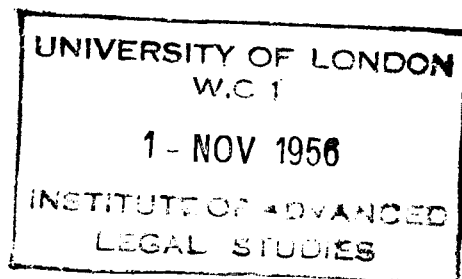


In the Privy Council.



*On Appeal from the Court of Queen's Bench for Lower 29508
Canada in the Province of Quebec (Appeal Side).*

BETWEEN

THE CITY OF MONTREAL - - *Appellant*

AND

THE STANDARD LIGHT AND
POWER COMPANY - - - *Respondent.*

NOTES OF JUDGMENT

OF

MR. JUSTICE WÜRTELE.

The Respondent was incorporated on the 24th June, 1892, under the name of "The St. Henry Light and Power Company," by the Statute of the Province of Quebec, 55-56 V., cap. 77, and was authorised to manufacture and deal in electricity, gas, and other illuminants, and to lay such wires and pipes underground, in such streets and public places as might be deemed necessary for the purpose of supplying electricity and gas for light, power or heating, without however doing any unnecessary damage, and providing proper facilities for free passage through the streets and public places while its works should be in progress.

10 This charter was amended on the 27th February, 1893, by the Statute 56 Vic., cap. 73, which amongst other things enacted that the municipal councils of all cities and other places should have the right, if they should deem it necessary, to oversee and prescribe the manner in which the streets should be opened for the placing of wires underground, and that the Company should put back the surface of such streets as near as possible in their original condition at its own cost. The amending Act also changed the name of the

Company to "The Standard Light and Power Company." The Charter also provides that before commencing the laying of pipes the Company must make a report to the Commissioners of Agriculture and of Public Works of the works which they intend to undertake, and must also send a copy of the report to the Council of the municipality in which such works are to be carried on. The Company in the exercise of the powers granted to it, determined to lay wires underground in the City of Montreal, and by the ministry of R. A. Dunton, a notary public, on the 15th day of May, 1896, communicated to the City of Montreal the names of the streets in which it intended to lay underground wires, and notified and called upon the City to prescribe if it should be deemed necessary the manner in which such streets should be opened. The Company had been ever since the month of March in communication with the City Surveyor upon the subject of such underground conduits. No objection was raised to the contemplated work, and the City Surveyor reported that the cost of replacing the streets which it was intended to open in a proper condition would be eighteen thousand dollars (\$18,000), and suggested that the Company should be requested to furnish security for that amount. Although the Company was not bound under its Charter to furnish such security it would willingly have done so, but no further steps were taken by the City in that direction. 10

On the 22nd of August, 1896, the Company made a report to the Commissioners of Agriculture and of Public Works respectively of the work which it contemplated doing, showing the streets in which they proposed to lay wires, and it produced at the same time a plan showing the nature and extent of the work, and then on the 24th day of the same month by the ministry of its notary it served upon the City copies of the report and plan, and called upon the City to prescribe, if it deemed it necessary, the manner in which the streets indicated should be opened, notifying the City at the same time that in default of the City prescribing the manner of opening the streets within a delay of ten days, it would proceed with the work in accordance with the report. The City did not answer the notification, nor did it prescribe any manner in which the streets should be opened. 20

The Company then proceeded to excavate at the corner of Mountain and St. Antoine Streets, but it was forcibly prevented from continuing the work by a number of policemen, accompanied by the chief of police and the City Surveyor, who all acted under the orders of the City.

The Company applied for, and obtained from the Superior Court, a Writ of Injunction, to enjoin the City to cease from molesting or interfering with the Company in the execution of the work of laying the underground wires in the streets mentioned in its notification to the City. 30

The Company alleged that under the powers conferred upon it by its charter and the amending Act it had the right of laying underground wires in the streets of the City of Montreal; that it was only bound to make a report of the work which it projected at any time to execute to the Commissioners of Agriculture and of Public Works, and to send a copy of such report to the Council of the City; that the City had no power to prevent the accomplishment of such work, and had merely the right, should the Council deem it necessary, 40

to prescribe the manner in which its streets should be opened, and to oversee the execution of such work; that the Council had not taken advantage of the power thus granted to it, and had not prescribed the manner in which the streets were to be opened, and that the only right it really possessed was to force the Company to put back the surface of the streets in their original condition after the laying of the pipes.

