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In the Privy Council.

No 26 of 1933

**ON APPEAL FROM THE SUPREME COURT
OF CANADA.**

IN THE MATTER of General Order No. 490 of the Board of Railway Commissioners for Canada dated 20th February, 1931, amending the rules for wires erected along or across Railways adopted by General Order No. 231 dated May 6th, 1918, as amended by General Order No. 291 dated April 7th, 1920 (Case No. 470), and of the Appeal therefrom by the Canadian Electrical Association and the Hydro Electric Power Commission of Ontario.

BETWEEN

THE CANADIAN ELECTRICAL ASSOCIATION AND THE
HYDRO - ELECTRIC POWER COMMISSION OF
ONTARIO *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS, THE
CANADIAN PACIFIC RAILWAY COMPANY, THE
MICHIGAN CENTRAL RAILROAD COMPANY AND
THE RAILWAY ASSOCIATION OF CANADA ... *Respondents.*

APPELLANTS' CASE.

1. This is an appeal brought by special leave from a Judgment of the Supreme Court of Canada dismissing the present Appellants' appeal from General Order No. 490 of the Board of Railway Commissioners for Canada. The said General Order purports to amend the "Regulations Regarding Wires Erected Along and Across Railways" adopted by the Board under its General Order No. 231 as amended by General Order No. 291.

RECORD.
pp. 56, 57.
pp. 29, 30.
pp. 4-10.

2. By virtue of Section 52 (3) of the Railway Act of Canada (R.S.C., 1927, c. 170), (hereinafter called the Railway Act) an appeal lies from such Orders of the Railway Board to the Supreme Court of Canada upon any

APPELLANTS' CASE.

RECORD.

question which, in the opinion of the Board, is a question of law or a question of jurisdiction, or both, upon leave therefor having been first obtained from the Board. Such leave was obtained, and the appeal was argued and decided as above mentioned.

3. The questions arising on this appeal are, firstly, whether provisions in the Railway Act laying on the Board, in connection with proposals to carry electric power lines over railways, the duty of laying down the terms and conditions whereunder the proposed works may be executed, should be interpreted as in effect investing the Board with legislative powers to create a liability in the electric power companies for damage that may be caused thereafter in any manner and to any person as a result of the existence of the power lines; and, secondly, if the said provisions are rightly to be so construed, whether they are *intra vires* of the Parliament of Canada. 10

4. The first named Appellant, The Canadian Electrical Association, is an Association having for its principal object the advancement of the common interests of its members. The membership in this Association comprises a large number of public utility companies engaged in the production and transmission of electrical power for commercial and private consumption throughout the Dominion of Canada, some of these companies being incorporated under Dominion Legislation and some under Provincial and all having full charter or statutory powers to erect and maintain the overhead transmission lines necessary in the distribution of their power. 20

5. The second named Appellant, The Hydro Electric Power Commission of Ontario, is a Government Commission created a body corporate by Statute of the Legislature of the Province of Ontario (R.S.O. 1927 Chap. 57) and is also similarly engaged in the production and transmission of electric power and has similar statutory power.

6. In connection with their operations, the member companies of the first-named Appellant, and the second-named Appellant itself, are obliged in a very large number of instances to carry their overhead transmission lines across the lines of railway and lines of telegraph of the various Respondents who are created by the Dominion Parliament or subject to its legislative control, being in particular subject to the application of the Railway Act. Section 372 of the Railway Act provides as follows:— 30

“ Putting wires across Railways or other wires.

“ Leave of Board.”

