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*May 26.
*June 15.

THE CORPORATION OF THE CITY OF TORONTO ..... APPELLANT;

AND

THE VILLAGE OF FOREST HILL, THE TOWNSHIP OF YORK AND CANADIAN NATIONAL RYS. ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Board of Railway Commissioners for Canada—Jurisdiction—Board's order directing municipality to contribute to cost of highway bridge crossing over a railway in another municipality—Whether municipality "interested or affected" by order for construction of bridge—Railway Act, R.S.C., 1927, c. 170, ss. 256, 39, 259, 33 (5).

A street ran east and west through (and continuing beyond) the northern part of the city of Toronto and of the adjoining village of Forest Hill. At a point in Forest Hill it was carried over a ravine by a bridge under which a railway (under Dominion jurisdiction) crossed the street. The bridge was 500 feet beyond the nearest point of the Toronto city limits. The Board of Railway Commissioners for Canada, on application of the Village of Forest Hill, authorized reconstruction of the bridge, and directed that the City of Toronto contribute to the cost. The City appealed.

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

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Held: The Board had not jurisdiction under the *Railway Act* to direct that the City contribute to the cost of the work. There were no circumstances to warrant a holding that the City was "interested or affected" by the Board's order, within the meaning of the Act.

The Railway Act, R.S.C., 1927, c. 170, ss. 256, 39, 259, 33 (5), considered. *Toronto Ry. Co.* v. *Toronto,* [1920] A.C. 426, at 437, and *Canadian Pacific Ry. Co.* v. *Toronto Transportation Commission,* [1930] A.C. 686, cited; and other cases referred to and discussed. *Toronto* v. *Canadian Pacific Ry. Co.,* [1908] A.C. 54, distinguished.

Quaere whether, in any case, under the circumstances in question, the reconstruction of the bridge was not a matter merely of "street improvement" (*British Columbia Electric Ry. Co.* v. *Vancouver, etc., Ry. & Nav. Co. et al.,* [1914] A.C. 1067); whether the order did not deal with matters which, in their essence, fell under the category of "municipal" rather than that of "railway"?

APPEAL by the City of Toronto from an order (No. 47439, dated 25th September, 1931) of the Board of Railway Commissioners for Canada (1) which authorized the Village of Forest Hill (the applicant) to construct a certain bridge, replacing an existing bridge, whereby the roadway of Eglington Avenue was carried over a railway of the Canadian National Railways, and directed (*inter alia*) that the City of Toronto contribute to the cost of the construction.

Leave to appeal was granted by the Board, and was also granted by a judge of the Supreme Court of Canada. The appeal was upon the following question:

"Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the *Railway Act* (Canada) to provide in Order No. 47439, dated 25th day of September, A.D. 1931, that the City of Toronto should contribute to the cost of the work referred to in said order?"

The material facts of the case are sufficiently stated in the judgment of Smith J. now reported. The question submitted was answered by this Court in the negative and the appeal was allowed with costs to the appellant against the village of Forest Hill.

G. R. Geary K.C. and *J. N. Herapath* for the appellant.

Melville Grant for the respondent, Village of Forest Hill.

Alistair Fraser K.C. for the respondent, Canadian National Railways.

(1) See reasons given by the Board, (1932) 39 Can. Ry. Cas. 176, dismissing an application by the city of Toronto for a rehearing on the question of jurisdiction.

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DUFF J.—I concur with my brother Smith.

I am unable to agree that the decision under appeal can be supported by the judgment of the Privy Council in *Toronto Corporation* v. *Canadian Pacific Ry. Co.* (1).

The question which is the governing question in this case, whether, namely, the municipality was "a person interested or affected by the order," within the meaning of the statute, was disposed of by the Lords of the Judicial Committee, by reference to the reasons of Meredith J.A., in the Court of Appeal (2), in which they agreed. Those reasons are as follows:

