

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

v.

Elphège Dufresne - - - - - *Respondent*

FROM

THE SUPERIOR COURT SITTING IN REVIEW FOR THE DISTRICT OF
MONTREAL, PROVINCE OF QUEBEC.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 25TH JUNE, 1920.

Present at the Hearing :

VISCOUNT HALDANE.

LORD MOULTON.

LORD SUMNER.

LORD PARMOOR.

[*Delivered by* LORD SUMNER.]

In 1912 and 1913 the City of Montreal had in view a municipal improvement, consisting in the extension of the Rue du Palais, or Boulevard St. Joseph, in the Quartier St. Denis of the City, for which it was necessary to acquire a considerable amount of land then in private hands. The City had special powers of acquiring land by compulsory purchase under a statute, which constitutes and is called its charter, 62 Vict., ch. 58, §§421-444 of which deal expressly with such a point as is now raised, but, either because that Act was inapplicable to the new improvement, or for some other reason, a further Act (2 George V, ch. 56) was passed, called "An Act to amend the charter of the City of Montreal," §33 of which provided that, failing acquisition by private agreement, the City might acquire the necessary lands under the provisions of Arts. 7581 to 7599 inclusive of the general Expropriation Act of 1909.

Negotiations with the separate proprietors, of whom there were between 160 and 170, came to nothing, and in June, 1913, the City proceeded to exercise these new powers of expropriation and gave the necessary notices. The respondent, M. Elphège Dufresne, owned three plots. He refused \$5,987, the price offered, and compensation amounting to \$19,940 was awarded to him by duly appointed arbitrators.

Art. 7598 of the Expropriation Act contemplates payment of the compensation awarded within two months of the date of an award. The properties were, however, numerous, the titles in some cases involved a considerable amount of investigation, the aggregate compensation ultimately awarded was a large sum, \$2,273,638; and the City, no doubt wishing to deal with all the proprietors together, allowed the statutory period to elapse without making payments to them. There does not appear to have been any dispute at this stage, and the City even resolved to make some special arrangements for the convenience of the poorer proprietors. In the meantime, under date the 24th April, 1914, an agreement with the City was signed by the whole body of expropriated proprietors, granting an extension of time for payment, and, pursuant to this agreement, the City made an aggregate payment into Court on the 9th May, 1914.

The terms of the agreement were *inter alia* as follows:—

“ Nous soussignés, propriétaires expropriés en cette affaire, consentons que le délai fixé par la loi (Art. 7581 et suivants des Statuts Refondus de la Province de Québec, 1909), pour permettre à la Cité de payer les montants accordés par les sentences arbitrales rendues en cette affaire, soit prolongé jusqu'au 1^{er} juin prochain. Le délai de deux mois fixé par l'article 7598 des Statuts Refondus de Québec, 1909, sera censé n'expirer que le 1^{er} juin prochain.

“ La Cité devra déposer les dits montants entre les mains du Protonotaire de la Cour Supérieure du District de Montréal, suivant les dispositions des articles 5781 et 7600 des Statuts Refondus de Québec, 1909, et ce paiement aura le même effet que s'il eût été fait dans les deux mois de la date de la reddition des sentences arbitrales.”

When money is paid into Court, or, which is the same thing, is deposited in the hands of the Prothonotary of the Superior Court of the District of Montreal, it becomes subject to two charges, each of 1 per cent., namely a tax imposed by 12 Vict., ch. 112, entitled “ Acte pour pourvoir à la construction et réparation de Maisons de justice et de Prisons dans certains endroits de Bas-Canada ” and a further charge for the expenses of the Protonotaire, imposed by an Order of the Lieutenant-Governor of the Province of Quebec in Council under the provisions of §§3550 and 3555 of the Revised Statutes of Quebec, 1909. This latter charge has been imposed under earlier authority as far back as 1861. No question has been raised before their Lordships as to the validity and applicability of these provisions in the present case.

The above-mentioned agreement made no provision at all with regard to these two charges, each of 1%. It is hardly possible that their existence should have been overlooked by the parties to the agreement, and indeed, the resolution of the City of Montreal

above referred to, which is only six weeks later in date than the agreement, makes special mention of them, though not so as to affect the present respondent. The questions in this appeal, which relate entirely to these charges, must, therefore, be decided by considering the nature of the charges themselves and the provisions of the Articles relating to expropriation, which the City of Montreal put in force.

