Privy Council Appeal No. 16, 1930.

The Canadian Pacific Railway Company and others - - *Appellants*

v.

The Toronto Transportation Commission and others - - *Respondents*

The Toronto Transportation Commission - - - - *Appellants*

v.

Canadian National Railways and others - - - - *Respondents*

(*Consolidated Appeals*)

Privy Council Appeal No. 19 *of* 1930.

The Toronto Transportation Commission - - - - *Appellants*

v.

Canadian National Railways and others - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY, 1930.

Present at the Hearing :

THE LORD CHANCELLOR.
LORD BLANESBURGH.
LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

These appeals are concerned with the validity of orders pronounced by the Board of Railway Commissioners for Canada whereby the Toronto Transportation Commission was required to contribute to the cost of certain works directed by the Railway Board to be carried out within the City of Toronto. Three quite distinct undertakings are involved, namely, the Bloor Street Subways, the Royce Avenue Subway and the Main Street Bridge.

The consolidated appeals relate to the first two works which were dealt with together by the Railway Board ; the separate appeal relates to the third work. It is necessary to examine the circumstances of each separately.

I.—THE BLOOR STREET SUBWAYS.

The recent rapid growth of the City of Toronto has converted into busy main thoroughfares a number of roads which formerly lay on the outskirts of the City and the danger arising from the existence of railway level crossings on these roads caused the City Corporation in view of the increasing traffic to take action for their removal. Bloor Street, one of the most important of these thoroughfares, runs east and west through the north-western section of the City. When the works now in question were ordered it was crossed on the level at one point by a series of lines of the Canadian National and Canadian Pacific Railways and at another point, some 400 yards to the east, by a line of the Canadian National Railways. These level crossings were situated in the portion of Bloor Street lying between the points where it is intersected by Lansdowne Avenue and Dundas Street respectively. There has for many years been a street railway or tramway on Bloor Street but between the points of its intersection by Lansdowne Avenue and Dundas Street there was a gap in the street railway which here made a wide detour avoiding the crossings and rejoining Bloor Street beyond them. Passengers could either go round the detour in a street car or dismount and walk across the railway lines and intervening space, re-entering the street car on the further side.

The street railways in Toronto, which were originally operated partly by the City Corporation and partly by the Toronto Railway Company, passed in 1921 entirely into the possession of the Corporation which entrusted the working of them to an organisation incorporated for the purpose on 3rd August, 1920, under the name of the Toronto Transportation Commission, by an Act of the Ontario Legislature. The Commission assumed the management of the system on 1st September, 1921. Its statutory duties include the construction, control, maintenance, operation and management of new lines of street railway in addition to or in extension of existing lines. The system is worked as a service-at-cost undertaking, the tolls and fares being so fixed as to furnish it with a sufficient revenue to render it self-sustaining.

The two level crossings on Bloor Street were long regarded as a source of danger and as early as 1891 gates and watchmen were provided for the protection of the public at the first-mentioned crossing by order of the Railway Committee of the Privy Council, the predecessors of the present Railway Board. Similar safeguards were ordered at the other crossing in 1908.

In November, 1922, the City Corporation applied to the Railway Board under sections 257 and 259 of the Railway Act, 1919, a statute of the Dominion Legislature, for an order requiring

the Canadian National and Canadian Pacific Railway Companies to collaborate with the Corporation in the preparation of a joint plan for the separation of grades or elimination of level crossings at various places in the north-western section of the City, including the Bloor Street crossings. The parties agreed to report to the Railway Board and plans were subsequently submitted and discussed. At a hearing by the Railway Board in January, 1924, one of the reasons advanced by representatives of the City and of the ratepayers for requiring protection by grade separation at the Bloor Street crossings was that by this means the Transportation Commission would be enabled to extend its lines across the existing gap and so to afford a better service. The Transportation Commission, which had not previously appeared in the proceedings, was notified and thereafter was represented at the subsequent hearings under reservation of its rights. It took up throughout the attitude that the construction of the proposed works was immaterial to it. Ultimately the Railway Board on 9th May, 1924, approved plans submitted by the Canadian Pacific Railway Company for the construction of subways to carry Bloor Street under the railway lines at both level crossings and on 21st May, 1924, ordered the work to proceed, reserving all questions as to the distribution of the cost.

