

The Corporation of the City of St. Catharines - - - *Appellant*

v.

The Hydro-Electric Power Commission of Ontario - - - *Respondent*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH OCTOBER, 1929.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD DARLING.

LORD MERRIVALE.

LORD TOMLIN.

MR. JUSTICE DUFF.

[*Delivered by* LORD TOMLIN.]

This is an appeal from a judgment dated the 5th April, 1928, of the Appellate Division of the Supreme Court of Ontario, dismissing the appeal of the appellant (who is the plaintiff in the action) against the judgment dated the 15th December, 1927, of the trial Judge, Mr. Justice Logie.

The action was begun by the appellant on the 21st April, 1927.

The relief sought was in effect (1) for the return and delivery up by the respondent to the appellant free from any charge or other claim of certain debentures and interest coupons issued by the appellant and deposited by the appellant with the respondent in accordance with the terms of an agreement in writing made between the respondent and certain municipal corporations (including the appellant) for the construction of a Hydro-Radial Railway from Port Credit to St. Catharines, in the Province of Ontario, and (2) for a declaration that the

appellant was not in any way indebted or otherwise liable to the respondent in respect of any expenditure or commitment of the respondent in connection with the railway, the construction of which had never been carried out.

The respondent counter-claimed for payment by the appellant of the appellant's share of the cost incurred by the respondent under the agreement and for an order authorising the respondent to sell the debentures in question for the purpose of satisfying the amount of such share.

The dispute between the parties arose in the circumstances which are next narrated.

The respondent is a corporation constituted by a statute of Ontario. The main function of the respondent is to procure and distribute electrical power in Ontario. It is composed of three members appointed by the Lieut.-Governor in Council. The members hold office during pleasure. One of the members must be and two of them may be members of the Executive Council. No action can be brought against the respondent without the fiat of the Attorney-General of Ontario.

The Hydro-Electric Railway Act, 1914, passed by the Legislature of Ontario, as amended by subsequent Acts, empowered Municipal Corporations to agree with the respondent for the construction, equipment and operation of electrical railways to be operated by electrical power supplied by the respondent. For convenience this Act as amended will be hereafter referred to as the Act of 1914.

The preamble of the Act of 1914 was in the following terms :—

“Whereas it is expedient to provide for the economical and efficient construction and operation of electric railways in localities in which municipal corporations are willing to provide and bear the cost of the work, and that in order to further the success of the undertaking means should be provided for the co-operation of the municipal corporations interested, and that the work should be undertaken by or under the direction of the Hydro-Electric Power Commission of Ontario acting for and on behalf of the municipal corporations interested; and whereas it appears that the funds required for carrying out any such undertaking can best be provided by the issue of bonds by the Commission, such bonds to be a charge upon the railway and other works comprised in the undertaking, the debentures of the several corporations interested being deposited as collateral security for the payment of the said bonds, and neither the Province nor the Commission being liable for the payment thereof except to the extent of the moneys received by the Commission from time to time from the municipal corporations.”

By Section 4 of the Act of 1914 it was provided (Subsection 1) that a corporation or two or more corporations might, if authorised by the Lieut.-Governor in Council so to do, enter into an agreement with the respondent for the construction, equipment and operation of an electric railway to be operated by electrical power or energy supplied by the respondent, and (Subsection 2) that the agreement should provide (*inter alia*) for (c) the proportion in which the cost of construction, equipment, maintenance

and operation of the railway should be borne by each of the corporations interested, (*d*) the issuing of debentures of the corporation or of each of the corporations and their deposit with the respondent as collateral security for any bonds issued by the respondent for the construction of the railway, and (*e*) the proportion of the revenue from such railway to be paid annually by the respondent to each corporation after deducting the charges therein mentioned.

Subsections (4) and (5) of Section 4 of the Act of 1914 made provision for obtaining by means of a by-law the assent of the electors of a corporation to any agreement before its execution by such corporation.

Section 5 (1) of the Act of 1914 provided that the by-law submitted to the electors should recite—

- (*a*) The estimated cost of the work.
- (*b*) The portion of the cost of construction and equipment of the line to be borne by the corporation.
- (*c*) The total annual amount estimated to be required for the maintenance of the railway and for sinking fund charges and interest.
- (*d*) The portion of such amount to be borne by the Municipality.

