THE OTTAWA ELECTRIC RAILWAY COMPANY ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF OTTAWA ..... RESPONDENT.

1944
**Nov. 22, 23
*Dec. 20

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Street Railways—Municipal Corporations—Agreement between City of Ottawa and Ottawa Electric Ry. Co., ratified and confirmed by c. 84, statutes of Canada, 1924—Application by City to Board of Transport Commissioners for decrease in fares chargeable by Company—Question whether City had complied with proceedings required before making application—Form of resolution by City Council—Interpretation of agreement, statute—Words of provision, whether imperative, or directory only.

An agreement between the City of Ottawa and the Ottawa Electric Ry. Co. (a company incorporated by Act of Parliament of Canada), which agreement was ratified and confirmed by c. 84, statutes of Canada, 1924, provided, *inter alia,* for application for increase or decrease of fares on a certain part of the Company's railway. Clause 9 (*c*) of the agreement provided that "should the revenue to be derived from the operation of [said part of the railway] appear likely to be more than sufficient, in the opinion of the City expressed by resolution, to provide during the five year period next succeeding the five year period then current, for [items specified in clause 9 (*a*)], then the City may notify the Company in writing, one year before the end of any five year period, that it considers the fares excessive", and, if no satisfactory adjustment was made within one month, the City might apply to the Board (now the Board of Transport Commissioners for Canada) for a decrease in fares.

The City Council at a meeting "received and adopted" a presented report of the City's Board of Control recommending that the City Clerk notify the Company that "in accordance with clause 9 of the" said agreement, it was the City's "intention to apply for a reduction in the current tariff of fares"; and the City Clerk notified the Company that "under authority of clause "c" of section 9 of the [said agreement], the City Council, at a meeting held on * * * passed a resolution and instructed me to notify your company that it considers the present fares excessive and if no satisfactory adjustment is made within one month from * * * it is the intention of the City to apply to the Board of Transport for such a decrease in fares during the next five year period as will allow a revenue not more than sufficient to provide for the items specified in clause "a" of section 9 of the said agreement". Later the City applied to the Board for an order decreasing the fares.

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Kellock JJ.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

The Company contended, by way of preliminary objection, that before giving the notice the City had failed to express by resolution the opinion that the revenue to be derived appeared likely to be more than sufficient to provide during the next five year period in question for said items, as required by the said agreement and statute of 1924, and that therefore the City was not entitled to give the notice or maintain its application to the Board. That question came before this Court, by leave of the Board of Transport Commissioners, on appeal from holdings of the Board.

Held (affirming holdings of the Board, 56 C.R.T.C. 317), that the City was entitled to give the notice and to maintain its application.

Per the Chief Justice and Taschereau J.: The fact that the City Council's resolution, instead of reproducing the exact words of said clause 9 (*c*), adopted a report which proceeded by way of a reference to the clause itself, did not justify the Company's objection. Whether the terms of the clause be held as being imperative or directory, the condition therein stated in respect of the resolution was sufficiently complied with—indeed more than substantially—and the action taken by the City Council completely satisfied the requirements of the clause. The resolution necessarily imported the City's opinion that the Company's revenues appeared likely to be more than sufficient for the purposes in question, and in effect expressed that opinion. Also, no prejudice could result to the Company on account of the alleged omission in the resolution. Also, it was not to be assumed (nor was there any evidence) that the resolution was adopted without due deliberation and after careful consideration. (The words of said Act of 1924, so far as material in this case, merely confirm and validate the agreement and make it binding as a contract between the parties; though the Act, because of its direction to the Board and because the agreement affects the interest of the general public, may not be considered merely as providing and imposing mutual obligations on the Company and the City. Also the Act, rather than conferring a privilege of applying to the Board, really restricts the parties' rights in that connection; the Company is under the Board's jurisdiction existing under the *Railway Act*, and said Act of 1924 limits the right of each party to apply to the Board as to fares, to the terms and conditions of the agreement. The agreement as ratified by the Act, in so far as clause 9 (*c*) is concerned, only deals with the procedure whereby the Board's jurisdiction is to be set in motion; it indicates what form will be given to the application to the Board —a certain resolution of the City Council and the notice in writing to the Company).

Per Kerwin J.: The Act of 1924 did more than merely ratify and confirm the agreement; and the agreement should be construed as a statutory enactment. Even considered as such, the first part of clause 9 (*c*), down to the word "resolution", is merely directory, not imperative, and the word "then" in the phrase "then the City may notify the Company in writing" means no more than that the parties were making provision for the City's application; it does not mean that the City may give notice only if it should first specifically express its opinion by resolution. The lack of a resolution expressed in the precise words used in clause 9 (*c*) was not fatal to the City's appli-

cation made after its notice to the Company. There was nothing to indicate that thorough consideration was not given to the matter by the City Council, nor was there any prejudice to the Company.

Per Rand J.: The provisions of the agreement dealing with fares and the Board's powers over them must be taken to have become, by the Act of 1924, the subject of statutory enactment. But the mere expression of opinion by the City in a formal resolution is not an imperative step to the right to raise the question of fares. To the language used by Parliament in restricting the power to deal with the fares, which involves the taking away of the general privilege under the *Railway Act,* there should not be attributed the intention of surrounding the public trust lying on the City Council with conditional formalities of no substantive value. The formality intended to be secured was approval of the Council before executive action should take place, and whether that approval should lie in a resolution fomally expressing the opinion of the Council, to be followed automatically by executive action, or in one instructing the giving of the notice, would be a matter of indifference. The essential protection to the Company was that there should be no unauthorized action; that behind any step by the executive should stand the knowledge, opinion and approval of the Council. That protection was present here. The resolution directing the giving of the notice, by the necessary implication of its terms, involved the opinion of the Council essential to the propriety of its action.

