Privy Council Appeal No. 104 *of* 1945.

City of Montreal - - - - - - - - *Appellant*

v.

Montreal Locomotive Works Limited and another *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH OCTOBER, 1946

Present at the Hearing:

VISCOUNT SIMON
LORD WRIGHT
LORD PORTER
LORD UTHWATT
SIR LYMAN POORE DUFF

[*Delivered by* LORD WRIGHT]

This is an appeal from an unanimous judgment of the Supreme Court of Canada, reversing a judgment of the King's Bench of Quebec which had decided in favour of the appellant by a majority of three to two and affirmed the judgment of the trial Judge, Bond C.J.

The question at issue was whether the appellant, the City of Montreal, was entitled to recover from the respondent Company certain taxes which it claimed to levy under the City Charter and Byelaws. The trial proceeded upon an agreed submission by the parties under Article 509 of the Quebec Code of Civil Procedure.

The respondent Company is incorporated under the law of Canada and carries on business at Montreal. On the 23rd October, 1940, it entered into two contracts with the Canadian Government represented by the Minister of Munitions and Supply of Canada, with a view to the production of tanks and gun carriages. One of these contracts was called the Construction Contract and was for the designing, construction and equipment of new plant upon land to be sold by the respondent to the Government for the production of the tanks and gun carriages provided for by the other contract which was called the Production Contract. In the former contract the respondent undertook the designing, construction and equipment of the new plant " for and on behalf of the Government and as its agent " and in the latter contract it was agreed that the respondent should operate the new plant for the production of the tanks and gun carriages " for and on behalf of the Government and as its agent ". The new plant was duly constructed upon a piece of the respondent's land which was sold to the Government. The respondent then proceeded to operate the new plant as stipulated by the agreement. The issue is whether the appellant is entitled to levy certain municipal taxes on the respondent. These fall into two main heads (1) the tax on immovable property in regard to the piece of land sold by the respondent to the Government; (2) the " business " tax in regard to the construction of tanks and gun carriages carried on upon it. The claims were under each head in respect of two periods (*a*) from 1st November, 1941, to 30th April, 1942; (*b*) from 1st May, 1942, to 30th April, 1943. The substantial issue can be stated with

sufficient accuracy for the moment to have been whether the respondent Company was in occupation of the premises so as to be taxable as such in the material periods. That issue again depended on whether during these periods it was operating merely as a manager or agent of the Government or whether it was carrying on business on its own behalf as a principal selling or delivering the tanks and gun carriages to the Government when it had made them according to the specifications prescribed by the Government. In the former event, the relation under the contract would be one of mandate and the respondent Company would not be on the premises in its own right and would not be liable to the tax as occupant. The occupant would in that event be the Government as the respondent's principal or superior and in virtue of Section 125 of the British North America Act would be immune from taxation. On the other view the respondent would be subject to the taxes as occupant. The two contracts as already stated expressly declare that the respondent was under them acting as agent for and on behalf of the Crown. But these declarations are not conclusive. The question must be decided on a consideration of the terms of the carefully prepared contracts. Their Lordships will reserve at this stage any examination of a separate point which is raised with regard to the property tax in respect of the first period in question, that between 1st November, 1941, and 30th April, 1942, that is, after the beneficial ownership in the piece of land and the buildings upon it was transferred from the respondent to the Government but before it had been formally transferred.

The Government, the second respondent in this appeal, has intervened in the proceedings on the footing that even if it was merely the principal or superior of the respondent in these matters it might have to indemnify the respondent in respect of any taxes which the respondent was held bound to pay as a result of the action.

The taxes in question were municipal taxes imposed by the appellant under its charter and byelaws.

Article 1 (*h*) of the City Charter defines the word occupant as meaning any person who occupies an immovable in his own name otherwise than as proprietor, usufructuary or institute and who enjoys the revenues derived from such immovable.

