33, 1933

In the Privy Council.

No. 21 of 1932.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Between

THE OTTAWA ELECTRIC RAILWAY COMPANY *Appellant*

and

CANADIAN NATIONAL RAILWAYS

and

THE CANADIAN PACIFIC RAILWAY COMPANY - *Respondents.*

CASE FOR THE APPELLANT

1. This is an appeal from a judgment of the Supreme Court of Canada dismissing an appeal taken on questions of law from an Order of the Board of Railway Commissioners for Canada. p. 173 p. 85

2. Appellant contended that the interpretation given by the Board to two agreements, in the same terms, entered into by Appellant with the Canadian Pacific Railway Company in the one case and with the Canada Atlantic Railway Company in the other case, was wrong. For the purpose of the present appeal the Canadian National Railways may be taken to be the successors to the rights and obligations of the Canada Atlantic Railway Company.

3. The circumstances out of which the Appeal arises are somewhat complicated and are set out in detail in Order No. 44058 of the Board, which is the order granting leave to appeal to the Supreme Court p. 101

p. 60
p. 73

of Canada, as well as in the Reasons for Order No. 40417, which was the judgment of the Board in the matter.

p. 12B
p. 125

4. The principal circumstances are that in 1896 appellant entered into agreements in the same terms with respondents respecting two wooden farm bridges which existed at the site of the present bridge, and which carried Somerset Street (then Cedar Street) westerly over the two Respondents' tracks and at a right angle thereto. Though they were in

p. 103, l 38 et seq.

line with each other, there was a depression between the wooden bridges and consequently they did not lie end to end and were quite independent of each other. The agreement in the case of the C. P. R. had reference to the westerly bridge and in the case of the other respondent, to the easterly bridge. By the agreement, in each case, appellant undertook to indemnify the other party against certain liability in respect of one of the bridges.

p. 103, l. 44, et seq.

p. 130, l. 22

5. Thereupon in the same or the following year, the existing wooden bridges, which ran east and west, were removed and replaced by appellant, by a continuous steel and concrete structure of greater height and one that was able to carry street cars, and appellant thenceforward until 1928 operated its electric street railway over that bridge, while under it through two separate openings ran the railways of the two respondents.

p. 108, and p. 102, l. 18 et seq.

6. Since 1870 the Canadian Pacific Railway Company through its predecessor the St. Lawrence and Ottawa Railway Company, had had an obligation with reference to its wooden bridge, namely, an obligation to the previous owner of its right of way, to "erect and keep up three bridges over the cut, if we so require". It is submitted that this was the only obligation that the parties had in mind when they entered into the agreement, though if the agreement is wide enough to include respondent's liability to others, it is effective of course, notwithstanding the intention.

7. The agreement itself does not purport to be, nor is it, authority to the appellant to cross the lines of respondents. Appellant's right (referred to in the second paragraph of the agreement) to go upon this part

p. 124, l. 9

of Cedar Street, was contained in an agreement with the City of Ottawa.

8. Appellant also had authority from the Railway Committee of the Privy Council to cross the lines of the respondents, though it does

p. 78, l. 43

not appear that such authority could be refused or was required at that time.

9. In 1907, upon application by the City of Ottawa (and at the cost of appellant to the extent of 75% thereof, and in spite of its opposition)

a bridge 16 feet wide was ordered by the Board to be built along or onto the south side of the existing bridge for its full length, to provide additional accommodation for highway and pedestrian traffic. The Board found as a fact that the wooden bridges had been removed, (in 1896-7). p. 127, l. 20 et seq. p. 131, l. 28 p. 130, l. 22 et seq.

10. In 1927 again the City of Ottawa applied to the Board for an order requiring the replacement of the existing bridge or bridges, which then consisted of the bridge which had replaced the wooden bridges in 1896, and of the additional bridge which had been built in 1907. The grounds advanced were that the existing structures needed repairs and that the total width represented by the bridge built in 1896-7 and by the 1907 bridge was then insufficient for modern traffic and a wider and stronger bridge was required. Appellant again opposed the application. p. 1, l. 19

11. The Board granted the application, by Order No. 40417 (Commissioner Oliver dissenting) and concluded that the respondents were primarily liable under the Board's practice, for some part of the cost of the new structure; but on an interpretation of the above agreements, the Board exempted respondents from such part of the cost and ordered the appellant to assume that part, namely, the share which would have fallen upon the respondents but for the agreements, and the whole cost of maintenance other than that of the pavement and sidewalks. p. 85 p. 99, l. 39

12. Pursuant to Order No. 40417, the successors to the wooden bridge (the 1896-7 bridge and the 1907 bridge built along and onto it at the south), were swept away and a new bridge built in their place (hereinafter called the 1928 bridge) and it is part of the cost of this bridge which is in question. p. 106, l. 1-10 p. 73, l. 13 p. 8, l. 11-14 l. 35 p. 39, l. 8 p. 44, l. 7, 11 p. 47, l. 3-12 p. 69, l. 25-31 p. 60, l. 24 p. 61, l. 2 p. 63, l. 31 p. 87, l. 8 and 25 p. 89, l. 33 p. 91, l. 21 p. 92, l. 8

13. Order No. 44058 of the Board granted appellant leave to appeal to the Supreme Court of Canada on questions of law which are set forth in the following paragraph and the main facts relating to the questions in issue are set forth in that Order, although the evidence and other proceedings at the hearing are also included in the Record. p. 6, l. 2 p. 5, l. 11 p. 101

p. 107

14. The questions of law as submitted by the Board to the Supreme Court of Canada are as follows:—

"Having regard to the facts above stated and the bylaws, agreements, decisions, and orders which are the schedules hereto:—

"1. Has the Electric Railway any obligation under the said agreements with the Steam Railways to indemnify the Steam Railways, or either of them, in any respect whatever with reference to such liability as the Steam Railways, or either of them, may have to contribute towards the cost of construction of a bridge such as provided for in the Board's Order No. 40417?"

