

<p style="text-align: center;">_____</p> <p>THE TORONTO TRANSPORTATION }          COMMISSION ..... }</p>	}	APPELLANT;
AND		
<p>CANADIAN NATIONAL RAILWAYS, }          THE CANADIAN PACIFIC RAIL- }          WAY COMPANY AND THE COR- }          PORATION OF THE CITY OF }          TORONTO ..... }</p>	}	RESPONDENTS.

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\*May 29, 30.  
 \*Sept. 26.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS  
 FOR CANADA

*Railways—Order of Board of Railway Commissioners for Canada against corporation operating street railway system for contribution to cost of subways constructed under steam railway tracks—Railway Act, R.S.C., 1927, c. 170, ss. 39, 257, 259, 44 (3)—Jurisdiction of Board under the Act—Appeal from Board's order for contribution—Whether appellant "interested or affected by" the order for construction of the subways—Jurisdiction of Parliament of Canada to enact legislation in question.*

The Toronto Transportation Commission, which operates the street railways in Toronto, appealed from the order of the Board of Railway Commissioners for Canada requiring it to contribute to the cost of two subways on Bloor Street and one on Royce Avenue, which were constructed under certain steam railway crossings by order of the Board under its powers under s. 257 of the *Dominion Railway Act*. The appellant, whose Bloor Street lines had not previously crossed

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\*PRESENT:—Anglin C.J.C. and Mignault. Newcombe, Lamont and Smith JJ.

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the railway tracks, but had led towards them on each side thereof, constructed its tracks through the Bloor Street subways, thus establishing a continuous line along Bloor Street, and now operates cars thereon. It does not operate through the Royce Avenue subway, nor are there any tracks on that street.

*Held*, as to the Bloor Street subways, that the appellant was "interested or affected by" (*Railway Act*, s. 39) the order directing the work, and the Board had jurisdiction under said Act to order it to contribute to its cost. (As to appellant's contention that in operating the street railways it was a mere agent of the city corporation and could not be required to contribute, it was held that, whatever might be its rights and remedies against the city, the appellant, as an operating corporation in control of the street railways, and entrusted with their full management, could be treated by the Board as a company or person to which s. 39 of said Act applied, subject, of course, to its interest being shewn).

*Held*, as to the Royce Avenue subway, that the appellant was not "interested or affected by" the order directing the work, and the Board had not jurisdiction under said Act to order it to contribute. This was so, notwithstanding that the construction of the subway involved a certain diversion of Dundas Street, which street had been, and is now in its diverted course, used by appellant. (*Per* Mignault and Lamont JJ.: Not being interested in the subway, appellant could not be said to have an interest in the diversion. Moreover, the contribution exacted from appellant took no account of the cost of the diversion as distinguished from the cost of the subway, the contribution being to the whole expenditure. *Per* Newcombe J.: There was no finding that appellant derives a benefit from the method provided for the approach or discharge of traffic from and to the subway as between Dundas Street and Royce Avenue; and there was no reason to believe that the Board intended to impose part of the subway cost as compensation for advantages said to accrue by reason of the diversion of Dundas Street. If, on the contrary, as the case seemed to suggest, the Board was anticipating value which might be realized when, if ever, a branch of the tramway is constructed through the subway, the Board would not have jurisdiction to order payment under s. 39 of the *Railway Act*; it cannot be said that a person is interested merely because in the future he may become so). Anglin C.J.C. and Smith J. dissented on this question, holding that, in connection with the construction of the subway, the diversion of the *situs* of appellant's tracks on Dundas Street involved such a division and diversion of traffic as probably to effect an improvement for the street railway over conditions theretofore existing; and it was impossible to hold that it had been shewn that appellant had not a present interest, different in kind from that of the ordinary residents in, or users of, the city streets, in the changes effected by the Board's order for construction of the subway, still less that it was wholly unaffected by that order; as to whether such interest or affection was too slender to justify the order for contribution, that was a question of degree, involving the sufficiency in extent of the interest or affection, as to which the discretion exercised by the Board could not be interfered with.

The *Railway Act*, R.S.C. 1927, c. 170, ss. 39, 257, 259, 44 (3), 33 (5), considered. *Toronto Ry. Co. v. Toronto*, [1920] A.C. 426, cited.