Per Kellock J.: The principle of the decision in *Halford* v. *Cameron's Coalbrook Steam Coal, etc., Co.,* 16 Q.B. 442, applies. The resolution of the City Council did "express" (giving to that word the meaning adopted in the *Halford* case: "represent in words", "exhibit by language" or "shew or make known") that the City was of the opinion specified in said clause 9 (*c*), and was sufficient, though the word "opinion" or a similar term was not used.

APPEAL by the Ottawa Electric Railway Company (a company incorporated by an Act of the Parliament of Canada) from the order of the Board of Transport Commissioners for Canada (1) deciding in favour of the City of Ottawa a preliminary question of law raised in connection with an application by the City to the Board under clause 9 (*c*) of a certain agreement in writing between the City and the Company dated January 25, 1924. That agreement is set out in the schedule to, and is ratified and confirmed by, c. 84 of the Statutes of Canada, 1924 (and see c. 143 of the Statutes of Ontario, 1924, as to confirmation, etc., by the Legislature of Ontario).

The City's application to the Board, which was dated August 6, 1943, was for an order decreasing the fares established and in effect on that part of the Company's

(1) 56 Canadian Railway and Transport Cases 317.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

transportation system as is situate within the limits of the City of Ottawa and such other parts as are situate outside such limits but within the area specified in clause 4 (*c*) of said agreement (which parts are called "the said part" in clause 9 (*c*) of said agreement quoted in the reasons for judgment now reported), which existing rates of fare had been established and approved by an order of the Board of Railway Commissioners for Canada in 1933.

Said clause 9 (*c*) and other relevant provisions of the agreement (and also the enacting provisions of the said Act of 1924) are set out in the reasons for judgment now reported. Said clause 9 (*c*) provides for certain proceedings before such an application as that now in question is made by the City. A certain resolution was passed by the City Council, and, following it, a notice was given to the Company. These are also set out in the said reasons for judgment. The Company contended that the resolution of the City Council, in the form which it took, was not a compliance with what was required, and that, therefore, the City was not entitled to give the notice to the Company nor to maintain its application to the Board.

The Board held (MacPherson C. dissenting) that the City was entitled to give the notice to the Company and was entitled to maintain its application to the Board. The Board granted to the Company leave to appeal to the Supreme Court of Canada upon the following questions, which, in the opinion of the Board, were questions of law and of jurisdiction:

Whether, as a matter of law, the Board was right—

1. In holding that the Applicant [the City] was entitled to give to the Respondent [the Company] the notice dated June 27th, 1942.

2. In holding that the Applicant is entitled to maintain its application to the Board dated the 6th day of August, 1943.

W. F. Schroeder K.C. and *J. L. Kemp* for the appellant.

G. C. Medcalf K.C. for the respondent.

The judgment of the Chief Justice and Taschereau J. was delivered by

THE CHIEF JUSTICE—On the 6th of August, 1943, the Corporation of the City of Ottawa applied to the Board

of Transport Commissioners for Canada for an Order decreasing the fares in effect on that part of the Company's transportation system situate within the limits of the City of Ottawa and such other parts as are situate outside such limits but within the area specified in clause (*c*) of section 4 of a certain agreement between the City and the Ottawa Electric Railway Company, dated January 25th, 1924, which rates of fares were established and approved by an Order of the Board of Railway Commissioners for Canada (as it then was), dated August 31st, 1933, to be effective for a period of five years from and after the 13th day of August, 1933.

It was submitted in the application that the rates of fares presently in effect were excessive and produced a larger revenue from the operation of the said part of the Company's system than was

> sufficient to provide the said Company during the five-year period commencing with the 13th day of August, 1943, with the cost of operating the said part of the said Company's transportation system, and such portion of the cost of operating works in connection therewith as is properly chargeable to the said part, and in maintaining and keeping up the same in an efficient condition and making proper provision for their depreciation, renewal and replacement, and for a just and reasonable rate to the Company on the capital investment in the said part and on such portion of the capital investment in the said works as is properly chargeable to the said part.

The answer of the Company to the application, as it was originally fyled on August 13th, 1943, amounted to a general denial, but it was subsequently amended on the 10th of September, 1943, and then alleged that, before giving the notice under section 9 (*c*) of the agreement between the Company and the City, the latter had failed to express by resolution the opinion that the revenue to be derived from the part of its transportation system affected by the agreement appeared likely to be more than sufficient to provide for the five year period next succeeding the five year period then current, which expression of opinion was required by the terms and provisions of the agreement and the statute into which it was incorporated, being Chapter 84 of the Statutes of Canada, 14-15 George V; and that the City was not, therefore, entitled to give the said notice and the proceedings were not now maintainable.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

In its reply, the City admitted that the Council thereof did not express by resolution, on or before the 13th day of August, 1942, its opinion that the revenue to be derived from the operation of that part of the street railway owned and operated by the Company appeared likely to be more than sufficient to provide for the items specified in clause (*a*) of section 9 of the agreement; but it added that such opinion was expressed in the notice served upon the Company of its intention to apply to the Board for a decrease of fares. On behalf of the City, it was submitted that, as a matter of law, the failure of the Council to pass such a resolution in no way affected its right to make its application to the Board.

In view of the respective contentions above referred to, a special case was submitted to the Board of Transport Commissioners on the preliminary question of law raised by the pleadings.

On January 12th, 1944, the majority of the Board, upon consideration of all that had been placed before it, arrived at the conclusion that on a true construction of the agreement and Statute the City had substantially and sufficiently complied with the provisions of section 9 (c) of the agreement to entitle it to give the Company the notice and to make and maintain its application to the Board for an Order decreasing the present rates of fares.

The Board took the view that, as between the parties, the agreement, even although validated by the Statute, was to be regarded as having created only obligations arising out of a contract; that the agreement was to be construed accordingly, and that the provision with regard to the resolution to be passed by the Council was directory, rather than absolute or imperative, and that no disadvantage, or prejudice, to which the Company may have been put could result to the Company from the course that had been followed by the City.

