

70 & 71, 1930

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CASE FOR THE
RAILWAY COMPANIES

In the Privy Council.

No. 16 of 1930.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

CANADIAN PACIFIC RAILWAY COMPANY and
CANADIAN NATIONAL RAILWAYS *Appellants,*

AND

THE TORONTO TRANSPORTATION COMMISSION
and THE CORPORATION OF THE CITY OF
TORONTO *Respondents.*
(*Royce Avenue Subway*)

AND BETWEEN

THE TORONTO TRANSPORTATION COMMISSION *Appellants,*

AND

CANADIAN NATIONAL RAILWAYS, THE CANADIAN
PACIFIC RAILWAY COMPANY and THE COR-
PORATION OF THE CITY OF TORONTO *Respondents.*
(*Bloor Street Subways*)

(CONSOLIDATED APPEALS.)

CASE

FOR THE CANADIAN PACIFIC RAILWAY COMPANY AND THE
CANADIAN NATIONAL RAILWAYS,

Appellants in the first and Respondents in the second of the above appeals.

1. These are an appeal by the Canadian Pacific Railway Company and the Canadian National Railways (hereinafter referred to as "the Railway Companies") and a cross-appeal by the Toronto Transportation

Record.
p. 85.
pp. 71-72.

Commission, by special leave, from a judgment of the Supreme Court of Canada dated the 26th September 1929 in part allowing and in part dismissing an appeal by the Toronto Transportation Commission from an Order of the Board of Railway Commissioners for Canada, number 40367, made on the 16th February 1928, apportioning between the parties to these appeals the cost of constructing subways under the lines of the Railway Companies at Royce Avenue and at Bloor Street in the City of Toronto.

p. 40, l. 3.

The appeal of the Railway Companies is from so much of the said judgment of the Supreme Court as set aside by a majority (Mignault, Newcombe and Lamont JJ.—Anglin C.J.C. and Smith J. dissenting) 10 a direction contained in the Order No. 40367 that the Toronto Transportation Commission should contribute a proportionate part to the cost of the Royce Avenue Subway.

p. 72, l. 27.

The appeal of the Toronto Transportation Commission is from so much of the said judgment as affirmed unanimously a direction contained in the Order No. 40367 that the Toronto Transportation Commission should contribute a proportionate part the cost of the Bloor Street Subways.

p. 72, l. 23.

p. 2, l. 26.
p. 43.

2. The Respondent The Toronto Transportation Commission is a Corporation incorporated in 1920 by a Statute of the Province of Ontario 10 & 11 George V. Chapter 144, and operates the electric street railways 20 throughout the City of Toronto.

3. The Board of Railway Commissioners for Canada (hereinafter called "the Board") is a Commission set up by the Railway Act of Canada 1919, and created a Court of Record. It exercises very extensive powers of control over railways in Canada, and in particular it deals with all questions connected with the crossing of Dominion Railways by highways and by other railways and tramways, deciding by its orders what works are required for the protection, safety and convenience of the public, how these are to be constructed and how the costs thereof shall be distributed.

pp. 1-6.

4. The situation of the works presently in question is shown on the 30 plan, Exhibit 8A, and the material facts are set out in a statement of facts settled by the Board and the Schedules thereto.

p. 2, l. 11.

Royce Avenue and Bloor Street, which run east and west and parallel to one another, are about three-quarters of a mile apart. Both are intersected by lines of railway belonging to the Railway Companies and by Dundas Street running in a north-westerly direction. All three streets are heavily travelled main thoroughfares. Upon Dundas Street, which on both sides of its intersection with Royce Avenue adjoins the west side of the Railway Companies' right of way, there is a double street railway line.

pp. 7-9.

5. Prior to the Orders of the Board upon which the present appeals 40 arise the level railway crossing at Royce Avenue and the two level railway crossings at Bloor Street had been protected under Orders of the Board by gates and watchmen.

p. 2, l. 41.

The street railway lines did not at that time cross the railway lines at these points. Street railway passengers proceeding to or from the north-

westerly part of Toronto by Bloor Street were accordingly obliged either to make a considerable detour, involving change of car, or proceed on foot across two level crossings over four lines of railway. Those who crossed the railway line on foot were furnished by the street car conductors with transfer tickets enabling them to resume their journey beyond the crossings in other street cars without extra charge.

Record.

