1963

Apr. 30,
May 2

Sept. 18

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

THE CITY OF DORVAL AND ELM RIDGE COUNTRY CLUB INC. } DEFENDANTS.

Crown—Injunction—Expropriation—Expropriation Act R.S.C. 1952, c. 106, ss. 27, 28, 29 and 30—Cities and Towns Act (Quebec) R.S. 1925, c. 102, s. 519—British North America Act s. 125—Claim for local improvement taxes on compensation money—Prescription—Action properly instituted by information—Privilege under Quebec law—"Encumbrance"—"Charge"—Date for determining prescription of claims for taxes—Land abutting on street—Interest—Costs.

The Crown on March 20, 1957 expropriated certain lands in the Province of Quebec belonging to the defendant Elm Ridge Country Club Inc. and paid to it the sum of $900,000, in two instalments, in full payment of all claims arising out of the expropriation. At the time the first instalment was paid the club executed a partial release and remitted to the Crown a cheque for $15,571 58 in payment of a claim by the defendant, the City of Dorval for local improvement taxes alledgedly owing on the lands by the club at the time of the expropriation, without admitting such liability. It was agreed that the said sum would be held by the Crown in a suspense account pending the negotiation of a settlement between the club and the City of Dorval. This settlement was not arrived at and the sole question in issue in this case is whether the City of Dorval is entitled

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to claim compensation and, if so, in what amount The Court decided that the City of Dorval was entitled to compensation in the sum of $7,469 75 with interest to run on various portions of that amount as set forth in the reasons for judgment.

Held: That as provided in the *Expropriation Act,* R.S.C. 1952, c. 106, ss. 27, 28, 29 and 30 the action is properly instituted by information exhibited in this Court by the Crown

2 That a privilege exists and becomes a charge on the land assessed when determined by an assessment roll completed and deposited and the time when the delay for objection thereto has expired, and the contention that it becomes a charge on the land only when an action is taken to have the land sold fails.

3. That although the privilege or claim is usually maintained by a judgment of the Court before the three year prescription there was no necessity nor possibility of proceeding in this manner in view of s 23 of the *Expropriation Act* which provides "The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; *and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof".*

4 That a privilege under Quebec laws "is a right which a creditor has of being preferred to other creditors according to the origin of his claim" and cannot exist alone as it secures the fulfillment of some obligation and it therefore follows that the privilege considered here is a lien or liability attached to property or a charge thereon and being so meets with the definition of "encumbrance" in the English text and "charge" in the French text of s. 23 of the *Expropriation Act.*

5 That the date for determining if any of the City of Dorval's claims for taxes were prescribed under the three year prescription of s. 519 of the *Cities and Towns Act (Quebec)* R.S. 1925, c. 102 is the date of expropriation of the lands by the Crown, i.e. March 20th, 1957 and not July 24th, 1962, the date of the information herein, and any such claim or claims should be deducted from the amount held in escrow by the Crown.

6 That the prescription against any right, whatever it may be, can start running only from the day it is open, and even then only if the action to enforce it is available and in the present instance, action could have been taken only on the due date of the taxes in each year and it is from that date only that prescription of the taxes can start running.

7 That the City of Dorval's contention that prescription runs from the date of each instalment the taxes for 1954 were payable, i.e. January 1, April 1, July 1 and October 1 fails since the whole amount of the local improvement tax for the year 1954 was due and exigible on January 1, 1954, the other instalments applying only to municipal taxes.

8. That the taxes for the year 1954 were prescribed on March 20, 1957 more than three years after their due date namely January 1, 1954 and the City of Dorval has no right to claim them.

9. That the club failed in rebutting the evidence contained in the city's by-laws and the "Procès-verbal" rolls and other documents and has failed to establish that its land does not abut upon the street and is therefore liable for the local improvement tax

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10 That the City of Dorval having succeeded in recovering taxes for two years instead of four is entitled to half of its taxable costs only to be recovered from the Crown which is entitled to recover them from Elm Ridge Country Club Inc.

11. That since the present information forms part of the expropriation proceedings to take over the property of the Club and in this instance the Crown has remained a passive bystander, it is not entitled to costs.

INFORMATION exhibited by the Crown to have property expropriated by it valued by the Court.

The action was tried before the Honourable Mr. Justice Noël at Montreal.