*Held*, also, that the Parliament of Canada had jurisdiction to confer upon the Board the authority held to be given by the provisions of the Act to compel contribution, under the circumstances of the case, from the appellant, a provincial corporation. *Toronto v. Can. Pac. Ry. Co.*, [1908] A.C. 54; *Toronto Ry. Co. v. Toronto*, 53 Can. S.C.R. 222.

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APPEAL by the Toronto Transportation Commission (by leave of a judge of this Court, and upon a settled statement of facts) from an order of the Board of Railway Commissioners for Canada directing that the appellant contribute a certain portion of the cost of certain subways, constructed by order of the Board, in the city of Toronto.

The appellant is a corporation established under c. 144 of the Statutes of Ontario of the year 1920, and is the administrative body charged with the operation of the street railways in the city of Toronto, all of which belong to the City. There were three subways in question, two on Bloor street (between Lansdowne avenue and Dundas street), and one on Royce avenue. One of the Bloor street subways is under the tracks of the Galt subdivision of the Canadian Pacific, the Brampton subdivision of the Canadian National, and the Toronto, Grey & Bruce subdivision of the Canadian Pacific (which cross Bloor street side by side). The other Bloor street subway is under the tracks of the Newmarket subdivision of the Canadian National. The subway on Royce avenue is under the tracks of the said Galt, Brampton, and Toronto, Grey and Bruce subdivisions.

The description and location of the streets and railway lines in question and the situation with regard to them prior to the scheme for construction of the subways in question sufficiently appear in the judgments now reported. The settled statement of facts contained, *inter alia*, statements, in effect, as follows:

On November 21, 1922, the City of Toronto applied to the Board of Railway Commissioners for Canada for an order requiring the Canadian National to collaborate with the City in the preparation of a joint plan for the separation of grades at Bloor street and Royce avenue as well as at a number of other streets in the northwestern section of the city.

A hearing of the said application was held by the Board in Toronto on February 14, 1923. As a result of the hear-

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ing the parties agreed to study the matter and submit a report to the Board.

At a hearing by the Board held in Toronto on January 8, 1924, plans were submitted by the City and the Railways and discussed. Various organizations and ratepayers' associations in the city of Toronto which were affected were represented at the hearing, and it was urged by them as well as the City of Toronto that one of the reasons requiring protection by grade separation at these crossings was to enable the Transportation Commission to extend its lines of street railway across the tracks so as to give the residents of the northwestern section of the city a better and more continuous street car service. It was also stated that the Transportation Commission would possibly in the future extend its lines of street railway across the tracks of the steam railways at Royce avenue. The hearing was adjourned for the purpose of allowing further study of the plans submitted.

A further hearing of the Board was held in Toronto on February 19, 1924, notice of which was sent by direction of the Board to the Transportation Commission, which had not previously appeared, and the bodies operating other public utilities interested in or affected by the plans submitted. The Transportation Commission appeared at this and subsequent hearings, reserving its rights, and took part in the final argument, as to the distribution of cost, at the same time stating that it was immaterial to it whether the subways in question were constructed or not. At these hearings exhaustive enquiry and discussion took place covering the various general schemes submitted, including the proposed methods of dealing with the crossings at Bloor street and the proposal of the Canadian Pacific to divert Dundas street as part of the Royce avenue grade separation. It was shown that Dundas street was a heavily travelled main artery with a double track street railway, extending along and immediately adjacent to the westerly limit of the steam railway right of way from a point some distance south of Royce avenue to a point just north of that crossing. The Canadian Pacific proposal, which provided for the diversion of Dundas street, including the street railway tracks, at its then level with easy approaches to the subway in both directions on the original location

of the street, was supported by the evidence of an independent experienced engineer, called on behalf of a body of citizens of West Toronto, and was adopted by the Board. The diversion runs from the corner of Humberside avenue and Dundas street on a tangent through to Dundas street at the corner of Indian road, thus avoiding the dangerous condition of heavy traffic coming upon a busy street with street car tracks which would have resulted from the construction of the subway at Royce avenue, if Dundas street and the street railway tracks had not been diverted.

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As a result of these hearings the Board, acting under its powers for the protection, safety and convenience of the public, issued its order no. 35037, dated May 9, 1924, approving the general plans submitted by the Canadian Pacific for grade separation in the northwestern section of the city including subways under the tracks of the Canadian Pacific Galt and Toronto, Grey & Bruce Subdivisions and the Canadian National Brampton Subdivision at Bloor street and Royce avenue and under the tracks of the Canadian National Newmarket Subdivision at Bloor street.

