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* May 3, 4.
* June 1.

IN THE MATTER OF A REFERENCE AS TO THE APPORTIONMENT OF THE COSTS OF A HIGHWAY CROSSING DIRECTED TO BE CONSTRUCTED OVER THE CANADIAN PACIFIC RAILWAY COMPANY AT ANGLIERS, PROVINCE OF QUEBEC, BY THE MUNICIPAL COUNCIL OF ST. EUGÈNE DE GUIGUES.

Railways—Highway—Level crossing—Quebec Orders in Council—Crown grants—Provincial Acts—Reservation for highways—Costs of construction and maintenance—Practice of the Board of Railway Commissioners for Canada—Seniority—Re-hearing—Railway Act, sections 43, 51, 189, 256, 259.

On the application of the municipality of St. Eugène de Guigues, province of Quebec, for a level crossing over the Canadian Pacific Railway Company's tracks at Angliers, the Board of Railway Commissioners for Canada by a first judgment (43 Can. Ry. Cas. 84) held that, under the Quebec Order in Council of October 30, 1794, the Municipal Code and certain provincial Acts, the municipality was senior at the point of crossing and placed the cost of construction and maintenance on the railway company. The latter then applied under section 51 of the *Railway Act* for a re-hearing of the application and on the re-hearing, which was first refused and subsequently granted, both parties submitted additional evidence, and the case was re-argued. On April 8, 1936, the Board of Railay Commissioners for Canada rendered its decision, (45 Can. Ry. Cas. 208); but the Chief Commissioner, the Assistant Chief Commissioner and the Deputy Chief Commissioner (the latter differing from the Chief Commissioner in his view of the facts and of the law) were all of the opinion that a case should be stated in writing for the opinion of the Supreme Court of Canada on the following questions: 1. Whether the Chief

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

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Commissioner was right in holding that the Orders in Council of 1794 do not constitute a valid reservation for highways as against subsequent grantees of the Crown. 2. Whether the Chief Commissioner was right in holding that the grant from the Crown to the railway company in 1933 is sufficient in itself to rebut any presumption in favour of such a reservation which might otherwise arise either from the terms of the Orders in Council or by reason of the practice which has been followed for many years in the survey of Crown lands in the province of Quebec. 3. Whether the Chief Commissioner was right in holding that the railway company occupies a position of seniority in respect of the railway crossing, the subject of this application. 4. Had the Board jurisdiction under section 51 of the *Railway Act* to grant a re-hearing of the application?

Held that, as to the first and second questions the title of the railway company to the lands in question was not subject to any reservation in respect of highways; and as to the fourth question, that the Board of Railway Commissioners for Canada had jurisdiction under section 51 of the *Railway Act* to give a direction for, and to proceed with, the re-hearing of the municipality's application.

As to the third question, no answer was given to it, as, in the opinion of the Court, it was no part of its functions to define the practice of the Board in respect of the apportionment of cost of works upon an application to construct a railway crossing on a highway or a highway crossing on a railway.

REFERENCE by the Board of Railway Commissioners for Canada (1) to the Supreme Court of Canada of certain questions of law contained in a stated case in writing for the opinion of that Court, pursuant to the provisions of section 43 of the *Railway Act*.

The facts as set out in the stated case are summarized as follows: By grant from the Crown in the right of the province of Quebec of June 12, 1933, the Interprovincial and James Bay Railway Company (the railway now forming part of the Canadian Pacific Railway) became "the absolute owner" of a railway right of way through the lands of the Crown in certain townships, including the lands at the point of crossing here in question. The operative words of the instrument transfer and convey full ownership to the railway company subject to express reservations of minerals and of the right to retake any part of the lands situate on the shores of lakes and rivers. Two Orders in Council made in 1794, during Lord Dorchester's administration, were put in evidence. The first, dated 10th October, 1794, approves a diagram for a river township nine miles broad by twelve miles deep, to be adopted in the laying out of the ungranted lands of the

(1) (1936) 45 Can. Ry. Cas. 208.

Crown; and it directs that the Surveyor General make a diagram on the same principle for an inland township of ten miles square. The Order in Council refers in terms to the reserves for the Crown and church, and these reserves are shewn in red and black on the diagram, but there is no reference to road allowances. The second Order in Council, dated 30th October, 1794, adopts a similar diagram for an inland township, and quotes the report of the Land Committee to His Excellency that "it has been necessary in order to make each lot contain two hundred and ten acres (the allowance of five for every hundred acres for highways included) to make the township contain ten miles, five chains in length and ten miles, three chains and fifty-five links in breadth." The Township of Baby, in which the crossing in question is situate, is a river township. It was shown to be the practice of the Department of Lands, in making grants to settlers, to include in the grant 105 acres of land for each 100 acres bought and paid for by the settler subject to a reservation, commonly but not uniformly contained in the grants, for highways. In the forms of Crown grant the words "and the usual allowance for highways" form part of the description of the land granted, and are not inserted by way of reservation. The application for the crossing was originally made by letter from the municipality to the Board, which issued its order authorizing the crossing, and directed that the question of the apportionment of the cost should be reserved for further consideration. A judgment was subsequently delivered by the Deputy Chief Commissioner, concurred in by Commissioner Norris, and in part concurred in by the Assistant Chief Commissioner, directing that the crossing should be provided at the expense of the railway company, and a formal order was issued accordingly (1). The railway company thereupon applied for a re-hearing which was first refused but subsequently granted. The case was then set down for further hearing, additional evidence was put in by both parties and the case was re-argued before the Chief Commissioner, the Assistant Chief Commissioner and the Deputy Chief Commissioner. Subsequently a judgment was delivered by the Chief Commissioner in which he reached conclusions completely at variance with those reached by the Deputy Chief Commissioner, but expressing