Paul Ollivier, Q.C. for plaintiff.

R. C. Amaron for City of Dorval.

J. J. Spector, Q.C. for Elm Ridge Country Club Inc.

The facts and questions of law raised are stated in the reasons for judgment.

NOËL J. now (September 18, 1963) delivered the following judgment:

In this proceeding the Crown seeks a declaration as to whether the City of Dorval is entitled to claim compensation for municipal local improvement taxes as a result of the expropriation, on March 20, 1957, of a parcel of land being part of lots 13 and 14 of the official plan and book of reference for the Parish of Lachine, County of Jacques Cartier, Province of Quebec, the property on the date of expropriation of the defendant, Elm Ridge Country Club Inc., and if so entitled, the amount of such compensation; that should it be decided that the defendant, the City of Dorval, is entitled to compensation and the amount of such compensation exceeds the sum of $15,571.58 deposited by the defendant, Elm Ridge Country Club Inc., the said club be condemned to reimburse the amount of such excess to Her Majesty; and such further and other relief including such order as to cost, as to this Honourable Court may seem meet.

At the hearing, however, counsel for the Crown stated that he had considerable doubt as to the legality of one part of the information, i.e., s. 9(*b*) of the conclusions which deals with the request for a condemnation of the Elm Ridge

Country Club Inc., to reimburse the amount of any excess over the sum of $15,571.58 to Her Majesty and permission to withdraw this part of the information as requested is granted.

The sole question, therefore, which remains in issue in the present case is whether the City of Dorval is entitled to claim compensation and if so, in what amount.

The circumstances under which the claim of the City of Dorval arose were unusual and its determination is not free of difficulty and it is therefore necessary to relate in some detail the facts which gave rise to the present issue.

The lands belonging to the Elm Ridge Country Club Inc. were taken by the Crown under the provisions and authority of the *Expropriation Act,* being c. 106 of the Revised Statutes of Canada 1952, for the purpose of a public work of Canada, by depositing of record on March 20, 1957 under the provisions of s. 9 thereof, a plan and description of such lands in the Registry Office for the registration district of Montreal under number 1260826 whereby the said lands became vested in Her Majesty the Queen.

Pursuant to an agreement between the Crown and the Elm Ridge Country Club Inc. the owner of these lands on the date of expropriation, the latter agreed to accept a total sum of $900,000 in full payment of all claims arising out of the said expropriation. This amount was paid by the Crown to the Elm Ridge Country Club Inc. in two instalments, the first on June 28, 1957 in the sum of $400,000 upon execution by the club of a partial release before notary Hyman Ernest Herschorn, of Montreal, under number 15136 of his minutes and in which the club declared that it was at the date of expropriation the sole owner of the said lands and that there were no taxes owing on the said lands which were free and clear of all encumbrances; the second instalment in the sum of $500,000 was paid on March 14, 1958, upon execution by the defendant of a release of all claims arising out of the expropriation before the same notary under number 15353 of his minutes.

At the time of the execution of the partial release, Elm Ridge Country Club Inc. remitted to the Crown a cheque for $15,571.58 to cover a claim by the defendant, the City of Dorval, for local improvement taxes allegedly owing on the said lands by the club at the time of expropriation. This

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remittance was made by the club without any admission or recognition that the City of Dorval was entitled to the said sum of $15,571.58 or to any amount for taxes or otherwise and it was expressly agreed between the Crown and the club that the said sum would be held by the Crown in a suspense account pending the negotiation of a settlement between Elm Ridge Country Club Inc. and the City of Dorval.

As both the City of Dorval and the club were unable to reach an agreement with respect to the question of the taxes owing on the property at the time of expropriation the present proceedings were taken under the authority of the *Expropriation Act*, R.S.C. 1952, c. 106, ss. 27, 28, 29 and 30 which read as follows:

27. In any case in which land or property is acquired or taken for, or injuriously affected by the construction of any public work, the Attorney General of Canada may cause to be exhibited in the Court an information in which shall be set forth:

(*a*) the date on which and the manner in which such land or property was so acquired, taken or injuriously affected;

(*b*) the persons who, at such date, had any estate or interest in such land or property and the particulars of such estate or interest and of any charge lien or encumbrance to which the same was subject, so far as the same can be ascertained;

(*c*) the sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance; and

(*d*) any other facts material to the consideration and determination of the questions involved in such proceedings.

