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*May 14, 15.
*June 1.

THE MONTREAL TRAMWAYS COMPANY AND THE MONTREAL PARK AND ISLAND RAILWAY COMPANY ..... APPELLANTS;

AND

THE LACHINE, JACQUES-CARTIER AND MAISONNEUVE RAILWAY COMPANY ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Board of Railway Commissioners—Jurisdiction—Lands of provincial railway company—Undertaking for general advantage of Canada — Transfer to provincial railway — Construction of statute—"Railway Act," R.S.C., 1906, *c.* 37, *s.* 176.

The Board of Railway Commissioners for Canada has no jurisdiction, under section 176 of the "Railway Act," R.S.C., 1906, ch. 37, to order that a Dominion railway company should be authorized to use or occupy lands which, at the time of the application for the approval and of the approval of the location of the Dominion railway, had become the property of a provincial railway company. *City of Montreal* v. *The Montreal Street Railway Co.* ((1912) A.C. 333), referred to. Idington J. dissenting.

Per Idington J.—The Board of Railway Commissioners for Canada has the same power to make orders respecting the use and occupation of the lands of a provincial railway company as it has in regard to the lands of any other corporate body created by a provincial legislature.

APPEAL from the order of the Board of Railway Commissioners for Canada, dated the 20th of July, 1912, whereby the Lachine, Jacques-Cartier and Mai-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

sonneuve Railway Company was authorized to use and occupy a portion of the lands of the Montreal Tramways Company which had been transferred to that company by the Montreal Park and Island Railway Company in pursuance of the Dominion statute 1 & 2 Geo. V., ch. 115.

The Montreal Tramways Company was incorporated by the statute of the Province of Quebec, chaptered 77 of the statutes of that province enacted in the year 1911 (1 Geo. V.). The Montreal Park and Island Railway Company was also incorporated by a statute of the Province of Quebec, in 1885, and, by the Dominion statute 57 & 58 Vict., ch. 84, was afterwards declared to be an undertaking for the general advantage of Canada. By section 11 of its Act of incorporation, the Montreal Tramways Company was, amongst other things, authorized to acquire the privileges, lands, franchises, etc., of the Montreal Park and Island Railway Company and, by the Dominion statute, 1 & 2 Geo. V., ch. 115, the Montreal Park and Island Railway Company was authorized to transfer its privileges, lands, franchises, etc., to the Montreal Tramways Company. In accordance with the authority thus obtained the Montreal Tramways Company acquired the privileges, lands, franchises, etc., of the Montreal Park and Island Railway Company by deed executed on the 18th of November, 1911, including the lands affected by the order now appealed from, and forthwith entered into possession and occupation thereof. The deed of sale was ratified by a statute afterwards enacted by the Legislature of Quebec, 2 Geo. V., ch. 84. The respondent company was incorporated by the Quebec statute, 9 Edw. VII., ch. 99, and was afterwards, by the Dominion statute, 1 & 2

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Geo. V., ch. 104, declared to be an undertaking for the general advantage of Canada. On the application of the respondent company, the Board of Railway Commissioners for Canada, on the 12th June, 1911, made an order fixing the location of the portion of the respondents' railway now in question with the restriction, as to the Montreal Street Railway Co., that the location across the lands in question should be arranged between the parties so that the least injury and inconvenience might thereby be caused to the Montreal Street Railway Company. On the 29th of March, 1912, the respondents served a notice of expropriation of the strip of land now in question, which was needed for their right-of-way, addressed to the "Estate of the Montreal Park and Island Railway Company (now the Montreal Tramways Company), owner of the above-mentioned lands"; on 9th April, 1912, they served a petition for the appointment of arbitrators to determine the compensation to be paid for the lands sought to be expropriated addressed in the same manner, and, on the 19th of May, 1912, desisted from the said expropriation proceedings. The respondents, on the 9th of July, 1912, applied to the Board of Railway Commissioners for Canada for an order authorizing them to take and make use of the strip of land in question for the purposes of their railway and, upon that application, the order now appealed from was made.