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the opinion that a case should be stated for the opinion of this Court. In his opinion the Assistant Chief Commissioner and the Deputy Chief Commissioner (the latter differing from the Chief Commissioner in his view of the facts and the law) concurred (2).

G. A. Walker K.C. for the Canadian Pacific Railway Company.

R. Cannon K.C. for the municipality of St. Eugène de Guigues.

The judgment of the court was delivered by

DUFF C.J.—This appeal concerns three questions stated for the opinion of this Court by the Board of Railway Commissioners. The nature of the proceedings giving rise to the stated case appears in the first three paragraphs of that case, which are these:

1. On October 13, 1933, the municipality of St. Eugène de Guigues applied for a crossing over the Canadian Pacific Railway Company's tracks at Angliers, which is situate within the township of Baby.

2. On March 5, 1934, the Board authorized the construction of this crossing, and by its order no. 50814 reserved its decision in regard to the apportionment of the cost of construction and maintenance. Subsequently, by order no. 51463, of October 25, 1934, the cost of construction and maintenance was ordered to be borne and paid by the Canadian Pacific Railway Company.

3. On December 17, 1934, the Canadian Pacific Railway Company applied under section 51 of the *Railway Act* for a re-hearing of the application, and on the re-hearing, which was first refused and subsequently granted, both parties submitted additional evidence, and the case was re-argued by all parties interested.

The Board of Railway Commissioners has authority under section 259 to apportion the cost of works constructed pursuant to the authority of the Board given upon an application under section 256 for leave to construct a railway crossing on a highway or to construct a highway crossing on a railway. The authority under section 259 is a statutory authority the exercise of which is entrusted to the Board. It seems very clear that this Court has no power, by laying down a rule, nor has the Board itself power, by establishing a practice, to limit the discretion with which the Board is invested by that section (*Attorney-General* v. *Emerson*) (1).

It appears that in fact, when such applications are made to the Board, the determining circumstance, under the

(1) (1935) 44 Can. Ry. Cas. 84. (2) (1936) 45 Can. Ry. Cas. 208.
(1) (1889) 24 Q.B.D. 56.

practice of the Board, in respect of the apportionment of cost, is what is described as "seniority"; by which is meant, apparently, that when the railway is constructed on land over which the public have a right of passage by virtue of statute, dedication or otherwise, the incidence of the cost of the works necessary to provide a highway crossing over the railway, upon the site over which there existed these rights of passage, falls upon the railway company; while, if, when the railway was constructed, there were no such rights of passage, the cost of the works is borne by the municipality or other public authority applying for the order.

I do not profess to be stating with accuracy or completeness the practice of the Board; and, indeed, one of the questions submitted to us would seem to indicate that the practice is not so definitely settled as to enable one, with confidence, to sum it up in a precise rule.

It is, perhaps, unnecessary to say that it is no part of the functions of this Court to define that practice. Accordingly, we shall not attempt to do so, and no answer will be given to the third question.

While it is beyond our province authoritatively to define, or even to describe, the practice, still more to enunciate any rule supposed to be evidenced by the practice, yet there is one question upon which we think we may give our opinion with some advantage, and we proceed to do so.

We have come to the conclusion that the title acquired by the railway company under the grant by the province of Quebec designated in the stated case is not subject to any reservation of any highway or any right on the part of the Crown, or any other public authority, to construct a highway in or upon the lands which are the subject of the grant. We are also of the opinion that there is no right reserved to take lands without compensation from the area granted for the construction of highways.

The first two questions submitted are in these words:

1. Whether the Chief Commissioner was right in holding that the Orders in Council of 1794 do not constitute a valid reservation for highways as against subsequent grantees of the Crown.

2. Whether the Chief Commissioner was right in holding that the grant from the Crown to the railway company in 1933 is sufficient in itself to rebut any presumption in favour of such a reservation which might otherwise arise either from the terms of the Orders in Council or by

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reason of the practice which has been followed for many years in the survey of Crown lands in the province of Quebec.

The meaning of "reservation for highways" is not free from doubt, but we think that what we have just said constitutes an answer to these questions in substance.

