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 \*Feb. 3, 4  
 \*Mar. 8.

THE OTTAWA ELECTRIC RAILWAY  
 COMPANY.....APPELLANTS;

AND

THE TOWNSHIP OF NEPEAN AND  
 OTHERS.....RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSION-  
 ERS FOR CANADA.

*Railway Board—Ottawa Electric Ry. Co.—Tariff of rates—Agreement  
 with City—Britannia extension—Separate rates—Powers of Board.*

In establishing a tariff of rates for carriage of passengers on the cars of the Ottawa Electric Ry. Co. the Board of Railway Commissioners should consider the portion of the line from Holland Avenue to Britannia separately from the rest and fix the rates therefor without regard to the conditions of carriage on the remainder of the system.

*Held*, per Duff, Brodeur and Mignault JJ., Davies C.J. contra, that under its agreement with the City of Ottawa, made in 1893, establishing five cents as the maximum of fares for the carriage of passengers within the city limits, the right of the company to charge any rate up to that maximum was not, prior to the enactment of sec. 325 (5) of the Railway Act of 1919, subject to the control of the Board.

*Per* Anglin J. The power conferred on the company by earlier provincial legislation to fix its rates of fare was continued by the Dominion Acts of 1892 and 1894 and thus became as to the City of Ottawa of 1893 the subject of "a Special Act" which, under sec. 3 of the Railway Act of 1906 overrides the general jurisdiction of the Railway Board over fares and tolls.

**APPEAL** from a decision of the Board of Railway Commissioners for Canada by leave of the Board on questions of law.

The following questions were submitted by the Board for the opinion of the Court.

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PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin Brodeur and Mignault JJ.

“(1) Whether upon the proper construction of the agreements with the City of Ottawa and the Village of Hintonburg the statutes relating to the Ottawa Electric Railway Co. and the relevant provisions of the Railway Acts, the Board was right in disallowing the tariff of the Company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue notwithstanding that the Board has found as a fact that the Company did not require additional revenue.

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“(2) Also whether upon the proper construction of the said agreements and statutes for the purpose of computing the toll to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Avenue or at the former westerly limit of the Village of Hintonburg now the city of Ottawa.

“(3) Has the Board the right to treat the Company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by municipal agreements.”

By virtue of an agreement with the City of Ottawa the company could not exact a higher rate than five cents for carrying passengers within the city limits but they asked the Board to sanction a higher rate for the part of the line running to Britannia. This the Board refused to do on the ground that as the system as a whole was profitable additional revenue was not required.

The court heard counsel on these questions and ordered a re-argument on three others, namely:—

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“(1) Has the Board of Railway Commissioners authority to reduce the company’s charge for passenger services within the City of Ottawa below the fare of 5 cents now charged for any such service?”

“(2) If the first question is answered in the negative, has the Board power to require the company to provide a service partly within and partly beyond the limits of the City of Ottawa for a charge not exceeding 5 cents?”

“(3) In passing upon the questions raised upon this appeal, is the court in any respect governed by section 325 of the Railway Act of 1919?”

*Chrysler K.C.* for the appellants.

*Denison K.C.*, and *Wentworth Greene*, for the Township of Nepean.

*J. E. Caldwell*, for the Village of Westboro.

*F. B. Proctor*, for the City of Ottawa.

THE CHIEF JUSTICE.—This is an appeal from the order or judgment of the Board of Railway Commissioners rejecting an application of the appellant company for leave to charge a higher rate than the existing one upon that portion of their railway known as the Britannia section or extension.

All the facts necessary for our decision on the questions of law referred to us are stated very fully in the reasons of the Chief Commissioner, Sir Henry Drayton, with which the rest of the Board concurred. Three questions are asked by them for us to answer. They are as follows:—

(1) Whether upon the proper construction of the agreements with the City of Ottawa and the Village of Hintonburg the statutes relating to the Ottawa Electric Railway Company and the relevant provisions of the Railway Acts, the Board was right in disallowing the

tariff of the company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue, notwithstanding that the Board has found as a fact that the company did not require additional revenue.

(2) Also, whether upon the proper construction of the said agreements and statutes for the purpose of computing the toll to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Avenue or at the former westerly limit of the Village of Hintonburg now the City of Ottawa.

(3) Has the Board the right to treat the company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by Municipal agreements.

It appears clear to me that when exercising its statutory powers in fixing the rates which a company may charge, the decision of the Board is final and we have no right to interfere or express any opinion upon it unless it clearly appears either (1) that the Board in exercising its judgment has refused to consider facts which it ought to have considered or (2) has considered facts which it should not have considered, or (3) has admittedly proceeded on a view of facts rightly taken into consideration which is erroneous at law.

In the case before us the Board determined that it should not consider the Britannia extension as a separate entity but should consider it as an extension of the main city line and form its conclusions on the rate question with reference to the operations of the whole line.

If the Railway Commissioners were obliged, as was contended by Mr. Chrysler, to consider this extension as a separate entity, they found that the present rates which the company sought permission to raise were not fair and reasonable, and would, therefore, in such case presumably have permitted some raise to be made.

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If, on the other hand, they had to consider the application to raise the rates in the Britannia section with reference to the operations of the entire line and as a mere extension of it as they determined it was, then their decision is one with which we have no right to interfere or express any opinion upon.

I am of opinion that in so deciding they acted within their legal rights and that this court has no jurisdiction to interfere.

The question, therefore, to determine is whether or not the Britannia extension was to be considered as part of the company's main line or as a separate entity. That, I take it, is a legal question and one which the Board rightly determined. The application to Parliament for the power and privilege of constructing the extension was made by the company on the express ground that it was an extension merely of their city lines, and in the statutes passed it was so recited and enacted. I cannot in the face of the express words of the statute, construe it as a separate entity. It is true that the main charter of the company limits the fares which they charge on their city lines to the *then existing city limits* and that such limitation does not embrace the Britannia section which was outside of those limits. But that by no means disposes of the question whether the Board had the right to disallow the application to be allowed to charge on the Britannia extension higher rates than those now existing; that is a question which, the Board having taken into its consideration all the facts it was obliged to consider and not having considered any facts which it has no right to consider, was in its absolute discretion and judgment. Mr. Chrysler pressed upon us the admitted fact that the Britannia extension was,

in part, constructed upon the company's own private property and not upon the streets or roads. It does not appear to me that this fact makes any difference in determining the question of an increase of the rates whether the extension was to be treated and considered as a separate entity or not. The Board determined not to consider it such and, I think, was right in so doing. But when it has so decided after considering everything it was bound to consider, this court has no right to interfere with its conclusions.

In reaching the conclusions I have stated and disallowing this appeal I do not wish to be understood as affirming or agreeing with the statement of the Chief Commissioner of the Railway Board in delivering the reasons of the Board for making the order disallowing the proposed new tariff, to the effect that the Board had no authority to reduce the company's charge for passenger services within the City of Ottawa below the five cents now charged for such service. As I understand the language of the Chief Commissioner, he holds that even if the rate of five cents was held by the Board to be an unfair and unreasonable one the Board was powerless to reduce it because the Dominion Parliament has confirmed the agreement between the company and the Corporation of the City of Ottawa which provided that rate as a maximum one. The question is simply as to the meaning of the agreement so confirmed. That agreement, it seems to me, merely establishes five cents as a maximum rate which the company in no case or under no circumstances can exceed. The Board itself with all its statutory powers could not in the face of this express prohibition agreement, allow a higher tariff rate than five cents. But I respectfully submit in exercising

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its statutory powers and determining whether the rate of five cents, or even a lower rate than that, was or was not a "fair and reasonable rate," the action of the Board is unfettered by the prohibition against charging more.