372. “ Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in subsection five of this section, be constructed or maintained 40

“ (a) along or across a railway, by any company other than the railway company owning or controlling the railway; or

“ (b) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

- “ Plans to be submitted.” “ 2. Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works. RECORD.
- “ Powers of Board.” “ 3. The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.
- 10 “ Authority for works.” “ 4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.
- “ When leave not required.” “ 5. Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under section three hundred and sixty-seven of this Act, nor for the maintenance of works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes.”
- 20 7. On May 16th, 1918, the Board of Railway Commissioners by its Order No. 321 adopted the “ Regulations Regarding Wires Erected Along, and Across Railways,” which the General Order No. 490, the subject of this appeal, purports to amend. These Regulations are made applicable to all cases, whether leave to cross is sought from the Board or the consent of the Railway Company is obtained by clause 3 of the Regulations, which runs as follows :— pp. 4-10. pp. 29, 30.
- 30 “ 3. That any Order of the Board granting leave to erect, place or maintain any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board shall, unless otherwise expressed, be deemed to be an order for leave to erect, place and maintain the same according to the conditions and specifications set out in that part of the said schedule applicable thereto, which conditions and specifications shall be considered as embodied in any such order without specific reference thereto, subject, however, to such change or variation therein or thereof as shall be expressed in such Order.”
- 40 8. The “ conditions and specifications ” mentioned in the said clause include “ Standard Conditions and Specifications for Wire Crossings ” and Part I of those Conditions and Specifications cover “ Over-Crossings.” pp. 4-8. pp. 29, 30.
- Conditions 1 and 2 of the said Part I are the subject of the amending General Order No. 490 with which the present appeal is concerned. These Conditions, prior to the disputed amendment, read as follows :—
- “ 1. The applicant shall, at its or his own expense, erect and place the lines, wires, cables or conductors authorized to be placed p. 4, ll. 7-24.

RECORD.

along or across the said railway, and shall at all times, at its own expense, maintain the same in good order and condition and at the height shown on the drawing, and in accordance with the specifications hereinafter set forth, so that at no time shall any damage be caused to the company owning, operating or using the said railway, or to any person lawfully upon or using the same, and shall use all necessary and proper care and means to prevent any such lines, wires, cables or conductors from sagging below the said height.

“ 2. The applicant shall at all times wholly indemnify the Company owning, operating, or using the said railway, of, from, and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables or any works or appliance herein provided for not being erected in all respects in compliance with the terms and provisions of this order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant.”

pp. 29, 30. 9. The said Condition No. 2 was amended by the said General Order No. 490 to read as follows :—

p. 30, ll. 12-21.

“ 2. The applicant shall at all times wholly indemnify the Company owning, operating, or using the railway from and against all loss, damage, injury and expense to which the Railway Company may be put by reason of any damage or injury to persons or property caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this Order as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.”

It will be seen that this amendment in effect purports to create, in the place of a mere liability for damage caused either by breach of the terms and conditions of the Order or by negligence of the power companies, a liability in the nature of insurance to the world in general for damage brought about by the mere existence of the power lines.

pp. 29, 30. 10. The said General Order No. 490 was issued by a majority of the Board (Deputy Chief Commissioner Vien dissenting) after hearing the parties interested and in face of the objections of the present Appellants. pp. 10-20. The reasons of the majority of the Board in support of the Order may be summarized briefly as follows :—

p. 10, l. 19, to p. 11, l. 10.

(a) The original Order No. 231 sought to be amended was issued under similar legislative provisions to those contained in Section 372 of the Railway Act above quoted, and in frequent instances in the past, no agreement having been reached between the parties, applications to the Board for leave to cross had become

necessary; in view of certain objections made and insisted upon by the Railway Companies as a condition of such crossings, the Board had recognized the necessity for a full consideration of the whole matter, and for some years past had incorporated in its Orders permitting crossings, a clause making the permission granted subject to whatever conditions should be settled upon by the Board in deciding the general application which resulted in the present Order appealed from; RECORD.

10 (b) Clause (3) of the General Order and paragraphs 1 and 2 of the Conditions sought to be amended are then set forth, together with various proposed amendments suggested by the respective Counsel for the parties interested and their submissions in respect thereto; p. 11, l. 21, to p. 16, l. 4.

