

44, 1934

# In the Privy Council.

No. 26 of 1933.

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## ON APPEAL FROM THE SUPREME COURT OF CANADA.

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BETWEEN

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

AND

10 CANADIAN NATIONAL RAILWAYS  
CANADIAN PACIFIC RAILWAY COMPANY  
MICHIGAN CENTRAL RAILROAD COMPANY and  
THE RAILWAY ASSOCIATION OF CANADA - *Respondents.*

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## CASE FOR RESPONDENTS.

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1. This is an appeal by special leave from a judgment of the Supreme Court of Canada delivered on the 31st day of March, 1932, dismissing an appeal from an Order of the Board of Railway Commissioners for Canada dated the 20th of February, 1931. Record.  
p. 56.  
p. 29, l. 30.

2. The Board of Railway Commissioners for Canada (hereinafter called "the Board"), is a Commission set up by the Railway Act of Canada. It exercises very extensive powers of control over railways in Canada and in particular it deals with all questions connected with the putting of wires across railways, deciding by its orders the extent to which, by whom, how, when, on what terms and conditions and under what supervision such works may be executed.

3. In the generation and distribution of electrical energy it is at times necessary for the electric power companies to construct and maintain lines, wires and other conductors and structures or appliances for the conveyance of power or electricity along or across a railway; or across or near other such lines, wires, conductors, structures or appliances which are within the legislative authority of the Parliament of Canada.

Record.

4. In the crossing of railways or the lines of telephone or telegraph companies, the power lines of electrical companies may be carried overhead or underground.

5. If the power lines cross over the railway or telephone or telegraph lines and for any reason such power lines or the structures supporting them should break or fall and come into contact with such other wires, or the rails, or cars on such rails, or persons on the right of way of the railway company, there would be great danger of a serious accident resulting in death of or injury to persons or damage to property, or both. If the under-crossing method be adopted, the power lines have to be placed in a duct 10 underground, beneath the rails of the railway company. In such event, the chances of injury or damage are very much reduced, if not entirely eliminated.

6. When an electric power company is desirous of constructing and maintaining its lines or wires along or across the lines or wires or rails of any railway company, subject to the legislative authority of the Parliament of Canada, it must either obtain the consent of the railway company or obtain the permission of the Board under Section 372 of the Railway Act (R.S.C., 1927, c. 170) which reads as follows :—

“ 372. (1) Lines, wires, other conductors, or other structures 20 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 ss. 5 of this section, be constructed or maintained—

“ (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.

“ (2) Upon any application for such leave, the applicant 30 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.

“ (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.

“ (4) Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

“(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 authorised, 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.”

Record.

10 **7.** On May 6th, 1918, the Board, pursuant to the provisions of R.S.C. 1906, Chapter 37, Section 246 (now Section 372 of the Railway Act, 1919) issued General Order No. 231 adopting rules for the carrying of wires or cables along or across the tracks of railway companies under the jurisdiction of the Board. Annexed to this Order was a schedule, entitled “Standard Conditions and Specifications for Wire Crossings,” and providing for two methods of crossing: Part I—Overcrossings; Part II—Underground Lines.

p. 54, l. 24.

pp. 4-10.

p. 4, l. 5.  
p. 8, l. 39.

**8.** On April 7th, 1920, General Order No. 231 was amended by General Order No. 291. The amendments contained in General Order No. 291 are not material to this issue. General Order No. 231, as amended by General Order No. 291, is set out in the Record.

pp. 4-10.

20 **9.** On February 20th, 1931, General Order No. 231 was further amended by the Board by General Order No. 490, re-enacting Paragraph 2 of Part I of the Standard Conditions and Specifications for Wire Crossings. This clause, which is the subject of this appeal, reads as follows:—

pp. 29-30.

30 “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.”

p. 30, l. 12.

**10.** The issue of General Order No. 490 followed a judgment of the majority of the Board, Deputy Chief Commissioner Vien dissenting. The reasons for judgment of the majority may be summarized as follows:— The necessity for issuing regulations in regard to the erection, placing and maintaining of electric lines, wires or cables across railways had arisen from the fact that no agreement could be arrived at between the interested parties as to the terms under which this could be done; the Board had deemed