> This case is governed by that of *In re Canadian Pacific Railway Company and York*, in this Court (3), and that of *Toronto* v. *Grand Trunk, etc.*, in the Supreme Court of Canada (4). They are all quite the same in principle. The fact that the territorial limits of the City of Toronto did not extend beyond the southerly limit of the land of the railway company, and that their power over the highway in question ends there, cannot deprive them of interest in a source of great danger to persons travelling upon the highway but a few yards beyond that part of it which is vested in them, and with the keeping of which in repair they are charged. If, instead of the railway, there were a pit or a precipice there, could it be said that they had no duty to protect those lawfully using the highway against its danger? That, because it happened to be in the next parish, they were not concerned, in any way, with that danger? The road, over which they have control, is a paved invitation to the public to use it up to almost the very point of greatest danger; and up to lesser, but still considerable, danger before passing beyond their limits. We are not concerned in the extent of their interest, but that they have a substantial interest in the safety of that level crossing seems to me indisputable, unless indeed they can, and until they do, stop up the highway at their limits. It is a case of doing that, or adopting some other means of protecting traffic upon the highway either going out of or coming into the City, the highway being an invitation to use it each way. Whether the railway company, or the railway company and the other corporation, should pay the whole of the cost of necessary protection, or the bulk of it, is not a question for consideration here. The appellants are interested, and that is all that need be determined.

It requires no argument to shew that these reasons have no application to this case.

It was admitted by Mr. Grant, in the course of his most able argument, that the principle for which he contended was that all municipalities in which traffic passing over the bridge in question would normally originate, in substantial magnitude, would be subject to the jurisdiction of the Board as being "persons interested or affected by the

(1) [1908] A.C. 54.
(2) (1907) 7 Can. Ry. Cas. 274, at 280-281.
(3) (1898) 25 Ont. A.R. 65.
(4) (1906) 37 Can. S.C.R. 232.

order." That is a principle, in my opinion, not laid down or contemplated by the statute.

I express no opinion whatever as to whether, if the Corporations of the City of Toronto and the County of York were, respectively, "persons interested or affected by the order," within the meaning of the statute, the order of which that before us is a type is one of the kind authorized by the provisions in question. There is something at least to be said for the view that it deals with matters which, in their essence, fall under the category of "municipal" rather than that of "railway."

The appeal should be allowed and the order set aside with costs throughout.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

SMITH J.—This is an appeal from the order of the Board of Railway Commissioners of Canada authorizing the applicant, the Village of Forest Hill, to construct an overhead bridge on Eglington Avenue and Spadina Road.

The order directed that the Canadian National Railway Company pay $20,000 toward the construction of this bridge, and that the remainder of the cost be paid by the applicant, the City of Toronto and the Township of York, the consideration of their respective contributions being reserved until after completion of the bridge.

The appellant appeals on the ground that there was no jurisdiction in the Board to direct the City to contribute to the cost of the proposed bridge.

Eglington Avenue is an original road allowance running easterly and westerly through the northern part of the city of Toronto and of the village of Forest Hill, and, to the east of Toronto, through the town of Leaside and on through the township of North York. To the west of Forest Hill it runs through the township of York to the towns of Mount Forest and Weston.

At a point in Forest Hill this avenue is carried over a ravine by a bridge, under which the Toronto Belt Line Railway, now owned by the Canadian National Railway Company, crosses the avenue. Spadina Road to the north joins the avenue at the bridge, but continues south from the avenue at a short distance west of the bridge.

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This bridge was built by the Belt Line Railway Company in 1890, the location being then in the township of York, but now in the village of Forest Hill. North of the avenue it is about 500 feet west of the westerly limit of the part of the city of Toronto that was formerly North Toronto; and south of the avenue it is about 2,000 feet west of the westerly limit of the city of Toronto; and it is about one mile north of the northerly limit of Toronto.

The avenue has been widened to 86 feet and paved to a width of 54 feet through Toronto and Forest Hill, except a short piece in Forest Hill which, with the part forming a boundary between Forest Hill and the Township of York, it is intended to complete during the present summer.

The question is:

"Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the *Railway Act* (Canada) to provide in Order No. 47439, dated 25th day of September, A.D. 1931, that the City of Toronto should contribute to the cost of the work referred to in said order?"

The order of the Board is made under the powers granted by sec. 256 of the *Railway Act*, R.S.C., 1927, ch. 170, subsections 1 and 2 of which are as follows:

256. Upon any application for leave to construct a railway upon, along or across any highway, or to construct a highway along or across any railway, the applicant shall submit to the Board a plan and profile showing the portion of the railway and highway affected.

(2) The Board may, by order, grant such application in whole or in part and upon such terms and conditions as to protection, safety and convenience of the public as the Board 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, or 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 the granting of the application in whole or in part in connection with the crossing applied for, or arising or likely to arise in respect thereof in connection with any existing crossing.

The power to apportion the cost of the work among corporations, municipalities and persons is derived from sections 39 and 259 of the Act, which are as follows:

39. 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.

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 enforcible against any railway company, municipal or other corporation or person named in such order.

