

70 & 71, 1930

In the Privy Council.

No. 16 of 1930.

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

BETWEEN

THE CANADIAN PACIFIC RAILWAY COMPANY
AND CANADIAN NATIONAL RAILWAYS - - *Appellants*

AND

THE TORONTO TRANSPORTATION COMMISSION AND
THE CORPORATION OF THE CITY OF TORONTO *Respondents*
(*Royce Avenue Subway*)

AND BETWEEN

THE TORONTO TRANSPORTATION COMMISSION - *Appellants*
AND

CANADIAN NATIONAL RAILWAYS, THE CANADIAN
PACIFIC RAILWAY COMPANY AND THE COR-
PORATION OF THE CITY OF TORONTO - - *Respondents.*
(*Bloor Street Subways*)

CONSOLIDATED APPEALS.

RECORD OF PROCEEDINGS.

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ON APPEAL FROM THE SUPREME COURT
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BETWEEN
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AND

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(*Bloor Street Subways*)

CONSOLIDATED APPEALS.

RECORD OF PROCEEDINGS.

No. 1.

Statement of Facts (settled by Board of Railway Commissioners for use on appeal
to Supreme Court of Canada).

No. 1.

—
Statement
of Facts.

NORTH WEST GRADE SEPARATION.

1. Bloor Street is an original concession road extending in an east and west direction through the northwest section of the City of Toronto as shown on the plan attached hereto and marked as Schedule No. 1.

2. Royce Avenue is parallel to and about three-quarters of a mile north of Bloor Street as shown on said plan.

10 3. The Galt Subdivision of the Canadian Pacific Railway Company, hereinafter called the Canadian Pacific, was constructed during the years 1875 to 1879 and extends in part in a generally northwesterly direction crossing Bloor Street and Royce Avenue as shown on said plan.

No. 1.
—
Statement
of Facts—
continued.

4. The Brampton Subdivision of the Canadian National Railways, hereinafter called the Canadian National, was constructed in the year 1858 parallel to and immediately east of the Galt Subdivision of the Canadian Pacific.

5. The Toronto Grey & Bruce Subdivision of the Canadian Pacific was constructed during the years 1869 to 1871 parallel to and immediately east of the Brampton Subdivision of the Canadian National.

6. The Newmarket Subdivision of the Canadian National crosses Bloor Street approximately twelve hundred and eleven feet east of the lines of the Canadian Pacific described in paragraph 5 hereof. 10

7. Dundas Street is an old established Provincial highway extending in a northwesterly direction through Toronto, crossing Bloor Street a short distance west of the point where the latter street crosses the tracks of the steam railways and being immediately parallel to the said railways from a point approximately 1783 feet south of Royce Avenue to a point just north of Royce Avenue at which point it veers to the west.

Dundas Street is one of the main arteries over which traffic from the districts north and west of Toronto enter the City.

8. The street railways in the City of Toronto were originally operated in part by the Toronto Railway Company and in part by the City Corporation 20 and for a number of years prior to the year 1920 had included lines extending from the centre of the City along Bloor Street to the intersection of Lansdowne Avenue, along Dundas Street to West Toronto, and along Bloor Street from the intersection of Dundas Street westerly. These lines of street railway, among others, are indicated in black on the said Plan.

9. The Toronto Transportation Commission, hereinafter called the Transportation Commission, was incorporated by an Act of the Legislature of the Province of Ontario, being Statutes of Ontario, 1920, Chapter 144. A copy of the said Act with amendments thereto is hereto attached as Schedule No. 2. (Record, p. 43.) 30

10. Pursuant to the provisions of this Act the City Corporation, in the year 1921, acquired the property of the Toronto Railway Company and entrusted the operation, control and management of the said property and also of the street railways theretofore operated by the City Corporation to the Transportation Commission which has since operated the said lines of street railway together with extensions thereof.

11. The practice in Toronto as in other Canadian cities is to charge a single fare from any point to another point on the railway in the City in order to facilitate transit and a transfer ticket is issued entitling holder to transfer from one car to another at junction points. 40

12. From the date mentioned in Paragraph 10 hereof up to closing of the street for subway construction no line of street railway existed on that portion of Bloor Street between Lansdowne Avenue and Dundas Street, but passengers on the street railway travelling west along Bloor Street as far as Lansdowne Avenue, who wished to continue west and north, instead of travelling south and transferring at the corner of Lansdowne Avenue and Dundas Street, could obtain transfers and walk

along Bloor Street across the steam railway tracks to the intersection of Bloor and Dundas Streets and continue their journey on the street railway from that point, and similar privileges were given to those travelling in the opposite direction. The line of street railway subsequently constructed on this portion of Bloor Street as hereinafter referred to, is shown, in green on the said Plan.

No. 1.
—
Statement
of Facts—
continued.

13. Prior to February 1st 1883, the City limits of the City of Toronto did not extend north of Bloor Street nor west of Dufferin Street as shown on the said plan, which also illustrates the growth of the northwestern
10 portion of the City and the built-up area.

14. At that date there were only 31 houses built within the portion of the City bounded by College, Clinton, Bloor and Dufferin Streets. Clinton Street extends in a north and south direction through the City parallel to and approximately one mile east of Dufferin Street.

15. North of Bloor Street and west of Dufferin Street there lay part of Seaton Village. In the year 1882, Seaton Village was annexed to the City of Toronto, and the population of this portion of Toronto lying north of Bloor Street and west of Dufferin was then approximately 1300 people.

16. A statement showing the growth in population in the district
20 north of Bloor Street and west of Dufferin Street from the years 1879 to 1924 is hereto attached as Schedule No. 3. (Record, p. 41.)

17. A statement showing the growth in population in the City of Toronto and adjacent territory from 1879 to 1924 is attached hereto as Schedule No. 4. (Record, p. 42.)

18. By Order of the Railway Committee of the Privy Council dated January 8th 1891, gates and watchmen were installed for the protection of the public at the crossing of Bloor Street with the Canadian Pacific Galt and Toronto, Grey & Bruce Subdivisions, and the Canadian National Brampton Subdivision. A copy of such Order is attached hereto as
30 Schedule No. 5. (Record, p. 7.)

19. By Order of the Board No. 10782, dated May 23rd 1910, provision was made for the protection of the crossing of Royce Avenue across the tracks of the steam railways by gates and watchmen. A copy of Order No. 10782 is attached hereto as Schedule No. 7. (Record, p. 9.)

20. By Order No. 4795 of the Board, dated 18th May 1908, provision was made for the protection by gates and watchmen of the crossing at Bloor Street West, in the City of Toronto, by the track of the Northern Division of the Grand Trunk Railway Company of Canada, now the Newmarket Subdivision of the Canadian National Railways. A copy of
40 said Order No. 4795 is attached hereto as Schedule No. 6. (Record, p. 8.)

21. The protection by gates and watchmen at the crossings mentioned in the three preceding paragraphs hereof was maintained until the level crossings were closed for the purpose of subway construction, pursuant to the Board's Order of June 5th, 1924.

22. On the 21st day of November 1922, the Corporation of the City of Toronto applied to the Board for an Order requiring the Canadian National to collaborate with the City in the preparation of a joint plan for

No. 1.
 Statement
 of Facts—
 continued.

the separation of grades at Bloor Street and Royce Avenue as well as at a number of other streets in the Northwestern section of the City.

23. A hearing of the said application was held by the Board in Toronto on February 14th 1923. As a result of the hearing the parties agreed to study the matter and submit a report to the Board.

24. At a hearing by the Board held in Toronto on January 8th 1924, plans were submitted by the City and the Railways and discussed. Various organizations and ratepayers' associations in the City of Toronto which were affected were represented at the hearing, and it was urged by them as well as the City of Toronto that one of the reasons requiring protection by grade separation at these crossings was to enable the Transportation Commission to extend its lines of street railway across the tracks so as to give the residents of the northwestern section of the City a better and more continuous street car service. 10

It was also stated that the Transportation Commission would possibly in the future extend its lines of street railway across the tracks of the steam railways at Royce Avenue.

The hearing was adjourned for the purpose of allowing further study of the plans submitted.

25. A further hearing of the Board was held in Toronto on February 19th 1924, notice of which was sent by direction of the Board to the Transportation Commission, which had not previously appeared, and the bodies operating other public utilities interested in or affected by the plans submitted. The Transportation Commission appeared at this and subsequent hearings, reserving its rights, and took part in the final argument, as to the distribution of cost, at the same time stating that it was immaterial to it whether the subways in question were constructed or not. At these hearings exhaustive enquiry and discussion took place covering the various general schemes submitted, including the proposed methods of dealing with the crossings at Bloor Street and the proposal of the Canadian Pacific to divert Dundas Street as part of the Royce Avenue grade separation. It was shown that Dundas Street was a heavily travelled main artery with a double track street railway, extending along and immediately adjacent to the westerly limit of the steam railway right-of-way from a point some distance south of Royce Avenue to a point just north of that crossing. The Canadian Pacific proposal, which provided for the diversion of Dundas Street, including the street railway tracks, at its then level with easy approaches to the subway in both directions on the original location of the street, was supported by the evidence of an independent experienced engineer, called on behalf of a body of citizens of West Toronto, and was adopted by the Board. The diversion runs from the corner of Humberside Avenue and Dundas Street on a tangent through to Dundas Street at the corner of Indian Road, thus avoiding the dangerous condition of heavy traffic coming upon a busy street with street car tracks which would have resulted from the construction of the subway at Royce Avenue, if Dundas Street and the street railway tracks had not been diverted. 20 30 40

26. As a result of these hearings the Board, acting under its powers for the protection, safety and convenience of the public, issued its Order No. 35037, dated May 9th 1924, approving the general plans submitted by the Canadian Pacific for grade separation in the northwestern section of the City including subways under the tracks of the Canadian Pacific Galt and Toronto, Grey & Bruce Subdivisions and the Canadian National Brampton Subdivision at Bloor Street and Royce Avenue and under the tracks of the Canadian National Newmarket Subdivision at Bloor Street. A copy of the said Order is attached hereto as Schedule No. 8 (Record, p. 10) and a copy of plan showing the subways ordered to be constructed is attached hereto and marked as Schedule No. 8-A.

27. The reasons for judgment upon which the said Order No. 35037 was issued are attached hereto as Schedule No. 9. (Record, p. 11.)

28. On May 21st 1924, a further hearing of the Board was held in Toronto to discuss the details of the works referred to in the preceding paragraph hereof from an engineering standpoint, to give directions as to the portions to be undertaken forthwith and to hear arguments on the question of distribution of the cost of the subways ordered to be constructed. Following this hearing the Board, acting under the powers referred to in Paragraph 25 hereof, issued its Order No. 35153, dated June 5th 1924, which directed that work on the subways now in question be undertaken and provided inter alia as follows :

“That all questions of distribution of costs, interest or other matters involved in the construction of the said work be reserved for further order of the Board.”

A copy of the said Order is attached hereto as Schedule No. 10. (Record, p. 19.)

29. On the 10th day of July 1924, Order No. 35308 was issued by the Board amending Clause 1 of Order No. 35153. A copy of the said Order No. 35308 is attached hereto as Schedule No. 11. (Record, p. 20.)

30. On the 15th day of July 1925, the Transportation Commission applied to the Board of Railway Commissioners for an Order under Section 252 of the Railway Act, granting them leave to construct for the Corporation of the City of Toronto, a double track line of street railway, between Dundas Street and Lansdowne Avenue along Bloor Street. A true copy of said application is attached hereto as Schedule No. 12. (Record, p. 21.)

31. By Order No. 36693, dated August 13th 1925, the Board granted the said application and reserved for further consideration the question of contribution to the cost of said subways by the applicant. Copies of the said Order and of the consents thereto of the Canadian Pacific and Canadian National are attached hereto as Schedule No. 13. (Record, pp. 22-23.)

32. Under the authority so granted to it, the Transportation Commission did, during the course of construction of the subways, construct a double line of street railway tracks along Bloor Street from

No. 1.
 Statement
 of Facts—
continued.

Lansdowne Avenue to Dundas Street and through the subways constructed pursuant to the Board's Order and the Transportation Commission now operates street cars through the said subways. The trolley wires of such street railway are carried through the subways in a wooden trough which is supported by the span cables strung across the subways at intervals and hooked to the top of the steel bents at the centre of the subways and at the sidewalk line. In addition to the trolley wires an insulated feed cable for supplying current to them is carried through the subways, being suspended by oak blocks bolted at intervals to the lower flange of the steel superstructure, and connected at intervals with the trolley wires. A plan illustrating the method of construction is attached hereto as Schedule No. 14. 10

The Transportation Commission does not operate street cars through the subway at Royce Avenue.

33. By Order of the Board No. 36737, dated August 22nd 1925, the Canadian Pacific and the Canadian National were authorized to use and operate the subway carrying the tracks of the Canadian Pacific Galt Subdivision and the Canadian National Brampton Subdivision over Bloor Street. A copy of such Order is attached hereto as Schedule No. 15. (Record, p. 25.) 20

34. By Order of the Board No. 36738, dated August 21st 1925, the Canadian National was authorized to use and operate the subway carrying the tracks of its Newmarket Subdivision over Bloor Street. A copy of such Order is attached hereto as Schedule No. 16. (Record, p. 24.)

35. By Order of the Board No. 37239, dated January 15th 1926, the Canadian Pacific and the Canadian National were authorized to use and operate the subway carrying their tracks over Royce Avenue. A copy of such Order is attached hereto as Schedule No. 17. (Record, p. 25.)

36. On November 15th 1926, the Board issued its formal Order No. 38424, distributing the cost of construction of the said subways, and directing that the Transportation Commission should contribute to the cost thereof as therein set forth. A copy of such Order is attached hereto as Schedule No. 18. (Record, p. 26.) 30

37. The reasons for judgment upon which the said Order No. 38424 was issued are attached hereto as Schedule No. 19. (Record, p. 28.)

38. On the 16th February 1928, the Board issued Order No. 40367, rescinding Order No. 38424 and altering the distribution of cost in so far as the contribution from the Grade Crossing Fund was concerned, but not otherwise. A copy of such order is attached hereto as Schedule No. 20 (Record, p. 39.) 40

No. 2.

Schedule 5.—Order of Railway Committee of Privy Council.

No. 2.

Schedule 5.

Ottawa, January 8th, 1891.

To the President
of the Canadian Pacific Railway Company.
Montreal.

Order of
Railway
Committee
of Privy
Council,
8th Janu-
ary 1891.

Be pleased to take notice that the Railway Committee of the Privy Council, in pursuance of the authority vested in it by the 187th and 188th clauses of the Railway Act, 1888, has duly considered the applica-
10 tion of the Corporation of the City of Toronto for protection at the following crossings of streets at rail level in that City by the Canadian Pacific Railway and the Grand Trunk Railway—namely,—

The crossing of Bloor Street by the Canadian Pacific and Grand Trunk Railways—

The crossings of Dufferin Street, Bathurst Street and Avenue Road by the Canadian Pacific Railway—

And that the Committee deems it expedient for the public safety and hereby orders with the sanction of His Excellency the Governor General in Council, that gates and watchmen be provided within two
20 months of the date of this order, and be thereafter maintained by the Canadian Pacific Railway and Grand Trunk Railway Companies, respectively as the case may require, at the said crossings.

That the Committee further orders that the cost attending the placing and maintenance of gates and watchmen at the said crossings be apportioned as follows :—

Where two railway companies use the same crossings each railway company to contribute one third, and the municipality or municipalities interested, the other third of the said cost.

Where one railway company only uses the crossing, the railway
30 company to contribute one-half, and the municipality or municipalities interested, the other half of the said cost.

John A. Macdonald
Chairman, Railway Committee, P.C.
T. Trudeau
Secretary, Railway Committee, P.C.

No. 3.

Schedule 6.

Order of
Board of
Railway
Commis-
sioners
No. 4795 for
protection
of New-
market
Subdivision,
18th May
1908.

No. 3.

Schedule 6.—Order of Board of Railway Commissioners No. 4795 for protection
of Newmarket Subdivision.

File 8791
Case 2891

Order No. 4795

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Meeting at Toronto.

Monday, the 18th day of May, A.D. 1908.

Hon. J. P. Mabee, Chief Commissioner.

James Hills, Commissioner.

10

IN THE MATTER OF the application of the Corporation of the City of Toronto, hereinafter called the "Applicant," under Sections 237 and 238 of the Railway Act, for an Order directing the Grand Trunk Railway Company of Canada, hereinafter called the "Grand Trunk," to provide and maintain gates and a watchman at the crossing, at Bloor Street West, in the said City of Toronto, by the track of the Northern Division of the Grand Trunk :

UPON the hearing of Counsel for the Applicant and the Grand Trunk, the evidence adduced, and what was alleged—

1. IT IS ORDERED that the Grand Trunk establish and maintain gates at the Bloor Street West crossing; the same to be put in operation within six months from the date of this Order. 20

2. AND IT IS FURTHER ORDERED that, immediately after installation, the Applicant pay to the Grand Trunk one-half the cost of the said installation, and at the end of each year, upon accounts for maintenance being rendered by the Grand Trunk to the Applicant, the latter pay to the Grand Trunk one-half the cost of such maintenance.

3. AND IT IS FURTHER ORDERED that, in the event of any dispute, the amounts charged or chargeable be adjusted by the Board.

4. AND IT IS FURTHER ORDERED that, in the event of the construction of any electric railway across the point in question, this Order shall be open for further consideration if application therefor is made. 30

BY THE RAILWAY COMMISSIONERS
FOR CANADA

Examined and certified as a true
copy under Section 23 of "The
Railway Act."

A. D. CARTWRIGHT,

Sec'y of Board of Railway Commissioners for Canada.

40

OTTAWA, 4th day of June 1908.

(Sgd.) J. P. MABEE,

Chief Commissioner,

Board of Railway Commissioners for Canada.

No. 4.

Schedule 7.—Order of Board of Railway Commissioners, No. 10782.

Order No. 10782.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Meeting at Toronto.

Monday, the 23rd day of May, A.D. 1910.

Hon. J. P. Mabee, Chief Commissioner.

D'Arcy Scott, Assistant Chief Commissioner.

S. J. McLean, Commissioner.

No. 4.

Schedule 7.

Order of
Board of
Railway
Commis-
sioners,
No. 10782,
23rd May
1910.

10 IN THE MATTER OF the application of the Corporation of the City of Toronto, hereinafter called the "Applicant," under Sections 237 and 238 of the Railway Act, for an Order directing the Canadian Pacific and the Grand Trunk Railway Companies to construct and provide a suitable crossing at Royce Avenue, in the City of Toronto, and to provide protection therefor:

File 9437.148:

UPON hearing the application in the presence of Counsel for the Applicant and the Railway Companies, the evidence adduced, and what was alleged by Counsel at the hearing—

20 IT IS ORDERED that the said crossing at Royce Avenue be protected by gates and watchmen,—the work of installing the gates to be carried on by the Canadian Pacific Railway Company; plans to be filed within thirty days from the date of this Order, and the work to be completed within sixty days after the approval of the plans by the Chief Engineer of the Board; the cost of the said work to be borne and paid by the Applicant, and the two Railway Companies in the proportions following: five-fifteenths (5/15) by the Applicant, four-fifteenths (4/15) by the Grand Trunk Railway Company, and six-fifteenths (6/15) by the Canadian Pacific Railway Company. After the completion of the work
30 and the rendering of accounts therefor to the Grand Trunk Railway Company and the Applicant, the Grand Trunk Railway Company to pay its said four-fifteenths (4/15) and the Applicant its five-fifteenths (5/15) of the cost of the said construction; the cost of maintenance to be contributed in the same proportion, upon monthly or quarterly accounts therefor being rendered by the Canadian Pacific Railway Company, whichever may be agreed upon. The gates to be operated day and night.

(Sgd.) D'ARCY SCOTT,
Assistant Chief Commissioner,
Board of Railway Commissioners for Canada.

No. 5.

No. 5.

Schedule 8.

Schedule 8.—Order of Board of Railway Commissioners No. 35037 settling plan of work.

Order No. 35037

Order of Board of Railway Commissioners, No. 35037, settling plan of work, 9th May 1924.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Friday, the 9th day of May, A.D. 1924.

Hon. F. B. Carvell, K.C., Chief Commissioner.

S. J. McLean, Ass't Chief Commissioner.

A. C. Boyce, K.C., Commissioner.

C. Lawrence, Commissioner.

Hon. Frank Oliver, Commissioner.

10

IN THE MATTER OF the application of the Corporation of the City of Toronto, in the Province of Ontario, hereinafter called the "Applicant," under Sections 257 and 259 of the Railway Act, 1919, for an Order requiring the Canadian Pacific and Canadian National Railway Companies to collaborate with the Applicant in the preparation of a joint plan for the separation of grades at the crossings of Bloor Street, Royce Avenue, Weston Road, and St. Clair Avenue by the said railways, and at the crossings of Wallace Avenue and Davenport Road by the Canadian National Railway; and that a time be fixed by the Board for the submissions to it of a plan dealing with grade separation at the said crossings: File Nos. 32453, 18759, 9437.149, 8673, 9437.94, 132.1 and Case No. 1353. 20

UPON hearing the application at the sittings of the Board held in Toronto, February 14th, 1923, in the presence of Counsel for the Applicant and the Railway Companies, and what was alleged; and upon a further hearing at the sittings of the Board held in Toronto, January 8th, 1924, in the presence of the said interested parties—

THE BOARD ORDERS as follows:

1. That no change in grade or interference with the width of right of way be made on the main double track lines of the Canadian Pacific Railway Company's Galt and Toronto, Grey & Bruce Subdivisions and of the Canadian National Railway Company's Brampton Subdivision; and that subways be constructed at Bloor Street, Royce Avenue, Junction Road, and St. Clair Avenue, Toronto; such subways to be the full width of the street, with fourteen-foot clearances,—the Junction Road Subway to extend as far east as Miller Street; but the Applicant may, if it desires to do so, extend the same to Davenport Road; the present Weston Road Bridge to be eliminated; and the Royce Avenue Subway to involve the acquisition of additional land and the construction of a diversion of Dundas Street, as set forth on the plan filed by the Canadian Pacific Railway Company. 30 40

2. That track elevation and grade separations be carried out on the Canadian Pacific Railway Company's North Toronto Line, according to the plan filed by the said Railway Company, including the constructions of subways at Osler Avenue, Symington Street, Lansdowne Avenue, Dufferin Street, and Bartlett Avenue; such subways to be the full width of the street, with fourteen-foot clearances.

3. That subways be constructed on the Newmarket Subdivision of the Canadian National Railway Company, at Bloor Street, Royce Avenue, Davenport Road, and St. Clair Avenue; such subways to be the full
10 width of the street, with fourteen-foot clearances.

4. That if the Applicant should require greater clearances at any of the subways herein authorized, the same is hereby authorized; the additional expense, however, to be borne entirely by the Applicant.

(Sgd.) F. B. CARVELL,
Chief Commissioner,
Board of Railway Commissioners for Canada.

No. 5.
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Schedule 8.
—
Order of
Board of
Railway
Commis-
sioners,
No. 35037,
settling plan
of work,
9th May
1924—con-
tinued.

No. 6.

Schedule 9.—Reasons for judgment of Board of Railway Commissioners in connection with Order No. 35037.

20 Re proposed Northwest Grade Separation, Toronto.

FILE 32453.

(A) F. B. CARVELL, CHIEF COMMISSIONER.

In the month of November, 1922, the City of Toronto made application to this Board for an Order that the Canadian Pacific Railway Company and the Canadian National Railways be required to collaborate with the Corporation in the preparation of a joint plan for the separation of grades in the north-western portion of the City of Toronto.

Parties were heard at Toronto on the 14th of February, 1923, when, after considerable discussion it was suggested that the City and the two
30 railway companies endeavour to arrive at a satisfactory agreement among themselves. A great many conferences were held and, we believe, an honest attempt was made by all parties concerned, to arrive at a conclusion, but as they failed to do so, the case finally came on for hearing at Toronto on the 8th day of January, 1924, when separate proposals were made by the City of Toronto, Canadian Pacific and Canadian National Railways.