The question is not, of course, directly before us on this reference, but I am anxious not to be considered as agreeing with the conclusions of the Chief Commissioner on the point, concurred in as they were by the other members of the Board, and as such a conclusion was necessarily an important factor in deciding whether in disallowing the proposed new tariff the operations of the railway as a whole had a right to be considered by them.

At the second argument of this reference before us the question whether this court was in any respect governed by section 325 of the Railway Act of 1919 was debated.

In the view I take of the jurisdiction and powers of the Railway Board over the Ottawa Electric Railway Company being ample to justify their order, and also to fix the fares it may or may not charge, I do not deem it necessary to invoke the aid of the legislation of 1919. The previous legislation was quite sufficient, in my opinion, to give the Board jurisdiction and to justify its order now under appeal. If that legislation of 1919 was applicable I do not see how any question as to the validity of the Board's action could arise.

In the year 1894, the then two independent street railways in Ottawa were united, and the agreement made between them was ratified by Parliament as also the agreement between the united companies and the City of Ottawa by 57 & 58 Vict. ch. 86.

Section 7 of that Act is as follows:—

The lines of street railway constructed by the said companies, or either of them, are hereby declared to be works for the general advantage of Canada, and the said "The Ottawa Electric Railway Company" is hereby declared to be a body corporate subject to the legislative authority of the Parliament of Canada.

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From and after the passage of that legislation the new appellant the Ottawa Electric Railway Company, became, in the words of the statute, a body corporate subject to the legislative authority of the Parliament of Canada and its works were declared to be for the general advantage of Canada. The Company, therefore, had all the benefit of the general railway legislation of the Dominion then or thereafter passed and became subject in all respects to the same.

In 1906, such a general Act was passed, the 314th section of which is as follows:—

314. The company or the directors of the company, by by-law, or any officer of the company thereunto authorized by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

2. Such tolls may be either for the whole or for any particular portions of the railway.

3. All such by-laws shall be submitted to and approved by the Board.

4. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein.

5. No tolls shall be charged by the company until a by-law authorizing the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any service as common carrier, except under the provisions of this Act.

Then section 323, enacts as follows in its first part:—

323. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a



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prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed

Under this legislation the Board, in my opinion, has full and ample powers to control the rates of the company on its main lines and its extensions, and, finding that the company had a revenue of at least 15 per cent from its works as a whole, was acting within its rights when it rejected the company's application for leave to charge a higher rate than the existing one upon the Britannia section or extension of their lines of railway.

I am unable to appreciate the argument that the powers granted to the companies by the provincial legislature to make by-laws regulating the rates which might be charged for the carriage of passengers became vested in the united companies under the name of the Ottawa Electric Railway by the Act of the Parliament of Canada which declared the work to be for the general advantage of Canada, and that the General Railway Act did not take away or impair those rights or powers. It seems to me that the contention is fully met by section 6 of the Railway Act of 1906, which reads as follows:—

6. Where any railway, the construction or operation of which is authorized by Special Act passed by the legislature of any province, is declared, by any Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway, and to the company constructing or operating the same, to the exclusion of such of the provisions of the said Special Act, as are inconsistent with this Act, and in lieu of any general railway Act of the province.

Under any construction of these various Acts the power to control and disallow any proposed tariff of rates as being "unjust and unreasonable"

remained in the Railway Board under section 323 of the Railway Act and applied to the tariff of rates now under review.

The power of the common law courts over rates charged by a common carrier were practically transferred by section 323 of the Railway Act above quoted to the Board of Railway Commissioners.

I would therefore, answer the first question, under the circumstances I have stated above, in the affirmative construing the phrase "right in disallowing the tariff" in question as meaning "within its right." Whether the decision was right or wrong is not for me to pass on; I merely say the Board was within its right in deciding as it did.

My answer to the first part of the third question is in the affirmative, and, to the latter part, in the negative.

The appeal, therefore, should be dismissed with costs.

INDINGTON J.—There existed in Ottawa in the early part of 1894, two street railways, respectively owned by separate corporate companies whose early history and relations with the City of Ottawa concern, or at all events should concern, us very little for the purpose of determining the questions raised by this appeal.

Suffice it to say that in said year there were agreements entered into between the said companies whereby the assets of the one were to be sold to the other and between both and the City of Ottawa, presented to the Parliament of the Dominion with a petition to confirm same and vest the properties which had been theretofore and were then held by either in the appellant.

Parliament, by 57 & 58 Vict. ch. 86, sec. 1, ratified the said agreement between the said companies, and

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by section 2, the said agreement between them and the City of Ottawa.

Then by section 3 of said Act, it enacted as follows:—

3. The franchises, powers and privileges heretofore or hereby granted to or conferred upon the said companies, or either of them and which are hereby authorized to be transferred to the said united company, shall be exercised and enjoyed by the said united company, subject to the terms, provisos and conditions contained in the said agreement with the Corporation of the City of Ottawa.

Section 6 provided as follows:—

6. The name of the Ottawa City Passenger Railway Company is hereby changed from 'The Ottawa City Passenger Railway Company' to 'The Ottawa Electric Railway Company', but such change in name shall not in any way impair, alter or affect the rights or liabilities of the company, nor in any wise effect any suit or proceeding now pending or judgment existing eitherby or in favour of, or against the said company, which, notwithstanding such change in the name of the company, may be prosecuted or continued, completed and enforced as if this Act had not been passed.

And section 7 of the same Act declared as follows:—

7. The lines of street railway constructed by the said companies, or either of them, are hereby declared to be works for the general advantage of Canada, and the said 'The Ottawa Electric Railway Company' is hereby declared to be a body corporate subject to the legislative authority of the Parliament of Canada.

That legislation beyond doubt constituted the appellant and the said lines of railway, in the language just quoted, "works for the general advantage of Canada" and subjected the appellant as the new corporate owner of same and said works to the future railway legislation of the Dominion, unless when expressly exempted therefrom.

The Dominion Parliament by the Railway Act of 1906, section 5, provided as follows:—

5. This Act shall, subject as herein provided, apply to all persons, companies and railways, other than Government railways, within the legislative authority of the Parliament of Canada.

The said Railway Act, 1906, provides, by section 314, as follows:—

314. The company or the directors of the company, by by-law, or any officer of the company thereunto authorized by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

2. Such tolls may be either for the whole or for any particular portions of the railway.

3. All such by-laws shall be submitted to and approved by the Board.

4. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein.

5. No tolls shall be charged by the company until a by-law authorizing the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any service as a common carrier except under the provisions of the Act.

Section 323 of said Act reads in first part as follows:—

323. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

The foregoing outlines of so much of the legal history of appellant as can be made relevant to any of the questions herein submitted, when taken in connection with said section 323 of said Act, contains all the law to which we should have regard in answering same.

Indeed I hold that the lastly quoted part of section 323 contains all that is relevant in this particular case, for the Board finds that the appellant has a revenue of at least 15% from its works, as a whole. That renders it impossible to say, as matter of law, that the ruling is "unjust and unreasonable" and hence in any

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way such a violation of said section 323 as to furnish any ground of complaint on the appellant's behalf.

If it is not possible to hold that in law there has been something unjust or unreasonable done by the Board in reaching its judgment, or in the application of any of the statutes to which I have referred, then it hardly seems possible that there can be any question of law proper for this court, to be called upon to decide.

I may briefly state some other facts which it is said give rise to the doubt of the correctness in law of the conclusion reached by the Board.

It seems that the appellant's railway extends from a point some short distance east of Ottawa to Britannia-on-the-Bay to the west of said city, with numerous divergent parts and branches running over many of the city streets.

As inevitably happens in every large business enterprise, there are some parts of this railway which do not pay as well as others; and indeed are a burden, according to the absurd view that the feeders to serve the system are entirely useless and that all the persons passing over same would in any event pass over the other central part and pay a fare.

