

CANADA / JUDGMENT

Savard v. City of Chicoutimi

[1974] SCR 1037**COURT**

Supreme Court of Canada

DECIDED

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Savard v. City of Chicoutimi Collection Supreme Court Judgments Date 1973-06-29 Report

[1974] SCR 1037 Judges Fauteux, Joseph Honoré G  rald; Abbott, Douglas Charles; Pigeon, Louis-Philippe; Laskin, Bora; Dickson, Robert George Brian On appeal from Quebec Subjects Contract Decision Content Supreme Court of Canada Savard v. City of Chicoutimi, [1974] S.C.R. 1037 Date: 1973-06-29 Lucien Savard (Plaintiff) Appellant; and City of Chicoutimi (Defendant) Respondent. 1973: May 14; 1973: June 29. Present: Fauteux C.J. and Abbott, Pigeon, Laskin and Dickson JJ. ON APPEAL FROM THE COURT OF QUEEN’S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC Contract—Removal of earth to open up streets—Delay—Indefinite terms—Transfer without undertaking to open up street—Confession of judgment—Code of Civil Procedure, art. 460—Cities and Towns Act, R.S.Q. 1964, c. 193, s. 429(1). Appellant was the owner of a lot located to the north of Dubuc Street in the City of Chicoutimi; in the middle of this lot was a ridge with very steep slopes. An Official Plan signed by appellant and respondent provided for the subdivision of appellant’s land into lots, with, at the centre, a traffic circle connected to “Dubuc Street” by a street, later named “Alexandre Street”, located on the ridge. The site for that street was transferred to respondent shortly thereafter. To open Dubuc Street to traffic at that place it was necessary to cut through the ridge and the hill-top had to be cut down in order to open up Alexandre Street. Under two agreements appellant, to facilitate disposal of the earth by the City, transferred to the latter a portion of his lots, and the City temporarily assumed the cost of the loading of the 27,000 cubic yards of earth which it undertook to remove before a stated date. Appellant undertook to reimburse the City as and when he received funds from the sale of his lots. The City removed part of the earth within the specified time, and the rest subsequently. Appellant’s action for damages, claiming (1) authorization to cause 27,000 cubic yards of earth to be removed from his own lots, and 25,000 cubic yards from Alexandre Street; (2) the cost of this removal; (3) damages for the City’s delay in removing the earth; and (4) that he be relieved from his obligations, was dismissed by the Superior Court, and the confession of judgment filed by respondent in the amount of \$1,000 was upheld. This decision was affirmed on appeal. Hence the appeal to this Court. Held: The appeal should be dismissed. [Page 1038] Nowhere in the agreement was there any attempt made to state exactly where the earth removal was to be effected apart from the clause

regarding the “reimbursement of the loading of the 27,000 cubic yards” after they shall “have been removed from the official subdivision of Mr. Lucien Savard”, which includes what was subsequently named Alexandre Street and the site of which was only transferred to the municipality at a later date. When the agreement was signed the land transferred to the municipality could not be regarded as a street. It was merely destined to become one. For that to happen, a large quantity of earth obviously had to be removed, and that removal was only to be effected in the interest of Savard, as only he had an interest in opening Alexandre Street. In accepting the transfer the municipality had not undertaken to open the street to traffic. Appellant had to await the pleasure of the municipal council for that. He is only entitled to a nominal sum for damages resulting from the City’s delay in removing the 27,000 cubic yards of earth. Respondent’s confession of judgment is sufficient for that purpose. With regard to the other conclusions of the action, appellant has shown no reason for which he would be entitled to have them allowed. APPEAL from a judgment of the Court of Queen’s Bench, Appeal Side, Province of Quebec, affirming a judgment of the Superior Court. Appeal dismissed. R. Desbiens, for the plaintiff, appellant. G. Prévost, for the defendant, respondent. The judgment of the Court was delivered by PIGEON J.—This appeal is against a unanimous decision of the Court of Appeal of Quebec, which affirmed the judgment of the Superior Court upholding respondent municipality’s confession of judgment in the amount of \$1,000 and dismissing for the balance the action in damages of plaintiff-appellant, Lucien Savard. Savard was the owner of a large vacant lot in the city of Chicoutimi. This lot could not easily be used because it was mostly a hill-top with very steep slopes and a ridge in the middle. In early 1959 Savard, whose financial resources were very limited, had a surveyor prepare a plan [Page 1039] of subdivision. The plan shows the lot in question as located to the north of “Dubuc Street”. However, the topographic lines show the ridge across the location of that street. In fact there was as yet no street, not even on the Official Plan. The proposed subdivision involved the subdividing of the land into some ten lots with, at the centre, a traffic circle about 120 feet in diameter connected to “Dubuc Street” by a street located approximately on the ridge. This subdivision plan was submitted to the municipality. On March 6, 1959, Savard wrote the mayor and councillors a letter which began as follows: [TRANSLATION] Under the terms of the last borrowing by-law the City set aside a certain sum for opening up Ste. Anne and Dubuc Streets, and I therefore felt it would be appropriate to present for approval by the council my plan for the future development of portions of lots 611, 612, 626, 627 and 630. The plan was ultimately approved with some slight changes. The official plan of subdivision signed by Savard and the City manager and dated June 10, 1959, covers not only the subdivision of Savard’s land, but also that of the piece of land owned by the municipality which was reserved for the extension of Dubuc Street over a distance of about 400 feet in front of Savard’s land. The official book of reference accompanying the plan describes the City as owner of the extension of Dubuc Street, but it is Savard who is shown as the owner of the portions of lots therein described as “(STREET)” which, beginning at Dubuc Street, end in the small square or traffic circle previously mentioned. This street, later named “Alexandre Street” in a by-law dated February 1, 1960, would