Article 361 is the general provision declaring that all immovable property situate within the limits of the city shall be liable to taxation with the exceptions thereafter stated. Then subsection 6 of the Article provides that the city may make byelaws to impose and levy annually on taxable immovable property in the city, taking into account any special or general real estate tax, an assessment not exceeding two per cent. of the value of the said immovables, as entered on the valuation roll in force at the time of the imposition. The assessment, it provides, shall be a charge upon such immovables and the owners thereof shall be personally liable therefor. This is the " property " tax which is one of the impositions claimed by the city in this case. Article 362 sets out a list of exemptions none of which are here relevant. The overriding exemption of the Crown under the British North America Act is not specifically repeated; Article 362A however contains the following special provision: " The exemptions enacted by Article 362 shall not apply either to persons occupying for commercial or industrial purposes buildings or land belonging to His Majesty or to the Federal and Provincial Governments or to the Board of Harbour Commissioners who shall be taxed as if they were the actual owners of such immovables and shall be held to pay the annual and special assessments, the taxes and other municipal dues." The next two paragraphs provide that if an occupant whose name appears on the valuation roll quits before 1st May the premises leased, he shall not be held to pay the taxes imposed for the year beginning on 1st May. The 1st May was the beginning of the fiscal year. The next paragraph of the Article provides for entering on the roll the name of a person who occupies for the purposes mentioned in the Article the immovable either on 1st May or on another date during the fiscal year.

Article 363 imposes the other tax which has to be considered in this case; that tax is called the " business " tax and it is to be levied on all trades, manufactures, financial or commercial institutions, premises occupied as warehouses or storehouses, occupations, arts, professions or means of profit or livelihood carried on or exercised by any person or persons in the city, not exceeding ten per cent. of the annual value of the premises in which such trades, financial or commercial institutions, occupations, arts, professions or means of profit or livelihood are respectively exercised or carried on. The main issue in this appeal is whether the respondent is liable as a firm exercising or carrying on the business which is the subject of taxation, that is whether it carries on the business on its own behalf, and is not merely the agent or mandatory of a principal who in this case would be the Crown.

The byelaws go on to provide in detail for the administration of the taxes, and in particular by Article 375 (*a*) (*b*) for transfers and changes of ownership.

The taxes are annual taxes and are imposed each year by byelaws for that year. The relevant byelaws for the years in question are duly exhibited in the case.

In accordance with the Construction Agreement the buildings specified were completed and were ready to be occupied on 1st November, 1941. The real estate assessment had been made before then on the respondent. When the appellant claimed to continue the tax as on an increased value charging the respondent as owner for the period from 1st November, 1941, to 30th April, 1942, by a bill specifying the respondent as the owner, the respondent by letter of his solicitors dated 28th November, 1941, protested that the land and buildings were the property of the Government and though the land was still registered in the name of the respondent it was under promise of sale to the Government and would be conveyed to the latter by deed within a few days. By a letter dated 1st December, 1941, the Government repeated this information, giving also details of the contracts between the respondent and the Government. The deed of sale was not registered until 28th February, 1942, but the property passed under the Contract to the Government on or before 1st November, 1941. The appellant however claimed to tax the respondent as owner and maintained that claim in the present action, and in addition, though the appellant was notified that the respondent was operating as manager for the Government under the Production Agreement, the respondent was assessed for the business tax. In the assessment for the following year, 1st May, 1942, until 30th April, 1943, the respondent was entered as occupant of the new building, motive power and land in the real estate assessment and was also charged with the business tax with respect to the same building. It is with the validity of these assessments that the present suit is concerned.

It is clear that all the assessments must be set aside if the respondent cannot be held occupant during the period in question. The special question which has been raised in connection with the assessment for the first period which was expressed to be on the respondent as owner may be referred to later but cannot affect the issue if the appellant fails to establish that the respondent was the occupant at the material periods. To decide this crucial question their Lordships must examine in a little more detail the contracts between the parties. The two agreements are long and complicated. It is unnecessary to state their terms in full. All that is attempted here is a summary of the most salient provisions which seem to bear on the material issues. Here it is also enough simply to note that the American Locomotive Company was a party to each agreement in order to co-operate with and assist the respondent.

The Construction Agreement included an agreement for the sale by the respondent to the Government of the site on which the new plant was to be erected according to designs prepared by the respondent. The respondent was to have full control over the design, construction and equipment of the new plant and all incidental matters, but subject to

such supervision, direction and control as the Government might desire to exercise. There were elaborate financial conditions, but in effect the total cost was to be provided by the Government and banking arrangements were to be made to enable the respondent to meet all expenses without resorting to its own funds. For this purpose a " Special Account " was to be established with the Royal Bank of Canada and replenished month by month, with a provision for additional credit when necessary. The respondent was to act throughout and be recognised as acting as agent for the Government and was to be indemnified accordingly in every respect " except in cases of definite bad faith or wilful neglect on the part of the respondent " and was to be entitled to charge all overhead and other expenses. Title in all the new plant, equipment and accessories was to be vested in the Crown. The Government was to be entitled to cancel the agreement, subject to various conditions for settling outstanding matters.