Generally speaking, the application as developed involved—

(1) Grade separation at all level street crossings now existing on the Canadian Pacific double track known as the Galt Subdivision, the Canadian National double track Brampton Division, and the Canadian
40 Pacific single track known as the Toronto, Grey and Bruce, from Bloor Street north to and including St. Clair Avenue, and also including Wallace Avenue, Humberside Avenue, and Junction Road, at which there are no level street crossings at the present time.

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Reasons for
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connection
with Order
No. 35037.
(A) F. B.
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Chief Com-
missioner
(concurred
in by Com-
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McLean,
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 missioner
 (concurred
 in by Com-
 missioners
 McLean,
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 —continued.

(2) Subways at all level street crossings on the Canadian Pacific Railway North Toronto line, from the West Toronto diamonds eastwardly to and including Bartlett Avenue, as well as grade separations at Primrose and Perth Avenues, at which points there are now no level crossings.

(3) Subways at all level street crossings on the Canadian National Newmarket Subdivision from Bloor Street northerly to and including St. Clair Avenue and also grade separations at Wallace and Lappin Avenue, at which points there are now no level crossings.

The Canadian Pacific filed plans and made proposals proposing grade separations on the first of the lines above mentioned at Bloor Street, Royce Avenue and St. Clair Avenue, and on their North Toronto line, being the second above mentioned at all street crossings proposed by the City, with the exception of Perth and Primrose Avenues. 10

The Canadian National proposed a cut-off from a point some distance north on their Newmarket Subdivision running south-westerly and connecting with their Brampton Subdivision just north of St. Clair Avenue, thereby proposing that all their trains should run over this cut-off and the Brampton Subdivision to and from the City, leaving the Newmarket Subdivision purely as an industrial and switching track and suggested that there be no grade separations on that subdivision. 20

The City proposed the elevation of the tracks on the main double track lines, being the first line herein referred to, commencing at a point about 4,000 feet south of Bloor Street and reaching an elevation of ten feet above the present track level at Wallace Avenue; continuing the same elevation beyond Royce Avenue, with an excavation $8\frac{1}{2}$ feet deep between the West Toronto diamonds and St. Clair Avenue, and suggested that all tracks on these lines be bunched together leaving sufficient space for six tracks, the object being to shorten the subways and reduce consequent land damages.

The City also proposed the elevation of tracks on the North Toronto line from $4\frac{1}{2}$ to $6\frac{1}{2}$ feet, and the elevation of tracks on the Newmarket Subdivision, nearly corresponding to the proposed elevation on the main double track lines. The Canadian Pacific objected to the elevation of tracks on the main double track line to any extent, and also to the bunching of tracks as suggested by the City, on two grounds. First, that it would seriously interfere with the traffic possibilities, as it would increase the grade from 0.83 to something over 1% and secondly, that such an elevation would seriously interfere with the service to existing branch lines or industrial spurs. 30

Both Railway Companies objected to the bunching of tracks or in any way contracting the available trackage space as it is the main entrance of both railways from the north into the City of Toronto, and they objected to any curtailment of the possibilities of further development which would result from a contraction of the existing space. The Canadian Pacific proposed elevating their tracks on the North Toronto division, generally speaking, from $1\frac{1}{2}$ feet to $3\frac{1}{2}$ feet less than that proposed by the City, claiming that the elevations which they were proposing were absolutely 40

the limit consistent with the proper operation of industrial spurs as they are now located.

The Canadian National proposed the elevation of the tracks on the main double track line somewhat less than that proposed by the City, but reaching the same elevation, namely, ten feet at Royce Avenue, but objected to any elevation of tracks on the Newmarket subdivision excepting about three or four feet at the diamond at the crossing of the Newmarket North Toronto Canadian Pacific Subdivisions necessary to meet the proposed elevation of the North Toronto grade.

10 If the City's proposal should be carried out, it would greatly decrease land damages, because the subway approaches would not extend nearly as far away from the tracks as they would if the subways were constructed under the tracks at the existing levels, moreover, the elevation of the tracks would probably make it possible to construct subways in future more easily than it could otherwise be done, but on the other hand there would be an increase in cost in elevating the tracks.

The territory served by the three railways as above described is the great industrial centre of the City of Toronto and probably the greatest industrial centre in Canada, and I feel it would be a great mistake to do
20 anything which would hamper access to and from these industries or in any way tend to discourage not only present conditions but expansion, and therefore feel that the tracks should not be elevated except where absolutely necessary, and then only to the minimum height, in order to carry out necessary improvements.

The matter must be looked at not only from the standpoint of the grades on the railway tracks, but also from the standpoint of the grades on the industrial sidings serving industries tributary to the railways. For example, on the Galt subdivision of the Canadian Pacific Railway, the Canadian National double-track Brampton division, and the Canadian
30 Pacific single-track line known as the Toronto, Grey and Bruce, the maximum grade at present is 0.84%. If the City's plan were followed, this would increase the grade to 1.04%, thus distinctly lessening the operating efficiency of the railways.

On the railway plans as filed, the maximum grade proposed on the industrial sidings on the lines above mentioned, as well as on the Canadian Pacific North Toronto Line, is 2%. This is the same maximum which was adopted by the Board in the case of the industrial sidings on the North Toronto Grade Separation. To adopt, as is set out in various portions of the City's plan, industrial siding grades in excess of 2% would not only
40 curtail the facilities of the industries concerned, but would also interfere with the economic operation of the railway trackage.

I also think it would be very unwise to bunch together existing tracks thereby restricting the use by the railways of any land now possessed by them in their entrance to the City of Toronto. While no doubt for many years sufficient room would be left after taking away 40 or 50 feet of land, but it is the principal entrance from the north to the City of Toronto which today is the second largest city in Canada, and which without doubt

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McLean,
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No. 6. will be one of the greatest cities of the continent, and for the small amount
 Schedule 9. of money to be saved I think it would be a great mistake to in any way
 interfere with further requirements in the way of traffic.

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 No. 35037.
 (A) F. B.
 Carvell,
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 McLean,
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 —continued.

While no doubt the construction of the cut-off herein referred to might
 be an advantage to the Canadian National Railways from an Operating
 standpoint, yet I feel sure that the retention of the Newmarket Subdivision
 from Bloor Street to St. Clair Avenue as an industrial proposition will be
 productive of such interference with street traffic with resulting danger
 to the public, as will necessitate, in the interests of public safety, grade
 separations at points hereinafter referred to, where the street traffic is
 congested. The maintenance of these tracks, for industrial purposes, will
 involve a great deal of switching. That switching must be carried on in
 congested areas over street crossings at grade where traffic is dense, and
 would unquestionably prove a menace to public safety. This Board has
 become convinced that switching movements in congested areas are as
 dangerous as, and probably more dangerous, by reason of their frequency
 and uncertainty than regular train movements, and the Board's records
 of fatal accidents (one of recent date in the City of Toronto over purely
 industrial tracks, involving the loss of two lives) abundantly substantiate
 this statement. To limit the hours during which switching movements
 can be carried on in a congested industrial area, in a City the size of
 Toronto, is not possible without serious interference with traffic and
 imposing serious inconvenience upon the important interests concerned
 therein. Due consideration having been given to all these factors I am
 satisfied that in the interest of public safety and having regard to all other
 considerations as to convenience of and non-interference with the traffic
 tributary to this area, this line should not be retained for industrial purposes
 without separation of grades at congested grade crossings.

It is my view, therefore, that the whole situation should be settled
 now on lines which this Board considers just and proper, having regard
 to the paramount consideration of public safety, and if the Canadian
 National Railways are desirous of building a cut-off it must be done by
 them as a transportation policy and not under direction of this Board as
 part of a general scheme to render more safe the operation of railways in
 this portion of the City of Toronto.

The reference above made to the elevation of tracks and their conse-
 quent interference with the proper use of industrial spurs applied to spur
 lines on the Newmarket Subdivision as well as on the double track lines,
 and therefore I am unable to agree with the City's contention as to either
 the elevation of tracks or the bunching of the same, or with the Canadian
 National Railways' proposition as to the construction of the cut-off and
 the elimination of any grade separation on the Newmarket Subdivision.

The City and the Canadian Pacific Railway proposed an overhead
 bridge at St. Clair Avenue. The Canadian National Railway, however,
 proposed a subway, on the ground that it answered the purpose just as
 well and would be considerably cheaper. This seems to be admitted by the

C.P.R. and the City, and therefore I think there should be a subway at this point rather than an overhead bridge. The City proposed a subway at Junction Road, which was not in the C.P.R. proposals. It is my opinion that this is necessary, as far east as Miller Street, and I think it should be constructed, but it seems to me that the overhead bridge on the Weston Road should be eliminated, as both do not seem necessary. I know it makes the traffic along the Weston Road into the City a little more circuitous and possibly a little more lengthy, but with subways at Keele Street, Junction Road, Osler and Royce Avenues, further maintenance of this
10 bridge would be unnecessary.

I, therefore, think an Order should issue laying down the following principles for grade separations on the railways herein referred to as follows :—

(1) On the main double track lines herein referred to as Galt, Brampton and Toronto Grey and Bruce Subdivisions there should be no change in grade or interference with the width of right-of-way, and there should be subways constructed at Bloor Street, Royce Avenue, Junction Road and St. Clair Avenue, all these subways to be the full width of the street with 14 feet clearances, the Junction Road Subway to extend as far
20 east as Miller Street. If the City desire a continuance thereof to Davenport Road it would be a matter for them to work out as they thought best, the present Weston Road bridge to be eliminated; the Royce Avenue subway to involve the acquisition of additional land and the construction of a diversion of Dundas Street as set forth on the C.P.R. plan.

(2) Track elevation and grade separations on the C.P.R. North Toronto line, according to the plan filed by the C.P.R. and including subways at Osler Avenue, Symington Street, Lansdowne Avenue, Dufferin Street and Bartlett Avenue, all to be the full width of street and 14 foot clearances.

30 (3) Subways to be constructed on the Newmarket Subdivision at Bloor Street, Royce Avenue, Davenport Road and St. Clair Avenue, all to be the full width of street and 14 foot clearances, and in all these cases, if the City requires greater clearances than 14 feet, which is the statutory standard, the same to be granted, the additional expense, however, to be borne entirely by the City.

I think it unnecessary to make any reference to the question of cost, because there is not very much difference in the ultimate cost of any of the schemes proposed, but the general proposals herein laid down are based more upon the requirements of the industries of the City of Toronto
40 and the operation of the railways both at the present and the future, and the laying down of a comprehensive scheme of grade separation in that portion of the City, than upon the mere question of cost, although, of course, that should play an important part in any matters of this kind.

Copies of this Judgment and the Order based hereon to be sent to all interested parties and another hearing to be held at the earliest possible

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in by Com-
missioners
McLean,
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—continued.

No. 6. date, for the purpose of settling all details of an engineering nature, the
 Schedule 9. distribution of cost and the time and method of carrying out the work
 herein provided for.

Reasons for Judgment of Board of Railway Commissioners in connection with Order No. 35037. (A) F. B. Carvell, Chief Commissioner, &c.—*continued.* May 8, 1924.

(SGD) F. B. CARVELL,

“ I Agree ”

(SGD) S. J. McL.

A. C. B.

C. L.

Re Proposed North West Grade Separation
 Toronto, Ont.

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File 32453

(B) Hon. Frank Oliver, Commissioner. (B) HON. FRANK OLIVER, Commissioner :

I agree with the Judgment of the Chief Commissioner in so far as the subways across the tracks of the Canadian National and Canadian Pacific Railways from Bloor Street to St. Clair Avenue, inclusive, are concerned, and also in regard to subways on the North Toronto connection of the Canadian Pacific.

As to the Newmarket Subdivision of the National Railway, my opinion is that all interests would be best served by establishing a connection between the Newmarket and Brampton subdivisions at some point west of St. Clair Avenue, and routing all trains, both freight and passenger, moving between Toronto Central Station and that Junction, over the double track lines. If this were done, as suggested by Mr. H. M. McLeod, the section of the Newmarket lines from which traffic had thus been diverted, would be used only as an industrial spur, and therefore subways would not be necessary. 20

Under present street traffic conditions there is greater danger to life and limb, both of pedestrian and auto passengers, in the ordinary traffic of a busy street, than at a level railway crossing where train movements are infrequent and at a low rate of speed. 30

In the Province of Ontario in 1923 there were 236 fatal and 2,348 non-fatal accidents from motors, motorcycles and trucks. In the same period there were 117 fatal and 202 non-fatal accidents for railroads. This danger of street traffic must always be present, so long as persons unskilled, or of careless temperament, drive cars. A subway adds to the ordinary danger of the street, therefore subways should be avoided, so far as that can be done consistently with the public convenience and safety.

A subway is a detriment to the business interests of the street which passes through it. It breaks the continuity: to the great detriment of business on either one side or the other of it. This is largely because the 40

subway practically kills business for the whole of its length. By the City plan the Bloor Street and Davenport Road subways would each be over 800 feet in length and the St. Clair Avenue subway over 1,000.

The Newmarket Subdivision of the National and the double track lines of the C.P.R. and National parallel each other at a distance of 1,300 feet at Bloor Street and of 2,800 feet at St. Clair Avenue. On Bloor the ends of the subways would be only 550 to 600 feet apart. On Royce, Davenport Road and St. Clair Avenue, they would be from 1,800 to 1,900 feet. Subways so near together would not only destroy the value
 10 of the property fronting on them, but would seriously lessen the value of the intervening property as well. This decrease of value could not be taken into account in considering damage claims; the property owners would simply have to suffer the loss.

The distance between Bloor Street and Royce Street is 3,150 feet. Three streets parallel to Bloor and Royce serve the area between. The centre one of the three, Wallace Avenue is the only one now opened through and crossing the Newmarket tracks. If through traffic is to move over the Newmarket subdivision as at present, and Wallace Avenue is left open and without a subway as contemplated, the danger and inconvenience
 20 now complained of will remain, so far as it is concerned. The alternative is to close Wallace and block all cross travel between Bloor and Royce, or construct an additional subway across the Newmarket tracks on Wallace, with no corresponding subway across the double tracks.

The proposed subway at the Davenport Road crossing of the Newmarket tracks is entered on its westerly side close to the railway right-of-way, and therefore at the maximum depth of the subway, by Station Road which is only half the width of an ordinary street. The driver of an automobile in the Davenport Road subway could not see the near approach of an automobile by way of Station Road, neither could a driver on Station
 30 Road see an automobile in the Davenport Subway. The point of junction of Station Road with the Davenport subway would be from seven to nine feet below the surface level; the depth depending upon the elevation of the tracks and on the clearance allowed in the subway. With possibly hundreds of automobiles passing through the subway in a day, it would be impossible to estimate the danger incurred, but it must be immeasurably greater than an ordinary level railway crossing having only a moderate movement of traffic.

At the proposed St. Clair subway under the Newmarket tracks a like condition prevails to that at Davenport Road. Station Road enters the
 40 St. Clair subway from the east under precisely similar circumstances, and necessarily with similar consequences. Caledonia Street also enters the subway but from the west, practically doubling the danger.

Instead of removing danger at the crossings of Davenport Road and St. Clair Avenue, the construction of subways as above described creates a new danger, greatly in excess of that at present existing, and immeasurably greater than would result from leaving the crossings as they are if the through railway traffic were altogether diverted from that line.

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 Frank
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 tinued.

By routing all through traffic, now going over the Newmarket Sub-division, by way of the National main line, there would only be a switching movement on that subdivision to meet the requirements of the industries served by it. With traffic so limited, it would be possible and proper to open Paton Road and Antler-Lappin Avenues, as well as Wallace, across the Newmarket tracks and thereby add greatly to the convenience of residence and business on these streets on both sides of the tracks. In order that there might be neither inconvenience nor danger resulting, it would be possible to restrict switching movements to certain hours in early morning, mid-forenoon, mid-afternoon and late at night, so that there would be absolute assurance of no interference with the street traffic during hours when such traffic might be congested or urgent. 10

The cost of the connection or cut-off proposed by Mr. McLeod is placed by him at \$810,000, including land damages. The construction of four subways under the Newmarket Subdivision with land damages, is estimated by the City to cost roughly \$1,800,000. If a subway at Wallace Avenue is added, the cost would be increased by \$167,000, making a total of nearly \$2,000,000.

If the public safety or convenience demanded the expenditure of the larger sum required for subways under the Newmarket track, that must be accepted as sufficient reason for its being spent. But, believing that the safety and convenience of the public would be better served by diversion of the traffic, I do not consider that an order should be made that would compel the larger expenditure. 20

For the foregoing reasons I would respectfully recommend that the Judgment of the Chief Commissioner be varied in that part relating to the Newmarket Subdivision to read as follows,—

1. That the National Railways construct a connection between the Newmarket Subdivision and the double track main line of the Canadian National Railway, west of St. Clair Avenue, according to plan and profile shown by Mr. McLeod. 30

2. That after such construction no through traffic be allowed to pass over the Newmarket Subdivision between Toronto Union Station and the junction west of St. Clair Avenue.

3. That there be no switching movements on the Newmarket Subdivision except during certain hours in early morning, mid-forenoon, mid-afternoon and late at night, as shall be fixed by an Order of this Board, and that under no circumstances shall an engine or car remain stationary on any street crossing for more than such number of minutes as may be permitted by standing order of the Board. 40

4. That the Railway consents to Paton Road being opened across the track of the Newmarket Subdivision and that connection between Antler and Lappin Avenues also be permitted to be made across that track, if and when the City so requests.

(Sgd.) FRANK OLIVER.

Ottawa, May 9th, 1924.

Schedule 10.—Order of Board of Railway Commissioners No. 35153 for construction. Schedule 10.

35153

ORDER NO. 35153.

Order of
Board of
Railway
Commis-
sioners
No. 35153
for con-
struction,
5th June
1924.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Thursday, the 5th day of June A.D. 1924.

Hon. F. B. Carvell, K.C., Chief Commissioner.

S. J. McLean, Ass't Chief Commissioner.

A. C. Boyce, K.C., Commissioner.

10 C. Lawrence, Commissioner.

Hon. Frank Oliver, Commissioner.

IN THE MATTER OF the application of the Corporation of the City of Toronto, in the Province of Ontario, hereinafter called the "Applicant," under Sections 257 and 259 of the Railway Act, 1919, for an Order requiring the Canadian Pacific and the Canadian National Railway Companies to collaborate with the Applicant in the preparation of a joint plan for the separation of grades at the crossings of Bloor Street, Royce Avenue, Weston Road, and St. Clair Avenue by the said railways, and at the crossings of Wallace Avenue and Davenport Road by the Canadian National Railway.

20

File No. 32453.

UPON hearing the matter at the sittings of the Board held in Toronto, May 21st and 22nd, 1924, in the presence of Counsel for the Applicant, the Canadian Pacific and the Canadian National Railway Companies, the Consumers' Gas Company, the Toronto Transportation Commission, the Toronto Electric Light Commission, the Hydro-Electric Power Commission of Ontario, and the Bell Telephone Company of Canada, and what was alleged—

THE BOARD ORDERS as follows :

1. That the Canadian Pacific and the Canadian National Railway
30 Companies be, and they are hereby, directed to construct, jointly two subways, one under the double tracks of the Galt Subdivision and the Toronto, Grey & Bruce Subdivision of the Canadian Pacific Railway Company and the Brampton Subdivision of the Canadian National Railway Company on Bloor Street, and one under the said tracks on Royce Avenue, in the City of Toronto, Province of Ontario.

2. That the Canadian National Railway Company be, and it is hereby, directed to construct a subway under the tracks of its Newmarket Sub-division on Bloor Street, in the said City of Toronto.

3. That plans showing the two subways on Bloor Street be filed by
40 the Railway Companies, for the approval of the Chief Engineer of the Board, within thirty days from the date of this Order; and that plans showing the Royce Avenue Subway be filed, for the approval of the Chief Engineer of the Board, not later than January 1st, 1925; detail plans of

No. 7. the said work also to be filed for the approval of the Chief Engineer of the Board.

Schedule 10.

Order of Board of Railway Commissioners No. 35153 for construction, 5th June 1924—continued.

4. That the work on the two subways at Bloor Street be commenced not later than August 1st, 1924, and completed not later than July 1st, 1925.

5. That the work on the subway at Royce Avenue be commenced as early in the Spring of 1925 as convenient, and completed not later than January 1st, 1926.

6. That all questions of distribution of costs, interest, or other matters involved in the construction of the said work be reserved for further Order of the Board.

10

(Sgd.) F. B. CARVELL,
Chief Commissioner,
Board of Railway Commissioners for Canada.

No. 8.

No. 8.

Schedule 11.

Schedule 11.—Order of Board of Railway Commissioners No. 35308 amending Order No. 35153.

Order of Board of Railway Commissioners No. 35308 amending Order No. 35153, 10th July 1924.

ORDER No. 35308.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Thursday, the 10th day of July, A.D. 1924.

Hon. F. B. Carvell, K.C., Chief Commissioner.

C. Lawrence, Commissioner.

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IN THE MATTER OF The Order of the Board No. 35153, dated June 5th, 1924, directing the Canadian Pacific and the Canadian National Railway Companies to construct, inter alia, two subways, one on Bloor Street and one on Royce Avenue, in the City of Toronto, in the Province of Ontario.

File No. 32453.

UPON reading what is filed in support of the Canadian Pacific and the Canadian National Railway Companies—

THE BOARD ORDERS that the said Order No. 35153, dated June 5th, 1924, be amended by striking out Clause 1 thereof and substituting therefor the following, namely:—

“ 1. That the Canadian Pacific and the Canadian National Railway Companies be directed to construct two subways under their tracks, one on Bloor Street and one on Royce Avenue, in the said City of Toronto; the Canadian Pacific Railway Company to do all the work on the said subways under the tracks of its Galt and of its Toronto,

30

Grey & Bruce Subdivisions and under the Brampton Subdivision of the Canadian National Railway Company, south of North Toronto Diamond, with the exception of providing and actually placing the girders on the Canadian National Railway Company's tracks, which work is to be performed by the Canadian National Railway Company; the Canadian National Railway Company to do all the work on the subways north of the Diamond."

(SGD.) F. B. CARVELL,
Chief Commissioner.

No. 8.
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Order of
Board of
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sioners
No. 35308
amending
Order
No. 35153,
10th July
1924—con-
tinued.

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No. 9.

Schedule 12.—Application of Toronto Transportation Commission for leave to construct Railway across Bloor Street Subway.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.
APPLICATION No.

The Toronto Transportation Commission as Managers of the street railway system owned by the Corporation of the City of Toronto, hereby applies to the Board for an order under Section 252 of The Railway Act granting the applicants leave to construct for the corporation of the City of Toronto a double track line of street railway, between Dundas Street and Lansdowne Avenue, in the City of Toronto, upon the highway known as Bloor Street, which, by order of the Board dated June 5th 1924 and numbered 35153, has been carried under certain tracks of the Canadian National Railways and the Canadian Pacific Railway.

And the applicant submits herewith three plans of the said proposed construction.

This application is made without prejudice to any submissions which the applicant may hereafter see fit to make with reference to the jurisdiction of the Board in the premises.

Dated at Toronto the 15th day of July A.D. 1925.

TORONTO TRANSPORTATION COMMISSION

Per Irving S. Fairty

Its Solicitor.

No. 9.
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Schedule 12.
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Application
of Toronto
Transporta-
tion Com-
mission for
leave to
construct
railway
across Bloor
Street
Subway,
15th July
1925.

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No. 10.

No. 10.

Schedule
13A.**Schedule 13A.—Letter, Canadian Pacific Railway Company to Secretary, Board of
Railway Commissioners consenting to Application.**Letter,
Canadian
Pacific
Railway
Company to
Secretary,
Board of
Railway
Commis-
sioners,
consenting
to applica-
tion,
17th July
1925.

17th July, 1925.

