

56, 1932

In the Privy Council.

No. 83 of 1931.

CANADIAN
LAW
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APPELLANT'S CASE.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE CORPORATION OF THE CITY OF
MONTREAL (Defendant) Appellant,

AND

MONTREAL INDUSTRIAL LAND COMPANY
LIMITED (Plaintiff) Respondent.

APPELLANT'S CASE.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada (Anglin C.J., Rinfret, Lamont, Smith and Cannon JJ.) delivered on the 23rd day of June, 1931, allowing by a majority of three to two the Respondent's appeal from a judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) delivered on the 12th December, 1930, affirming a judgment of the Superior Court for the Province of Quebec dated the 16th June, 1930. Record.
p. 30.

By the said judgment of the Supreme Court the Appellant's roll assessing the costs of paving part of Sherbrooke Street East in the City of Montreal on the owners of land fronting on the said street is declared illegal and set aside. The assessments against the Respondent and other bordering proprietors in Sherbrooke Street amount to the sum of \$330,047. p. 9.
p. 6.
p. 58.

2. On the 20th July, 1925, the Municipal Council of the Appellant City passed a resolution authorising the construction of a permanent pavement in Sherbrooke Street from Duquesne Street to Boulevard Desautels in Mercier Ward (formerly the village of Longue Pointe) and providing that the cost should be borne by the fronting proprietors in accordance with the provisions of the Charter of the City (62 Vict. ch. 58) as then in force. p. 53, l. 35.

The pavement in question was duly constructed in 1926. p. 58, l. 8.

Record.

3. In 1928 Article 455 of the City's Charter was by section 15 of the Act 18 George V. chapter 97 (which came into force on the 22nd March, 1928) replaced by the following :—

“ Notwithstanding the provisions of Article 455 of the Act 62 Victoria, chapter 58, as enacted by the Act 1 George V. (1911), chapter 60, section 25, and replaced by the Acts 3 George V. chapter 54, section 29, and 4 George V. chapter 73, section 26, the cost of pavings laid since the 1st of January, 1919, and that of pavings to be laid hereafter on public places, streets or lanes, shall be charged to the bordering proprietors at the uniform price of five dollars per 10 square yard, payable cash or in twenty annual instalments, according to the number of frontage feet of the immoveables belonging to them. In such charge of five dollars per square yard are included all paving accessories, and more particularly the levelling, gullies, curb, removal and re-erection of poles, hydrants, *et cetera* * * * *.”

p. 58.

4. A roll assessing the cost of the paving in question in accordance with Article 455 as amended in 1928 on the bordering proprietors at \$5.00 per square yard was duly completed on the 13th December, 1928. The amounts so assessed against the two properties of the Respondent were respectively \$5,905 and \$5,888. 20

p. 3, l. 44.

5. The Respondent on the 8th February, 1929, brought an action in the Superior Court for the Province of Quebec and by its declaration asked that the resolution of the 20th July, 1925, and the said assessment roll should be declared illegal and quashed on the grounds that by an Act of 1910 (1 George V. chapter 48, section 1, paragraph *i*) providing for the annexation of the town of Longue Pointe to the City of Montreal it had been provided that :—

“ La cité de Montréal devra, dans un délai de six mois, ouvrir et macadamiser les rues Vinet et Sherbrooke des limites ouest aux limites est de la ville de la Longue Pointe ” 30

that this had not been done and that, when the City decided to pave Sherbrooke Street, it was one of the obligations of annexation that this should be at the charge of the Appellant.

p. 4, l. 15.

6. The Appellant in its plea denied the allegations of the Respondent's declaration and stated that macadamising and permanent paving were two different operations and that the Appellant was not bound to pave Sherbrooke Street at its own expense.

7. By statutes passed from time to time the Appellant had been authorised to postpone the opening and macadamising of the streets in question. 40

8. Under the City Charter as it existed at the date of the annexation in 1910 there was no provision for assessing the cost of paving upon the owners of land bordering upon the streets, but such cost was borne by the

ratepayers generally. This was subsequently altered and the Act of 1928, set out in paragraph 3 above, provides, as the Appellant submits, that the cost of paving the streets shall in all cases be charged, to the amount of \$5 per square yard, on the bordering proprietors. It is submitted that this charge is imposed irrespective of whether or not any particular street had been or ought to have been previously macadamised and that the delay by the Appellant in macadamising the street in question did not affect the liability of the bordering proprietors.

Record.

9. The Superior Court (Désaulniers J.) gave judgment on the 16th June, 1930, dismissing the Respondent's action on the grounds that macadamising and paving were distinct operations and that the Appellant was expressly authorised by Statute to charge five dollars per square yard in respect of paving upon the bordering proprietors.

p. 6.

10. The Respondent appealed from that judgment to the Court of King's Bench (Appeal Side) and, on the 12th December, 1930, the Court (Dorion, Tellier, Howard, Bernier and Galipeault JJ.) gave judgment (Howard and Galipeault JJ. dissenting) affirming the judgment of the Superior Court. In the opinion of the majority the macadamising and paving were different operations and the Appellant by the assessment roll in question was not charging for the macadamising, but only charging the bordering proprietors according to Article 455 of its Charter and that all the bordering proprietors should be subject to that law.

pp. 9-18.

In the opinion of the minority in the Court of King's Bench the general law in regard to paving did not absolve the Appellant from the original statutory obligation to macadamise Sherbrooke Street at its own expense, and if the permanent paving was something more than the Appellant was bound to do the extra expense had not been shown and the assessment was invalid.