There were elaborate provisions for the disposal of the plant, machinery and site at the termination of the contract. In the event of the Government selling the site, plant, etc., the Government was entitled to realise its full value: in the event, however, of the site being cleared of the plant and machinery, it was to be resold to the respondent for the original price of one dollar, which was the consideration stipulated in the deed of sale dated 27th February, 1942, transferring the property to the Government. The property in the site vested in the Government at some date earlier than 1st November, 1941.

The Production Contract was also a very complicated document. The respondent therein agreed to operate the plant referred to above for the production of gun carriages and tanks for the Government at a certain rate and according to specification and under the inspection and to the satisfaction of the Government and was entitled to incur and pay on behalf of the Government and as its agent all proper and reasonable costs, for which it was to be reimbursed by the Government. What these costs were, was elaborately defined by the agreement. In addition to this reimbursement the Government was to pay the respondent certain specified fees for each tank and gun carriage produced in each month. To meet these charges a Special Account was opened at the Royal Bank of Canada to be drawn upon in advance by the respondent, the intention being to enable the respondent Company to have sufficient funds available to meet all charges. The respondent was given full control over the management and operation of the plant and in the employment of labour of every description and in the purchase of all necessary materials and all other matters necessary or incidental to the performance of the contract, but all this was subject to such supervision, direction and control as the Government by its Minister should desire to exercise. The Government agreed by the first clause that the respondent was acting on behalf of the Government and as its agent in all matters pertaining to the performance of the contract and agreed to indemnify the respondent from all claims and liabilities of any nature whatsoever arising out of the performance of the contract and from responsibility for any failure or delay in carrying out the contract except in cases of definite bad faith or wilful neglect on the part of the respondent.

The Construction Contract had as its object the eventual delivery in accordance with the specifications of gun carriages and tanks with a particular " fee " attached to each delivery and on this aspect the contract might appear to be a contract for the sale of goods to be manufactured to the order of the Government and subject to the conditions expressed. This was the conclusion reached by the House of Lords in a decision cited to their Lordships during the argument. The case is *Dixon* v. *London Small Arms Company Limited*, 1 App. Cas. 632. The question was whether the defendant Company was liable to the owner of a patent for infringement of the patent in making small arms for the Government under contract. If the defendant had been the servant or agent of the Crown, it could have claimed the benefit of the Crown's exemption from the patent fees, but it

was held by the House, reversing the Court of Appeal, that it was liable because it was a private contractor with the Crown, to supply a certain manufactured article and was not protected in what it did by any privilege attaching to the Crown. The decision depended upon a careful analysis of the contract in that case. Lord Cairns L.C. summed up his conclusion: " During this process what is the position of the person who is called the contractor? He is clearly not the servant of the Crown. . . . Is he then the agent of the Crown? My Lords, I cannot find any ground whatever for contending that the contractor is an agent of the Crown. He is a person who is a tradesman, and not the less a tradesman because he is engaged in works of a large and extensive character: he is a tradesman manufacturing goods for the purpose of supplying them according to a certain standard which is laid before them as a condition on which the goods will be accepted. . . . If the respondents make the lock themselves the materials are provided by the respondents and the respondents work upon these materials not as agents of the Crown, but as conducting their own work and their own manufacture for the purpose of supplying the complete arm." Lord Selborne stated at page 660 that the question must be decided by a strict and accurate application of legal principles to the contract then before the House. Their Lordships are faced with a similar problem, which they must decide by examining the precise terms of the contracts before them. A decision upon one contract is not generally any real guidance in determining the effect of these or other particular contracts, except in so far as it throws light on general legal principles. The problem can be precisely stated to be whether the respondent in this case was an agent of the Government or whether it was acting on its own behalf in making the tanks and gun carriages for delivery to the Government. The antithesis was expressed by Marchand J. in the Court of King's Bench to be between a contract for the performance of work by estimate (*par devis et marché*) and a contract in which the respondent was an independent contractor (*entrepreneur*) and not agent (*mandataire*). Bissonnette J. was of opinion that the contract was one of work and labour (*le contrat de louage d'ouvrage, ou le contrat d'entreprise*) and that the respondent was an independent contractor. Walsh J. and St. Jacques J. (dissenting) were of opinion that the contract was one of mandate or for the lease of personal services. The Supreme Court agreed with the dissenting Judges in the King's Bench, and unanimously held that the contracts provided for a case of agency. Rinfret C.J. in delivering the judgment of the Court succinctly sums up his view of the position in these words: " The only difference between the Construction Contract and the Production Contract is that under the latter the Company receives a fee for its work; but in each case and under each contract banking arrangements are provided for so that the Company will not have to resort to its own funds. The Minister has full control throughout. Therefore, the Company sells to the Crown for $1 land which it will get back at the same price or which it will be paid for at its value if the Crown keeps it. It is to build and equip a plant and manufacture in it, as agent for the Crown, certain war implements at the cost of the Crown, without using any of its funds, under the Crown's control and without any responsibility except for bad faith or wilful neglect. Everything remains the property of the Crown and the agreements are revocable at any time. In my view, these contracts clearly provide for a case of agency."