A. D. Cartwright, Esq.,
Secretary, Board of Railway Commissioners,
Ottawa, Canada.

Dear Sir :—

Referring to the application of the Toronto Transportation Commission for authority, under Section 252 of the Railway Act, to construct its line of street railway across and under the tracks of the Canadian National Railways and this company on Bloor Street, Toronto. 10

This company is prepared to consent to the issue of an order granting the applicant authority to construct and maintain its tracks across and under the tracks of this company through the said subway, in accordance with the plan submitted, subject to the following observations :—

1. That detail plans showing the proposed method of attaching the overhead construction to the subway should be submitted for the approval of our engineers and of the engineer of the Board.

2. That this consent is without prejudice to the contention of the Railway Companies that the present applicant should be ordered to contribute its proper proportion of the cost of construction and maintenance of the subway, or, that in the alternative, if the Board comes to the conclusion that the present applicant should not be made a contributing party that the contribution of the City of Toronto should be increased by such proportion as would properly be chargeable to the Tramways system. 20

The position of the present applicant in regard to the distribution of cost was fully set forth in the argument of May 21st, 1924, judgment being then reserved by the Board upon this feature, and I would submit that it is not necessary to re-open the matter for any further submissions in regard thereto. 30

I have sent a copy of this letter to Mr. Fairty.

Yours truly,

E. P. FLINTOFT,
Assistant General Solicitor.

No. 11.

Schedule 13B.—Letter, Canadian National Railways to Secretary, Board of Railway Commissioners consenting to Application.

Montreal, July 27th, 1925.

A. D. Cartwright, Esq.,
Secretary, B.R.C.,
Ottawa, Ont.

Dear Sir :—

File 32453.6—re Bloor Street Crossing C.N.R. & C.P.R.

10 Referring to your letter of the 20th instant we have no objection to offer to the plans which accompanied Mr. Fairty's letter of the 21st instant.

The plan which accompanied Mr. Fairty's application of the 15th of July has been examined by our Engineers and there is no objection to it.

The question of the status of the Toronto Transportation Commission and its obligation to contribute to the cost of the work have been already discussed before the Board, and I need not repeat the arguments.

I am sending a copy of this letter to Mr. Fairty.

Yours truly,

(Sgd) ALISTAIR FRASER.

No. 11.

Schedule 13B.

Letter,
Canadian
National
Railways to
Secretary,
Board of
Railway
Commis-
sioners,
consenting
to applica-
tion,
27th July
1925.

20

No. 12.

Schedule 13.—Order of Board of Railway Commissioners No. 36693 permitting crossing.

R.L.

ORDER NO. 36693

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Thursday, the 13th day of August, A.D. 1925.

S. J. McLean, Ass't. Chief Commissioner.

A. C. Boyce, K.C., Commissioner.

30 IN THE MATTER OF the application of the Toronto Transportation Commission, as Manager of the Street Railway System owned by the Corporation of the City of Toronto, hereinafter called the "Applicant," under Section 252 of the Railway Act, 1919, for leave to construct a double track line of street railway across the tracks of the Newmarket Subdivision of the Canadian National Railways on Bloor Street, between St. Helen's Avenue and Symington Avenue; and across the Brampton Subdivision of the said Canadian National Railways and the Galt Subdivision of the Canadian Pacific Railway Company on Bloor Street, between Perth Avenue and Dundas Street, as shown on the plan and profile No. R.R. 184, dated 28th February, 1925, on file with the Board under file No. 32453.6;

No. 12.

Schedule 13.

Order of
Board of
Railway
Commis-
sioners
No. 36693
permitting
crossing,
13th August
1925.

No. 12. UPON the report and recommendation of its Chief Engineer, and the
 Schedule 13. consents of the Canadian National Railways and the Canadian Pacific
 Railway Company, filed—

Order of Board of Railway Commissioners No. 36693 permitting crossing, 13th August 1925—*continued.* THE BOARD ORDERS that the Applicant be, and it is hereby, authorized to construct its tracks across the tracks of the Newmarket Subdivision of the Canadian National Railways on Bloor Street, between St. Helen's Avenue and Symington Avenue, in the City of Toronto, in the Province of Ontario; and across the Brampton Subdivision of the Canadian National Railways and the Galt Subdivision of the Canadian Pacific Railway Company on Bloor Street, between Perth Avenue and Dundas Street, in the said City of Toronto, by means of the subways constructed under the Order of the Board No. 35153 dated the 5th June, 1924 as shown on the said plan and profile on file with the Board under file No. 32453.6; and that the question of contribution to the cost of the said subways by the Applicant be reserved for further consideration by the Board. 10

(Sgd.) S. J. McLEAN,
 Assistant Chief Commissioner,
 Board of Railway Commissioners for Canada.

No. 13. No. 13. 20
 Schedule 16. **Schedule 16.—Order of Board of Railway Commissioners No. 36738 permitting operation of Newmarket Subdivision over Bloor Street.**

Order of Board of Railway Commissioners No. 36738 permitting operation of Newmarket Subdivision over Bloor Street, 21st August 1925. R.L. ORDER NO. 36738
 THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA
 Friday, the 21st day of August, A.D. 1925.
 Hon. H. A. McKeown, K.C., Chief Commissioner.
 A. C. Boyce, K.C., Commissioner.

IN THE MATTER OF the application of the Canadian National Railways, hereinafter called the "Applicants," under Section 251 of the Railway Act, 1919, for leave to use and operate the subway constructed under the tracks of their Newmarket Subdivision on Bloor Street, in the City of Toronto, Province of Ontario, under the Order of the Board No. 35153, dated June 5th, 1924 : 30

File No. 32453.

UPON the report and recommendation of its Chief Engineer, and its appearing that the work has been carried out in accordance with the approved plan—

THE BOARD ORDERS that the use and operation of the said subway under the tracks of the Newmarket subdivision of the Applicants on Bloor Street, in the said City of Toronto, be, and it is hereby, approved. 40

(Sgd.) H. A. McKEOWN,
 Chief Commissioner,
 Board of Railway Commissioners for Canada.

No. 14.

Schedule 15.—Order of Board of Railway Commissioners No. 36737 permitting operation of Galt and Brampton Subdivisions over Bloor Street.

R.L.

ORDER NO. 36737

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Saturday, the 22nd day August, A.D. 1925.

Hon. H. A. McKeown, K.C., Chief Commissioner.

A. C. Boyce, K.C., Commissioner.

- 10 IN THE MATTER OF the application of the Canadian Pacific Railway Company, hereinafter called the "Applicant Company" under Section 251 of the Railway Act, 1919, for authority to use and operate the subway carrying the tracks of its Galt Subdivision, and the tracks of the Brampton Subdivision of the Canadian National Railways, over Bloor Street, in the City of Toronto, Province of Ontario, as constructed under Order No. 35153, dated June 5th, 1924, as amended by Order No. 35308, dated July 10, 1924 : File No. 32453.

- 20 UPON the report and recommendation of its Chief Engineer, and its appearing that the work has been carried out in accordance with the plans approved by the Board—

IT IS ORDERED that the Applicant Company and the Canadian National Railways be, and they are hereby, authorized to use and operate the said subway carrying the tracks of the Applicant Company's Galt Subdivision and the tracks of the Canadian National Railways' Brampton Subdivision over Bloor Street, in the City of Toronto, Province of Ontario.

(Sgd.) H. A. McKEOWN,
Chief Commissioner.

Board of Railway Commissioners for Canada.

No. 15.

- 30 **Schedule 17.—Order of Board of Railway Commissioners No. 37239 permitting operation of Royce Avenue Subway.**

ORDER NO. 37239

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Friday, the 15th day of January, A.D. 1926.

S. J. McLean, Asst. Chief Commissioner.

A. C. Boyce, K.C., Commissioner.

IN THE MATTER OF the application of the Canadian National Railways and the Canadian Pacific Railway Company, hereinafter called the "Applicants," for authority to use and operate the subway at Royce

No. 14.

Schedule 15.

Order of Board of Railway Commissioners No. 36737 permitting operation of Galt and Brampton Subdivisions over Bloor Street, 22nd August 1925.

No. 15.

Schedule 17.

Order of Board of Railway Commissioners No. 37239 permitting operation of Royce Avenue Subway, 15th January 1926.

No. 15. Avenue, in the City of Toronto, authorized by the Orders of the Board
 Schedule 17. Nos. 35153, 35308, and 36607 :

File No. 32453.5

Order of Board of Railway Commissioners No. 37239 permitting operation of Royce Avenue Subway, 15th January 1926—*continued.*

UPON the report and recommendation of the Chief Engineer of the Board—

IT IS ORDERED that the Applicants be, and they are hereby, authorized to use and operate the said subway at Royce Avenue, in the City of Toronto, Province of Ontario.

(Sgd.) S. J. McLEAN,
 Assistant Chief Commissioner,
 Board of Railway Commissioners for Canada.

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No. 16. Schedule 18.—Order of Board of Railway Commissioners No. 38424 distributing cost.

ORDER NO. 38424

Order of Board of Railway Commissioners No. 38424 distributing cost, 15th November 1926.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Monday, the 15th day of November, A.D. 1926.
 Hon. H. A. McKeown, K.C., Chief Commissioner.
 S. J. McLean, Ass't Chief Commissioner.
 A. C. Boyce, K.C., Commissioner.
 C. Lawrence, Commissioner.
 Hon. Frank Oliver, Commissioner.

20

IN THE MATTER OF the Orders of the Board Nos. 35153, 35308, 36737, 36738, 37239, 36693, dated respectively June 5, 1924, July 10, 1924, August 22, 1925, August 21, 1925, January 15, 1926, and August 13, 1926, authorizing the construction of three subways, one under the tracks of the Galt Subdivision and the Toronto, Grey & Bruce Subdivision of the Canadian Pacific Railway Company and the Brampton Subdivision of the Canadian National Railways at Bloor Street; one under the tracks of the Canadian Pacific and the Canadian National Railway Companies on Royce Avenue; and one under the tracks of the Canadian National Railways' Newmarket Subdivision on Bloor Street, in the City of Toronto and Province of Ontario,—reserving for further hearing of the Board all questions of distribution of cost, interest, and other matters involved in the Construction of the said works :

30

File Nos. 32453, and 32453.6

UPON hearing Counsel for the City of Toronto, the Canadian Pacific and the Canadian National Railway Companies, the Bell Telephone Company of Canada, the Consumers' Gas Company, the Toronto Transportation Commission, the Hydro-Electric Power Commission of Ontario, and the Toronto Hydro-Electric System (The Toronto Electric Commissioners)

40

upon the question as to the distribution of such cost, the evidence offered, and what was alleged; and upon reading the written data filed on behalf of the Railway Companies, and its appearing that the work ordered has extended over a period of years—

No. 16.
—
Schedule 18.
—

THE BOARD ORDERS

1. (a) That twenty-five per cent of the cost of the actual construction work for the year 1924, at each of the following crossings, namely :—

ON BLOOR STREET,—one crossing under the tracks of the Galt subdivision of the Canadian Pacific Railway Company; another under the tracks of the Brampton Subdivision of the Canadian National Railways; another under the tracks of the Toronto, Grey & Bruce Subdivision of the Canadian Pacific Railway Company; and another under the tracks of the Newmarket Subdivision of the Canadian National Railways; and

Order of
Board of
Railway
Commis-
sioners
No. 38424
distributing
cost,
15th Nov-
ember 1926
—continued.

ON ROYCE AVENUE,—one crossing under the tracks of the Galt Subdivision of the Canadian Pacific Railway Company; another under the tracks of the Canadian National Railways; and another under the tracks of the Toronto, Grey & Bruce Subdivision of the Canadian Pacific Railway Company,—not to exceed the sum of fifteen thousand dollars (\$15,000),—be paid out of “The Railway Grade Crossing Fund”;

(b) twenty-five per cent of the cost of the actual construction work for the year 1925 in respect of each of the said crossings, not to exceed for any one crossing the sum of fifteen thousand dollars (\$15,000), to be paid out of “The Railway Grade Crossing Fund;” and

(c) forty per cent of the cost of the actual construction work for the year 1926, in respect of each of the said crossings, not to exceed for any one crossing the sum of twenty-five thousand dollars (\$25,000), to be paid out of “The Railway Grade Crossing Fund,—” the said contributions from the Fund to be paid on progress estimates.

2. That the Bell Telephone Company of Canada, the Hydro-Electric Power Commission of Ontario, and the Toronto Hydro-Electric System bear and pay the cost of any changes in their wires or plant made necessary by the changes in the streets; the Consumers' Gas Company to be at the cost of any work done by it; any such payments made by the said Gas Company to be without prejudice to its rights, if any, over against the City; the Toronto Transportation Commission to pay ten per cent of the cost of the work, after deducting the amount available from “The Railway Grade Crossing Fund.”

3. That after deducting the said payments and the contributions from “The Railway Grade Crossing Fund,” the remainder of the cost of the work, including interest at five per cent per annum thereon from dates of expenditure to date of payment, be borne and paid fifty per cent by the City of Toronto and fifty per cent by the Railway Companies.

4. That in case of any disagreement between the said Railway Companies, the Toronto Transportation Commission, or the City of Toronto

No. 16. as to the details of carrying out the apportionment or distribution of
 — cost, or as to any of the payments by this Order directed, or with reference
 Schedule 18. to any other detail or matter incident thereto, or arising thereout, such
 — matter may be referred to this Board by any of the parties affected, on
 Order of notice to the others, for adjustment or further direction as to such
 Board of details.
 Railway
 Commis-
 sioners

(Sgd.) H. A. McKEOWN,
 Chief Commissioner,
 Board of Railway Commissioners for Canada.

No. 38424
 distributing
 cost,
 15th Nov-
 ember 1926
 —continued.

No. 17.

10

No. 17. **Schedule 19.—Reasons for Judgment of Board of Railway Commissioners in connection
 — with Order No. 38424.**

Schedule 19.

Re Distribution of Cost—Northwest Grade Separation, Toronto.

Files 32453 and 32453.6.

Reasons for
 Judgment of
 Board of
 Railway
 Commis-
 sioners in
 connection
 with Order
 No. 38424,
 15th Dec-
 ember 1926.

McLEAN, ASSISTANT CHIEF COMMISSIONER :

I.

When Order No. 38424 in the above matter was issued dealing with
 the distribution of cost of the grade separation concerned, there was
 not, on account of the volume of work before the Board, an opportunity
 of preparing and issuing Reasons for Judgment. The Board, however, 20
 had before it in dealing with the preparation of the Order working
 notes. In view of the requests which have been filed asking whether
 Reasons for Judgment were issuing, it now seems proper to issue these
 working notes, as setting out the general reasons underlying the Order.

II.

Under Order No. 35153, of June 5th, 1924—File 32453, Pt. 2—the
 C.P.R. and the C.N.R. were to construct jointly two subways; one,
 under the double tracks of the Galt subdivision and the Toronto, Grey &
 Bruce tracks of the C.P.R., and the Brampton Subdivision of the C.N.R.
 at Bloor Street; and one under the tracks of the C.P.R. and C.N.R. at 30
 Royce Avenue. The C.N.R. was also to construct one subway under the
 tracks of the Newmarket Subdivision on Bloor Street. The Order provided
 that all questions of distribution of cost, interest, or other matters involved
 under the construction of said works, were to be reserved for further Order
 of the Board. By Order No. 35308, of July 10th, 1924,—File 32453, Pt. 2,
 Order No. 35153 was amended. Clause 1 of Order No. 35153 was stricken
 out and the following substituted :

“ That the Canadian Pacific and the Canadian National Railway
 “ Companies be directed to construct two subways under their
 “ tracks, one on Bloor Street and one on Royce Avenue in the said 40

“ City of Toronto; the Canadian Pacific Railway Company to do all
 “ the work on the said subways under the tracks of its Galt and of its
 “ Toronto, Grey & Bruce Subdivisions, and under the Brampton
 “ Subdivision of the Canadian National Railway Company, south
 “ of the North Toronto Diamond, with the exception of providing
 “ and actually placing the girders on the Canadian National Railway
 “ Company’s tracks, which work is to be performed by the Canadian
 “ National Railway Company; the Canadian National Railway
 “ Company to do all the work on the subways north of the Diamond.”

No. 17.

Schedule 19.

Reasons for
 Judgment of
 Board of
 Railway
 Commis-
 sioners in
 connection
 with Order
 No. 38424,
 15th Dec-
 ember 1926
 —continued.

- 10 By Order No. 36737, of August 22nd, 1925,—File 32453, Pt. 3, the Canadian Pacific Railway Company was authorized to use and operate the subway carrying the tracks of the Galt Subdivision and the tracks of the Brampton Subdivision of the Canadian National over Bloor Street. Order No. 36738, of August 21st, 1925, authorized the opening for traffic of Bloor Street subway on the Newmarket Subdivision of the Canadian National Railways.

Order No. 37239, of January 15th, 1926,—File 32453·5—authorized the Canadian National and the Canadian Pacific Railways to use and operate the subway at Royce Avenue.

- 20 The Toronto Transportation Commission, in July 1925, applied to the Board for an Order under Section 252 of the Railway Act granting the applicants leave to construct for the Corporation of the City of Toronto a double track line of street railway, between Dundas Street and Lansdowne Avenue, in the City of Toronto, upon the highway known as Bloor Street, which, by Order of the Board dated June 5th, 1924, and numbered 35123, has been carried under certain tracks of the Canadian National Railways and the Canadian Pacific Railway.

As part of said application, which is dated July 15th, 1925, the following is set out :

- 30 “ This application is made without prejudice to any submissions
 “ which the applicant may hereafter see fit to make with reference
 “ to the jurisdiction of the Board in the premises.”

- Thereafter Order No. 36693 (File 32453·6) of August 13th, 1925, issued authorizing the applicant to construct its tracks across the tracks of the Newmarket Subdivision of the Canadian National Railways on Bloor Street, between St. Helen’s Avenue and Symington Avenue, in the City of Toronto, in the Province of Ontario; and across the Brampton Subdivision of the Canadian National Railways and the Galt Subdivision of the Canadian Pacific Railway Company on Bloor Street, between Perth Avenue and
 40 Dundas Street, in the said City of Toronto, by means of the subways constructed under the Order of the Board No. 35153, dated June 5th, 1924, as shown on the said plan and profile on file with the Board under File No. 32453·6; and that the question of contribution to the cost of said subways by the applicant be reserved for further consideration by the Board.

No. 17.

III.

Schedule 19.

Reasons for
Judgment of
Board of
Railway
Commis-
sioners in
connection
with Order
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15th Dec-
ember 1926
—continued.

In addition to the City of Toronto, the Canadian Pacific, and the Canadian National Railways, notification went to Messrs. Geary, Flintoft, Fraser, the Bell Telephone Company, the Consumers' Gas Company, the Toronto Transportation Commission, the Canadian National Electric Lines, the Hydro-Electric Power Commission of Ontario, the Toronto Hydro-Electric System (the Toronto Electric Commissioners), the Canadian General Electric Company. The Consumers' Gas Company asked under date of February 15th, 1924, by letter, who made the original application, and was informed, on February 16th, 1924, that it was made by the City of Toronto. 10

IV.

The Canadian National Railways, by a statement dated March 30th, 1926, which is to be found on File 32453·3, filed information bearing on the actual expenditures incurred by it during the years 1924-25, and up to February 28th, 1926. This information had been asked for by the Board. It is stated that for Bloor Street subway on the Newmarket Subdivision, Bloor Street subway on the Brampton Subdivision, and Royce Avenue subway on the Brampton Subdivision the total estimated cost was approximately \$2,567,000. It is stated that the total actual expenditure to date is as follows: 20

Bloor Street Subway, Newmarket Subdivision.....	\$267,357·64
Bloor Street Subway, Brampton Subdivision.....	32,490·82
Royce Avenue Subway, Brampton Subdivision.....	20,281·72

The figures so given are really in the nature of progress estimates, and do not cover land damages. The question of interest is also left to one side.

The Canadian Pacific Railway Company was also asked for information, and its reply will be found on File 32453, Pt. 3. It was also asked for details as to cost by years. What was in mind was the possibility of giving a contribution out of the Grade Crossing Fund spread over a period of years where a work ordered took more than one year to complete. I may say in passing that a similar matter was taken up in connection with Spadina Bridge (part of the Viaduct scheme); and the Toronto Terminal Company has furnished figures for the expenditure on the work during 1925, and an Order has been made for a contribution out of the Grade Crossing Fund. When the figures for 1926 are received further Order can be made for contribution from the Grade Crossing Fund. See File 31297. 30

The Canadian Pacific Railway Company in its answer (File 32453, Pt. 3), dated April 15th, 1926, stated that "it is practically impossible to give a definite figure as to the amount expended in each of the years on each of the two crossings of this Company's line over Bloor Street." By two crossings, as referred to here, are meant the crossing on the Galt Subdivision and the crossing on the Toronto, Grey & Bruce. These two crossings are separated by the right of way of the C.N.R. It was submitted 40

by the Canadian Pacific that the Board might give contributions out of the Grade Crossing Fund in 1924, 1925 and 1926, on each of the following crossings :

- Canadian Pacific—Galt Subdivision.
- Canadian National Rys.,—Brampton Subdivision.
- Canadian Pacific—Toronto Grey & Bruce Subdivision.

The two Subdivisions operated by the Canadian Pacific were, it is set out, constructed by two different companies. It is stated that the actual expenditures to January 31st, 1926, were :

10	1924—	\$100,270·00
	1925—	\$344,580·94
	1926—	\$ 487·61
		\$445,338·55

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sioners in
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ember 1926
—continued.

On File 32453·3, there is a further letter from the Canadian Pacific Railway Company dated April 15th, 1926. This deals with the Royce Avenue subway. It is stated that the amounts expended by it to January 31st, 1926, are shown as—

20	1924.....	\$228,949·39
	1925.....	704,761·70
	1926.....	31,845·47

In a letter of May 25th, 1926, on the same file, addressed to the Board's Chief Engineer, will be found an argument of the Canadian Pacific Ry. Co. as to the right of the Board to consider the Toronto, Grey & Bruce line as separate and distinct both from the Canadian National and from the Galt Subdivision of the Ontario and Quebec Railway, the Canadian National Railways being on the one side of the Toronto, Grey & Bruce and the Ontario and Quebec being on the other.

30 As to the ability of the Board to contribute out of the Grade Crossing Fund in the way suggested, I direct attention to what was done in connection with the Spadina Avenue Bridge case. I also set out the following for consideration :

Section 262, sub-section 2. The 25% limitation is a limitation regarding the total proportion of cost of actual construction work which can be contributed from the Grade Crossing Fund.

40 The section does not require that the total protective work shall have been completed when the payment is made. It does require that there shall have been expenditure on "actual" construction work in the year the grant is made, sufficient to justify the percentage grant. The test is contained in the work "actual," and this may be for work done for a period of years, and justifies, so long as the total 25% limitation is not exceeded, a payment on progress estimates in each of these years.

Attention must, however, be directed to the alternative limitation contained in the section. The provision is that "the total amount of " money to be apportioned.....shall not, in the case of any one crossing, " exceed 25%....., and shall not, in any such case, exceed the sum of

No. 17. " \$15,000." This limits the payment which may be made in any one year, on any one crossing, in two ways, viz., by the 25% limitation, and, also, by the further limitation of \$15,000. This latter limitation may have the effect of holding the actual percentage payment below 25%. The sum so limited has certain provisions attached to its application. It is set out that no such money, that is, the \$15,000, or any portion thereof, shall in any one year (a) " be applied to more than six crossings on any " one railroad in any one municipality " and (b) more than one in any " one year on any one crossing."

Schedule 19.
Reasons for Judgment of Board of Railway Commissioners in connection with Order No. 38424, 15th December 1926
—continued.

Recognizing the limitations so imposed, it is, I submit, open to make 10
in successive years annual grants to any one crossing. This is, however, subject to the limitation that the sum expended in any one year shall not exceed \$15,000; and the further evident intention that the total payment out shall not exceed 25% of the cost of construction.

By the amending legislation of 1926, the percentage limitation is increased from 25% to 40%; while the limitation, as to amount, viz., \$15,000, is amended by substituting \$40,000.

