

Privy Council Appeal No. 143 of 1923.

The Corporation of the City of Toronto - - - - *Appellants*
v.
The Toronto Railway Company - - - - *Respondents*

The Toronto Railway Company - - - - *Appellants*
v.
The Corporation of the City of Toronto - - - - *Respondents*
(*Consolidated Appeals*)

FROM

THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 24TH OCTOBER, 1924.

Present at the Hearing :

VISCOUNT CAVE.
LORD DUNEDIN.
LORD SHAW.
LORD CARSON.
LORD BLANESBURGH.

[*Delivered by* VISCOUNT CAVE.]

These appeals are brought, the first by the Corporation of the City of Toronto and the second by the Toronto Railway Company, against an order of the Appellate Division of the Supreme Court of Ontario dated the 24th September, 1923. By that order the Appellate Division on an appeal from an order of Mr. Justice Logie partly allowed and partly refused a motion by the Corporation to set aside an award made by arbitrators in relation to the taking over by the Corporation from the Railway Company of certain street railways in Toronto, and also dismissed a motion

by the Railway Company to set aside the same award. Against these decisions both the parties appeal on different grounds.

In the year 1891 the Corporation, having agreed to take over from the Toronto Street Railway Company (an old company which has now disappeared) the street railways of that Company in Toronto and the real and personal property connected therewith, invited tenders for the purchase of an exclusive right to operate surface street railways in Toronto (except in certain parts of the City) for a period of twenty years, which was to be extended to thirty years in the event of legislation being obtained to enable that to be done. Under the conditions of sale upon which the tenders were to be made the person whose tender was accepted (therein called "the purchaser") was to take over all the property to be acquired by the City from the Toronto Street Railway Company at the amount of the award under which the City was to acquire that property. There were also other conditions of sale, including the following:—

"7. At the termination of this contract the City may (in the event of the Council so determining) take over all the real and personal property necessary to be used in connection with the working of the said railways, at a value to be determined by one or more arbitrators (not exceeding three) to be appointed as provided in the Municipal Act and Acts respecting Arbitrations and References, and to have all the powers of arbitrators appointed under said Acts, and each party shall bear one-half of the cost of the necessary arbitration at conclusion of term of lease, but the City shall only pay for the land conveyed by them to the purchaser, what it is worth, without reference to its value for the purpose of operating a street railway or railways.

The successful tender was that of Messrs. Kiely, McKenzie & Everett, and by an indenture dated the 1st September, 1891, the Corporation assigned to them and to Mr. C. C. Woodworth all the railways and property acquired by the Corporation from the Toronto Street Railway Company and granted to them the exclusive right for a period of twenty years from that date, and for the extended period of ten years in the event of the needed legislation being obtained "and no longer," to operate surface street railways in the City of Toronto with the exceptions therein mentioned, the above conditions of sale being incorporated in and made part of the grant.

By a statute of the Legislature of Ontario passed on the 14th April, 1892 (55 Vict. Ch. 99), the agreement between the Corporation and the four persons above named, with the conditions of sale above referred to, were declared to be valid and binding upon all parties for the full period or thirty years from the 1st September, 1891, and no longer, but subject to the provisions of the Act. By the same statute the respondent Company, the Toronto Railway Company (therein called the Company), was incorporated and was empowered to purchase and take over from the above-named parties the agreement of the 1st September, 1891, and all the property, rights and privileges comprised therein. Section 4 of the statute contained certain provisions, relating to the option of taking over the railway property reserved to the City by

clause 7 of the conditions of sale, which it is desirable to set out in full :—

“ 4.—(2) If the City of Toronto desire to exercise the right of taking over the property necessary to be used in the working of the railways at the termination of the said period of thirty years it shall, not less than twelve months prior thereto, give to the purchasers or the Company, as the case may be, notice of its intention so to do.