The great difference of opinion on this question in the Courts below illustrates the difficulty which is inherent in deciding questions like this. In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner

though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior. In the present case the business or undertaking is the manufacture of the warlike vehicles. The respondent might have been making them with a view to selling them to the Government for its own profit. The Government as purchaser might in that case advance funds or subsidise the work: the Crown might, as it would presumably, take powers of supervision, inspection and regulation, having specified the tests which each vehicle is to satisfy. The Government might even provide the material or the factory to the actual manufacturer. These and kindred powers might be very wide, without the result being that the manufacturer was not doing the work for his own profit and at his own risk. But in reviewing in the present case the contracts which are the determining matters, their Lordships with great respect to the Judges below who have taken a different view, find themselves in agreement with the judgment of the Supreme Court. The combined force of the whole scheme of operations seems to them to admit of no other conclusion. The factory, the land on which it was built, the plant and machinery were all the property of the Government which had them appropriated or constructed for the very purpose of making the military vehicles. The materials were the property of the Government and so were the vehicles themselves at all stages up to completion. The respondent supplied no funds and took no financial risk and no liability, with the significant exception of bad faith or wanton neglect: every other risk was taken by the Government. It is true that the widest powers of management and administration were entrusted to the respondent but all was completely subject to the Government's control. A " fee " was payable in respect of each completed vehicle, but when the whole plan is considered, that was solely as a reward for personal services in managing the whole undertaking. It was something very different from the risk of profit or loss which an independent contractor has to assume; every item of expense was borne by the Crown, just as the Government took every possible risk of loss or damage except in the very unlikely event, as already noted, of bad faith or wilful neglect on the part of the respondent. The undertaking throughout was the undertaking of the Government and not the undertaking of the respondent which was simply an agent or mandatory or manager on behalf of the Crown. The accuracy of the positive announcement in each of the contracts that the respondent was acting throughout under the contracts for and on behalf of the Government and as its agent cannot be controverted.

It follows that the respondent was not the " occupant ". The land and building were the property of the Crown, so that the property tax is not exigible, nor did the respondent carry on or exercise a manufacture within the meaning of either Section 362A or Section 363 of the Charter. Thus in the judgment of their Lordships, the claim of the appellant to levy upon the respondent either the property tax or the business tax fails and should be dismissed.

A separate point was raised on the question of the property tax for the first period, from 1st November, 1941, to 30th April, 1942. The general reasons already given have shown that in any event the tax was not in their Lordships' judgment exigible. But all the Judges in the Courts in Canada have held that the claim to property tax must fail also on a separate ground, namely, that the tax was levied on the respondent as owner or proprietor, whereas on the facts stated above, the property was vested in the Crown throughout the material period, as was fully explained to the appellant when it was first sought to impose the tax. It is pointed out in the Courts below that this is not a mere matter of verbal inexactitude, but is a substantial difference. It is enough here to say that their Lordships agree on this matter with the opinions of all the Judges in Canada.

For the reasons given their Lordships are of opinion that the whole appeal should be dismissed and they will humbly so advise His Majesty. The appellant will pay the costs of both respondents.

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In the Privy Council

CITY OF MONTREAL

v.

MONTREAL LOCOMOTIVE WORKS LIMITED AND ANOTHER

DELIVERED BY LORD WRIGHT

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