The part of the said railway extending from Ottawa to Britannia-on-the-Bay was authorized by Parliament, by the statute of 1899, ch. 82, expressly enacting that the company might as an extension to its then existent railway, construct and operate, etc., such a branch.

An agreement referred to in the questions I am about to quote had been entered into between the appellant and the Village of Hintonburgh specially providing for its franchise in that part of its line.

That agreement has expired, and can hardly be said as matter of law to have anything to do with the questions raised, especially when the maximum limit of basis fixed thereby is adhered to by appellant.

The Board, however, for some reason not very apparent in so plain a case, has submitted the following alleged questions of law on which appellant bases this appeal, and asks to find out what has been done by the Board is in law unwarranted:—

(1) Whether upon the proper construction of the agreements with the City of Ottawa and the Village of Hintonburgh, the statutes relating to the Ottawa Electric Railway Company and the relevant provisions of the Railway Acts, the Board was right in disallowing the tariff of the company filed providing for payment of additional fares for carriage upon the extension from Holland Avenue, notwithstanding that the Board has found as a fact that the company did not require additional revenue.

(2) Also, whether upon the proper construction of the said agreements and statutes for the purpose of computing the toll to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Avenue or at the former westerly limit of the Village of Hintonburgh now the City of Ottawa.

(3) Has the Board the right to treat the Company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by Municipal agreements.

I am unable to understand the argument that in law there is such an imperative legal distinction, between the part of the company's line beyond Holland Avenue, and those other parts of same, which must of necessity become effective and so operate as an imperative mandate in relation to the defining or fixing of rates that there must be different rates east of that line from those west thereof, which conflicts with conclusions reached by the Board. The mathematical distinction I can grasp but that we have to

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deal with must be one so founded in law as to affect this case.

To urge that a separate and distinct line of treatment thereof in regard to the question of fares for passage over it because it was authorized and built at a different time from some other part, seems to me, with great respect, a very idle argument. And it does not seem to me to be improved by a reference to the question of whether the power of expropriation existed before or was first enforced by a particular clause in the legislative history of the appellant.

The same sort of argument would lead to holding as matter of law that the Hintonburgh part of the line must be treated as a thing separate from the rest of the lines in fixing fares, and so on throughout the system.

I can understand the question of the delimitation of rates as evidenced by agreements between appellant and municipal bodies being a matter of fact which probably the Board of Railway Commissioners should examine in reaching a determination as to any tariff of tolls. When the Board has done so and examined all else in the way of facts bearing upon the questions raised by the proposed imposition of a tariff, I fail to see how any question of law arises. It is not for us to pass upon the question of whether or not the proper construction of the agreements and the relevant provisions of the Railway Acts, as a matter of law, lead to the allowance or disallowance of the proposed tariff when we find that the Board, even assuming as well founded appellant's contention relative to the construction of said agreements and statements, has found as fact that the company did not require

additional revenue and hence it was neither just nor reasonable to impose further rates.

I could understand the question of law being put as to whether or not the rates of fares named in such agreements and legislative validation thereof must be held to have been thereby in law imperatively and definitely determined for all time. But when we find the Board and counsel for appellant have assumed that to be law (which I much doubt but pass no opinion upon) and acted upon such assumption, there seems nothing but mere questions of fact involved in what remains for consideration.

There is much to be said for the true legal aspect of the whole matter involved having been reduced, by the Parliamentary legislation above recited, to a mere question of what would be in the opinion of the Board be a just and reasonable tariff, regardless of the agreements in question, and especially so when we find they seem in this regard to have merely arrived at a maximum tariff.

Evidently this part of the agreement though for even that and many other purposes validated by the preceding legislation, may be held to have been overridden by the later legislation constituting the Board and assigning it such powers as it has, constituting it absolute master of the whole question of rates or tolls, provided always as a test of the due discharge of such duties as entailed thereby that it has duly considered all that is involved as fact in such like agreements.

Let us assume that there had, instead of a highly profitable investment such as appellant's has turned out, resulted an enterprise that could not be made productive of a fair profit without discarding the limitation in these agreements; could it be said that

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the Board under the legislation conferring such an absolute power long after the agreements had come into existence, would be powerless to grant any relief?

The questions as presented and the argument thereon do not permit me to feel at liberty to answer definitely this question.

I, therefore, merely submit it as an illustration of what might have been a possible solution of much that is involved in what has been considered, and suggesting a reason why the questions submitted cannot be answered in a more helpful way than I am compelled to.

Holding the view I have expressed as to the first question, it seems self-evident that the answer to the second question is not involved in the disposition of the question before the Board and hence needs no answer.

As to the third question I cannot conceive of any rule of law that would prevent the Board from considering the company's operations as a whole, and if it saw fit to disallow the proposed tariff, or any portion thereof which it is considered to be unjust, or unreasonable, or contrary to the provisions of the Railway Act, it was entirely within its province. So far as the doing so can be said to raise any question of law, I have no hesitation in answering affirmatively.

As to the second branch of the third question, raising the point of whether or not the Board must permit the fixing of tariffs on a mileage basis. I may point out that the appellant's factum distinctly disavows desiring to raise such a question and insists that

there was no question before the Board as to whether the tolls should be based upon mileage, or upon a flat rate.

That seems to eliminate as far as this appellant is concerned in this appeal, the only other possible question of law raised by the third question for our decision.

It is only as a basis of appeal by way of which an appellant may seek to get relief that we can consider any such question. However willing we should be to aid the Board we cannot properly so interfere unless incidentally to the determination of something in respect of which an appellant seeks relief.

With great respect I submit the questions submitted (save the first part of the third question) do not raise or distinctly state any definite question of law actually relevant to the matters in issue between those concerned, upon which a ruling is desired, and can be properly made.

The first part of the third question should be answered in the affirmative.

I think, therefore, following our view expressed in the case of *Canadian Pacific Railway Co. v. Regina Board of Trade* (1) the appeal should be dismissed with costs.

After I had written the foregoing the majority of the court decided to direct a re-argument (which has been had) upon certain stated questions. In deference, however, to suggestions made in that argument, which was not directed on the grounds upon which I proceeded and hence has not changed my opinion, I may be permitted to point out that the declaration, contained in the above quoted section 7 of the Dominion Act, 57 & 58 Vict. ch. 86, that, so long ago as 1894, the works of the appellant were thereby declared to be for the general advantage of Canada; and hence

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by such declaration withdrawn, by virtue of Item No. 10 of section 92 of the British North America Act, from any control of, or incidental to, their operation either by virtue of any legislation of Old Canada or the legislation of the Province of Onatrio.

Such, I think, must be held to be the result of the decision of the Judicial Committee of the Privy Council in the case of *Toronto v. The Bell Telephone Co.*(1). Unfortunately that case was not referred to in either argument herein.

By the express language of the above quoted section 7, as well as the necessities of the situation created by the other provisions of the said Act a new corporate entity, composed of two such previously existent, is created and that is declared to be subject to the legislative authority of the Parliament of Canada.

The result of the said legislation, viewed in light of said decision, seems to have been to give predeterminate effect to the Act of Parliament wherever conflict arises between the respective enactments.

We are not left to depend alone upon such reasoning for this conclusion was adopted by the enactment of section 6 of the Railway Act of 1906, which reads as follows:

6. Where any railway, the construction or operation of which is authorized by a special Act passed by the legislature of any province, is declared, by any Act of the Parliament of Canada, to be a work of the general advantage of Canada, this Act shall apply to such railway, and to the company constructing or operating the same, to the exclusion of such of the provisions of the said Special Act as are inconsistent with this Act, and in lieu of any general railway Act of the province.

Hence beyond peradventure all the subsequent undertakings of the new creation such as the new branch, declared by the later Act authorizing it, to be

an extension, and that extension which is now in question, must be governed in every respect by the Dominion Railway Act, and not by any legislation of the Ontario legislature either as to fares or otherwise.