“ (3) After the said City of Toronto shall have given notice of its intention to take over the said property, it may at once proceed to arbitrate under the conditions in that behalf, and both the City and the purchasers or the Company, as the case may be, shall in every reasonable way facilitate such arbitration, and the arbitrators appointed in the matter shall proceed so as, if possible, to make their award not later than the time named by the City for taking over the said property. But if from any cause the award shall not be made by such time or if either party be dissatisfied with the award, the City may nevertheless take possession of the said railways and all the property and effects thereof, real and personal, necessary to be used in connection with the working thereof on paying into Court either the amount of such award, if the award be made, or, if not, upon paying into Court or to the purchasers or Company, as the case may be, such sum of money as a judge of the High Court of Justice may, after notice to the opposite party, order, and upon and subject and according to such terms, stipulations and conditions as the said Court shall by its order direct and prescribe, provided always that the rights of the parties except in so far as herein specially provided, shall not be affected or prejudiced thereby. In determining such value the rights and privileges granted by the said agreement and the revenue, profits and dividends being or likely to be derived from the enterprise are not to be taken into consideration, but the arbitrators are to consider only the actual value of the actual and tangible property, plant, equipments and works connected with and necessary to the operation of the railways, which is not to include any land, property or rights acquired or used in connection with the said street railway, and which do not actually form a part of the said street railway undertaking necessary to the carrying on of the same.

“ (4) In arriving at such value the arbitrators are to consider and award only the value of the said several particulars to the City at the time of the arbitration, having regard to the requirements of a railway of the best kind and system then in operation and applicable to the said City.”

The Toronto Railway Company (which will be referred to as the Company) duly purchased and took over the street railways and the property connected therewith and carried on the railways during the whole period of thirty years expiring on the 31st August, 1921.

In the month of June, 1920, the Corporation gave notice to the Company under section 4 (2) of the Act of 1892 that it was its intention to exercise its right of taking over at the end of the period of thirty years the property necessary to be used in connection with the working of the tramways, and this notice was accepted by the Company. In June, 1921, three arbitrators (Mr. Hume Cronyn, Sir Thomas White and Sir Adam Beck) were appointed under clause 7 of the conditions of sale and section 4 (3) of the Act to determine the value of the property to be taken over. The arbitration was formally opened in that month, but at the request of the parties the hearing of evidence

was postponed until the month of September following. On the 25th August, 1921, an order was made by Mr. Justice Latchford that, upon the Corporation paying to the Company the sum of \$1,000,000 and paying into Court the sum of \$500,000 to abide the event of the arbitration pending between the parties, the Corporation should be at liberty to take possession of the railways of the Company and all property necessary to be used in connection therewith immediately upon the expiration of the 31st August, 1921, pursuant to section 4 (3) of the Act, and also that the Corporation should be entitled to credit against the purchase price as ascertained in the arbitration a further sum of \$1,000,000, being part of the amount due by the Company to the City in respect of percentages. The Corporation duly paid the above sums of \$1,000,000 and \$500,000, and at midnight on the 31st August, 1921, took possession of the railways and other property.

The arbitration then proceeded, and on the 30th January 1923, the arbitrators by a majority (Mr. Hume Cronyn and Sir Thomas White) made an award whereby they fixed the value of the property which the City was under an obligation to take over at \$11,188,500. Sir Adam Beck, the remaining arbitrator, dissented from the award but did not name an alternative figure. The majority of the arbitrators issued to the parties a full and lucid statement of the reasons for their award, to which reference will be made later in this judgment.

The Corporation being dissatisfied with the result of the arbitration moved in the Supreme Court of Ontario by way of appeal from the award, and also to set it aside on the ground of certain errors in law which were alleged to appear upon the face of it; and the Company also moved to remit the award to the arbitrators on certain other grounds of law. Both motions came before Mr. Justice Logie, who, without entering upon the merits of the motions, dismissed them pro forma to enable appeals to be taken to the Appellate Division. Appeals were accordingly taken to the Appellate Division, and that Court on the 24th September, 1923, made an order whereby they (1) dismissed the appeal of the Corporation against the award, (2) on the motion of the Corporation to set aside the award varied the award by striking out of it the value of certain property which the City had objected to take over as not being necessary for working the tramways but which the arbitrators had held to be necessary for that purpose, and also by striking out an allowance for interest, but otherwise refused the motion, and (3) dismissed the Company's motion to remit the award to the arbitrators. Hence the present appeal and cross-appeal.

