the contract ; and the valuation is the only source suggested as that from which the amount of the capital value could have been derived. The two are connected together by the contract itself for some purposes, for instance, for the purpose of dealing with the sale of surplus assets. It is very frankly admitted, and could not be denied, that the sum which it was sought to add to capital value was included in the valuation ; and in their Lordships' opinion the inference is plain that the same sum was included in the amount fixed by the contract as the capital value of the company. If that is so, then the inference appears to be that this sum now claimed is not an addition to plant within the meaning of Article 92. The plant in question was part of the plant as valued and included in the capital value ; and, this being so, it cannot be an addition to the plant, and cannot, under the terms of Article 92, be added to the amount of

the capital value in order that interest may be claimed upon it. If the company were allowed to do that, they would undoubtedly be receiving interest twice over upon the same amount. Of course, that could have been done by express contract, but there is nothing to show that the parties intended that this contract should have that effect.

For these reasons their Lordships are of opinion that the first of these appeals fails.

The second appeal relates to a sum of \$534,055 and 58 cents, representing the value of certain stores of the company, and the claim is made under that part of Article 92 which relates to working capital. It was provided by that Article (as has already been stated) that the capital value as fixed did not include any working capital, and that any working capital required should be furnished by the company and the company should be entitled to interest upon it. It appears that stores to this exact amount of \$534,055 were included in the valuation already referred to, and it is plain, therefore, that if that sum were now added to the capital the company would again be receiving interest twice upon the same amount.

The question to be determined is this: Was the amount of these stores working capital within the meaning of the contract, and was it working capital furnished by the company within the meaning of Article 92? It may be, and no doubt it is, the fact, that in one sense stores are working capital of a company; but having regard to the fact that the stores now in question were included in the amount of the capital value as stated, and that the contract says that working capital was not included in that amount, the inference is fairly clear that for the purposes of this contract the stores were not treated as working capital. In any case it is plain that stores provided by the company before the date of the contract can hardly be working capital furnished by the company after that date. It is needless to repeat what has already been said as to the meaning of the contract; but it appears to their Lordships to be quite impossible to believe that it was the intention of the parties to this contract that these stores, having been already included in capital, should again be added to capital under the words of the clause.

This appeal, therefore, also fails, and their Lordships will humbly advise His Majesty that both appeals be dismissed with costs.

In the Privy Council.

THE MONTREAL TRAMWAYS COMPANY

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THE CITY OF MONTREAL AND ANOTHER.

SAME

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SAME.

DELIVERED BY THE LORD CHANCELLOR.

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