One of the Commissioners, however, Mr. MacPherson, was of a contrary opinion. He thought that the condition set out in section 9 (*c*) had to be fulfilled before the City had a right to give the notice to the Company, or

to make an application to the Board, that the City admitted that it had not been fulfilled, and that the application should, therefore, be dismissed.

There was then an application to the Board for leave to appeal to this Court, which was granted and, by an Order, dated February 12th, 1944, the following questions, which, in the opinion of the Board are questions of law and jurisdiction, were submitted to us:—

Whether, as a matter of law, the Board was right—

1. In holding that the Applicant was entitled to give to the Respondent the notice dated June 27th, 1942.

2. In holding that the Applicant is entitled to maintain its application to the Board dated the 6th day of August, 1943.

It is not necessary to discuss in detail the history of the preceding Companies which were known as the Ottawa City Passenger Railway Company and the Ottawa Electric Street Railway Company, Limited, and which, in the year 1893, were amalgamated and followed by incorporation of the appellant under the name of the Ottawa Electric Railway Co.

It is sufficient to say that the appellant Company was created by a Statute of the Parliament of the Dominion of Canada and carries on a transportation business by means of electric street cars and busses throughout the City of Ottawa and beyond the City limits into the City of Hull, which is in the Province of Quebec.

The appellant and the respondent entered into an agreement bearing date of the 25th of January, 1924, which was duly confirmed by a by-law of the City, bearing the same date, and which deals with the terms and conditions of the operations of the appellant's business in the City of Ottawa.

The appellant, being a federal Company, came under the provisions of the *Railway Act*. The agreement was confirmed and validated by Statute of the Parliament of Canada, to which it was attached as a schedule.

The City is under the jurisdiction of the provincial legislature and the agreement was also validated and confirmed by the Ontario Legislature (Chapter 143 of the Statutes of Ontario, 1924).

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

For the purpose of the present appeal, it does not seem that we are concerned with the Ontario Statute and it will be sufficient to refer to the provisions of the Dominion Statute.

In the preamble of that Statute it is recited, among other things, that the Company has prayed that the agreement be ratified and confirmed, and that the parties be empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder. It is important to set out in full sections 1 and 2 of the Statute, reading as follows:—

1. The agreement set out in the Schedule to this Act, dated the twenty-fifth day of January, 1924, between the Company and the Corporation is ratified and confirmed, and the parties thereto are hereby empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder.

2. Notwithstanding the provisions of *The Railway Act, 1919,* and amendments thereto, the rates of fares on The Ottawa Electric Railway Company's transportation system, as established by the said agreement, shall not be altered before the thirteenth day of August, 1928, either by the parties thereto or by the Board of Railway Commissioners for Canada, and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement.

The relevant portions of the agreement, which, as already stated, is attached as a schedule to the Dominion Statute, are sections 4 (*b*), 9 (*a*) (*b*) (*c*) (*d*), and 13, as follows:—

4. (*b*) Notwithstanding any provision of the Railway Act (Canada) 1919, or of any subsequent Act amending the same, or of any order in council made thereunder, the above fares shall not be altered until the 13th day of August, 1928, and then only if such alteration is permitted in accordance with clause 9 hereof and only while such alteration remains in force.

9. (*a*) Should the Company consider that the revenue to be derived from the operation of the part of its transportation system within the City limits, as they may be from time to time, and from the other lines mentioned in sub-clause (*c*) of clause 4 hereof (hereinafter in this clause called "the said Part") will be insufficient to provide during the five year period next succeeding the five year period then current, for the following items, viz., the cost of operating the said part and such portion of the cost of operating works in connection with the Company's transportation system as is properly chargeable to the said part, and of maintaining and keeping up the same in an efficient condition, and of making proper provision for their depreciation, renewal and replacement, and for a just and reasonable return to the Company on the capital investment in the said part and on such portion of the capital investment in the said works as is properly chargeable to the said

part, as such capital investments may be from time to time, the Company may notify the City in writing not later than one year before the end of any five year period, that it cannot profitably continue, after such period, the tariff of fares then in effect on the said part, and shall submit therewith a tariff of fares, and the tariff of fares to be effective during the next five year period shall thereupon be open for discussion between the parties hereto.

(*b*) Should no satisfactory adjustment be effected within one month after such notification, the Company may, at any time thereafter, apply to the Board of Railway Commissioners for authority to charge such an increased tariff of fares on the said part of the said system, during the next five year period, as will produce a sum sufficient to provide in such period for the said items.

(*c*) Should the revenue to be derived from the operation of the said part appear likely to be more than sufficient in the opinion of the City expressed by resolution, to provide during the five year period next succeeding the five year period then current, for the said items, then the City may notify the Company in writing, one year before the end of any five year period, that it considers the fares excessive, and if no satisfactory adjustment of the matter is made within one month after such notification, the City may apply to the Board for such a decrease in fares upon the said part during the next five year period, as will allow a revenue not more than sufficient to provide for the said items.

(*d*) Whenever notice has been served by the Company or by the Corporation under clause 9 of this Agreement, any accountant or engineer instructed by the Corporation by a resolution shall have full right of access to the books, records, documents, vouchers and balance sheets of the Company, and shall have full right to examine the same, and to take extracts therefrom.

13. The parties hereto agree to join in applying to the Parliament of the Dominion of Canada and to the Legislature of the Province of Ontario for legislation confirming and ratifying this Agreement, and declaring the same to be valid, legal and binding upon the parties hereto (the expense of such legislation to be borne by the Company).

The proceedings, whereby the application of the City involved in the present appeal was initiated, are entered in the minutes of the City Council, of June 25th, 1942, as follows:—

MINUTES OF THE CITY COUNCIL

Transportation Building,

June 25th, 1942,

4.30 p.m.

PRESENT:—All the members with the exception of Aldermen Ash, Band, Bradley and Hamilton.

Special meeting called by His Worship the Mayor.

Controller Geldert presented Report No. 16 of the Board of Control.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

REPORT No. 16, BOARD OF CONTROL

To the Council of the Corporation
of the City of Ottawa.

