

Privy Council Appeal No. 82 of 1913.

**The British Columbia Electric Railway Com-
pany, Limited** - - - - *Appellants,*

v.

**The Vancouver, Victoria and Eastern Rail-
way and Navigation Company and others** *Respondents.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 26TH JUNE 1914.

Present at the Hearing :

LORD MOULTON.

LORD SUMNER.

LORD PARKER OF WADDINGTON.

SIR GEORGE FARWELL.

[Delivered by LORD MOULTON.]

The appellants, the British Columbia Electric Railway Company, Limited (referred to herein as the "Tramway Company") are a company operating street railways in the city of Vancouver under powers conferred upon them by an Act of the Legislature of the province of British Columbia. Their railways are local street railways wholly situated within the province of British Columbia, and have not been declared to be for the general advantage of Canada or for the advantage of two or more provinces, so that they have not passed into the domain of legislation of the Dominion Parliament.

The respondents, the Vancouver, Victoria and Eastern Railway and Navigation Company (referred to herein as the "Railway Company") are a company owning and operating a railway

which has been declared to be a work for the general advantage of Canada. It is therefore under Dominion legislation. Its tracks run through the city of Vancouver of which the other respondents (hereinafter referred to as the "Corporation") are the municipal authority.

The litigation out of which the present appeal arises relates to a portion of the track of the railway which runs along the bottom of a valley with somewhat steep sides, the general direction of which is north and south. That valley is included within the limits of the city of Vancouver, and streets run across and along it, but owing to the inequality of the levels there has been but little building along those streets. One street, known as Raymur Avenue, runs along the valley parallel to the railway track and near to it. Four streets, whose direction is east and west, cross Raymur Avenue and the railway track at right angles. These streets are known as Hastings Street, Pender Street, Keefer Street, and Harris Street. Tracks of the Tramway Company pass along Hastings Street and Harris Street, and cross the tracks of the Railway Company by level crossings.

For some time prior to July 1912 the Corporation had under consideration a plan for carrying the four streets above referred to across the railway track on viaducts, so as to avoid the gradients due to the low level of the railway track. Owing to their not having decided whether or not they should adopt this plan, they had been unable to grant any of the numerous applications which had been made to them for building permits along those streets, inasmuch as the grades of the streets could not be determined. Early in 1912, however, they passed a bye-law authorising the construction of these four viaducts. Such a bye-law required the assent of the citizens to give it validity, and on being put to the vote it failed to obtain the

requisite support on account of the great expense that the construction of the viaducts would entail on the Corporation.

Under these circumstances the Corporation proceeded to apply to the Railway Board for an order authorising the construction of the viaducts and declaring the respective proportions in which the cost of the bridges, &c., should be borne by the Railway Company and the Corporation. Originally no notice of this application was served upon the Tramway Company. But at the hearing of the application it was pointed out that inasmuch as the proposed constructions would effect the crossings of the Tramway Company they ought to be served with a copy of the application. Counsel representing the Tramway Company were present in the Court at the time and consented to accept service so that the hearing was continued without interruption. But although the Tramway Company were thus made parties, their Counsel took no part in the discussion except to oppose the contention put forward by Counsel on behalf of the Railway Company, that the tramway should bear a part of the cost of the construction of the viaducts and the street improvements connected therewith.

At the conclusion of the hearing the Railway Board indicated that they would grant the application of the Corporation and apportion the cost of the works among the Railway Company, the Corporation and the Tramway Company, and on the 14th October 1912 they accordingly made an order the operative part of which is as follows :—

“ It is ordered as follows :—

“ 1. The applicant is hereby authorised to construct
 “ Hastings Street, Pender Street, Keefer Street, and Harris
 “ Street across the tracks of the Vancouver, Victoria and
 “ Eastern Railway and Navigation Company, in the said

" city of Vancouver, by means of overhead bridges, as
 " shown on the plan filed with the Board under file
 " No. 20062, detail plans of the said structures to be
 " submitted for the approval of the Chief Engineer of the
 " Board.

" 2. Twenty per cent. of the cost of the actual construc-
 " tion work at each of the crossings on Pender and Keefer
 " Streets, not to exceed in each case the sum of \$5,000
 " shall be paid out of the Railway Grade-Crossing Fund;
 " twenty-five per cent. of the remainder of the cost of such
 " work shall be borne and paid by the Applicant, and
 " seventy-five per cent. by the Vancouver, Victoria and
 " Eastern Railway and Navigation Company. Twenty per
 " cent. of the cost of constructing Harris Street Bridge, not
 " to exceed the sum of \$5,000, shall be paid out of the Rail-
 " way Grade-Crossing Fund; twenty per cent. of the
 " remainder of such cost to be paid by the Applicant,
 " twenty per cent. by the British Columbia Electric Railway
 " Company, and sixty per cent. by the Vancouver, Victoria
 " and Eastern Railway and Navigation Company. Twenty
 " per cent. of the cost of constructing the Hastings Street
 " Bridge shall be paid by the Applicant, twenty per cent.
 " by the British Columbia Electric Railway Company and
 " sixty per cent. by the Vancouver, Victoria and Eastern
 " Railway and Navigation Company.