therefore be an access road serving Savard's development only. On January 18 the city council was presented with an offer of transfer of the road site for the nominal price of \$1 and resolved to [Page 1040] accept it. The deed was signed before a notary on February 19. Just as it was essential to cut through the ridge to open the extension of Dubuc Street to traffic, so also it was essential to cut down the hill-top to open up Alexandre Street and make the surrounding lots usable for residential construction. On January 30, 1960, Savard received a letter from surveyor Lamarre giving him the following indications:

[TRANSLATION] ... I have prepared a development plan for this property to make it more suitable for construction, taking into account the work done to open Dubuc, Ste. Anne and Jolliet Streets. To implement this plan it will be necessary for you to level off a certain quantity of earth either from your own land, or from the part of Dubuc Street in front of your land and the part which lies south of that street, in the angle it forms with Jolliet Street. Here are the figures: From your land: Total volume of earth to be levelled off..... 67,500 cu. y. Volume of earth to be kept for

fill..... 28,800 cu. y. Volume available for

disposal..... 38,700 cu. y. From land owned by the City: Volume of earth to be levelled off..... 25,200 cu. y. Clearly in this letter "land

owned by the City" refers to Dubuc Street and "your land" includes "Alexandre Street". The following day, February, 1, 1960, Savard made the municipality an offer regarding removal of the earth. As this offer was not accepted, he submitted another on March 3. At a meeting of the council held on March 7, and continued by adjournment on March 10 and March 15, a resolution was adopted authorizing the execution of an agreement on certain conditions. On August 17, 1960, a deed was duly signed before a notary. In this Savard begins by stating that he has given "22,397 square feet of land for the street" to the City.

The deed then states: [TRANSLATION] To facilitate disposal of the earth by the City, Mr. Savard hereby assigns and transfers [Page 1041] to the City with warranty and also free and clear the three following lots: (Description) By this security the City temporarily assumes the cost of the loading of the earth on his land. It is well understood that Mr. Savard undertakes to reimburse to the City any sum owed to the latter as and when he receives funds from the sale of his lots. Failing reimbursement of the loading of the 27,000 cubic yards of earth measured on site by Mr. Lucien Savard within 24 months thereafter, when the total of 27,000 cubic yards of earth, measured on site, shall have been removed from the official subdivision of Mr. Lucien Savard made by surveyor Jean-Marie Lamarre on June the tenth one thousand nine hundred and fifty-nine (1959), payable at \$0.12 a yard, that is to say \$3,240.00, as agreed, the City shall immediately and without putting in default and without notice of any kind become owner of the aforementioned lots hereby given as security, and the said Mr. Savard undertakes to sign all documents necessary to give effect to this agreement, so that the City become owner of these lots. By a later deed of June 20, 1961, it was agreed that the subsequent part of the agreement should read as follows:

[TRANSLATION] The said earth shall be removed as and when needed by the City for placing on the City of Chicoutimi dump, wherever it shall be, or for other purposes, and the council has decided that ten thousand (10,000) cubic yards in place shall be used at

once and that the remaining seventeen thousand (17,000) cubic yards in place shall be removed during the year one thousand nine hundred and sixty-one (1961), and at the latest on September first of the year one thousand nine hundred and sixty-two (1962), The City removed within the specified time less than ten thousand cubic yards of earth. By his action instituted on June 26, 1963, plaintiff claimed \$52,000 in damages, alleging that the 27,000 cubic yards of earth for removal were to be taken from his lots and that the City was further obligated to remove 25,000 cubic yards from Alexandre Street, the whole at \$1.00 a cubic yard. Paragraphs nine and ten of his statement of claim read as follows: [Page 1042] [TRANSLATION] 9. It is physically impossible to remove the 27,000 cubic yards of earth from plaintiff's properties without at the same time removing the earth situated on the site of Alexandre Street, forming part of the subdivision and owned by defendant City;