20 (c) The question of the Board's jurisdiction to make an Order under Section 372 of the Railway Act amending these Conditions in the terms sought by the Railway Companies is then taken up, and the Board refuses to abandon a course pursued by the Board for many years. It is pointed out that the only authority for putting wires near, along or across railways is to be found in Section 372 of the Railway Act, and Sub-section (3) of Section 372 is relied upon as conferring authority on the Board to make such an Order, dismissing the Appellants' contention that this sub-section merely has reference to the ordinary physical protective measures to be adopted in respect of these crossings. In conclusion it is observed:— p. 16, ll. 5-41.

30 “Considering the special provisions of the subsection above referred to, and the uniform procedure of the Board thereunder, it is not proposed here and now to negative the Board's jurisdiction, especially in view of the fact that it is open to the Power Companies to correct the Board's procedure, if it has misdirected itself herein.” p. 16, ll. 37-41.

40 (d) The question as to whether the Board's discretion should be exercised so as to grant the Order as requested by the Railway Companies is then considered, and it is said that, since the Board's paramount duty is to concern itself with the safety of the general public, and since a condition placing upon the Power Companies the burden of insurers in respect of any possible damages would, in the Board's opinion, be best calculated to secure that they adopt every precaution to prevent accidents, the amendment as sought by the Railway should be allowed. The amendment of Condition 2 as above set forth is therefore ordered. p. 16, l. 42, to p. 20, l. 3.

11. In his dissenting Judgment, Deputy Chief Commissioner Vien substantially upholds the arguments of the present Appellants. pp. 20, 29.

12. By virtue of the provisions set out in paragraph 2 of this Case, the Appellants sought and obtained from the Board leave to appeal to the

RECORD. Supreme Court of Canada from the said Order No. 490 upon a question of law and jurisdiction, the question submitted to the Supreme Court being as follows:—

p. 31, ll. 33-4. “As a matter of law, had the Board jurisdiction to make General Order No. 490 dated 20th February, 1931?”

p. 56-7. 13. The appeal of the Appellants to the Supreme Court of Canada was dismissed and the above question answered in the affirmative by a majority Judgment of the said Court, the Judgment of the Court (Duff, Lamont and Smith, JJ.) being delivered by Duff, J., and the dissenting Judgment of Rinfret and Cannon, JJ., being delivered by Rinfret, J. 10

p. 57-8. pp. 58-64. 14. The majority of the Supreme Court of Canada, in reasons stated very briefly, expressed the conclusion that the said Order No. 490 was competent to the Board of Railway Commissioners and properly enacted because, in their view, the Dominion Parliament had power to prohibit such works as those under discussion and, therefore, could attach any “term or condition” to granting leave to construct them; because the language of Sub-section 3 of Section 372 of the Railway Act is comprehensive enough to embrace any “term or condition,” and there was nothing in the Order appealed from in itself absurd and nothing in the Statute repugnant to the Order. The reasons conclude with the following statement: 20

p. 58, ll. 5-7. “As to the contention that the matter of the Condition is in its nature a matter exclusively for the Provincial Legislatures, I can only say that I do not understand the point.”

pp. 58-64. 15. The reasons of Rinfret and Cannon JJ., which hold that the question submitted to the Court should be answered in the negative, set forth the following points in arriving at this conclusion, namely:—

p. 60, ll. 3-39. (a) The Appellants, with statutory authority, either Dominion or Provincial, to construct and maintain their transmission lines in a given territory, were incorporated to render a public service. It may be assumed that the legislature which called them into existence regarded their services as being no less in the public interest than those of the Railways. In the absence of a specific provision, therefore, Section 372 should not be construed so as to give the Board power to prevent them from crossing, or to attach conditions to permission which would practically defeat their statutory rights, or would give the Railway a preferential position in respect of liability in damages. The enactment should be interpreted to mean that the Board ought to grant leave subject to certain terms and conditions. When, elsewhere in the Railway Act, Parliament did intend to delegate to the Board the power to refuse leave, it has said so in express terms (*e.g.* Section 373 (4)). 30 40

(b) The real question is what “terms and conditions” may the Board prescribe, and in view of the wide terms of Sub-sections 3 and 4 of Section 372, the well-known language in delivering the

judgment of the Judicial Committee in *C.P.R. v. Toronto Transportation Commission*, of Lord Macmillan (1930 A.C. 686 at 697) that “ 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 ” should be applied.