11. The Respondent after having filed with its Petition for security an affidavit to establish that the Supreme Court had jurisdiction, inscribed the case before the Supreme Court of Canada. On the 23rd of June, 1931, the Supreme Court (Anglin C.J., Rinfret, Lamont, Smith and Cannon JJ.) gave judgment (Lamont and Cannon JJ. dissenting) allowing the appeal and setting aside the assessment roll.

pp. 30-31.

12. THE CHIEF JUSTICE concurred in the reasons given by Mr. Justice Rinfret and Mr. Justice Smith.

p. 31, l. 30.

MR. JUSTICE RINFRET considered that the Appellant had not shown that it had been relieved of its obligation to open and macadamise the street out of the general funds of the City; that the general law of 1928 in reference to charging the cost of paving upon the bordering proprietors did not affect the special law providing the terms of annexation; that if paving in the Act of 1928 implied the use of materials more durable and more expensive than macadam both were a kind of paving; that the Respondent ought to have a credit for so much of the work as ought to have been done

p. 31, l. 33.

Record. by the Appellant at the general expense; that the assessing of the full amount of \$5 per square yard authorised by the Statute of 1928 amounted to a contravention of the Appellant's obligation to open and macadamise; that, if the amount by which the cost of paving exceeded the cost of macadamising might be properly assessable against the Respondent, the assessment roll had been homologated as a whole and must be set aside and that the Respondent was legally entitled to invoke the statutory condition of annexation as a ground for refusing to pay an assessment in contravention of that statutory condition.

p. 40, l. 27. MR. JUSTICE SMITH agreed with the reasons given by Mr. Justice Howard and Mr. Justice Galipeault in the Court of King's Bench. 10

p. 37, l. 1. MR. JUSTICE LAMONT pointed out that at the date of the annexation the law contained no provision by which the City was empowered or permitted to assess the costs of opening and macadamising streets in whole or in part against the owners of lands abutting thereon or against any particular ratepayers and that accordingly the City's obligation in regard to these costs was to meet them out of the general funds. Under the amendments to the City Charter referred to, the right of the City to put down a permanent pavement in 1925 could not, in the learned Judge's opinion, be questioned. As to whether after paving the street it was competent for the City to charge 20 the cost against the owners of the lands abutting thereon his opinion was that it was competent because the statute of 1928 expressly declared that the cost of paving should be so charged. He considered that a general statute might repeal a particular one. The Respondent in order to show that the City had no right to assess the statutory tax of \$5 per square yard ought to have established that the City did in fact open and macadamise as part of the construction of the permanent paving, and this not having been done, the assessment roll must stand.

p. 41, l. 19. MR. JUSTICE CANNON considered that the Respondent's claim to have the cost of opening and macadamising borne by the City was based, not on 30 the provision of the Act of 1910 providing for the opening and paving, but on the general law in force at that date to the effect that such costs should be borne by the City and that it was just and reasonable to determine the rights of the parties by reference to the general law on this subject in force when the assessment roll was homologated. The general law at the latter date provided that the cost of paving done since 1st January, 1919, should be borne by the adjoining proprietors, and to escape from this general law it was necessary for the Respondent to show that it had been exempted. In regard to the Respondent's contention that the City ought to deduct from the assessment the cost of the macadamising from which the Respon- 40 dent was exempt the learned Judge considered that the legislature had, for the purpose of providing pavement superior to macadam, changed the law for everyone and had set aside the conditions of the annexation law made in 1910. Reference was made to the *President and Fellows of Sion College vs. City of London* (1901) 1 K.B. 617.

13. Provisions in regard to macadamising streets similar to that in question in the present case appear in the Statutes in relation to the annex-

ation of other municipalities and the future rights of the Appellant will be affected by the said judgment of the Supreme Court.

14. Of the Judges who have heard this case six have decided the question involved in favour of the Appellant and five in favour of the Respondent.

15. It is submitted that the appeal should be allowed and the Respondent's action dismissed for the following, among other

REASONS.

- 10 1. Because Article 455 of the City's Charter as enacted in 1928 expressly provides that the cost of pavings should be charged upon the bordering proprietors at the uniform price of five dollars per square yard.
2. Because the assessment roll in question is in conformity with the Statute and there is no warrant for setting it aside.
3. Because the Appellant's obligation under the Act of 1910 to open and macadamise Sherbrooke Street ought to be construed to mean that the work was to be done and the cost was to be borne in accordance with the provisions of the City Charter for the time being in force.
- 20 4. Because the City Charter as in force in 1910 provided in effect that the cost of paving should be borne by the ratepayers generally.
5. Because the obligation imposed by the Act of 1910 was modified by subsequent Statutes providing that the cost of paving streets should be borne by the bordering proprietors.
6. Because macadamising and paving are different things.
- 30 7. Because the reasons for judgment of the Superior Court, the majority in the Court of King's Bench and the dissenting Judges in the Supreme Court of Canada are right.

GUILLAUME SAINT PIERRE.
HONORÉ PARENT.



In the Privy Council.

No. 83 of 1931.

On Appeal from the Supreme Court of Canada

BETWEEN

THE CORPORATION OF THE
CITY OF MONTREAL

(Defendant) Appellant,

AND

MONTREAL INDUSTRIAL LAND
COMPANY LIMITED *(Plaintiff) Respondent.*

APPELLANT'S CASE.

BLAKE & REDDEN,
17, Victoria Street,
S.W.1.