The City pleaded that by the laws regulating Municipal Corporations, it had a sovereign and absolute control of its streets; that it was in fact the owner of such streets and had a full and absolute right to close and discontinue any of them should it be deemed for the public interest; that the Legislature had not conferred on the Company powers superior to those of the City, and that by Section 6 of its Charter the Company was bound to obtain the consent of the Council for any works proposed to perform, and could not commence them without the consent of the City; that it was only on the 24th day of August, 1896, that the Company served the copy of the report which it had made to the Commissioners of Agriculture and of Public Works upon the City, and that the first regular meeting of the Council after such notification only took place on the second Monday of the month of September, when alone the question could be laid before it; that the action of the Company was therefore premature, and that it had acted illegally and maliciously in commencing its work on the 10th of September, before the Council could deliberate on the matter and prescribe the manner in which the work should be carried out.

The Company replied that it had complied with all the conditions and provisions of its Charter and of the law, and that the City was subject to the authority and jurisdiction of the Legislature.

The legal proceedings in this case were commenced on the 11th day of the month of September, and judgment was rendered in the Superior Court on the 21st September, declaring the Writ of Injunction absolute, and enjoining the City to desist from molesting and interfering with the Company by preventing it from laying underground wires in the exercise of the rights conferred upon it by its Charter and the amending Act. The case was inscribed in appeal on the day the judgment was rendered, and it was argued before this Court on the 25th of September, and now on the 3rd of October judgment is about to be delivered by the highest tribunal in the Province. All this has taken place within a space of about three weeks, and it shows that when parties are desirous to proceed it is possible even in the Province of Quebec, whatever may have been said, to obtain justice in a speedy manner.

Three questions are especially raised in this Case:—

1st. Had the Provincial Legislature jurisdiction to grant the powers which the Company seeks to exercise?

2nd. If so, has the Legislature actually granted such powers in the Company's Charter and the amending Act? And

3rd. Has the Standard Light and Power Company complied with the requirements of the law and of its Charter? and has it proceeded in a regular and lawful manner in opening the streets of the City?

As regards the first question, there can be no doubt that the Legislature had full authority, and, indeed, the Counsel for the City has virtually conceded

it. By paragraphs 8, 11, and 13 of Section 92 of "The British North America Act, 1867," the Provincial Legislatures are empowered exclusively to make laws respecting municipal institutions, the incorporation of companies with provincial objects and property and civil rights in the Provinces. Under these powers the Legislature of Quebec had the right to grant powers dealing with property and civil rights to the Company, and to grant municipal powers and powers respecting property and civil rights to the Corporation of the City of Montreal, and afterwards, if deemed expedient, to restrict or take away any such rights so granted. Article 10 of the Revised Statutes of Quebec in treating of the Statutes of the Province lays down a rule which affects all corporations and persons to whom powers have been conferred by the Legislature, when it declares that every Statute is considered as reserving to the Legislature, whenever the public good requires the same, the power of repealing it, and also of revoking, restricting, and modifying any power, privilege, or advantage granted to any person or party. 10

The Legislature, therefore, had the right of restricting any powers which it might have granted at any time to the Corporation of the City of Montreal with respect to its streets, and to enact the Statutes conferring rights with respect to the laying of pipes in such streets upon the Company without the consent of the Corporation of the City, even if such grant of power to the Company should curtail rights previously given to the City. Dillon on Municipal Corporations, in Volume I., Section 71, says that the Legislature has full control over the public property and public rights of Municipal Corporations, and that it may authorize a Railway Company to occupy the streets of a city without its consent and without payment. This, of course, applies to all other companies and to all persons as well as to railway companies. Within the sphere of its attribution the Legislature possesses as absolute powers as the Imperial Parliament does, and it is evident that it acted within the sphere of its attribution in enacting the Statutes in question. 20