My suggestion is that there be authorized in aid of the subway construction concerned the maximum payment permissible from the Fund, and that the contributions be made on progress estimates, as I have 20 suggested.

In regard to the suggestion of the Canadian Pacific Railway Company that the Galt Subdivision crossing on Bloor Street and the Toronto, Grey & Bruce crossing be considered as separate crossings, and so treated in grant from the Grade Crossing Fund, I think it would be justifiable to recognize that the Toronto, Grey & Bruce is a distinct legal entity, and that the contribution on this basis may be permitted. The burden, of course, is on the railways to present the accounts in such a way as will comply with the requirements of the Grade Crossing Fund.

V.

30

Leaving aside for later consideration the division of cost to be participated in by the city and the railways, I wish to consider now the other component factors.

(A) The first is the Bell Telephone Company. This, in my opinion, is covered by the Brock Avenue Subway case—*Bell Telephone Co. vs. C.P.R., G.T.R., and City of Toronto*, 14 Can. Ry. Cas., 14. In this case, a grade separation had been ordered at Brock Avenue and apportionment of cost was made. The level of the city street was lowered, thus involving moving and relocating the telephone line. It was held that " it was not " unreasonable to expect the telephone company to bear the cost of any 40 " change in its wires made necessary by the change in the street." This ruling so laid down has been followed in other cases.

(B) The Consumers' Gas Company. It was submitted by Counsel for the Gas Company that the application now made is founded on application by the City, and does not proceed from the Board's own motion. In the North Toronto Case, to which reference is made below, the work had been

begun on the initiation of the Board: and it is thus submitted as I understand it, that whatever may have been the situation as to cost division when the work was undertaken on the initiative of the Board, a different situation arises when the initiative is that of the City. It was also contended by Counsel for the Gas Company that the work was of no benefit to the Gas Company and that it never had been a source of danger. It was contended, further, that any cost occasioned by reason of the alteration was covered by statute and decision. Counsel pointed out that where change was necessitated by an application of the City, the courts had found that the City must pay. Reference is made to 1916, 2 Appeal Cases, P.C. 618, *Toronto Corporation vs. Consumers' Gas Co.* (Evid. Vol. 423, P. 4001).

It was pointed out by the Chief Commissioner that the Board had a right to call on the Company for its contribution. Counsel for the Gas Company, admitting the Board's right to order protection, said that under the charter legislation of the company, and under the decisions, the company had the right to claim over against the City, and the Board should not interfere with such rights. It was further submitted that the Board's jurisdiction was limited to the operation within the limits of the right of way. It was set out that while the Board might have jurisdiction under the Dominion statute, it would be inequitable and unjust to take away from the Company any right it might have against the City of Toronto. Counsel for the City submitted that the Board had power and was not hampered by provincial legislation. The same position was in substance taken by Counsel for the Canadian Pacific Ry. Co.

In connection with the North Toronto Grade Separation, there was before the Board an application by the City of Toronto asking that, in substance, the Gas Company be made to reimburse the City for the expenditures which had been made in making the necessary rearrangements of the Gas Company's layout as affected by the grade separation. In the Judgment of Chief Commissioner Carvell, of October 16th, 1919, it was pointed out that the question turned on the fact that the Gas Company had not been made a party to the procedure culminating in the issue of Order No. 22855; that the Gas Company had billed the City for work done by it and that the same was paid by the City—Board's Judgment & Orders, Vol. IX, p. 300. The City then applied to the Board for an Order directing repayment of these sums, and the Judgment of the Board was that the work was done by the Consumers' Gas Company, under direction of the City, and that in reality it was under contract.

The matter was before the Board at an earlier date and was dealt with in the Judgment of August 1st, 1919, rendered by Chief Commissioner Drayton—25 Can. Ry. Cas., 372. The question of the contract phase was left to be dealt with as I have indicated. In the Judgment of Chief Commissioner Drayton, the following words are material. He said, at p. 372, "usual practice would have justified an Order directing the work to be done, either at the Company's own expense, or to such other amount as the circumstances might justly require."

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 ember 1926
 —continued.

The Judgment continued—

“ It developed, however, at the hearing, that the work had
 “ been done and without any Order from the Board dealing with
 “ the question. As I had doubts as to the Board’s jurisdiction to
 “ make an Order under these circumstances, the work having
 “ apparently been arranged between the parties themselves, leave
 “ was given to file further submissions. This has been done.” p. 373.

The case was accordingly set down for hearing.

I am of opinion that it is open to the Board to direct the Gas Company to bear the cost of the work done by it; and I so recommend. There is one query I raise for discussion here, however, and that is, whether this should be without prejudice to the right of the Gas Company to claim over against the City in respect of the rights, if any, it has against the City. 10

(C) There now have to be considered a number of utilities owned by the City: (1) The Toronto Transportation Commission. Reference has been made to the Orders under which the tracks of the Toronto Street Railway have been allowed to be carried through the subways. Mr. Fraser (Vol. 423, p. 3981), stated in substance that whether or not a definite Order can be made against the Transportation Commission, or whether they are part of the City, a fair share should be paid by some one other than the steam Railway. Mr. Flintoft, at p. 3909, stated that the Toronto Transportation Commission was a railway. He said that the Toronto Transportation Commission as a railway should be treated as a general contributor, independent of the City. He stated, further, that the Transportation Commission should be brought in either as a party now, or that when it came to cross the line of railways in the subways it should not be allowed to cross without a proper contribution. 20

Mr. Fairty’s position for the Street Railway is set out in Vol. 423, pp. 4008, 4014, 4015, and 4023, in substance as follows: “ The City is the principal, the Transportation Commission is the agent for the City. “ The Transportation Commission does not create the danger. It does not add one cent to the cost, and the subway is of no benefit to the “ Transportation Commission.” He claims, further, that after a subway has been in existence and a street railway comes along and wants to operate through it, there is no case where it has been asked for a subsequent contribution. At pp. 4014 and 4015, Mr. Fairty, when arguing this, was referred to the provisions of Section 45. Mr. Fairty said that might be practicable thereunder, but he was going to argue this later. 30

The main argument of Mr. Fairty closed without further reference to Section 45. At p. 4041, Mr. Fairty referred the Board to the decision in the Syndicate Avenue Crossing Case, which is referred to below. He relied on this as upholding a proposition that the user of streets by the Street Railway was only one type of user and that, therefore, the highway should be provided by the City, and it should bear the full cost of providing that highway, p. 4042. The portion of Mr. Fairty’s argument just referred to did not deal with Section 45 of the Railway Act. 40

In concluding, at p. 4023, his main argument, which covers from pp. 4013—4023, inclusive, Mr. Fairty used the following words :

“ Then, to summarize, I would just emphasize the three points I have mentioned before. First of all, we do not create the danger. Secondly, we do not add one copper to the cost; and thirdly, the subway is of no benefit to us; and for those reasons I would respectfully suggest that there be no distribution as against the Toronto Transportation Commission.”

Mr. Geary, Vol. 423, pp. 4066 and 4067, argued that the Toronto Transportation Commission was making an ordinary use of the highway; that a use of the highway by the different parties is still a use of the highway which has never passed out of the possession of the City, and that, therefore, the Commission should not be specifically charged with any amount. At p. 4067, he said, however, that if anything was put on the Toronto Transportation Commission this should be outside of Toronto's share. In the same connection, Chief Commissioner Carvell asked: “ Which would you prefer, that we forget the Transportation Commission, Hydro-Electric Power Commission, the Toronto Electric Commission, and assess it all against the city, or would you rather we assessed it against them individually and relieve the City?” Mr. Geary said: “ I must have it that way if they are going to be added at all.”

I am of the opinion that the Toronto Transportation Commission should contribute to the cost of the work. The basis of said contribution requires further consideration. At the hearing, reference was made to the Edmonton Case—*The City of Edmonton vs. G. T. P. and C.N.R.* (Syndicate Avenue Crossing Case), 15 Can. Ry. Cas., 443. Here the Street Railway, owned by the City, was carried across the railway track located on the city street, the city street being senior to the railway. It was directed that the City should be at the expense of putting in the diamond and, also, of the crossing, but that the expense connected with protective appliances and the maintenance thereof should be borne equally by the City and the two railway companies. It was argued by Messrs. Flintoft and Fraser that the same principle should be applied here. That is to say, it was submitted that if the street railway had been allowed to cross on the level, the Board would have required half-interlocking protection, and that under the Edmonton decision there would have been a division of cost. It was then urged that where the tracks are now carried through subways the same principle should be applied, and that the measure of contribution should be arrived at by capitalizing the cost of the half-interlocker plant. See in this connection Mr. Flintoft, *Ibid*, p. 3912; also p. 3921.

An estimate has been prepared by the Board's Chief Engineer on this basis. Figures submitted to him by the Canadian Pacific, on my direction, have been rechecked; and he estimates that the cost chargeable on this basis in respect of the two subways in which the Canadian Pacific and Canadian National Railways are concerned would be \$95,500. The

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No. 17. figure which has been estimated by the Canadian Pacific is \$135,000.
 —
 Schedule 19. In the case of half-interlocker at Bloor Street, Newmarket Subdivision,
 — the figure estimated on this basis by him is \$41,000 as against a capitalized
 Reasons for cost of \$44,000 estimated by the Canadian National. The Canadian
 Judgment of National Railways also add a factor to cover elimination of delays and
 Board of reduction of possible damage done by the cars. While the division
 Railway proposed follows the principle laid down in the Edmonton Case, I recom-
 Commis- mend, as a substitute, the 10% basis of contribution which was made
 sioners in applicable to the Avenue Road Crossing in the North Toronto Grade
 connection Separation, North Toronto Grade Separation—Distribution of Cost, Board's 10
 with Order No. 38424, Judgments & Orders, Vol. IV, 213. An estimate submitted to the Board's
 No. 38424, Chief Engineer gives the approximate cost of the two Bloor Street subways
 15th Dec- constructed jointly by the Canadian Pacific and Canadian National Railways
 ember 1926 at \$625,000, 10% of which would amount to \$62,500.
 —continued.

(D) The Hydro-Electric of Ontario was discussed in Vol. 423, pp. 3867,
 4031, 4033, and 4034. Counsel for the Hydro-Electric Commission for
 Ontario argued that it was not down upon the highway, but that there
 was a crossing of the highway at St. Clair and Davenport Road in the air;
 that it had complied with all the statutory requirements for protection
 at the present time, and that the danger was not of its making; that it 20
 was a utility serving the public at cost, and that any increased cost would
 have to come out of the public; that whatever charge might be made
 should not be charged against the public indirectly through the Electric
 Commission, but directly against the City. He argued that whatever
 increased cost might be involved should be met by making it a charge
 against the cost of the whole work and not against the Hydro-Electric
 Commission for Ontario.

The Toronto Hydro-Electric (The Toronto Electric Commissioners),
 at Vol. 423, p. 3866 and at p. 4036, argued, in substance, that it considered
 it should not be in a worse position than the Gas Company or the Hydro- 30
 Electric of Ontario. At p. 4037, Counsel claimed that the supply of light
 was in the same position as the supply of water. I am of opinion that the
 principle of the Bell Telephone Company should apply in the case of these
 two utilities.

VI.

Discussion took place in regard to the junior and senior rule, reference
 being made at p. 816, Evid. Vol. 415, by Mr. Geary to the fact that the
 Board authorized the opening of Perth Avenue, Primrose Avenue and
 Wallace Avenue. These are not involved in the present case, but the
 reference is significant in that Mr. Geary said that as soon as they had 40
 been opened by the Board the question of the senior and junior rule should
 not be applied, but that there should be division of cost. See also discussion
 by Mr. Geary, Vol. 423, pp. 3867 to 3877, inclusive. Discussion took place
 in connection with the senior and junior rule as to the effect of the legislation
 of 1909, Section 260 of the Railway Act. Mr. Flintoft took the position,
 regarding additional tracks on Bloor Street and the question of whether

they came under the additional burden since 1909, that when the line was in place and additional tracks built subsequent to 1909, this did not mean that there was a new railway being built; that is to say, the rights which accrued prior to 1909 continued. See discussion, Mr. Flintoft, Vol. 423, pp. 3930-3943; 3966-3970. Mr. Fraser agreed in this position —pp. 3977-78.

Mr. Fraser, at p. 3999, referred to what had been done in regard to division of cost of gate protection on the Newmarket Subdivision, and said this should be taken as affording a measure of the basis of apportionment. He referred, for example, at p. 3994, to crossings on Bloor Street where there was an even division between the City and the railway. At Davenport Road, one-half was paid by the City and one-quarter paid by the Canadian National Railways and one-quarter by the Toronto Suburban Railway. At Royce Avenue, there were gates where the total cost was on the City. At St. Clair Avenue, which is not involved in the subways before us now, there were gates, costs of which were 1/3 on the City and 2/3 on the railway. At pp. 4000-01, Mr. Fraser said the Canadian National Railways should not be asked to contribute to subways on the Newmarket Subdivision beyond the proportions they now pay towards gates. Mr. Geary, at p. 4054, said that what had been done in regard to the apportionment of cost of gate protection was not pertinent to consideration of subway construction and cost apportionment. In speaking of the basis of cost, Mr. Geary, at pp. 3879-3888, claimed the situation was such that the City should not be called upon to pay as large a percentage as it did in the North Toronto Grade Separation. At p. 3888, he contended that the Board should not, in general, impose more than 25% on the City and, in particular, 20% in regard to the Newmarket Subdivision. He said that the question of the large number of senior highways was to be relied upon. The general position of the railways favoured, after the deduction of the various items chargeable to other parties, distribution of the balance equally. See Mr. Flintoft's discussion at pp. 3923, 3927. At pp. 3903 and 3904, the suggestion was made by Mr. Flintoft that the Order should provide for payment by the parties other than the party carrying on the work of their contributions on monthly progress estimates, and that provision should be made for interest. At p. 3904, Mr. Geary agreed to provision regarding progress estimates going into the Order. On the same page, Mr. Flintoft said that so long as the matter is understood, he did not care whether the interest provision went into the Order.

Mr. Geary's position in regard to cost may be found in summary on pages 4047-4067. Regarding the division of cost between railways, Mr. Flintoft, at p. 3825, said: that the Canadian Pacific handle the portion south of the diamond, and that the Canadian National could probably handle the portion to the north of the diamond to better advantage; that when they came to North Toronto and the Newmarket Subdivision, it was a matter for each railway.

At pp. 3857 and 3858, the matter was discussed and Chief Commissioner Carvell stated it was his understanding that Mr. Fraser agreed;

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 —continued.

the Canadian Pacific to do the work south of the diamond and the Canadian National to do the work north. Mr. Fraser stated, at p. 3858, that this was what was agreed to. At pp. 3923-3924, there was discussion as to how the cost of the joint work in respect of the two Bloor Street subways should be looked after. Mr. Flintoft said that so far as the Canadian Pacific and Canadian National Railways were contributing to the joint work in connection with these two subways, it would be worked out between them. If there was any difficulty, the matter could be brought to the Board. Mr. Flintoft stated the same thing applied to the MacTier Subdivision and the Brampton Subdivision. The MacTier Subdivision, as here referred to, is the Subdivision with which the tracks of the Toronto, Grey & Bruce lines connect. 10

At p. 3979, the Chief Commissioner asked Mr. Fraser :

“Do you concur in Mr. Flintoft’s suggestion that there should be no division between the two railways, that they should work the matter out themselves, unless they reach the point where they cannot agree?”

“MR. FRASER: I do Mr. Chairman. I think that will be rather a long and involved matter, depending on a number of factors, and I think we can work it out. If we cannot we can, of course, always come back to the Board.” 20

This indicates Mr. Fraser’s agreement in the statement of Mr. Flintoft above set out.

VII.

The question of seniority and juniority has been raised. I think in a large work of this nature (1) we should not have our hands tied by the senior and junior rules, and that the situation at a particular crossing should not be regarded by itself, but that the matter should be looked at from the standpoint of the whole work. A similar condition existed in the North Toronto Grade Separation Case—Board’s Judgments and Orders, Vol. IV, p. 213. 30

(2) I do not consider that where railway construction has taken place prior to 1909, the provisions of the 1909 legislation apply to branches subsequently constructed.

(3) I recommend the maximum contribution from the Grade Crossing Fund, based, as I have indicated, on progress estimates spread over a period of years, if the work takes such time.

(4) I recommend that the Bell Telephone Company, the Consumers’ Gas Company, the Toronto Transportation Company, the Toronto Hydro-Electric, and the Ontario Hydro-Electric contribute as above set out. 40

(5) A 50% contribution by the City is justifiable in the present case.

After deducting the contributions from the Grade Crossing Fund and the other parties required to contribute, the balance should be divided between the railways and the City; the City to pay 50%.

I suggest for consideration that the rapid city development and highway traffic which has taken place is a factor which should have some weight, and I think that under the circumstances 50% is a reasonable contribution.

December 15th, 1926.

(SGD) S. J. McL.

"I agree."

(SGD) A. C. B.

(SGD) F. O.

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—*continued.*

No. 18.

Schedule 20.—Order of Board of Railway Commissioners No. 40367 amending Order No. 38424.

No. 18.
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Schedule 20.
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Order of Board of Railway Commissioners No. 40367 amending Order No. 38424, 16th February 1928.

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ORDER NO. 40367.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Thursday, the 16th day of February, A.D. 1928.

Hon. H. A. McKeown, K.C., Chief Commissioner.

S. J. McLean, Asst. Chief Commissioner.

C. Lawrence, Commissioner.

20 Hon. Frank Oliver, Commissioner.

IN THE MATTER OF THE Orders of the Board Nos. 35153, 35308, 36737, 36738, 37239, and 36693, dated respectively June 5, 1924, July 10, 1924, August 22, 1925, August 21, 1925, January 15, 1926, and August 13, 1926, authorizing the construction of three subways, one under the tracks of the Galt Subdivision and the Toronto, Grey & Bruce Subdivision of the Canadian Pacific Railway Company and the Brampton Subdivision of the Canadian National Railways at Bloor Street; one under the tracks of the Canadian Pacific and the Canadian National Railways on Royce Avenue; and one under the tracks of the Canadian National Railways' Newmarket Subdivision on Bloor Street, in the City of Toronto and Province of Ontario, —reserving for further hearing of the Board all questions of distribution of cost, interest, and other matters involved in the construction of the said works : File Nos. 32453 and 32453.6.

UPON hearing Counsel for the City of Toronto, the Canadian Pacific and the Canadian National Railway Companies, the Bell Telephone Company of Canada, Consumers' Gas Company, the Toronto Transportation Commission, Hydro-Electric Power Commission of Ontario, and the Toronto Hydro-Electric System (The Toronto Electric Commissioners) upon the question as to the distribution of such cost, the evidence offered, and what was alleged; and upon reading the written data filed on behalf

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No. 18. of the Railway Companies, and its appearing that the work ordered has
Schedule 20. extended over a period of years--

Order of
Board of
Railway
Commis-
sioners

No. 40367
amending
Order
No. 38424,
16th Feb-
ruary 1928
—continued.

THE BOARD ORDERS

1. That the following payments towards the cost of the work of grade separation carried out under authority of the above recited Orders of the Board, be made out of "The Railway Grade Crossing Fund—"

(a) ON BLOOR STREET—Forty per cent. of the annual expenditure on the work in connection with the crossings under the tracks of the Galt Subdivision of the Canadian Pacific Railway Company; under the tracks of the Brampton Subdivision of the Canadian National Railways and under the tracks of the Toronto, Grey & Bruce Subdivision of the Canadian Pacific Railway Company, commencing with the year 1924, not exceeding, however, in any one year the sum of \$75,000; and forty per cent. of the annual expenditure on the work in connection with the crossing under the tracks of the Newmarket Subdivision of the Canadian National Railways, commencing with the year 1924, not exceeding, however, in any one year the sum of \$25,000; and 10

(b) ON ROYCE AVENUE—forty per cent. of the annual expenditure on the work in connection with the crossings under the tracks of the Galt Subdivision of the Canadian Pacific Railway Company; under the tracks of the Brampton Subdivision of the Canadian National Railways and under the tracks of the Toronto, Grey & Bruce Subdivision of the Canadian Pacific Railway Company, commencing with the year 1924, not exceeding, however, in any one year the sum of \$75,000. 20

2. That the Bell Telephone Company of Canada, the Hydro-Electric Power Commission of Ontario, and the Toronto Hydro-Electric System bear and pay the cost of any changes in their wires or plant made necessary by the changes in the streets; the Consumers' Gas Company to be at the cost of any work done by it; any such payments made by the said Gas Company to be without prejudice to its rights, if any, over against the City; the Toronto Transportation Commission to pay ten per cent. of the cost of the work, after deducting the amount available from "The Railway Grade Crossing Fund." 30

3. That after deducting the said payments and the contributions from "The Railway Grade Crossing Fund," the remainder of the cost of the work, including interest at the rate of five per cent. (5%) per annum thereon from the dates of expenditure to the date of payment, be borne and paid—

(a) as to the crossings of Bloor Street and Royce Avenue by the Galt Subdivision of the Canadian Pacific Railway Company, the Brampton Subdivision of the Canadian National Railways, and the Toronto, Grey & Bruce Subdivision of the Canadian Pacific Railway Company, fifty per cent. by the City of Toronto and fifty per cent. by the Railway Companies; and 40

(b) as to the crossing of Bloor Street by the Newmarket Subdivision of the Canadian National Railways, fifty per cent. by the City of Toronto and fifty per cent. by the Canadian National Railways. No. 18. — Schedule 20.

4. That in case of any disagreement between the said Railway Companies, the Toronto Transportation Commission, or the City of Toronto, as to the details of carrying out the apportionment or distribution of the cost, or as to any of the payments by this Order directed, or with reference to any other detail or matter incident thereto, or arising thereout, such matter may be referred to the Board by any of the parties affected, on notice to the others, for adjustment or further direction as to such details. Order of Board of Railway Commissioners No. 40367 amending Order No. 38424, 16th February 1928 —continued.

5. That the Order of the Board No. 38424, dated November 15th, 1926, be, and it is hereby, rescinded.

(SGD) H. A. McKEOWN,
Chief Commissioner,
Board of Railway Commissioners for Canada.

No. 19.

Schedule 3.—Statement showing growth of population in Toronto from 1879 to 1924. No. 19. — Schedule 3.

Population in the area N.W. of the corner of Bloor and Dufferin Streets, as determined from original dot maps of the 1915 Civic Transportation Committee, and revised to date. Statement showing growth of population in Toronto from 1879 to 1924.

Year	Population in Area		Total	Increase during Preceding 5 Years
	Inside City	Outside City		
1879			2,700	
1889			6,200	3,500
1899			13,500	7,300
1904			18,200	4,700
1909	20,900	9,500	30,400	12,300
1914	51,100	12,800	63,900	33,500
1919	Est. 61,100	21,050	82,150	
1920	63,100	22,700	85,800	21,900 (x) 6 Yrs
1924	Est. 70,140	35,260	105,400	

No. 20.

No. 20.

Schedule 4.

Schedule 4.—Statement showing growth of population within City of Toronto and adjacent district from 1879 to 1924.

Statement showing growth of population within City of Toronto and adjacent district from 1879 to 1924.

Statement showing population within and adjacent to the City of Toronto, and built up area within the city, from 1879 to 1914, taken from the Report of the Civic Transportation Committee on Radial Entrances and Rapid Transit for the City of Toronto—1915.

POPULATION.