On May 21, 1924, a further hearing of the Board was held in Toronto to discuss the details of the works from an engineering standpoint, to give directions as to the portions to be undertaken forthwith and to hear arguments on the question of distribution of the cost of the subways ordered to be constructed. Following this hearing the Board issued its order no. 35153, dated June 5, 1924 (amended by order no. 35308, issued July 10, 1924), which directed that work on the subways be undertaken and provided *inter alia* as follows:

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

On July 15, 1925, the Transportation Commission applied to the Board for an order under s. 252 of the *Railway Act*, granting it leave to construct for the Corporation of the City of Toronto, a double track line of street railway, between Dundas street and Lansdowne avenue along Bloor street.

By order no. 36693, dated August 13, 1925, the Board granted the said application and reserved for further consideration the question of contribution to the cost of said subways by the applicant.

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Under the authority so granted to it, the Transportation Commission did, during the course of construction of the subways, construct a double line of street railway tracks along Bloor street from Lansdowne avenue to Dundas street and through the subways constructed pursuant to the Board's order and the Transportation Commission now operates street cars through the said subways.\*

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

Orders of the Board were issued authorizing the Canadian Pacific and the Canadian National to use and operate the subways carrying their tracks over the streets as aforesaid.

On November 15, 1926, the Board issued its formal order no. 38424, distributing the cost of construction of the said subways and directing that the Transportation Commission should contribute to the cost thereof as therein set forth. This order was rescinded by order no. 40367, issued on February 16, 1928, which altered the distribution of cost in so far as the contribution from the railway grade crossing fund was concerned, but not otherwise. The distribution of the cost as provided by the said order is stated in the judgment of Mignault J.† The Toronto Transportation Commission (appellant) was to pay 10% of the cost of the work, after deducting the amount available from the railway grade crossing fund.

Leave to appeal to this Court was given upon the following questions:

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

- (a) the Bloor Street Subways,

- (b) the Royce Avenue Subway.

or either of such works referred to in such order.

- (2) If the above question should be answered in the affirmative as to either or both of the said works, had

\*A description of the construction through the Bloor Street subways appears on p. 81 *infra*.

†At pp. 88, 89 *infra*.

the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel contribution from the Toronto Transportation Commission, a Provincial corporation, in respect of—

(a) the Bloor Street Subways,

(b) the Royce Avenue Subway,

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

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As to the Bloor street subways, the appeal was dismissed. As to the Royce avenue subway, the appeal was allowed, Anglin C.J.C. and Smith J. dissenting. Success being divided, no order was made as to costs.

*D. L. McCarthy, K.C.*, and *I. S. Fairty, K.C.*, for the appellant.

*E. Lafleur, K.C.*, for the respondent, Canadian National Railways.

*W. N. Tilley, K.C.*, for the respondent, the Canadian Pacific Railway Company.

*G. R. Geary, K.C.*, for the respondent, the City of Toronto.

The judgment of Anglin C.J.C. and Smith J. (dissenting in part) was delivered by

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

As in the Main Street case (1), leave to appeal has been granted on two questions, viz.: (a) Does the *Railway Act*\* purport to confer on the Board jurisdiction to make the impugned Order?; (b) If it does, is it, in that respect, *intra vires*?

(1) Reported *infra*, p. 94.

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

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

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

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

Up to the closing of the street for subway construction no line of street railway existed on that portion of Bloor Street between Lansdowne Avenue and Dundas Street, but passengers on the street railway travelling west along Bloor Street as far as Lansdowne Avenue, who wished to continue west and north, instead of travelling south and transferring at the corner of Lansdowne Avenue and Dundas Street, could obtain transfers and walk along Bloor Street across the steam railway tracks to the intersection of Bloor and Dundas Streets and continue their journey on the street railway from that point, and similar privileges were given to those travelling in the opposite direction.

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

acting under its powers for the protection, safety and convenience of the public, issued its Order No. 35037, dated May 9, 1924, approving the general plans submitted by the Canadian Pacific for grade separation in the northwestern section of the city including subways under the tracks of



the Canadian Pacific Galt and Toronto, Grey and Bruce Subdivisions and the Canadian National Brampton Subdivision at Bloor Street and Royce Avenue \* \* \* (Paragraph 26).