Thereafter the Transportation Commission on 15th July, 1925, applied to the Railway Board for an order under section 252 of the Railway Act sanctioning the construction by the Commission of a double line of street railway along Bloor Street between Lansdowne Avenue and Dundas Street through the new subways and over the intervening space, thus doing away with the existing gap and providing a continuous line along the street. The application, which was made without prejudice to any submissions which the Commission might see fit to make with reference to the jurisdiction of the Railway Board in the matter, was with the consent of the Railway Companies granted on 13th August, 1925, by the Railway Board, which reserved for further consideration the question of contribution by the Commission to the cost of the subways. The Commission accordingly proceeded to lay down street railway tracks with the necessary equipment along Bloor Street through the subways and over the intervening space. By orders dated 21st and 22nd August, 1925, the Railway Board authorised the new subways to be put into use.

On 15th November, 1926, the Railway Board, after hearing parties, pronounced an order distributing the cost of the Bloor Street works. By this order the Railway Board, after directing certain percentages of the cost to be charged to a statutory fund known as the Railway Grade Crossing Fund, ordered that 10 per cent. of the balance should be paid by the Transportation Commission and that the remainder should be borne equally by the City Corporation and the two Railway Companies concerned. This order was subsequently on 16th February, 1928, rescinded

by the Railway Board which made a new order of that date No. 40367 varying the rescinded order, but not in any respect material for the present purpose. In the proceedings now before their Lordships the Transportation Commission appeals against this Order No. 40367 so far as it has been affirmed by the Supreme Court of Canada and challenges the right of the Railway Board to impose upon it any liability to contribute to the cost of the Bloor Street works.

As the order is impugned on the ground that the Railway Board had no jurisdiction to pronounce it an examination of the constitution and powers of the Board is necessary. The Board of Railway Commissioners for Canada is a statutory court of record possessing all the powers of a superior court. It succeeded to all the powers, authorities and duties of its predecessor, the Railway Committee of the Privy Council. By section 33 (1) of the Railway Act, 1919, there is conferred on the Board "full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested . . . (*b*) requesting the Board to make any order or give any direction, leave, sanction or approval which by law it is authorized to make or give or with respect to any matter, act or thing which by this Act . . . is prohibited, sanctioned or required to be done." By Section 33 (5) it is provided that "the decision of the Board as to whether any company, municipality or person is or is not a party interested within the meaning of this section shall be binding and conclusive upon all companies, municipalities and persons." Section 34 (1) empowers the Board to make orders with respect to any matter, act or thing which by the Act is sanctioned, required to be done or prohibited and generally for carrying the Act into effect. By section 44 (3) "the finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive."

Provision is made for review and appeal in sections 51 and 52. Under section 51 "the Board may review, rescind, change, alter or vary any order or decision made by it or may rehear any application before deciding it." Three modes of review are provided in section 52. First, the Governor in Council may at any time in his discretion either upon petition of any party, person or company interested or of his own motion vary or rescind any order of the Board ; secondly, an appeal is provided for to the Supreme Court of Canada upon a question of jurisdiction upon leave being obtained from a Judge of that Court ; thirdly, the Board may itself grant leave to appeal to the Supreme Court upon any question which in the opinion of the Board is a question of law or a question of jurisdiction or both. Save as provided in section 52 every decision or order of the Board is declared to be final and not subject to prohibition, injunction, certiorari or any other process or proceeding in any Court.

The present appeal is within the second category. On an application by the Transportation Commission leave was on

27th February, 1929, granted to the Commission by Mignault, J., to appeal to the Supreme Court of Canada from the Board's order No. 40367 of 16th February, 1928, upon the questions :—

"(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 16th February, 1928, that the Toronto Transportation Commission should contribute to the cost of

(*a*) the Bloor Street Subways.

* * * *

(2) If the above question is answered in the affirmative . . . . 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.

* * * *

On the matter coming before the Supreme Court of Canada the order of the Railway Board was unanimously affirmed as regards the Bloor Street subways. Their Lordships are now asked by the Transportation Commission, the present appellants, to advise the reversal of that decision which is supported by the two Railway Companies and the City Corporation as respondents.

The application of the Corporation of Toronto which initiated the proceedings invoked sections 257 and 259 of the Railway Act. Section 257 (1) reads as follows :—

"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, 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."

Section 259 provides that

"259. Notwithstanding anything in this Act, or in any other Act, the Board may . . . . . 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 enforcible against any railway company, municipal or other corporation or person named in such order."