6. On the 21st November, 1922, the City of Toronto, under Sections 257 and 259 of the Railway Act 1919 (9-10 George V. Chapter 68) applied to the Board for an Order requiring the Railway Companies to collaborate with the City in the preparation of a joint plan for the "separation of grades" at *inter alia* the Royce Avenue and Bloor Street crossings. Separation of grades means the carrying of the railway over or under the highway or the highway over or under the railway. p. 11, l. 24.

7. Sections 39, 252, 257 and 259 of the Railway Act 1919 are, in part, as follows:—

20 " 39 (1) When the Board, in the exercise of any power vested in it, " in and by any order directs or permits any structure, appliances, " equipment, works, renewals, or repairs to be provided, constructed, " reconstructed, altered, installed, operated, used or maintained, it " may, except as otherwise expressly provided, order by what company, " municipality or person, interested or affected by such order, as the " case may be, and when or within what time and upon what terms " and conditions as to the payment of compensation or otherwise, and " under what supervision, the same shall be provided, constructed, " reconstructed, altered, installed, operated, used and maintained.

30 " (2) The Board may, except as otherwise expressly provided, " order by whom, in what proportion, and when, the cost and expenses " of providing, constructing, reconstructing, altering, installing and " executing such structures, equipment, works, renewals, or repairs, or " of the supervision, if any, or of the continued operation, use or main- " tenance thereof, or of otherwise complying with such order, shall be " paid.

" 252. The railway lines or tracks of any railway company shall " not cross or join or be crossed or joined by or with any railway lines " or tracks other than those of such company, whether otherwise within " the legislative authority of the Parliament of Canada or not, until " leave therefor has been obtained from the Board as hereinafter " provided.

* * * * *

40 " (4) No trains shall be operated on the lines or tracks of the " applicant over, upon or through such crossing or junction until the " Board grants an order authorising such operation.

* * * * *

Record.

“ 257 (1) Where a railway is already constructed upon, along or
 “ across any highway, the Board may, of its own motion, or upon
 “ complaint or application, by or on behalf of the Crown, or any
 “ municipal or other corporation, or any person aggrieved, order the
 “ company to submit to the Board, within a specified time, a plan and
 “ profile of such portion of the railway, and may cause inspection of
 “ such portion, and may inquire into and determine all matters and
 “ things in respect of such portion, and the crossing, if any, and may
 “ make such order as to the protection, safety and convenience of the
 “ public as it deems expedient, or may order that the railway be carried 10
 “ over, under or along the highway, or that the highway be carried
 “ over, under or along the railway, or that the railway or highway be
 “ temporarily or permanently diverted, and that such other work be
 “ executed, watchmen or other persons employed, or measures taken
 “ as under the circumstances appear to the Board best adapted to
 “ remove or diminish the danger or obstruction in the opinion of the
 “ Board arising or likely to arise in respect of such portion or crossing,
 “ if any, or any other crossing directly or indirectly affected.

* * * * *

“ 259. Notwithstanding anything in this Act, or in any other Act,
 “ the Board may, subject to the provisions of the next following section 20
 “ of this Act, order what portion, if any, of cost is to be borne respectively
 “ by the company, municipal or other corporation, or person in respect
 “ of any order made by the Board, under any of the last three preceding
 “ sections, and such order shall be binding on and enforceable against
 “ any railway company, municipal or other corporation or person
 “ named in such order.”

Section 2 (21) of the Railway Act defines “ railway ” as “ except where
 the context is inapplicable ” including “ street railway and tramway.”

p. 4, l. 6
et seq.

8. The question of the separation of grades at the crossings in question
 was considered at several hearings of the Board. Various organisations 30
 and ratepayers’ associations were heard and it was represented that grade
 separation would enable the Toronto Transportation Commission to extend
 its lines of street railway across the tracks of the Railway Companies and
 thereby improve the street car service.

p. 4, l. 32.

9. Dundas Street for some distance on both sides of its intersection
 with Royce Avenue immediately adjoined the right of way of the Railway
 Companies and was on approximately the same level.

p. 10, l. 35.

The new subways were required to have a clearance of fourteen feet
 under the railway lines, and consequently the Royce Avenue subway would
 enter Dundas Street considerably below the existing street level. As an 40
 alternative to depressing the level of Dundas Street and, with a view to
 avoiding the dangerous condition of heavy traffic through the Royce Avenue
 subway coming out upon a main thoroughfare with street car tracks at the
 foot of two inclines, the Board adopted a plan whereby Dundas Street,

p. 4, l. 41.

with the street railway lines upon it, was diverted farther west, without alteration of level, and upon the former site of the street, easy approaches to the subway were constructed. Record.

