

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of The  
Toronto and Niagara Power Company v.  
The Corporation of the Town of North  
Toronto, from the Court of Appeal for  
Ontario ; delivered the 24th July 1912.*

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PRESENT AT THE HEARING :  
THE LORD CHANCELLOR.  
LORD MACNAGHTEN.  
LORD DUNEDIN.  
LORD ATKINSON.  
SIR CHARLES FITZPATRICK.

[DELIVERED BY THE LORD CHANCELLOR.]

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The question raised by this Appeal is whether the Appellants may enter upon the streets of the town of North Toronto for the purpose of erecting poles to carry power lines for the conveyance of electricity. Chancellor Boyd, the Trial Judge, decided that they had such power, but subject to compliance with certain conditions. The Court of Appeal of Ontario reversed his judgment, holding that the Appellants had no such power unless they had first obtained the leave and license of the Respondents. The only question which arises is as to the necessity of such leave and license, and the argument depends entirely upon the construction of certain Statutes of the Parliament of Canada. By their Act of Incorporation, which was passed by the Parliament of the Dominion in 1902, the Appellants were given powers which, if not cut down by other legislation, are sufficient to justify their action. The material provisions of the Act of

Incorporation may be summarised as follows :—  
By Section 12 the Appellants were among other things, empowered to establish works for the production and sale of electricity, and to construct the lines of wire and poles which they might require. They were enabled to conduct and supply electrical power and to conduct it along wires at any places through, over, along, or across any public highway, and to enter upon any lands on either side of their wires or conduits, and remove trees or other obstructions, as well as to enter on private property and take such parts of it as were necessary for their lines of wire, poles or conduits. In the event of the Company taking private property, which they were empowered to do, certain provisions of the Railway Act, which by a subsequent section were incorporated, were, in case of disagreement or of questions as to damages, to apply.

By Section 13 the Appellants were given power to erect poles and construct trenches and conduits and to do all things necessary for the transmission of power, heat, or light, as fully as circumstances might require, provided the same were so constructed as not to incommode the public use of streets, highways, or public places, and they were made responsible for all damage caused by them in the carrying out or maintenance of these works.

By Section 18 the Appellants were empowered to make surveys and a map of the lands through or under which these works were to pass or be operated, they were empowered to make a book of reference for the works, and to deposit it, as required by the Railway Act with respect to plans and surveys, by sections or portions less than the whole length of the works, and on such deposit of the map or plan or book of reference of any such section or portion all the sections of the Railway Act were to apply as if the surveys

and levels had been taken of the lands through or under which the whole of the works were to pass and the book of reference for the whole had been deposited.

By Section 21, Sections 40 to 61, Section 90, Sections 93 to 98, and Sections 136 to 169 of the then Railway Act, 1888, as amended by the Railway Act, 1899, were to apply to the Appellants and their undertakings in so far as these sections were not inconsistent with the provisions of the Act of Incorporation, and subject to the provision that wherever in the Railway Act the word "Company" occurred it should mean the Company by the Act of Incorporation incorporated, and that wherever in the Railway Act the word "railway" occurred it should, unless the context otherwise required, and in so far as it applied to the provisions of the Act of Incorporation, mean the works, conduits, lines, cables, or other works thereby authorised to be constructed.

The only one of the above sections of the Railway Act which affects this case is Section 90.

The Act of Incorporation appears to their Lordships to give to the Appellants, unless the powers which it *prima facie* confers are restricted by the Railway Act, very large powers which entitle the Appellants to succeed in the present action. If it can be taken by itself their Lordships are of opinion that the Act shows that the Parliament of Canada treated the Company, the works of which were expressly declared to be for the general advantage of Canada, and so brought within Section 91 of the British North America Act, as proper to be entrusted with freedom to interfere with municipal and private rights. For this there may well have been, on the balance of advantages, good reason—the purpose of the

Company being to bring electric power from Niagara Falls to parts of Canada, to reach which its lines would have to pass through a series of municipal areas. To make its powers of entry subject to the veto of each municipality might mean failure to achieve its purpose. It is, therefore, not surprising that a pioneer company such as this should have been given large powers.

But while *primâ facie* such powers were given, their Lordships collect from other legislation of the period that the legislature was fully aware of the difficulties of giving such powers without restriction, and that the question of safeguards was present to the minds of the draughtsmen. Companies which had power to bring electrical power and wires into Canadian cities might prove a serious danger to the public. The evidence in the present case shows the peril to the safety and the lives and property of the inhabitants of a populous district which a high voltage, such as that of a power Company, might occasion. The Parliament of Canada, not unnaturally anxious to avoid dangers of this kind, accordingly passed general statutes conferring upon Municipal authorities large powers of control. Section 90 of the Railway Act, 1888, was amended by the Railway Act, 1899, which added to it a subsection illustrative of this kind of control. The new subsection enacted that when any Company had power by any Act of the Parliament of Canada to construct and maintain lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity, such Company might, *with the consent of the Municipal Council or other authority having jurisdiction over any highway, square, or other public place*, enter thereon for the purpose of exercising such power, and break up and open any highway, square, or other public place.

Certain further restrictions on the manner of exercise of these powers by the Company then follow.

If the powers conferred by this section displaced the less restricted powers of entering without any consent conferred by the Act of Incorporation the Appellants are in the wrong. Their Lordships have, therefore to determine this question. They have to bear in mind that a Court of Justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant Statutes read as a whole.