10. There are on the site of Alexandre Street, formed by lots 630-5, 627-5, 626-1 and 612-5 of the Official Plan of the City of Chicoutimi, 25,000 cubic yards of earth which will have to be removed at the same time, above stated, and the cost of the removal of this earth will be \$25,000.00; A plea to this action was filed on November 21, 1963, but the case did not promptly proceed to trial. The City removed the rest of the 27,000 cubic yards in May, June and July, 1965. Subsequently, on January 27, 1967, it filed a confession of judgment in the amount of \$1,000 with interest and costs. This confession of judgment was refused but, as art. 460 of the Code of Civil Procedure allows him to do, plaintiff obtained judgment for the amount mentioned in the confession and the action proceeded for the balance. On April 11, 1967, plaintiff filed an amended statement of claim in which, while maintaining the above-quoted allegations, he added that the negligence of the City had caused him damages which he estimated at \$4,000 for the period prior to the institution of the action, and \$181,000 for the subsequent period. The new conclusions prayed that plaintiff be authorized to cause 27,000 cubic yards of earth to be removed from his lots, and 25,000 cubic yards from Alexandre Street; that the City be ordered to pay \$52,000 for the cost of this removal, with a further \$185,000 in damages; that plaintiff be relieved of his obligations under the agreements of August 17, 1960, and June 20, 1961, and that these agreements be annulled and their registration cancelled. After a lengthy trial, the Superior Court refused to accept that the agreements between plaintiff and the City obligated the latter to remove 52,000 cubic yards of earth, and not a total of 27,000. As to the damages due for the delay in implementing these agreements, the confession of judgment was held to be sufficient and the action for the balance was dismissed with costs. This decision was affirmed on appeal, and in this Court appellant argued that
 - (1) the City was obligated to effect the removal of the 27,000 cubic yards of earth from Savard's lots;
 - (2) the damages caused by the delay in effecting the removal amounted to much more than \$1,000;

- (3) the other conclusions of the action ought to have been allowed at least in part. The wording of the agreement of August 17, 1960, undeniably left something to be desired. Nowhere in the deed or in the resolution was there any attempt made to state exactly where the removal was to be effected. The deed refers first to the “loading of the earth on his land”, meaning that of Savard. Subsequently, however, referring to the lots which were to be sold, it states “his lots”. Next comes the clause regarding the “reimbursement of the loading of the 27,000 cubic yards” (this is the first time they are mentioned in the deed), after they shall “have been removed from the official subdivision of Mr. Lucien Savard”. As we have seen this official subdivision included what was later named Alexandre Street, as well as the lots which were to be sold. It was only later that Savard transferred the site of the street to the municipality. However, in accepting this transfer the latter did not undertake to open the street to traffic. Such opening to traffic necessitated a by-law (Cities and Towns Act, R.S.Q. c. 193, s. 429, subs. 1). The by-law filed in the record only gives the street a name, which may be done by resolution or by-law (same section, subs. 7(a)). When the deed was signed, therefore, the land transferred to the municipality could not be regarded as a street. It was merely destined to become one. For that to happen a large quantity of earth obviously had to be removed, and that removal was only to be effected in the interest [Page 1044] of Savard, as only he had an interest in opening Alexandre Street. In these circumstances the Superior Court and the Court of Appeal placed a literal interpretation on the clause of the agreement stating that the 27,000 cubic yards will be removed “on the official subdivision of Mr. Lucien Savard”, which includes what was subsequently designated as Alexandre Street. In my view there was no error in reaching this conclusion in spite of what is contained elsewhere in the contract, from which one might infer that the earth removal, the cost of which Savard was called on to share, was to be done only on his land. Once again it should be remembered that the opening of Alexandre Street was solely in his interest, contrary to what was the case with respect to Dubuc Street. Savard knew when he negotiated with the City that it would have to remove about 25,000 cubic yards in order to make Dubuc Street usable (see the letter from surveyor Lamarre, quoted above). He also knew that in order to make his subdivision usable more than 27,000 cubic yards of earth would have to be removed from it (same letter). In these circumstances the Superior Court was justified in holding that Savard was only entitled to a nominal sum for damages resulting from the City’s delay in removing the 27,000 cubic yards of earth. How could it be otherwise, since the municipality was not obligated to effect the opening of Alexandre Street? Having transferred the land, Savard had to await the pleasure of the municipal council. Accordingly he cannot recover the substantial damages which he has had computed by an accountant, as if the City had undertaken not only to remove 27,000 cubic yards of earth within the time specified by the contract, but also to open Alexandre Street to traffic. Of the other conclusions of the action, I need only say that appellant has shown no reason for which he would be entitled to have them allowed. It is true that it was not felt necessary to give explicit reasons in that regard, but there [Page 1045] is no doubt that dismissal of the action entails dismissal of all the conclusions. For the above reasons, I hold that the appeal should be dismissed with costs. Appeal dismissed with costs. Solicitor for the plaintiff, appellant: Rosaire Desbiens,

Montreal. Solicitor for the defendant, respondent: Gilles Prévost, Chicoutimi.

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