Gentlemen:

1. OTTAWA ELECTRIC RAILWAY CO.

The Street Railway Committee having adopted a motion to instruct the City Clerk to notify the Ottawa Electric Railway Co. that, in accordance with Clause 9 of the agreement between the Corporation and the Railway Company, dated January 25, 1924, it is the Corporation's intention to apply for a reduction in the current tariff of fares, the Board recommends that the City Clerk give such notice to the Railway Company.

The five year extension period of the agreement with the Company expires on August 13, 1943, and it is required that notice of one year be given the Company of any change that may be contemplated by the City in the agreement.—Carried.

2. OTTAWA ELECTRIC RAILWAY CO.

The Street Railway Committee having adopted a motion to instruct the City Clerk to notify the Ottawa Electric Railway Co. of the Corporation's intention to re-examine the terms of the agreement respecting bus services with a view to securing a revision of these terms, the Board recommends that the City Clerk give such notice to the Railway Company.—Carried.

3. OTTAWA ELECTRIC RAILWAY CO.

The Street Railway Committee having adopted a motion to instruct the City Clerk to notify the Ottawa Electric Railway Co. of the City's intention to seek reconsideration of the terms of the agreement relating to the cost of snow removal from City streets, the Board recommends that the City Clerk give such notice to the Railway Company.—Carried.

Respectfully submitted

June 25th, 1942.

(Sgd.) J. E. S. LEWIS, Chairman,
E. A. BOURQUE,
G. M. GELDERT,
J. A. FORWARD,
C. E. PICKERING.

1. Moved by Controller Geldert, seconded by Controller Bourque, that Report No. 16 of the Board of Control, just presented, be received and adopted.—Carried.

This was followed by a notice, bearing date of June 27th, 1942, signed by the City Clerk, addressed to the Manager of the appellant Company, and reading thus:—

I beg to inform you that under authority of Clause "C" of Section 9 of the Agreement between your Company and the City of Ottawa, dated January 25th, 1924, the City Council, at a meeting held on Thursday the 25th day of June, instant, passed a resolution and instructed me to notify your company that it considers the present fares excessive and if no satisfactory adjustment is made within one month from the date

of this notification it is the intention of the City to apply to the Board of Transport for such a decrease in fares during the next five year period as will allow a revenue not more than sufficient to provide for the items specified in clause "A" of Section 9 of the said Agreement.

The question involved in the appeal is whether, in the circumstances set out above, the City was entitled to give the Company the notice as provided in section 9 (*c*) of the agreement and to make and maintain its application to the Board of Transport Commissioners.

Counsel for the Company argued that the majority of the Board, while correctly holding that the provisions and conditions of the 1924 agreement relating to the alteration of fares have been given the force of the Statute, erred in holding that these provisions and conditions should be construed in precisely the same way as if they had been matters not of enactment but of private agreement; that the conditions enumerated in section 9 (*c*) of the agreement with respect to the passage of a resolution by the City were directory and not imperative and that strict compliance therewith is not necessary; that the City has substantially complied with the provisions of that section, and that the appellant has suffered no disadvantage or prejudice by reason of the failure of the City to comply with those provisions.

The appellant submits that the provisions of section 9 (*c*), being a part of the Statute (chapter 84, 14-15 George V), are imperative and absolute, first, because such provisions relate to a privilege, right or power granted with a direction that certain regulations, formalities or conditions shall be fulfilled, secondly, because it is a provision of the Statute which enables the parties affected by it to take legal proceedings under certain specified circumstances, thirdly, that it is part of the Statute which confers jurisdiction upon a tribunal of limited authority and statutory origin and is one of the conditions and qualifications annexed to the grant, fourthly, it is a provision relating to Court procedure, fifthly, it is a condition precedent to the right to give the notice without the giving of which the proceedings before the Board of Transport Commissioners for Canada cannot be launched.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

The real reply of the City was, in effect, that, even if there had been no resolution preceding the notice sent to the Company on the 27th of June, 1942, such resolution was not necessary.

There was some discussion at bar with regard to the true meaning of the admission made by the City in its reply before the Board that its Council had not expressed by resolution the opinion provided for by section 9 (*c*) of the agreement. In my view, that admission does not mean any more than that the resolution of the Council had not used the precise words of section 9 (*c*).

It cannot be said that there was no resolution at all, and the only interpretation that can be given to the admission as made in the reply, consistent with the facts and circumstances as we know them, must be that the text of the resolution is not couched exactly in the words of the agreement.

There can, however, be no question about the notice sent by the City Clerk in carrying out the order of the Council. It says distinctly that a resolution was passed instructing him

> to notify your company that it considers the present fares excessive and if no satisfactory adjustment is made within one month from the date of this notification it is the intention of the City to apply to the Board of Transport for such a decrease in fares during the next five year period as will allow a revenue * * *.

The notice itself is clearly worded according to section 9 (*c*) and was unobjectionable as to its form for all intents and purposes.

This Court was invited by counsel for the Company to construe section 9 (*c*) strictly and to decide that the conditions therein mentioned had to be adhered to according to the rules of interpretation of statutes; while counsel for the City contended that, although validated by Statute (Chapter 84), as between the parties, the agreement should be construed according to the general rules accepted for the interpretation of contracts.

A rather large number of cases were referred to by each counsel in support of his respective contention; but, as was observed by Lord Campbell in *The Liverpool Borough Bank* v. *Turner*(1):—

(1) (1860) 30 L.J.Ch. 379, at 380.

No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed.

After having very carefully read the cases to which the Court was referred by counsel, and also some others, I had to come to the same conclusion as Lord Penzance in *Howard* v. *Bodington* (1), where he said:—

I have been very carefully through those cases, but upon reading them all the conclusion at which I am constrained to arrive is, that you cannot glean a great deal that is very decisive from a perusal of those cases.

The statutes and agreements under discussion in the decided cases are on all sorts of subjects and I think it must be said that the Court must determine its opinion by an interpretation of the particular statute, or agreement, which it has to apply in the case submitted to it.