Section 6 (1) of the Act of 1914 provided that the respondent might raise money for the construction and equipment of the railway by the issue for and on behalf of the corporations of bonds charged upon and secured by the railway, and all the assets, rights, privileges, revenue, works, property and effects belonging thereto or held or used in connection therewith.

Section 7 of the Act of 1914 provided that neither the Province of Ontario nor the respondent should be liable in any manner for the payment of such bonds except to the extent of—

- (*a*) The moneys received by the respondent as revenue from the operation of the railway after payment of working expenses, including the cost of electrical power or energy and the cost of administration ; and
- (*b*) the moneys received from the corporations or from the sale of the debentures of the corporations, for the payment of the bonds and the interest thereon.

It is material also to refer to Sections 8, 9, 10, 11 and 12 of the Act of 1914. These sections, in which the respondent is referred to as the Commission, are as follows :—

“ 8.—(1) Notwithstanding anything contained in Section 7, the Lieutenant-Governor in Council may authorise the Treasurer of Ontario, for and on behalf of the Province, to guarantee the payment of the bonds issued by the Commission.

“ (2) The form of the guaranty and the manner of its execution shall be determined by the Lieutenant-Governor in Council.

“ 9.—(1) The council of every corporation entering into an agreement with the Commission under this Act shall annually raise and pay over to the Commission its proportion of such sums as may be required by it for working

capital or to meet any deficit in the cost of maintenance and operation of the railway, including the cost of the supply of electrical power or energy by reason of the revenue from the railway being insufficient to meet such charges, and shall also annually raise and pay over to the Commission its proportion of a sum sufficient to meet the interest on any bonds issued by the Commission under the powers conferred by this Act, and an annual sum sufficient to form in forty years from the expiration of the first ten years of the currency of the bonds a sinking fund for their retirement at maturity.

“ 10. The Commission shall annually adjust and apportion the amounts payable by the municipal corporations under the next preceding section.

“ 11.—(1) After the execution of the agreement as provided by Section 4 the corporations shall issue and deposit with the Commission debentures to the amounts respectively apportioned as their respective shares of the cost of the construction and equipment of the railway and shall from time to time thereafter upon the requisition in writing of the Commission issue and deposit with the Commission such further debentures as may be required for the construction, completion, extension or improvement of the railway, in the proportions fixed by the agreement.

“ (2) The debentures so issued shall be held by the Commission as collateral security for the bonds issued by the Commission under Section 6, and when any corporation party to this agreement shall make default in any payment required to be made by it under this Act or under the agreement, the Commission shall thereupon sell or otherwise dispose of so much of the debentures of such corporation as shall be necessary to supply such deficiency.

“ (3) If the amount realised by the sale or other disposal of the debentures is insufficient, with the amount of the remaining debentures of the corporation, to meet the share of the cost apportioned to the corporation, the corporation shall forthwith issue and deposit with the Commission debentures to a sufficient amount to make up the deficiency.

“ (4) It shall not be necessary to obtain the assent of the electors to any by-law for the issue of debentures under this section.

“ 12. Subject to the provisions of Section 13, after the deposit of the debentures as provided by Section 11, the Commission may construct, complete, equip, maintain and operate the railway as provided by the agreement, and for that purpose shall have and may exercise all the powers, rights, immunities and privileges of a company incorporated by special Act for the construction of a railway under The Ontario Railway Act so far as the same are applicable.”

In January, 1917, an agreement in writing was made between the respondent (called in the agreement the Commission) of the one part and 17 municipal corporations, including the appellant, of the other part, for the construction of a railway from Port Credit to St. Catharines. A by-law of the City of St. Catharines approving the agreement was passed on the 22nd January, 1917, and 14 other corporations passed similar by-laws.

Two corporations, however, failed to pass the necessary by-laws and decided to stay out of the scheme. This led to difficulty. Ultimately the Hydro-Electric Railway Act, 1919, was passed, whereby the agreement was given statutory sanction, and the 15 approving corporations and the respondent were enabled to carry out the agreement on the footing of such corporations depositing with the respondent additional debentures to make up

for those which would have been deposited by the two dissenting corporations.