p. 10, l. 18.  
*et seq.*

Record. expedient under such circumstances to issue regulations of general applica-  
 p. 17, l. 12. tion ; in framing these regulations the Board should be guided by reasons  
 of public safety rather than by the incidence of pecuniary liability which  
 p. 17, l. 26. should be to establish such regulations as will keep everybody concerned  
 p. 18, l. 1. most astute to foresee and prevent accidents ; the liability of the power  
 company should not be limited to mishaps concerning which it can be shown  
 p. 18, l. 5. to be at fault, as unusual or accidental breakdowns in electric power systems  
 sometimes completely destroy all evidence of their cause ; except where the  
 cause of the mishap can be traced to the railway company, the interest of all 10  
 parties, and particularly the interest of the public, would appear to be most  
 certainly and justly safeguarded by holding the power company—the only  
 party in possession of knowledge of what is going on on its own system,  
 p. 18, l. 19. and the only one in a position to control it—liable for damage or injury done  
 by its system ; it seems conclusive that public safety would be best assured  
 if the power companies were held liable for any damage or injury which  
 their systems might cause, even if it were difficult or impossible to locate  
 accurately the reason for the mishap ; the power companies must cross the  
 right of way of the railway company without spilling their dangerous load ;  
 p. 19, l. 6. if they spill their load and damage results, they must be held liable therefor ; 20  
 regarding as entirely essential the safety of persons outside the circle of  
 either company, and desiring to frame conditions most likely to ensure to  
 them immunity from danger and loss, the Board was of opinion that this  
 result can be best assured by placing upon the shoulders of the Company  
 carrying a dangerous load across the right of way a primary obligation to  
 bear it safely across the railway property, unless the negligence of the latter  
 company should operate to cause the power wires to spill their load.

pp. 20-29. **11.** In his dissenting judgment, Mr. Vien stated in substance, that  
 p. 22, l. 42. the question of the liability in damages due to negligence or otherwise is a  
 matter which, under the provisions of the British North America Act, falls 30  
 within the jurisdiction of the Provincial legislatures, except when it is  
 necessarily incidental to the proper carrying into effect of laws enacted by  
 the Dominion Parliament ; that the functions of the Board are judicial and  
 administrative and that they are not legislative ; that the expression  
 p. 24, l. 18. “ terms and conditions ” contained in Section 372 obviously refers to devices  
 for safety and does not extend to the right to fix liability for what may  
 happen, even if these terms and conditions are observed ; and that the  
 question of damages is a matter for the provincial courts and not for the  
 Board.

**12.** The Appellants made an application under Section 52, ss. 3, 40  
 of the Railway Act for leave to appeal to the Supreme Court of Canada  
 from General Order No. 490 of the Board on the ground that the said  
 Order was beyond the powers and jurisdiction of the Board.

**13.** On June 5th, 1931, the Board made an Order granting leave to the Appellants to appeal upon the following question, which, in the opinion of the Board, was a question of law or a question of jurisdiction, or both, namely :— Record.  
p. 31.

“As a matter of law, had the Board jurisdiction to make General Order No. 490, dated the 20th of February, 1931.”

**14.** On March 31st, 1932, the Supreme Court of Canada (Duff, Lamont and Smith, JJ.), (Rinfret and Cannon, JJ., dissenting), gave judgment upholding the jurisdiction of the Board to make General Order No. 490, and dismissing the appeal. pp. 56-57.

**15.** The judgment of the Court was delivered by Mr. Justice Duff, who held in effect that the powers of the Dominion Parliament are supreme in respect of such works as are dealt with in the Order under discussion ; that the language of the Statute is comprehensive enough to embrace any term or condition ; that there is nothing in the Order which is inconsistent with the Statute ; and that the Order is valid. pp. 57-58.  
p. 57, l. 29.

**16.** Mr. Justice Rinfret in his dissenting judgment (concurred in by Cannon, J.) held that Parliament should not be assumed to have legislated so as to appropriate the provincial field, except if the intention so to do is clearly indicated ; that in order to conclude that Parliament intended to delegate to the Board its power to create civil liability, more explicit language than that found in Section 372 should be required ; and that the expression of that section “terms and conditions” has reference only to the engineering features and protective devices relating to the actual construction of the works and their maintenance. pp. 58-64.  
p. 60, l. 40,  
et seq.

**17.** The Respondents submit that the judgment of the Supreme Court of Canada is right, and should be affirmed for the following, among other

### REASONS.

- 30
- (1) BECAUSE the Board of Railway Commissioners had power, under Section 372 of the Railway Act, to make such Order.
  - (2) BECAUSE the Board has, under Section 372 of the Railway Act, discretion as to the terms and conditions which it may impose on any person or company seeking to carry its wires across a railway subject to the authority of the Dominion Parliament.

- (3) BECAUSE an applicant is not bound to proceed under Part I, but may adopt an underground crossing under Part II.
- (4) BECAUSE the Board has jurisdiction to require that electric wires be carried under the railway, and Part I contains conditions applicable to an alternative method of crossing which need not be adopted.
- (5) BECAUSE the terms and conditions imposed by the Board in the Order are not unreasonable or inconsistent with the Statute. 10
- (6) BECAUSE the reasons given by the majority of the Board of Railway Commissioners and the majority of the Supreme Court of Canada are right.

W. N. TILLEY.

IVAN C. RAND.

E. P. FLINTOFT.

W. B. KINGSMILL.

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BLAKE & REDDEN,

17 Victoria Street, S.W.1.