In delivering judgment in *Toronto Railway Co.* v. *Toronto City* (1), Viscount Finlay, discussing sections 59 (now 39) and 238 (3) (now sec. 259), says, at page 437:

Whatever be the construction of this subsection (238 (3), now 259), there is nothing in it to put an end to the application of s. 59 (now 39) to orders under ss. 237 and 238 (now 256 and 257). The power given by s. 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. As ss. 237 and 238 (now 256 and 257) are part of the Railway Act, it follows that s. 59 (now 39) applies to orders made under them.

The judgment delivered by Lord Macmillan in *Canadian Pacific Ry. Co.* v. *Toronto Transportation Commission* (2), quotes from these remarks of Viscount Finlay, and holds (p. 696) that they apply to the present sections 39 and 259; and that an order may be made only on a company, municipality or person interested or affected by the order directing the works.

Section 33 (5) of the Act is as follows:

5. 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.

Dealing with the provisions of this section, his Lordship, at the same page (696) says:

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

(1) [1920] A.C. 426. (2) [1930] A.C. 686.

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within the meaning of the statute so as to confer jurisdiction on the Railway Board.

This disposes of the contrary view expressed in *The County of Carleton* v. *The City of Ottawa* (1).

The sole question to be determined as a question of law in this appeal is whether or not the City of Toronto, under the circumstances, is a municipality interested or affected by the order in question.

The Board apparently came to the conclusion that the City was interested or affected mainly on the report of its engineer. After reciting the facts already set out as to the location, width and paving of the street, he says that it is bound to carry a heavy traffic from municipality to municipality, and the 2,600 feet within Forest Hill is much like a bridge between two larger municipalities. He goes on to say that the present bridge is an unsightly structure, but, if the street were not being widened, it would be adequate to take care of the traffic for some time to come, but the municipalities want to improve conditions and want a wider and better looking bridge, and that the improvements will bring more traffic over the crossing.

These are the grounds on which he recommends that the Eglington Avenue section of the bridge be paid for in part by the City of Toronto. The Village of Forest Hill is widening and paving this avenue running through the town, and it is said that the "protection, safety and convenience of the public" require that this bridge, which is part of the street, should also be widened and paved.

The public belongs to no particular municipality, but may come from all municipalities. Each municipality ordinarily is bound to keep in a condition of safety its own streets, but the Board under the *Railway Act* in some special circumstances may order one municipality to contribute to the cost of works in another, but only where the outside municipality is interested or affected. How is the City of Toronto interested or affected by the construction of this bridge in Forest Hill in any way fundamentally different from the way in which any other outside municipality is interested or affected?

It is said that Toronto adjoins Forest Hill and the street is continued from one municipality to the other. It is also

(1) (1909) 41 Can. S.C.R. 552.

continued across East View and the Township of North York to the east. Are these municipalities also interested or affected, and had the Board jurisdiction in its discretion to assess part of the cost on them also?

Counsel for Forest Hill complained that because of what was said by Mr. Geary, as quoted by the Chairman of the Board, he was precluded from offering evidence as to the origin and volume of traffic likely to use the bridge. He thought he could have established that much traffic over the bridge would originate largely with people of the northern and western part of the city, making use of this avenue and Spadina Road as a main connecting link between these parts of the city. In my opinion this, if a fact, would not affect the question in the slightest degree, as the matter of where traffic over the structure originates and the volume of it from various districts is not a factor in deciding whether or not a particular municipality is interested or affected by the works within the meaning of the Act.

Toronto Corporation v. *Canadian Pacific Railway Co.* (1) establishes that a duty which a municipality owes to people for their protection, safety and convenience may furnish a ground for holding that municipality to be one interested or affected by works ordered to be constructed.

There the southerly limit of the lands of the Railway Company outside the City of Toronto adjoined the northerly limit of a city street. It was held that the fact that the power of the city did not extend beyond its limits did not deprive it of interest in a source of great danger to persons travelling on the city highway, but a few yards beyond it.

The principle on which the decision rests is stated in the following passage (2):

> If, instead of the railway, there were a pit or a precipice there, could it be said that they (the city) had no duty to protect those lawfully using the highway against its danger? That, because it happened to be in the next parish, they were not concerned, in any way, with that danger? The road over which they have control is a paved invitation to the public to use it up to almost the very point of greatest danger; and up to lesser, but still considerable, danger before passing beyond their limits.

(1) [1908] A.C. 54.

(2) See judgment of Meredith J.A. in the Court of Appeal, 7 Can. Ry. Cas., at 281.