In addition to the power conferred on the Railway Board by section 259 of apportioning the cost of works ordered by it under *inter alia* section 257 there is included among an earlier group of sections headed "General Jurisdiction and Powers," section 39, which enacts 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 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 with such order, shall be paid."

The applicability of section 39 to the works in question was not contested. It could not well be in view of the judgment of the Judicial Committee in the case of *Toronto Railway Company* v. *Toronto City* [1920] A.C. 426, in delivering which Viscount Finlay, dealing with sections 59 and 238 (3) of the Railway Act, 1906, as amended by the Railway Act, 1908 (with which sections 39 and 259 of the present Railway Act correspond), said at p. 437 :—"The power given by section 59 applies in the case of any order made by the Board in the exercise of any power vested in it by the Railway Act," and pointed out that if the order there impugned could be supported under section 59 it was unnecessary to consider whether it could also be supported under section 238 (3). Accordingly, if the order impugned in the present case can be supported under section 39 of the Railway Act, 1919, it is unnecessary to consider whether it could also be supported under section 259. It was also common ground that the present case was not "otherwise expressly provided" for in the Act.

The language of section 259 is wide but that of section 39 is wider still. Indeed, if subsection (2) of section 39 is read by itself it would seem to empower the Railway Board to order any person whomsoever to bear or contribute to the cost of works ordered by it. Subsection (2) of the former section 59 was open to the same observation and is thus dealt with in the case just cited at pp. 435–36. "There is not in subsection 2 any definition of the class of persons who may be ordered to pay such expenses, but it seems clear that subsection 2 must be read with reference to the immediately preceding provision and that such an order may be made only on a company,

municipality or person interested in or affected by the order directing the works."

The question at issue may thus be narrowed down to this—Was the Transportation Commission " interested or affected by " the order for the construction of the Bloor Street Subways within the meaning of section 39 ? The finality provisions quoted above from the Railway Act have not in the past been held to preclude the Courts in Canada or their Lordships' Board in other cases from determining on appeal as a question of law whether a company, municipality or person was interested or affected within the meaning of the statute so as to confer jurisdiction on the Railway Board. Accepting that view their Lordships proceed to consider the position of the Transportation Commission in relation to the works in question.

The material facts are (1) that when the order to construct the works was made by the Railway Board the street railway did not cross the railway lines under which the subways were to be constructed and the street railway system was physically clear of the level crossings which were to be eliminated ; (2) that no alteration of the street railway was necessitated by the construction order ; (3) that the elimination of the level crossings and the construction of the subways rendered it practicable to continue the street railway along Bloor Street and to do away with a gap in the street railway system ; (4) that before the subways were completed and opened for traffic the Transportation Commission applied to the Railway Board for an order, which was granted, authorizing it to construct a double track of street railway connecting up its Bloor Street lines through the new subways, which work was duly executed, the trolley wires, etc., being carried through the subways and attached to the structures.

On these facts, was the Transportation Commission interested in or affected by the construction of the subways ?

Section 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.

If the street railway had intersected the other railways at the level crossings in question at the time when the order for the construction of the subways was made the cases of *Toronto Corporation* v. *Canadian Pacific Railway* [1908], A.C. 54 and *Toronto Railway Company* v. *Toronto City* (*cit. sup.*) would afford sufficient authority for holding that the Transportation Commission was interested in or affected by the works ordered. In that case the street railway would have come within section 8 of the Railway Act which subjects Provincial railways (including, by

the definition in section 2 (21), street railways and tramways) which cross Dominion railways to the provisions of the Railway Act relating to the crossing of one railway by another. It may be noted that that section refers to Provincial railways which may hereafter cross any Dominion railway. The case of *British Columbia Electric Railway Company Limited* v. *Vancouver, Victoria and Eastern Railway Company* [1914] A.C. 1067 relied on by the Transportation Commission does not assist them. The analysis of that case in *Toronto Railway Company* v. *Toronto City* (*cit. sup.*) demonstrates that it is not an authority on the present question and the points of distinction there emphasised need not be repeated.