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This evidently was the view held by the appellant itself otherwise it never should have troubled the Board of Railway Commissioners by filing with it a proposed new tariff of fares.

The point made by Mr. Denison of counsel for one of the respondents, that at common law the common carrier was as between him and any one of the public, not entitled to charge any fare beyond what was just and reasonable, was well taken.

Besides those cases he referred to I find the case of *Interstate Commerce Commission v. Baltimore & Ohio Rd. Co.* (1) which proceeds upon a distinct holding of such a view as the basis upon which the legislation there in question proceeded. See also *Harris v. Packwood* (2).

Our Railway Act in making a statutory provision for the determination of what rates are chargeable, also proceeds upon the same basis of what is just and reasonable.

I therefore repeat that I can see nothing else to test the jurisdiction of the Board so long as it has not gone beyond its statutory authority and has not failed to consider all relevant facts.

DUFF J.—The questions submitted should, in my opinion, be disposed of as follows:—

The first question: This question is not answered since it involves questions of fact within the exclusive

(1) 145 U.S.R. 263.

(2) 3 Taun. 264.

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competence of the Board of Railway Commissioners. So far as it involves a question of law it is covered by the answer given to the first part of the third question.

The second question: At Holland Avenue.

The third question: First member. No. Second member: Yes; though not necessarily on a mileage basis.

My reasons for these conclusions can be stated briefly. They are based upon two propositions which appear to me clearly established.

First. I concur fully with the opinion of the Chairman of the Board as to the effect of the statute of 1894. By force of that statute and the scheduled agreements the rights and obligations of the Ottawa Electric Railway Co. in relation to the fares chargeable in respect of the services provided for or contemplated by the agreement between the Street Railway Companies and the City—services which may with sufficient accuracy be referred to as City services—were to be governed by the agreement itself; and consequently the Ottawa Electric Company did not on the passing of the Railway Act of 1903 (see s. 3) become in respect of such fares subject to the jurisdiction of the Board of Railway Commissioners touching the matter of the regulation of rates.

Second. As regards the Britannia extension on the other hand, authorized by the Act of 1899, I can find nothing in that statute excluding this line from this jurisdiction of the Board and I think that on the passing of the Railway Act of 1903 the provisions of that enactment on the subject of the regulation of rates became applicable to it.

The first of these propositions seems to involve this consequence: The fares exigible under the statute

and agreement of 1894 must be taken to be a just remuneration, neither too much nor too little, for the city services; and it seems to follow that in determining what is a just and reasonable remuneration for the services performed on the Britannia lines the proceeds derived from the city services must be left out of account. That is to say that in determining what is just and reasonable in respect of the Britannia lines, you must start with the hypothesis that everything paid in respect of city services has been fully earned by the performance of those services.

The point may be illustrated by a reference to one example of the manner in which the existing tariff operates. Under that tariff the company is entitled to charge a maximum fare of five cents for transport from the corner of Laurier Avenue and Charlotte Street to Britannia, a charge which the company, by the Act and agreement of 1894 is nevertheless entitled to make for that part of the service which is performed within the city. In other words, under existing conditions, so long as the Britannia line is kept in operation and this service is maintained, the company is obliged to give, for a fare of five cents, the city service (for which by law it is entitled to receive a fare of five cents) plus the service from Holland Avenue to Britannia; and that appears to be the necessary consequence of treating the operations of the company as a whole and maintaining the existing tariff.

I think it is not permissible to do this because thereby full effect is denied to the legal rights of the company under the statute and agreements of 1894.

I must mention that in answering these questions we are governed by the law as it stood before the enactment of the Railway Act of 1919.

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ANGLIN J.—This case comes before us by leave of the Board of Railway Commissioners granted under s.s. 3 of s. 56 of the Railway Act, R.S.C., c. 37, as enacted by 9 & 10 Ed. VII., c. 50, s. 1. The Board is thereby empowered to grant a right of appeal.

upon any question which *in the opinion of the Board* is a question of law.

It may therefore be that this court should not decline to pass upon any question leave for the submission of which as a question of law has been given by the Board, however difficult or even impossible it may be to find in it such a question. On the other hand if a question formulated by the Board is susceptible of more than one interpretation, inasmuch as it must be assumed that the Board did not intend to ask the opinion of the court on anything other than a question of law, the court should put upon it any construction at all admissible that presents such a question. If on no possible interpretation can a question of law be found it would seem reasonable to assume that there had been some mistake in the drafting of the question in respect of which leave has been given, and on that assumption the Board might be asked to reconsider it and, if possible, to state it in a form which would present an issue of law. I should have been disposed to adopt this course in regard to the first question in the present case were it not for the fact that I incline to the view that it was probably intended by it to cover substantially the same ground as is covered by the first member of the third question, and in the latter may be found a question of law. It would not seem to be practicable to answer the first question submitted on this appeal without reviewing the discretion of the Board exercised upon considerations which are in no sense matters of law.

It is beyond the function which s. 56 (3) of the Railway Act contemplated should be exercised by this Court to determine

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whether \* \* \* the Board was (or was not) right in disallowing the tariff of the Company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue.

Should there be no legal obstacle to the adoption of the course decided upon by the Board, there may be error in the determination of some matter of fact or in the exercise of the wide discretion entrusted to it by the statute, neither of which can be made the subject of an appeal to this court. I find it difficult to conceive of any case in which the court may properly be asked whether any action taken by the Board is or is not "right," unless where the law peremptorily requires that some particular course should be taken in regard to the subject matter of the question.

The facts out of which the questions submitted arise appear in the order of the Board granting leave to appeal. Mr. Chrysler contends that the finding of the learned Chief Commissioner, that the company has a statutory right, not subject to the control of the Board, created by the confirmation of its agreement of 1893 with the City of Ottawa by the Dominion Act of 1894 (c. 86), to charge any rate of fare fixed by it, not exceeding five cents, for the carriage of each adult passenger within the then limits of the City of Ottawa, constitutes such a legal requirement and compels the allowance by the Board of some additional rate for carriage on the Britannia extension, admittedly beyond those limits, and precludes that tribunal from taking into account in fixing such rate the company's profits on the operation of so much of its system



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as is covered by the agreement. If the Chief Commissioner's finding is right, or must be assumed to be so on this appeal, I am, with respect, of the opinion that the learned counsel's conclusions would seem necessarily to follow. Otherwise the company would be obliged to expend in the operation of an extension found to be unprofitable (par. "r") income derived from other portions of its system to which, *ex hypothesi*, it has an absolute statutory right: To put it otherwise—having by statute a right to be paid five cents for carrying a passenger, who embarks in Ottawa, to the former city limits, it would be compelled to carry him gratis beyond those limits—and for an additional three miles should he desire to travel to the Britannia terminus. The same result would ensue in the case of a passenger boarding one of the company's cars at some point on the extension to be carried to a place within the City of Ottawa as it stood in 1893. The only traffic on the Britannia extension for which the company would receive any remuneration would be that having both its point of origin and its point of destination on the extension itself. If it is beyond the jurisdiction of the Board directly to control the company's tolls within the limits of the Ottawa of 1893, it cannot, in my opinion, do so indirectly by refusing to the company reasonable remuneration for the traffic on the Britannia extension, considered by itself.