The question upon the appeal was whether the Board had jurisdiction to make the order appealed from.

Rinfret K.C. for the appellants.

Lafleur K.C. and *Jodoin K.C.* for the respondents.

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THE CHIEF JUSTICE agreed with Duff J.

IDINGTON J. (dissenting).—This is an appeal invoked under the "Railway Act" to test the jurisdiction of the Board of Railway Commissioners for Canada to make the following order, dated 12th July, 1912:—

Upon reading what is alleged in support of the application and on behalf of the Montreal Park and Island Railway Company, and the report of the chief engineer of the Board:—

It is ordered that the applicant company be and it is hereby authorized to take for the purpose of the crossing that portion of the said lot No. 340, of the lands of the Montreal Park and Island Railway Company consisting of a strip of land 597 feet in length by 100 feet in width, containing 1.62 arpents, as shewn on the said plan.

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

The matter has been needlessly confused by incorporating in the case and proceedings matters entirely irrelevant to the neat point which is involved.

The respondent was originally incorporated by the Legislature of Quebec, but, by an Act of the Parliament of Canada, 1 & 2 Geo. V., ch. 104, the work was declared to be one for the general advantage of Canada and thus all appertaining thereto came within the provisions of the "Railway Act" and the consequent jurisdiction of the said Railway Commissioners.

That Board was duly applied to for an order approving of the proposed route for respondent's railway when a great many parties, including the Montreal Street Railway Company, under which the Montreal Tramways Company, now appellant, claims, were heard in regard to their respective objections to the route.

An order, dated 12th of June, 1911, was made subject to various conditions approving of at least a part

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of the proposed route, including that part of it crossing the land in question, but in respect thereof was left in somewhat indefinite form, which is expressed as follows in sub-section (*d*) of section 1 of said order:—

(*d*) The location across the lands of the Montreal Street Railway Company to be arranged between the parties so that the least injury and inconvenience may be suffered by the street railway company.

The respondent seems to have instituted expropriation proceedings which, on such an indefinite order, may have been considered premature and, on objection, desisted therefrom. All relative thereto does not concern us here.

The respondent seems to have conceived the idea that, inasmuch as the Montreal Park and Island Railway Company had become a Dominion railway, the proper course was to have resort to the power of the Board under section 176 of the "Railway Act," and applied accordingly, but it was disclosed upon the hearing of the application that, though that railway company was still under the Dominion authorities, Parliament had empowered it to sell its property and, in course of exercising that power, the land in question had passed to the Montreal Tramways Company which was and is a concern incorporated by the Legislature of Quebec.

Thereupon the Board made the order above quoted. It did not pretend to act upon section 176 of the "Railway Act," but simply confined itself to making an order which completed the work left in the indefinite form I have already adverted to, and declared what it always had intended, subject to amicable adjustment, should be done in the way of declaring its approval of the route.

This it had, in my opinion, undoubtedly, jurisdiction to declare and approve.

The mistake in description of the owner does not affect the taking of the land or the right to direct the route as defined to be taken by respondent.

The pretension that because the land happened to belong to a local tramway, therefore, there was no jurisdiction in the Board to so direct is without foundation.

The local railway company's property is, in that regard, just as much within the power of Parliament and subject to the provisions of the "Railway Act" as is that of any other corporate body created by the local legislature.

The further pretension that the power of expropriation in such case belongs to a local board instead of the Dominion authorities is equally without foundation unless we are to invert the order of superiority as between the Dominion and the provinces, as defined by the "British North America Act," and reverse many authorities deciding that what is necessary to the execution of the purpose of the constructing of Dominion works, including railways, has to be observed. The cases of *The City of Toronto* v. *The Bell Telephone Co.*(1), and the *Attorney-General of British Columbia* v. *The Canadian Pacific Railway Co.*(2), have surely settled that much and given a wide enough scope to what is conceivable as necessarily incidental to the execution of the powers of Parliament. A later generation may laugh (when struggling with its results) at the conception of telephone posts and wires

(1) [1905] A.C. 52. (2) [1906] A.C. 204.