Does then the fact that at the time of the order for the construction of the subways the street railway of the Transportation Commission did not cross the other railways deprive the Railway Board of jurisdiction to order the Commission to contribute to the cost of the subways? In their Lordships' opinion this circumstance, while no doubt an important negative element, is not necessarily conclusive of absence of interest or affection. The whole circumstances must be taken into account. In the present instance there can be no question that the existence of the level crossings with their attendant danger constituted a barrier across the route of the Commission's Bloor Street railway. The Commission maintained that the removal of the crossings was immaterial to it but this is hardly consistent with its immediate utilisation of the substituted subways for linking up the detached ends of its system. Indeed, the situation of the level crossings was such that their removal could not but affect and affect beneficially the street railway; that it was so affected is best shown by the fact that whenever the danger was removed the Commission very properly at once availed itself of the facility provided by the new subways to complete one of its important through routes. At the time when the order for contribution was made the Commission, under an order it had itself obtained from the Railway Board before the subways were completed, was running its cars through the subways. In their Lordships' opinion the Railway Board when making an order for contribution to the cost of works is entitled to have regard to the state of matters existing when the order for contribution is made. The Board when it made the order now under appeal had before it evidence which satisfied it that the Commission was interested in or affected by the construction of the subways. The Judges of the Supreme Court of Canada took the same view. Their Lordships see no reason to differ from this conclusion which is consonant with the plain facts of the case.

Once it is established that the Commission was within the meaning of the Railway Act interested in or affected by the construction of the subways the jurisdiction of the Railway Board under the Act to order it to contribute to the cost of the works is unassailable. The question of the quantum of the contribution is a matter entirely in the discretion of the Railway Board with which their Lordships are not concerned.

It remains to notice the plea advanced that if the Railway Act on a sound construction authorised, as their Lordships hold it does, the making of the order under appeal affecting a Provincial undertaking, then the Act itself is to this extent beyond the competence of the Dominion Legislature. The point was only faintly raised before their Lordships. It was finally disposed of in the two cases in 1908 and 1920 above cited and may be negatived without further discussion.

II.—THE ROYCE AVENUE SUBWAY.

The facts relating to this undertaking differ materially from those of the Bloor Street subways. Royce Avenue runs east and west parallel to and about three-quarters of a mile north of Bloor Street. At its west end it crossed on the level the same lines of the Canadian National and Canadian Pacific Railways as were crossed by Bloor Street further south. Just beyond the point where it crossed the railways on the level Royce Avenue joined practically at right angles an important thoroughfare known as Dundas Street running in a north-westerly direction and closely adjoining the railway lines. For some distance to the south of the junction of the two roads Dundas Street runs parallel to the railway lines, but as it approached the junction it trended off to the west and at the point of junction its line of direction was at an acute angle with the railway lines from which it was gradually diverging. The problem of eliminating the level crossing on Royce Avenue by the construction of a subway carrying the roadway under the railway lines was complicated by the existence of this junction between Royce Avenue and Dundas Street immediately beyond the level crossing. As the subway required to have a clearance of 14 feet it was necessary to lower the existing level of Royce Avenue substantially with the result that at the former point of junction it would be at a considerably lower level than Dundas Street. In order to re-effect the junction with Dundas Street the alternatives were either to lower Dundas Street to meet Royce Avenue as it emerged from the subway or to slew Dundas Street on its existing level further to the west, thus allowing space for Royce Avenue to ascend and rejoin it. The latter course was adopted, but instead of constructing a single new junction Royce Avenue as it left the subway was bifurcated and two sloping roadways were constructed one going in a north-westerly direction and the other in a southerly direction and both joining Dundas Street on its altered line at an easy angle of approach. There has never been a street railway on Royce Avenue but on Dundas Street there is an important street railway operated by the Toronto Transportation Commission.

It is unnecessary to detail the history of the procedure before the Railway Board with regard to the Royce Avenue subway for it was dealt with simultaneously with the Bloor Street subways and included in the same series of orders already described. It is only necessary to note the following points of distinction :—

(1) There was a separate order of the Railway Board dated 23rd May, 1910, requiring the provision of watchmen and gates at the Royce Avenue level crossing for the protection of the public ; (2) there was of course no application by the Transportation Commission to construct a track through the Royce Avenue subway, such as there was in the case of the Bloor Street subways ; and (3) there was a separate order dated 15th January, 1926, authorising the opening for traffic of the Royce Avenue subway. The construction order of 21st May, 1924, and the allocation of cost Order No. 40367 of 16th February, 1928, included and applied to both the Bloor Street and the Royce Avenue subways and the two cases were appealed together to the Supreme Court by the Transportation Commission on the same questions as are set out above in the case of the Bloor Street subways, the Royce Avenue subway being included as head (*b*) in these questions.

