

Privy Council Appeal No. 21 of 1932.

The Ottawa Electric Railway Company - - - - *Appellants*

v.

The Canadian National Railways and others - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 7TH APRIL, 1933.

Present at the Hearing :

THE LORD CHANCELLOR.
LORD BLANESBURGH.
LORD MERRIVALE.
LORD ALNESS.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by special leave by the Ottawa Electric Railway Company from a judgment of the Supreme Court of Canada, dated the 18th of May, 1931, which dismissed an appeal from an order of the Board of Railway Commissioners of Canada dated the 5th of March, 1928, and numbered 40417.

On the 14th July, 1927, the Municipal Corporation of the City of Ottawa (hereinafter referred to as "the City") made an application to the abovementioned Board of Railway Commissioners for an order under the Railway Act of 1919, requiring the Ottawa Electric Railway Company, the Canadian National Railways and the Canadian Pacific Railway Company, or some one or more of the said Companies, to replace the existing Somerset Street Bridge or viaduct in the City of Ottawa which carries Somerset Street and the tracks and right-of-way of the Ottawa Electric Railway Company over the tracks of the Canadian National Railways and the Canadian Pacific Railway Company.

with a bridge of sufficient breadth and of such construction as will afford safe and adequate facilities for all traffic on the said street, and for an order apportioning the cost of such new bridge between the said railways, or between some one or more of them, and the said Corporation, as the Board may direct.

It was alleged by the City that the then existing bridge over the tracks of the respondent Railway Companies, by which the appellant Company's tracks and right of way were carried over the said Railways was originally constructed at the cost of the appellant Company, and was thereafter enlarged at the joint cost of the appellant Company and the City under an order numbered 3684 of the Board and dated the 13th March, 1907.

It was further alleged that the bridge had fallen into a state of disrepair and was dangerous to traffic and of insufficient breadth, and that it would be necessary to remove the same and have it replaced by a more modern structure of greater breadth.

After hearing counsel for the representatives of the City (in the order referred to as "the applicant") the appellant Company and the respondent Railway Companies, the Board of Railway Commissioners made an order on the 5th March, 1928 which was numbered 40417, and which was as follows :—

" THE BOARD ORDERS

1. That the Applicant be, and it is hereby, authorised to reconstruct the said bridge carrying Somerset Street and the tracks of the Ottawa Electric Railway Company over the tracks of the Canadian National Railways and the Canadian Pacific Railway Company, in the City of Ottawa and Province of Ontario, in accordance with plans to be filed for the approval of an Engineer of the Board.

2. That the said bridge be fifty-eight feet in width.

3. That the Applicant bear and pay the cost of the construction of the sidewalks and the paving of the roadway, the remainder of the cost of the said bridge to be borne and paid sixty per cent. by the Ottawa Electric Railway Company and forty per cent. by the Applicant; the cost of maintaining the bridge, with the exception of the wearing surface thereof which shall be maintained by and at the expense of the Applicant, to be paid by the Ottawa Electric Railway Company."

The Ottawa Electric Railway then applied for leave to appeal to the Supreme Court of Canada, and the Board of Railway Commissioners, stating that the parties had agreed the material facts and certain agreements dated the 8th and 21st August, 1896 (hereinafter referred to), granted leave to appeal to the Supreme Court upon the following questions, which in the opinion of the Board were questions of law :—

" Having regard to the facts above stated and the by-laws, agreements, decisions, and orders which are the schedules hereto—

1. Has the Electric Railway Company 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?"

On the 18th of May, 1931, the Supreme Court gave judgment on the appeal and answered the questions as follows: (1) Yes. (2) The whole. (3) Not answered. (4) Covered by answer to No. 2. The Court further directed that the Ottawa Electric Railway Company should pay the costs incurred by the respondent Railway Companies in that Court.

This is the order against which the appeal to His Majesty in Council is directed.

The material facts are as follows, and except where otherwise mentioned they were agreed between the parties.

The situation of the crossing in question is in the City of Ottawa, where Somerset Street (formerly Cedar Street) crosses approximately at right angles the respective tracks and rights of way of the respondent Railway Companies.

Prior to 1895 each of the two parallel rights of way now owned by the respondent Railway Companies, was crossed by a separate wooden bridge of different height, erected by each of the respondent Railway Companies or its predecessor at its own expense, in the approximate situation of the space now occupied by the tracks of the appellant company, and having a width of about twenty feet six inches.

Between those two wooden bridges there was a depression, and the two bridges did not lie end to end against each other, but were quite independent of each other.

The bridges had originally been built for the purpose of providing accommodation for the farmer or farmers across whose lands the lines of the predecessors of the respondent Railway Companies passed.