"2. If the answer to question 1 is "Yes", does such obligation thereunder extend to (a) the whole, or (b) part only of such cost that may be occasioned by the increased volume and the variation in character of traffic since the dates of the said agreements?

"3. If the obligation extends to part only of the cost referred to in question 2, then to what part?"

"4. If the Electric Railway Company has any obligation under the said agreements to indemnify the Steam Railways, or either of them, with respect to maintenance, what is the extent of the obligation?"

p. 173

15. The Supreme Court answered the questions as follows:—

1. Yes.

2. The whole.

3. Not answered.

4. Covered by answer to No. 2.

16. What appellant complains of in the judgment appealed from is that the agreements with respondents are interpreted as if the indemnification extended to any liability of respondents in respect of all bridges that might successively or additionally be constructed at that crossing and to all increased strength and additional width and various levels that increases ad infinitum in the nature and volume of vehicular traffic may render necessary—in other words, all liability in respect of the grade separation or crossing; whereas the latter part of clause numbered 1 of the agreements makes it clear that what is indemnified against with reference to the crossing is claims for damages and when the question of indemnification against liability to maintain is dealt with in that clause that

p. 124, l. 29 et seq.

indemnification is confined to the wooden bridges then in existence and since removed, and does not extend to the crossing or grade separation generally, or to other bridges. p. 124, l. 26 et seq.

17. Appellant respectfully contends that the judgment of the Supreme Court of Canada is wrong and ought to be reversed, and that the questions should be answered as follows:—

1. No.

2. Answered by No. 1

3. Answered by No. 1

4. Answered by No. 1

or in the alternative if it should be found that at the time of order No. 40417 there was any obligation, it is submitted that the questions should be answered as follows:—

1. Yes.

2. Neither the whole nor any part of the cost specified in this question, (the liability being limited to a bridge of the same type as the wooden bridges).

3. Answered by 2.

4. The extent of the obligation with respect to maintenance is to indemnify against liability to maintain the wooden bridges, or one equivalent to them

for the following among other

REASONS

(1) Because in each case the agreements related to certain obligations in respect of a specified bridge which was swept out of existence shortly after the date of the agreements in question and because thereafter there could be no further liability on respondents, nor consequently on appellant, to maintain, alter, repair or reconstruct it; and because having replaced the wooden bridges by a steel and concrete bridge fit to carry street cars, in 1896-7, any subsequent reconstruction or replacement was

not a reconstruction or replacement of the wooden bridges, but of their successors.

(2) Because any subsequent liability for reconstruction or replacement imposed on respondents was a liability not protected by the agreements, since in replacing the wooden bridges, appellant had carried to their farthest limits the obligations it had undertaken.

(3) Because a fortiori the indemnification agreement did not extend to the second successor (in 1928) to the wooden bridges.

(4) Because the liability which appellant assumed was not the general liability which respondents might have thereafter with respect to that crossing, or with respect to the public at large at that place, or, particularly, with respect to the 1928 bridge, which was the successor to the successor to the wooden bridges, and so the liability to which respondents would have become subject under the Board's practice and which was erroneously handed on to the appellant is not the liability contemplated by the agreements but another liability entirely.

(5) Because the liability indemnified against, if it was a liability to maintain the wooden bridges at a certain standard, had reference to the standard of 1895 traffic or to the standard of the condition of the wooden bridges at the date of the agreement.

(6) Because clause numbered 2 of the agreement appears to extend in any event only to cases where the reconstruction or replacement takes place on the initiative, or at any rate under the control, of the appellant and it is submitted that a fair inference is that what the parties had in mind was the new bridge made by appellant in 1896-7.

(7) Because on two occasions the bridges at this location had been removed (in 1896-7 and in 1928) and two new bridges have been built since the agreements in question were entered into.

(8) Because the obligation to indemnify "from time to time" is not an obligation to indemnify against liability in respect of successive bridges that may from time to time come into existence.

(9) Because if an obligation did exist at the time of order No. 40417 to indemnify respondents against some liability with respect to the bridge thereby ordered, it does not follow that the obligation extends any further than to indemnify against respondents' share of the cost of reproducing a new bridge of the same strength and width as the wooden bridges and because as to any excess cost due to making the 1928 bridge strong enough to carry the new traffic, there is no indemnification.

(10) Because the word "alter" carries respondents no further than does any other of the words used, since the bridge to be altered ceased to exist in 1896-7, or (in the alternative) because the alteration indemnified against was made in 1896-7; and the liability with which respondents were threatened in 1927 was not a liability to alter but to replace.

REDMOND QUAIN

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CASE FOR THE APPELLANT

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