10. The Board, acting under the powers for the protection, safety and convenience of the public vested in it by Section 257 of the Railway Act as above set out, on the 9th May, 1924, issued its Order No. 35037 approving the general plans for the subways and on the 5th June, 1924, issued its Order No. 35153, directing the Railway Companies to construct the subways at Royce Avenue and Bloor Street including as part of such works the diversion of Dundas Street. p. 5, l. 1.
p. 10.
p. 19.
p. 10, l. 39.

11. On the 13th August, 1925, the Board by Order No. 36693 granted an application by the Toronto Transportation Commission under Section 252 of the Railway Act for leave to construct a double line of street railway through the Bloor Street subways and reserved for further consideration the question of contribution by the applicant to the cost of these subways. These lines were accordingly constructed and have since been operated by the Toronto Transportation Commission. No street railway lines have as yet been laid in Royce Avenue. p. 21, l. 10.
p. 23, l. 20.
p. 5, l. 44.

12. On the 16th February, 1928, after the work of constructing the said subways and diverting Dundas Street, including the removal and relaying of the Toronto Transportation Commission's tram lines thereon, had been completed and paid for (in the first instance) by the Railway Companies, the Board issued its Order No. 40367 directing *inter alia* that the Toronto Transportation Commission should pay a proportion of the cost of the construction of the three subways. p. 40, l. 3.
p. 40, l. 30.

13. Under Section 52 of the Railway Act of Canada, an appeal lies from the Board to the Supreme Court of Canada (A) upon a question of jurisdiction, by leave of a judge of the Supreme Court and (B) upon a question of law or jurisdiction by leave of the Board. The Toronto Transportation Commission on the 27th February 1929, obtained from a judge of the Supreme Court leave to appeal to the Supreme Court from the Order of the Board No. 40367 on the following questions :— p. 48.

(1) Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act of Canada to provide in Order No. 40367, dated February 16th, 1928, that the Toronto Transportation Commission should contribute to the cost of :—

(A) the Bloor Street Subways,

(B) the Royce Avenue Subway,

40 or either of such works referred to in such order.

(2) If the above question should be answered in the affirmative as to either or both of the said works, had the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for

Record. Canada authority to compel contribution from the Toronto Transportation Commission, a Provincial corporation, in respect of:—

(A) the Bloor Street Subways,

(B) the Royce Avenue Subway,

or either of such works referred to in such order, under the circumstances of this case ?

14. Subject to the above-mentioned rights of appeal and to the power of the Governor in Council to vary or rescind any Order of the Board, the decisions of the Board are by the Railway Act declared to be final. By Section 44 (3) of the Act the finding or determination of the Board upon any question of fact within its jurisdiction is binding and conclusive. Accordingly the question of jurisdiction was the only question in issue in the Supreme Court of Canada and this was held to depend on whether the Toronto Transportation Commission was, within the meaning of Section 39 of the Railway Act, a company or person "interested or affected" by the Order for construction of the works in question.

p. 75, l. 9.
p. 81, l. 14.

p. 72, l. 23.

15. The Supreme Court (Anglin C.J., Mignault, Newcombe, Lamont and Smith JJ.) unanimously upheld the jurisdiction of the Board in regard to the Bloor Street Subways, but in regard to the Royce Avenue Subway the majority of the Court (Mignault, Newcombe and Lamont JJ.) came to the conclusion that the Toronto Transportation Commission was not interested or affected by so much of the Order No. 35153 as provided for the construction of the Royce Avenue Subway and the diversion of Dundas Street.

p. 72, l. 27.
p. 81, l. 43.

pp. 76-82.

Mr. Justice Mignault (with whom Mr. Justice Lamont concurred) said:—

p. 81, l. 47
et seq.

"The Appellant (the Toronto Transportation Commission) does not use the subway nor has it any line on Royce Avenue. And as to the diversion on Dundas Street which it now uses, it suffices to say that this diversion was decided upon to afford an easy approach to the subway. Not being interested in the latter, the Appellant cannot be said to have an interest in the diversion, which was, moreover, the cause of additional expense to it, for it became necessary to lay new tracks along the diverted road."

p. 83, l. 9.

