

In the Privy Council

No. 100 of 1931

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ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Between:

THE MUNICIPAL CORPORATION OF THE CITY OF
EAST WINDSOR,

Appellant,

—and—

THE MUNICIPAL CORPORATION OF THE COUNTY OF ESSEX,
Respondent;

And between:

THE MUNICIPAL CORPORATION OF THE COUNTY OF ESSEX,
Appellant,

—and—

THE MUNICIPAL CORPORATION OF THE CITY OF
EAST WINDSOR,
Respondent.

(CONSOLIDATED APPEALS)

APPELLANT'S CASE IN MAIN APPEAL AND RESPONDENT'S CASE IN CROSS-APPEAL.

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—and—

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APPELLANT'S CASE IN MAIN APPEAL AND RESPONDENT'S CASE IN CROSS-APPEAL

1. These are two appeals from the judgment of the Second Appellate Division of the Supreme Court of Ontario, delivered on the 12th day of June, 1931, whereby the appeal of the County of Essex (for convenience hereinafter called the "County") and the cross-appeal of the City of East Windsor (for convenience hereinafter called the "City") were both dismissed with costs.

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2. The appeals of the City and County to the Second Appellate Division were from the judgment of Chief Justice Rose, Chief Justice of the High Court delivered on the 15th day of January, 1931, whereby he allowed in part an appeal of the City from an award of His Honour J. J. Coughlin, Esquire, Arbitrator, dated the 1st day of August, 1930, and dismissed in part, the said appeal.

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3. Prior to the 1st day of June, 1929, the Town of Ford City formed part of the County of Essex for Municipal purposes. By order of the Ontario Railway and Municipal Board bearing date the 5th of March, 1929, it was erected into a City under the name of "East Windsor." Such order became effective on the 1st day of June, 1929, and thereafter the City was separated from the County for Municipal purposes.

4. The Municipal Act (1927) R.S.O. Cap. 233 S. 38 ss. 5, provides for an adjustment of assets and liabilities between a City and County when a town is erected into a City. S. 38 of the Act is as follows:—

- "38. (1) Where a district is erected into a village or town, or is de- 10
 "tached from one and annexed to another local municipality, there
 "shall be an adjustment of assets and liabilities between the cor-
 "poration of the municipality from which the district becomes or
 "is detached and the corporation of the village or town or of the
 "municipality to which the district is annexed, as the case may be,
 "and if the interest of the district in the assets of the corporation
 "of the municipality from which it becomes or is detached exceeds
 "its proportion of the liabilities thereof, that corporation shall pay
 "to the corporation of the village or town or of the municipality to 20
 "which the district is annexed, as the case may be, the amount of
 "excess; but if the district's proportion of such liabilities exceeds
 "its interest in such assets the corporation of the village or town
 "or of the municipality to which the district is annexed, as the case
 "may be, shall pay to the corporation of the municipality from
 "which the district becomes or is detached the amount of the
 "excess."
- (2) "If the corporations do not within three months after the
 "separation takes effect agree as to such adjustment, the matter
 "shall be determined by arbitration."
- (3) "Where a district is detached as well from a county as from 30
 "the local municipality, of which it forms part, there shall be a
 "similar adjustment of the assets and liabilities of the corporation
 "of the county from which the district is detached between that
 "corporation and the corporation of the county to which the district
 "is annexed, and the provisions of subsections 1 and 2 shall mutatis
 "mutandis apply."
- (4) "If the corporation of the county, or of the local municipality,
 "does not within three months after the separation takes effect,
 "notify the corporation of the other county or local municipality
 "that it requires an adjustment of the assets and liabilities, its 40
 "right to claim an adjustment shall be barred."

(5) "Where a town not being a separated town is erected into a city, or a town or village is annexed to a city or separated town, there shall be a similar adjustment of the assets and liabilities of the corporation of the county from which the town or village is withdrawn between that corporation and the corporation of the city or separated town."