RECORD.

10 (c) Liability in damages is fundamentally a matter of property and civil rights, and without denying the competence of the Dominion to deal with matters necessarily incidental to effective Railway legislation, Parliament, and *a fortiori* the Board, whose duties under Section 372 are essentially administrative, should not be assumed to have legislated so as to encroach on the Provincial field unless the intention to do so is clearly indicated. Further than this, the power to create civil liability is not easily understood to have been delegated.

p. 60, l. 40,
to p. 61, l. 7.

20 (d) Full effect can be given to the language of Section 372 without implying the grant of power claimed by the Board, by interpreting the expression “ terms and conditions ” as having reference to engineering features and protective devices or, in other words, as attaching merely to the manner and means of construction; and this is amply borne out by a consideration of the scheme of the Railway Act and of the ordinary functions of the Board.

p. 61, ll. 8-
16.

30 (e) The argument that the disputed order may be supported as being an award of compensation is disposed of on various grounds, which need not be elaborated here; but it is pointed out in this part of the reasons that, under Sections 272 and 273 of the Act dealing with “ farm crossings,” the Board is empowered to order upon what “ terms and conditions ” such crossings may be constructed and maintained, and the fallacy of the Respondents’ position becomes apparent when it is thought that under this similar language, upon their interpretation of it, full civil liability for accidents could be placed upon the farmer.

p. 61, l. 17,
to p. 63,
l. 26.p. 61, l. 40,
to p. 62, l. 3.

(f) The natural meaning of the language of Sub-section (3) of Section 372 is that the terms and conditions which the Board is empowered to order have reference to the actual execution of the work is made clear by an examination of the text as follows :—

p. 63, ll. 27-
37.

“ . . . may order . . . on what terms and conditions . . . the proposed work may be executed.”

40 16. Under Clause 3 of the said General Order No. 231 above cited and as appears from the reasons of the Board and of the learned Judges of the Supreme Court of Canada, the Standard Conditions as amended by the General Order No. 490 appealed from are intended to apply to all overhead crossings whether leave is obtained therefor under Section 372 of the Railway Act, or the consent of the Railway Company concerned is obtained. The matter has been so treated throughout by all parties concerned.

RECORD.

17. The Appellants will submit that the Board of Railway Commissioners for Canada, as appears generally from the language of and powers conferred upon it by the Railway Act is, apart from the restrictive judicial functions given it, purely an administrative body; that it was never the intention of the Parliament of Canada to confer legislative powers upon it. This is particularly the case in respect of Section 372 of the Act which is obviously an administrative provision.

18. When Section 372 therefore requires that the leave of the Board must, in the absence of consent, be obtained before crossing, it is clear that it was not the intention that such leave should be withheld, but rather that it should be granted upon terms and conditions. When Parliament intended to delegate to the Board the power to refuse leave it has said so elsewhere in the Railway Act in express terms, as for example in Sub-section 4 of Section 373 where the language used is—"the Board may refuse or may grant such application in whole or in part . . ." The Appellants will therefore submit that the argument advanced by the Respondents and adopted by the majority of the Supreme Court of Canada to the effect that, because the Board was empowered to refuse leave, it might attach any term and condition it saw fit to granting leave, is clearly unsound. 10

19. The Appellants will further submit that in interpreting the expression "terms and conditions" in Sub-section 3 of Section 372, the whole of the said Section 372 should be read and not merely the said Sub-section 3; that a reference to Sub-section 2 which requires the appellant to submit a plan of the location showing the proposed works, makes it clear that the expression under consideration has reference to the physical aspect and mechanical devices to be employed in constructing such works; that in any event Sub-section 3 itself, properly read is clear to the same effect as appears from the following:— 20

"The Board . . . may order . . . on what terms and conditions . . . the proposed works *may be executed*." 30

p. 30, ll. 12-21.