Year	In City	Adjacent	Total	Built up Area	
	Increase	Increase	Increase	Increase.	
1879	75,100	: 11,200	: 86,300	: 3105 ac.	10
1889	<u>160,100</u>	: <u>12,200</u>	: <u>172,300</u>	: <u>4885 ac.</u>	
	85,000 :		1,000	86,000 :	1750 ac.
1899	<u>192,900</u>	: <u>21,500</u>	: <u>214,400</u>	: <u>5785 ac.</u>	
	32,800 :		9,300 :	42,100 :	900 ac.
1904	<u>226,400</u>	: <u>29,500</u>	: <u>255,900</u>	: <u>6870 ac.</u>	
	33,500 :		8,000 :	41,500 :	1085 ac.
1909	<u>325,300</u>	: <u>26,900</u>	: <u>352,200</u>	: <u>9469 ac.</u>	
	98,900 :		2,600 :	96,300 :	2599 ac.
1914	<u>470,100</u>	: <u>31,400</u>	: <u>501,500</u>	: <u>15679 ac.</u>	20
	144,800 :		4,500 :	149,300 :	6210 ac.
1919	<u>499,300</u>	: <u>58,600</u>	: <u>557,900</u>	: <u>16180 ac.</u>	
	29,200 :		27,200 :	56,400 :	501 ac.
1924	<u>542,200</u>	: <u>110,000</u>	: <u>653,500</u>	: <u>17730 ac.</u>	
	42,900 :		51,400 :	95,600 :	1550 ac.

No. 21.

No. 21.

Schedule 1.—Plan showing growth of City of Toronto from 1834 to 1910.

(Separate document.)

No. 22.

No. 22.

Schedule 8A.—Plan showing subways ordered to be constructed.

(Separate document.)

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No. 23.

No. 23.

Schedule 14.—Plan showing Toronto Transportation Commission's wires under Bloor Street Subway.

(Separate document.)

No. 24.

No. 24.

Schedule 2.—Act constituting Toronto Transportation Commission, and Amendments thereto.

Schedule 2.

Statutes of Ontario 1920 10-11 Geo. V., Chapter 144.

An Act Respecting the City of Toronto.

Assented to June 4th, 1920.

Act constituting Toronto Transportation Commission, and Amendments thereto.

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Preamble—

WHEREAS the Corporation of the City of Toronto has, by petition, prayed for special legislation in respect of the several matters hereinafter set forth; and whereas at the annual municipal elections, held by the said Corporation on January 1st, 1920, the following questions were submitted to the electors qualified to vote on money by-laws: "Are you in favour of (1) The operation of the Toronto Railway System by a commission of three ratepayers resident in the municipality, to be appointed by the City Council and to act without salary? (2) The city's applying for legislation enabling it to borrow money without a further vote of the electors to acquire the property of the Toronto Railway Company which the City is entitled to take over under the agreement between the City and the Company and for the purposes of the Transportation Commission, and to make arrangements for the operation thereof?"; and whereas the said electors, by a large majority, voted in favour of both of the foregoing questions; and whereas it is desirable to validate certain sales of lands for arrears of taxes and to remove any doubts that may arise as to the validity thereof; and whereas it is expedient to grant the prayer of the said petition;

Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Establishment of Toronto Transportation Commission.

1. The Council of the Corporation of the City of Toronto (hereinafter called the "Corporation") may by by-law establish a Commission under the name of "The Toronto Transportation Commission," (hereinafter called the "Commission") with the powers, rights, authorities and privileges hereinafter set forth.

Incorporation and Members.

2. The said Commission shall be a body corporate and shall consist of three members, each of whom shall be a resident and ratepayer of the City of Toronto, and shall be appointed by the Council of the Corporation of the City of Toronto on the nomination of the Board of Control, and

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Act con-
stituting
Toronto
Transporta-
tion Com-
mission, and
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ments
thereto
—continued.

no appointment shall be made by such Council in the absence of such nomination except on the affirmative vote of at least two-thirds of the members of the Council present and voting, and the members so appointed shall hold office for three years and until their successors are appointed.

Vacancies.

3. Where a vacancy in the Commission occurs from any cause, the Council shall immediately appoint, as set out in the next preceding section, a member who shall hold office for the remainder of the term for which his predecessor was appointed.

Reappointment of Members.

4. Any member shall be eligible for re-appointment on the expiration of his term of office.

5. The members of the Commission may be paid such salary or other remuneration as may be fixed by by-law of the Council.

Member of Council not Eligible.

6. No member of the Council shall be eligible to be appointed a member of the Commission.

Control and Management by Commission of Street Car Systems.

7. The Council of the said Corporation, upon the Corporation acquiring such property of the Toronto Railway Company, as the said Corporation is entitled to take over under the provisions of the agreement and conditions, tender and by-law incorporated therewith, set forth as Schedule "A" to the Act passed in the fifty-fifth year of the reign of Her late Majesty Queen Victoria, chaptered 99, or under the provisions of the said Act, shall by by-law entrust to the said Commission the control, maintenance, operation, and management thereof and also the control, maintenance, operation and management of the municipal street railways, controlled and operated by the said Corporation.

Rights, Powers, Etc., of City Transferred to Commission.

8. Upon such by-law being passed by the said Council all the powers, rights, authorities and privileges of the said Corporation as to the construction, maintenance, operation, control and management of street railways by any general or special Act conferred upon the said Corporation shall be exercised by the Commission and not by the Council of the Corporation.

Control and Operation of Civic Car Lines.

9. The Council of the said Corporation may, in its discretion, by by-law entrust the construction, control, maintenance, operation and management of the municipal street railways controlled and operated by the said Corporation to the Commission at any time before the acquiring by the said Corporation of the property of the Toronto Railway Company hereinbefore referred to and thereafter all the powers, rights, authorities and privileges of the said Corporation as to construction, operation, control, maintenance and management of municipal street railways shall be exercised by the Commission and not by the Council of the said Corporation.

Construction and Operation of Motor Busses, Subways, Tubes, Etc.

No. 24.

10 10. The Council of the said Corporation may at any time by by-law entrust the construction, control, maintenance operation and management of lines of motor busses, or of subways, or of tubes or of any other method of underground or overhead local transportation within the power of the Corporation to the said Commission, and thereafter all the powers, rights, authorities and privileges of the said Corporation as to the construction, control, maintenance, operation and management of the transportation so put under the control of the Commission shall be exercised by the Commission and not by the Council of the Corporation.

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Toronto
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—continued.

Duties of Commission as to Local Transportation, etc.

11. From and after its establishment it shall be the duty of the Commission to consider generally all matters relating to local transportation in the City of Toronto, to construct such new lines of street railway and to provide such plant, equipment and other facilities as it may consider necessary to be constructed or provided in anticipation of the taking over by the City of the property of the Toronto Railway Company, referred to in Section 6.

Particular Powers of Commission.

20 12. The Commission shall, in particular, but not so as to restrict its general powers and duties, have the following powers and duties, namely:—

(a) To construct, control, maintain, operate and manage new lines of street railway in addition to or in extension of existing lines;

(b) To fix such tolls and fares so that the revenue of the commission shall be sufficient to make all transportation facilities under its control and management self-sustaining, after providing for such maintenance, renewals, depreciation and debt charges as it shall think proper;

30 (c) To make requisitions upon the Council for all sums of money necessary to carry out its powers and duties but nothing herein contained shall divest the Council of its authority with reference to providing the money required for such works, and when such money is provided by the Council the treasurer of the municipality shall upon the certificate of the Commission pay out any money so provided.

Annual Report of Commission to Council.

13. Immediately after the close of each calendar year the Commission shall prepare report to Council and publish a complete audited and certified financial statement of its affairs, including revenue and expense account, balance sheet and profit and loss statement, and said statement
40 shall be accompanied by a general report of the operations of the Commission during the year.

No. 24. *Inspection of Books, etc., by Audit Department.*

Schedule 2. 14. All the books, documents, transactions and accounts of the Commission shall, at all times, be open for inspection by the audit department of the said City.

Act constituting Toronto Transportation Commission, and Amendments thereto

—continued.

Power to Borrow Money to Acquire Property of Toronto Railway Company and for New Lines of Railway.

15. The Council of the said Corporation may, without submitting the same to the qualified electors, pass a by-law or by-laws, from time to time, for the issue of "City of Toronto Consolidated Loan Debentures," for such sum or sums as may be deemed necessary by the Council for the following purposes: 10

(a) To acquire such property of the Toronto Railway Company as the Corporation is entitled to take over, under the provisions of the agreement and conditions, tender and by-law set forth as Schedule "A" to the Act, passed in the fifty-fifth year of the reign of Her late Majesty, Queen Victoria, chaptered 99, or under the provisions of the said Act confirming the said agreement;

(b) To provide and pay for such plant, equipment and other facilities as may be necessary to be provided in anticipation of the taking over by the Corporation of the property of the Toronto Railway Company hereinbefore referred to and to meet such other expenditure as may be necessary in making arrangements for the operation of the said property when acquired by the said Corporation; 20

(c) To provide the Commission with moneys with which to construct new lines of railway or extensions of existing lines, to provide rolling stock and equipment, erect buildings, acquire lands and other facilities and otherwise to carry out fully the foregoing provisions of this Act.

Debentures not to be Counted in Ascertaining Limit of Borrowing.

16. The amount of any debentures, issued by the said Corporation under the provisions of sections 1 to 15 inclusive of this Act, shall not be included in the Corporation's debt in estimating the limit of its borrowing powers. 30

4 *Geo. V., c. 98, s. 4, repealed.*

17. Section 4 of the Act, passed in the fourth year of the reign of His Majesty King George V., chaptered 98, is hereby repealed.

* * * * *

1920 Statutes of Ontario, Chap. 144, 10-11 Geo. V., was amended by 12-13 Geo. V., Chap. 133, Sec. 3, as follows:

16a. All claims, actions and demands arising from or relating to the construction, repair, operation, management or control of the railways and property entrusted to the said Commission under 40

Sections 7, 9 and 10, or arising from the exercise of any of the powers of such Commission under this Act, shall be made upon and brought against the Commission and not upon or against the Corporation of the City of Toronto, and such Commission may sue and be sued in its own name.

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Act constituting Toronto Transportation Commission, and Amendments thereto
—continued.

And was further amended by 17 Geo. V., Chap. 134, Secs. 4 and 5, by adding the following subsections :

10 12a. Subject to the provisions of The Highway Traffic Act, 1923, and The Public Vehicle Act, 1923, and to any amendments or regulations made to or under the said Acts, The Toronto Transportation Commission may operate public vehicles hired by a party of persons for the purpose of conveying such persons on a special trip or a special return trip from the City of Toronto to any place outside Toronto or from any place in the County of York to any place outside that county.

20 12b. Subject to the provisions of The Highway Traffic Act, 1923, and The Public Vehicle Act, 1923, and to any amendments or regulations made to or under the said Acts, The Toronto Transportation Commission may operate public vehicles from the City of Toronto to the City of Niagara Falls and return.

No. 25.

Schedule 21.—Order of Mignault, J., granting leave to appeal to Supreme Court of Canada.

In the Supreme Court of Canada.

IN THE SUPREME COURT OF CANADA.

No. 25.

THE HONOURABLE
MR. JUSTICE MIGNAULT
IN CHAMBERS.

WEDNESDAY THE 27th DAY
OF FEBRUARY, 1929.

Schedule 21.

30 IN THE MATTER of Order No. 40367 of the Board of Railway Commissioners for Canada, made on the 16th day of February, 1928, requiring (inter alia) the Toronto Transportation Commission to contribute towards the cost of constructing three subways, one under the tracks of the Galt Subdivision and the Toronto, Grey, and Bruce Subdivision of the Canadian Pacific Railway Company and the Brampton Subdivision of the Canadian National Railways at Bloor Street; one under the tracks of the Canadian Pacific and the Canadian National Railways on Royce Avenue; and one under the tracks of the Canadian National Railways' Newmarket Subdivision on Bloor Street, in the City of Toronto and Province of Ontario.

Order of Mignault, J., granting leave to appeal to Supreme Court of Canada, 27th February 1929.

*In the
Supreme
Court of
Canada.*

BETWEEN

THE TORONTO TRANSPORTATION COMMISSION

Appellants

and

THE CANADIAN NATIONAL RAILWAYS, THE CANADIAN
PACIFIC RAILWAY and THE CITY OF TORONTO

Respondents.

No. 25.
Schedule 21.

Order of
Mignault,
J., granting
leave to
appeal to
Supreme
Court of
Canada,
27th Feb-
ruary 1929
—continued.

UPON THE APPLICATION of the Toronto Transportation Commission made on the 15th day of March, 1928, for an order granting the Applicant leave to appeal from the said Order No. 40367 of the Board of Railway Commissioners for Canada, and the application having stood over by consent until this day, and upon hearing read the said order sought to be appealed from and upon hearing what was alleged by Counsel for the Applicant, the Canadian National Railways and the Canadian Pacific Railway Company, and the Board of Railway Commissioners for Canada and the Corporation of the City of Toronto not being represented although duly served,

1. IT IS ORDERED that the Appellant have leave to appeal to the Supreme Court of Canada from the said Order No. 40367 of the Board of Railway Commissioners for Canada upon the following questions: 20

(1) Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act of Canada to provide in Order No. 40367, dated February 16th, 1928, that the Toronto Transportation Commission should contribute to the cost of—

- (a) the Bloor Street Subways,
- (b) the Royce Avenue Subway,

or either of such works referred to in such order,

(2) If the above question should be answered in the affirmative as to either or both of the said works, had the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel contribution from the Toronto Transportation Commission, a Provincial corporation, in respect of— 30

- (a) the Bloor Street Subways,
- (b) the Royce Avenue Subway,

or either of such works referred to in such order, under the circumstances of this case?

2. IT IS FURTHER ORDERED that the Case in the said Appeal shall consist of a statement of Facts with the necessary Appendix of Documents to be agreed upon among the parties hereto or, failing agreement, to be settled by the Board of Railway Commissioners for Canada. 40

3. AND IT IS FURTHER ORDERED that the costs of this application be costs in the said Appeal.

(SGD) P. B. MIGNAULT, J.

No. 26.**Schedule 22.—Notice of setting case down for hearing, 11th March 1929.***(Not printed.)*

No. 26.

No. 27.**Schedule 23.—Order approving security for costs, 19th March 1929.***(Not printed.)*

No. 27.

No. 28.**Contents of Case.***(Not printed.)*

No. 28.

No. 29.**Factum of the Toronto Transportation Commission.****PART I.****STATEMENT OF FACTS.**

This is an appeal by leave of Hon. Mr. Justice Mignault by order dated February 27th 1929 (Record p. 47) from Order No. 40367 of the Board of Railway Commissioners for Canada dated February 16th 1928 (Record p. 39). The order in question directed that a certain contribution towards the cost of certain subways previously ordered by the Board be made from the Railway Grade Crossing Fund; that ten per cent. of the cost less such contribution be paid by the Appellant and that the balance of the cost be borne one-half by the Respondent City Corporation and one-half by the Respondent steam railroads.

The facts have been settled by the Board appealed from and printed in the Case.

PART II.**POINTS IN ISSUE.**

The points in issue are set out in the order giving leave to appeal as follows :—

(1) Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act of Canada to provide in Order No. 40367, dated February 16th 1928,

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that the Toronto Transportation Commission should contribute to the cost of—

- (a) the Bloor Street Subways,
 - (b) the Royce Avenue Subway,
- or either of such works referred to in such order ?

(2) If the above questions should be answered in the affirmative as to either or both of the said works, had the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel contribution from the Toronto Transportation Commission, a Provincial corporation, in respect of—

- (a) the Bloor Street Subways,
 - (b) the Royce Avenue Subway,
- or either of such works referred to in such order, under the circumstances of this case ?

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PART III.

ARGUMENT ON BEHALF OF APPELLANT.

The Appellant is a corporation incorporated by Statute 10-11 Victoria, C. 144, Ontario, (Record p. 43) to manage the street railway lines and other forms of local transportation owned by the respondent corporation. It has no beneficial interest in such property and is purely a statutory agent of the city corporation or, to put it another way, to all intents and purposes a municipal department operating a service-at-cost system.

20

On September 1st 1921 the street railway systems then existing in the City of Toronto were handed over to its control and management. The main systems were two in number, in the first place the lines formerly operated by the Toronto Railway Company, and in the second place the lines formerly operated by the city corporation. In the district in question the lines formerly operated by the Toronto Railway Company embraced—

- (a) A line on Dundas Street, a diagonal highway leading to the centre of the city.
- (b) A line on Bloor Street as far west as Lansdowne Avenue.
- (c) A line on Lansdowne Avenue connecting the two aforesaid lines and extending north of Bloor St.

30

In addition the city corporation operated a line on Bloor Street running westerly from Dundas Street.

In the statement of Facts as settled it is stated that the appellant permitted passengers who desired to do so to walk along Bloor Street from Lansdowne Avenue to Dundas Street, a distance of slightly over half a mile, and to transfer at the corner of Bloor and Dundas Streets for points north and northwest. While this is true it was very rare indeed that any passenger would avail himself of this doubtful privilege for by riding down Lansdowne Avenue from the corner of Bloor Street and Lansdowne Avenue for two blocks he could make a direct connection with the Dundas Street line.

40

The appellant had no part or lot in the application for grade separation in this district and it was a matter of complete unconcern to it whether or not grade separation would be granted. As far as Bloor Street was concerned the appellant's position before the Board was that to construct a line on such street was economically disadvantageous to it for there were no economies which it could effect in rerouting or operation which would recoup it for the capital cost of such street railway line. On the other hand, to be absolutely fair, the appellant is willing to concede that the construction of the line in question, was a slight advantage to certain of the public who
 10 wished to travel east and west upon Bloor Street without having to make the short detour to the south to cross over the Dundas Street Bridges. The mass of the travelling public, however, did not travel east and west on Bloor Street but naturally took the diagonal road, Dundas Street, to and from the heart of the city.

The attitude of the appellant, therefore, was, it is submitted, quite logical and comprehensible. If the Board came to the conclusion that the circumstances did not warrant grade separation, it was quite satisfied to continue its existing operation. If, however, the Board came to the conclusion that the growth of the district in question and the increase
 20 in highway traffic made it desirable that Bloor Street should be carried under the railway, it then would, in order to serve the public, make use of such highway in its altered condition. The ultimate decision of the Board, therefore, was not influenced in any way by the attitude of the appellant. It is plain that the grade separation in question would have been ordered, as it was ordered at Royce Avenue and other streets, whether or not the appellant intended to use any of such highways at their new levels or whether such use should take the form of a street railway or bus transportation.

Such is the situation with regard to Bloor Street. In regard to Royce
 30 Avenue the Commission has no lines or services on this street and has no intention of constructing a street railway line along this street or in any way making use of this subway. The appellant will not further refer especially to the Royce Avenue subway. It will be sufficient to say that all its observations to be hereinafter made with reference to the Bloor Street subways apply with even greater force to the Royce Avenue subway and it submits with absolute confidence that there is no circumstance which can be urged which would even found an argument for the suggestion that the appellant is in any way interested in or affected by the construction of such subway. If the appellant can be ordered to contribute to the cost
 40 of the construction of this work, the Board would have equal jurisdiction to order it to contribute towards the cost of subways in Ottawa.

When the Bloor Street subways were practically complete the appellant applied to the Board under Section 252 of the Railway Act of Canada, reserving all its rights, for leave to construct street railway tracks upon the highway in question. The Board granted such permission unconditionally, reserving, however, consideration of the question of contribution

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by the appellant, in respect of the application launched by the respondent city corporation.

The street railway tracks of the appellant were, therefore, laid upon Bloor Street but the construction of such tracks did not in any way add to the cost of such subways.

In *Boland v. Canadian National Railways*, 59 O.L.R. 486, page 494, the Privy Council used the following language with reference to this very subway :

“ The question, therefore, resolves itself into this : Is the subway part of the undertaking of the railway? Their Lordships consider that it is not. The expression ‘subway’ has been used and it is convenient, but in fact, what has been done is merely a lowering of the road and the construction of a new railway bridge. Their Lordships do not doubt that the lowered road still remains, as it was part of the road belonging to the municipality. They might put sewers under it or gas pipes along it, and could not be restrained by the railway authorities—assuming, of course, that these things so done did not in any way interfere with the position of the railway proper.” 10

The appellant therefore submits, that it or the city corporation, its principal had the right to use this highway by the most universal, efficient and economical method of highway user, *i.e.* by street car, without let or hindrance and without terms or conditions of any kind unless it could be shown that such user in some way interfered with or might interfere with the respondent railway’s works. It is, of course, conceded that no such interference was, or could be, caused by the appellant’s railway. 20

Under these circumstances the appellant, submits that the Dominion Railway Act gave the Board no right to order contribution from it towards the cost of this depressed highway and in the alternative that any provision of such act which might be construed as giving the Board any such right is *pro tanto ultra vires* the Parliament of Canada. 30

This case might conceivably have been regarded from two aspects, viz., (a) the crossing of a highway by a Dominion railway, or (b) the crossing of a Dominion railway by a Provincial railway. We are spared consideration of the latter aspect for it is clear from a perusal of the proceedings that the order for contribution against the appellant was made upon the City’s original application and in consequence of the Board’s implied decision that the Appellant was a person “interested in or affected by” such application within the meaning of Section 39 of the Dominion Railway Act to be hereinafter more particularly referred to.

It may be said in passing, however, that this attitude of the Board was not taken inadvisedly for apart from the question whether the Appellant needed under the circumstances of this case to make any application to the Board, based on Section 252 of the Act, for leave to cross the steam railways (a matter it is submitted quite arguable), the Board, upon the appellant’s application, made reserving all its rights, gave a simple and unconditional permission to cross and found no occasion for invoking any of its powers under the said Section 252 of the Act. And as such crossing in any event 40

involved no cost or expense, an order for contribution to the cost of the subway plainly could not be justified as made upon such application.

What, therefore, the respondent seeks to justify is an order directing contribution towards the cost of a subway from a corporation not present at the scene of the work, whose operations in no sense contributed to any danger supposed to exist at the former crossing, who did not desire the construction of such subway, who were not applicants or parties to the application until brought in by the Board and whose subsequent user of the works ordered by the Board did not add anything to the cost of such
10 works.

The original application of the City Corporation was made under Section 257 of the Railway Act 9-10 Geo. V. c. 68, which reads as follows :—

“ 257. (1) Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of
20 such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it 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, and 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 such portion or crossing, if any, or any other crossing directly
30 or indirectly affected.

“ (2) When the Board of its own motion, or upon complaint or application, makes any order that a railway be carried across or along a highway, or that a railway be diverted all the provisions of law at such time applicable, to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land, exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

“ (3) The Board may exercise supervision in the construction of any
40 work ordered by it under this section, or may give directions respecting such supervision.”

The contention of the respondents the steam railways is that Section 39 of the Railway Act justifies the Board's order against the appellant. This section reads as follows :

“ 39.—(1) When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances,

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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, 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.” 10

In the *Queen Street Bridge case (Toronto Railway Company vs. City of Toronto)* 46 O.L.R. 452, Lord Finlay said at p. 458 with reference to the section of the Act then corresponding to this section, “There is not in “ sub-section 2 any definition of the class of persons who may be ordered “ to pay such expenses, but it seems clear that sub-section 2 must be read “ with reference to the immediately preceding provision, and that such “ an order may be made only on a company, municipality or person “ interested in or affected by the order directing the works.” 20

Granted this, who then are persons “interested in or affected by” the works? As early as the case of *C.P.R. v. County of York*, 25 A.R.65, the necessity of a limitation upon these works was recognized. The necessity was emphasised in the *Vancouver case, British Columbia Electric Railway Company vs. Vancouver &c. Ry. Co. and City of Vancouver*, 48 S.C.R. 98, especially by Duff J. at p. 129, and in the case of *Thorold v. G. T. R.* 24 C.R.C. 21. And the decision of the Privy Council in the *Vancouver case*, 1914 A.C. 1067 must be taken to have established that there must be a reasonable limitation on these words, a limitation which the Courts will review, and that mere presence or benefit *ipso facto* confers no jurisdiction upon the Board to assess a person with the cost of a work. 30

No case yet has gone so far as to attempt to define who are or who are not persons “interested in or affected by” a work. And it must be conceded by the respondents that no case has gone the length of the order appealed from. Up to this time the only persons sought to be assessed have been—

(a) Dominion railways directly concerned. 40

(b) The municipality concerned, *e.g., City of Toronto v. G. T. R.* 37, S.C.R. 232.