10 (6) "Where a town is erected into a city the city shall not be entitled, in the adjustment of assets and liabilities to any allowance in respect of its interest in the court house or gaol of the county."

5. For the purpose of adjusting the assets and liabilities between the City and the County, representatives of both Corporations met and as a result an agreement was entered into bearing date the 29th day of November, 1929, (Exhibit 2).

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6. The Agreement (Exhibit 2) provided for the settlement of certain liabilities; of payment by the County of certain of the City's obligations. It further provided that after the 31st of December, 1929, there should be an adjustment in other respects of the assets and liabilities, such adjustment to be made as of the 1st of June, 1929; if the parties were unable to agree, the determination of the matter was to be referred to His Honour Judge Coughlin, Senior Judge of the County of Essex, and his decision was to be subject to appeal.

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7. Representatives of the City and County were unable to agree upon the adjustment of assets and liabilities in other respects as provided in the agreement (Exhibit 2) and accordingly the determination of the matter was referred to His Honour Judge Coughlin, who made his award on the 1st day of August, 1930.

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8. Schedule 1 to the said Award sets forth the amounts which the City is directed to pay to the County in respect of unpaid debentures. The City appealed to a Judge of the Supreme Court of Ontario from the award with respect to the last five items in this Schedule and its appeal was allowed with respect to the last item being By-law Number 690. Its appeal with respect to By-laws 480, 499, 518 and 661 was dismissed.

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9. Schedule 2 to the said award sets forth certain amounts found to be payable by the City to the County and certain amounts found to be payable by the County to the City leaving a credit balance in favour of the County of \$55,095.32. The City appealed against the second item of Schedule 2 and its appeal was allowed.

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10. By the said Award the Learned Arbitrator also directed that the City should pay to the County interest on the balance shown on Schedule 2 at the rate of 5 per centum per annum from the 1st day of January,

P. 64, L. 20

P. 68 1930. The City appealed against this finding and its appeal was allowed.

F. 81 11. The County appealed to the Appellate Division of the Supreme Court of Ontario from that part of the Judgment of the Learned Chief Justice which allowed the appeal of the City and the City cross-appealed from that part of the said judgment which dismissed its appeal in respect of the matters above set forth. Both the appeal and cross-appeal were dismissed.

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12. The City now appeals from that part of the judgement of the Second Appellate Division which dismissed its appeal with respect to By-laws 480, 499, 518 and 661. 10

13. Prior to 1921 a system of County roads was established in the County pursuant to The Highway Improvement Act. This Statute is now found in (1927) R.S.O. Cap. 54. No material change has been made in Section 12 which provides for a system of County Roads. The relevant parts of Section 12 are as follows:—

“12. (1) Subject to the approval of the Lieutenant-Governor in Council as hereinafter provided the Council of a county may by by-law “adopt a plan of county road improvement and establish a county “road system throughout the county by assuming roads in any “municipality in the county and may include in such system such 20 “boundary line roads or portions thereof between the county and “any other county, or between the county or a city or separated “town, as may be agreed upon by the municipalities interested and “the by-law shall designate the roads to be assumed or improved “or intended to form or be added to the county road system.”

“(2) The by-law shall provide for the levying of a general annual “rate upon all the municipalities in the county not separated there- “from for municipal purposes unless the Minister is of opinion that “on account of the remoteness of any municipality from the roads “included in the county road system it is inequitable that the rate 30 “should be levied in such municipality, in which case the by-law “shall exempt such municipality accordingly, but the representative “or representatives in the county council of any municipality so “exempt shall not vote upon any by-law passed under this Part, “and for the purposes of section 13 the equalized assessment of “any municipality so exempt shall not be included in ascertaining “the total equalized assessment of the county.”

“(3) All moneys raised under such by-law shall be applied in the “construction, improvement, maintenance and superintendence of “roads included in the county road system and to any expenditure 40 “properly chargeable to county road systems under the provisions “of this Act.”