28. (1) Such information shall be deemed and taken to be the institution of a suit against the persons named therein, and shall conclude with a claim for such a judgment or declaration as, in the opinion of the Attorney General, the facts warrant.

29. Any person who is mentioned in any such information or who afterwards is made or becomes party thereto, may by his answer, exception or defence, raise any question of fact or law incident to the determination of his rights to such compensation money or any part thereof, or in respect of the sufficiency of such compensation money.

30. Such proceedings, so far as the parties thereto are concerned, bar all claims to the compensation money or any part thereof, including any claim in respect of dower, or of dower not yet open, as well as in respect of all mortgages, hypothecs or encumbrances upon the land or property; and the Court shall make such order for the distribution, payment or investment of the compensation money and for the securing of the rights of all persons interested as to right and justice and according to the provisions of this Act, and to law appertain.

May I say here that although at the hearing I did express some doubt as to the legality of the procedure followed in the present information and suggested that it might have

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been better for the Crown to have proceeded under s. 1823 of the *Civil Code of the Province of Quebec,* by, having a sequestrator nominated, depositing the disputed amount with him and allowing both the City of Dorval and the club to fight it out before a provincial court, the above sections of the *Expropriation Act* seem to justify the information as taken.

According to the City of Dorval, the municipal taxes owed to it by Elm Ridge Country Club Inc. are due as a result of special assessments made upon abutting owners of which it alleges the club was one, for aqueduct, sewer and paving works.

Indeed pursuant to petition number 214, by-law number 331 was passed by the City of Dorval authorizing pavement and aqueduct works on a total taxable frontage of 3,709.9 ft. on lot 13 of the official plan and book of reference for the Parish of Lachine, County of Jacques Cartier of which the Elm Ridge Country Club Inc. was the abutting owner of 1,930 ft., at a total yearly instalment of $1,223.17 of which $622.73 would be the club's proportionate share, the said instalments to be paid yearly over a period of 25 years and the first instalment being due in the year 1954.

The same by-law 331 also authorized the construction of sewers on a total taxable frontage of 5,730.9 ft. on the same lot of which the club was the abutting owner of 2,870 ft. at a total yearly instalment of $3,088.19 of which $1,546.56 would be the club's proportionate yearly share over a period of 25 years and the first instalment being due in the year 1954.

Pursuant to petition 215, by-law number 358 was passed by the City of Dorval authorizing work on roads on a total taxable frontage of 3,790.9 ft. on the same lot, of which the club was the abutting owner of 1,930 ft. at a total single instalment of $1,105.63 (comprising interest charges paid on loan during 1955) of which $562.79 would be the club's proportionate share, the said instalment to be paid in the year 1955.

The same by-law 358 also authorized road work on the same total taxable frontage of 3,790.9 ft. of which the club was the abutting owner of 1,930 ft. at a total yearly instalment of $5,044.48 of which $2,568.38 would be the club's

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proportionate yearly share, over a period of 20 years and the first instalment being due in the year 1956.

By-law number 359 was then passed by the City of Dorval authorizing pavement work on a total taxable frontage of 7,425.08 ft. of part of lot 13 of which the club was the abutting owner of 1,861 ft. at a total yearly instalment of $5,402.40 of which $1,353.88 would be the club's proportionate yearly share over a period of 20 years, the first instalment being due in the year 1956. Although the third sheet of Ex. DD-2 indicates that the first instalment was to be paid in the year 1959, this would however appear to be an error, the evidence being that it was to be paid in 1956.

In accordance with the above-mentioned by-laws the City of Dorval forwarded to Elm Ridge Country Club Inc. a number of tax bills (Ex. DD-5) for each of the years 1954, 1955, 1956 and 1957.

The bill for the year 1954 is for an amount of $2,169.29 and the due date which appears on the left hand side of it is January 1, 1954. For the year 1955 the amount is $2,732.08 for which January 1, 1955 is the due date for $2,169.29 of the above amount and October 25, 1955 the due date for $562.79 of same. For the year 1956 the amount is $4,737.57 and the due date is June 25, 1956. For the year 1957 the amount is $4,737.67 and the due date is April 20, 1957.