(c) Adjacent municipalities whose inhabitants contribute to the danger and benefit by its removal, *e.g., City of Toronto v. C.P.R.* 1908 A.C. 54.

(d) Non-municipal street railways maintaining an actual existing crossing which contributes to the danger. *Queen St. Bridge case*, 46 O.L.R. 452; *Avenue Rd. case (Toronto Ry. Co. v. City of Toronto)* 53 S.C.R. 222.

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It is quite to be expected that persons present at the scene of a grade separation and whose works cause in part at least the danger to be removed should be considered "interested in and affected by" the order for the construction of works to remove such danger. But the facts of this case as stated above are far different from the cases above referred to. The
10 appellant submits that persons not present at the scene, not contributing to the danger, not increasing the cost, not desirous of the work and not parties to the application, cannot in any way be considered as "interested in or affected by" the work in question. The later user of this highway by the appellant is in principle no different from that of the casual motorist, the boy on a bicycle or the mother with her perambulator.

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In the *Vancouver case* the Privy Council cited as an absurdity the suggestion that a neighbouring shop-owner could be called on to pay any part of the cost of protective measures ordered by the Board. In what
20 particular does such shop-owner owning a motor car frequently using the bridge, differ from the appellant, and could or would the appellant have been assessed for a portion of the cost of the works had it operated buses instead of street cars over this highway?

The appellant submits that Drayton, Chief Commissioner, correctly interpreted the effect of the *Vancouver case* when he said in the *Kenilworth case (Hamilton St. Ry. Co. v. G. T. R., 17 C.R.C. 393)*.

"The case is undoubtedly authority for the proposition that the Board has no jurisdiction to consent to the municipality making a highway improvement and ordering that a provincial line contribute to the cost thereof. I think it may be said to determine that no local
30 railway company can be subjected to any part of the cost of works which the Board does not find to be necessary to remove a danger created in whole or in part by the crossing of a provincial line by a Dominion line."

The appellant also submits that it is not a party interested in or affected by the work in question because of the peculiar relationship existing between it and the respondent city corporation. As above pointed out it is merely a statutory agent of such respondent and to all intents and purposes a city department. Vide *Macdougall v. Water Commissioners of Windsor*, 31 S.C.R. 326. Once a city corporation pays the assessments or charges
40 incident to its ownership and control over a highway it must have the right as the Privy Council pointed out in the *Boland case* (supra) to use such highway for all proper highway purposes. The endeavour to make a certain class of users pay twice, once as rate-payers and once as such users is illogical, unjust and discriminatory and has never been defended except on the ground of pure opportunism. If this lowered highway is a city street it must have all the qualities and incidents of a city street

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and there is no more power in the Board to assess the City's railway department separately than to assess its sewer department, its water department, its electric light department or any other branch of the civic service. The city corporation's contribution towards the cost of grade separation must and should cover all these forms of highway user.

In respect of this matter the appellant submits that the Board have in this case departed from their expressed principle in other cases, e.g., *Edmonton St. Ry. Co. v. G.T.R. Ry. Co.*, 14 C.R.C. 93; *G.T.R. Ry. Co. v. City of Edmonton*, 15 C.R.C. 445 and the *Elgin St. case* (supra). For example in the second of the above cases McLean, Asst. Chief Commissioner, 10 said, at p. 451, "The Board has a well established practice, where one
" railway seeks to cross another, of putting the entire cost of the construc-
" tion and maintenance of any protective device which it may order on
" the junior road. We have also a well established practice of considering
" a municipally-owned street railway as senior to the tracks of a steam
" railway which a municipality seeks to cross with its street railway if
" the street upon which the street railway is to be operated over the steam
" railway was a street at the point of crossing prior to the construction
" of the steam railway. That is the seniority of the street at the point 20
" of crossing is taken to give seniority to the street railway, because the
" operation of a street railway is but one of the many ways a municipality
" might carry traffic along its street."

Finally the appellant submits that irrespective of the construction of Section 39 of the Railway Act, the Parliament of Canada had no right to authorize the Board to order contribution from the appellant, a provincial corporation, under the circumstances of this case. On this question the appellant wishes to adopt as its argument the dissenting judgment of Duff J. in the *Vancouver case*, 48 S.C.R. 98, at p. 108 and to submit that while this judgment can no longer be deemed to apply where there is an actual existing crossing of a provincial railway creating danger, it is of 30 full force and effect in the circumstances of the present case.

D. L. McCARTHY,
IRVING S. FAIRTY,
of Counsel for the Appellant.

No. 30.

Factum of
the Cana-
dian Pacific
Railway
Company.

No. 30.

Factum of the Canadian Pacific Railway Company.

PART I.

STATEMENT OF FACTS.

1. This is an Appeal by leave of the Honourable Mr. Justice Mignault from Order No. 40367 of the Board of Railway Commissioners for Canada, 40 hereinafter referred to as the "Board," dated 16th February, 1928. Two

questions are submitted as to the jurisdiction of the Board to direct the Appellant to contribute toward the cost of three subways mentioned in said Order.

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2. Two of these subways are constructed on Bloor Street and one on Royce Avenue, as shown on the plan being Schedule No. 1 of the case. The subways on Bloor Street are about a quarter of a mile apart; one being under the tracks of the Galt Subdivision of the Canadian Pacific (two main tracks and one siding), the Brampton Subdivision of the Canadian National (two main tracks), and the Toronto, Grey and Bruce Subdivision of the Canadian Pacific (one track); the other being under the Newmarket Subdivision of the Canadian National (one track). The subway on Royce Avenue is constructed under the tracks of the said Galt, Brampton and Toronto, Grey and Bruce Subdivisions of the railways (five tracks in all).

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dian Pacific
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3. It is admitted that that portion of the City through which the streets and railways in question run, has grown to a remarkable extent, and service by the street railway for these portions was a matter of extensive study and investigation for a considerable number of years prior to the issue of Orders 35037 and 35153. Prior to the issue of these Orders the street railway tracks of the Appellant already extended along Bloor Street from the east to Lansdowne Avenue and from Dundas Street westward, and along Dundas Street from the point where it crosses the steam railways by an overhead bridge, northwesterly for a considerable distance beyond the junction with Royce Avenue.

4. The street railway is not constructed through the subway on Royce Avenue but as appears by the Statement of Facts, Dundas Street, including the street railway tracks, was diverted by the Respondents at its then level with easy approaches to the subway in both directions on the original location of the street in order to avoid a dangerous traffic condition and also looking forward to the possible future extension by the Appellant of its line of street railway from Lansdowne Avenue along Royce Avenue and through the subway to connect with its lines on Dundas Street.

5. The Statement of Facts shows that in issuing the Orders in question the Board was acting for the protection, safety and convenience of the public.

6. The Appellant obtained an Order from the Board, No. 36693, dated 13th August, 1925, before the completion of the subways, granting it leave to build a double line of street railway along Bloor Street from Lansdowne Avenue to Dundas Street. By the said Order the Board reserved the question of contribution by the Appellant to the cost of the said subways for further consideration.

7. The Appellant used the bridges carrying the Respondents' railway tracks over the subways to support its trolley wires and feed cable as described in paragraph 32 of the Statement of Facts.

PART II.

QUESTIONS FOR DECISION.

1. Had the Board under the circumstances of this case, jurisdiction under the Railway Act of Canada to provide in Order No. 40367, dated February 16th, 1928, that the Transportation Commission should contribute to the cost of :—

(a) The Bloor Street Subways ;

(b) The Royce Avenue Subway ;

or either of such works referred to in such order ?

2. If the above question should be answered in the affirmative as to either or both of the said works, had the Parliament of Canada jurisdiction to confer upon the Board authority to compel contribution from the Transportation Commission, a Provincial corporation, in respect of :—

(a) The Bloor Street Subways ;

(b) The Royce Avenue Subway ;

or either of such works referred to in such Order, under the circumstances of this case ?

PART III.

ARGUMENT.

1. In regard to the power of the Dominion Parliament to enact the material sections of the Railway Act it is submitted that the question is really governed by the following decisions :—

<i>Toronto Corporation v. Canadian Pacific Ry.</i>	1908	A.C. 54
<i>Toronto Railway Co. v. City of Toronto</i>	1920	A.C. 426
<i>City of Toronto v. Grand Trunk Ry.</i>	1906	37 S.C.R. 232
<i>County of Carleton v. City of Ottawa</i>	1909	41 S.C.R. 552
<i>Toronto Railway Co. v. City of Toronto</i> (Avenue Road)	1916	53 S.C.R. 222

2. The Board acted in this matter for the protection, safety and convenience of the public and therefore had full jurisdiction, under the provisions of the Railway Act above referred to, to order the carrying out of the works in question in this proceeding and to order the Appellant to contribute a part of the cost thereof.

<i>City of Toronto v. Grand Trunk Railway</i>	1906	37 S.C.R. 232
<i>Ottawa Electric Ry. Co. v. City of Ottawa</i>	1906	37 S.C.R. 354
<i>James Bay Ry. Co. v. Grand Trunk Ry.</i>	1906	37 S.C.R. 372
<i>Toronto Corporation v. Canadian Pacific Ry.</i>	1908	A.C. 54
<i>Toronto Railway Co. v. City of Toronto</i> (Avenue Road)	1916	53 S.C.R. 222
<i>Toronto Railway Co. v. City of Toronto</i> (Queen Street)	1920	A.C. 426

See also :—

<i>Grand Trunk Ry. v. City of Kingston</i>	1903	8 Ex. C.R. 349 (4 C.R.C. 102)
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3. The decision of the Judicial Committee of the Privy Council in *British Columbia Electric Railway Company vs. Vancouver, Victoria & Eastern Railway and Navigation Company* is distinguishable from the present case.

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	<i>British Columbia Electric Ry. Co. v. Vancouver Victoria & E. Ry. & Nav. Co.</i>	1914	A.C. 1067	No. 30.
	<i>Toronto Railway Co. v. City of Toronto (Avenue Road)</i>	1916	53 S.C.R. 222	Factum of the Cana- dian Pacific Railway Company— <i>continued.</i>
10	<i>Toronto Railway Co. v. City of Toronto (Queen Street Bridge Case)</i>	1920	A.C. 426	

4. The decision of the Board on the question as to whether the Appellant is a party interested in or affected by the works in question is in reality a decision on a point of fact and under the Act is final and conclusive on the parties. Such being the case, the Order of the Board that the Appellant shall contribute to the cost of these works is not subject to review. The circumstance that at the moment the order was made the line of street railway did not actually cross the steam railways on the level does not limit the power of the Board to order it to contribute.

	<i>City of Toronto v. Grand Trunk Railway</i>	1906	37 S.C.R. 232
20	<i>James Bay Ry. Co. v. Grand Trunk Railway</i>	1906	37 S.C.R. 372
	<i>County of Carleton v. City of Ottawa</i>	1909	41 S.C.R. 552

See also :

	<i>In re Canadian Pacific Ry. and Township and County of York</i>	1898	25 O.A.R. 65
	<i>Grand Trunk Railway v. Cedar Dale</i>	1906	7 C.R.C. 73

5. The Board's decision in this case is in harmony with the practice which it has uniformly followed as indicated by the following decisions :

	<i>City of Toronto v. Grand Trunk Railway</i>	1906	37 S.C.R. 232
	<i>Ottawa Electric Ry. v. City of Ottawa</i>	1906	37 S.C.R. 354
30	<i>County of Carleton v. City of Ottawa</i>	1909	41 S.C.R. 552

See also :

	<i>In re Canadian Pacific Ry. and Township and County of York</i>	1898	25 O.A.R. 65
	<i>Grand Trunk Railway v. Cedar Dale</i>	1906	7 C.R.C. 73
	<i>Hamilton Street Ry. v. Grand Trunk Ry. (Kenilworth Avenue)</i>	1914	17 C.R.C. 393

6. This respondent relies on the reasons given by the Board in ordering the Appellant to contribute toward the cost of these works, and submits that both questions submitted for the decision of this Court should be
40 answered in the affirmative and that this Appeal should be dismissed with costs.

W. N. TILLEY.

E. P. FLINTOFT.

Of Counsel for the Respondent,
Canadian Pacific Railway Company.

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PART I.

STATEMENT OF FACTS.

1. This is an Appeal by leave of the Honourable Mr. Justice Mignault from Order No. 40367 of the Board of Railway Commissioners for Canada, hereinafter referred to as the "Board," dated 16th February, 1928. Two questions are submitted as to the jurisdiction of the Board to direct the Appellant to contribute toward the cost of three subways mentioned in said Order. 10

2. Two of these subways are constructed on Bloor Street and one on Royce Avenue, as shown on the plan being Schedule No. 1 of the case. The subways on Bloor Street are about a quarter of a mile apart; one being under the tracks of the Galt Subdivision of the Canadian Pacific (two main tracks and one siding), the Brampton Subdivision of the Canadian National (two main tracks), and the Toronto, Grey and Bruce Subdivision of the Canadian Pacific (one track); the other being under the Newmarket Subdivision of the Canadian National (one track). The subway on Royce Avenue is constructed under the tracks of the said Galt, Brampton and Toronto, Grey and Bruce Subdivisions of the railways (five tracks in all). 20

3. It is admitted that that portion of the City through which the streets and railways in question run, has grown to a remarkable extent, and service by the street railway for these portions was a matter of extensive study and investigation for a considerable number of years prior to the issue of Orders 35037 and 35153. Prior to the issue of these Orders the street railway tracks of the Appellant already extended along Bloor Street from the east to Lansdowne Avenue and from Dundas Street westward, and along Dundas Street from the point where it crosses the steam railways by an overhead bridge, northwesterly for a considerable distance beyond the junction with Royce Avenue. 30

4. The street railway is not constructed through the subway on Royce Avenue but as appears by the Statement of Facts, Dundas Street, including the street railway tracks, was diverted by the Respondents at its then level with easy approaches to the subway in both directions on the original location of the street in order to avoid a dangerous traffic condition and also looking forward to the possible future extension by the Appellant of its line of street railway from Lansdowne Avenue along Royce Avenue and through the subway to connect with its lines on Dundas Street. 40

5. The Statement of Facts shows that in issuing the Orders in question the Board was acting for the protection, safety and convenience of the public.

6. The Appellant obtained an Order from the Board, No. 36693, dated 13th August, 1925, before the completion of the subways, granting it leave to build a double line of street railway along Bloor Street from Lansdowne Avenue to Dundas Street. By the said Order the Board reserved the question of contribution by the Appellant to the cost of the said subways for further consideration.

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7. The Appellant used the bridges carrying the Respondents' railway tracks over the subways to support its trolley wires and feed cable as described in paragraph 32 of the Statement of Facts.

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PART II.

QUESTIONS FOR DECISION.

1. Had the Board under the circumstances of this case, jurisdiction under the Railway Act of Canada to provide in Order No. 40367, dated February 16th, 1928, that the Transportation Commission should contribute to the cost of :—

- (a) The Bloor Street Subways;
- (b) The Royce Avenue Subway;

or either of such works referred to in such order?

2. If the above question should be answered in the affirmative as to either or both of the said works, had the Parliament of Canada jurisdiction to confer upon the Board authority to compel contribution from the Transportation Commission, a Provincial Corporation, in respect of :—

- (a) The Bloor Street Subways;
- (b) The Royce Avenue Subway;

or either of such works referred to in such Order, under the circumstances of this case?

PART III.

ARGUMENT.

1. In regard to the power of the Dominion Parliament to enact the material sections of the Railway Act it is submitted that the question is really governed by the following decisions :

<i>Toronto Corporation v. Canadian Pacific Ry.</i>	1908	A.C. 54
<i>Toronto Railway Co. v. City of Toronto</i>	1920	A.C. 426
<i>City of Toronto v. Grand Trunk Ry.</i>	1906	37 S.C.R. 232
<i>County of Carleton v. City of Ottawa</i>	1909	41 S.C.R. 552
<i>Toronto Railway Co. v. City of Toronto</i> (Avenue Road)	1916	53 S.C.R. 222

2. The Board acted in this matter for the protection, safety and convenience of the public and therefore had full jurisdiction, under the provisions of the Railway Act above referred to, to order the carrying

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out of the works in question in this proceeding and to order the Appellant to contribute a part of the cost thereof.

<i>City of Toronto v. Grand Trunk Railway</i>	1906	37 S.C.R. 232	
<i>Ottawa Electric Ry. Co. v. City of Ottawa</i>	1906	37 S.C.R. 354	
<i>James Bay Ry. Co. v. Grand Trunk Ry.</i>	1906	37 S.C.R. 372	
<i>Toronto Corporation v. Canadian Pacific Ry.</i>	1908	A.C. 54	
<i>Toronto Railway Co. v. City of Toronto</i> (Avenue Road)	1916	53 S.C.R. 222	
<i>Toronto Railway Co. v. City of Toronto</i> (Queen Street)	1920	A.C. 426	10

See also

<i>Grand Trunk Ry. v. City of Kingston</i>	1903	8 Ex. C.R. 349 (4 C.R.C. 102)	
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3. The decision of the Judicial Committee of the Privy Council in *British Columbia Electric Railway Company vs. Vancouver, Victoria & Eastern Railway and Navigation Company* is distinguishable from the present case.

<i>British Columbia Electric Ry. Co. v. Vancouver, Victoria & E. Ry. & Nav. Co.</i>	1914	A.C. 1067	
<i>Toronto Railway Co. v. City of Toronto</i> (Avenue Road)	1916	53 S.C.R. 222	20
<i>Toronto Railway Co. v. City of Toronto</i> (Queen Street Bridge Case)	1920	A.C. 426	

4. The decision of the Board on the question as to whether the Appellant is a party interested in or affected by the works in question is in reality a decision on a point of fact and under the Act is final and conclusive on the parties. Such being the case, the Order of the Board that the Appellant shall contribute to the cost of these works is not subject to review. The circumstance that at the moment the order was made the line of street railway did not actually cross the steam railways on the level does not limit the power of the Board to order it to contribute.

<i>City of Toronto v. Grand Trunk Railway</i>	1906	37 S.C.R. 232	
<i>James Bay Ry. Co. v. Grand Trunk Railway</i>	1906	37 S.C.R. 372	
<i>County of Carleton v. City of Ottawa</i>	1909	41 S.C.R. 552	

See also

<i>In re Canadian Pacific Ry. and Township and County of York</i>	1898	25 O.A.R. 65	
<i>Grand Trunk Railway v. Cedar Dale</i>	1906	7 C.R.C. 73	

5. The Board's decision in this case is in harmony with the practice which it has uniformly followed as indicated by the following decisions: 40

<i>City of Toronto v. Grand Trunk Railway</i>	1906	37 S.C.R. 232	
<i>Ottawa Electric Ry. v. City of Ottawa</i>	1906	37 S.C.R. 354	
<i>County of Carleton v. City of Ottawa</i>	1909	41 S.C.R. 552	

See also

<i>In re Canadian Pacific Ry. and Township and County of York</i>	1898	25 O.A.R. 65
<i>Grand Trunk Railway v. Cedar Dale</i>	1906	7 C.R.C. 73
<i>Hamilton Street Ry. v. Grand Trunk Ry. (Kenilworth Avenue)</i>	1914	17 C.R.C. 393

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6. This respondent relies on the reasons given by the Board in ordering the Appellant to contribute toward the cost of these works, and submits that both questions submitted for the decision of this Court should be answered in the affirmative and that this Appeal should be dismissed with costs.

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E. LAFLEUR.
ALISTAIR FRASER.

Of Counsel for the Respondent,
Canadian National Railways.

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Factum of the City of Toronto.

I.—STATEMENT OF FACTS.

This is an appeal by leave of Hon. Mr. Justice Mignault by Order dated Wednesday, 27th February, 1929, from Order No. 40367 of the Board of Railway Commissioners for Canada dated February 16th, 1928. The Order in question directed that a certain contribution towards the cost of certain subways previously ordered by the Board be made from the Railway Grade Crossing Fund; that ten per cent. of the cost, less such contribution, be paid by the Appellant and that the balance of the cost be borne one-half by the Respondent City Corporation and one-half by the Respondent Steam railroads.

The facts have been settled by the Board appealed from and printed in the case.

II.—POINTS IN ISSUE.

The points in issue are set out in the order giving leave to appeal as follows:

(1) Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act of Canada to provide in Order No. 40367, dated February 16th, 1928, that the Toronto Transportation Commission should contribute to the cost of—

- (a) the Bloor Street Subways,
- (b) the Royce Avenue Subway,

or either of such works referred to in such order?

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(2) If the above questions should be answered in the affirmative as to either or both of the said works, had the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel contribution from the Toronto Transportation Commission, a Provincial corporation, in respect of—

- (a) the Bloor Street Subways,
- (b) the Royce Avenue Subway,

or either of such works referred to in such order, under the circumstances of this case ?

III.—THE QUESTION OF JURISDICTION

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The Respondent submits that the first question as framed in the order giving leave to appeal and set out in Part II of this Factum should be answered in the affirmative.

The Railway Board is clothed with the requisite jurisdiction to make the order in regard to which the Appellant has lodged this appeal, by reason of Section 39 of The Railway Act, Chapter 170 of the Revised Statutes of Ontario, 1927, which provides 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.”

Two questions arise in the interpretation of this section,—

(1) Did the Railway Board in ordering the Bloor Street and Royce Avenue subways act for the protection, safety and protection of the public ?

(2) Is the Appellant an interested party under the above Section 39 of the Act ?

The Board in ordering the construction of the said subways had in mind the protection, safety and convenience of the public and so the Board had the requisite jurisdiction.

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This section is interpreted in *Toronto Railway Company v. City of Toronto and Canadian Pacific Railway*, 20 C.R.C., page 280. In this case the tracks of the Toronto Railway Company crossed those of the Canadian Pacific Railway at grade on a public highway. On the report of the Engineer that the crossing was dangerous the Board on its own motion ordered that the street be carried under the Canadian Pacific Railway Company's tracks. The grade separation relieved the Toronto Railway Company from the expense of maintaining an interlocking plant and benefitted it otherwise. Quoting from the judgment of Davies J.—

- 10 “ When it once is made clear to the Board of Railway Commissioners that
 “ the public protection and safety requires that the crossing of the railway
 “ tracks applied for should only be granted on certain terms and
 “ conditions, or that an existing crossing requires additional safeguards
 “ and protection, then I think under Section 227 (present Section 252)
 “ coupled with 28th, 29th, 32nd and 59th sections (present sections 36,
 “ 51, 34 and 39) the powers of the Board are complete for the purposes
 “ the legislature intended and may be exercised by them either on their
 “ own motion or on special application made to them.” The Appellant,
 when before the Railway Board relied on the Vancouver case (*British*
 20 *Columbia Electric Railway Company v. Vancouver, et al*, 19 C.R.C., 287)
 contending that this case was authority that the Railway Board had not
 jurisdiction to order the Provincial Railway to pay a portion of the cost
 in connection with the grade separation.

- Anglin J., in the *Toronto Railway Company v. City of Toronto and Canadian Pacific Railway* case points out the principle followed by the Judicial Committee in the *Vancouver* case and distinguishes it from the *Toronto Railway Company and City of Toronto and Canadian Pacific Railway* case. Quoting from his judgment, “The recent case of *British Columbia*
 “ *Electric Railway Company v. Vancouver, Victoria and Eastern Railway*
 30 “ *Company*, 1914, A.C., 1067 was much relied upon at bar by counsel for
 “ the Appellant. In that case, in the opinion of the Judicial Committee, the
 “ ground and reason of the application of the municipal corporation, on
 “ which the Board acted, was municipal convenience and improvement.
 “ It was, in their Lordships' opinion, ‘ a matter between the Corporation and
 “ the Railway Company alone,’ from which the proper inference would
 “ seem to be that the order made by the Board was not regarded as an
 “ ‘ order as to the protection, safety and convenience of the public ’
 “ within subsection 1 of Section 238, in respect of which, under subsection 3,
 “ the Board might order that a portion of the cost of the works should
 40 “ be borne by a Corporation or a person other than the Dominion Railway
 “ or the municipal corporation at whose instance they were directed or
 “ sanctioned. In such a case the Judicial Committee negatives the right
 “ of the Board to order payment of a portion of the cost of the works
 “ merely because some benefit would accrue therefrom to the body or
 “ person upon whom it is sought to impose that burden. The order made
 “ by the Board did not ‘ direct that any work should be done ’; it was

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“ merely permissive. Therefore their Lordships held that it was not
“ within the purview of Section 59 (present section 39).”