“(7) Where a by-law has been heretofore passed for the purpose
 “of establishing a county road system the council of the county,
 “with the approval of the Lieutenant-Governor in Council, may
 “amend such by-law in accordance with the foregoing provisions
 “of this Part.”

14. By Section 14 of the said Act authority is given the County to raise by debentures such sums as may be necessary to meet the estimated expenditure for construction and improvement of Highways. The relevant portions of Section 14 are as follows:—

10 “14. (1) The Council of a county may from time to time pass by-laws
 “to raise by debentures, payable in not more than twenty years in
 “the manner provided by The Municipal Act, such sums as may be
 “necessary to meet the estimated expenditure for the construction
 “and improvement of highways under this Act not exceeding five
 “per centum of the equalized assessment of the county, or the
 “council may by by-law provide that the required amount shall be
 “raised in equal annual instalments by a general county rate levied
 “in each successive year for a period not exceeding ten years but
 “such amount shall not exceed five per centum of the equalized
 20 “assessment of the county and the provisions of this Act shall
 “apply to any money heretofore or hereafter so provided as fully
 “as if debentures had been issued whether a by-law transferring
 “such money to a special account under this Act has or has not been
 “passed.”

“(4) In addition to or in substitution for any amount which may
 “be raised under subsection 1, the council of a county may raise in
 “any year by general county rate such sums as the council may
 “deem necessary for the purposes mentioned in the said subsection.”

30 “(5) The limitation of county debentures which may be issued
 “under subsection 1 to five per centum of the equalized assessment
 “of the county shall apply only as to the amount of debentures out-
 “standing at any time and such limitation shall be exclusive of de-
 “bentures the proceeds of which are applied to expenditure within
 “the limits of an urban municipality.”

40 “(6) Money raised by the issue of debentures for road construc-
 “tion under authority of this Act shall be applied solely for that
 “purpose, and shall not be used in paying any part of the current
 “or other expenditure of the corporation, or for road repair or
 “maintenance and if the council applies any of such money in pay-
 “ing current or other expenditure, or for road repair or mainten-
 “ance, the members who vote for such application shall be person-

“ally liable for the amount so applied, which may be recovered in
“any court of competent jurisdiction.”

P. 35, L. 35
P. 36, L. 42
P. 37, L. 1

P. 48, L. 17-35

P. 93

15. The debentures in question were issued to pay the cost of construction of permanent highways having a lifetime of ten years or more. One reason for issuing debentures was that the works were of a permanent nature and the benefit fell in not all at one time but from year to year and for that reason those who in the future would profit by the expenditure should bear their appropriate share of the cost thereof. The Town of Ford City (now the City of East Windsor) while it was a part of the County, from year to year paid for the benefit as it accrued. On the 1st of June, 1929, it ceased to be a part of the County, and from that time should only contribute to the cost of County roads in the manner provided in the Highway Improvement Act. 10

16. The Sections of the Highway Improvement Act pertaining to contribution by a City to the cost of roads in a county are as follows:—

“35. The Lieutenant-Governor in Council, upon application of the council of any county having or adopting a system of county roads “under this Act, may direct that a commission or commissions be “selected as in section 41 provided, in the case of each city or town “separated from the county, and it shall be the duty of the commission or commissions to designate and define the suburban roads “or portions thereof in the county system towards the construction “and maintenance of which the city or town shall contribute.” 20

“37. (1) Subject to the provisions of the following subsections, expenditure upon all work upon suburban roads outside the limits “of a city or town shall be borne by the county, city or town and “the Province, in the proportion of twenty-five per centum by the “county, twenty-five per centum by the city or town and fifty per “centum by the Province.”

