

70 & 71, 1930

No. 16 of 1930.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN—

THE CANADIAN PACIFIC RAILWAY
COMPANY and CANADIAN NATIONAL
RAILWAYS - - - - *Appellants*

— AND —

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

AND BETWEEN—

THE TORONTO TRANSPORTATION
COMMISSION - - - - *Appellants*

— AND —

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

CONSOLIDATED APPEALS.

**CASE OF THE TORONTO TRANSPORTATION
COMMISSION.**

RECORD.

1. The Toronto Transportation Commission (hereinafter for
convenience called "the Commission") was incorporated in the year
1920 by an Act of the Province of Ontario, being 10-11 Geo. V, Chap.
144, entitled An Act Respecting the City of Toronto; the Canadian
National Railways and The Canadian Pacific Railway Company

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(hereinafter for convenience called "the Steam Railways") are corporations owning and operating Dominion Steam Railways, and the Corporation of the City of Toronto is a municipal corporation.

2. The street railway and other local transportation services of the City Corporation, instead of being managed as its other civic services are managed, directly by the Council of such Corporation, are, by the statute above referred to and by-laws passed thereunder, entrusted to the management and control of the Commission, a corporation created by such statute for this express purpose. Ownership of such transportation facilities is still retained by the ¹⁰ said City Corporation and the Commission is charged with the duty from time to time of so adjusting its fares and services that the enterprise will at all times be self-sustaining. In other words it operates a service-at-cost enterprise.

3. Prior to the year 1922 certain lines of the Steam Railways traversed the north-west portion of the City of Toronto, roughly in a south-easterly direction, at the level of the various highways crossed in such area and from time to time orders providing for protective measures at highway crossings where highway travel was substantial had been made by the Board of Railway Commis- ²⁰ sioners for Canada (hereinafter referred to as "the Board") or its predecessors the Railway Committee of the Privy Council (Canada).

4. Owing, doubtless, to the growth and development of the district affected, the City Corporation came to the conclusion that the newer conditions demanded at the crossings aforesaid a separation of the highway and steam railway grades and consequently on November 21st, 1922, it applied to the Board for an order requiring the Respondent Steam Railways to collaborate with it and submit plans looking to a separation of grades in the whole area affected.

p. 10. 5. On May 9th, 1924, the Board, after protracted hearings, ³⁰ issued its Order No. 35037 approving of a general plan whereby the highways were to be carried under the steam railroads at thirteen points in such area. On June 5th, 1924, this order was supplemented p. 19. by Order No. 35153 providing for the construction by the Steam Railways of the two subways planned on Bloor Street and the subway planned on Royce Avenue, two highways running east and west through such area.

6. Pursuant to the orders above referred to the surface of the highways known as Bloor Street and Royce Avenue was placed under the tracks of the Steam Railways at a cost roughly of ⁴⁰ \$1,250,000 for Bloor Street and \$1,110,000 for Royce Avenue and such highways were re-opened for traffic in the Summer of 1925.

7. At the time of the application of the City Corporation for separation of grades the Commission had no tracks or service on those portions of Bloor Street or Royce Avenue affected by such application and consequently did not cause or contribute to any danger or traffic inconvenience arising in this locality.

8. When the application was launched the Commission was notified by the Board to appear upon the hearings. It accordingly did so, expressly reserving its rights and it took the position before the Board that it did not desire the proposed work, that whether
10 or not it was carried out was a matter of complete unconcern to it and that it had no interest in the application.

9. This attitude of the Commission was entirely genuine and is quite comprehensible. With Royce Avenue the Commission has never had any concern of any kind. As far as Bloor Street was concerned, to construct railway tracks thereon was economically disadvantageous to it for there were no economies which it could effect in re-routing or operation which would recoup it for the capital cost of such tracks. The provision of transportation on
20 this street by the Commission was, however, a slight advantage to certain of the public who wished to travel east and west on Bloor Street without having to make the short detour to the south to cross over the Dundas Street bridges. The mass of the travelling public, however, did not travel east and west on Bloor Street but naturally took the diagonal road, Dundas Street, to and from the heart of the City.

10. The attitude of the Commission was therefore, that if the Board came to the conclusion that the circumstances did not warrant grade separation it was quite satisfied to continue its existing operation. If, however, the Board should decide that the
30 growth of the district in question and the increase in highway traffic made it desirable that the surface of Bloor Street should be depressed, it then would, in order to serve the public, make use of such highway in its altered condition. The ultimate decision of the Board was not influenced in any way by the attitude of the Commission. It is plain that the grade separation in question would have been ordered, as it was ordered at Royce Avenue and other streets, whether or not the Commission intended to use any of such highways at their new levels, or whether such use should take the form of a street railway, or whether such transportation should be
40 provided by 'buses.