In the Statute of 1924 (Chapter 84) now under consideration, the agreement, while being "ratified and confirmed" by section 1, was not made part of the Act. The object of that section is to give the agreement validity and to state that "the parties thereto are hereby empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder". Be it noticed that the authorization is to carry out the obligations and the privileges thereunder and, therefore, those of the agreement. No power or authorization is added to the agreement itself.

Section 2 of the Statute derogates from certain provisions of *The Railway Act, 1919,* in respect of the rates of fares, but merely to state that "as established by the said agreement [they] shall not be altered before the thirteenth day of August, 1928." That part of the section may now be disregarded, as the date fixed has now long since expired. Then section 2 goes on:—

and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement.

Again, therefore, it does not derogate from the agreement itself and merely confirms the "terms and conditions" thereof in regard to any alteration in fares.

(1) (1877) 2 P.D. 203, at 211.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

RINFRET C.J.

The words of the Statute, so far as material in the present case, merely confirm and validate the agreement and make it binding as a contract between the parties. The intention of the legislature, gathered from the provisions of the only two sections of the Statute, would appear, therefore, to limit the effect of the enactment to the validating of the agreement between the Company and the City.

It may not, however, be considered merely as providing and imposing mutual obligations on the Company and the City, because of the direction given in the Statute to the Board of Railway Commissioners for Canada, and also because it may not be denied that the agreement also affects the interest of the general public in their right to utilize the facilities of the Company.

As between the appellant and the respondent, it would seem that their respective obligations and privileges, to use the words of section 1 of the Statute, are reciprocal. Clauses 9 (*a*) and 9 (*c*) of the agreement clearly lead to that view; but I cannot agree with counsel for the Company that section 2 of Chapter 84 confers a privilege on either party in respect of the right to apply to the Board of Railway Commissioners for Canada (now the Board of Transport Commissioners). On the contrary, I would think that it restricts the rights of the parties in that connection. There can be no question that the Company is under the jurisdiction of the Board and that, in particular, in respect of its rates and fares, the effect of section 2 restricts the right of each party to the agreement to apply to the Board and limits it to the terms and conditions of the agreement. So far as that point is concerned, I fail to see how it can be said that the Statute confers a privilege on either party.

This leads me to say that the questions submitted to the Court hardly raise a point as to the jurisdiction of the Board. Neither the agreement, nor the Statute, created that jurisdiction. It existed under the *Railway Act* by reason of the incorporation of the Company as a federal entity and, but for the agreement and Statute, the jurisdiction of the Board would have been general and unaltered. Perhaps it was suspended in regard to

rates and fares until the 13th day of August, 1928, but since that date the question is no longer one of jurisdiction. The latter is not derived either from the agreement or from the special Statute; the right of control which the Board exercises over the rates of fares of the Company is given to it by the *Railway Act*, and the agreement as ratified by the Statute, in so far as 9 (*c*) is concerned, only deals with the procedure whereby the jurisdiction of the Board is to be set in motion. It indicates what form will be given to the application to the Board:—a certain resolution of the City Council and the notice in writing to the Company.

I would not, therefore, follow the contention of the City to the extent of saying that the failure of the City Council to pass a resolution was wholly immaterial, but the discussion on that point is really irrelevant in the premises, because, as a matter of fact, there was a resolution passed by the Council. Report No. 16 of the Board of Control was adopted by a resolution of the Council. The minutes of June 25th, 1942, show that a resolution was then and there carried by the Council and the question, as it presents itself, is not, therefore, whether a resolution is necessary or not under clause 9 (*c*) of the agreement, but rather whether the particular resolution adopted by the Council was sufficient for the purpose which the City intended thereby to achieve.

The point raised by counsel for the Company is that the resolution was not effective because it was not strictly adopted in the words of section 9 (*c*) and, to be more precise, because it did not express the opinion of the City that the revenue to be derived by the operation of that part of its transportation system within the City appeared likely to be more than sufficient to provide during the five year period next succeeding the five year period then current for the items enumerated in section 9 (*a*) of the agreement, and that the City considered the fares excessive.

It is true that the resolution is not in the express terms of section 9 (*c*), but the word "expressed" in 9 (*c*) cannot mean any more than "put forth" and does not exclude the idea that the opinion can be implied. It is, to my

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

mind, the necessary implication of the report of the Board of Control that they were acting under clause 9 (*c*) of the agreement. It refers to clause 9 and it states that "it is the Corporation's intention to apply for a reduction in the current tariff of fares". Obviously the intention of the City was to make an application to the Board for a reduction of the fares "in accordance with Clause 9", in view of the fact that the conditions provided for in that clause had arisen; and that intention was clearly conveyed to the Company by the notice sent on behalf of the City on June 27th, 1942, in the very terms of the section.

The only quarrel of the Company is really with the form of the resolution and nothing else.

For my part, I cannot see that the objection can have any merit, because, instead of reproducing in the resolution the exact words of section 9 (*c*), the report of the Board of Control and the resolution of the Council proceeded by way of a reference to the clause itself. Whether the terms of that clause be held as being imperative or directory, I would hold that the condition therein stated, in respect of the resolution to be adopted by the Council, has been sufficiently complied with—indeed more than substantially—and that the action taken by the City Council completely satisfied the requirements of that particular clause. In effect it expressed the opinion referred to in that clause and it necessarily imports the opinion of the respondent that the revenues of the appellant were more than sufficient for the purposes in question. Any alleged omission (and I do not agree that there is any) should certainly be considered as non-essential, and, in the words of Fry, on Specific Performance, 6th edit., p. 440, as the omission of a term which is neither "important" nor " considerable".