These amounts form a sum of $14,376.71 which, with whatever interest at the rate of 5 per cent applies, the City of Dorval claims should be paid it as compensation for the loss of its taxes.

Elm Ridge Country Club Inc. on the other hand contests the right of the City of Dorval to this compensation money on four main points. Counsel for the club urged firstly that although the law creates a privilege without the necessity of registration for municipal rates of which, however, only five years of arrears, besides the current year, can be claimed (s. 2011 C.C., s-s. 3 and s. 2084, s-s. 1) this privilege could only be maintained by a judgment of the Superior Court obtained before the three year prescription provided by ss. 518 and 519 of the *Cities and Towns Act (Quebec)* R.S. 1925, c. 102.

He then added that it becomes a charge on the land only when an action is taken to have the land sold and then the city would be paid in accordance with the classification of

its privilege; that the city has to bring the land to a judicial sale before it can effect its privilege.

Although there is no doubt that the above procedure is the ordinary manner in which a privilege such as we have here is realized and payment is obtained of the privileged claim, the privilege itself exists and becomes a charge on the land long before any action is taken to realize it. Indeed it exists and becomes a charge on the land assessed when determined by an assessment roll completed and deposited and the time when the delay for objection thereto has expired.

In *Surprenant v. Brault*[1] the Quebec Court of Appeal indeed so decided, Tellier J. at p. 486 having this to say:

> D'après la loi des cités et villes . . . le trésorier de la cité fait son rôle, le dépose au bureau du conseil, et donne ensuite un avis public annonçant aux contribuables que le rôle est fait et déposé et que la taxe devra être payée dans les 20 jours qui suivent la publication de cet avis (S. Ref. (1909) 5749).
>
> C'est bien différent de la loi scolaire. Pas besoin d'homologation. Un avis public seulement. C'est cet avis qui met le rôle en vigueur. Le conseil n'est pas supposé intervenir au moins en l'absence de plainte. Suivant l'article 7527 les taxes municipales et leurs intérêts constituent une créance privilégiée, exempte de la formalité de l'enregistrement. *A quel moment le privilège prend-il naissance? Je crois que c'est au moment de la publication de l'avis public.* Un rôle n'est qu'un document privé, que le greffier peut retoucher à volonté tant qu'il n'a pas été rendu public au moyen de la publication d'un avis public. Comment voudrait-on qu'il puisse affecter le contribuable avant que celui-ci le connaisse, ou soit légalement présumé le connaître. Je tiens donc que le privilège doit dater de la publication de l'avis.

And in the above decision it was also held that:

> Une hypothèque ne constitue une charge sur un *immeuble* qu'à compter de son enregistrement. Les taxes municipales et scolaires sont des charges réelles sur les biens-fondés qui y sont assujettis, mais seulement qu'à compter de l'entrée en vigueur du rôle de perception pour les taxes municipales et à compter de leur échéance pour les taxes scolaires.

As the privilege on the land exists long before any action is taken to realize it, the club's contention in this regard must therefore fail. Furthermore although the privilege or claim is usually maintained by a judgment of the Court before the three year prescription there was no necessity nor possibility of proceeding in this manner here in view of

[1] (1922) 32 R.J.Q. (B.R.) 481.

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s. 23 of the *Expropriation Act*, R.S.C. 1952, c. 106 which states that:

> The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; *and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof,* and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in Her Majesty.

Counsel for the club, however, adds that the privilege the city has for the taxes claimed herein is not an encumbrance upon or a claim for such land or property as required by the above section. The French text of s. 23 of the *Expropriation Act* uses the words "réclamation et charge" whereas as we have seen the English text uses the words "claim and encumbrance". Now a privilege under the laws of Quebec "is a right which a creditor has of being preferred to other creditors according to the origin of his claim (cf. 1983 C.C.)." It is a real right against the property subject to it, and gives to the creditor the right to follow the property subject to it, if immovable, into the hands of any person who may have it in his possession and cause him to surrender it so that it may be sold and that he be paid out of its proceeds. In a privilege there are indeed these two elements, the right of preference and the "droit de suite".

A privilege cannot subsist alone, it secures the fulfillment of some obligation. If the obligation is partially paid, it secures the unpaid remainder. If the obligation is extinguished, the privilege which secured it becomes extinguished with it.