" 3. The cost of depressing the tracks of the Vancouver,
 " Victoria and Eastern Railway and Navigation Company
 " shall be included in the cost of the work.

" 4. The cost of maintaining the said Keefer, Pender,
 " Harris and Hastings Street Bridges shall be borne and
 " paid, fifty per cent. by the Applicant and fifty per cent.
 " by the Vancouver, Victoria and Eastern Railway and
 " Navigation Company.

" 5. In case of dispute between the parties in carrying
 " out the terms of this Order, the same shall be settled by
 " the Chief Engineer of the Board."

The Tramway Company thereupon applied to the Supreme Court of Canada for leave to appeal to that Court from the above order in so far as the said order directed that the Tramway Company should pay a portion of the cost of the construction of the Harris Street Bridge and of the Hastings Street Bridge, and duly obtained permission so to appeal on the ground that the Railway Board had no jurisdiction to order the

Tramway Company to pay any proportion of the costs of the bridges and other works mentioned in their Order.

The appeal came on before the Supreme Court of Canada on 7th April 1913, and was dismissed with costs by a majority of the Judges of that Court, Duff and Brodeur, JJ., dissenting. The order dismissing the appeal is dated 6th May 1911, and it is from this order that the present appeal is brought.

Their Lordships entirely agree with the remarks of Duff, J., as to the ground and reason of the application of the Corporation to the Railway Board. Referring to the statement made at the hearing by Mr. Baxter who represented the Corporation, he says :—

“ Mr. Baxter’s statement makes it quite clear that the
 “ occasion for the application arose from the necessity of
 “ determining the permanent grade of these four streets.
 “ It was a question, he said, whether on the one hand the
 “ grade was to be elevated, or on the other, the grade was to
 “ be made to conform to the grade of the railway tracks and
 “ level crossings established. It was necessary to have the
 “ matter disposed of because people were applying for
 “ permits to build upon these streets, and these could not
 “ be granted owing to the inability of the municipality to
 “ give the grade of the streets. The Council preferred the
 “ former of the two alternative courses because they recog-
 “ nized that the street grades were too low and must
 “ inevitably be raised.”

It follows therefore that the application was a matter between the Corporation and the Railway Company alone. The Tramway Company was entitled to be present to see that its interests were not prejudiced by any order which might affect injuriously property belonging to it. But the application was not made against it, nor was it asking any privilege from the Railway Board so that its presence did not give to the Railway Board any jurisdiction to make this order against it. If the Board possessed any such jurisdiction it must be derived from the provisions of the Statutes which created it and gave to it its

powers. Their Lordships can find nothing in those statutes which empowers the Railway Board to make any such order against the Tramways Company. The only portion of the tramway lines which was subject to the jurisdiction of the Railway Board was the actual crossings, and those only so far as concern Sections 227 and 229 of the Railway Act, and these sections have nothing whatever to do with such matters as these street improvements. So far as concerns the cost of the bridges or the cost of lowering the track of the Railway Company (which by the order was included in the cost of the viaducts) the Tramway Company was in precisely the same position as any private citizen of the city of Vancouver. It is evident from the reasons given by the Railway Board that they directed the Tramway Company to pay a proportion of the cost of the improvements because they were of opinion that the Tramway Company would benefit by them. They say:—

“It being a substantial benefit to them we are of opinion that they should contribute to the cost of the two bridges they will use. That is the bridges at Hastings and at Harris.”

The same language might have been used about a private citizen owning some large shop on one of the streets, or owning premises on either side of the valley, who would profit by the connection being on the level instead of by two steep and opposite grades, and such a private individual would be just as much under the jurisdiction of the Railway Board as was the Tramway Company. The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the Tramway Company would be benefited by the works gave them jurisdiction to make them pay the cost or a portion of it. There is nothing in the Railway Act which gives any such jurisdiction.

An attempt was made to treat the order of the Board as being made under the powers of Section 59 of the Railway Act, and it was contended that such section entitled the Railway Board to require that the Tramway Company should pay a portion of the expense. It is sufficient to point out that the order is not made under Section 59, nor does it come within its provisions. It does not direct that any work should be done. It is an order of a purely permissive character granting a privilege to the Corporation which they may exercise at the expense of a third party, and it leaves it to the Corporation to decide whether they shall avail themselves of it or not. The provisions of Section 59 relate to a wholly different class of cases.

It is not necessary for their Lordships to deal with any of the other weighty reasons given in the judgment of Duff, J. On the grounds above stated they are of opinion that the order so far as it directed the appellants to pay a portion of the costs was made without jurisdiction, and they will humbly advise His Majesty that the appeal should be allowed with costs, and that the order of the Supreme Court should be set aside, and that in lieu thereof an order should be made, with costs, allowing the appeal to the Supreme Court of the present appellants, and setting aside the order dated the 14th October 1912 of the Board of Railway Commissioners, in so far as the said order directs that the British Columbia Electric Railway Company, Limited, shall pay a certain proportion as provided in the said order, of the cost of the construction of the Harris Street Bridge and the Hastings Street Bridge referred to.

In the Privy Council.

THE BRITISH COLUMBIA ELECTRIC
RAILWAY COMPANY, LIMITED

v.

THE VANCOUVER, VICTORIA AND
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TION COMPANY AND OTHERS.

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