In paragraph 24 of the "settled statement" it is said,

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

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

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

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

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

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

Par. 32 of the Statement of Facts reads as follows:

32. Under the authority so granted to it, the Transportation Commission did, during the course of construction of the subways, construct a double line of street railway tracks along Bloor Street from Lansdowne Avenue to Dundas Street and through the subways constructed pursuant to the Board's Order and the Transportation Commission now operates street cars through the said subways. The trolley wires of such street railway are carried through the subways in a wooden trough which is supported by the span cables strung across the subways at intervals and hooked to the top of the steel bents at the centre of the subways and at the sidewalk line. In addition to the trolley wires an insulated feed cable for supplying current to them is carried through the subways, being suspended by oak blocks bolted at intervals to the lower flange of the steel superstructure, and connected at intervals with the trolley wires. A plan illustrating the method of construction is attached hereto \* \* \*.

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Finally, (paragraph No. 36).

On November 15, 1926, the Board issued its formal Order No. 38424, distributing the cost of construction of the said subways, and directing that the Transportation Commission should contribute to the cost thereof as therein set forth,

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

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

The jurisdiction of the Board to order the appellant Commission to bear a part of the cost of the subways under consideration, the construction of which was ordered by the Board, as the "settled statement" says, "acting under its powers for the protection, safety and convenience of the public", depends upon whether the Commission is a company "interested or affected by (the) order" so made, since s. 39 applies to every such order of the Board, whether s. 259 may or may not also be invoked in support of the disposition here made of the cost. The *Queen Street East* case (1).

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

The interest of the Commission in the Royce Avenue subway is, perhaps, not so obvious. We, however, are not concerned with the quantum of its interest or with the extent to which it is affected by the order for the construction of that subway. That the Transportation Commission should have had some appreciable interest or that its undertaking should be in some tangible way "affected by" the order, for construction, suffices to give jurisdiction to the Board to require it to contribute to the cost. Whether that jurisdiction should be exercised, in so far as it

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(1) *Toronto Ry. Co. v. City of Toronto*, [1920] A.C. 426, at pp. 435-6, 437-8.

may depend upon the quantum of interest or affection, it is exclusively for the Board, in its discretion, to determine (s. 44 (3)). While the Transportation Commission does not now carry, and may never carry, its lines through the Royce Avenue subway, the *situs* of its tracks on Dundas Street has been so diverted in connection with the construction of that subway, that, whereas formerly traffic coming from Royce Avenue was thrown upon them approximately at a right angle and in a single stream, whether intended to go north or south on Dundas Street, it is now divided and comes up to the tracks not, as formerly, about at right angles, but by two ramps or approaches so constructed that the portion going northerly goes up one ramp and approaches the railway at a very acute angle, while that going southerly ascends by another ramp and also approaches the railway at a very acute angle. That this division and diversion of traffic involves some improvement for the street railway over the conditions theretofore existing, seems altogether probable. While, therefore, if the interest of the Transportation Commission and its being affected by the order for the construction of the Royce Avenue subway depended upon its making use of that subway for its tracks, we might be disposed to say that the case would seem rather to be one for the application of s. 45 of the *Railway Act*, we find it impossible to hold that it has been shewn that the Transportation Commission has not a present interest, different in kind from that of the ordinary residents in, or users of, the city streets, in the changes effected by the order of the Board in connection with the subway, still less that it is wholly unaffected by an order which provides for the removal of its tracks somewhat to the west and for the construction of the two ramps above referred to, thus dividing the traffic from Royce Avenue so that it will approach the lines of the street railway at angles much more acute than theretofore. While there may be not a little to be said for such an "interest" and "affection" being too slender to justify the order of the Board requiring the Transportation Commission to bear 10 per cent. of the cost of the Royce Avenue subway, that is rather a question of degree involving the sufficiency in extent of the "interest" and "affection", in regard to which the discretion exercised by the Board cannot be interfered with here.

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The disposition of question (b) is indicated in the judgment in the Main Street case (1).

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

The judgment of Mignault and Lamont JJ. was delivered by.

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

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

Leave to appeal from an order of the Board of Railway Commissioners for Canada, hereinafter called the Board, was obtained by the appellant from a judge of this Court.