“(2) Except as provided in subsection 3, the amount to be contributed by the city or town shall not exceed the proceeds of an “annual rate of one-half mill on the dollar of the value of the rateable property of the city or town, according to the last revised “assessment roll.” 30

“(3) The council of any city or separated town, where a commission has been directed as provided by section 35, may in any “year, by a by-law passed by a vote of at least two-thirds of the “members present and voting thereon, appropriate for work upon “suburban roads a sum not exceeding the proceeds of a rate of two “mills on the dollar on the value of the rateable property in such “city or town according to the last revised assessment roll; but “such by-law shall not be passed until the council of the county 40

“shall have appropriated an equal amount for the like purposes to
“be expended in the same year.”

“(4) Roads designated as suburban roads by the commission
“appointed as provided by this Act, shall be maintained and repair-
“ed from the time of such designation at the cost of the Province
“and of the corporations in the proportions fixed by subsection 1.”

The Sections pertaining to contribution by a City to Provincial High-
ways are as follows:—

10 “61. (1) The corporation of every county in which work of construc-
“tion or repair and maintenance is from time to time carried out
“shall repay to Ontario twenty per centum of the expenditure made
“by the Department within such county, and each city or separated
“town shall repay to Ontario a like proportion of the expenditure
“made within the limits of the roads, designated as ‘provincial
“suburban’ adjacent to the city or town.”

20 “62. (1) That portion of a provincial highway adjacent to a city or
“town which is separated from the county for municipal purposes
“or of direct benefit to the city or town shall be designated a pro-
“vincial suburban road and the corporation of the city or separated
“town shall contribute thereto as in section 61 provided.”

17. The City has to bear the full cost of construction and mainten-
ance of highways within the corporate limits. Many of these highways
are important connecting links between County roads and the larger and
more important City of Windsor. The County may receive 50 per centum
of its expenditures for Highway Improvements. A Township may receive
30 per centum of its expenditures upon highways. Sections 17, 45, 46, 47
and 48 of the Highway Improvement Act so provide.

18. The inhabitants of the City contribute to the cost of these high-
ways directly through a tax on gasoline and in other ways. The Gasoline
30 Tax Act (1927) R.S.O. Cap. 55, Section 2 as amended by 19 Geo. V. Cap. 18
Section 2 provides:—

“2. For the purpose of providing for a fair contribution by the
“users of roads in Ontario towards the cost of the construction and
“maintenance thereof, every purchaser shall pay to the Minister
“for the use of His Majesty in the right of the Province of Ontario,
“a charge or tax at the rate of five cents a gallon on all gasoline
“purchased or delivery of which is received by him.”

40 19. The learned arbitrator misdirected himself as to the law and the
facts in holding the City liable to contribute to the unpaid road debentures
as appears in his reasons for judgment.

20. The Learned Chief Justice as well as the Learned Arbitrator

failed to consider whether or not the City or the County obtained the benefit of the expenditure represented by the debentures outstanding as of the 1st of June, 1929, and failed to consider the obligation of the County with respect to the construction and maintenance of roads within the County after such period.

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21. In other respects it appears from the reasons for judgment that the Learned Chief Justice as well as the Court appealed from misdirected themselves as to the law and the evidence with respect to the said debentures.

22. If effect cannot be given to the contention of the City that it should pay no part of the outstanding debenture indebtedness of the County incurred in respect of permanent improvement to highways situate within the County, it should not be called upon to pay a greater sum than that which it would have paid had it remained part of the County under the law as it stood on the 1st of June, 1929. The City was entitled to receive by way of rebate 50 per cent. of the amount which it would have had to pay annually in respect of the Highway Debentures. Section 28 subsection (5) of the Highway Improvement Act is as follows:—

“(5) An urban municipality situate within a county, but not separated therefrom for municipal purposes, whether there is or is not any such county road extension or connection in such urban municipality, shall be subject to the annual general levy for county road purposes under the by-law mentioned in section 12, but the council of the county shall on or before the 1st day of April in each year remit, in the case of a town, fifty per centum, and in the case of a village seventy-five per centum of the amount raised by such rate in the town or village in the previous year less the cost of the repairs, if any, done by the county upon any such county road extension or connecting link or upon any road in such urban municipality included in the county road system during the previous year.”

