

1906
 *Mar. 29, 30. THE OTTAWA ELECTRIC RAIL- } APPELLANT;
 WAY COMPANY..... }

AND

THE CITY OF OTTAWA AND THE }
 CANADA ATLANTIC RAILWAY } RESPONDENTS.
 COMPANY..... }

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Construction of subway—Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality.

The power of the Board of Railway Commissioners, under sec. 186 of the Railway Act, 1903, to order a highway to be carried over or under a railway is not restricted to the case of opening up a new highway, but may be exercised in respect to one already in existence.

The application for such order may be made by the municipality as well as by the railway company.

The Board, on application by the City of Ottawa, ordered a subway to be made under the track of the Canada Atlantic Railway Co. where it crosses Bank Street, the cost to be apportioned among the city, the C. A. Ry. Co. and the Ottawa Electric Ry. Co. By an agreement between the Electric Company and the city the company was given the right to run its cars along Bank Street and over the railway crossing, paying therefor a specific sum per mile. The company appealed from that portion of the order making them contribute to the cost of the subway, contending that the city was obliged to furnish them with a street over which to run their cars and they could not be subjected to greater burdens than those imposed by the agreement.

Held, that the Electric Co. was a company "interested or affected" in or by the said work within the meaning of sec. 47 of the said Railway Act, and could properly be ordered to contribute to the cost thereof.

*PRESENT:—Sedgewick, Girouard, Davies, Idington and Mac-lennan JJ.

Held, further, that there was nothing in the agreement between said company and the city to prevent the Board making said order or to alter the liability of the company so to contribute.

1906
OTTAWA
ELECTRIC
RY. CO.
v.
CITY OF
OTTAWA
AND
CANADA
ATLANTIC
RY. CO.
—

APPEAL from an order of the Board of Railway Commissioners for Canada, by leave of said Board, directing that a subway be made under the track of the Canada Atlantic Railway Co. where it crosses Bank Street in the City of Ottawa and that the cost thereof be apportioned among the city, the Canada Atlantic Railway Co. and the Ottawa Electric Railway Co.

The order of the Board was made on the application of the City of Ottawa. Leave to appeal to the Supreme Court was granted the Ottawa Electric Railway Co. as follows:

“THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

MEETING AT OTTAWA.

Tuesday, the fifth day of September, A.D. 1905.

“Present:

A. C. KILLAM, K.C.,

Chief Commissioner.

HON. M. E. BERNIER, LL.D.,

Deputy Chief Commissioner.

JAMES MILLS, M.A., LL.D.,

Commissioner.

“IN THE MATTER OF

“The application of the Ottawa Electric Railway Company, under section 43 of the “Railway Act, 1903,” to the Board for an Order allowing an appeal

1906
OTTAWA
ELECTRIC
RY. CO.
v.
CITY OF
OTTAWA
AND
CANADA
ATLANTIC
RY. CO.
—

to the Supreme Court of Canada from the order of the said Board dated the 17th day of July, A.D. 1905, directing the Canada Atlantic Railway Company to construct a subway at the crossing of Bank Street, in the City of Ottawa, by the said Canada Atlantic Railway, and apportioning the cost between the Corporation of the City of Ottawa, the Canada Atlantic Railway Company, and the Ottawa Electric Railway Company, as therein set forth;

“Upon hearing counsel for the Ottawa Electric Railway Company, the Canada Atlantic Railway Company, and the Corporation of the City of Ottawa, and the evidence adduced—

“IT IS ORDERED

“That permission be given to the Ottawa Electric Company to appeal to the Supreme Court of Canada upon the following questions of law:

“1. Whether, by reason of the terms of the agreement between the Ottawa Electric Railway Company and the City of Ottawa, dated the 28th day of June, 1893, the Ottawa Electric Railway should have been ordered to contribute to the cost of the work thereby ordered to be constructed;

“2. Whether the Ottawa Electric Railway Company was entitled under said agreement, to have the City of Ottawa furnish to the Ottawa Electric Railway Company, for the use of the said company in the exercise of its running powers, a street or highway known as Bank Street, including that portion of the said street where it is crossed by the tracks of the Canada Atlantic Railway Company (either with the existing grade or with a changed grade as proposed), upon terms as to payment or compensation as laid down in the said agreement, and whether, if such was

the effect of the said agreement, the Ottawa Electric Railway Company should have been ordered to contribute to the cost of the work thereby ordered to be constructed.

(Sgd.) A. C. KILLAM,
Chief Commissioner,
Board of Railway Commissioners for Canada."

1906
OTTAWA
ELECTRIC
RY. CO.
v.
CITY OF
OTTAWA
AND
CANADA
ATLANTIC
RY. CO.

G. F. Henderson for the appellants. The Board cannot make an order in derogation of our rights under the contract with the city which is an interference with property and civil rights in the province. *In re Goodhue*(1); *Canadian Pacific Railway Co. v. Parish of Notre Dame de Bonsecours*(2); *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*(3).

Under the law as it existed when the contract was entered into this order could not have been made and subsequent legislation cannot impair our rights under it. *Cooley on Constitutional Limitations*, (6 ed.), pp. 335, *et seq.*; *Dartmouth College v. Woodward*(4).

McVeity for the respondents City of Ottawa, and *Chrysler K.C.* for the *Canada Atlantic Railway Co.* were not called upon.

The judgment of the court was delivered by

DAVIES J.—This is an appeal granted by leave of the Board of Railway Commissioners from their order directing the Canada Atlantic Railway Company to construct a subway at the crossing of Bank Street in

(1) 19 Gr. 366.