It therefore follows that the privilege we are dealing with here is a lien or liability attached to property or a charge thereon and being so meets with the definition of "encumbrance" in the English text and "charge" in the French text. Indeed in Wharton's Law Lexicon "incumbrance" is "a claim lien or liability attached to a property, as a mortgage, a registered judgment, etc.". The city's privilege therefore is a charge on the land and meets with the requirements of s. 23 of the Act.

We must now determine whether or not, in fact any privileged claims or encumbrances existed at the relevant date.

Here counsel for the club raises his third contention, the matter of prescription and urges that as municipal taxes, under the *Cities and Towns Act,* are outlawed in three years (cf. ss. 518-519) all claims for taxes in the present case were prescribed on July 24, 1962, date upon which the present information was taken.

The City of Dorval on the other hand submits that the important date as far as prescription is concerned is not July 24, 1962, the date upon which the present information was taken, but March 20, 1957 the date upon which the Crown took the land by expropriation and that at that time the city was still within the period to sell the land for the unpaid taxes on it. The city adds that from the date of expropriation the three year prescription no longer ran and when the Crown took over the ownership of the club property, the municipality lost its recourse against the land; indeed, it could no longer sell the property now belonging to the Crown for the taxes existing against it and its recourse was then transformed from a claim for taxes to a claim for compensation.

I must say that s. 23 of the *Expropriation Act* quoted above is clear on this point and supports the city's contention. Indeed, it does explicitly state that any claim or encumbrance upon the land or property is converted to a claim to the compensation money or to a part thereof, and consequently from then it is no longer a claim for taxes.

It appears then that the only matter to be determined now on this point is whether any of the claims for taxes for the years 1954, 1955, 1956 and 1957 were prescribed under the three year prescription of s. 519 of the *Cities and Towns Act* at the date of expropriation, i.e., March 20, 1957 and not on July 24, 1962, the date of the present information as suggested by the club, and any such claim or claims should be deducted from the amount held in escrow by the Crown.

Now prescription against any right whatever it may be, can start running only from the day it is open, and even then only if the action to enforce it is available, because as long as it cannot for some reason or other be usefully taken, prescription does not run; the reason for this is that prescription is based on the neglect of the creditor who cannot be taken to have neglected to take action, as long as he

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could not take action usefully. In the present instance, action could have been taken only on the due date of the taxes in each year and it is from that date only that prescription of the taxes can start running.

The city contends that in 1954 as the taxes were payable in four instalments, i.e., on January 1, April 1, July 1 and October 1, the only possible amount of taxes which could be prescribed by the three year prescription was the first instalment, namely that payable on January 1, 1954 and that the remaining instalments may still be recovered. Taxes for 1955 and 1956 of course would not be prescribed. As for 1957, the city contends that under the terms of the taxing by-laws, taxes are due on the first of the year in each subsequent year, although they may not be exigible on that date, as the *Cities and Towns Act* provides that the taxes will be paid by the person owning the property taxed twenty days after the notice of the deposit of the collection roll. On that basis the taxes for 1957 would have become due on the first of the year 1957 although they were not payable until twenty days after the deposit of the roll, sometime in April 1957, after the land had been taken over by the Crown.

With respect to the year 1954, it is hardly possible to accept the city's contention that the prescription runs from the date of each instalment for that year in view of the fact that Mr. J. L. Roy, a witness and employee of the city, stated, at p. 109 of the transcript, that the whole amount of the local improvement tax for the year 1954 was due and exigible on January 1, 1954, the other instalments applying only to the other municipal taxes:

> Q. That is the due date, January 1, 1954?
>
> A. Right.
>
> Q. With a privilege to pay in instalments, you say?
>
> A. Not the tax itself, the whole bill, but the local improvements tax. The first instalment includes 25% of municipal tax and special tax plus 100% of local improvement tax
>
> Q. I am sorry I do not understand that.
>
> A. That was the provision The taxpayers had to pay their taxes, municipal, school taxes and all other taxes in four instalments, but the first instalment includes 100% of the local improvement tax.