“(a) Any moneys so received by the town or village shall be expended upon streets in the municipality designated by the Minister.”

“(b) No such rebate shall be made for any year during which the construction or rebuilding of any such extension or connecting link has been in progress.”

The effect of the Award of the Arbitrator and the judgments appealed from has penalized the City by Making it pay twice as much as it ultimately would have had to pay under the law as it stood on the 1st of June, 1929.

23. In any event if the debenture liability immediately attached the City upon the passing of the County Debenture By-law the liability should have been fixed as of that date. If so the percentage at the time of the passing of the By-law should govern and credit should be given for the excess payments made.

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P. 111

24. The County appeals from the part of the judgment of the Second Appellate Division dismissing its appeal from the judgment of the Learned Chief Justice.

10 25. The Learned Chief Justice was right in allowing the appeal of the City in respect of the Arbitrator's finding that the City should contribute to the County some part of the Provincial levy against the County for Provincial highways because this item was settled by the agreement of November 29th.

P. 107
L. 30
P. 108
L. 1-4

26. In any event the County claimed in respect of a levy for work done on Provincial Highways in the year 1929. The City was not liable to contribute to the cost of work done after the 1st of June, 1929, and no evidence was given that any part of the work on Provincial Highways was done before that date.

20 27. The Learned Chief Justice was right in allowing the appeal of the City in respect of By-law Number 690, as this By-law was not passed until after the 1st of June, 1929, nor was the money raised by the said By-law used to pay for work done previous to that time.

P. 106
L. 23

28. The Learned Chief Justice was right in allowing the appeal of the City with respect to the interest, as time for payment had been settled by the parties under paragraph 3 of the Agreement of the 29th of November, 1929.

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L. 13

30 29. The City submits that the judgment of the Second Appellate Division of the Supreme Court of Ontario and of Chief Justice Rose, and the findings of the arbitrator are wrong, insofar as the same hold that the City is liable to contribute to the County any part of the debenture debt created by By-laws 480, 499, 518 and 661 and that the said judgments are right in respect of the matters against which the County now appeals for the following amongst other

REASONS

1. Because the City paid its share of the cost of Highway improvements from time to time in the same way as the rest of the County and it should not be made to pay for benefits which accrue to the County after separation from the County.

2. Because the City paid to the County from year to year the pro-

portion of the levy for payments in respect of debentures which its equalized assessment bore to the total equalized assessment of the County while it remained a part of the County and it should not pay anything after it ceases to be in the County.

3. Because the City is called upon to pay more than it would have had to pay had it remained a part of the County.

4. Because if the debenture indebtedness was a fixed liability the City is called upon to pay a greater proportion thereof than its proper proportion at the time the liability was incurred and it is not given credit for excess payments already made. 10

5. Because the Learned Arbitrator and the Courts appealed from failed to take into consideration the obligations of the County and the City with respect to Highway improvements after separation.

6. Because the Learned Arbitrator and the Learned Chief Justice misdirected themselves as to the facts and the law with respect to the liability of the City to contribute to the payment of outstanding debentures for highway improvements.

7. Because upon the evidence the City should not be called upon to pay any part of the debenture indebtedness unpaid at the time of separation. 20

8. Because that part of the Judgment against which the County appeals is right for the reasons given by the Learned Chief Justice.

9. Because the City obtained no legal benefit by reason of the Highways improved after separation in respect of which debentures were issued.

10. Because by agreement all current liabilities were to be paid by the County in the year 1929.

11. Because interest should not be charged as the parties by agreement have specifically provided for the time of payment.

12. Because the matter of interest did not come within the submission to arbitration. 30

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East Windsor.

IN THE PRIVY COUNCIL.

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