Privy Council Appeal No. 108 *of* 1919.

The Montreal Light, Heat and Power Company - - *Appellants*

v.

The City of Montreal - - - - - - *Respondents*

FROM

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 6TH MARCH, 1924.

Present at the Hearing:

LORD BUCKMASTER.
LORD ATKINSON.
LORD WRENBURY.
LORD DARLING.

[*Delivered by* LORD BUCKMASTER.]

The solution of the question raised on this appeal depends on the construction of Section 39 of a statute, 9 Edward VII, c. 81, passed in 1909, to amend the Charter of the City of Montreal.

Before the passage of this Act certain persons and companies had obtained the right of carrying telegraph, telephone and electric light and power wires and cables by an overhead system through the streets of the city of Montreal. It was considered to be in the public interest that all such wires and cables should be placed underground and it was for the purpose of carrying this object into effect that the section in question was introduced into the statute. The point which arises to be determined relates solely to the proper method of apportioning the cost which the city incurred in connection with the laying of the underground conduits necessary for the receipt of the wires and cables. About the general scheme and principle of the section no question arises.

and its provisions can be summarised without reference to the actual words. In the first place authority was given to the city to construct, administer and maintain a system of underground conduits for the receipt of the wires and cables with a right to compel the persons and companies who operated by overhead systems to place the same underground. Provision was also made to secure compensation for the value of the poles, wires and overhead constructions which it was necessary to remove, and a body was established known as the Electrical Commission of the City of Montreal to fix and determine what the amount of that compensation should be. To this body the city had the power to delegate all the rights that they possessed for the purpose of carrying out the undertaking; while from this body an appeal was given to the Quebec Utilities Commission from whom again an appeal was permitted by a statute known as the Quebec Public Utilities Commission to the Court of King's Bench upon a question of law or jurisdiction.

The scheme which the section embodied expressly contemplated that the conduits to be laid should be of sufficient size not only to provide for the existing requirements, but to a reasonable extent for what might be required in future by all persons or companies who had then obtained or should thereafter obtain rights and privileges entitling them to use the streets for the purpose of their electrical undertakings, and such persons or companies were required to state what portion of the conduits they desired to have reserved. In order to provide for the expense, both for compensation and for construction, establishment, administration and maintenance, power was given to the City Council to raise money by the issue of bonds, debentures or stock to the amount of 5,000,000 dollars. The method by which the rate of payment for persons using the conduits was to be determined is in Sub-section 8 of Section 39, and as it is upon this that the present appeal depends, it is desirable to set it out in full. It is in the following words :—

> "The city is authorised to fix, determine, charge and receive rentals on all underground constructions reserved by the persons, firms, syndicates, companies or corporations, and all overhead constructions owned by the city. Such rentals shall be fixed from year to year, to cover the cost of maintenance and administration of the same, the interest and sinking fund calculated in such manner as to extinguish the debt in not less than forty years on the capital invested by the city for the construction or purchase of such underground conduits, as well as the salaries and expenses of the Electrical Commission. When the said debt has been extinguished, the rental shall no longer include the interest and sinking fund on the extinguished debt; but the amount of such rentals for each person or company shall be in proportion to the portion of the conduits occupied or reserved by him or it."

The conduits were duly constructed and ducts in these conduits were given and reserved to the existing undertakers, including some for use by the city, and after these allocations of space, certain portions remained unoccupied and unreserved and available for future developments.

The first words clearly empower the city to fix the rentals on the underground constructions reserved by the persons, firms and companies. The word " constructions " is the equivalent of the French word " installations," and the meaning is that so much of the system of conduits as is actually used by or reserved for the use of the persons or companies whose wires they carry should pay a rental which the city was to fix. The next sentence establishes the method by which such rentals are to be assessed, and that is to cover not merely the cost of maintenance and the administration of the installations, but also the interest and sinking fund necessary to extinguish in 40 years the capital used for their construction ; and the final provision relates to the amount of such rentals when the debt has been paid.

The city, in exercise of their powers delegated to the Electrical Commission the assessment of these rentals, who fixed it in this way : they took the total length of the ducts throughout the whole system of the conduits in feet and divided the total cost by this figure, thus arriving at a unit cost per foot of duct, and to fix the rental of any particular person or company they multiplied this unit by the actual length of duct occupied or reserved by such person or company.

On appeal to the Quebec Utilities Commission this judgment was over-ruled, and it was declared that the amount should be arrived at by determining among the different users of the system, including the city, the proper proportion of the total expense fixed by determining the ratio of the extent of the system used or reserved by any particular user to the total system used. From this it would result that if any person or company used one-tenth of the total conduits used they would pay one-tenth of the total sum, the city being regarded as liable in respect only of the actual space used or specifically allocated for their use. The Court of King's Bench, by a majority of three judges to two, affirmed this method, and from the Court of King's Bench this appeal proceeds.