Mr. Chrysler argued that the Board has not submitted to the court the question whether the company has or has not the statutory right which the Chief Commissioner has found it enjoys with regard to the rates of fare within the city of Ottawa as it stood in 1893-4, and that that matter is therefore not subject

to review here. It is quite true that the question is not formulated in explicit terms. But the first member of the third question submitted

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treating the word "right" used in it as meaning power or jurisdiction—necessarily involves it. I find nothing else in the statutes and agreements referred to in the first question, and recited in the statement of facts embodied in the order of the Board, that could possibly exclude that right. They include the statute and agreement on which the Chief Commissioner bases his finding that a statutory right to a five cent fare for each adult passenger carried within the limits of the Ottawa of 1893, over which the Board has no power of regulation or control, is vested in the company. We cannot in answering the first member of the third question propounded ignore this feature of the case before us which appears to me to be so vital that it is virtually the turning point in its determination and presents, if not the sole, at least the most obvious and most important question of law to be found in the entire submission. Somewhat paradoxically upon this question the appellant company upholds the finding of the Chief Commissioner while the respondents maintain that it is wrong.

Although, the reasons presently to be stated, of the opinion that the company has a right not subject to the control of the Board to fix a rate of fare not exceeding five cents for each adult passenger, except as provided by clause 49 of the agreement of 1893, carried by it within the then limits of Ottawa, with respect, I fail to find in the confirmation by the statute of 1894 of clause 46 of the agreement of 1893 sufficient ground

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for that conclusion. On the contrary, if the company's right rested on that contract and statute alone, while it could not claim any fare exceeding five cents (except for the traffic specially provided for by clause 47) for the carriage of a passenger within the limits of the Ottawa of 1893, its right to demand fares up to that figure would, in my opinion, be subject to the control of the Board. Clause 46 is purely restrictive in its terms. Had the company intended to stipulate for a right to charge any fare fixed by it not exceeding five cents, it is scarcely conceivable that that right would not have been expressed in positive terms such as are found in clause 47 dealing with the special rates of fare between 12 o'clock midnight and 5.30 a.m. Moreover, the fact that its right to collect and fix fares within the Ottawa of 1893 existed independently of and antecedently to the contract of that year and the statute of 1894, as I shall now endeavour to demonstrate, renders it wholly unnecessary to import by implication into clause 46 of that contract the positive provision which the contracting parties would seem to have deliberately omitted from it.

The Ottawa City Passenger Railway Company was incorporated by the Parliament of the late Province of Canada in 1866 and by section 8 of that statute (c. 106) its directors were empowered to make by-laws touching (*inter alia*).

the fares to be received for passengers and freight transported over the railway or any part thereof.

The franchise conferred was to construct and to operate by animal power a street railway on certain specified streets and others to be agreed upon in the City of Ottawa and adjoining municipalities. The work

being purely local and provincial passed, at Confederation, under the control of the legislature of Ontario. That body in 1868 amended the company's charter (c. 45) by declaring applicable to it certain sections of the Consolidated Railway Act of 1859 (c. 66), *inter alia* those with respect to "Powers," and expressly excluding the application of other clauses of the same Act, *inter alia* sections 118 and 151 relating one to the reduction of tolls by the legislature and the other to the approval of tariffs by the Governor-in-Council. Under the heading "Powers" it was by section 9 of the Consolidated Railway Act provided that

the company shall have power and authority \* \* \* tenthly \* \* \* to regulate \* \* \* the tolls and compensation to be paid and to receive such tolls and compensation.

S.s. 1 of s. 31 of ch. 170 of R.S.O. 1887 (The Ontario Railway Act) applied to the Ottawa City Passenger Railway Company, but s. ss. 9, 10, 11 and 12 of the same section did not. R.S.O. 1887, c. 2, s. 10.

No other change in the statutes affecting the company was made prior to 1892. It would therefore appear that at that time under the provincial statutes governing it one of the "powers" of the company was to regulate its tolls—a power which it would probably exercise through directors' by-laws passed under sec. 8 of the Act of 1866—without control by the legislature or by the Governor-in-Council under sections 118 or 151 of the Consolidated Railway Act of 1859, or the corresponding sections of c. 170 of the Revised Statutes of Ontario, 1887. The Ontario Street Railway Act of 1883 (46 Vict., c. 16) (R.S.O. 1887, c. 171) by its 24th section provided that

nothing in this Act contained shall apply to or affect any street railway company existing or incorporated before the 1st of February, 1883.

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In 1892 the company desiring to extend its line across the Union Bridge and into the City of Hull sought and obtained from the Dominion Parliament an Act (c. 53) empowering it to do so, (s. 1) declaring it to be a work for the general advantage of Canada (s. 6) conferring on it the additional right to use motive power other than animal power, except steam (sec. 3), making applicable to the new lines of which the construction was thereby authorized the Acts of 1866 and 1868 and "the powers thereby conferred," and providing that the "operation" of the railway "by any new or additional powers conferred by this Act," should be subject to the provincial law in relation to street railways (s. 6).

"Operation" in this statute in my opinion does not include the fixing or regulation of fares. It refers to the working of the railway—how the cars should be run—control of the tracks, motive power and equipment. *Bedford Bowling Green Stone Co. v. Oman* (1); *Minneapolis Street Railway Co. v. City of Minneapolis* (2). A reference to the clauses of the Dominion Railway Act (R.S.C. 1906, c. 37) included in the fasciculus headed "Operation" will serve to indicate the purview of that term as understood by the Parliament of Canada.

By sec. 13 of the Act of 1892 it was provided that nothing in this Act shall in any way impair any of the powers which the company has at the passing of this Act.

Ordinarily I should incline to think that the word "powers" in such a section would not include the right to fix rates. But that right was conferred by the Act of 1868 as a "power and authority;" and by the Act of 1868 it was confirmed as one of the "powers"

(1) 134 Fed. R. 441-450.

(2) 155 Fed. R. 989-1000.

under sec. 9 of the Consolidated statute of 1859 incorporated with the Act of 1868. Furthermore, in the Dominion Act of 1892, while secs. 92 and 93-98 of the general Railway Act (51 V., c. 29) are expressly made applicable to the company, there is no reference either to sec. 223 empowering the company to fix tolls or to secs. 11 (k) and 227 and 228 providing for the control of tolls by the Railway Committee of the Privy Council and the Governor-in-Council respectively. The proper conclusion from these circumstances appears to me to be that the "power" of fixing and regulating its rates of fare free from the control of the Lieutenant-Governor-in-Council, which the company possessed under the provincial legislation affecting it, was continued unimpaired by the operation of secs. 6 and 13 of the statute of 1892, notwithstanding the declaration thereby made that the company's undertaking was a work for the general advantage of Canada, and that that right thus became the subject of a "Special Act" excluding the application of inconsistent provisions of the general Railway Act (51 V., ch. 29, ss. 3 and 6), if they would otherwise have been applicable to it as a street railway.

Such was the position of the Ottawa City Passenger Railway Company in regard to the imposition and control of tolls at the time of the agreement of 1893 and the statute of 1894 confirming it, so much canvassed at bar. The Ottawa Electric Street Railway Company, then absorbed by and amalgamated with the Ottawa City Passenger Railway Company, had been incorporated in 1890 and was subject to the Ontario Street Railway Act (R.S.O. 1887, c. 171). But the only statutory provision affecting its tolls was that contained in s. 9 of that Act, limiting the

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maximum fare to be charged by it to five cents for any distance not exceeding three miles and one cent for each additional mile. It seems very clear to me, therefore, that the sole office of the first member of clause 46 of the agreement of 1893—

no higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said line and branches thereof within the present city limits.

was so to limit the company's right to fix its rates of fare conferred by the provincial Acts of 1866 and 1868 and confirmed by the Dominion Act of 1892, and not otherwise subjected to statutory control or restriction, that thereafter the ordinary fare for the carriage of an adult passenger within the then city limits should not exceed five cents,—a concession which the company no doubt made in consideration of counter-vailing benefits and advantages obtained by it under the agreement. That, in my opinion, is the entire scope and purpose of the part of clause 46 now under consideration and it therefore becomes quite unnecessary to consider the effect of its confirmation by the statute as creating a statutory right in favour of the company.