Nor can I see what prejudice can have resulted, or can result, to the appellant on account of the alleged omission in the resolution of the City Council. The resolution, even if it carried out strictly the provision in clause 9 (*c*), is really of no value to the appellant as a source of information, or as a guarantee of careful and informed consideration by the Council before entering into the rate

dispute. The Company was fully and completely informed of what the City intended to do by its resolution and by its notice. There cannot be the slightest doubt about the City's intention and there is nothing in clause 9 (*c*) to the effect that the opinion which the City expresses in its resolution should only be arrived at after due deliberation.

Moreover, it is not to be assumed that the resolution was adopted by the Council without due deliberation and after careful consideration of the matters involved. There is certainly no evidence to the contrary in the material before the Court.

I would, therefore, answer the questions submitted by the Board in the affirmative. The appellant should pay the costs of the respondent on the appeal to this Court.

KERWIN J.—I have had the advantage of reading the proposed judgment of my Lord the Chief Justice and, while I agree in the result, my reasons for so doing differ in some respects from his and I therefore propose to state them shortly.

The application to the Board by the City was made in pursuance of the agreement of January 25th, 1924, and it is therefore unnecessary, in my view, to consider or express any opinion as to the effect of subsection 5 of section 325 of the *Railway Act*, R.S.C. 1927, chapter 170. I agree that the reply of the City to the amended answer of the Company is not an admission that the City had not expressed by resolution its opinion that the revenue to be derived from the operation of the relevant part of the Company's transportation system would appear likely to be more than sufficient to provide for the stated items during the five year period next succeeding the five year period then current. It means no more than that the resolution passed by the City Council on June 25th, 1942, was not phrased in the precise words used in section 9 (*c*) of the agreement.

I concur with the Assistant Chief Commissioner of the Board that the Dominion statute of 1924 does more than merely ratify and confirm the agreement of January 25th, 1924, between the City and the Company. The various

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Kerwin J.

cases cited on this point are of very little assistance and one must come to a conclusion upon a consideration of all the terms of the agreement and statute. Ratification and confirmation was accomplished by section 1 of the Act:—

> The agreement set out in the Schedule to this Act, dated the twenty-fifth day of January, 1924, between the Company and the Corporation is ratified and confirmed, and the parties thereto are hereby empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder.

Section 2, however, enacts:—

> Notwithstanding the provisions of *The Railway Act, 1919,* and amendments thereto, the rates of fares on The Ottawa Electric Railway Company's transportation system, as established by the said agreement, shall not be altered before the thirteenth day of August, 1928, either by the parties thereto or by the Board of Railway Commissioners for Canada, and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement.

It is true that the period ending August 13th, 1928, has long since expired and we need not, therefore, concern ourselves with what might have been the position if some one other than the City had applied to the Board during that period for a reduction of fares. But the provision that "the rates of fares * * * shall not be altered * * * by the Board of Railway Commissioners for Canada", coupled with the last leg of section 2 "and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement" lead me to the conclusion that something more than mere approval of the agreement is accomplished and that in fact the agreement should be construed as a statutory enactment.

Even considered as such, the first part of clause 9 (*c*) of the agreement down to the word "resolution" is merely directory and not imperative. Again, expressions used in other agreements and enactments and the decisions thereon are of little assistance. Provision is made by clauses 9 (*a*) and 9 (*b*) for an application by the Company if it thought the revenue would be insufficient. Clause 9 (*c*) provides for an application to be made by the City and I think no further meaning may be attached to the word "then", in the phrase "then the City may notify the Company in writing", than that the parties were making pro-

vision therein for the City's application. It does not mean that the City may give notice to the Company only if it should first specifically express its opinion by resolution.

In view of clause 15 of the agreement:

> The Company may at the request of the City, to be expressed by by-law, substitute other streets or parts thereof for the purpose of reaching the objective points of the extensions referred to in Schedule "A".

wherein it will be noted that the request of the City to the Company to substitute other streets is to be expressed by by-law, it may be that the parties did not want any possible implication to arise that by the general law the City should pass a by-law when proceeding under clause 9. It does not follow, however, that the lack of a resolution expressed in the precise words used in 9 (*c*) is fatal to the City's application to the Board after it had notified the Company of its intention so to apply. It was forcefully argued by Mr. Schroeder that the passing of a resolution by the City Council in the exact terms of clause 9 (*c*) would insure that the matter would receive thorough consideration but there is nothing to indicate that such consideration was not given to the matter when it came before the City Council on June 25th, 1942, and the report of the Board of Control was received and the recommendation therein contained that the City Clerk give the required notice to the Company, was adopted. Neither on this nor any other ground can I find that any prejudice was suffered by the Company.

The questions submitted by the Board of Transport Commissioners for Canada should be answered in the affirmative and the appellant should pay the costs of the respondent of the appeal to this Court.

RAND J.—This is an appeal from an order of the Board of Transport on two questions of law which relate to the right of the respondent to proceed with an application to the Board for a reduction of fares on the street railway of the appellant. The controversy arises out of the interpretation of a clause in an agreement entered into between the parties in 1924. The agreement deals generally with the relations between the City and the Company, and the particular clause, with the procedure preliminary to a modification of fares.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rand J.

The clause is as follows:

9. (*a*) Should the Company consider that the revenue to be derived from the operation of the part of its transportation system within the City limits, as they may be from time to time, and from the other lines mentioned in sub-clause (*c*) of clause 4 hereof (hereinafter in this clause called "the said Part"), will be insufficient to provide during the five year period next succeeding the five year period then current, for the following items, viz., the cost of operating the said part and such portion of the cost of operating works in connection with the Company's transportation system as is properly chargeable to the said part, and of maintaining and keeping up the same in an efficient condition, and of making proper provision for their depreciation, renewal and replacement, and for a just and reasonable return to the Company on the capital investment in the said part and on such portion of the capital investment in the said works as is properly chargeable to the said part, as such capital investments may be from time to time, the Company may notify the City in writing not later than one year before the end of any five year period, that it cannot profitably continue, after such period, the tariff of fares then in effect on the said part, and shall submit therewith a tariff of fares, and the tariff of fares to be effective during the next five year period shall thereupon be open for discussion between the parties hereto.