As regards the second question, it was argued by the Counsel for the City that, as a matter of public policy, it was necessary that the City Authorities should have full and absolute control over its streets, that to allow any corporation to exercise any right in the streets would be curtailing the powers of the municipal authorities, and that it could not be supposed that such could ever have been the intention of the Legislature. It is useless to argue such a question before the Courts, as the duty of the Courts is confined to the interpretation and application of statutes, and not to considering whether their enactment was expedient and politic. We take the law as it has been enacted and as it is, and we have no concern with what it should have been. The City of Montreal spends annually large sums of money in sending deputations to Quebec during the Sessions of the Legislature to obtain amendments to its Charter. Speaking for myself, and not for the Court, I may be allowed to say that the City might possibly find it to its advantage to employ a Parliamentary Agent to examine all Bills which might in any way affect the City's interests. If it did so, and took exception to some of the powers which are sought to be obtained by promoters, many of the powers sought for, which are oftentimes obnoxious, would not be granted, and much detriment and litigation might be 30 40

avoided. The proper time to have raised objections to the powers granted to "The Standard Light and Power Company" was when its Bills were before the Legislature, and not now when the Court is dealing with the powers so granted. It was also argued that it must necessarily be inferred that the Legislature had intended that the Company should remain subject to the Municipal Authority, and that a grant of power by the Council of the City or other municipality concerned was therefore necessary to authorise the Company to open streets, and that it was optional with the Municipal Authorities either to grant or refuse such authority; but a careful examination of the two Acts
 10 shows that it was, on the contrary, the intention of the Legislature to confer such power absolutely on the Company, subjecting it in the execution of such work merely to the inspection and supervision of the Municipal Authorities.

The Charter of the City of Montreal was consolidated, and is contained in the Statute of the Province of Quebec, 52 Vict., cap. 79. Amongst other powers conferred on the Corporation, it is authorised by paragraphs 42 and 43 of Section 140 to regulate all things concerning the streets of the city, to close and discontinue any streets, and to prevent any encroachment of the streets and side walks. There is no clause in the Charter itself vesting the ownership of the streets in the Corporation; but there is a general provision contained
 20 in Article 4,616 of the Revised Statutes of the Province of Quebec, which vests the ownership and control of all roads, streets, and public highways within the limits of any city or town in their respective Municipal Corporations. As I have already stated, however, this right of ownership and of control is subject nevertheless to the power of the Legislature to authorise railway companies, and water, telegraph, or gas companies to use and occupy the streets and highways for their respective purposes.

It is specially pleaded in the present case that it was not the intention of the Legislature to confer any such right upon the Standard Light and Power Company; that it could not open the streets and lay its pipes without first
 30 obtaining the consent of the Council of the City, as it could not be presumed that the Legislature intended to subordinate the City to a private Corporation. Let us see what are the provisions of the Company's Charter and of the amending Act, and what powers are directly granted to it by the Legislature. By Section 5 of the Charter the Company has power to manufacture and deal in electricity, gas, and other illuminants, and to lay its wires and pipes underground in all streets, highways, and public places for the purpose of supplying electricity and gas for light, power, and heating, without doing unnecessary damage and allowing such proper facilities for free passage while its works are in progress. By Section 18 the Company is required before commencing the
 40 laying of pipes to make a report to the Commissioners of Agriculture and of Public Works, and to send a copy of the report to the Council of the municipality in which the works are to be carried on. By Section 19 the Company is bound to construct and carry on its works so as not to endanger the public safety, and its works are declared to be at all reasonable times subject to the inspection of the Municipal Authorities after reasonable notice of such inspection has been given to the Company. By Section 20 the Company is enjoined in the construction of its works to leave the streets free and uninterrupted as far

as may be possible, and to replace the streets with due diligence in proper order, and is rendered responsible for any neglect in that respect. By Section 25 the Company could only exercise its privileges upon complying with the rules and regulations which might be adopted by the Municipal Authorities on the subject; but this section was repealed by the amending Act, and such amending Act by Section 1 merely provides that the Municipal Council should have the right to prescribe and oversee the manner in which such streets, roads, and highways should be opened.

It is apparent from these enactments that the power to open the streets of a city and lay pipes therein is directly and absolutely granted to the Company by the Legislature, and that it is not necessary that the permission of the Municipal Council should be obtained for that purpose. The obligation is imposed on the Company of carrying on its works so as not to endanger the public safety, and to replace the streets with all due diligence in a proper condition, and it is made responsible for all neglect to carry out these provisions. The only power given to the Municipal Council is to prescribe the manner in which the streets are to be opened, and to oversee the execution of the works, and to have at all reasonable times a right of inspection over such works and any appliances used.

We are unanimously of opinion that the Legislature intended to grant, and did in fact grant, the right and power claimed by the Company, and that such right and power are not dependent upon the consent or authorization of the municipal corporation.

I now come to the third question, whether the Company had proceeded in a regular and lawful manner, and had complied with the law and with its Charter.