The matter for determination in this case also is the same, namely, whether the Transportation Commission was " interested or affected by " the order for the construction of these works so as to give the Railway Board jurisdiction to impose upon it liability to contribute to their cost. In this instance, however, there has been a difference of opinion among the Judges of the Supreme Court of Canada. The learned Chief Justice Anglin and Smith, J., held that the Railway Board had jurisdiction to order the Commission to contribute to the cost of the works in respect of the Commission's interest in them ; while Mignault, Lamont and Newcombe, JJ., held that the Commission was not so interested in or affected by the works as to give the Railway Board jurisdiction to order the Commission to contribute to the cost. In the result the appeal was sustained as regards the Royce Avenue subway and the order of the Railway Board to this extent set aside. The Canadian National and Canadian Pacific Railway Companies now appeal to His Majesty in Council against the judgment of the Supreme Court in so far as it set aside the order on the Transportation Commission to contribute to the cost of the Royce Avenue subway. The Corporation of Toronto while technically a respondent supports the appeal, which is resisted by the Transportation Commission.

The conflicting points of view of the majority and the minority respectively in the Supreme Court may best be indicated by the following quotations from the opinions delivered.

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

> " 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."

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."

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

> "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 dividing the traffic from Royce Avenue so that it will approach the lines of the street railway at angles much more acute than theretofore."

The chief feature which distinguishes this case from that of the Bloor Street subways is that the Transportation Commission has never had any track on Royce Avenue and has not availed itself in any way of the new subway, although it was represented to the Railway Board by the promoters of the works that the Commission might in the future lay a track along Royce Avenue through the new subway. This feature is important in determining the presence or absence of interest or affection but does not in their Lordships' opinion conclude the matter in favour of the Commission. The subway works formed a single engineering undertaking of which the lowering of Royce Avenue, the construction of the subway, the formation of the approach slopes to Dundas Street and the diversion of Dundas Street to allow these sloping ways to rejoin it on the level were all integral parts and the whole works were designed to remove a public danger due to the presence of the Royce Avenue level crossing in the manner best calculated to suit the convenience of all concerned. The question, as their Lordships conceive it, is not whether the Transportation Commission was benefited by the execution of the works, although the plan adopted of diverting Dundas Street on the level was presumably preferable from the point of view of the street railway to forming a dip in the street at the former junction while the two tangential sloping ways presumably admitted the traffic from Royce Avenue to Dundas Street in a safer manner than if there had been a single junction almost at right angles. The question rather is whether the Transportation Commission as the operator of the street railway on Dundas Street was interested in or affected by the engineering works designed for the removal of the dangerous level crossing on Royce Avenue. To the question so stated their Lordships are satisfied that the answer must be in the affirmative. The Commission had to adapt its track to the diversion of Dundas Street which was an essential part of the works ordered and admittedly properly ordered by the Railway Board. That being so, the Commission was plainly interested in or affected by the works ordered by the Railway Board and consequently could

competently be required to contribute to the cost thereof. The propriety of requiring it to do so and the extent of the contribution ordered are matters on which their Lordships are not called upon to pronounce.

Their Lordships will accordingly humbly advise His Majesty that in the consolidated appeals from the judgment of the Supreme Court of Canada of the 26th September, 1929, the appeal against that part of the judgment which affirmed the Order No. 40,367 of the Railway Board of the 16th February, 1928, so far as relating to the Bloor Street subways should be dismissed, and the appeal against that part of the judgment which set aside the Order No. 40,367 of the Railway Board of the 16th February, 1928, so far as relating to the Royce Avenue subway should be sustained and the Order of the Railway Board to that extent restored. As regards costs, the Order in Council of 27th February, 1930 (1) granting special leave to the Canadian Pacific Railway Company and the Canadian National Railways to appeal against that part of the judgment of the Supreme Court of Canada which related to the Royce Avenue subway, and (2) granting special leave to the Toronto Transportation Commission to appeal against that part of the judgment which related to the Bloor Street subways, directed that the appeals should be consolidated and heard together upon one Printed Case on each side. Nevertheless the Corporation of Toronto, which was cited as a Respondent by the Railway Companies in the Royce Avenue appeal and by the Transportation Commission in the Bloor Street appeal, lodged a separate case in which it supported the Railway Companies in both matters. The position of the Corporation was no doubt peculiar as regards the Royce Avenue appeal, for being a respondent it could not join in the appellant Railway Companies' case and disagreeing with the other respondent, the Transportation Commission, it could not join in the latter's case.