11. When the work was practically completed on Bloor Street and the surface of the highway carried under the Steam Railways

the Commission, reserving its rights, made formal application under Section 252 of the Railway Act (Canada) for leave to cross under the Steam Railways by laying its tracks upon the highway carried under such railways as aforesaid, and a simple and unconditional permission was granted it by the Board for such crossing by its Order No. 36693.

12. This ordinary user of the highway at its new level by the Commission's services did not involve any interference with the works or services of the Steam Railways, did not add in any degree to the cost of the work and, as stated above, was of no pecuniary benefit to the Commission. 10

13. Section 252 of the Railway Act (Canada) provides as follows:—

252. (1) 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.

(2) Upon any application for such leave the applicant shall submit to the Board a plan and profile of such crossing or junction, and such other plans, drawings and specifications as the Board may, in any case, or by regulation, require. 20

(3) The Board may, by order,—

- (a) Grant such application on such terms as to protection and safety as it deems expedient;
- (b) change the plan and profile, drawings and specifications so submitted, and fix the place and mode of crossing or junction;
- (c) direct that one line or track or one set of lines or tracks be carried over or under another line or track or set of lines or tracks;
- (d) direct that such works, structures, equipment, appliances and materials be constructed, provided, installed, maintained, used or operated, watchmen or other persons employed, and measures taken, as under the circumstances appear to the Board best adapted to remove and prevent all danger of accident, injury or damage; 30
- (e) determine the amount of damage and compensation, if any, to be paid for any property or land taken or injuriously affected by reason of the construction of such works;
- (f) give directions as to supervision of the construction of the works; and

(g) require that detail plans, drawings and specifications of any works, structures, equipment or appliances required, shall, before construction or installation, be submitted to and approved by the Board.

(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.

(5) The Board shall not grant such last mentioned order until satisfied that its orders and directions have been carried out, and that the provisions of this section have been complied with.

10 **14.** The Commission submits that even if it were technically necessary for the Commission to apply to the Board under Section 252 *supra*, for leave to cross the Steam Railways (a matter somewhat arguable under the circumstances) such application and such section conferred no jurisdiction upon the Board to assess the Commission in respect of matters with which the section has no relation.

20 **15.** As far as Royce Avenue is concerned, the Commission does not use and has no intention of using this highway for its services. Prior to the new works it had street railway tracks on Dundas Street, a street running, roughly, north-westerly and south-
 20 easterly, and which near Royce Avenue runs for a considerable distance immediately adjacent to the Steam Railway tracks. Under former conditions traffic on Royce Avenue crossed the Steam Railway tracks on the level and immediately entered Dundas Street. Under the plan for the new construction it became necessary, on account of the insurmountable grade created for Royce Avenue traffic, to move Dundas Street and the Commission's tracks somewhat to the west and to have Royce Avenue enter Dundas Street in the form of a fork with entrances north and south of the old point of entrance. This change in conditions was obviously of
 30 no advantage to the Commission; in fact the new conditions create two traffic intersections and potential danger points instead of one.

16. On November 15th, 1926, the Board issued its Order No. 38424 apportioning the cost of the work already completed and by this order, after a contribution from the "Railway Grade Crossing Fund", the Commission was ordered to pay ten per centum of the cost of such work and the City Corporation and the Steam Railways jointly each fifty per centum of the remainder. The Commission cannot find in the Board's Reasons for Judgment any expressed reason why it should have been assessed. p. 26.

40 **17.** On February 16th, 1928, the Board issued a further order No. 40367 superseding Order No. 38424 *supra*, which order made an unimportant change in the contribution from the "Railway Grade p. 39.

Crossing Fund" but otherwise re-affirmed the terms of the prior order.

18. The sections of the Railway Act (Canada) which, it is suggested, bear upon the questions at issue herein are (apart from Section 252 above set out) Sections 39, 257 and 259, which provide as follows :—

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 10 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.

(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 maintenance thereof, or of otherwise complying 20 with such order, shall be paid.

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 over, 30 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.

(2) When the Board of its own motion, or upon complaint or application, makes any order that a railway be carried across or along a highway, or that a railway be diverted, all the provisions of law at such time applicable to 40 the taking of land by the company, to its valuation and sale and conveyance to the Company, and to the compensation therefor, shall apply to the land,

exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

(3) The Board may exercise supervision in the construction of any work ordered by it under this section, or may give directions respecting such supervision.

10 259. Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of the next following section 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.

