Judgment of the Lords of the Judicial Committee on the Appeal of The Hull Electric Company v. *The Ottawa Electric Company and the Corporation of the City of Hull, from the Court of King's Bench for Lower Canada, Province of Quebec; delivered 22nd February 1902.*

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR FORD NORTH.

[*Delivered by Lord Macnaghten.*]

In March 1887 Ahearn and Soper applied to the Mayor and Aldermen of the City of Hull stating that they had organised a Company for the purpose of supplying the City with electric light and asking for permission to erect their poles in the streets. On the 4th of April 1887 the City Council passed the following resolution "That " the petition of Mr. Ahearn and Mr. Soper asking " that they be permitted to erect within the limits " of the City poles for the establishment of their " system of electric light be granted under such " restrictions and regulations as are observed in " Ottawa and subject to the instructions of the " Committee on Streets and Improvements as to " the places where these poles shall be erected." The Company on whose behalf Ahearn and Soper were acting was the Chaudière Electric Light and Power Company Limited. They

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transferred their rights and assets to the Respondents the Ottawa Electric Company hereinafter called the Ottawa Company.

Under the permission granted by the foregoing resolution the Chaudière Company established a system of electric lighting in the City of Hull. It was continued and extended by the Ottawa Company and is still in operation.

In 1894 one Viau described as a contractor presented a petition to the City Council setting forth the importance of establishing a line of electric cars connecting the City with certain neighbouring places and also the advantage of establishing a system of lighting and heating for the City by electricity natural gas or otherwise and praying for special privileges in the shape of exclusive rights for a certain term of years and a temporary exemption from taxes in order to enable him to carry out his enterprise.

On the 7th of May 1894 the City Council under its corporate seal passed a bye-law known as Bye-law No. 61 in reference to Viau's scheme.

Under the 1st and 2nd paragraphs of this bye-law Viau obtained an exclusive privilege of constructing and maintaining a railway worked by electricity or any other motive power except steam or horse-power connecting the City with certain neighbouring places and passing over one or more of the City streets.

Paragraphs 3 and 4 were in the following terms :—

"3. From the date of the publication of the "present bye-law the said Theophilus Viau "whether personally or with other persons with "whom he shall think fit to associate himself "and his or their heirs or legal representative "shall have an exclusive privilege during 35 "years to establish in the City of Hull a system "of lighting and heating by electricity or by "natural gas or otherwise.

"4. The City of Hull by the present bye-law "grants to the said Viau individually or through "the society or company which he may think "fit to form later the exclusive rights mentioned "in paragraphs 1 and 3 such as it possesses "and as it has the right to grant this day."

Then followed among other provisions a provision to the effect that in case the proposed works were not commenced within two years from the date of the publication of the bye-law the concession should become null and void.

The Hull Electric Company hereinafter called the Hull Company was promoted for the purpose of working Viau's concession. It was incorporated by an Act of the Legislature of Quebec 58 Vict. chap. 69 passed on the 12th of January 1895. By this Act Bye-law No. 61 and the provisions thereof were declared to be legal and valid and the franchises privileges rights and exemptions therein contained were declared legal and binding upon the Corporation of the City of Hull.

After some delay but within the time limited by the bye-law the Hull Company commenced their works. They proceeded to construct the proposed railway and also established a system of lighting by electricity in competition with the Ottawa Company.

The Hull Company finding that the operations of the Ottawa Company interfered with their profits issued a written protest dated the 17th of March 1897 and thereby required the Ottawa Company to remove their appliances and to desist from supplying electric light by means of their system. The protest proved ineffectual and on the 10th of May 1897 the Hull Company commenced the action which has led to this appeal.

This action in which the City of Hull intervened with the view of supporting the Ottawa

Company was tried before the Superior Court. The trial Judge Lavergne J. dismissed the action with costs holding the bye-law bad and the Quebec Act void on the ground that electric light is a commercial commodity and that therefore the regulation of trade in it falls within the exclusive competence of the Parliament of Canada.

The Superior Court sitting in review reversed this Judgment and ordered the Ottawa Company to remove their posts and wires and to pay $200 as damages accrued during the period which elapsed between the date of the protest to the institution of the action. They held that the City had power to grant Viau's concession that the bye-law properly construed was not invalid and that the Quebec Act was not unconstitutional. They further held that the license to Ahearn and Soper was revocable that it was incompatible with the exclusive grant to Viau that the effect of that grant was to enable Viau to insist on the revocation of the former license and that the license had in fact been revoked either by the Quebec Act or at latest by the protest of the 17th of March 1887.

The Court of Queen's Bench on the 31st of December 1899 reversed the Judgment of the Court of Review and restored the Judgment of the Superior Court. The Judgment in the Queen's Bench was given by Lacoste C.J. The decision was rested on two grounds. In the first place agreeing with the Superior Court the Court of Queen's Bench held the bye-law bad and the Quebec Act unconstitutional. In the second place the Court considered that the license granted to Ahearn and Soper did not require the formality of a bye-law and that the resolution of the 4th of April 1887 was valid for the purpose in view. They doubted whether

such a license was revocable at all events without compensation. They thought that at any rate an express revocation was necessary. The City had not in their view delegated to the Hull Company any power of revocation. Their conclusion therefore was that the Hull Company could not prevent the Ottawa Company from supplying electric light or using for that purpose the posts and wires which it had placed in the streets of Hull under the permission accorded by the Resolution of April 1887.