The Transportation Commission having been unsuccessful, both as appellants and as respondents, their Lordships are of opinion that in the consolidated appeals the Commission should be found liable in costs to the Railway Companies, but in one set of costs only, and that no costs should be found due to or by the Corporation of Toronto, while as regards the costs in the Supreme Court, where there was no order for costs owing to the divided success of the parties, the Railway Companies and the Corporation must have their costs against the Transportation Commission.

III.—MAIN STREET BRIDGE.

A third problem is presented for their Lordships' consideration in this separate appeal relating to the distribution of the cost of a work known as the Main Street Bridge, which was heard along with the Bloor Street and Royce Avenue consolidated appeals

Prior to 1884 a public highway known as Dawes Road, then

situated in the Township of York, crossed on the level the lines of the Grand Trunk Railway, now the Canadian National Railways. By an agreement of that year between the Township and the Railway Company the portion of Dawes Road crossed by the railway was closed and a new substituted highway, now called Main Street, was carried over the railway by a bridge, which the Railway Company covenanted to build and keep in repair at its own expense. The district in which the bridge was situated subsequently became urban in character and was annexed to the City of Toronto. In 1919 the Corporation of the City applied to the Railway Board for an order on the Railway Company to reconstruct the bridge, and on the 3rd July, 1920, the Railway Board, by Order No. 29,923, ordered the Railway Company to do so at their own cost, according to specified dimensions, at the same time ordering plans to be submitted for approval. A plan was accordingly prepared and lodged by the Railway Company and approved by the Railway Board on the 18th August, 1921. This plan was subsequently withdrawn and a substituted plan was approved by the Railway Board on the 20th October, 1921.

The Statement of Facts in the case contains the following passage :—

> " Before approving the said plans the Secretary of the Board instructed the Canadian National Railways that the Chief Engineer of the Board, before passing on the said plans, required the same to be submitted to the City of Toronto, and also suggested that the same had better be submitted to the Ontario Railway and Municipal Board in view of the probability of the Toronto Street Railway using the said bridge to cross over in the future and further stated that upon these approvals being obtained he was prepared to pass upon the said plans. The bridge shown upon such plans was designed of sufficient strength to meet all possible stresses of highway travel including street cars and the detailed drawings showed street car tracks *in situ.*"

The former bridge is stated to have been physically solid and capable of carrying without the danger of a breakdown the traffic offered, but because of its dimensions to have been inadequate to accommodate the volume of the traffic.

The new bridge was completed and opened for traffic on the 1st December, 1921.

On the 1st September, 1921, the Toronto Transportation Commission, which had been constituted on the 3rd August, 1920, assumed, as above explained, the management of the street railway system in Toronto. In June, 1922, the Commission decided to construct a line over the new bridge and began to lay its tracks upon Main Street. While this work, which was completed on the 15th July, 1922, was in progress the Railway Company, on the 19th June, 1922, addressed a letter to the Railway Board complaining that the Transportation Commission had no authority for carrying its track over the new bridge and contesting the contention of the Commission that the approval by the Railway Board of a plan shewing street railway tracks on the bridge was equivalent to the approval required under Section 252 of the Railway Act for the

laying of the street railway track across the bridge. That section prohibits the crossing of the railway lines or tracks of any railway company by the railway lines or tracks of any other railway company without the leave of the Railway Board. The Railway Company accordingly applied for an order declaring that the approval of the plans for the bridge showing street railway tracks thereon was not the granting of leave by the RailwayBoard under Section 252 for the crossing of their line by the tracks of the Transportation Commission or alternatively for an order cancelling or amending the approval of the plans and further for an order that the Transportation Commission might be permitted to lay its tracks over the bridge only upon condition of paying to the Railway Company such proportion of the cost of construction and maintenance of the bridge as the Railway Board should direct.

On the 26th June, 1922, the Railway Company applied formally for a review of the allocation of cost of the new bridge, the application being made under Sections 51 and 39 of the Railway Act, quoted above. The grounds of the application were, *inter alia*, " (*a*) That since the Judgment and Order were made herein different circumstances have arisen in connection with a proposal to operate electric street railway cars across the bridge " and " (*b*) That in any event the discretion which the Board exercised under Section 39 of the Act in imposing the whole cost on the Grant Trunk Railway Company was not under the circumstances rightly exercised."