The sum paid to the Protonotaire on the 9th May, 1914, was the aggregate compensation awarded, viz., \$2,273.638, with legal interest accrued to date, viz., \$56,834. On the 7th July the Court, on the motion of the City of Montreal, made an order for payment out of Court in favour of the present respondent. M. Dufresne's title was clear and simple: a certificate of search by the Registrar of the Division of Jacques-Cartier and Hochelaga, in which the properties lay, showed three charges on them, amounting to \$251.88, \$1,560 and \$728.28. The City paid a few dollars for court costs: the respondent consented to an order, and the following order was made:—

“ Que la dite somme soit payée et distribuée comme suit, savoir ;—	
Montant déposé	\$20,168.38
1 ^{er} —Au protonotaire pour honoraires et taxes	
sur deniers déposés	403.37
2 ^{me}	251.88
3 ^{me}	1,560.00
4 ^{me}	728.28
5 —A Elphège Dufresne, propriétaire	
la balance des deniers	17,224.85
	\$20,168.38

The sum of \$403.37 is the amount of the two imposts of 1 per cent. above-mentioned, and the effect of the order is that the sum, which reached M. Dufresne's hands, or was paid to his use, fell short of the compensation awarded him, and interest due thereon by \$403.37. It is to recover this sum from the City of Montreal that the present action was brought, and the proceedings taken were in the proper form in which to obtain a decision as to the incidence of the charges under the circumstances of the case. The action is a test action.

The provisions, under which these sums are imposed, are for present purposes neutral. The words of the Act of 1849 are :—

“ Qu'il soit statué qu'il sera prélevé et payé a Sa Majesté une taxe ou droit de 1% sur tous les deniers qui, après la passation de cette acte, seront consignés dans toute Cour civile.”

No provision is made, by which one party can transfer the burden of the tax to another, or recover it over against others. No person is ordered to pay. The Crown taxes the deposit, takes its impost where it finds it, and leaves any rights and obligations arising out of this subtraction to be decided by the application of such law or contract as may be material

The provisions of the Expropriation Act are to the following effect. Where an award of compensation is made, and the

expropriating party has paid the amount of it into Court, he becomes at once entitled, by force of the award itself, to take immediate possession, and to exercise the rights, in respect of which the compensation was awarded (Art. 7595). On the other hand, an expropriatee, who is not paid the full amount awarded in capital, interest and costs within two months after the award, may recover the property and possession of his land or rights by ordinary civil action against the expropriator (Art. 7599). These articles deal, therefore, with rights and remedies, when no difficulty supervenes upon the making of the award. There is, however, another case, namely, the existence or the fear of the existence of hypothecary claims, and in such a case the expropriator, who is willing to pay, ought not to be harassed, delayed or defeated by the lapse of the time required to ascertain who is entitled to the money, a time which might easily exceed two months. In such a case, which is a case quite distinct from that contemplated in Art. 7595, Art. 7599 gives him an alternative, which at the same time prevents an action being taken against him under Art. 7598 for recovery of the property by the expropriator and enables him to deposit the amount of the award forthwith and free himself from the risk of paying the wrong person. Its material provisions are as follows :—

7. Ratification of Title.

“ 7599. 1. If the party taking the expropriation proceedings has reason to fear any hypothecary claims or has other reasons, he may deposit the amount of the compensation with the prothonotary of the district, in which the lands to be expropriated are situated, with six months' interest, together with a copy of the award.

“ 2. The award shall thereafter be considered a title to the lands therein mentioned, and proceedings shall be had to obtain confirmation of the title in the same manner as for other confirmations of title.

“ 3. The judgment in confirmation of title shall forever bar all claims against the lands, including dower not yet open, as well as any mortgage or incumbrance upon the same.

“ 4. The Court shall grant such order for the distribution payment or investment of the amount of the compensation, and for securing the rights of the parties interested, which it deems expedient, according to law and equity.

“ 5. The costs of the proceedings shall be paid by the party designated by the Court.

“ 6. If the judgment in ratification of title is obtained in less than six months after the deposit of the amount of the compensation with the prothonotary, the Court shall order that a proportionate part of the interest be refunded to the party, who made the deposit.