Before stating the questions raised under this appeal, it will be convenient to summarize as briefly as possible the facts which have been agreed upon by the parties.

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

Bloor Street, at a point a short distance east of its intersection with Dundas Street, is crossed by three lines of steam railways side by side, to wit, the Galt subdivision of the Canadian Pacific, the Brampton subdivision of the Canadian National, and the Toronto, Grey and Bruce subdivision of the Canadian Pacific. These lines run parallel to each other in a northwesterly direction, and before the construction of the subways here in question crossed Bloor Street and also Royce Avenue on the level. They are parallel to (but do not cross) Dundas Street, for a distance of approximately 1,783 feet, to a point immediately north of Royce Avenue where, as stated, Dundas Street veers to the west.

Bloor Street is also crossed, some 1,200 feet east of these three lines of steam railways, by the Newmarket subdivision of the Canadian National extending in a northerly direction. Prior to the construction of a subway here, this crossing was on the level.

The Toronto street railways were originally operated in part by the Toronto Railway Company and in part by the city corporation, and for a number of years prior to 1920 included in this locality lines extending from the centre of the city. Along Bloor Street the street railway ran from the east to the corner of Lansdowne Avenue, a north and south highway, being at that point about half a mile east of the intersection of Dundas Street with Bloor Street, and also a short distance east of the crossing of the Newmarket subdivision. Dundas Street intersects Lansdowne Avenue at a point which appears by the map to be a little more

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than a half-mile south of Bloor Street. West of the three steam railways above described, and west of Dundas Street at its intersection with Bloor Street, there had been for a number of years a line of street railway on Bloor Street. There were also, and still are, street railways on Lansdowne Avenue and on Dundas Street. Street railway passengers going towards the west along Bloor Street were provided, for the same fare, with transfers allowing them to take the cars running south on Lansdowne Avenue, thence the cars going northwest on Dundas Street, and they then transferred to the Bloor Street line running west. This process was reversed for passengers going from the west to the east on Bloor Street. Or they could disembark at Lansdowne Avenue, walk along Bloor Street, cross all the steam railways, and at Dundas Street continue their journey with their transfers by the Bloor Street cars, or reverse the process. There was then, as is apparent from what I have just said, no street railway on Bloor Street, between Lansdowne Avenue and Dundas Street, crossing the four lines of steam railways.

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

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

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

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

We next have an application to the Board by the appellant, dated July 15, 1925, for an order under section 252 of the *Railway Act* granting it leave to construct for the corporation of the city a double track of street railway between Dundas Street and Lansdowne Avenue on Bloor Street and through the subways on that street. The Board granted this application by order No. 36693, of August 13, 1925, and reserved for further consideration the question of contribution by the applicant to the cost of the subways. The appellant under this authority constructed a double

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line of street railway tracks along Bloor Street through the subways, between the two points above indicated, on which it now operates its cars. A full description of this construction through the Bloor Street subways is contained in paragraph 32 of the statement of facts (a). No street cars are operated by the appellant through the subway at Royce Avenue, nor are there any lines of street railway on that avenue.

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

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

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

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

*Subway on Royce Avenue.* To be paid out of the same fund, 40 per cent. of the annual expenditure, commencing

(a) See on page 81, *ante*.



in the same year, and not exceeding in any one year \$75,000, in connection with the crossing under the tracks of the three railways above described.

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

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

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

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

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

(a) the Bloor Street Subways,

(b) the Royce Avenue Subway,

or either of such works referred to in such order.

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

(a) the Bloor Street Subways,

(b) the Royce Avenue Subway,

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

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In dealing with the jurisdiction of the Board to order that the appellant should contribute to the cost of these subways, it is important to note that no question is raised here as to its power to direct the construction of the works themselves, the controversy being narrowed down to the point whether the appellant could be called upon to contribute to their cost. The application to the Board of the city corporation (November 21, 1922) was made under section 257 of the *Railway Act*. It must therefore be taken as granted that in ordering these works the Board acted within the ample powers which that section confers on it for "the protection, safety and convenience of the public". Having exercised a power vested in it, the Board could, under section 39, subsection 1, of the *Railway Act*, order "by what company, municipality or person, *interested or affected* by such order" (the order directing or permitting the works) the works should be constructed, and, under subsection 2 of the same section, "by whom, in what proportion, and when" the cost and expenses involved should be paid. It is now settled that the words "by whom" in subsection 2, "must be read with reference to the immediately preceding provision", and that an order directing payment or contribution "may be made only on a company, municipality or person interested in or affected by the order directing the works" (*Toronto Railway Co. v. City of Toronto* (1)).