For the year 1957 as the city established the due date of the taxes on their invoice as of April 20, 1957, i.e., after the expropriation by the Crown, and as at that date the latter

was the owner of the land against whom under s. 125 of the *British North America Act,* no taxes or privilege could be charged, no claim in this respect can be entertained. The fact that under the terms of the taxing by-laws, taxes are stated to be due on the first of the year of each subsequent year, cannot, in my opinion, prevail against the city establishing April 20, 1957, as the due date. Indeed having done so, it cannot now maintain that the due date is January 1, 1957. At p. 79 of the transcript, Mr. J. L. Roy, the city's treasurer, questioned by counsel for the city stated:

> Q. The question which I put to you, Mr. Roy I believe was on what date you considered the taxes, as treasurer of the City of Dorval, you considered these taxes to be due in each consecutive year?
>
> A. The due date as far as the City of Dorval in concerned is 20 days after the invoices are *mailed* and 20 days after the public notices are given in the local newspapers.

This witness added that this applies to all taxes including special improvement taxes and at p. 108 of the transcript in cross-examination he stated:

> Q. How are these due dates determined—who determines it?
>
> A. As soon as we insert the public notices in the local newspapers, both French and English, and the due date is 20 days after that publication.

There is also here a further argument which I believe is peremptory and which is that under s. 23 of the *Expropriation Act* the right to claim the compensation money is predicated on the fact that prior thereto when the land was acquired by the Crown, a claim or an encumbrance upon such land existed and it is this claim or encumbrance which is converted into a claim to the compensation money. If there was no claim or encumbrance upon the land at that time, there can be no claim to the compensation money. Indeed we have seen that the privilege is created at the time of the publication of a public notice and as according to the city's treasurer the due date is 20 days after the public notices which for 1957 is April 20, 1957, the city's claim or charge could have existed only as of March 31, 1957, 11 days after the Crown took over the land by expropriation. The city would therefore have no right to any part of the compensation money for the year 1957.

It would therefore appear that as far as the taxes for the year 1954 are concerned, i.e., $2,169.29, they were prescribed on March 20, 1957 more than three years after their due

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date, which as we have seen, was January 1, 1954, and therefore the City of Dorval has lost the right to claim them. With respect to those claimed by the city in 1957 in the amount of $4,737.67, for the reasons mentioned above, they also cannot be entertained. On this basis, the city would be entitled to $14,376.71, less $6,906.96 which is $7,469.75.

Counsel for the club, however, advanced a fourth argument with which I must now deal and which is that in order for the city to hold the club liable for whatever share of improvement taxes it has been charged with, the club must be an adjoining proprietor to the street where the improvements were made, and this he submits has not been established by the city.

May I say here that it is not necessary in the present case for the city to establish that the club's properties abut the street on which the improvements were made. Indeed, in view of the city's by-laws, "procès-verbal" rolls and resolutions and other documents produced as exhibits herein there is *prima facie* evidence that the club's lands do so abut and it is for the club to establish that this is not so.

I must also add that in every case in issue the formalities necessary for the passing of the by-laws, their approval by the authorities, the voters, the municipal commission or the Minister as well as the public notices were all complied with.

Now, these by-laws as well as the "procès-verbal" rolls, resolutions or other orders of the Council remain in force until they are judicially set aside within three months after their coming into force as provided by ss. 381 and 422 of the *Cities and Towns Act*. Furthermore, ss. 393 and 396 of the *Cities and Towns Act* read as follows:

> 393 Every by-law shall be executory and remain in force until amended, repealed, disallowed or annulled by competent authority, or until the expiration of the period for which it has been made.
>
> 396 Every by-law passed by the council shall, when published, be deemed public law within the municipality and outside of the same insofar as within the jurisdiction of the council, and it shall not be necessary to allege it specially.

In view of the above can the club at this late date after the expiry of the three months provided for attacking the above documents raise this issue and now attempt to establish that it is not an abutting owner?

The authorities are to the effect that when resolutions and by-laws are affected by nullity and are *ultra vires* they can be attacked by direct action or defence by those who are exempt from their application and the prescription of three months does not apply (cf. *L'Œuvre de Patronage de St-Hyacinthe v. Cité de St-Hyacinthe*)[1].

In the case of *Shannon Realties v. Ville St-Michel*[2] the Privy Council recognized that the company, Shannon Realties, had been illegally taxed and that it has the right to be freed from these taxes. Although rejecting the taking of a direct action, Lord Shaw declared that the plaintiff could invoke this illegality in an action taken by the corporation to recover these taxes. Subsequent to this decision in the case of *Aubertin v. La Cité de Montréal*[3] Martineau J. decided that the imposition of taxes being *ultra vires* there was no doubt that the delay of three months would not apply.