(2) [1899] A.C. 367.

(3) 22 Times L.R. 330.

(4) 4 Wheat. 518.

1906

OTTAWA
ELECTRIC
RY. CO.

v.

CITY OF
OTTAWA
AND
CANADA
ATLANTIC
RY. CO.Davies J.

the City of Ottawa by the said railway and apportioning the cost between the parties to this appeal.

The permission to appeal was limited to the two following questions of law :

1. Whether by reason of the terms of the agreement between the Ottawa Electric Railway Company and the City of Ottawa, dated the 28th day of June, 1893, the Ottawa Electric Railway Company should have been ordered to contribute to the cost of the work thereby ordered to be constructed.

2. Whether the Ottawa Electric Railway Company was entitled under said agreement to have the City of Ottawa furnish to the Ottawa Electric Railway Company for the use of the said company in the exercise of its running powers a street or highway known as Bank Street, including that portion of the said street where it is crossed by the tracks of the Canada Atlantic Railway (either with the existing grade or a changed grade as proposed), *upon terms as to payment or compensation as laid down in the said agreement*, and whether, if such was the effect of the said agreement, the Ottawa Electric Railway Company should have been ordered to contribute to the cost of the work thereby ordered to be constructed.

This appeal is, therefore, to be determined by the construction of the said agreement of the 28th day of June, 1893, and unless there is something to be found therein entitling the Ottawa Electric Railway Company to exemption from contribution to the cost of the construction of the said subway the appeal must fail.

Mr. Henderson in a lengthy argument contended that the Board of Railway Commissioners had not on a proper construction of sections 186 and 187 of the "Railway Act, 1903," jurisdiction to make the order appealed from at all.

We were unable to appreciate the force of Mr. Henderson's reasoning on this point, and considered the provisions of the Act referred to broad and ample enough in their terms to enable the Board to act, although that point was not within the terms of the order allowing the appeal.

Mr. Henderson's contention on the agreement was that by its terms the Electric Company could not be obliged to contribute anything to the cost of any work ordered by the Board of Railway Commissioners for the protection of the public at the crossings of the city streets by the Canada Atlantic Railway and the Ottawa Electric Railway, and that it was entitled to have the street in question provided for it without the imposition of any additional burden.

1906
OTTAWA
ELECTRIC
RY. CO.
v.
CITY OF
OTTAWA
AND
CANADA
ATLANTIC
RY. CO.
—
Davies J.

The clause in the agreement on which Mr. Henderson mainly relied was the 30th. It reserves to the corporation the right to take up the streets traversed by the railway for the purpose of altering the grades thereof or for any purpose within the powers, privileges, duties and obligations of the corporation without any compensation to the company and

without being liable to the companies for damages occasioned thereby to the company or the works connected therewith.

The argument then was that inasmuch as the application to the Board of Railway Commissioners for the construction of this subway was made at the instance of the city it must be taken to be such action relating to the alternative of the grades of the street as is contemplated in and provided for in the agreement, and that the terms of the agreement with reference to these works and alterations preclude the imposition upon the electric railway company of any of their cost.

We did not entertain any doubt whatever on the point at the argument, and did not deem it necessary to call on the other side.

The jurisdiction of the Board of Railway Commissioners under the 187th section does not in any way depend upon the person or company making applica-

1906

OTTAWA
ELECTRIC
RY. CO.

v.

CITY OF
OTTAWA
AND
CANADA
ATLANTIC
RY. CO.

Davies J.

tion under it. We think the Board could, on giving proper notice, invoke that jurisdiction of its own mere motion in the public interest and without waiting for the intervention of any one.

The construction of the subway ordered cannot be said to be an alteration of the grade of the street within the municipal power of the corporation as provided for in the 30th section of the agreement.

On the contrary it is a work in the interest and for the benefit of all parties concerned, ordered by a paramount authority having the fullest jurisdiction over the subject matter, whether invoked by "any party interested or affected," or whether acted on of its own motion without application.

The two railways, the Canada Atlantic and the Ottawa Electric, were under the jurisdiction of the Dominion Parliament as works declared to be for the general advantage of Canada.

In a case lately before us, *City of Toronto v. Grand Trunk Railway Co.*(1), we decided that the municipality was a "party interested" within the meaning of the Act there in question, and liable to pay the proportion of the cost of the protective works directed by the Railway Committee of the Privy Council to be paid by it.

The words "party interested" have by the present Act, section 47, been amended to read "party interested or affected," and we have no doubt whatever that in the case before us the Board had full jurisdiction to act, that its order binds alike the corporation and the two railway companies affected, and that there is nothing whatever in the agreement between the city and the electric company which can in any way alter the liability of the company to pay its share

(1) 37 Can. S.C.R. 232.

of the cost of this work ordered by a paramount authority to whose orders as such the company was subject.

We, therefore, answer the first question in the affirmative, reading the words "should have been ordered" as "could have been ordered," which seems to us to cover both questions submitted.

Appeal dismissed with costs.

Solicitors for the appellants: *McCracken, Henderson
& McDougal.*

Solicitor for the respondents, City of Ottawa: *Taylor
McVeity.*

Solicitors for the respondents, C. A. Ry. Co.: *Chrysler
& Bethune.*

1906
OTTAWA
ELECTRIC
RY. CO.
v.
CITY OF
OTTAWA
AND
CANADA
ATLANTIC
RY. CO.

Davies J.