19. On February 27th, 1929, Hon. Mr. Justice Mignault, under p. 47.
the powers contained in Section 52 (2) of the Railway Act (Canada), granted the Commission leave to appeal to the Supreme Court of Canada from Order No. 40367 of the Board upon the following questions:—

20 (1) Had the Board of Railway Commissioners for Canada, p. 48.
under the circumstances of this case, jurisdiction under the p. 80.
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,

or either of such works referred to in such order?

30 (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 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?

20. The appeal was heard by the Supreme Court of Canada on the 29th and 30th days of May, 1929, and on September 26th, 1929, pp. 71-72.
the Court delivered judgment dismissing the appeal with respect to

the Bloor Street Subways but allowing the same with respect to the Royce Avenue Subway; Chief Justice Anglin and Mr. Justice Smith dissenting as to the latter. The Commission is appealing from the judgment of the Court with reference to the Bloor Street Subways, and the Steam Railways are appealing from the judgment of the Court with reference to the Royce Avenue Subway.

p. 73.
p. 76

21. With regard to the Bloor Street Subways the judgments of Chief Justice Anglin and Mr. Justice Mignault state that they regard the Commission as "interested and affected" within the terms of the statute because the construction of its line on the newly located highway was beneficial to the Commission and more convenient to its patrons. As to this the Commission respectfully submits that having in mind the facts already stated, the benefit to the Commission was extremely problematical and that in any case benefit does not confer jurisdiction upon the Board. It submits that its use of the highway was in essence the same as that of all other users and that there is no jurisdiction in the Board to select street car riders out of all the classes of highway travellers and to exact from them a contribution over and above what other classes of such travellers are called on to pay. 10

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p. 81, l. 43.
p. 83.

p. 83, l. 13.

22. With regard to Royce Avenue Subway, Mr. Justice Mignault, with whom Mr. Justice Lamont agrees, and Mr. Justice Newcombe cannot find any fact which would make the Commission "interested in or affected by" the construction of the same. Mr. Justice Newcombe adds, "It cannot be said that a person is interested merely because, in the future, he may become so; and that, as I understand the case, is the position of the Appellant with respect to Royce Avenue".

p. 76, l. 17.

23. Chief Justice Anglin, with whom Mr. Justice Smith agrees, finds the Commission's interest "slender" but indicates that he is unwilling to review the Board's discretion as to the extent of its own jurisdiction. It is made fairly apparent, however, that the learned Chief Justice would not coincide in the judgment of the Board as to this subway if he did not feel impelled to refuse to interfere with the Board's estimate of its jurisdiction. 30

24. The Commission submits that the judgment of the Supreme Court of Canada with regard to the Bloor Street Subways is erroneous and should be reversed, and with regard to the Royce Avenue Subway is correct and should be affirmed for the following among other

REASONS.

1. The Board have no jurisdiction to decide that a person is "interested in or affected by" a work who—
 - (a) Is not present at the scene of such work ;
 - (b) Is neither an applicant for or desirous of such work nor a party to the application except by the Board's own motion ;
 - (c) Whose works or services do not cause in whole or in part any public danger or inconvenience sought to be removed by such work ;
 - (d) Whose works or services do not in any manner increase the cost of such work.

2. The user of Bloor Street at its new level by the Commission by the most efficient, economical and universal mode of highway user was in principle no different from its user by any other member of the public and the Board had no jurisdiction to discriminate in effect against the car-riders whom the Commission represents in respect of such user.

3. The Commission received no benefit from the Bloor Street grade separation beyond that received by any member of the public using the same, but in any case benefit to the Commission could not found a jurisdiction in the Board to make the order under review.

4. The Commission's crossing on Bloor Street of the Respondents' railway, if in fact it was a "crossing" within the meaning of Section 252, did not and could not interfere with such railway and did not and could not give rise to any substantive order of the Board and consequently the said Section 252 and the Commission's application thereunder had no bearing upon the questions raised in this appeal.

5. The Commission being simply the manager of one of the services of the City Corporation, the Board have no jurisdiction to order a contribution from such service in addition to that assessed against the City Corporation.

6. There are no facts whatever to justify the Board's assumption of jurisdiction over the Commission in

respect of the Royce Avenue Subway and everything urged in respect of the Bloor Street Subways applies *a fortiori* to the former work.

7. The Parliament of Canada has no constitutional jurisdiction to assess a provincial corporation such as the Commission under the circumstances of this case.

D. L. McCARTHY.

IRVING S. FAIRTY.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN:—

THE 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 CORPORATION OF THE CITY OF TORONTO - - - - *Respondents.*
(Bloor Street Subways)
CONSOLIDATED APPEALS.

C A S E

— OF —

THE TORONTO TRANSPORTATION COMMISSION.

LAWRENCE JONES & Co.,
Lloyds' Building,
3/4, Lime Street,
London, E.C.3.