“ If the judgment is not rendered until after the six months, the Court shall order that such additional sum as it may think right be deposited to meet the amount of the interest.” (R.S.Q., 5754s, 54 Vict., ch. 38, s. 1.

The exercise by the expropriator of the right to pay money into Court under the provisions of this Article is optional. It is given him for his benefit to relieve him from a specified difficulty, or from difficulties of a similar character, and he can resort to it or not as he pleases. It follows that its language must be carefully scrutinised, when he claims that it applies to a new case.

New the present case certainly is. There is no reason to suppose that it was from fear of hypothecary claims that resort was had to payment into Court, and indeed in *M. Dufresne's* case the charges on the property seem to have been simple claims, which were at once ascertained by reference to the register. No "other reasons" of a similar character are alleged. In fact, it is the appellants' case that the money was paid into Court under the agreement for an extension of time above referred to, and this agreement is not even alleged to have been necessitated by the existence or the fear of hypothecary claims. The agreement itself is not a "reason" within the meaning of the Article.

The appellants have laid considerable stress on the terms of this agreement, and have contended that by reason of the words "*la Cité devra déposer les dits montants entre les mains du Protonotaire de la Cour Supérieure du District de Montréal.*" payment into Court was made obligatory on the City, and accordingly the mere fact of such payment operated as a complete discharge of all the obligations created by the award. The Trial Judge accepted and the Superior Court, sitting in review, rejected this contention. In so far as it turns on the words "*devra déposer les dits montants,*" the question is one merely of translation and of construction, on which their Lordships need say no more than that they do not differ from the view taken in the judgment appealed against. Further, the words of the agreement do not make any mention of Art. 7599, and would be satisfied by giving them the effect of preventing the expropriated owners from resorting to their remedies under Art. 7598 on an allegation that the specified period of two months had elapsed without payment being made. Their Lordships will, however, examine the question, as it was examined in the Courts below, upon the assumption that the provisions of the Article are available to the appellants.

The effect of the contention is that a debtor without having sought out his creditors, and without having paid the amount of his indebtedness into their hands or those of their authorised agents, can obtain a complete discharge from his obligation by payment to a third person, even although the result of the course so taken must be that payment in full will never be made to those creditors or to their use at all. There are no express words in the Article, which have that effect, and, the whole proceeding expressed in the Article being taken to relieve the expropriator from an embarrassment, it is difficult to find any justification for giving him by implication a greater benefit than is afforded by that relief itself. If hypothecary claims are feared, the express operation of the article enables him to protect himself from having to pay twice over, that is from having to pay the awarded compensation and something more: why is it to be assumed that it has further an implied operation, which will secure him a discharge from his obligation under the award by paying something less than the awarded sum?

In effect, the express provisions of the Article negative any

such implication. The expropriator's right is to deposit with the prothonotary not to pay the amount to him. It is within the power of the Court to order the expropriator to pay the costs of the proceeding, which is inconsistent with the mere payment into Court being his discharge, nor can the sum in dispute in the present case be regarded as costs of the proceeding, which it would be within the power of the Court to award. The expropriator has to deposit six months' interest in Court, six months being apparently the time expected to be occupied in the proceedings preliminary to judgment in ratification of title. The pronouncement of this judgment forever bars all claims against the lands. After all, the length of time necessary for investigating the rights of parties claiming in a hypothecary interest cannot depend on the expropriator, who did not create them. Their complexities arose between and concern the expropriatees and the claimants, yet, if this investigation takes less than six months, the expropriator gets some interest back, and, if it takes more, the Court "shall" order him to make a further deposit to meet the amount of the interest. These provisions are quite inconsistent with the view that payment into Court is in itself an acquittance and discharge to the expropriator.

Their Lordships are accordingly of opinion that, at the time when the tax now in question was levied on the fund in Court, the expropriators, now appellants, had not discharged their obligation to pay the sum named in the award, and that, as the sum remaining in Court available to be paid out in satisfaction of the compensation awarded, fell short of the total amount of that compensation, it is still incumbent on the appellants to pay to the respondent the residue. The judgment appealed against was therefore right, and their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs. In accordance with the terms, by which the appellants undertook to abide, as a condition of special leave to appeal being granted, these costs will be taxed as between solicitor and client.

In the Privy Council.

THE CITY OF MONTREAL

v.

ELPHÉGE DUFRESNE.

DELIVERED BY LORD SUMNER.

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