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upon the streets of a municipal corporation being held to be such an incidental necessity, but, meantime, we must accept it with becoming respect as a proper interpretation of the "British North America Act."

Surely the crossing of a bit of land held by a corporation of another sort, not for present use, but in hopes, or alleged hopes, of its use possibly in a future age, falls far within these applications of the principle laid down and acted upon in these and other cases, unless we are to hold that a local tramway is a more sacred thing than its fellow creature, a municipal corporation.

With great respect, I think the argument based on section 176 has misconceived the situation in law and in fact. But that does not affect the jurisdiction of the Board which has been impeached to make the order it did. Even if used as against the Montreal Park and Island Railway Company, that is something the company moving has nothing to do with. Though assuming (with great respect I much doubt) the latter company properly made a party to elicit an opinion from us in a case to which it was no party, yet the order might, as against the Montreal Park and Island Railway Company, if an order suitable to such an exigency had been made under section 176, be rested thereupon and be held good.

The appeal should be dismissed with costs.

DUFF J.—This is an appeal from the Board of Railway Commissioners for Canada and the question which arises is whether the Board had power to make a certain order, dated 20th July, 1912, which is in the following terms.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

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Order No. 17,082.

Saturday, the 20th of July, A.D. 1912.

D'ARCY SCOTT, *Asst. Chief Commissioner.*

S. J. MCLEAN, *Commissioner.*

IN THE MATTER OF THE ORDER of the Board, No. 13,993, dated June 12th, 1911, approving the location of the Lachine Jacques-Cartier and Maisonneuve Railway Company's line of railway from the westerly terminus of the railway to a point about 400 feet west of the Canadian Pacific Railway Company's crossing at Iberville street subway, in the City of Montreal; and the application of the Lachine, Jacques-Cartier and Maisonneuve Railway Company for authority to take, for the construction of its railway, a portion of lot No. 340, in the Parish of St. Laurent, in the said City of Montreal, of the lands of the Montreal Park and Island Railway Company, consisting of a strip of 597 feet in length and 100 feet in width, containing 1.62 arpents, as shewn on the plan dated June 12th, 1911, and approved under the said order No. 13, 993.

Upon reading what is alleged in support of the application and on behalf of the Montreal Park and Island Railway Company, and the report of the chief engineer of the Board:—

IT IS ORDERED that the applicant company be and it is hereby authorized to take for the purpose of the crossing that portion of the said lot No. 340, of the lands of the Montreal Park and Island Railway Company consisting of a strip of land 597 feet in length by 100 feet in width, containing 1.62 arpents, as shewn on the said plan.

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

There can be no serious doubt, I think, that the Board, in making the order, was professing to execute powers conferred upon it by section 176 of the "Railway Act." It appears clearly enough from the application dated 10th May, 1912, and a further application of the 25th July, that it was understood by the respondents that the Board was exercising powers under

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that section. Indeed, it is so stated in the factum of the respondents and, while the section is not mentioned in the order, the order purports to be made under the application of the 10th of May, and it is not really disputed that the order was an order under the section mentioned. The Board would, of course, have no power under the general expropriation provisions of the Act to make such an order, as sufficiently appears from a consideration of sections 215 and 216.

I do not think the parties have really come to any issue upon the question whether the lands in question ever did constitute an integral part of the railway undertaking of the Montreal Park and Island Railway Company, or are now such a part of the Montreal Tramways Company, and I think there is no evidence before us which would enable us to pass upon the point, assuming it would be competent for us to do so on this appeal. It may be doubted, I think, whether section 176 has any application to the lands of a railway company which are not physically a part of the railway undertaking: for example, subsidy lands held for sale. It is quite arguable that proceedings under the general expropriation provisions of the Act would be the appropriate method of getting authority to take such lands even where the owner is a Dominion railway company. The point, in my view, is of no importance on this appeal, because, as I have already indicated, those proceedings are taken by the railway company under section 176; and the lands which the respondent company was authorized to take by the order appealed from are now and at the time the application and order were made were the property of a provincial railway company owning and operating a railway

which is a local undertaking and subject to the exclusive authority of the provincial legislature.