The Act of 1894 continues the existence of the "Ottawa City Passenger Railway Company" under the name of the "Ottawa Electric Railway Company" (s. 6) and sanctions its absorption of the Ottawa Electric Street Railway Company (s. 1), declaring that the lines of street railway of both companies are works for the general advantage of Canada and that the Ottawa Electric Railway Company is subject to the authority of the Parliament of Canada (s. 7). But any effect which these latter provisions might otherwise have had under sec. 6 of the Railway Act

of 1903 c. 58; (R.S.C. 1906, c. 37, s. 6) is excluded by secs. 3 and 11, to which, as well as to sec. 13 of the Act of 1892, the provisions of sec. 3 of the Railway Act of 1903 would seem to apply. Secs. 3 and 11 of the Act of 1894 are as follows:—

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(3) The franchises, powers and privileges heretofore or hereby granted to or conferred upon the said companies, or either of them, and which are hereby authorized to be transferred to the said united company, shall be exercised and enjoyed by the said united company, subject to the terms, provisos and conditions contained in the said agreement with the corporation of the City of Ottawa.

(11) Nothing in this act Shall in any respect impair any of the powers which the said Ottawa City Passenger Railway Company shall have immediately prior to the date appointed for this Act to take effect.

Under these provisions the power or privilege of the Ottawa City Passenger Railway Company to fix and regulate its rates of fare conferred by the legislation of 1866 and 1868 and confirmed by the statute of 1892 are again preserved for the benefit of the continuing corporation, the Ottawa Electric Railway Company. As provisions made by the Parliament of Canada inconsistent with the jurisdiction over tariffs and tolls then possessed by the Governor-in-Council and the Railway Committee of the Privy Council and now vested in the Board of Railway Commissioners by the Railway Act, they override the latter (s. 3 of c. 37, R.S.C., 1906). There is no reference to the general Railway Act in the statute of 1894.

The construction of the Britannia branch by the Ottawa Electric Railway Company was authorized by a Dominion statute of 1899 (c. 82) "as an extension of its present railway." Neither the agreement of 1893 between the City of Ottawa and the appellant company, nor the (now expired) agreement of the company



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with the Village of Hintonburgh applies *proprio vigore* to this extension. The former is explicitly confined in its operation to the City of Ottawa of 1893; the latter to lines of railway constructed on streets of the village. No part of the Britannia extension is within the Ottawa of 1893 and the short portion of it within the former village of Hintonburgh is constructed not on streets but on a private right of way. The fact that the company was authorized by the statute of 1899 to construct the line from Holland Avenue west to Britannia-on-the-Bay "as an extension of its present railway" does not bring that extension within the terms of agreements explicitly confined in their operation the one to territory within which no part of it is constructed and the other to property over which it does not pass; nor does it, in my opinion, as a matter of law preclude the sanction by the Board of a tariff of fares for that extension distinct from that in force for the rest of the company's system.

Sec. 3 of the Act of 1899 reads as follows:

Sections 90-172, both inclusive, of the Railway Act and such of the other sections as are applicable, shall apply to the company with respect to the said extension.

It is common ground that as to the Britannia branch the jurisdiction of the Board of Railway Commissioners over tariffs and tolls conferred by the general Railway Act is unfettered. But I cannot find in the mere description of this branch as an "extension" anything entitling the Board in the exercise of that jurisdiction to disregard the effect of any rights which the company may have to fix and regulate tolls on its lines within the limits of the City of Ottawa of 1893 independently of the Board's supervision and control. If, in order

to treat the company's operations as a whole and continue the existing tariff,

the Board must disregard such a right of the company, either directly or indirectly, in my opinion it may not do so. It follows that the Board should

permit the filing of tariffs \* \* \* covering service on the Britannia line without reference to the larger part of the system covered by the municipal agreements \* \* \*

though not necessarily on a mileage basis.

On the proper construction of the relevant agreements and statutes I am of the opinion that the Britannia extension commences at Holland Avenue since from that point westerly the company's tracks are laid on a private right of way and not on public streets and it is "from some point on its present railway" (of which the terminus was then at Holland Avenue) that the company was by the Act of 1899 authorized to construct and operate its line to Britannia-on-the-Bay.

While it would seem to follow from what I have said that it is not possible to hold as a matter of law that the order of the Board disallowing the tariff in question was not "right" and the respondents may therefore be entitled to ask the court to decline to answer the first question in the affirmative, in view of the facts and finding in paragraph "r" of the order allowing the appeal the company is entitled to such fares and on such basis as the Board may deem reasonable and just in respect of traffic on its Britannia branch irrespective and independently of the rates of fare prevailing on the rest of its system. As the learned Chief Commissioner said in delivering the opinion of the Board in this case:

Under the Railway Act the same company may have different rates on different parts of its system where traffic and operating conditions and construction costs are dissimilar, for example, railway

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tolls are justifiably higher in a mountainous district where cuttings and grades are heavy and as a result the cost of construction and operation is greater than in other districts. Again the tolls may be greater where traffic density and diversity differ.

Rates on a branch or lateral line may be justified, although higher than those of a main line, with greater traffic and although owned by the same company.

The fact that a flat rate of fare prevails throughout the rest of the company's system does not as a matter of law in my opinion preclude the authorization of an additional fare, either on a mileage or "measured" basis or as a flat rate, on the Britannia extension.

I would, for the foregoing reasons, without answering the first question, answer the second question: "At Holland Avenue;" and to the first member of the third question my answer would be: "No;" and to the second member thereof: "Yes, though not necessarily on a mileage basis."

In reaching these conclusions, I have entirely put out of consideration s.s. 5 of sec. 325 of the Railway Act of 1919. That provision is not retroactive. The statute was passed on 7th July, 1919; the decision of the Board was pronounced on 25th of February, 1919; and leave for this appeal was granted on 14th of April, 1919. The answers to the questions before us, therefore, in nowise depend on s.s. 5 of sec. 325 and I refrain from expressing any opinion whatever either upon its construction or upon the scope of its application.

On the whole the appeal succeeds and the appellants should have their costs.

BRODEUR J.—The appellant company operates within the city limits of Ottawa a street railway proper, and beyond city limits it runs a suburban railway called the Britannia line.

This suburban railway is constructed upon a private right of way and passes through the territories of the respondents, the township of Nepean and the village of Westboro.

The rates within the City of Ottawa are fixed by a contract which was confirmed by Parliament.

The Railway Company has filed before the Railway Board a tariff asking for larger fares than those charged heretofore on the Britannia line and the municipalities interested including the City of Ottawa have applied for the disallowance of the proposed tariff and it was disallowed on the 25th February, 1919. The Ottawa Electric Company dissatisfied with the order of the Board, obtained on the 14th of April, 1919, leave from the Board to appeal to this Court upon the following questions:—

1. Whether upon the proper construction of the agreement with the City of Ottawa and the Village of Hintonburgh, the Statutes relating to the Ottawa Electric Railway Company, and the relevant provisions of the Railway Acts, the Board was right in disallowing the tariff of the company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue notwithstanding that the Board has found as a fact that the Company did not require additional revenue.

2. Also whether upon the proper construction of the said agreements and statutes for the purposes of computing the toll to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Avenue or at the former westerly limit of the Village of Hintonburgh now the City of Ottawa.

3. Has the Board the right to treat the company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by municipal agreements?

These questions arise out of certain facts which the Board stated in their order granting leave.

The Board has found as a fact that the operation of the Britannia line, considered by itself, is not remunerative, but that the operation of the lines of the railway

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as a whole, including those within the City of Ottawa, are returning to the company adequate profits. The Board has found also that within the city limits on the street railway proper it could not reduce nor increase the rates because they have been the subject of an agreement with the city which has been approved and confirmed by Parliament (1894, ch. 86, s. 2) and that the Board's jurisdiction is bound by this special Act.