The agreement contained recitals in the following terms :—

“ Whereas pursuant to the Hydro-Electric Railway Act, 1914, and amendments thereto, the Commission was requested to enquire into, examine, investigate and report upon the cost of construction and operation of an electric railway or railways to be constructed through certain districts in which the corporations are situated, together with the probable revenue that would result from the operation of such railway or railways ;

“ And whereas the Commission has furnished the corporations with such a report showing (1) the total estimated cost, operating revenue and expenses of the railway or railways, and (2) the proportion of the capital cost to be borne by each of the corporations as set forth in Schedule B attached hereto ;

“ And whereas on receipt of the said report the corporations requested the Commission to construct, equip and operate a system of electric railways (hereinafter called the railway) over the routes laid down in Schedule A attached hereto, upon the terms and conditions and in the manner herein set forth ;

“ And whereas the Commission has agreed with the corporations on behalf of the corporations to construct, equip and operate the railway upon the terms and conditions and in the manner herein set forth ; but upon the express conditions that the Commission shall not in any way be liable by reason of any error or omission in any estimates, plans or specifications for any financial or other obligation or loss whatsoever by virtue of this agreement or arising out of the performance of the terms thereof ;

“ And whereas the electors of each of the corporations have assented to by-laws authorising the corporations to enter into this agreement with the Commission for the construction, equipment and operation of the railway as laid down in the said schedules subject to the following terms and conditions.

“ And whereas the corporations have each issued debentures for the amounts set forth in Schedule B attached hereto, and have deposited the said debentures with the Commission.”

By Clause 1 of the agreement the respondent agreed with the corporations (*inter alia*) to construct, equip and operate the railway through the districts in which the corporations were situate on behalf of the corporations and to issue bonds as provided in Clause 3 of the agreement to cover the cost of constructing and equipping the railway.

By Clause 2 of the agreement each of the corporations agreed, *inter alia*, (a) to bear its share of the cost of constructing, equipping, operating, maintaining, repairing, renewing and insuring the railway and its property and works as established by the respondent, subject to adjustments and apportionments between the corporations by the respondent from time to time and (b) to issue debentures for the amounts set forth in Schedule B, maturing in 50 years from the date of issue thereof, and the same clause also provided that such debentures should be deposited with the respondent previous to the issuing of the bonds mentioned above, and might be held or disposed of from time to time by the respondent as provided for in Clause 4 thereof.

Clauses 3 and 4 of the agreement were in the following terms :—

“ 3. It shall be lawful and the Commission is hereby authorised to create or cause to be created an issue of bonds, and to sell or dispose of the same on behalf of the corporations. Such bonds to be charged upon and secured by the railway, and all the assets, rights, privileges, revenues, works, property and effects belonging thereto or held or used in connection with the railway constructed, acquired, operated and maintained by the Commission under this agreement, and to be for the total amounts mentioned in Schedule B hereto attached : provided that the Commission may, upon obtaining the consent as herein defined of the majority of the corporations, increase the said bond issue by any amount necessary to cover the capital cost of extending the railway, and may also without such consent increase the said bond issue to cover the cost of additional works or equipment of any kind for use on the railway to an extent not exceeding ten per cent. (10%) of the bonds issued from time to time. In order to meet and pay such bonds and interest as the same becomes due and payable the Commission shall in each year after the expiration of ten years from the date of the issue of the bonds out of the revenue of the railway after payments of operating expenses (including electrical power) and the cost of administration set aside a sufficient sum to provide a sinking fund for the purpose of redeeming the same at maturity. Debentures issued by the corporations in compliance with clause 2 (b) hereof shall, to the extent of the par value of any bonds outstanding from time to time, be held or disposed of by the Commission in trust for the holders of such bonds as collateral security for payment thereof, it being understood and agreed that in the event of any increase of the said bond issue each corporation shall, upon the request of the Commission, deposit with the Commission additional debentures as described in clause 2 (b) hereof, to be held or disposed of by the Commission as collateral security for such increase of the said bond issue, and that any debentures held by the Commission in excess of the par value of the outstanding bonds from time to time may be held or disposed of by the Commission to secure payment of any deficit arising from the operation of the railway.