In other words the decision of the Judicial Committee in the *Vancouver case* was based on the ground that what took place was a highway improvement, and it was not a work made necessary in any degree by the presence of the street railway, and that the street railway had nothing to do with it, but it was necessitated by the desire of the City to improve the grades of the streets, and in the *Toronto Railway Company and City of Toronto and Canadian Pacific Railway case* the Supreme Court held that it was a matter of the protection, safety and convenience of the public and consequently the Board had jurisdiction. 10

The Section is also interpreted in the Queen Street High Level Bridge case, *Toronto Railway v. City of Toronto*, 25 C.R.C., 318. This was a case of a provincial railway running along a highway in Toronto which crossed on the level the tracks of three dominion railways. Upon an application to the Board by the Toronto Corporation the Board made an order under The Railway Act, 1906, Sections 237, 238, as amended in 1909, authorizing the Corporation to carry the highway with the tracks of the provincial railway over the tracks of the dominion railways and ordering that the corporation should submit plans and complete the contracts by specified dates. The order further directed that the cost of construction should be borne in specified proportions by the Corporation and the four railway companies. The order was mandatory and not merely permissive, consequently the Railway Board had power under Section 59 now section 39 of The Railway Act to direct that the Provincial Railway should contribute to the cost of construction. Quoting from the judgment of Viscount Finlay page 332, “ In the present case the order appears to their Lordships to be in substance “ mandatory, and to be made for the protection and convenience of the “ public with regard to the crossings of the railways. What was done “ may have improved the streets, but it was certainly not a mere matter “ of street improvement. Their Lordships therefore think that the “ *Vancouver case* is distinguishable from the present.” 20 30

The Respondent therefore submits that the orders of the Railway Board which were upheld in the two cases referred to above confirm the jurisdiction of the Board in the case at bar.

THE APPELLANT WAS AN INTERESTED PARTY.

The Respondent submits that the Appellant was an interested party under Section 39. There are several cases which provide for contribution to the cost of such work by a person interested and in these cases the meaning of the word “ interested ” has been considered. See *Re Canadian Pacific Railway Company and The County and Township of York*, 1 C.R.C., at page 36. *Toronto v. Grand Trunk Railway Company*, 1906, 37 S.C.R., 232, and *Canadian Pacific Railway Company v. Toronto*, 1908, A.C. 54. 40

The result of these cases was to determine that a municipal corporation, although strictly a provincial corporation and not otherwise under the

jurisdiction of the Dominion Railway Act was *interested* within the meaning of the section in question; i.e., Section 39, when the traffic on these streets was protected by works ordered to be constructed by the Railway Committee, and that a portion of the costs of such works could accordingly be imposed on such a municipal corporation.

There is, it is submitted, no reason why the same decisions do not apply as fully to a provincial railway as to a municipal corporation. The Appellant is, as regards the grade separation on Bloor St. and Royce Avenue, interested just as much as the municipal corporation in the cases 10 cited above. It was subject to the order of the Railway Board. Under Section 252 of the Act the Appellant applied for leave to construct a line of Street Railway under the Bloor St. subways. Subsection 1 of Section 252 provides that no railway can construct its tracks across another railway until leave therefor has been obtained from the Board. In other words, the Appellant had to go to the Board in order to obtain leave to construct and operate its line under the Bloor St. subways, and the Board had the right in granting such leave to impose a condition as to contribution by the Appellant to the cost of the said subways.

Section 259 of The Railway Act gives wide powers to the Board in 20 regard to apportioning cost of the construction of the subways in question which reads as follows:—

“ 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 enforceable against any railway company, municipal or other corporation or person named in such order.”

30 Accordingly the Board has power to order payment by a provincial railway of part of the cost of protection of a crossing.

The Respondent further submits that the order of the Board now appealed against should stand on the ground that whether a party is interested or not is a question of fact to be found by the Board, which cannot be disturbed.

In the case of *Grand Trunk Railway v. Village of Cedar Dale*, 7 C.R.C., page 73, it was pointed out that the Railway Board have a discretion and having exercised that discretion in regard to the question whether the party is interested or not it is not open to review by the courts. Further in the 40 case of *Town of Thorold v. Grand Trunk Railway* 24 C.R.C., 21, the question of whether a party is interested or not is a *question of fact to be found by the Board and is not open to review*. The *Cedar Dale* case and the *Thorold* case illustrate the powers given to the Board under Section 44 of the Railway Act. The Section reads as follows:—

“ 44. In determining any question of fact, the Board shall not be concluded by the finding or judgment of any other court, in any suit,

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prosecution or proceeding involving the determination of such fact, but such finding or judgment shall, in proceedings before the Board, be prima facie evidence only.

“2. The pendency of any suit, prosecution or proceeding in any other court, involving questions of fact, shall not deprive the Board of jurisdiction to hear and determine the same questions of fact.

“3. The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive.”

THE MATTER WAS INTRA VIRES OF THE DOMINION PARLIAMENT—

The second question as framed in the Order giving leave to appeal and set out in Part II, of this factum, should also be answered in the affirmative. 10
The Parliament of Canada had jurisdiction to confer upon the said Board authority to compel contribution from a provincial corporation toward the cost of the work under the circumstances of this case. In support of this contention see in *Re Canadian Pacific Railway Company and The County and Township of York*, 1 C.R.C., page 47. The Railway Committee of the Privy Council on the application of the City of Toronto ordered the Canadian Pacific Railway Company to put up gates and keep a watchman where the line of railway crossed the highway running from the City of Toronto into the Township of York, the line of railway being at the place in question the boundary between the two municipalities, and ordered the cost of main- 20
tenance to be paid in equal proportions by the Railway Company and the City. On a subsequent application by the City representing that the Township was equally interested and asking for contribution by the Township the Township brought in the County and an Order was made by the Railway Committee that the County and Township should contribute in certain proportions. The final result of the case was that the legislation was held to be intra vires, but that the County was not a person interested, not being under any responsibility for the maintenance of the highway in question, and that the Order making the Township contribute to the cost was proper. Quoting from the judgment of Osler, J.A., “On the question 30
“ whether these provisions of The Railway Act are *ultra vires* the Parliament, “ in relation to the three municipalities or otherwise, I have little to add “ to what I said on the general question in *McArthur v. Northern and “ Pacific Junction Railway Company*, 1890, 17 A.R., pages 124 and 125. “ As provisions relating to the safety of the public in connection with the “ management of a great Dominion undertaking they would appear to be “ eminently germane, if not absolutely necessary, to legislation on such “ a subject, and cannot be held to be invalid merely because, in the mode “ in which Parliament has declared they shall be carried out, they to some 40
“ extent affect property and civil rights. It cannot but be considered “ reasonable and right that the public, as represented by the municipalities “ through which the road passes, sharing in the advantages conferred by “ it and directly benefited by the measures of protection imposed and “ required, should share also in the cost of maintaining them. Legislation “ by which such liability may be imposed seems to me not essentially

“ different—regarded as legislation relating to the railway—from that
 “ under which the road is created, and the compulsory acquisition of land,
 “ and the ascertainment of its price or value, provided for, *e.g.*, the cases
 “ of fencing and subtracting benefit derived from increased value of
 “ remaining land. It is not, in my opinion, *ultra vires*, and if not, I agree
 “ that the Court cannot review the decision of the Railway Committee.”

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Quoting also from the judgment of Meredith J. :—

“ Was the matter one within the power of federal legislation? And,
 “ if so, was that power conferred upon that Committee?

10 “ Complete legislative power admittedly exists somewhere. Nothing
 “ turns upon the wisdom or unwisdom, or the reasonableness or unreason-
 “ ableness of the thing, or whether it is preceded or unprecedented;
 “ those are matters for legislative, not judicial, consideration. Then,
 “ exclusive power to make laws, in relation to such works and undertakings
 “ as the line of railway in question, is assigned to the Parliament of Canada :
 “ British North America Act, 1867 Sec. 91, Subsection 29, and Section 92,
 “ subsection 10a. So that really the one debatable question, on this
 “ branch of the case, is whether the enactment in question is legislation in
 “ relation to works and undertakings of lines of railway, or is legislation
 20 “ relating to property and civil rights only, and so within the power of
 “ Provincial legislation exclusively. *ib.*, Sec. 92, subsection 13. I am yet
 “ unable to understand how it can, with any degree of success, be contended
 “ that legislation providing for the safety of the public at, and upon, a line
 “ of railway, is not very properly, and necessarily, a matter relating to such
 “ a work or undertaking; and, if that be so, why may not all who are
 “ ‘ interested ’ be affected by such legislation? The legislation in question
 “ provides for such safety at such a place, and is expressly confined to the
 “ railway company and others interested in the matter.”

30 The jurisdiction of the Dominion Parliament so to legislate has been
 assailed on the ground that it has no right to impose a liability on corpora-
 tions not otherwise under its control, and directly under the control of the
 provincial legislature, the objection to such legislation being that it is an
 infringement on the rights of the provincial authority, and not within the
 powers of the Dominion as defined by the British North America Act. As
 regards municipal corporations, however, which are solely under the
 authority of the Provincial Legislature, the jurisdiction of the Board to
 impose financial obligations upon them has been affirmed in the cases
 cited above.

TORONTO RAILWAY CO., v. CITY OF TORONTO, 25 C.R.C., 318
 40 TORONTO CORPORATION v. CANADIAN PACIFIC RAILWAY Co. 1908, A.C. 54

As regards the Provincial Railway the question of the validity of such
 legislation was raised in the case of *British Columbia Electric Railway
 Company v. Victoria, Vancouver and Eastern Railway*, 18 C.R.C., 287. The
 decision of the Judicial Committee of the Privy Council in that case is to

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the effect that the Dominion Railway Company has no jurisdiction to order a provincial railway to pay any portion of the cost of carrying a municipal highway over the dominion railway lines, whereas in that case, as has already been pointed out in this factum, the work was solely one of highway improvement. The case was not one in which the powers of the Board under Section 252 were in question at all. Accordingly, it is submitted, the decision in that case does not affect the question that the Dominion Parliament had power to clothe the Railway Board with jurisdiction which it has exercised in the case at bar.

By the Provisions of the British North America Act, Section 91, the Dominion Parliament is given control of railways, and subject to such control the Provincial Legislatures are given jurisdiction over local works which they undertake. The jurisdiction of the Dominion Parliament must include the power to legislate for the proper construction and operation of all dominion railways. The proper construction and operation of such railways requires more legislative control over crossings of other railways or of ordinary highways as a matter incidental and ancillary to the control and operation of the railway and when the exercise of such legislative control on account of the location of a provincial railway, necessarily affects such provincial railway, it can be none the less a proper case for dominion legislation. It is indeed stated in the judgment of the Privy Council in the British Columbia Electric Railway case that “the only portion of “tramway lines which was subject to the jurisdiction of the Railway Board “was the actual crossing” and to that extent that decision is authority for the statement that the Dominion Railway Board has some jurisdiction over provincial railways. 10 20

The line of the Provincial Railway insofar as it crosses the Dominion Railway cannot be deemed to be a local work or undertaking in respect of which the provincial authority could legislate. The provincial railway, while as a whole it may be a local work or undertaking is so only up to the point where it crosses the Dominion Railway and so interferes with the construction or operation of that railway, and in the matter of such a crossing, it is submitted, the local legislature has no legislative right otherwise it would interfere with and conflict with the different rights of the Dominion Legislature in the construction and operation of the Dominion Railway. The only authority that could have jurisdiction to legislate in respect to such crossings is the Dominion Parliament. 30

If the Dominion Legislature has control over said crossings it should be able to define and limit the character of the crossings so as to insure the safe and proper construction and operation of the Dominion Railway. The Dominion Parliament having the right to deal with such crossings should be able exclusively to determine how it should so deal with it, consequently if necessary, to direct that the Provincial Railway should bear a portion of the cost of any necessary change. The power to enforce contribution to the cost of such work is, it is submitted, incident to *the right to control the crossing.* 40

At the hearing before the Railway Board the counsel for the Toronto Transportation Commission, the Appellant herein, argued that as the said commission was a public owned commission owned by the citizens of the City of Toronto that the cost of the work which the Board might feel inclined to assess against the Commission should be assessed against the Corporation of the City of Toronto. The Respondent submits that this contention is wrong. The said Appellant was incorporated by Statute 10-11 Geo. V., Chapter 144, and Section 2 of the said Act provides that the Commission shall be a body corporate. Section 7 provides that it shall

10 have control, maintenance, operation and management of the street railway and property formerly owned by the Toronto Railway Company and Section 8 of said Act provides that the maintenance and operation of the said railway shall be exercised by the Commission and not by the Council of the Corporation and by Section 12, subsection b, the Commission has power to fix tolls and fares so that the revenue shall be sufficient to make the transportation facilities under its control and management self-sustaining after provision for maintenance charges, revenue, depreciation, etc.

The Commission is therefore a body corporate, distinct and separate

20 from the Corporation of the City of Toronto, operating as a self-sustaining unit, and the said Commission is interested in or affected by the works ordered, namely, the Bloor Street and Royce Avenue subways. The proportion of the cost it is fair to throw upon that Commission is entirely a matter for the Board to decide.

For these reasons the Respondent therefore respectfully submits that the order of the Board should not be disturbed.

G. R. GEARY,
F. A. A. CAMPBELL,
Of Counsel for the Respondent,
the Corporation of the City of Toronto.

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No. 33.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

The 26th day of September, A.D. 1929.

Present :

The Right Honourable the CHIEF JUSTICE OF CANADA.
The Honourable Mr. Justice MIGNAULT.
The Honourable Mr. Justice NEWCOMBE.
The Honourable Mr. Justice LAMONT.
The Honourable Mr. Justice SMITH.

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IN THE MATTER of Order No. 40367 of the Board of Railway Commissioners for Canada, made on the 16th day of February, 1928, requiring

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Supreme
Court of
Canada.*

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Factum of
the City of
Toronto—
continued.

No. 33.
—

Formal
Judgment,
26th Sept-
ember 1929.

*In the
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No. 33.

Formal
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—continued.

(inter alia) the Toronto Transportation Commission to contribute towards the cost of constructing three subways, one under the tracks of the Galt Subdivision and the Toronto Grey and Bruce Subdivision of the Canadian Pacific Railway Company and the Brampton Subdivision of the Canadian National Railways at Bloor Street; one under the tracks of the Canadian Pacific and Canadian National Railways at Royce Avenue; and one under the tracks of the Canadian National Railways Newmarket Subdivision on Bloor Street in the City of Toronto and Province of Ontario.

Between

THE TORONTO TRANSPORTATION COMMISSION - - *Appellant* 10

and

CANADIAN NATIONAL RAILWAYS, THE CANADIAN
PACIFIC RAILWAY COMPANY and the CORPORATION
OF THE CITY OF TORONTO - - - - - *Respondents.*

The Appeal of the above named Appellant from the Order of the Board of Railway Commissioners for Canada No. 40367 made on the 16th day of February, 1928, having come on to be heard by this Court on the 29th and 30th days of May, A.D. 1929, in the presence of Counsel as well for the Appellant as for the Respondents, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment— 20

THIS COURT DID ORDER AND ADJUDGE, that the said Order No. 40367 of the Board of Railway Commissioners for Canada should be affirmed in so far as it relates to the Bloor Street subway, and that the said appeal should, in that respect, be dismissed.

THIS COURT DID FURTHER ORDER AND ADJUDGE, that the said Order No. 40367 of the Board of Railway Commissioners for Canada should be set aside in so far as it directs a contribution by the Appellant towards the cost of the Royce Avenue subway, and that the appeal should, in that respect, be allowed. 30

THIS COURT DID FURTHER ORDER AND ADJUDGE, that there should be no order as to costs.

(Sgd.) ARMAND GRENIER,
Acting Registrar.

No. 34.

Reasons for Judgment.

(A) ANGLIN, C.J. (Concurred in by SMITH, J.)

The appeal case opens with a comprehensive statement of facts settled by the Board of Railway Commissioners, much of which is historical and, while, no doubt, entirely relevant to the matters which the Board had to consider in exercising the discretion entrusted to it, is scarcely material to the question of its jurisdiction to order the Toronto Transportation Commission to pay a part of the cost of the construction of each
 10 of the two subways, one on Bloor Street and the other on Royce Avenue. The facts bearing at all directly on that question lie within a comparatively narrow compass.

As in the Main Street Case, leave to appeal has been granted on two questions, viz.: (a) Does the Railway Act* purport to confer on the Board jurisdiction to make the impugned order? (b) If it does, is it, in that respect, *intra vires*?

Bloor Street is a main artery of the City of Toronto running East and West, which is paralleled by Royce Avenue, about three quarters of a mile farther north. Both streets are intersected by Dundas Street—itsself
 20 also an important thoroughfare running north-westerly. On Dundas Street there was a double track street railway line of the Toronto Transportation Commission, which extended along and adjacent to the right of way of the Canadian Pacific Railway Company from a point somewhat farther south to a point North-west of the intersection of Royce Avenue and Dundas Street. On Bloor Street there was also, prior to the making of the subway under consideration, a line of street railway operated by the appellant Commission which terminated at Lansdowne Avenue about one half a mile East of Dundas Street.

30 The Transportation Commission has never operated a street railway on Royce Avenue; and it is uncertain when, if ever, such a line will be constructed.

Between Lansdowne Avenue and Dundas Street, and adjacently to the latter, Bloor Street is crossed by three important railway lines, two operated by the Canadian Pacific Railway Company and one by the Canadian National Railways System. The "settled statement" of facts, in paragraph 12, says:

40 "Up to the closing of the street for subway construction no line of street railway existed on that portion of Bloor Street between Lansdowne Avenue and Dundas Street, but passengers on the street railway travelling west along Bloor Street, as far as Lansdowne Avenue, who wished to continue west and north, instead of travelling south and transferring at the corner of Lansdowne Avenue and Dundas Street, could obtain transfers and walk along Bloor Street across the

* For convenience references are made to the R.S.C., 1927, c. 170, which reproduces the Railway Act, 1919, c. 68.

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(A) Anglin,
C.J. (con-
curred in by
Smith, J.)—
continued.

steam railway tracks to the intersection of Bloor and Dundas Streets and continue their journey on the street railway from that point, and similar privileges were given to those travelling in the opposite direction.”

Provision had been made by Orders of the Railway Committee of the Privy Council and of the Board of Railway Commissioners for the protection by gates and watchmen of the level crossings both on Bloor Street and on Royce Avenue, which is also crossed by the same lines of steam railway. As part of a general scheme of grade separation in North-West Toronto, the Railway Board—

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“ acting under its powers for the protection, safety and convenience of the public, issued its Order No. 35037, dated May 9th, 1924, approving the general plans submitted by the Canadian Pacific for grade separation in the north-western section of the City including subways under the tracks of the Canadian Pacific Galt and Toronto, Grey and Bruce Subdivisions and the Canadian National Brampton Subdivision at Bloor Street and Royce Avenue . . .” (paragraph 26).

In paragraph 24 of the “ settled statement ” it is said :

“ one of the reasons requiring protection by grade separation at these crossings was to enable the Transportation Commission to extend its lines of street railway across the tracks so as to give the residents of the north-western section of the City a better and more continuous street car service. It was also stated that the Transportation Commission would possibly in the future extend its lines of street railway across the tracks of the steam railways at Royce Avenue.”

20

By further order No. 35153 the Board, on the 5th of June, 1924, directed that the work on the subways now in question be undertaken, and provided, inter alia, as follows :

“ That all questions of distribution of costs, interest or other matters involved in the construction of the said work be reserved for further Order of the Board.”

30

On the 15th of July 1925, the Transportation Commission applied to the Board of Railway Commissioners for an Order under s. 252 of the Railway Act, granting it leave to construct, for the corporation of the City of Toronto, a double track line of street railway, between Dundas Street and Lansdowne Avenue along Bloor Street.

By Order of the 30th of August No. 36693, the Board granted this application, again reserving “ the question of contribution to the cost of “ said subways by the applicant.”

Under the authority thus granted, the Transportation Commission constructed its tramway lines along Bloor Street and has since operated such lines through these subways, thus crossing under the steam railways, as is more fully stated in paragraph No. 32 of the “ settled statement.” Finally, (paragraph No. 36)

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“ On November 15th 1926, the Board issued its formal Order No. 38434, distributing the cost of construction of the said subways, and directing that the Transportation Commission should contribute to the cost thereof as therein set forth.”

i.e. one tenth thereof, after deducting the amount available from the Railway Grade Crossing Fund.

From this Order the present appeal is taken by the Transportation Commission.

The jurisdiction of the Board to order the appellant Commission to bear a part of the cost of the subways under consideration, the construction of which was ordered by the Board, as the “ settled statement ” says,

“ acting under its powers for the protection, safety and convenience of the public,”

depends upon whether the Commission is a company “ interested or affected by (the) Order ” so made, since Section 39 applies to every such Order of the Board, whether s. 259 may or may not also be invoked in support of the disposition here made of the cost. The Queen Street East Case, 1920 A.C. 426, 435-6, 437-8.

That the Transportation Commission was vitally “ interested ” in the construction of the Bloor Street subway and was “ affected by ” the Order made therefor, is, in our opinion, beyond doubt. It benefits directly because it was thus enabled to substitute a continuous line of railway along Bloor Street, connecting directly with the Dundas Street lines, for the *dissecta membra* operated before the subway was built and which entailed both inconvenience and danger to its patrons in having to walk about half a mile, involving their crossing on the level three lines of steam railway.

The interest of the Commission in the Royce Avenue subway is, perhaps, not so obvious. We, however, are not concerned with the quantum of its interest or with the extent to which it is affected by the Order for the construction of that subway. That the Transportation Commission should have had some appreciable interest or that its undertaking should be in some tangible way “ affected by ” the Order, for construction, suffices to give jurisdiction to the Board to require it to contribute to the cost. Whether that jurisdiction should be exercised, in so far as it may depend upon the quantum of interest or affection, it is exclusively for the Board, in its discretion, to determine (s. 44 (3)). While the Transportation Commission does not now carry, and may never carry, its lines through the Royce Avenue subway, the situs of its tracks on Dundas Street has been so diverted in connection with the construction of that subway, that, whereas formerly traffic coming from Royce Avenue was thrown upon them approximately at a right angle and in a single stream, whether intended to go north or south on Dundas Street, it is now divided and comes up to the tracks not, as formerly, about at right angles, but by two ramps or approaches so constructed that the portion going northerly goes up one ramp and approaches the railway at a very acute angle, while that going southerly ascends by another ramp and also approaches the railway at a very acute angle. That this division and diversion of traffic involves some improvement for the

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street railway over the conditions theretofore existing, seems altogether probable. While, therefore, if the interest of the Transportation Commission and its being affected by the Order for the construction of the Royce Avenue subway depended upon its making use of that subway for its tracks, we might be disposed to say that the case would seem rather to be one for the application of s. 45 of the Railway Act, we find it impossible to hold that it has been shown that the Transportation Commission has not a present interest different in kind from that of the ordinary residents in, or users of, the City streets, in the changes effected by the Order of the Board in connection with the subway, still less that it is wholly unaffected by an order which provides for the removal of its tracks somewhat to the west and for the construction of the two ramps above referred to, thus dividing the traffic from Royce Avenue so that it will approach the lines of the street railway at angles much more acute than theretofore. While there may be not a little to be said for such an "interest" and "affection" being too slender to justify the order of the Board requiring the Transportation Commission to bear 10% of the cost of the Royce Avenue subway, that is rather a question of degree involving the sufficiency in extent of the "interest" and "affection," in regard to which the discretion exercised by the Board cannot be interfered with here. The disposition of question (b) is indicated in the judgment in the Main Street Case. 10 20

We are, for these reasons, of the opinion that this appeal fails and must be dismissed with costs.