It was alleged that prior to 1895 the public had used the said bridges, but there is no agreed statement as to the date of the beginning or extent of such user.

In the year 1895, and for some years prior thereto, the appellant Company owned and operated a street railway system for the conveyance of passengers for hire in the City and in certain territory adjacent thereto.

On the 8th April, 1895, the appellant Company entered into an agreement with the Corporation of the City, whereby amongst other things the appellant Company was granted permission to lay tracks on the Richmond Road from Broad Street to Preston and in Preston from the Richmond Road to Cedar Street and on Cedar Street from Preston Street westerly to the City limits.

It was provided by the said agreement that nothing therein contained . . . should be construed to impose any liability on the Corporation for the construction, repair or maintenance of the bridges in Cedar Street crossing the respondent Railway Companies' lands or any bridge or bridges that might be constructed in place of the same, or should be construed as an assuming by the Corporation of the said bridges or any or either of them.

In August, 1896, the appellant Company entered into agreements with the respondent the Canadian Pacific Railway Company and the predecessor of the respondent the Canadian National Railways with respect to the crossing of their respective railways at the points where the two abovementioned wooden bridges were situated.

The agreement with the predecessor of the first respondent Railway Company was dated the 21st August, 1896, and related to the easterly bridge and the consideration therein mentioned was \$500.00.

The agreement with the second respondent Railway Company was dated the 8th of August, 1896, and related to the westerly bridge and the consideration therein mentioned was \$800.00.

Except for the abovementioned variations and the difference in the names of the parties the agreements are in identical terms, and it is therefore only necessary to refer in detail to the terms of one of the agreements.

The agreement, which was referred to for the purpose of the argument was that which was made between the appellant Company and the respondents, the Canadian Pacific Railway Company.

The terms thereof are as follows :—

“ MEMORANDUM OF AGREEMENT made and entered into in duplicate this eighth day of August A.D. 1896.

BETWEEN :

THE OTTAWA ELECTRIC RAILWAY COMPANY (hereinafter called “ The Electric Company ”), of the First Part ;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (hereinafter called “ The Railway Company ”), of the Second Part.

WHEREAS the public highway in the City of Ottawa, formerly known as Cedar Street and now known as Somerset Street, is and has been carried over the St. Lawrence and Ottawa Branch of the Railway Company's Line by means of an overhead bridge :

AND WHEREAS the Electric Company have been authorised by the Corporation of the City of Ottawa to construct a line of Street Railway upon Somerset Street or Cedar Street to the westerly limit of the City :

AND WHEREAS the Electric Company, in consideration of the premises and of the money payment hereinafter set forth, have agreed with the Railway Company to assume and take over the liability (if any) of the Railway Company for the maintenance and repair of the said bridge and the approaches thereto and to indemnify the said Railway Company against all liability therefor :

NOW THEREFORE THIS INDENTURE WITNESSETH that, in consideration of the premises and of the sum of eight hundred dollars (\$800·00), now paid by the Railway Company to the Electric Company, the receipt whereof is hereby acknowledged, the parties, for themselves, their successors and assigns, mutually covenant, promise and agree to and with each other in manner and form following :—

(1) The Electric Company shall and will from time to time, and at all times hereafter, indemnify and save harmless the Railway Company from and against all liability to maintain, alter, repair or reconstruct the said bridge or the approaches thereto, and also from and against all claims for damages of every nature or kind whatsoever, or for any penalty imposed upon the said Railway Company, by reason of any defect or default in the said bridge or crossing or the approaches thereto.

2. The Electric Company further agree that, if it should at any time become necessary to reconstruct the present bridge, or to alter same, plans of such alteration, or of the new bridge to be constructed, shall first be submitted to and approved of by the Railway Company.

(3) The Railway Company hereby assign and set over to the Electric Company all the rights of the Railway Company on or connected with the said bridge and the approaches thereto.

Provided that nothing herein contained shall be construed as divesting the Railway Company of the fee simple in the railway right of way under the said bridges and approaches.

PROVIDED FURTHER, that, in the event of the Railway Company's requiring at any time to widen the span of the said bridge, they shall be entitled to do so at their own proper costs, charges and expenses."

After the execution of the last-mentioned agreements the appellant Company removed the said wooden bridges, filled up the depression which existed between the said bridges and erected one bridge, which was constructed of concrete, with steel girders; a double track carrying the appellant Company's street railway was laid over the bridge, and provision was made for the accommodation of vehicular and passenger traffic. The height of the bridge was raised four or five feet to give greater clearance to the respondent Companies' railways.

Thereafter the bridge was used not only by the appellant Company for the operation of its cars on the said tracks, but also by vehicles and pedestrians

In the year 1906 the Corporation of the City applied to the Board of Railway Commissioners for an order directing the appellant Company and the respondent Companies to submit a plan and profile for widening the said bridge and the approaches thereto.