First.—These lands are the property of the Montreal Tramways Company whose undertaking is a local undertaking under the exclusive jurisdiction of the Quebec Legislature. It is not disputed that the lands in question, prior to November, 1911, formed part of the property of the Montreal Park and Island Railway Company whose undertaking, having been declared for the general advantage of Canada, was a Dominion undertaking. In November, 1911, however, that company was authorized by an Act of the Dominion Parliament to transfer the whole or any part of its undertaking and property to certain companies engaged in operating provincial undertakings, including the Montreal Tramways Company, and, in the result, the property in question, with other properties, became vested in the Montreal Tramways Company, a railway company engaged in working a provincial railway, and were vested in that company when the application was made upon which the order was based. These facts are admitted again and again in course of the proceedings taken by the respondents and are not disputed in the respondents' factum.

Secondly.—Section number 176 has no application to lands which are the property of a provincial railway company. The full text of the section is as follows:—

176. The company may take possession of, use or occupy any lands belonging to any other railway company; use or enjoy the whole or any portion of the right-of-way, tracks, terminals, station or station grounds of any other railway company, and have and exercise full power to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Board first obtained

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and to any order and direction which the Board may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

2. Such aproval may be given upon application and notice, and, after hearing, the Board may make such order, give such directions, and impose such conditions or duties upon either party as to it may appear just or desirable, having due regard to the public and all proper interests.

3. If the parties fail to agree as to compensation, the Board may, by order, fix the amount of compensation to be paid in respect of the powers and privileges so granted. 3 Edw. VII., ch. 58, sec. 137; 6 Edw. VII., ch. 42, sec. 8 .

If this section applies to provincial railway companies, then it is within the power of the Board of Railway Commissioners for the Dominion to authorize a Dominion railway company to make use, to any extent that the Board shall think proper, of the works of a provincial railway company without the consent of the provincial railway company or the public authorities of the province, and without a declaration by Parliament that the provincial railway should be a work for the general advantage of Canada. The Board would also have power under the express provisions of the section to impose conditions upon the provincial railway company, as well as duties, as it might appear just or desirable to them and to fix the compensation to be paid in respect to the powers and privileges granted. In a word, the section, if such be its application, authorizes the establishment over provincial railways of that dual control which has been held to be contrary to the policy of the "British North America Act." *City of Montreal* v. *Montreal Street Railway Co.*(1), at pages 345, 346. Sub-section 4(*c*), of section 2 and section 8 of the "Railway Act" seem to shew that where it was intended that a specific pro-

(1) [1912] A.C. 333.

vision of the Act should apply to provincial railway companies that has been expressly stated.

I think the proper conclusion is that section 176 has no such application.

It is argued, however, that at the time the line of the respondents was located these lands were still a part of the property of the Montreal Park and Island Railway Company, a Dominion company. I do not think that in the circumstances of this case that is an answer to the appeal. When the application was made for leave to take possession of the lands, admittedly they had passed to the Montreal Tramways Company.

The Dominion legislation authorizing the transfer to the provincial company of the property of the Dominion railway company involved by necessary implication a declaration that such property, when transferred, should be no longer be part of a work for the general advantage of Canada; I entertain no doubt that such a declaration by the Dominion Parliament made with the concurrence of the Quebec Legislature would be entirely effective to remove the property transferred from the Dominion jurisdiction under sections 91(29) and 92(10) of the "British North America Act."

The result is that, with respect to the property transferred, section 176 ceased to have any operation.

ANGLIN J.—Upon its face, the order appealed from (No. 17,082) was within the jurisdiction of the Board of Railway Commissioners for Canada. It purports to authorize the "taking" by the Lachine, Jacques-Cartier and Maisonneuve Railway Company, "for the purposes of the crossing," of a part of the lands of the

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Montreal Park and Island Railway Company — a railway subject to the authority of the Parliament of Canada. Such an order is within the power conferred by section 176 of the Dominion "Railway Act."