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Surely the Corporation of the City of Toronto is under no duty to provide for the protection, safety and convenience of people using this bridge 500 feet beyond the nearest point of the city limits, the City having no special interest in that part of the Forest Hill street different from its interest in other parts of the street there.

Mr. Geary argued that the work of reconstructing the bridge was a matter merely of street improvement, and was not necessitated by any consideration of "protection, safety and convenience of the public," citing *British Columbia Electric Railway Co.* v. *Vancouver, Victoria & Eastern Ry. & Nav. Co. et al.* (1).

The learned Chairman of the Board describes this as a unique decision, and one which this Court and the Judicial Committee has ever since been attempting to distinguish or explain. He analyzes a number of cases in which he considers this has been done, and relies upon them as supporting the Board's decision that in this case Toronto is a municipality interested or affected by the order.

In two of these cases, viz., *The Toronto Railway Co.* v. *The Corporation of the City of Toronto et al.* (2) (Avenue Road), and *Toronto Railway Company* v. *The City of Toronto* (3) (Queen Street) already referred to, the tracks of the Toronto Railway Company on city streets crossed on the level the tracks of Dominion railways. The Board, in the first of these cases, ordered that the street be carried under the C.P.R. tracks, and in the other ordered that the street be carried over three Dominion railway tracks by a bridge. The sole question was whether or not the Toronto Railway Company was a company interested or affected by the orders, and it was held that it was such a company.

I am unable to see that these decisions have any bearing on the present issue. There seems to me to be no similarity or analogy, as the Toronto Railway tracks were on the spot, contributing to the danger intended to be removed by the orders.

Finally, *Toronto Transportation Commission* v. *Canadian National Railways* (4), dealing with the part known as Main Street Bridge, is cited, and the learned Chairman

(1) [1914] A.C. 1067.
(2) (1916) 53 Can. S.C.R. 222.
(3) [1920] A.C. 426.
(4) [1930] A.C. 686, 704.

of the Board states that it appears to him to be indistinguishable in its facts from the present case. There, in July, 1920, the Railway Board ordered the construction of a new bridge carrying Main Street in Toronto over the railway tracks. The Transportation Commission was not then in existence, and there were no tracks over the old bridge. In 1922, the Commission commenced to extend their tracks over the new bridge and, on protest to the Board by the Railway Company, the Commission applied to the Board for permission to cross, and, on October 10, 1922, obtained temporary permission under which they laid their tracks and continued to operate cars over the bridge. In 1926 the Board granted the Railway Company's application for a rehearing, and at this hearing ordered the Commission to pay ten per cent. of the cost. The judgment states that if the Commission had been running cars over the bridge at the time of the original order for construction of the new bridge, it would undoubtedly have been a company interested. The difficulty was whether or not the Transportation Commission, not being interested at the time of the original order, could be brought in at the rehearing and compelled to pay a part of the cost because in the meantime it had become a user of the new bridge. It was held that part of the cost could be allocated to the Commission because it was interested at the date of the rehearing and new allocation. This again seems to me to have no bearing on the present issue.

Mr. Geary's argument that the construction of the new bridge is a matter merely of street improvement does not seem to be disposed of by the three cases just referred to, as there is no similarity of facts.

The report of the Board's engineer shows that there was no condition of danger at the time of making the order, as the bridge was adequate to take care of the traffic for some time to come. The ground on which the order for a new bridge was sought, as he puts it, was that the municipalities want to improve conditions and want a wider and better looking bridge, which means that a great deal more traffic will use the overhead crossing. Toronto, of course, is not one of the municipalities that is seeking this improvement. Forest Hill wished to widen its street, of which the bridge was a part, and expected more traffic over it in con-

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sequence. It is difficult to discover any difference of object in widening the bridge and widening the rest of the street.

In any case, I am of opinion that no circumstance has been shown that warrants a holding that the City of Toronto is a municipality interested or affected by the works mentioned in the order within the meaning of the Act.

I would therefore answer the question submitted in the negative, and would allow the appeal with costs to the appellant against the respondent the Village of Forest Hill.

Question submitted answered in the negative, and appeal allowed with costs.

Solicitor for the appellant: *C. M. Colquhoun.*

Solicitors for the respondent, Village of Forest Hill: *Grant & Grant.*

Solicitor for the respondent, Canadian National Railways: *Alistair Fraser.*

Solicitors for the respondent, Township of York: *Starr, Spence & Hall.*