The City pleaded specially that the Company had not complied with the requirements of its Charter, and had not given in due time the notice which it was required to give, and that it had been premature in its action.

Communications took place between the City Surveyor and the Company from the month of March, 1896. On the 15th of May the Company notified the City, notarially, that it intended opening certain streets for the purpose of laying conduits, and called upon it to prescribe, should it be deemed necessary, the manner in which such streets should be opened. On the 22nd of August the report was sent to the Commissioners of Agriculture and of Public Works. On the 24th of August a copy of the report was served upon the City, and it was notarially notified that the Company would proceed with its work after a delay of ten days. The Company consequently complied with all the requirements of its Charter, and give full and due notice to the City; but the City pleads that the notice was only served upon it on the 24th of August, and that the first meeting of the Council subsequent to that date could only, and did only in fact, take place on the 14th of September, and that on that day it could not act as it had before it no report from the Road Committee on the matter. It pretends that the Company could not proceed before obtaining the consent of the Council, and an ordainment as to the manner in which it should open the streets. The Company, however, was not bound to obtain any authorization or consent from the City, and it was optional with the City to

prescribe the manner in which the streets should be opened or to abstain from doing so. It is true that the first regular meeting of the Council after the 24th of August could only take place on the 14th of September, but if the municipal authorities had been disposed to act in the matter, the Mayor, under Section 67 of the Charter of the City, could have called a special meeting by a notice given two days prior to such meeting, and upon the Mayor's refusal to call such a meeting five Aldermen could require the City Clerk to call it. The Company had for months been in communication with the City Surveyor, and had given proper and timely notice of its intention to open certain streets of the City, and it was not bound to wait the pleasure of the City. The City saw fit to ignore the rights of the Company, and it ignored and neglected to act on the notices which had been given to it by the Company. But we have seen that the City can act promptly when it wishes. On the very day that the Company commenced its work, about half an hour after it had begun to excavate, the City stopped the Company from proceeding with its works by a force of its police, and when judgment was given by the Superior Court enjoining the City to cease molesting the Company, it on the very same day appealed from the judgment. It was slow when the Company asked it to act, but quick when the Company acted. The City Surveyor had reported on the work which the Company intended performing, and had made no objection to it, merely recommending that the Company should be asked to give security to the extent of \$18,000 for the restoration of the streets to their original condition, but no action was ever taken by the City on this report of the City Surveyor, nor was the Company ever called upon to give such security.

The Court is unanimously of opinion that the Company proceeded with proper caution, and that it had complied in every respect with the requirements of its Charter, and had given due notice to the City.

The interference of the City with the work which the Company had commenced to perform was illegal, and the Company had, therefore, the right to proceed by injunction to enforce its rights and restrain the City from molesting it.

It was argued, however, that the Company should not have proceeded by injunction, but should have done so by mandamus, or should have sued the City for damages. It is true that the Company might have proceeded against the City for damages, but it had the right to exercise the powers which have been granted to it, and it can, therefore, choose between the remedies given it, and it has seen fit to adopt the remedy of a Writ of Injunction which will allow it to proceed with its work and exercise its powers.

The Writ of Mandamus is a remedy for the enforcement of duties, but it does not lie against officers or bodies who are vested with discretionary powers to enforce specific action. It may be used to enforce the performance of a specific duty; but where discretion is conferred to do or not to do an act, it cannot be used. In the present case the City had the right, if it saw fit, to prescribe the manner in which the streets should be opened, but it is under no legal obligation to do so; and consequently a Writ of Mandamus would not lie against it to force it to prescribe the mode or manner in which the Company should carry out its works. As the City did not see fit to act, the Company, after having

given due and proper notice, was clearly entitled to proceed with its works as it did.

The Court is unanimously of opinion that there is no error in the Judgment declaring the Writ of Injunction, which was issued against the City, to be permanent; and it is therefore affirmed, and the Appeal is dismissed with costs.

I hereby certify that the above are the Notes of Judgment delivered by me when Judgment was pronounced on the 3rd day of October, 1896.

J. WÜRTELE,
J.Q.B.

In the Privy Council.

*On Appeal from the Court of Queen's
Bench for Lower Canada in the Province
of Quebec (Appeal Side).*

BETWEEN

THE CITY OF MONTREAL

Appellant

AND

THE STANDARD LIGHT
AND POWER COMPANY

Respondent.

Supplemental Document.

NOTES OF JUDGMENT

OF

MR. JUSTICE WÜRTELE.

Lodged by Consent of both Parties.

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