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

This, of course, should not be lightly done, and therefore I am not disposed to disturb the finding of the Board that the appellant was interested in the construction of the two subways of Bloor Street. It is true that the appellant's lines on that street had never crossed the railways, but by

reason of the construction of the subways it was enabled to establish a continuous line of street railway along Bloor Street. Its passengers were no longer obliged to follow the circuitous route I have described, or to run the risk of crossing four lines of steam railway on foot. Although it was so suggested to us, I do not regard the order requiring the appellant to contribute to the cost of construction as a term of the unconditional authorization it had previously obtained to extend its lines through the subways. The soil of the subways is a public highway of the city. It would not have been within reason for the Board to refuse to allow the appellant to construct its lines of street railway through the subway, subject to such protective measures as might be prescribed for the preservation of the structure or the safety of the public. So I would be very slow to construe the subsequent order to contribute as a term of the authorization which the Board granted to the appellant. However no such argument is necessary to support the order of contribution in respect of the Bloor Street subways.

But the appellant cannot be said to have been interested in or affected by the construction of the Royce Avenue subway. Its tracks merely ran, and still run, along Dundas Street, which for some distance parallels the three lines of steam railways, but they never came into contact therewith. The appellant does not use the subway, nor has it any line on Royce Avenue. And as to the diversion on Dundas Street which it now uses, it suffices to say that this diversion was decided upon to afford an easy approach to the subway. Not being interested in the latter, the appellant cannot be said to have an interest in the diversion, which was, moreover, the cause of additional expense to it, for it became necessary to lay new tracks along the diverted road.\* It may be further added that the ten per

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\*The preceding two sentences (beginning with the words "And as to the diversion on Dundas Street which it now uses," etc.) were complained of by the respondent railway companies as being erroneous as to the facts, and a motion was made before the Court (Anglin, C.J.C., and Duff, Newcombe, Rinfret, Lamont and Smith, JJ.) on November 18, 1929, for an order directing a re-hearing of the appeal on the ground that the Court had been under a misapprehension as to the facts of the case with regard to the Royce Avenue subway. Judgment was delivered on December 9, 1929, as follows: "The Court is of the opinion that this is not a proper case in which to direct a re-hearing of the appeal as asked for. The motion will therefore be refused with costs."

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cent. contribution exacted from the appellant takes no account of the cost of the diversion as distinguished from the cost of the subway, the contribution being to the whole expenditure. My conclusion is that the order of contribution to the cost of the Royce Avenue subway and the diversion cannot be supported.

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

259. Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of the next following section of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person in respect of any order made by the Board, under any of the last three preceding sections, and such order shall be binding on and enforceable against any railway company, municipal or other corporation or person named in such order.

It is to be observed, however, that section 259 is to the same effect as section 238, subsection 3, introduced into the *Railway Act* as enacted by R.S.C., c. 37, by 8 & 9 Edw. VII, c. 32 (1909). Subsection 3 was considered by their Lordships of the Judicial Committee in *Toronto Ry. Co. v. Toronto* (1), and they stated that there was "nothing in it to put an end to the application of section 59 (now section 39) to orders under ss. 237 and 238" (now, as far as material here, sections 256 and 257 of the *Railway Act*, 1919, the third subsection of section 238 of the former Act being section 259 of the present Act).

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

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

By its terms question (2) requires an answer merely with respect to the Bloor Street subways. I think this answer must be in the affirmative. It is now settled that in such

a matter the jurisdiction of Parliament cannot be questioned. *Toronto v. Canadian Pacific Ry. Co.* (1); *Toronto Railway Co. v. Toronto* (the Avenue Road case) (2).

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

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

*Appeal dismissed as to Bloor Street case. Appeal allowed as to Royce Avenue case.*

Solicitor for the appellant: *Irving S. Fairty*.

Solicitor for the respondent, Canadian National Railways: *Allistair Fraser*.

Solicitor for the respondent, the Canadian Pacific Railway Company: *E. P. Flintoft*.

Solicitor for the respondent, the Corporation of the City of Toronto: *C. M. Colquhoun*.

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