We do not consider it necessary to determine the effect of the Orders in Council of 1794, upon which the appellant municipality relies; that is to say, we do not think it necessary to determine what effect these Orders in Council had at the time they were passed. Assuming they were legislative in character, and assuming they imposed a legal duty upon the officers of the Crown to include in each patent of Crown lands, of the character contemplated by the Orders in Council, a reservation for the benefit of the public of the right to take land for constructing highways in the premises granted up to the limit of the percentage mentioned, we are still unable to agree that these Orders in Council affect the rights of the railway company arising from the grant now under consideration.

The authority of the legislature of the province of Quebec in respect of the disposition of the Crown lands of that province is indisputable. In *St. Catherine Milling Co.* v. *The Queen* (1) Lord Watson said:

> By an Imperial statute passed in the year 1840 (3 and 4 Vict., c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the province of Canada, and it was, *inter alia*, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united provinces should be paid into the consolidated fund of the new province. There was no transfer to the province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown.

His Lordship then discusses the terms of sections 108 and 109 of the *British North America Act* and proceeds (pp. 57, 58):

> The enactments of section 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion

(1) (1888) 14 App. Cas. 46, at 55.

acquired right to under section 108, or might assume for the purposes specified in section 117.

Before turning to the legislation of Quebec affecting the disposal of Crown lands, it is convenient to quote some of the recitals of the grant now in question as well as the operative words:

Whereas, under production of new plans supplied by said railway company, it was shown that the lands used by said railway company were not all included in the above Orders in Council;

Whereas said railway company required an absolute deed of ownership on and upon the Crown lands actually occupied by its railway line, in accordance with the plans supplied by said railway company respectively the twentieth day of May, the third day of April, the thirtieth day of April, the twenty-sixth day of June, the ninth day of July and the first day of August, nineteen hundred and thirty, and signed by F. Taylor, Quebec professional engineer, and Malcolm D. Barclay, Quebec land surveyer.

Whereas the railway company further required an absolute title of ownership on the additional lands that will be necessary for the carrying out of its said railway line, as figuring on the above-mentioned plans;

Whereas under the above-mentioned Order in Council no. 599, the Minister has been authorized to sign and execute in favour of said railway company, a deed of transfer and conveyance of the rights of property on and upon all said lands.

Now, therefore, it has been agreed and covenanted as follows, by and between the parties hereto:—

For the above purposes, the Minister does hereby by these presents, transfer and convey in full ownership, subject to the reservation clause hereinafter mentioned, unto the railway company, hereto present and accepting, for itself, its successors and assigns the following parcels of land, to wit:—

Then follows a description of the lands granted.

It sufficiently appears from this, and, indeed, it is not disputed that, at the date of the grant, the land affected by it was in possession of the railway company, that their railway had been constructed upon it, and that they were occupying it as their right of way. Under section 189 of the *Railway Act,* by consent of the Governor in Council, a Dominion railway company may take possession of Crown lands for the purposes of its right of way. That section prohibits the company taking possession of, using or occupying any lands vested in the Crown without such consent; and it must be assumed that consent was obtained. It has now been settled by a decision of this Court (*Reference re s. 189, Railway Act*) (1), affirmed by the Judicial Committee of the Privy Council on appeal (2), that this section embraces the Crown lands of a province. It follows that

(1) [1926] S.C.R. 163. (2) [1926] A.C. 715.

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the railway company was lawfully in occupation of these lands as part of the site of its railway at the date of the grant, and the grant must be construed, therefore, in relation to that circumstance.

Turning now to the pertinent provisions of the Quebec statutes. Section 24 of chapter 44 (R.S.Q. 1925) is thus expressed:

> 24. With the exception of lands subject to the *Mining Act* (chap. 80) the Lieutenant-Governor in Council may, when he deems it expedient, fix the price per acre of public lands, and the terms and conditions of sale and of settlement and payment.

It was not seriously disputed at bar, and we have no doubt upon the point that, by this section, combined with the provisions of chapter 43, the Lieutenant-Governor in Council is empowered to authorize the Minister of Crown lands for the province to convey to a Dominion railway company lands required by that company for use as its right of way upon such terms and conditions as may be decided upon by the Lieutenant-Governor in Council. We do not doubt that, in virtue of this power, the Lieutenant-Governor in Council may convey lands in absolute ownership without any reservation of any description in respect of highways.

Coming to the grant itself. The grant in our opinion sufficiently evidences an intention that the title of the railway company shall be affected by no reservation in respect of highways.

The answer to the first and second questions is:

The title of the railway company to the lands in question is not subject to any reservation in respect of highways.

As to the fourth question. It appears from the stated case that in fact a re-hearing was directed. We have no doubt of the jurisdiction of the Board under section 51 to give such a direction and to proceed with the re-hearing.

The fourth question is answered in the affirmative.

There will be no order as to costs.