But, on the argument, it was made clear beyond all doubt that, while the land in question had been vested in the Montreal Park and Island Railway Company, when the application was made to the Board for approval of the location of the Lachine, Jacques-Cartier and Maisonneuve Railway, and when the order approving such location was pronounced, as a result of conveyances authorized by Dominion and provincial legislation, it had become vested in the Montreal Tramways Company, a provincial railway company, and belonged to it at the time the order now in appeal was pronounced. Moreover, it was admitted at bar that the land to be taken is adjacent to car-sheds formerly belonging to the Montreal Park and Island Railway Company, but now the property of the Montreal Tramways Company, that no tracks of either company are laid upon it, and that, in fact, no crossing is to be provided for.

These facts were known to the Board of Railway Commissioners, and it is a little difficult to understand how they came to make an order dealing with the land as if it were still the property of the Montreal Park and Island Railway Company, and stating that it is required for the purpose of a crossing. Under the circumstances I should have preferred remitting the matter to the Board in order that we might be advised, before passing upon it, whether the form which the order has taken was due to some clerical error in draftsmanship, or whether the Board was of the opinion, for some reasons not apparent to us, that, not-

withstanding the legislation above referred to and the conveyances consequent upon it, the land in question should still be deemed, for the purposes of section 176, to belong to the Montreal Park and Island Railway Company. But my colleagues think it unnecessary to adopt this course, since it is undisputed that the land in question was, in fact, vested in the Montreal Tramways Company when order No. 17,082 was made.

Dealing with the order, therefore, as if made for the taking of land belonging to the Montreal Tramways Company, a provincial railway company, I am of the opinion that the Board had not jurisdiction to make it. Section 176 of the "Railway Act" is the only authority under which counsel sought to sustain the order, and I know of no other provision of the statute that could be invoked to support it. Section 176, in my opinion, is confined to its operation to lands of railway companies subject to the legislative jurisdiction of the Dominion Parliament and has no application to lands of provincial railway companies.

BRODEUR J.—On the 10th of May, 1912, the railway company respondent, applied to the Board of Railway Commissioners for an order under section 176 of the "Railway Act" to take certain lands and to have the compensation fixed by the Board.

Originally these lands belonged to one of the appellants, the Montreal Park and Island Railway Company, a federal railway company. But these lands had been, in the month of November previous (1911) transferred to the other appellant, the Montreal Tramways Company, a provincial company.

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The Board granted the order on the 20th of July, 1912.

It is claimed by the appellants that the Board was without jurisdiction in proceeding under section 176 of the "Railway Act."

Section 176 provides that the Board may authorize a railway to

> take possession of, use or occupy any lands belonging to any other railway company,

and the Board may fix the amount of compensation if the parties fail to agree.

The words "any other railway company," in that section, do not refer to a provincial company. The company mentioned in the section is defined in the Act as meaning a company within the legislative authority of the Parliament of Canada.

The Board would be then without jurisdiction to fix the compensation for lands belonging to a provincial company.

The lands in question might, likely, be expropriated by the respondent company, but the compensation should be determined not by the Board, but by arbitrators appointed under the "Railway Act."

It was contended by the respondents that the proceedings of the Board were valid because when the plans were originally approved the federal company, appellants, were then owners. But the deposit of those plans in the registry office was made on the 19th of January, 1912, and the formal notice of expropriation was given on the 3rd of April, 1912. At both these dates the federal company had ceased to be the owners of these lands and they had passed into the possession of the provincial company.

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The Board was then, in July, 1912, without jurisdiction to authorize the taking of the lands of the provincial company and to fix the compensation therefor under section 176 of the "Railway Act."

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Perron, Taschereau, Rinfret, Geuest, Billette & Plimsoll.*

Solicitors for respondents: *Henri Jodoin.*