(B)
Mignault, J.
(concurrent
in by
Lamont, J.).

(B) MIGNAULT, J. (Concurred in by LAMONT, J.)

The appellant is the administrative body charged with the operation of the street railways in Toronto, all of which belong to that city. It was incorporated in 1920 by the Ontario Legislature, by chapter 144 of the statutes of that year, on petition of the city corporation, which was empowered to establish by by-law a commission for the operation of the street railways already belonging to it or to be taken over by it from the Toronto Railway Company. This commission has the control, maintenance, operation and management of these railways, and it is authorized in particular to construct, operate and manage new lines of street railway in addition to or in extension of existing lines; to fix such tolls and fares so as to render its system self-sustaining; and to make requisitions upon the council for all sums of money necessary to carry out its powers. It reports yearly to the council with a complete audited and certified financial statement of its affairs. In a rather restricted sense, the commission, when constituted, may perhaps be said to be the agent, with very wide powers, of the city corporation for the operation of the street railways, the title to which is in the city. The policy apparent by the terms of the statute is to entrust the control and management of these street railways to this commission, which is itself a body corporate, and which is to so operate them as to render the railways self-supporting. 30 40

The Respondents are two Dominion railway companies, subject to the statutes incorporating them and to the Dominion Railway Act, 1919, and also the corporation of the city of Toronto.

Leave to appeal from an order of the Board of Railway Commissioners for Canada, hereinafter called the Board, was obtained by the appellant from a judge of this Court. Before stating the questions raised under this appeal, it will be convenient to summarize as briefly as possible the facts which have been agreed upon by the parties.

10 Bloor Street is an original concession road extending in an east and west direction through the north-west section of Toronto, and Royce Avenue is parallel to, and about three-quarters of a mile north of, Bloor Street. Dundas Street is an old-established highway extending in a north-westerly direction through Toronto. It crosses Bloor Street, and at a point just north of Royce Avenue, veers to the west. It is one of the main arteries over which traffic from the districts north and west of Toronto enters the city.

20 Bloor Street, at a point a short distance east of its intersection with Dundas Street, is crossed by three lines of steam railways side by side, to wit, the Galt Subdivision of the Canadian Pacific, the Brampton Subdivision of the Canadian National, and the Toronto, Grey and Bruce Subdivision of the Canadian Pacific. These lines run parallel to each other in a north-westerly direction, and before the construction of the subways here in question crossed Bloor Street and also Royce Avenue on the level. They are parallel to (but do not cross) Dundas Street, for a distance of approximately 1783 feet, to a point immediately north of Royce Avenue where, as stated, Dundas Street veers to the west.

30 Bloor Street is also crossed, some 1200 feet east of these three lines of steam railways, by the Newmarket subdivision of the Canadian National extending in a northerly direction. Prior to the construction of a subway here, this crossing was on the level.

40 The Toronto street railways were originally operated in part by the Toronto Railway Company and in part by the city Corporation, and for a number of years prior to 1920 included in this locality lines extending from the centre of the city. Along Bloor Street the street railway ran from the east to the corner of Lansdowne Avenue, a north and south highway, being at that point, about half a mile east of the intersection of Dundas Street with Bloor Street, and also a short distance east of the crossing of the Newmarket Subdivision. Dundas Street intersects Lansdowne Avenue at a point which appears by the map to be a little more than a half-mile south of Bloor Street. West of the three steam railways above described, and west of Dundas Street at its intersection with Bloor Street, there had been for a number of years a line of street railway on Bloor Street. There were also, and still are, street railways on Lansdowne Avenue and on Dundas Street. Street railway passengers going towards the west along Bloor Street were provided for the same fare with transfers allowing them to take the cars running south on Lansdowne Avenue, thence the cars going north-west on Dundas Street, and they then transferred to the Bloor Street line running west. This process

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was reversed for passengers going from the west to the east on Bloor Street. Or they could disembark at Lansdowne Avenue, walk along Bloor Street, cross all the steam railways, and at Dundas Street continue their journey with their transfers by the Bloor Street cars, or reverse the process. There was then, as is apparent from what I have just said, no street railway on Bloor Street, between Lansdowne Avenue and Dundas Street, crossing the four lines of steam railways.

Pursuant to the Act incorporating the appellant, the city corporation, in 1921, acquired the property of the Toronto Railway Company, and entrusted the operation and management of the latter's lines of street railways, and also of the street railways theretofore operated by the city, to the appellant which has since operated them. 10

By order of the Railway Committee of the Privy Council, dated January 8th, 1891, gates and watchmen were installed for the protection of the public at the crossing on Bloor Street of the three steam railways above described. An order of the Board (which succeeded the Railway Committee of the Privy Council) of May 18th, 1908, No. 4795 provided for the protection by gates and watchmen of the crossing on Bloor Street of the Newmarket subdivision of the Canadian National (then the Grand Trunk), and by a further order of the Board of May 23rd, 1910, No. 10782, a similar provision was made for the protection of the crossing of Royce Avenue by the three steam railways above described. This protection of all these crossings was maintained until the level crossings were closed for the purpose of subway construction under the scheme authorized by the Board known as the Northwest Grade Separation. 20

On November 21st, 1922, the city corporation applied to the Board for an order requiring the Canadian National to collaborate with the city in the preparation of a joint plan for the separation of grades on, among other streets, Bloor Street and Royce Avenue, and this application was heard and plans submitted by the railways at several hearings by the Board in Toronto. Finally a further hearing was held by the Board on February 19th, 1924, of which the appellant received notice and at which it was represented. Among other proposals submitted, one by the Canadian Pacific provided for the diversion of Dundas Street on a tangent in the vicinity of the crossing of the railways on Royce Avenue, and this is the diversion which is an important feature of the case. On May 9th, 1924, by order 35037, the Board approved the general plans submitted for grade separation in the northwest section of the city, including subways on Bloor Street under the three lines of railway above described and under the Newmarket sub-division of the Canadian National. It sanctioned also a subway on Royce Avenue, involving the acquisition of additional land and the construction of the diversion of Dundas Street. This diversion, as shown by the plan, extends from the intersection of Humberside Avenue with Dundas Street in a north-westerly direction to the intersection of Indian Road with the same street, a distance, as I measure it, according to the scale of the plan, of approximately 1,000 feet. 40

On June 5th, 1924, the Board issued an order No. 35153 directing the construction of the works, and this order provided that all questions of distribution of cost, interest or other matters involved in the construction be reserved for further order of the Board. This order was subsequently amended on July 10th, 1924, by order of the Board No. 35308.

We next have an application to the Board by the appellant, dated July 15th, 1925, for an order under section 252 of the Railway Act granting it leave to construct for the corporation of the city a double track of street railway between Dundas Street and Lansdowne Avenue on Bloor Street and through the subways on that street. The Board granted this application by order No. 36693 of August 13th, 1925, and reserved for further consideration the question of contribution by the applicant to the cost of the subways. The appellant under this authority constructed a double line of street railway tracks along Bloor Street through the subways, between the two points above indicated, on which it now operates its cars. A full description of this construction through the Bloor Street subways is contained in paragraph 32 of the statement of facts. No street cars are operated by the appellant through the subway at Royce Avenue, nor are there any lines of street railway on that avenue.

An order of the Board No. 36737, of August 22nd, 1925, authorized the Canadian Pacific and the Canadian National to use and operate the subway carrying their tracks, to wit, the three railways above described, over Bloor Street, and a similar order, No. 36738, dated August 21st, 1925, gave leave to the Canadian National to use and operate the subway carrying the tracks of its Newmarket Subdivision over Bloor Street. There was also a like order of the Board No. 37239, bearing date January 15th, 1926, authorising the Canadian Pacific and the Canadian National to make use of the subway carrying their tracks over Royce Avenue.

After all this was done, the Board, on November 15th, 1926, issued a formal order No. 38424, distributing the cost of construction of the subways. This order was rescinded by the Board on February 16th, 1928, by its order of that date No. 40367, which altered the distribution of cost in so far as the contribution from the railway grade crossing fund was concerned, but not otherwise. It is from Order No. 40367 that this appeal is asserted.

It will be convenient to state here how the cost of construction of the subways was distributed by the order just mentioned. The order is concerned with three subways, two on Bloor Street, and one on Royce Avenue.

Subways on Bloor Street. Forty per cent. of the annual expenditure, commencing in 1924 and not exceeding in any one year \$75,000, in connection with the crossings under the tracks of the three railways above described, and 40 per cent. of the annual expenditure, commencing in the same year, and not exceeding in any one year \$25,000, in connection with the crossing under the tracks of the Newmarket subdivision of the Canadian National—to be paid out of the railway grade crossing fund.

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Subway on Royce Avenue. To be paid out of the same fund, 40 per cent. of the annual expenditure, commencing in the same year, and not exceeding in any one year \$75,000, in connection with the crossing under the tracks of the three railways above described.

The order provides that the Bell Telephone Co., the Hydro-Electric Power Commission of Ontario, the Toronto Hydro-Electric System, and the Consumers' Gas Company shall bear and pay the cost of any changes in their plant necessitated by changes in the streets. These public utilities do not otherwise contribute to the cost of the subways.

It is then ordered that the Appellant shall pay 10 per cent. of the cost of the work (which obviously includes the three subways and incidental expenses), after deducting the amount available from the railway grade crossing fund. 10

The rest of the expenditure is to be borne as follows:—As to the crossings of Bloor Street and Royce Avenue by the three railways above described, 50 per cent. by these railways and 50 per cent. by the city of Toronto; and as to the crossing of Bloor Street by the Newmarket subdivision of the Canadian National 50 per cent. by that Railway and 50 per cent. by the city of Toronto.

Leave to appeal from this order of the Board was given upon the two following questions:— 20

(1) Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act of Canada to provide in Order No. 40367, dated February 16th, 1928, that the Toronto Transportation Commission should contribute to the cost of

- (a) the Bloor Street Subways,
- (b) the Royce Avenue Subway

or either of such works referred to in such order.

(2) If the above question be answered in the affirmative as to either or both of the said works, had the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel contribution from the Toronto Transportation Commission, a Provincial Corporation, in respect of— 30

- (a) the Bloor Street Subways,
- (b) the Royce Avenue Subway,

or either of such works referred to in such order, under the circumstances of this case?

In dealing with the jurisdiction of the Board to order that the appellant should contribute to the cost of these subways, it is important to note that no question is raised here as to its power to direct the construction of the works themselves, the controversy being narrowed down to the point whether the appellant could be called upon to contribute to their cost. The application to the Board of the city corporation (November 21st, 1922) was made under section 257 of the Railway Act. It must therefore be taken as granted that in ordering 40

these works the Board acted within the ample powers which that section confers on it for "the protection, safety and convenience of the public". Having exercised a power vested in it, the Board could, under section 39, subsection 1, of the Railway Act, order "by what company, municipality, or person, *interested or affected* by such order" (the order directing or permitting the works) the works should be constructed, and, under subsection 2 of the same section, "by whom, in what proportion and when" the cost and expenses involved should be paid. It is now settled that the words "by whom" in subsection 2, "must be read with reference to the immediately preceding provision," and that an order directing payment or contribution "may be made only on a company, municipality or person interested in or affected by the order directing the works" (*Toronto Railway Co. v. City of Toronto*, 1920 A.C. 426, at pp. 435, 436).

The question is therefore whether this appellant is a company or person "interested in or affected by the order directing the works." This enquiry is open to us on this proceeding, for it is the basis of the jurisdiction asserted by the Board. Some reference was made to subsection 5 of section 33, but it is restricted by its terms to that section. In a case like this one, the finding of the Board that a company or person is interested in or affected by the order directing the works, may certainly be reviewed by this court on an appeal from the order distributing the cost.

This, of course, should not be lightly done, and therefore I am not disposed to disturb the finding of the Board that the appellant was interested in the construction of the two subways of Bloor Street. It is true that the appellant's lines on that street had never crossed the railways, but by reason of the construction of the subways it was enabled to establish a continuous line of street railway along Bloor Street. Its passengers were no longer obliged to follow the circuitous route I have described, or to run the risk of crossing four lines of steam railway on foot. Although it was so suggested to us, I do not regard the order requiring the appellant to contribute to the cost of construction as a term of the unconditional authorization it had previously obtained to extend its lines through the subways. The soil of the subways is a public highway of the city. It would not have been within reason for the Board to refuse to allow the appellant to construct its lines of street railway through the subway, subject to such protective measures as might be prescribed for the preservation of the structure or the safety of the public. So I would be very slow to construe the subsequent order to contribute as a term of the authorization which the Board granted to the appellant. However no such argument is necessary to support the order of contribution in respect of the Bloor Street subways.

But the appellant cannot be said to have been interested in or affected by the construction of the Royce Avenue subway. Its tracks merely ran and still run along Dundas Street, which for some distance, parallels the three lines of steam railways, but they never came into contact therewith. The appellant does not use the subway, nor has it any line on Royce

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Avenue. And as to the diversion on Dundas Street which it now uses, it suffices to say that this diversion was decided upon to afford an easy approach to the subway. Not being interested in the latter, the appellant cannot be said to have an interest in the diversion, which was moreover the cause of additional expense to it, for it became necessary to lay new tracks along the diverted road. It may be further added that the ten per cent contribution exacted from the appellant takes no account of the cost of the diversion as distinguished from the cost of the subway, the contribution being to the whole expenditure. My conclusion is that the order of contribution to the cost of the Royce Avenue subway and the diversion 10 cannot be supported.

The respondents referred us to section 259 of the Railway Act which reads as follows :—

“ 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 enforceable against any railway company, municipal or other corporation 20 or person named in such order.”

It is to be observed however that section 259 is to the same effect as section 238, subsection 3, introduced into the Railway Act as enacted by R.S.C. ch. 37 by 8 & 9 Edw. VII, ch. 32 (1909). Subsection 3 was considered by their Lordships of the Judicial Committee in *Toronto Ry. Co. v. Toronto*, 1920 A.C. 426 at p. 437, and they stated that there was “ nothing in it to put an end to the application of section 59 (now section 39) to orders under ss. 237 and 238 ” (now, as far as material here, sections 256 and 257 of the Railway Act, 1919, the third subsection of section 238 of the former Act being section 259 of the present Act). 30

The appellant contended that in operating the street railways, it was a mere agent of the city corporation, and that for this reason it could not be called upon to contribute to the cost of any of these subways. I think it suffices to say that, whatever may be its rights and remedies against the city corporation, the appellant, as an operating corporation in control of the street railways, and entrusted with their full management, could be treated by the Board as a Company or person to which section 39 of the Railway Act applies, subject of course to its interest being shown.

I would therefore answer question (1) in the affirmative as to the Bloor Street subways, and in the negative as to the Royce Avenue subway. 40

By its terms question (2) requires an answer merely with respect to the Bloor Street subways. I think this answer must be in the affirmative. It is now settled that in such a matter the jurisdiction of Parliament cannot be questioned. *Toronto v. Canadian Pacific Ry. Co.* [1908], A.C. 54; *Toronto Railway Co. v. Toronto* (the Avenue Road case) 53 Can. S.C.R. 222.

I would allow the appeal as to the Royce Avenue subway, and dismiss it in respect of the Bloor Street subways. Success being divided, I would make no order as to costs.

(C) NEWCOMBE, J.

I agree in the conclusions of my brother Mignault with respect to these two subways. It is said that the appellant Commission derives a benefit from the method provided for the approach or discharge of traffic from and to the subway as between Dundas Street and Royce Avenue. It may be so; but there is no finding to that effect, and I see no reason to believe that the Commissioners intended to impose a percentage of the cost of the subway on Royce Avenue as compensation for advantages said to accrue by reason of the diversion of Dundas Street. If, on the contrary, 10 as the case seems to suggest, the Board was anticipating value which might be realized when, if ever, a branch of the tramway is constructed upon the subway, I do not think that the Board would have jurisdiction to order payment under sec. 39 of the Railway Act. It cannot be said that a person is interested merely because, in the future, he may become so; and that, as I understand the case, is the position of the appellant with respect to Royce Avenue.

*In the
Supreme
Court of
Canada.*

—
No. 34.
Reasons for
Judgment.
(C) New-
combe, J.

No. 35.

Formal Judgment on Motion for rehearing.

IN THE SUPREME COURT OF CANADA.

20

Monday, the ninth day of December, A.D. 1929.

Present :

The Right Honourable the CHIEF JUSTICE OF CANADA.
The Right Honourable Mr. Justice DUFF.
The Honourable Mr. Justice NEWCOMBE.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice LAMONT.
The Honourable Mr. Justice SMITH.

30 IN THE MATTER of Order No. 40367 of the Board of Railway Commissioners for Canada, made on the 16th day of February, 1928, requiring (*inter alia*) the Toronto Transportation Commission to contribute towards the cost of constructing three subways, one under the tracks of the Galt Subdivision and the Toronto Grey and Bruce Subdivision of the Canadian Pacific Railway Company and the Brampton Subdivision of the Canadian National Railways at Bloor Street; one under the tracks of the Canadian Pacific and Canadian National Railways at Royce Avenue;

No. 35.
Formal
Judgment
on Motion
for re-
hearing,
9th Dec-
ember 1929.

*In the
Supreme
Court of
Canada.*

and one under the tracks of the Canadian National Railways Newmarket Subdivision on Bloor Street in the City of Toronto and Province of Ontario.

Between

THE TORONTO TRANSPORTATION COMMISSION - - *Appellant*

and

CANADIAN NATIONAL RAILWAYS, the CANADIAN
PACIFIC RAILWAY COMPANY and the CORPORATION
OF THE CITY OF TORONTO - - - - - *Respondents.*

No. 35.
Formal
Judgment
on Motion
for re-
hearing,
9th Dec-
ember 1929
—*continued.*

Upon motion made unto this Court on the eighteenth day of November in the year of our Lord one thousand nine hundred and twenty-nine by Counsel on behalf of the Canadian Pacific Railway Company and the Canadian National Railway Company for a rehearing of this appeal in so far as it relates to the Royce Avenue Subway upon the alleged ground that, as appears by the reasons for judgment, of His Lordship Mr. Justice Mignault, concurred in by His Lordship Mr. Justice Lamont, the Court was under a misapprehension as to the facts of the case with regard to the Royce Avenue Subway, and upon hearing what was alleged by Counsel for all parties, this Court did direct that the motion should stand over for judgment. 10

AND the motion coming on this day for judgment— 20

THIS COURT DOTH ORDER that the motion should be and the same is dismissed with costs.

(Sgd.) ARMAND GRENIER.
Acting Registrar.

No. 36.
Reasons for
Judgment
on Motion
for re-
hearing,
17th Janu-
ary 1930.

No. 36.

Reasons for Judgment on Motion for rehearing.

The Court is of the opinion that this is not a proper case in which to direct a rehearing of the appeal as asked for. The motion will therefore be refused with costs.

Ottawa, January 17, 1930. 30

I hereby certify that the forgoing is a true copy of the reasons for Judgment given by the Honourable Judges of the Supreme Court of Canada in this case.

S. EDWARD DOLTON,
Law Reporter.

No. 37.

Order in Council granting special leave to appeal to His Majesty in Council.

AT THE COURT AT BUCKINGHAM PALACE

The 27th day of February, 1930.

Present :

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT.

VISCOUNT GOSCHEN.

LORD CHAMBERLAIN.

LORD THOMSON.

Mr. SECRETARY ADAMSON.

*In the
Privy
Council.*

No. 37.
Order in
Council
granting
special leave
to appeal to
His Majesty
in Council,
27th Feb-
ruary, 1930.

10 WHEREAS there was this day read at the Board a Report from the
Judicial Committee of the Privy Council dated the 14th day of February
1930, in the words following, viz. :—

20 “ WHEREAS by virtue of His late Majesty King Edward the
Seventh's Order in Council of the 18th day of October 1909 there was
referred unto this Committee a humble Petition of the Canadian
Pacific Railway Company and the Canadian National Railways in
the matter of an Appeal from the Supreme Court of Canada between
the Petitioners Appellants and (1) the Toronto Transportation
Commission and (2) the City of Toronto Respondents setting forth
30 (amongst other matters) that the Petitioners desire to obtain special
leave to appeal from a Judgment of the Supreme Court delivered on
the 26th September 1929 so far as it allowed by a majority of three
to two an Appeal by the first Respondents from the direction
contained in an Order of the Board of Railway Commissioners for
Canada dated the 16th February 1928 for payment by the
1st Respondents of a part of the cost of the construction of a subway
in the City of Toronto carrying a highway known as Royce Avenue
under three lines of railway operated by the Petitioners : that the
facts are set out in the Petition : that on the 16th February 1928
40 after the work of constructing the subway and diverting the
1st Respondents' tramway tracks had been completed and paid for
(in the first instance) by the Petitioners the Board issued its Order
Number 40367 directing (*inter alia*) that the 1st Respondents should
pay a part of the cost of such construction and diversion : that the
1st Respondents refused to pay any part of the cost of constructing
the subway and the diversion stating that the Board had no juris-
diction to order them to pay any portion of such cost : that the
1st Respondents appealed to the Supreme Court : that on the
26th September 1929 judgment was delivered by the Supreme Court
by a majority (Anglin C.J. and Smith J. dissenting) allowing the
Appeal in regard to the Royce Avenue subway but dismissing the
Appeal in regard to the Bloor Street subways : And humbly praying

*In the
Privy
Council.*

No. 37.
Order in
Council
granting
special leave
to appeal to
His Majesty
in Council,
27th Feb-
ruary, 1930
—continued.

Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Supreme Court of the 26th September 1929 in so far as it was adverse to the Petitioners or for such further or other Order as to Your Majesty in Council may appear fit :

AND WHEREAS BY VIRTUE of the aforesaid Order in Council there was referred unto this Committee the humble Petition of the Toronto Transportation Commission in the matter of an Appeal from the Supreme Court of Canada between the Petitioners Appellants and (1) the Canadian National Railways (2) the Canadian Pacific Railway Company and (3) the Corporation of the City of Toronto Respondents setting forth (amongst other matters) the facts as already recited down to and including the Judgment of the Supreme Court of the 26th September 1929 : And humbly praying Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Supreme Court dated the 26th September 1929 in so far as it was adverse to the Petitioners or for such further or other Order as to Your Majesty may appear fit :

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty’s Order in Council have taken the humble Petitions into consideration and having heard Counsel in support thereof and for the Respondents Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that leave ought to be granted to the Petitioners in each case to enter and prosecute their Appeals against the Judgment of the Supreme Court of Canada dated the 26th day of September 1929 (2) that the Appeals ought to be consolidated and heard together upon one Printed Case on each side and (3) that the authenticated copies under seal of the Records produced by the Petitioners upon the hearing of the Petitions ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeals.”

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

In the Privy Council.

No. 16 of 1930.

On Appeal from the Supreme Court of Canada.

BETWEEN

THE CANADIAN PACIFIC RAILWAY COMPANY AND CANADIAN NATIONAL RAILWAYS - - - - *Appellants*

AND

THE TORONTO TRANSPORTATION COMMISSION AND THE CORPORATION OF THE CITY OF TORONTO - *Respondents*
(*Royce Avenue Subways*)

AND BETWEEN

THE TORONTO TRANSPORTATION COMMISSION - - - - *Appellants*

AND

CANADIAN NATIONAL RAILWAYS, THE CANADIAN PACIFIC RAILWAY COMPANY AND THE CORPORATION OF THE CITY OF TORONTO - *Respondents*
(*Bloor Street Subways*)

CONSOLIDATED APPEALS.

RECORD OF PROCEEDINGS.

BLAKE & REDDEN,

17, Victoria Street, S.W. 1.

*For the Canadian Pacific Railway Company
and Canadian National Railways.*

LAWRENCE JONES & Co.,

Lloyd's Building,

3/4, Lime Street, E.C. 3.

For the Toronto Transportation Commission.

FRESHFIELDS, LEESE & MUNNS,

New Bank Buildings,

31, Old Jewry, E.C. 2.

For the Corporation of the City of Toronto.