The appeal of the City relates exclusively to the method adopted by the arbitrators in valuing the several properties taken over; and before considering the objections put forward it is desirable to describe in greater detail the reasons given by the

arbitrators for their award. In these reasons the arbitrators described the property to be valued by them as follows :—

“ The property which it is the duty of the Board to value in accordance with the provisions of the Agreement and the Statute consists of railway tracks and sub-structures, overhead and underground distribution system, rolling-stock, substations with their equipment, land and buildings (including car-building and repair shops and car-barns), tools, and other chattels necessary to be used in connection with the working of the railway.”

As to the method or principle to be adopted in making the valuation they referred in detail to the provisions of the Ontario Act above referred to (55 Vict. Ch. 99, Sect. 4) and to clause 7 of the conditions of sale, and stated their conclusion as follows :—

“ The principal question, it seems to us, is, what is the actual value as of the time of the arbitration of the actual and tangible property, plant, equipments, and works connected with and necessary to the operation of the railways. The several qualifications referred to above must be kept constantly in mind in making the valuation.”

The arbitrators then proceeded to consider how they were to arrive at such actual value, and after quoting certain decisions (such as *Edinburgh Street Tramways Co. v. Lord Provost of Edinburgh*, L.R. 1894, A.C. 456, and *Melbourne Tramway and Omnibus Co. Ltd. v. The Tramway Board*, L.R. 1919, A.C. 667), in which the valuation of tramway property at the sum which it would cost to reconstruct it, subject to a deduction for depreciation, had been approved by the Courts, they proceeded as follows :—

“ As to all plant *in situ*, such as track with substructures, overhead and underground distribution system, machinery and equipment fixed in place for use in the operation of the railway, it seems clear from the foregoing decisions and judicial utterances that an approved method of determining their value is cost of reproduction at the time as of which the valuation is to be made, less a proper allowance for depreciation. Counsel for the Railway Company contended that the word ‘ depreciation ’ as used in these decisions means only physical wear, and that obsolescence, unless so complete as to require or justify immediate removal of the item of plant under consideration, is not to be considered. We do not concur in this view. We understand the word ‘ depreciation ’ occurring in the decisions cited to include obsolescence and deterioration from whatever cause, and not as confined to physical wear and tear, and to what might be called ‘ obsolescence ’ as distinguished from ‘ obsolescence ’ at the time of valuation. The fact and degree of obsolescence must be determined from the evidence upon the point, having regard to good practice in railway administration and to the qualification of the above-recited Subsection 4 of Section 4 of the Statute.

“ With respect to immovable plant *in situ*, this method of valuation seems the most practicable and convenient. In applying it, however, care must be taken to make full deduction for depreciation as defined. Take the case of a section of track which has become so worn that it should, having regard to good practice, be taken up and replaced by new construction. The cost of reproduction of the section in question might be quite large, but there would have to be deducted an amount for depreciation which would leave only scrap value remaining. In cases of parts or articles connected with plant *in situ* which, although useful, are not now being manufactured, value may be estimated by reference to prices of parts and articles which can be bought to-day, taking into account, of course, comparative utility, depreciation and all other relevant considerations.