“ 4. In the event of the revenue derived from the operation of the undertaking being insufficient in any year to meet the operating expenses (including electrical power), the cost of administration and the annual charges for interest and sinking fund on the bonds, and for the renewal of any works belonging in whole or in part to the railway, such deficit shall be paid to the Commission by the corporations upon demand of and in the proportion adjusted by the Commission. In the event of the failure of any corporation to pay its share of such a deficit as adjusted by the Commission, it shall be lawful for the Commission in the manner provided in Clause 2 (b) to dispose of debentures held by the Commission as security for any such deficit. Any arrears by any corporation shall bear interest at the legal rate.”

Clauses 10 and 14 of the agreement are as follows :—

“ 10. The Commission shall, at least annually, adjust and apportion between the corporations the cost of construction, equipment, operation, interest, sinking fund, and also the cost of renewing the property of the railway.

“ 14. This agreement shall continue and extend for a period of fifty years from the date hereof, and at the expiration thereof be subject to renewal, with the consent of the corporations from time to time for like periods of fifty years, subject to adjustment and re-apportionment as herein provided for the purposes of this agreement as though the terms hereof had not expired. At the expiration of this agreement the Commis-

sion shall determine and adjust the rights of the corporations, having regard to the amounts paid or assumed by them respectively under the terms of this agreement, and such other considerations as may appear equitable to the Commission and are approved by the Lieutenant-Governor in Council."

In Schedule A to the agreement the route of the proposed railway was described.

In Schedule B the names of the 17 corporations were set out. Opposite the name of each corporation was set the amount of debentures to be issued by that corporation for deposit with the respondent under Clause 2 (b) of the agreement. The amount set against the name of the appellant was \$623,750, but having regard to the adjustments necessary by reason of the dropping out of two of the corporations the actual amount of debentures which the appellant was bound to issue and deposit was \$688,539. The total of the several amounts set against the names of the 17 corporations was \$11,360,363.

The appellant in due course executed and deposited with the respondent, in compliance with Clause 2 (b) of this agreement debentures to the amount of \$688,539.

The respondent for the purposes of the enterprise raised money by the issue of bonds to the amount of \$1,200,000. Pursuant to Section 8 of the Act, these bonds were guaranteed by the Treasurer of Ontario under authorisation from the Lieut.-Governor in Council.

The respondent caused surveys for the railway to be made, bought certain lands for the purposes of the railway, purchased railway ties, and incurred other expenditure in preparation for the construction of the railway.

In October, 1919, a change of Government took place in Ontario, and in July, 1920, before the actual construction of the railway had begun, the respondent was instructed by the Premier of Ontario to stop further expenditure pending an enquiry into the undertaking. Matters, therefore, came to a standstill, and no further step was taken towards the construction of the railway.

In 1922, after an investigation known as "The Sutherland Investigation," the Legislature of Ontario passed the Municipal Electric Railway Act, 1922. By this Act the Act of 1914 and all amending Acts, including the Act of 1919, were (except for certain reserved purposes) repealed.

Section 29 (2) of the repealing Act provided that all by-laws theretofore passed by municipal corporations and all agreements made between municipal corporations and the respondent under the provisions of the Hydro-Electric Railway Act, 1914, and amendments thereto, with certain exceptions not material to be mentioned, were thereby declared to be void and of no further force or effect.

The repealing Act further authorised the respondent and the municipal corporations concerned to enter into a new agreement for the construction of the railway in question, and enacted that

the repealed Act and amendments with certain modifications should, so far as they applied, remain in full force and effect with regard to any such new agreement. One of the modifications was that the power conferred on the Lieut.-Governor in Council to authorise the Treasurer of Ontario to guarantee the bonds of the respondent was not to apply. This modification was fatal to the chances of any new agreement being reached.

In the result no new agreement was reached, and the railway has never been constructed. The bonds of the respondent issued before this repealing Act was passed are outstanding, and the debentures of the appellant deposited under the agreement are still in the hands of the respondent. There is no railway and the respondent is no longer under any obligation to construct a railway.

In 1924 the Legislature of Ontario passed the Hydro-Electric Act, 1924, which provided that all monies received by the respondent from the sale or other disposal of any real or personal property acquired by it for the purposes of the said railway should be held by the respondent in trust for the municipal corporations parties to the said contract, and should be distributed among them in the same proportion as that in which they undertook to contribute to the cost of the said railway at such times and in such manner as the Lieut.-Governor in Council might direct.