On the 21st September, 1922, the Transportation Commission applied to the Railway Board for an order under Section 252 of the Railway Act permitting it to cross the line of the Railway Company by the new bridge until the final disposal of the Railway Company's application for review of the allocation of its cost. This application was made by leave of the Railway Board without prejudice to the Commission's rights or to the submission that the permission of the Railway Board was not required for the crossing. Temporary permission was on the 10th October, 1922, granted by the Railway Board to the Commission to cross with its street railway the line of the Railway Company by means of the new overhead bridge pending the disposal of the Railway Company's application for review. The Transportation Commission has accordingly, since the 19th October, 1922, operated a service of street cars over the bridge.

On the 4th March, 1926, the Railway Board granted the Railway Company's application for a rehearing of its former order No. 29,923 of the 3rd July, 1920, imposing the cost of the reconstruction of the bridge on the Railway Company alone. The chief ground for granting the rehearing was apparently that in pronouncing their former order the Railway Board had been under a misconception as to the facts relating to the construction of the original bridge and had consequently held the case to be governed by an inapplicable precedent, although the changed situation brought about by the advent of the street railway traffic was also mentioned. With the grounds on which the rehearing

was granted their Lordships are, however, not concerned. At the re-hearing the whole question of the allocation of the cost of the reconstruction of the bridge was reconsidered with the result that the Railway Board issued an Order, No. 40,120, dated the 3rd January, 1928, amending its former Order of the 3rd July, 1920, and imposing the cost of the work of reconstruction as to 60 per cent. on the Railway Company, as to 30 per cent. on the City of Toronto, and as to 10 per cent. on the Transportation Commission.

The Transportation Commission thereupon applied to the Railway Board for leave to appeal against this Order No. 40,120 on the ground that as matter of law the Board had no jurisdiction to order a contribution from the Commission towards the cost of reconstructing the bridge. Leave to appeal upon this question was granted by the Railway Board on the 21st November, 1928. On the 2nd March, 1929, Mignault J. of the Supreme Court of Canada, on the application of the Transportation Commission, granted leave to appeal on the further question whether, if the Railway Board had jurisdiction under the Railway Act to make the Order complained of, the Parliament of Canada had jurisdiction to confer by the Railway Act jurisdiction on the Railway Board to compel contribution from the Transportation Commission, a Provincial corporation, towards the cost of the work in question under the circumstances of the case.

The appeal of the Transportation Commission to the Supreme Court resulted in the affirmance of the Order of the Railway Board, Mignault J. dissenting. The judgment of the majority was delivered by Chief Justice Anglin, with whom Newcombe Lamont and Smith, JJ., concurred. The learned Chief Justice said :—" Whether the Order against which this appeal is taken be viewed as an exercise by the Board of the powers conferred by ss. 257 and 259 [quoted *supra*] upon an application to cross under s. 252 made by the appellants or whether it should be viewed merely as a case in which the Board is 'reviewing . . . and altering or varying' (s. 51) an order or decision already made by it in regard to the payment of the cost of the bridge in question, its jurisdiction to make the order now in appeal seems to us to be indubitable. The appellant Transportation Commission was, in our opinion, clearly a company 'interested or affected by' the order for the construction of the new bridge within the meaning of ss. (1) of s. 39 [quoted *supra*]. That section applies to such an order (*Toronto Railway Company* v. *Toronto City* [1920] A.C.426, 435–6, 437–8) and therefore it was within the jurisdiction of the Board under s.s. (2) thereof to determine by whom, and in what proportions, the cost and expense of the construction thereby directed should be borne. That the appellant is not a company 'interested or affected by' Order No. 29,923 is scarcely arguable. If the present circumstances had existed in 1920 the Board might have made Order No. 40,120 when making Order No. 29,923. Sections 37 and 51 enabled it to make Order No. 40,120 in 1928."

As regards the second question the Chief Justice said : "Of the constitutional validity of the railway legislation under discussion there is, in our opinion, not the slightest doubt. *Toronto Railway Company* v. *Toronto City* [1920] A.C. 426, 438." Section 37, which has not hitherto been quoted, provides that "any power or authority vested in the Board may, though not so expressed, be exercised from time to time or at any time as the occasion may require."