Mr. Justice Newcombe agreed. He thought the case seemed to suggest that "the Board was anticipating value which might be realised when, if ever, a branch of the tramway is constructed upon the subway."

pp. 73-76.

Chief Justice Anglin (with whom Mr. Justice Smith concurred) said:—

p. 76, l. 6.

"We find it impossible to hold that it has been shown that the Transportation Commission has not a present interest different in kind from that of the ordinary residents in, or users of, the City streets, in the changes effected by the Order of the Board in connection with the subway, still less that it is wholly unaffected by an Order which provides for the removal of its tracks somewhat to the west

“ and for the construction of the two ramps above referred to, thus Record.
 “ dividing the traffic from Royce Avenue so that it will approach the
 “ lines of the street railway at angles much more acute than there-
 “ tofore.”

16. All the judges agreed that the validity of the legislation conferring p. 82, l. 41.
 on the Board the jurisdiction in question had been settled by authority. p. 76, l. 21.

17. On the ground that Mr. Justice Mignault erred in stating, as set p. 84, l. 9.
 out in paragraph 15 above, that the diversion of Dundas Street was decided
 upon to afford an easy approach to the subway and that this diversion
 10 caused the Toronto Transportation Commission the additional expense of
 laying new tracks, the Railway Companies on the 15th November, 1929,
 applied by motion to the Supreme Court for a re-hearing. On the 9th
 December, 1929, the Court (not including Mr. Justice Mignault who had
 retired from the Bench) delivered judgment dismissing the motion.

18. The Railway Companies submit that so much of the judgment
 of the Supreme Court dated the 26th September, 1929, as varied the Order
 of the Board No. 40367 by setting aside the direction that the Toronto
 Transportation Commission should contribute a proportionate part of the
 cost of the Royce Avenue Subway is wrong and ought to be reversed and
 20 that the remainder of the said judgment ought to be affirmed for the
 following, among other

REASONS.

1. Because the Board's Order for the construction of the works in question was an order made for the "protection, safety and convenience of the public."
2. Because the Board had power under Section 257 of the Railway Act to make such order.
3. Because the Board had under Section 39 of the Act entire
 30 discretion to order by what "company, municipality or person, interested or affected" by the order for construction the cost should be paid.
4. Because the Toronto Transportation Commission was, within the meaning of Section 39, a company or person "interested or affected" by the order for construction.
5. Because the Board has so found and by Sections 33 and 44 of the Railway Act such finding is binding and conclusive on the parties.
- 40 6. Because the Toronto Transportation Commission was specially interested or affected by the Order for the diversion of Dundas Street, including the removal and

relaying of the street railway lines and the construction of the ramps or approaches to the Royce Avenue subway.

7. Because the Toronto Transportation Commission having, before the completion of the Bloor Street Subways, by leave of the Board carried its lines through those subways and having since continually operated such lines, must be taken to have been "interested or affected."
8. Because the provisions of the Railway Act conferring jurisdiction upon the Board to order contribution by the 10 Toronto Transportation Commission or other Provincial Corporations towards the cost of works directed are ancillary to Dominion Railway legislation and are *intra vires*.
9. Because the reasons of Anglin C.J. and Smith J. in reference to the Royce Avenue Subway and the reasons of all the Judges in the Supreme Court in reference to the Bloor Street Subways and in regard to question 2 are right.

W. N. TILLEY. 20
E. P. FLINTOFT.



In the Privy Council.

No. 16 of 1930.

On Appeal from the Supreme Court of Canada.

BETWEEN

CANADIAN PACIFIC RAILWAY COMPANY
AND CANADIAN NATIONAL RAILWAYS

Appellants,

AND

THE TORONTO TRANSPORTATION COM-
MISSION AND THE CORPORATION OF
THE CITY OF TORONTO - -

Respondents

(Royce Avenue Subway)

AND BETWEEN

THE TORONTO TRANSPORTATION COM-
MISSION - - - -

Appellants,

AND

CANADIAN NATIONAL RAILWAYS, THE
CANADIAN PACIFIC RAILWAY COM-
PANY AND THE CORPORATION OF
THE CITY OF TORONTO - -

Respondents

(Bloor Street Subways)

(CONSOLIDATED APPEALS.)

CASE

FOR THE CANADIAN PACIFIC RAILWAY COMPANY
AND THE CANADIAN NATIONAL RAILWAYS

*Appellants in the first and Respondents in the second of
the above Appeals.*

BLAKE & REDDEN,

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