(*b*) Should no satisfactory adjustment be effected within one month after such notification, the Company may, at any time thereafter, apply to the Board of Railway Commissioners for authority to charge such an increased tariff of fares on the said part of the said system, during the next five year period, as will produce a sum sufficient to provide in such period for the said items.

(*c*) Should the revenue to be derived from the operation of the said part appear likely to be more than sufficient, in the opinion of the City expressed by resolution, to provide during the five year period next succeeding the five year period then current, for the said items, then the City may notify the Company in writing, one year before the end of any five year period, that it considers the fares excessive, and if no satisfactory adjustment of the matter is made within one month after such notification, the City may apply to the Board for such a decrease in fares upon the said part during the next five year period, as will allow a revenue not more than sufficient to provide for the said items.

On June 25th, 1942, the City, acting under the power of paragraph (*c*), by its council passed a resolution instructing the city clerk to notify the Ottawa Electric Railway Company that, in accordance with clause 9 of the agreement between the Corporation and the Railway Company, dated January 25th, 1924, it is the Corporation's intention to apply for a reduction in the current tariff of fares.

The motion before the council was by way of adopting a report from the Board of Control which in turn had approved a recommendation of a committee of the council. The report recited that the current five year period of the agreement would expire on August 13th, 1943, and that notice of one year had to be given to the Company of any change in fares that might be sought by the City.

The notification was by letter as follows:

June 27th, 1942.

D. N. GILL, Esq.,
Manager, Ottawa Electric Ry. Co.,
56 Sparks Street,
Ottawa, Ontario.

Dear Sir:

I beg to inform you that under authority of Clause "C" of Section 9 of the Agreement between your Company and the City of Ottawa, dated January 25th, 1924, the City Council, at a meeting held on Thursday the 25th day of June, instant, passed a resolution and instructed me to notify your company that it considers the present fares excessive and if no satisfactory adjustment is made within one month from the date of this notification it is the intention of the City to apply to the Board of Transport for such a decrease in fares during the next five year period as will allow a revenue not more than sufficient to provide for the items specified in clause "A" of Section 9 of the said Agreement.

Yours truly,

NRO/RFH City Clerk.

In the material before this Court there is nothing to indicate anything further between the parties before August 6th, 1943, when the City launched its application to the Board. The answer by the Company was simply a denial that the rates were excessive or would produce a larger revenue during the ensuing five year period than would meet the requirements enumerated in the agreement. Subsequently, in an amended answer, the Company raised the point that under clause 9 (*c*) it was a condition to the right to make an application that the City should have formally passed a resolution expressing its opinion on the revenue of the Company to be derived in the next succeeding five year period, substantially in the terms of the clause, and that, as no such resolution had been passed, the right to make an application had not arisen. On this issue the Board held that such a formal step was not a prerequisite to the application but at the request of the appellant stated the following questions of law to this Court:

Whether, as a matter of law, the Board was right—

1. In holding that the Applicant was entitled to give to the Respondent the notice dated June 27th, 1942.

2. In holding that the Applicant is entitled to maintain its application to the Board dated the 6th day of August, 1943.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rand J.

The appellant was incorporated by a statute of parliament and its undertaking has been declared a work for the general advantage of Canada. The contract was confirmed by chapter 84, Statutes of Canada, 1924, in the following terms:

1. The agreement set out in the Schedule to this Act, dated the twenty-fifth day of January, 1924, between the Company and the Corporation is ratified and confirmed, and the parties thereto are hereby empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder.

2. Notwithstanding the provisions of *The Railway Act, 1919,* and amendments thereto, the rates of fares on The Ottawa Electric Railway Company's transportation system, as established by the said agreement, shall not be altered before the thirteenth day of August, 1928, either by the parties thereto or by the Board of Railway Commissioners for Canada, and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement.

In the argument before the Board and this Court a great deal of discussion took place as to the effect of this language; whether by it the contract or any part of it had been made statutory or whether the result was simply to leave the agreement authorized, in its character as contract. I have little doubt that the provisions dealing with fares and the powers of the Board over them have become the subject of statutory enactment. In the absence of this special code, the fares would be subject to the general jurisdiction of the Board under the *Railway Act.* It would be extraordinary if we should find that statutory jurisdiction modified materially by a purely contractual stipulation.

There remains the narrow point whether a formal resolution containing only the expression of opinion by the City is an imperative step to the right to raise the question of fares. The "opinion" and the notice to the Company are obviously bound up with each other: certainly a state of mind is ordinarily assumed to precede action, and to be in harmony with it. There is no requirement that the notification be authorized by resolution, nor that the resolution now insisted on is in any way to be communicated to the Company. These considerations, so far from indicating any special significance in the resolution of opinion, appear rather to treat that opinion and the notice as two parts of a single act. It was contended by Mr. Schroeder that

the object was to ensure a certain deliberation on the part of the council in the course of which, data available from annual reports of the Company or other public sources would be or might be brought under examination. But so far as that contention confines such a purpose to the mere expression of opinion, I am unable to accede to it.

The precise particulars by which parliament has restricted the power to deal with these fares involves the taking away of the general privilege, under the *Railway Act,* of any recognized public body to raise such a question before the Board. The entire interests of the public of Ottawa have, therefore, been entrusted to the City Council and I cannot attribute to the language of parliament the intention of rendering that trust precarious by surrounding it with conditional formalities of no substantive value.

What clause 9 (*c*) contemplates is, first, preliminary negotiation between the City and the Company to reach agreement and, failing that, an application to the Board. The executive arm of the City consists of a Board of Control and the Mayor. The formality intended to be secured was approval of council before executive action should take place, and whether that approval should lie in a resolution formally expressing the opinion of the council, to be followed automatically by executive action, or in one instructing the giving of the notice, would seem to me to be a matter of indifference. The essential protection to the Company was that there should be no unauthorized action; that behind any step by the executive should stand the knowledge, opinion and approval of the council. That protection was present here. The resolution directing the notice to be given by the clerk, by the necessary implication of its terms, involved the opinion of the council essential to the propriety of its action.