The General Railway Act of 1888, as amended by that of 1899, was repealed and re-enacted with some modifications by the Railway Act of 1903, and this Act was in its turn repealed and re-enacted, again with some modifications, by the Railway Act of 1906. The Interpretation Act (R. S. C. I, s. 20) provides that in such a case any reference in any unrepealed Act (*e.g.*, in the present case the Act of Incorporation) to a repealed Act is to be construed as a reference to the provisions of the substituted Act (in this case the Act of 1906), and that, if there is no provision in the substituted Act relating to the same subject-matter, the repealed Act is to stand good and be read as unrepealed in so far, and in so far only, as is necessary to give effect to it.

Turning then to the General Railway Act of 1906 in order to see what light its language throws on the question whether the powers originally conferred in 1902 by the Act of Incorporation still stand unrestricted, the first observation to be made is that the draughtsman has used language which expresses an intention to save all such powers.

By the definition section (2) "company" means a railway company, and "Special Act"

means any Act under which the Company has authority to construct or operate a railway, or which is enacted with special reference to such railway. By Section 3 the General Act is to be construed as incorporated with the Special Act, and, unless otherwise provided in the General Act, where the provisions of the General Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to override the provisions of the General Act. By Section 4 if in any Special Act passed by the Parliament of Canada previously to 1st February 1904 it is enacted that any provision of the Railway Act, 1888, or other general Railway Act in force at the time of the passing of such Special Act, is excepted from incorporation therewith, or if the application of any such provision is, by such Special Act, extended, limited, or qualified, the corresponding provision of the General Act is to be taken to be excepted, extended, limited, or qualified, in like manner. By Section 247 when any company is empowered by Special Act of the Parliament of Canada to construct, operate, and maintain lines of telegraph or telephone or for the conveyance of light, heat, power, or electricity, the Company may, with the consent of the Municipal Council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising its powers, and may, subject to certain restrictions, break up the ground. If the Company cannot obtain leave from the Municipality it may apply to the Board of Railway Commissioners, and the Board has discretion to grant such leave.

Section 248 specially defines the word "company," for the purposes of that particular section

to include a telephone company, and imposes restrictions on the powers of such companies to construct, maintain, or operate their lines of telephone upon, along, across, or under any highway, square, or other public place in any city, town, or village, without the consent of the Municipality. The materiality of this section, which is to apply notwithstanding any provision of any Act of the Parliament of Canada, is that it shows that where the legislature intended to interfere with the powers of companies other than railway companies it did so by special provision.

Section 247, in the opinion of their Lordships, applies, so far as the wording of the section itself is concerned, only to companies within the the definition clause, that is to railway companies. Railway companies may have powers to construct lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity. When they have such powers, and no special power to enter on municipal property, the section empowers them to do so, if the Municipality consents, and under restrictions. But if by its Special Act the railway company has been in terms given larger and less restricted powers of the same kind, Sections 3 and 4 already referred to show that these special powers are saved. An exception to this appears in Sub-section (g) of Section 247 where the Board of Railway Commissioners is given jurisdiction to abrogate rights given by the Special Act to the extent of requiring the lines to be placed under ground.

As to this sub-section, two observations must be made. The first is that no question of its application is raised in this litigation. The second is that the application of the sub-section is excluded by the wording of Section 21 of the Act of Incorporation. It is inconsistent with the

provisions of that Act, for it is in reality only one of the provisions of the Railway Act of 1906 relating to Railway Companies, and is therefore excluded.

The only way in which Section 247 of the Railway Act of 1906 is applicable to the Appellants is by the language in which it is made applicable by Section 21 of their Special Act. But if the provisions of Section 90 of the Railway Act 1888, as amended by the Railway Act, 1899, and in substance re-enacted with additions by the Railway Acts, 1903 and 1906, are, as appears to be the case, kept alive by the Interpretation Act, these provisions are declared by Section 21 of the Special Act applicable only in so far as they are not inconsistent with the provisions of that Act. Moreover, the definitions of "company" and "railway" in Section 21 make Sections 3 and 4 of the Railway Act, 1906, apply, so that the provisions of the Appellants' Act of Incorporation override and extend the provisions of Section 247. In the result it appears to their Lordships that the powers conferred by Sections 12 and 13 of the Act of Incorporation of 1902 remain intact.

In the Courts below the Trial Judge decided in favour of the Appellants on the question of power to enter and erect their poles without consent. A point was discussed as to the deposit of plans under Section 18 which it is now agreed does not arise.

The Court of Appeal took a different view. They held that the general restrictions imposed by Section 90 of the Act of 1888, as amended by the Act of 1899, and by Section 247 of the Act of 1906, were not inconsistent with the provisions of Sections 12 and 13 of the Act of Incorporation.

For these reasons their Lordships cannot agree with this opinion. They will therefore humbly advise His Majesty that this Appeal should be allowed, and that it should be declared that the



Appellants are entitled to a declaration that they are at liberty to erect poles for the purpose of stringing transmission or power wires along Eglinton Avenue without the consent of the Respondents, and to have the latter restrained from interfering with them in doing so. The Respondents must pay the costs of this Appeal and in the Courts below.

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In the Privy Council.

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THE TORONTO AND NIAGARA POWER  
COMPANY

v.

THE CORPORATION OF THE TOWN  
OF NORTH TORONTO.

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DELIVERED BY THE LORD CHANCELLOR.

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