Though the Railway Commissioners thought they could not change, alter or reduce the city rates, they decided, however, that the profits made by the company under its contract should be utilized to cover the deficit incurred in the operation of the Britannia extension and they ordered the company to operate at a loss its suburban line. This decision does not seem to me satisfactory. If the contract with the city has the effect asserted by the Board it is then binding to all intents and purposes and this part of the system should have been left alone and the profits or losses made in connection with it should not have been considered in the determination of the rates to be paid on some other part of the system. In other words the company's operations should not have been treated as a whole.

When the company was incorporated in 1866 by the legislature of the Province of Canada (ch. 106) it was declared by sec. 8 that the directors would have the power to make by-laws touching

the fares to be received for passengers and freight transported over the railway or any part thereof.

We find also another provision in this statute of 1866 giving the right to the company to lay their tracks on certain streets.

These two provisions give more extensive powers than those which would be granted to-day, for Parliament would not give the power to a railway company to lay tracks on a particular street without the consent of the municipality, and as far as the rates are concerned Parliament would not to-day give a railway company the right to fix its rates without the control of the Railway Board. But in 1866 the street railways were new ventures which were treated most liberally by our legislators.

The appellant company had then the power under its charter to fix its rates without being bound to submit them to the Government and it could lay its tracks upon certain streets within the City of Ottawa.

The line of railway being a provincial line fell after Confederation under the legislative control of the Province of Ontario. But in 1892 the company being desirous to connect its railway with a line situate in another province, its undertaking was declared by the Federal Parliament under the provisions of s.s. 10 of s. 92 of the British North America Act to be a work for the general advantage of Canada (1892, ch. 53).

In 1893 the Railway Company made a contract with the City of Ottawa in which it was stipulated that it could run its cars upon some other streets than those mentioned in the Act of Incorporation of 1866 and the railway company agreed by clause 46 that

no higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said lines and branches thereof within the present city limits. \* \* \*

and that it could amalgamate with an electric street railway company then in existence under its present name.

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This contract was ratified and confirmed by the Canadian Parliament in 1894 and by the Special Act then passed it was declared that

the franchises, powers and privileges heretofore or hereby granted to or conferred upon the \* \* \* company shall be exercised and enjoyed.

under its new company name (1894, s. 3. ch. 86) and by sec. 11 of the Act it was also declared that

nothing in this Act shall in any respect impair any of the powers which the said \* \* \* company shall have immediately prior to the date appointed for this Act to take effect.

This Act came into effect on the first of June, 1894.

What is the effect of this legislation of 1894?

First, it ratifies and confirms the agreement with the City of Ottawa by which a flat rate not exceeding five cents should be charged for the conveyance of a passenger in the day-time. It becomes a binding contract for the city, for the company and also for the public by which this fare of five cents would be considered a reasonable rate. This provision forms part of the special Act of the Railway Company.

At the same time Parliament in declaring that the powers possessed by the railway company would not be impaired, but on the contrary these powers would continue to be exercised and enjoyed by the company, confirms and ratifies the power that the company possessed by its Act of Incorporation of 1866 to fix its rates subject, of course, to the new rates fixed in its agreement with the city.

It seems to me that as a result of this legislation of 1894, the company was the only authority that could deal with the rates within the city of Ottawa provided it should not charge more than five cents.

The general provisions of the Railway Act giving the Board the power to deal with the rates would certainly not affect the lines of the appellant company within the city limits since sec. 3 of ch. 37 of the R.S.C. declares that the Railway Act should be construed as incorporated with the special Act and where the provisions of the Railway Act and of the special Act relate to the same subject matter, the provisions of the special Act will override those of the general Act.

The Parliament of Canada having by the special Act of the appellant company dealt specifically with the tolls within the City of Ottawa, the subject matter of these tolls could not be considered by the Board of Railway Commissioners, whether they are profitable or not.

In 1899 the Parliament of Canada authorized the appellant company to build a suburban line outside of the city limits on private rights of way as an extension of its street railway. It was provided by this new Act that certain sections of the Railway Act were applicable

and such of the other sections as are applicable, shall apply to the company with respect to the said extension.

It may be claimed that under the provisions of the Act of 1894 the tolls to be charged on the suburban or extension line shall be under the control of the Railway Company itself but the question of jurisdiction of the Board in that regard has not been raised, and both parties agree that the Board has jurisdiction to fix the rates on the suburban railway. But it is claimed on the part of the appellant that these rates on the extension line should be determined without regard to the profits or losses made on the city lines

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because the latter are not under the control of the Board.

I fully concur with this view of the appellant. The special Act of 1894 fixed the rates for the city limits and these rates cannot be disturbed by the Board since they form part of an Act which overrides the general powers of the Board under the Railway Act. The Board having come to the conclusion that the rate on the Britannia line was not remunerative it was its duty to grant to the appellant company a remunerative rate on this part of the line and it should not have taken into consideration the profits made on some other part of the line which did not come under its jurisdiction.

The first question which is submitted to us involves questions of fact, which, of course, have to be dealt with exclusively by the Board. We have no authority to decide whether the rates asked for by the company are fair and just. So far, however, as this question No. 1 involves a question of law, it is covered by the answer I give below to the first part of the third question.

We are asked by the second question submitted to us to state whether the tolls to be charged on the extension line should be computed from Holland Avenue where the extension begins.

If the extension line was built on the streets with the consent of the city, special tolls could be charged only from the city limits, but the extension line is not built on the streets but on a private right of way. Then I would declare in answer to the second question that the point of commencement of the extension line should be considered for toll purposes to be at Holland Avenue.

I would answer in the negative the first part of the third question and in the affirmative the second part of it. As a result of these answers the appellant's contentions are generally sustained.

The appeal should be allowed with costs.

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MIGNAULT J.—This is an appeal by leave on three questions of law from the decision of the Board of Railway Commissioners for Canada disallowing a tariff of tolls filed by the appellant. The only point involved is as to the extension of the appellant's line from Holland Avenue in the former Village of Hintonburgh, now a part of the City of Ottawa, to Britannia-on-the-Bay in the Township of Nepean, but to answer the questions submitted it is necessary to consider the statutes and contracts under which the appellant carries on its operations.

All the facts found by the Board are stated in the order granting leave to appeal, as well as in the opinions given by the learned Chief Commissioner, and it will be sufficient to give briefly my reasons for the answers which I make to the questions submitted.

The appellant now stands in the place of two Ottawa street railway companies, the Ottawa City Passenger Railway Company, incorporated in 1866, by an Act of the Province of Canada (29 & 30 Vict., ch. 106), and the Ottawa Electric Street Railway Company, incorporated in 1891 by letters patent of the Province of Ontario. These two companies amalgamated in 1894, forming what was termed the united company under the name of the Ottawa Electric Railway Company. Previously to the amalgamation, in 1892, an Act was passed by the Dominion Parliament (55 & 56 Vict., c. 53) declaring the undertaking of the Ottawa

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City Passenger Company to be a work for the general advantage of Canada, conserving its charter powers and authorizing it to extend its lines to the City of Hull, in the Province of Quebec. After the amalgamation an Act was passed by the Dominion Parliament, in 1894 (57 & 58 Victoria, ch. 86), ratifying the amalgamation, and confirming the contract entered into between the City of Ottawa and the Ottawa City Passenger Railway Company and the Ottawa Electric Street Railway Company and the appellant was declared a body corporate subject to the legislative authority of the Parliament of Canada. It is under this contract and this statute that the appellant carries on its operations in so far as the City of Ottawa, as it then was, is concerned.

It may be added that, in 1895, the appellant entered into a contract with the then village of Hintonburgh, adjoining Ottawa on the west, for the extension of its lines, under which the appellant extended its railway as far as Holland Avenue in the said village. This contract has now expired.