In the case of *La Ville de La Tuque v. Desbiens*[4] the Quebec Court of Appeal decided that when the acts of a municipal council are *ultra vires* any taxpayer has a recourse to a direct action to cause the nullity of the offending act to be pronounced and this action is not affected by the prescription of three months which governs the petition to quash for illegality.

The same principle was decided in the case of *Cité de Montréal v. Décarie*[5], *Laberge v. Cité de Montréal*[6] and *Ville de East Angus v. Westgate*[7] where Archambault J. declared that as the rolls of perception were illegal and *ultra vires* the taxpayer sued for recovery of taxes can take advantage of this illegality of the roll as far as he is concerned notwithstanding the three months prescription established by the *Cities and Towns Act*.

I see no reason why I should not apply the above principles to the present case providing of course the club has satisfactorily established that their land does not abut the street on which the improvements were made. This I am afraid it has not done. It has produced some verbal evidence to the effect that between the property and the land of the

[1] (1918) 27 R.J.Q., (B.R.) 496.
[2] (1923) 130 L.T.R. (P.C.) 518 at 522.
[3] (1925) 31 R.L., N.S. 163.
[4] (1921) 30 R.J.Q., (B.R.) 20.
[5] (1918) 24 R.L., N.S. 241.
[6] (1918) 27 R.J.Q. (B.R.) 1.
[7] (1928) 66 R.J.Q. (C.S.) 531.

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club and the street along which the improvements were made, there is a ditch of approximately some 10 ft. in width, there is a fence on the inside of the ditch which allegedly would have marked the boundary of the club's property, and there is a distance from the fence to the street of approximately 50 ft. This is the extent of the club's evidence on this point. On the other hand, the evidence of the city on this particular aspect is to the effect that the fence is the dividing line between lots 12 and 13, that the club owned all of lot 13 and the city owned the strip or right-of-way which is the street of a width of 66 ft. located on the western boundary of lot 12. The paving of course was 25 ft. in width but the width of the right-of-way was 66 ft. This in my opinion is why some of the witnesses were confused in thinking that the club's property did not abut the street. As for the ditch, it is not clear to whom it does belong, although it would seem from its purpose and the fact that it serviced the community, that it would belong to the city.

In any event, I must conclude that the club has not succeeded in rebutting the evidence contained in the city's documents and has therefore failed to establish that its land does not abut upon the street.

There will therefore be judgment declaring that the City of Dorval is entitled to compensation which I assess at an aggregate sum of $7,469.75 with interest at the rate of 5 per cent to run on the following amounts for the following periods, $2,169.29 and $562.79 for the year 1955 commencing on January 1 thereof, $4,737.67 for the year 1956 commencing also on January 1 thereof, the said interest to run until the date of judgment.

Although the due date for the amount of $562.79 is October 25, 1955 and June 25, 1956 for the amount of $4,737.67, I have started the interest on January 1 of each of these years for the following reasons.

We have indeed seen that in order that a municipal tax exist on land, a roll of evaluation or of perception must be made. It is only when the roll of perception based on the roll of evaluation is made and prepared that the tax becomes exigible or demandable in a city such as Dorval where such rolls are made every year. Most of the time, and this is what occurred here, the evaluation roll is made and prepared several months after the commencement of the fiscal year;

it then takes another period of time, one or two months before the roll is homologated, and a roll of perception is made and deposited and it is only when both rolls are in force that the taxes become due. Until then they do not even exist. Indeed their existence coincides with the date upon which they become demandable or exigible. However, at this stage they become retroactive to the first of the fiscal municipal year, and the interest thereon runs from the first day of the municipal fiscal year.

In view of the fact that the City of Dorval here has been successful in recovering taxes for two years instead of four, it will be entitled to half of its taxable costs only to be recovered from the Crown and the latter will be entitled to recover these costs from Elm Ridge Country Club Inc. As for the Crown, in view of the fact that the present information forms part of the expropriation proceedings to take over the property of the club and as in the present instance it remained a passive bystander, I see no reason why it should be allowed any costs.

Judgment accordingly.