By clause 9 (*a*) the Company has the right, "if it should consider" fares to be inadequate, to raise the question with the City. Under this a state of mind, even adverse in opinion to its action, is irrelevant and I can see no reason why the opposite should, in pure formality, be taken to be the import of the language used in relation to the City when that is capable of another and perfectly reasonable construction. This points also to the place of

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rand J.

emphasis in the words, "in the opinion of the City expressed by resolution"; it is not "opinion" but "resolution"; opinion will be deemed to be in harmony with action but it must be deducible from "resolution", as we have it here.

The appeal should be dismissed with costs.

KELLOCK J.—The point involved in this appeal is taken in paragraph 2 of the amended answer of the appellant, to the effect that the respondent had "failed to express by resolution" the opinion referred to in paragraph 9 (*c*) of the agreement of the 25th of January, 1924, and that, having so failed, it was not entitled to give the notice provided for by the said clause. Appellant contends that the agreement is to be taken as part of the Statute, 14-15 Geo. V, chapter 84, that the words above quoted are to be construed as mandatory and not merely directory, and when so regarded the resolution of the respondent's council of June 25th, 1942, is not a compliance with the terms of the agreement. On behalf of the respondent, it is contended, (1) that clause 9 (*c*) should be construed as a contractual provision and not as part of the statute, and when so construed, the resolution of June 25th, 1942, if in any respect deficient, which is denied, complies with all the essential terms of the agreement; (2) that if the clause in the agreement is to be construed as a statute, that part of clause 9 (*c*) above referred to is merely directory; and (3) even if the clause is to be construed as mandatory, the resolution of the respondent council completely satisfied its requirements.

It will be convenient to consider this last contention first. The question is as to whether appellant is right in its assumption that any resolution which meets the requirements of clause 9 (*c*) must contain *in explicit terms* the opinion of the council of the respondent on the matter dealt with by that clause.

In *Halford* v. *Cameron's Coalbrook Steam Coal, etc., Company* (1), there was involved the construction of 7 & 8 Victoria, Chapter 110, section 45, which enacted as

(1) (1851) 16 Q.B. 442.

to bills of exchange made or accepted on behalf of any company subject to the Act that

> every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the names of two of the directors of the company on whose behalf or account the same may be so made or accepted, *and shall be by such directors expressed to be made or accepted by them on behalf of such company;*

and that every such bill should be binding upon the company and the company should be liable thereon. In the case before the court, acceptance, as far as the directors were concerned, consisted of their signatures followed by a description of them as directors of the company appointed to accept the bill. It was objected on behalf of the company that the requirements of the statute had not been met and that the action did not lie.

The court (Lord Campbell C.J., Patteson, Coleridge and Erle JJ.) held that the objection was not a valid one. Lord Campbell, in giving the judgment of the court, said at page 445:

> But we think that there is no necessity for the very words and syllables here mentioned to be written by the two directors on the face of the bill. According to Dr. Johnson, the meaning of the verb "to express" is "to represent in words; to exhibit by language; to shew or make known in any manner". Now do not the two directors who have accepted this bill represent in words, exhibit by language, shew and make known, that the bill is accepted by them as directors on behalf of the company?

In my opinion, the principle of this decision applies to the case at bar. Turning to the resolution of the 25th of June, 1942, it is as follows:

> Moved by Controller Geldert, seconded by Controller Bourque, that Report No. 16 of the Board of Control, just presented, be received and adopted.—Carried.

The Report referred to is as follows:

> 1. OTTAWA ELECTRIC RAILWAY CO.
>
> The Street Railway Committee having adopted a motion to instruct the City Clerk to notify the Ottawa Electric Railway Co. that, in accordance with Clause 9 of the agreement between the Corporation and the Railway Company, dated January 25, 1924, it is the Corporation's intention to apply for a reduction in the current tariff of fares, the Board recommends that the City Clerk give such notice to the Railway Company.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Kellock J.

The five year extension period of the agreement with the Company expires on August 13, 1943, and it is required that notice of one year be given the Company of any change that may be contemplated by the City in the agreement.—Carried.

It is to be noted that what was to be notified to the appellant by the city clerk under the resolution "in accordance with clause 9" of the agreement of the 25th of January, 1924, was that it was the respondent's intention to apply for a reduction in fares. The resolution states that "the five year extension period of the agreement expires on August 13, 1943". This refers to the order of the Board of Railway Commissioners for Canada of August 31st, 1933, which had established different rates of fares from that originally provided for under the agreement of January 25th, 1924, made pursuant to clause 9 (*c*). This would be well understood by the appellant. The resolution goes on to state that "it is required that notice of one year be given the Company of any change that may be contemplated by the City in the agreement". There is no change but one provided for in clause 9 (*c*) "in accordance with" which the notice was to be given and this is with respect to a reduction of fares during the five year period next succeeding the period expiring August 13th, 1943. Such a change must be based upon the opinion of the respondent which the clause describes. Can it be said that this resolution could be otherwise understood by the appellant?

In my opinion, the resolution does "represent in words" or "exhibit by language" or "shew or make known" that the city was of the opinion specified in the clause, although the word "opinion" or a similar term is not used. I think the principle of the decision above referred to is to be applied to the facts of the case at bar. I do not think there is any substance in the argument put forward on behalf of the appellant that if the word "opinion" were to be found in the resolution, there would necessarily have been any difference in the consideration given to the matter when the resolution was before the council of the respondent for consideration. I see no weight in this argument as in any way touching the interpretation to be given to the language of the agreement in question.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Kellock J.

I agree with my Lord the Chief Justice with regard to the effect of the admission contained in the respondent's reply.

In view of the opinion to which I have come, it is not necessary to deal with the other points argued.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *MacCraken, Fleming, Schroeder & Burnett.*

Solicitor for the respondent: *Gordon C. Medcalf.*