20. The Appellants will submit that condition No. 2 of the Standard Conditions and Specifications as amended by the General Order No. 490 appealed from is in effect legislative in that it purports to alter the relative positions in law with respect to liability in damages of the Power Company and the Railway Company to the obvious disadvantage of the former; that in fact the condition as amended would place upon the Power Company the burden of an insurer not only of the Railway Company but of the general public with regard to any damages arising out of an accident at an overhead crossing—

"unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere." 40

This is a burden which the Power Company is not called upon to bear under the general law in force in any of the Provinces of Canada with respect to responsibility for damages.

21. The Appellants will therefore submit that the statement contained in the Judgment of the majority of the Supreme Court of Canada to the effect that there is nothing in the Order appealed from in itself absurd and nothing in the Statute repugnant to the Order is clearly erroneous. The Statute, in the light of the foregoing must be repugnant to an order of this nature, and the absurdity of the order itself would seem to be established when it is considered that if such an order were competent to the Board under Sub-section 3 of Section 372 of the Act, it would also be competent to the Board under Sub-section 2 of Section 273 dealing with farm crossings. RECORD.

10 The language of both Sub-sections is identical, and it would seem to have been hardly the intention of Parliament to empower the Board to place upon a farmer the obligation of insuring the Railway Company with respect to all damages arising out of accidents at a farm crossing.

22. The Appellants will further submit that if Section 372 of the Railway Act does purport to confer power upon the Board to issue an Order such as the General Order No. 490 appealed from altering the civil liability in damages of the parties, then the said Section is to such extent ultra vires the Parliament of Canada as being an interference with civil rights in the Province. It cannot be said that legislation altering the general law of damages, as between a Railway Company and a third party having no contractual relationship with it, is legislation necessarily incidental to Railway legislation. The real purpose behind the Order appealed from, as appears from the Judgment of the Board, is to force the Power Companies to take extraordinary precautions by placing upon them an extraordinary legal burden. It was obviously the duty of the Board to see that any given crossing would be safe, but not to avoid such duty or pass it on to the Power Companies in an indirect manner by interfering with their legal rights. pp. 29, 30. pp. 18-19; especially p. 19, ll. 6-12.

20

23. The Appellants will further submit that full effect may be given to the language of Sub-section 3 of Section 372 by holding that the expression "terms and conditions" refers merely to the manner and means of construction; that if there is any ambiguity or obscurity, the sub-section should be interpreted in a way which will render it intra vires and not ultra vires, and also in a way which takes cognizance of the well known canon of construction that the power to legislate will not easily be presumed to have been delegated.

30

24. The Appellants further respectfully adopt the reasoning and conclusions of the judgment of the dissenting Judges in the Supreme Court of Canada.

25. The Appellants therefore submit that the Judgment of the majority of the Supreme Court of Canada should be reversed and that the p. 31, ll. 33-4.

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question answered by that Court in the affirmative should be answered in the negative, for the following amongst other

REASONS

1. Because on the true interpretation of the language of Section 372, and particularly of Sub-section 3 thereof, power is only conferred upon the Board to prescribe terms and conditions with respect to the actual, physical manner and means of constructing any overhead crossing.

2. Because if Section 372 purports to empower the Board to issue such an Order as the said General Order No. 490, it is ultra vires as being an interference with civil rights in the Provinces, and not necessarily incidental to a Federal legislative power. 10

3. Because the said General Order No. 490 is legislative in character, and the said Section 372 does not confer upon the Board power to legislate.

4. Because if Section 372 be ambiguous or obscure, it should be interpreted in the sense which renders it intra vires and not ultra vires, or in the sense which involves the least encroachment on the Provincial field.

5. Because the Judgment appealed from is wrong and the reasons of the minority Judges in the Supreme Court of Canada are correct.

D. N. PRITT.

I. B. LUCAS.

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Respondents.

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