It was alleged, among other matters, that the appellant Company were running cars on the two tracks, across the bridge at short intervals of time, that there was no space left for vehicular traffic, thereby rendering it unsafe and dangerous to persons lawfully using the highway with horses and vehicles.

On the 13th of March, 1907, the Board of Railway Commissioners ordered that the appellant Company be directed to widen the said bridge by sixteen feet, according to plans to be submitted

to and approved by the Board: they further ordered that the Corporation of the City should pay to the appellant Company one-fourth of the expense involved in the said addition.

The work specified in the abovementioned order, which was numbered 3684, was carried out, with the result that sixteen feet additional accommodation for vehicular and pedestrian traffic was provided along the south side of the said bridge.

On the 14th July, 1927, the Corporation of the City made the application to the Board of Railway Commissioners, to which reference has already been made, and there ensued the abovementioned proceedings and orders which have led to this appeal.

The appeal was argued by learned counsel for all parties upon the assumption that the decision depended upon the true construction of the agreements of the 8th August, 1896, and the 21st of August, 1896, having regard to the facts hereinbefore mentioned.

The cases presented by the appellants and respondents respectively, may be summarised as follows:—

On behalf of the appellant Company it was argued that the bridges which were in existence at the date of the agreements were the subject thereof and such bridges having disappeared, the obligation of the appellant Company was at an end;

On the other hand, it was argued on behalf of the respondent Companies that the agreements on their true construction provided that in so far as there might at any time be liability upon the respondent Companies in respect of a bridge at the abovementioned place it was assumed by the appellant Company.

Great stress was laid by the learned counsel for the appellant Company on the words "the said bridge" in clause 1 of the agreement, which it was argued referred to the bridge which was in existence at the date of the agreement, and that the liability to maintain, alter, repair or reconstruct referred to that bridge only, and that inasmuch as the bridge, which existed at the time of the application to the Board of Railway Commissioners in 1927, was not the same as that which existed at the date of the agreement, but was an entirely different bridge, the appellant Company's liability was at an end.

There would be much force in this argument if the decision of the appeal rested only upon the abovementioned words in clause 1, but in order to arrive at the true construction of the agreement, and a correct conclusion as to the intention of the parties, all the terms of the agreement must be considered.

In this respect, the third clause, in their Lordships' opinion is an important and significant one: for it provides that the Railway Company, *i.e.*, the Canadian Pacific Railway Company assign and set over to the appellant Company all the rights of the Railway on or connected with the said bridge and the approaches thereto.

The first proviso to that clause is equally significant, for it was thereby provided that nothing contained in the agreement should be construed as divesting the Railway Company of the fee simple in the railway right of way under the said bridges and approaches.

These terms, in their Lordships' opinion, indicate that the intention of the parties was that, as far as the bridge or crossing and the approaches thereto were concerned, the appellant Company was to "stand in the shoes" of the respondent Railway Company, and that being the case, it was necessary to insert the above-mentioned proviso in order to safeguard the respondent Railway Company's right of way under the bridge or crossing.

This conclusion is supported by the further proviso that in the event of the respondent Railway Company requiring at any time to widen the span of the bridge they should be entitled so to do at their own proper costs, charges and expenses.

It was provided by the first clause that the appellant Company would from time to time and at all times indemnify the respondent Company against all liability to maintain, alter, repair or reconstruct the said bridge or crossing or the approaches thereto.

It was argued that the above liability could only refer to the bridge existing at the date of the agreement, and was not applicable to that which was in reality a new and different bridge. Their Lordships are of opinion however that the words are sufficient to cover the liability in respect of the construction of a new bridge in place of the then existing bridge.

It is not necessary for their Lordships to refer to all the arguments in respect of the construction of the agreement presented on the one side and the other; it is sufficient to say that some of the terms of the agreement can be said to support the appellant Company's contention, whereas other terms are clearly opposed to it.

Upon consideration of the recitals, and the terms of the operative part of the agreements and having regard to the material circumstances existing at the date thereof, their Lordships are of opinion that the answers, which were given by the Supreme Court of Canada to the questions submitted to that Court, were correct.

Several cases were cited to their Lordships, and it is only necessary to say that none of them cover the case now under consideration by reason of the difference between the facts and agreements of the cited cases and those of the present case.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed.

The appellant Company must pay to the respondent Companies the costs of this appeal.

In the Privy Council.

THE OTTAWA ELECTRIC RAILWAY COMPANY

v.

THE CANADIAN NATIONAL RAILWAYS AND
OTHERS.

DELIVERED BY SIR LANCELOT SANDERSON.

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