The appellant in effect claims that the respondent is a Government Department, and that, as it is the action of the Government which has led to the present *impasse*, the contract ought to be treated as repudiated by the Government, and the appellant ought to have its debentures returned and to be acquitted of all liability to contribute to the expenses which were incurred before the repealing Act was passed.

On the other side it is contended that the respondent is not a government department, but an independent legal entity, and that the agreement, so far as it was acted upon before the repealing Act, still governs the rights of the parties, and that under it the debentures are collateral security for the bonds issued before the repealing Act by the respondent, and must bear their proper proportion, rateably with the debentures of the other corporations, of the burden of that position.

Their Lordships agree with the learned trial Judge that the respondent, which is a statutory corporation created by the Legislature of Ontario with limited powers, cannot be regarded as a Government Department so as to treat an agreement entered into by the respondent as an agreement entered into by the Government. The first question, therefore, is what effect has the repealing Act had upon what had been done before it was passed, namely, upon the issue of bonds by the respondent and the deposit of debentures by the appellant. In their Lordships' judgment, that issue and deposit created rights and liabilities which have not been destroyed by the repealing Act. The Act repeals the Acts under which action was taken and declares the agreement to be void and of no further force or effect, but that

repeal and declaration does not, in their Lordships' opinion, prevent the earlier Acts and agreement remaining the standard of reference for determining the ambit of rights and liabilities brought into existence once and for all under the powers of those Acts and agreement while they were in force.

The next question, therefore, is what, upon the true construction of the Acts and agreement, is the position in regard to the deposited debentures.

In their Lordships' judgment, upon an examination of the Act of 1914 and the agreement, it is impossible to avoid the conclusion that the respondent is thereby constituted the instrument upon the terms of the Act of 1914 and the agreement, by which a joint enterprise of the corporations concerned is to be carried out. The respondent has the duty of constructing, equipping and operating the railway. The primary liability to a limited extent for the bonds issued pursuant to the agreement to raise the capital cost of construction and equipment rests upon the respondent, as does the primary liability for operating the railway when constructed, but protection is afforded to the respondent in respect of each of these branches of liability by the deposit of the debentures of the several corporations. First, under Section 11 of the Act of 1914 and Clause 3 of the agreement the debentures are to be held or disposed of by the respondent in trust for the holders of the bonds as collateral security for payment thereof. Secondly, under Clause 4 of the agreement the corporations have to recoup to the respondent any deficiency of revenue in the working of the railway and the debentures are security to the respondent for this obligation of the corporation.

The proportions in which the corporations bear their burdens *inter se* are fixed by Schedule B of the agreement, as modified by the changes taking effect under the Act of 1919 and subject to adjustment by the respondent under Clause 10. In their Lordships' view, the power to adjust under this clause is a power incidental to the rights and duties created by the deposit of the debentures, and therefore to the extent to which that deposit is still operative itself remains operative.

In the result, therefore, their Lordships are of opinion that the appellant's debentures and interest coupons in the hands of the respondent are held by the respondent as trustee to secure collaterally the issued bonds and that the appellant is not entitled to their delivery up.

On the other hand, their Lordships take the view that it is for the respondent to apportion the total liability between the several corporations and that the reference to the Master to take an account with the consequential judgment for payment of what was found due on the account was not justified.

In their Lordships' judgment, the orders of both Courts below should be discharged and an order should be made dismissing the appellant's action with costs, with a declaration on the respondent's counter-claim that the appellant's debentures are

held by the respondent with power of sale under Section 11 (2) of the Act of 1914 in trust to secure collaterally the bonds of the respondent issued under the agreement to the extent of that proportion of the total liability upon the bonds which ought to be borne by the appellant having regard to the provisions of the agreement and the modification therein resulting from the Act of 1919, and subject to any adjustment which the respondent may properly make under the power of adjustment contained in the agreement—and that the respondent should have the costs of the counter-claim. There should be no costs on either side of the appeal to the Appellate Division of the Supreme Court of Ontario.

Their Lordships will humbly advise His Majesty accordingly.
There will be no costs of the appeal to His Majesty in Council.



In the Privy Council.

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v.

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