“The same method (reproduction cost, less depreciation) may, we think, be useful also in valuing the rolling-stock of the Railway Company, as was done by the arbitrator in the Melbourne Tramway case referred to above. In the case before the Board, where so many of the cars taken over are of older types, it would, however, be most difficult to make the valuation solely by reference to cost of reproduction new, less depreciation. We have had placed before us, however, a great deal of evidence as to the character of this rolling-stock, its original cost of construction, reproduction cost, physical deterioration, degrees of obsolescence, and as to alleged defects and advantages from the operating standpoint. All this evidence has been given its due weight in reaching conclusions as to the value of the rolling-stock.

“The principle of reproduction cost less depreciation is also of service in valuing buildings, such as car-barns, car-construction and repair shops, sub-stations and the plant and machinery which they contain. Care must be taken here also to make full deduction for depreciation (including obsolescence) and to take into account the evidence adduced bearing upon the question of the suitability of such buildings, plant and machinery for the purposes for which they are being used, and, generally, all factors bearing upon the matter of their usefulness and fair value, subject to the qualifications of the Agreement and Statute.

“With regard to tools, stores and small chattels (fixed or unfixed) generally, it is not necessary to go to the trouble of considering what it would cost to reproduce them new and then deduct an amount for depreciation. We have had evidence as to the market value of such chattels or of others which would serve as well or better, and from such market value and comparison and other evidence relating to use, condition and extent of depreciation a conclusion as to value may be reached.

“As to land (other than land acquired from and now retaken by the City) it seems to us that it should be valued at its fair value as of the time of the arbitration. In estimating its fair value we are, we think, entitled to consider, in addition to other relevant factors of value of individual parcels, their suitability (having regard to size and location) for street railway purposes. As to the land (including buildings) acquired from the City by the purchasers, and particularly referred to in clause 7 of the Conditions, the question is, what is its fair value without reference to its value for the purpose of operating a street railway.”

The arbitrators concluded this part of their reasons by the following statement :—

“Speaking generally, we have had before us an immense amount of evidence dealing with the suitability, physical condition, depreciation, original cost of construction or purchase price, cost of reproduction and overhead costs connected with reproduction, of all the properties, real and personal, taken over by the City. All this evidence has been considered in its bearing upon the question of value. In this connection we have kept before us the language of the Judgment of the Honourable Chief Justice Meredith delivered December 16th, 1921, upon a case stated by the Board for the opinion of the Court upon a point as to the relevancy of certain evidence. He says :—

‘There is no law which limits arbitrators to one method of determining value ; any and every method that may be helpful may be applied. Actual cost, reproduction cost and market value—direct or indirect—or actual value, may each and all give assistance ; or only one may be useful, according to the nature and circumstances of the particular enquiry.’

“All evidence adduced by both sides has been carefully considered and given its due weight in its bearing upon the question of actual value at the time of the arbitration, having regard to the provisos and qualifications of the Agreement and Statute. The Board has also had the advantage of an inspection of the land and buildings, railway plant and equipment of the Company.”

Having disposed of these general considerations, upon which they based the principal items in their valuation, the arbitrators proceeded to deal with certain more special questions which had been raised by the parties; and their decisions on such of these questions as are now material to be referred to may be summarised as follows:—

- (A) They rejected a contention on the part of the Company that in estimating the cost of reproduction they should take into account the rates of wages and prices obtaining during a period of three years prior to the 1st September, 1921, on the assumption that if the City had been obliged to construct a railway system which was to be available on that date it must have begun operations three years earlier, adding:—

“It seems to us that, so far as the principle of reproduction cost less depreciation is availed of, it must be reproduction cost as of ‘the time of the arbitration.’”

- (B) They rejected a contention on behalf of the City that in estimating the cost of reproduction they should base their estimates upon the prices of material and rates of wages prevailing before the War, as such prices and rates would have varied had there been no war and had the trend of prices and wages in progress before the War continued down to the time of the arbitration, adding:—

“In our opinion, it would be impossible to determine the ‘actual value at the time of the arbitration’ upon such a hypothetical basis, which has no reality in fact, and consequently seems opposed to the meaning contained in the word ‘actual’ in the expression ‘actual value.’ We do not conceive that the valuation as of the time of the arbitration should have precise regard to the prices of labour or of material as of a specific date such as September 1st, 1921. Where the method of reproduction cost less depreciation is used or market prices are considered, regard should be had to the evidence as to construction cost and prices generally as of the time of the arbitration. In view of the stress laid by Counsel for the City upon war-time costs and speculative prices, it may be pointed out that the War has been over for more than four years and that since the date of taking over the railway prices of commodities and cost of labour have, according to the evidence, become fairly stabilized.”