The first ground on which the Chief Justice bases his decision may be laid aside. It was abandoned at the Bar by the leading Counsel for the Respondent. It is obviously untenable. The scheme in favour of which Bye-law No. 61 was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the Provincial Legislature and not the less so because in such cases it is usual and probably essential for the success of the undertaking to exclude for a limited time the competition of rival traders.

Nor is there any difficulty with respect to the Resolution of April 1887. Ahearn and Soper asked for nothing more than a permission in its nature revocable. Nothing more was given to them. There seems to be no reason why such a permission should not be granted by a simple resolution and recalled in a similar manner.

The real difficulty of the case lies in determining the true meaning and effect of Bye-law No. 61. In approaching the question it must be borne in mind that at the time when that bye-law was passed the Ottawa Company had in accordance with the Resolution of April 1887 and by the express permission of the Council established a system of electric lighting in the City of Hull and that they were actually supplying the municipality with electric light under a contract

which was only terminable by a notice to be given on a distant day in the current year and which if not so terminated would run on from year to year until terminated by a like notice on the same day in some following year. Viau of course was quite aware of the position of the Ottawa Company. Indeed it is not disputed that paragraph 4 of the bylaw was intended to place on record the fact that the Ottawa Company had at the time a system of electric lighting in operation in the city. At first sight no doubt the grant to one person or to one body of persons of the exclusive right to establish a system of electric lighting within a particular area seems hardly consistent with the continuance within the same area of a similar system of lighting in the hands of another body carrying on operations under a revocable license from the very same grantors. But the two things are not incompatible. Now it seems quite clear that it was not intended that the license granted by the Resolution of 1887 should be revoked off-hand by the bye-law itself. An immediate revocation would have exposed the municipality to a serious liability for breach of contract; and it would have caused no little inconvenience to the municipality and the private customers of the Ottawa Company. There was no other source of supply available; there was no immediate prospect of obtaining a supply through Viau's scheme. Moreover it is to be observed that the bye-law itself provided that in the event of the proposed works not being commenced within two years the concession should drop and even if the works were commenced within the prescribed period it would not follow that Viau's system of electric lighting would ever be established. Viau and his associates might find it more to their advantage to confine their operations to the electric railway.

Then if the bye-law did not of itself revoke the license of 1887 when and under what circumstances was revocation to take place? The bye-law is silent on the point. There are only two alternatives. Either the power of revocation remained in the hands of the Council or it passed to Viau and his associates. It certainly was not given to them expressly. Was it given to them by necessary implication? Even assuming that the license of 1887 was to continue unrevoked Bye-law No. 61 was anything but a prudent or business-like arrangement. Viau was not a man of substance. He had not the control of any water-power. He had no one at his back. Apparently he was without any means of carrying his scheme into effect except what he could get by pledging the concession. For the concession itself he paid nothing. By accepting it he came under no obligation to do anything of any sort or kind. He gave no security to the Council. He was not bound to supply electric light to the City or to those of the inhabitants who might require it. Nor was he placed under any restriction as to the amount of the charges which he and his associates might make. He and they were left at liberty to charge as much as they pleased or as much as they could get and they were left at liberty to grant or withhold the supply at their pleasure. In these circumstances the claim of the Appellant Company that no other person or body of persons shall supply electric lighting to the City during the period of their concession is not one that commends itself to favourable consideration. It seems to their Lordships that it would have been an act of incredible folly on the part of the Council to give Viau and his associates the right to terminate the license of the Ottawa Company at their will and pleasure. Unless the bye-law admitted of no other construction their Lordships would certainly hesitate to come to the

conclusion that the Council of the City of Hull had so utterly neglected their duty. Their Lordships however agree with the Court of Queen's Bench in thinking that the bye-law admits of a more reasonable construction. Their Lordships think that the real meaning of the transaction was this:—The City of Hull granted to Viau an exclusive right of establishing a system of electric lighting for a certain term of years—that is to say by their grant to him they bound themselves during that period not to grant such a right to anybody else; but at the same time they said to Viau "you "must remember that we have granted per- "mission to the Ottawa Company to establish a "system of electric lighting in the City of Hull "and that system is now in operation—we bind "ourselves not to convert that permission into a "right but we do not bind ourselves to revoke "that permission at your bidding. We keep the "power of revocation in our own hands." Possibly the consideration that the Ottawa Company was to be left to carry on its operations in Hull until the Council saw fit to revoke its license may account for the singular fact that in passing Bye-law No. 61 the Council did not think it necessary either to impose on Viau and his associates any obligation to furnish a supply of electric light to the municipality or to those of the inhabitants who might require it or to place any restriction upon the charges which Viau and his associates might demand.

In the result therefore their Lordships agree in substance with the second ground of the decision of the Court of Queen's Bench and they will humbly advise His Majesty that this Appeal ought to be dismissed.

The Appellants will pay the costs of the Appeal.