Mignault J. agreed that the Railway Board was entitled under Section 51 to alter its previous decision "if it had jurisdiction otherwise to make the Order complained of" but he held that under the circumstances the Railway Board had no jurisdiction to order the Transportation Commission to contribute to the cost of the reconstruction of the bridge. Relying on the cases of *British Columbia Electric Railway Company, Limited*, v. *Vancouver Victoria & Eastern Railway Company* and *Toronto Railway Company* v. *Toronto City* (both *cit. sup.*) he took the view that neither the fact that the Transportation Commission derived benefit from the reconstruction of the bridge nor the fact that it had applied without prejudice under Section 252 for leave to carry its tracks across the bridge gave the Railway Board jurisdiction to order it to contribute to the cost of the work. He did not consider that the railway was constructed across the highway or that the work was for "the protection, safety and convenience of the public" within the meaning of Section 257, which he held to be inapplicable to the case as being merely one of a street improvement.

The Transportation Commission has now appealed to His Majesty in Council from the decision of the Supreme Court, and the appeal is resisted jointly by the Canadian National Railways and the Corporation of the City of Toronto.

Their Lordships entertain no doubt that the Railway Board under the wide powers conferred upon it by Sections 37 and 51 was entitled to review and alter its original order imposing on the Railway Company the whole cost of the reconstruction of the bridge. But any alteration to be made by it on its original Order on such review must of course be such as it had jurisdiction to make. Now it is clear that Section 39 is applicable to the work of reconstruction which the Board ordered on the 3rd July, 1920. The critical question accordingly in this case, as in the Bloor Street and Royce Avenue subway cases, is whether the Transportation Commission was "interested or affected by" the Order for the reconstruction of the Bridge. The majority of the Judges of the Supreme Court thought that the contrary was scarcely arguable. Mr. Justice Mignault does not deal with the point but bases his opinion on the other grounds indicated.

Their Lordships have found the question to be attended with some difficulty. The Transportation Commission did not come into existence until the 3rd August, 1920. How then could it be "interested or affected by" an Order made on the 3rd July,

1920 ? No order for contribution could have been pronounced against it on the 3rd July, 1920, for it was then non-existent. True, after it came into existence it took advantage of the reconstructed bridge by carrying its track across it in 1922, but it could not have been a party to the original proceedings.

The answer, in their Lordships' opinion, is to be found in the view already expressed that the Railway Board when allocating the cost of a work which it has ordered is entitled to have regard to the situation as existing at the date when it considers the question of allocation. If new interests which are affected by the work have arisen since it was originally ordered their Lordships see no reason to doubt that the Railway Board can competently order contribution to the cost to be made from such quarters. The test of liability to contribute is not necessarily to be found in the answer to the question whether an order to execute the work could originally have been pronounced against the party sought to be made liable to contribute. When it was said in *Toronto Railway Company* v. *Toronto City* (*cit. sup.*) at p. 437 that an order for contribution under Section 39 (2) could " be made only on a company, municipality or person interested in or affected by the order directing the works," their Lordships did not mean that only a person who could originally have been ordered to construct the works could be made liable in contribution to their cost, but rather that no one could be ordered to contribute unless he could be shown to be interested in or affected by the works directed to be executed.

Now when the Railway Board reconsidered, as it was entitled to do, its original order allocating the cost of the work in question, the Transportation Commission had its tracks laid across the reconstructed bridge and was operating a service of street cars over it. If that had been the position of affairs when the original order was pronounced the Transportation Commission in their Lordships' view would indubitably have been a party " interested or affected by " the work of reconstruction and could have been ordered to contribute to the cost. Equally, when the Railway Board reconsidered its original order, it was entitled to take into account the state of matters then existing and to order contribution accordingly.

Their Lordships thus find themselves in agreement with the decision of the Supreme Court and will humbly advise His Majesty that the appeal be dismissed. As regards costs in this case the Corporation of Toronto lodged a separate case adopting the case of the Railway Company. There does not appear to be any good reason why the Corporation should not have joined with the Railway Company in their case. The Transportation Commission accordingly must be found liable to the Railway Company in their costs of the appeal; as regards the Toronto Corporation there should be no order as to costs.

In the Privy Council.

THE CANADIAN PACIFIC RAILWAY COMPANY AND OTHERS

v.

THE TORONTO TRANSPORTATION COMMISSION AND OTHERS.

THE TORONTO TRANSPORTATION COMMISSION

v.

CANADIAN NATIONAL RAILWAYS AND OTHERS.

(*Consolidated Appeals*).

THE TORONTO TRANSPORTATION COMMISSION

v.

CANADIAN NATIONAL RAILWAYS AND OTHERS.

DELIVERED BY LORD MACMILLAN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1930.