- (C) They dealt in detail with certain items of overhead expenditure, preliminary expenses and other “intangible” items for which the Company claimed credit.
- (D) They rejected a claim by the Company that payments made by the Company towards the cost of constructing a subway in Avenue Road under the tracks of the

Canadian Pacific Railway and a bridge (known as the Don Bridge) over the steam railways on Queen Street East should be included in the valuation of the track on the following grounds :—

“ These payments were made by the Company in pursuance of Orders of the Board of Railway Commissioners for Canada, the object being the elimination of dangerous level crossings and consequent protection and convenience of the public. It does not appear to us that these payments constitute ‘ actual and tangible property ’ within the meaning of the Statute, and we have been unable to agree with the argument put forward by Counsel for the Company that these payments became, so to speak, attached to or inherent in the cost of construction of the tracks of the Company carried through the subway and over the bridge respectively. By mandatory Orders the Board of Railway Commissioners assessed these payments against the Company, and we cannot see that they may be taken into consideration by the Board in estimating the cost of reproduction of the railway track.”

- (E) They included in their award, though with some doubt, interest upon the amount of the valuation from the time when the railway was taken over by the City to the date of the award.
- (F) With regard to the items of property which the City objected to take over on the ground that they were not “ necessary to be used in connection with the working of the railway ” (which items were set out in detail in Schedule B to the award), the arbitrators considered that they had authority to decide whether such items in fact came within the above description, and held that certain items came within the description and the value thereof should be allowed, but that certain other items of property, including (a) the main office building of the Company, (b) the “ Scarborough Bridge property,” and (c) the “ King Street and St. Lawrence Street property,” were not necessary to be used in connection with the working of the railway and accordingly were not to be included in the valuation.

Appeals against the award having been brought as above mentioned, the Supreme Court, on the application of the City, varied the award by striking out of the award and valuation the sums allowed in respect of certain of the items set out in Schedule B of the award on the ground that the arbitrators had no jurisdiction to determine whether those items were or were not necessary to be used in connection with the working of the railways, and that the parties must first have their necessity established within the terms of the contract before an arbitration could be had as to their value ; and also by striking out the allowance of interest on the value as ascertained by the arbitrators on the ground that, though it was equitable that interest should be paid from the time of taking possession, there was no warrant for including it in the award ; but in other respects the appeals were dismissed. Hence the present appeals.

In support of the appeal of the City Counsel raised two points relating to the methods of valuation adopted by the arbitrators.

First they contended that, in valuing certain parts of the property taken over, and especially in valuing the rolling-stock, buildings, and track, the arbitrators had proceeded on the theory that in every case the value must be taken to be what it would cost to reproduce the items less depreciation, and that no such method should have been applied to this property in the present case. The proper course, they urged, having regard to the provisions of Section 4 (4) of the Act of 1892, was first to consider whether, having regard to size, suitability, location and other factors, a reasonable person would reproduce these assets as part of a Toronto railway system in 1921, and if not to value them on the basis of what they would fetch, or if no sale were possible, then on a "scrap" basis. In their Lordships' opinion this argument proceeds on a misconception as to what the arbitrators did. No doubt they took reproduction cost less depreciation as affording a serviceable guide in valuing the track, rolling-stock, and buildings; and in this they were fully justified by the authorities cited. Indeed it is difficult to see how such items as fixed plant *in situ*, car-barns, car-construction and repair shops, sub-stations and the machinery which they contain, could have been valued except with the assistance of some such principle. But the arbitrators were careful to make it clear that they had by no means adopted reproduction cost less depreciation as the only and sufficient test of value. In valuing the track and other plant *in situ* they allowed (as the above quotations show) not only for wear and tear, but for "obsolescence," and had regard to good practice in railway administration and to section 4 (4) of the Act, and also to comparative utility and other relevant considerations. So, in valuing rolling-stock, they gave due weight to character, obsolescence and alleged defects and advantages from the operating standpoint; and with regard to buildings, suitability and other matters bearing upon their value were plainly not neglected. If the statements made by the arbitrators in the reasons for their award as to the methods which they had adopted in making their valuation are accepted as correct—and there is no reason whatever for not so accepting them—it will appear that they not only proceeded on lines which had been approved by many decisions of the House of Lords and of this Board, but gave due weight to the special provisions of the Act of 1892 and to all the circumstances of the case. This contention therefore fails.