It is plain from the section that there are two different ways, apart from that adopted by the Court of King's Bench, by which this matter may be considered. It is possible to regard the city as being in fact a tenant of the total unoccupied and unreserved space, which is in effect the judgment of the Electrical Commission, and the other is the one which has been very fully argued upon this appeal, viz., that as each new occupier is introduced into the system he shall pay such a sum in respect of the interest and the sinking fund as would ultimately produce at the end of 40 years the same amount as would have been provided in respect of his user had he been one of the original persons or companies whose wires were placed underground. In considering these various contentions their Lordships have come to the conclusion that the Court of King's Bench and the Quebec Public Utilities Commission have adopted the right view. In the first place they think it is clear that the section contemplates an arrangement by which the interest and the sinking fund in respect of that portion

of the total debt incurred solely for the construction and purchase of the underground conduits must be calculated in such a manner as to provide for total extinction of that portion of the debt at the expiration of 40 years. It was indeed argued that the phrase in the section which in English is " for the construction or purchase of such underground conduits," means only for the construction or purchase of such portion of the underground conduits as is actually occupied or reserved, thus limiting the liability of each user of the system to providing a share of the sinking fund notionally allocated to the proportion used by him of the total system. This argument depends upon the value to be attached in English to the words " of such underground conduits." The French word for " of such " is " des," a word which it is said must be accepted as equivalent to " de ces," a possible but by no means a certain interpretation, seeing that the word " ces " is immediately followed by a noun and that a few lines before, where the two words " de ces " are used, they are not contracted into one. If, however, it be so regarded it is not easy to find any ambiguity about the following words " underground conduits." The word " conduits " has not been mentioned previously in the sub-section, and there is nothing therein to suggest any apportionment of the whole, so as to make the phrase " conduits," which includes the whole block of ducts, refer only to a portion of such ducts used and reserved by any particular person or company. In their Lordships' opinion the conduits referred to are those mentioned in Section 39 (1), *i.e.*, the total system of ducts collected together and of such capacity and extent as not only to satisfy the present requirements but to provide to a reasonable extent for the future. It follows from this that the rentals must extinguish the total debt for construction, and must be so regarded, but to throw upon the city the liability for the cost of all the unused and unreserved portions of the conduits would be to prevent the debt being extinguished unless the Corporation contributed an annual sum out of the rates for that portion neither used or reserved. There is nothing in the statute to suggest that this is contemplated. It was, however, contended that as the city used a portion of the system and have been accepted as liable to a rental to this extent, there being no express provision to impose such liability the liability for the whole unoccupied space might also be charged on them, but payment for the part used is wholly different from liability for what they do not use, and there is nothing to prevent the city being included in the phrase " corporations " on whom the rentals are to be imposed even though they themselves are the primary authority to fix the amount. The only other method of extinguishing the debt would be that to which reference has been made, but apart from the astonishing complication of any such system and the hindrance and bar that it would place in the way of future electrical development in the city, it would not apply unless before the end of the 40 years the total space was occupied or reserved. Their Lordships have not overlooked the argument of the appellants that as the earlier part of the sub-

section provides that the rentals are to cover the cost, maintenance and administration of " the same," that is of the installations which have been placed underground, this shows that such expenses are to be allocated in respect of actual user, but though their Lordships admit the difficulty caused by this word they regard the subsequent words to which attention has been directed as too strong to permit effect to be given to the appellants' argument, and the apportionment of the cost of maintenance and administration of these underground installations must be treated as the fractional cost of the whole expense determined as the judgment appealed from provides. Their Lordships think, therefore, that the rents must be fixed so that upon the assumption that no further use of the conduits is made the debt will be satisfied. The provision which enables the rentals to be fixed from year to year, though it might be necessary for the purpose of meeting the varying overhead charges, also provides a simple and effective method by which, as a new user takes place, a new adjustment of the burden is made.

Their Lordships find confirmation of their view in the last clause of the section: this begins by a provision applicable when the debt has been extinguished, that is at the expiration of 40 years. From that time rentals will no longer include the interest and sinking fund on the debt, but are to be in proportion to the portion of the conduits occupied or reserved by any person. This last clause means that from that time, the costs of construction being eliminated, the rental at the expiration of 40 years is to be fixed by the proportion of the space occupied to the total space, this is regarded as a new system, and yet, according to the appellants, it is the system which now prevails. If their contention were sound there would be no meaning in the concluding sentences of the sub-section.

Mr. Justice Pelletier, who delivered the dissenting judgment in the Court of Appeal, was obviously impressed by this difficulty, and their Lordships agree with him in thinking that a full-stop might have altered the meaning, but it is not there, and the semicolon fully permits transference of sense from the earlier words.

Another point mentioned in argument which it is only necessary to notice, was that the judgment of the Quebec Commissioners did not appear to be that of the Commission, but merely of the President, but that is disposed of by the fact that it was delivered in the presence of another Commissioner.

Their Lordships are, therefore, of opinion that this appeal fails, and will humbly advise His Majesty that it should be dismissed with costs.

In the Privy Council.

THE MONTREAL LIGHT, HEAT AND POWER COMPANY

v.

THE CITY OF MONTREAL.

DELIVERED BY LORD BUCKMASTER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1924.