

*Privy Council Appeal No. 35 of 1923.*

The Montreal Tramways Company - - - - *Appellants*

*v.*

La Ville de Montréal Nord - - - - *Respondents*

FROM

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

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1924.

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*Present at the Hearing :*

VISCOUNT CAVE.  
LORD DUNEDIN.  
LORD CARSON.  
LORD BLANESBURGH.  
MR. JUSTICE DUFF.

[*Delivered by LORD DUNEDIN.*]

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In the town of Montreal Nord there is a tramway which goes through the town. It is constructed on a strip of land which belongs in property to the Company. There is a street called the Avenue des Récollets which abuts on the tramway from the north and so forms a cul de sac. The town having expanded to the south, there is another street also called Avenue des Récollets which has been constructed opposite to the first and also forms a cul de sac. The town wished to connect the two streets by a level crossing across the tramway lines and so abolish the cul de sac and make the Avenues des Récollets an end to end street. In order to do so the respondents, the town of Montreal Nord, presented a petition to the Quebec Service Commission. The petition is headed :—

*“ Requête pour obtenir l'autorisation de  
prolonger l'Avenue des Récollets.”*

The petition, after setting forth the position of the tramway and the necessity for opening and prolonging certain streets, continues as follows :—

A ces causes, la Ville Montréal-Nord vous prie de donner un Ordre pour qu'elle puisse prolonger la dite Avenue des Récollets, en traversant sur son parcours et à niveau la voie ferrée en question ; le tout, à telles conditions qu'il plaira à votre Commission.

To this petition the respondents put in answers, the 4th paragraph of which is as follows :—

4.—La requérante ne peut s'emparer de ce terrain sans avoir au préalable exproprié et en avoir payé la valeur et cette Commission n'a pas juridiction pour déposséder l'Intimée en faveur de la requérante.

The Commission delivered a judgment in which, after narrating the demand of the town and the answers made by the tramway company, they said that they considered that as long as the title of the ground in question was not in any way taken away from the company the company had nothing to complain of as the opening of the street would be apt to bring additional traffic to the railway, and they framed an ordinance allowing the passage on the railway to be made with crossing gates and signals, all to be erected at the expense of the town. At the end of the ordinance was the following paragraph :—

Cette ordonnance est rendue uniquement pour régler la traverse des rails et du terrain de la compagnie par la Ville tant que durera l'exploitation de cette ligne de tramways et elle ne devra pas être interprétée comme affectant ou diminuant en aucune façon les droits de la Montreal Tramways Company à la propriété du terrain en question.

The appellants appealed to the King's Bench to reverse this decision. The decision was affirmed by a majority, two judges dissenting. An appeal has now been taken to His Majesty in Council.

The learned counsel for the respondents, in argument before their Lordships, attempted to take up the position that the ordinance as it stood was not really an authorisation to the town to make the crossing but only a regulation that if they could make it they should do it in a certain way. This view their Lordships think is quite untenable. It is directly opposed to the terms of the respondents' own petition and equally opposed to the grounds of the judgment of the Court below. The question, therefore, simply is whether the Commission could grant the authorisation asked. The Commission is appointed in virtue of an Act entitled the Quebec Public Utilities Commission Act. It is quite unnecessary to cite at length the provisions of the Act. It is sufficient simply to point out that the Commission has no power of expropriation. Such powers are possessed by the town to a limited extent under other statutes, but it is not maintained that these powers have been exercised on this occasion. There being thus no right in the Commission to expropriate, the section to which finally the power

to pronounce the order was referred was section 742. That section is as follows:—

The Commission shall have a general supervision over all public services subject to the legislative authority of the Province, as defined by Article 718, and may make such orders regarding equipment, appliances, safety devices, extension of works or systems, reporting, 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.

By definition public service undoubtedly includes a tramway company. In their Lordships' view it is quite impossible to construe this section as giving someone other than the public service in question, the right to impose a burden upon the public service's property. The section deals with what the public service may be ordered to do upon its own property. There is not the slightest doubt as to the effect of the present order. It is, as clearly explained by Guérin, J., to create a servitude of passage. Now the whole scope of the section is not to provide for the creation of rights but to regulate the conditions of an admitted possession. If the right of passage already existed either by grant, by statutory provision, or as a result of expropriation, then section 742 would have its proper application, which cannot, in their Lordships' view, be stretched so as to create rights which do not otherwise exist. Section 740 (e) shows what can be done in the case where a tramway company wishes to cross a street. There might well have been another section analogous to that, but it is not for the judiciary to legislate, and the counterpart of 740 (e) cannot be spelt out of 742.

Their Lordships were referred to the case of *Canada and Gulf Terminal Railway Company v. Fleet*, 28 Québec, King's Bench, p. 112, where the Court, by a majority of 3 to 2, held that section 742 gave the Commission a right to grant another company running powers over a company's line. The learned judges of the majority thought that the words "other matters" introduced the necessary power. The dissenting judges held that "other matters" must be construed as *ejusdem generis* with the words preceding. In their Lordships' opinion the view of the minority was right, not alone upon the view as to *ejusdem generis*, but, as explained above, on the whole scope of the section. The view of the majority would lead to any possible length, without any definite limitation being suggested.

Their Lordships will, therefore, humbly advise His Majesty to allow the appeal, to dismiss the petition, the appellants to have their costs before this Board and in the Courts below.

In the Privy Council.

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THE MONTREAL TRAMWAYS COMPANY

v.

LA VILLE DE MONTRÉAL NORD.

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DELIVERED BY LORD DUNEDIN

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