But secondly it was contended on behalf of the City that in cases where reproduction cost had to be taken into consideration that cost should have been estimated, not on the basis of the prices of labour and materials which were current at the date of the valuation, but either on normal prices or on the "trend basis" referred to in the above extract from the arbitrators' reasons marked (B). You cannot, it was said, apply the theory of reproduction at current prices at a time when, having regard to the

abnormal prices actually current, no reasonable man would reproduce the subject-matter at those prices. Their Lordships agree with the arbitrators in holding that they were under no obligation to proceed on any such imaginary basis. At the time when the valuation was made prices had (the arbitrators say) become fairly stabilized; and in determining actual value at that time they were entitled to have regard to the prices then generally current.

For these reasons their Lordships are of opinion that the appeal of the City fails.

Passing to the cross-appeal, it will be necessary to deal first with an objection taken by the Company to the method of valuation adopted by the arbitrators. In applying the principle of reproduction cost less depreciation, it was argued, the arbitrators should have estimated reproduction cost upon the basis mentioned under the above heading marked (A), that is to say, upon the basis of the prices of labour and materials which were current during the three years next preceding the 1st September, 1921. The right method, it was said, was to consider what must have been paid by a contractor who had contracted to have the property in question ready on that date, and such a contractor would have expended three years in the work of construction and would have proceeded upon the prices from time to time current during that period. In their Lordships' opinion this argument is equally untenable. There is not sufficient evidence to show that a period of three years must have been expended in construction, and indeed it is plain that as to some of the property in question a much shorter period would have sufficed. But in any case there is no warrant for pushing the hypothesis of reconstruction to this length, and the arbitrators were entitled to base their valuation on the prices generally current at the time of the arbitration. In short, the argument which disposes of the "trend basis" disposes of the "three years' basis" also.

The remaining points taken on the Company's cross-appeal related to the decisions of the arbitrators summarised above under the headings (c) to (f) and may be considered under like headings.

(c) The objection to the finding of the arbitrators as to overhead expenditure was abandoned.

(d) It was contended that the payments made by the Company towards the cost of the Avenue Road subway and the Don Bridge should be included in the valuation of the track. A track over a bridge or in a subway, it was said, was worth more than a track on a level road and should be valued accordingly. In their Lordships' opinion this argument should prevail. It is true that, as the arbitrators point out, the payments in question were not "actual and tangible property" within the meaning of Section 4 (3) of the statute; the payments as such represent cost and not value. But the asset produced by means of the payments—namely a track passing under the Canadian Pacific line and over the steam railways in Queen Street and so escaping

both these obstructions to traffic—is still in existence and available to the City ; and it could hardly be reproduced except by means of an expenditure at least equivalent to the contributions made by the Company. (See Lord Low's judgment in the *Edinburgh Tramway* case, 21 R. at p. 695). In their Lordships' opinion the sum of \$125,000, fixed by the arbitrators as representing these payments properly depreciated, should be allowed.