In 1899, by the Dominion statute, 62 & 63 Vict., ch. 82, sec. 1, it was enacted that the appellant

may, as an extension of its present railway, construct and operate by means of electricity or other motive power, except steam, a double or single track, iron or steel railway, with the necessary side tracks, switches and turn-outs for the passage of cars, carriages and other vehicles adapted to the same, from some point on its present railway in the municipalities of Hintonburgh or Nepean in the County of Carleton, to some point at or near Bells Corners in the Township of Nepean.

The railway referred to in this enactment as the *present* railway of the appellant did not extend further west than Holland Avenue in the Village of Hintonburgh and the extension from that point to Britannia-on-the-Bay, which I understand is to the east of Bells

Corners, was constructed, not on a street or road, but on a private right of way acquired by the appellant.

The statute of 1899 declared that sections 90 to 172, both inclusive, of the Railway Act (then that of 1888) and such of the other sections of the said Act as are applicable shall apply to the appellant with respect to the said extension.

The appeal having been argued on November 17, 1919, this court, on December 22, 1919, ordered a re-argument on the following questions:

(1) Has the Board of Railway Commissioners authority to reduce the Company's charge for passenger services within the City of Ottawa below the fare of 5 cents now charged for any such service?

(2) If the first question is answered in the negative, has the Board power to require the Company to provide a service partly within and partly beyond the limits of the City of Ottawa for a charge not exceeding 5 cents?

(3) In passing upon the questions raised upon this appeal, is the Court in any respect governed by section 325 of the Railway Act of 1919?

The re-argument took place on February 3 and 4, 1920, and was of a very exhaustive character.

The principal question discussed was as to the effect of clause 46 of the contract with the city of Ottawa which reads as follows:

No higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said line and branches thereof within the present city limits, and for children under ten years of age no higher fare than three cents shall be charged, except between the hours of twelve o'clock midnight and five-thirty a.m..

The question was also discussed whether the Board of Railway Commissioners could reduce the maximum rate of five cents for passengers provided for the city of Ottawa.

It is argued that clause 46 is purely negative, that it in no way determines any toll or fare which the company may charge, that its objects was not to

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empower the company to exact tolls, the power to do so being conferred on the directors by the statute of 1866, but merely to restrict the exercise of this power, so that in any event the company could not demand more in the day time than five cents per adult passenger, and that in so far as the fixing of tolls and the control of the Board is concerned, the whole matter was left where it was before the contract, so that the directors can by by-law regulate the tolls to be charged, subject to the control of the Board, these tolls however not to exceed the maximum stipulated in clause 46 of the contract.

I cannot so construe the contract. It is true that clause 46 is negative in form, such negative form being usual in agreements of this kind, and it is also true that the directors derive their power to regulate tolls from the charter the company obtained from the legislature. But the whole object, or at least the main object, of the contract was to oblige the company to operate a street railway in the City of Ottawa, the city receiving from the company an annual payment based on the mileage of the latter's lines, and for this service the company was to be remunerated by tolls charged for the carriage of passengers. So the fixing of a maximum fare by the contract necessarily implies that the company may charge any fare, provided it does not exceed the maximum, and within these limits, and during the life of the contract, the city cannot contend that the fare charged is not just and reasonable. This contract was ratified and confirmed by Parliament, the latter thus recognizing that the fixing of fares has been treated as a matter of agreement between the city and the company, and unquestionably the contract binds both the city as

representing the public interested in the railway service and the company for the term of its duration, with the consequence that the power of interference of the Railway Board—which can be exercised only on the ground that the tolls charged are unfair and unreasonable—is excluded by the recognition by the city and by Parliament that up to the maximum stipulated by clauses 46 and following of the contract, any tolls charged by the company while the contract is in force are fair and reasonable.

I am therefore of opinion that, properly construed, clause 46 of the contract authorizes the appellant to charge five cents per passenger during the hours mentioned, or any lower rate; and also, inasmuch as the contract was ratified and confirmed by Parliament and the ratification and confirmation was accompanied by the declaration (sec. 3) that the franchises, powers and privileges conferred on the original companies should be exercised and enjoyed by the appellant, subject to the terms, provisos and conditions contained in the agreement with Ottawa, my opinion is that the Board of Railway Commissioners cannot for the services contemplated in this agreement, reduce, no more than it can increase, the maximum rate provided by the contract. In coming to this conclusion, I also rely on section 3 of the Railway Act (R.S.C., 1906, ch. 37) the statute of 1894 being a special Act overriding the provisions of the Railway Act in so far as is necessary to give effect to such special Act.

This disposes of question 1, submitted by the court for re-argument, which question should be answered in the negative. I may add that this is also the opinion expressed by the learned Chief Commissioner.

Mr. Dennison argued however that the statute of

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1894 is a private Act, which cannot prevail over a public Act like the Railway Act. This argument is answered by section 13 of the Interpretation Act (R.S.C. 1906, ch. 1) as well as by section 3 of the Railway Act, for surely the statute of 1894 is a special Act within the meaning of that section.

Question 1 being answered in the negative, question 2 requires a reply, and I am of opinion that this reply must also be in the negative. In so far as service outside Ottawa is concerned, it cannot be considered as covered by the charge made for the City of Ottawa under the contract and statute of 1894. By the City of Ottawa I mean the territory described in the contract.

Question 3, in so far as this appeal is concerned, should be answered in the negative. This section was enacted subsequently to the order of the Board, but the power it confers on the Board, should the question now come before it, possibly renders the discussion of this appeal of somewhat an academic interest. I may add that I do not wish to be understood as placing a construction on section 325 of the Railway Act of 1919.

I now come to the questions submitted by the Board which are the subject of this appeal. And here I must note the following findings of fact of the Board in paragraphs (r) and (s) of the order allowing the appeal:

(r) The Board has found, as a fact, that the operation of the Britannia extension considered by itself is not remunerative, and that if the operation of this line can be so considered it is clear that the company is entitled to an increased remuneration for the service it performs thereon.

(s) The Board has also found that the operation of the lines of this railway as a whole including those within the City of Ottawa have returned or are returning to the company adequate profits. The

company contends that inasmuch as the receipts from the lines within the City of Ottawa are the result of the operations of the company under a schedule of rates limited by the agreement with the city and confirmed by the Act of Parliament such favourable result is not a valid reason under the Railway Act for disallowing a tariff which will give the company power to collect additional fares upon the Britannia extension.

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I may add that the contracts with Ottawa and Hintonburg in nowise apply to the Britannia extension, which is governed by the statute of 1899. The respondents, however, contend that the contract with Hintonburg applied to the extension from Holland Avenue up to the Western limits of the former village, a distance of some 1900 feet. I think this contention cannot be sustained, because the contract with Hintonburg refers to a railway to be built on the streets of the village, and this extension was built, not on any street, but on the private right of way of the appellant from Holland Avenue to the West, and because the statute of 1899, which governs the extension, gives authority to the appellant to construct the said extension, from some point on the then present railway of the appellant in the village of Hintonburg and the most westerly point of the said railway was at Holland Avenue. The extension was constructed under the authority given by this statute.

I cannot doubt, moreover, in special reference to paragraph (r) of the order granting leave to appeal, that the Board can consider by itself the operation of the Britannia extension from Holland Avenue to Britannia-on-the-Bay.



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The answers I would give to the questions submitted, are contained in the formal judgment of the court, and in my opinion the appeal should be allowed with costs.

*Appeal allowed with costs.*

Solicitor for the appellants: *F. H. Chrysler.*

Solicitor for the respondent Township of Nepean:  
*Wentworth Greene.*

Solicitor for the respondent Village of Westboro:  
*F. H. Honeywell.*

Solicitor for the respondent City of Ottawa:  
*F. B. Proctor.*

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