(E) The Company claimed that the award of the arbitrators, so far as it allowed interest on the value of the property taken over from the date when possession was taken to the date of the award, should be restored. Upon this point their Lordships agree with the view taken by the Supreme Court. The general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid is well established, and has on many occasions been applied to compulsory purchases ; and their Lordships are not aware of any circumstances which would prevent that principle from applying in the present case. But the duty of the arbitrators in this case was not to determine all the rights of the Company, but only to ascertain the actual value of certain property at a certain time ; and it is a truism to say that such value cannot include interest upon it. The liability for interest depending upon the principle stated, lies outside of the arbitration for its enforcement.

(F) Lastly, it was contended on behalf of the Company, contrary to the decision of the Supreme Court, that the arbitrators had jurisdiction to determine whether the disputed items of property comprised in Schedule B to the award were or were not necessary to be used in connection with the working of the railway, and accordingly that the value of the items of this character allowed by the arbitrators and struck out by the Supreme Court should be restored. It was also contended that as to the above items marked (a) (b) and (c) the arbitrators were wrong in law in holding them not necessary to be so used.

Upon the question of the arbitrators' jurisdiction their Lordships are unable to agree with the decision of the Supreme Court. No doubt it is true, as pointed out by Mr. Justice Hodgins, that the arbitrators were only authorised to ascertain the value of property necessary for the working of the railways ; but it was impossible for them in this case to fix a sum representing that value without incidentally determining (in case of dispute) what items were to be included in it. The question of "necessity," like the question of value, was a question of fact. Both questions had to be determined before the arbitrators could name a sum as representing the value of the "necessary" property ; and both were in their Lordships' opinion, committed to the arbitrators for decision. The decisions in *Manchester Tramway Co. v. Manchester Corporation* (37 L.T. 504, 19 T.L.R. 439) and *Manchester Carriage Co. v. Swinton Urban District Council* (L.R. 1906, A.C. 277) appear to be in point. The value of the items allowed by the arbitrators amounting to \$543,500 should therefore be restored to the award.

As to the particular items which were disallowed by the arbitrators and which were in question on the cross-appeal, their Lordships have come to the following conclusions:—

- (a) As to the Head Office of the Company the arbitrators have found that from the standpoint of the administration of the railway a head office was necessary, that the office in question was situated on a convenient site, and that at the time of the taking over of the railway it was being used for the purposes of the Company and was “practically” used only in the operation of the railway. In their Lordships’ opinion the true legal inference from these findings is that the office was within the meaning of the conditions necessary to be used in connection with the working of the railway. The value, fixed by the arbitrators at \$170,000, should therefore be added to the award.
- (b) The Scarborough Bridge property belonged at the time of the taking over of the railway to a subsidiary Company in which the appellant Company held a controlling interest; but it was not the property of the appellant Company, and that Company had no title to it. In these circumstances their Lordships are of opinion that the arbitrators acted rightly in excluding it from their valuation.
- (c) The King Street and St. Lawrence Street property was found by the arbitrators not to be necessary to be used in connection with the working of the railway, and they add:—

“The City took possession and for a time occupied a small parcel of this property used as a compressor station. The parties, however, having agreed that the property shall be dealt with as a whole and that the compressor station shall follow the fate of the major part of the property, we have included nothing in our Award for said station.”

Their Lordships see no reason for questioning the decision of the arbitrators on this point.

This disposes of the points raised in these appeals; and, for the above reasons, their Lordships are of opinion that the appeal of the City should be dismissed with costs, and that the appeal of the Company should be allowed as to the Avenue Road Subway and Don Bridge, the items in Schedule B to the award allowed by the arbitrators, and the main office buildings, but otherwise should be dismissed. As the Company have only partly succeeded in the cross-appeal, there will be no costs of the cross appeal. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE CORPORATION OF THE CITY OF TORONTO

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THE TORONTO RAILWAY COMPANY

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DELIVERED BY VISCOUNT CAVE.

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