

IN THE MATTER OF THE GRAND TRUNK RAILWAY COMPANY; THE MUNICIPAL CORPORATION OF THE CITY OF KINGSTON; THE COUNTY OF FRONTENAC AND THE KINGSTON AND STORRINGTON AND KINGSTON MILLS CONSOLIDATED ROAD COMPANY. AND IN THE MATTER OF THE RAILWAY ACT, 51 VICTORIA, CHAPTER 59, CANADA.

1903
Nov. 23.

Railway Committee of the Privy Council—Construction of subway—County road and city street—Cost of construction—Ultra vires—Merits of order.

The Municipal Corporation of a city was one of the movers in an application to the Railway Committee of the Privy Council for an order authorizing the construction of a subway under a railway, by which one of the city streets was made to connect with a county road, the works being adjacent to a city street but not within the city limits.

Held, that the city was interested within the meaning of the term as used in the 188th section of *The Railway Act*, which provides that the Railway Committee might apportion the cost of such works as those in question between the railway company and "any person interested therein."

2. On an application to make an order of the Railway Committee of the Privy Council a rule of court, the court will not go into the merits of the order, or consider objections to the procedure followed by the Railway Committee.

Semble, that while the Railway Committee of the Privy Council has jurisdiction in such a case, to impose upon the party interested an obligation to bear part of the expense, it has no jurisdiction to compel a party or other than the railway company to execute the works.

MOTION to make three certain orders of the Railway Committee a rule of the Exchequer Court.

The orders were granted respectively on the 19th December, 1902, the 4th day of March, 1903, and the 16th day of June, 1903. Subjoined are copies thereof:—

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• ORDER OF 19TH DECEMBER, 1902.

In re
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et al.

Statement
 of Facts.

The Municipal Council of the County of Frontenac having applied to the Railway Committee of the Privy Council of Canada for an Order directing that the present highway crossing, at rail level over the Grand Trunk Railway at Kingston Junction, and known as the "Montreal Road Crossing," be done away with, and in lieu thereof, that the said highway be diverted and carried under the railway by a subway to be constructed as shown on plan and profile submitted and annexed thereto.

The said committee, having this day heard counsel for the Corporation of the County of Frontenac, the Corporation of the City of Kingston and the Grand Trunk Railway Company of Canada, respectively, and duly considered the evidence submitted on their behalf, is of opinion that the said crossing known as the "Montreal Road Crossing" is a dangerous one, and therefore deems it necessary in the interest of the public safety that the said crossing be done away with, and the highway at that point diverted so as to pass under the railway by a subway to be constructed at the place shown above on the said plan, and subject to the sanction of the Governor in Council, hereby orders and directs as follows:

1. That the said Montreal Road be diverted so as to pass under the Grand Trunk Railway by a subway to be constructed at the place shown on the said plan.

2. The Corporations of the County of Frontenac and the City of Kingston, respectively, shall at their own cost, procure all the land and other property other than land belonging to the Grand Trunk Railway Company of Canada required for the construction of the diversion of the said highway, as hereby directed and shown on the said plan, and shall also bear and pay all the expense incurred in connection with all damages aris-

ing or payable by reason of the said diverted highway, including the cost of the excavation required for the said subway to be constructed upon or across the right of way of the Grand Trunk Railway Company of Canada, and shall thereafter assume the control of and at all times maintain the said diverted highway in a suitable and proper condition for the purpose intended.

All costs and expenses hereby imposed upon and all damages payable by the said corporation shall be borne and paid by them in equal proportions. The excavation required for the construction of the said subway under the tracks of the Grand Trunk Railway Company of Canada shall be made by the railway company and the cost thereof paid by the said corporations on presentation of properly certified accounts showing the amount thereof.

3. The Grand Trunk Railway Company of Canada shall at its own cost construct the overhead bridge required for the purpose of carrying its lines of railway across the said subway, together with the necessary abutments and other works appertaining thereto, and shall thereafter maintain the same.

4. All the said work shall be done in accordance with plans to be submitted to and approved by the Government Chief Engineer of Railways and Canals.

(Sgd.) ANDW. G. BLAIR,

Chairman.

ORDER OF 4TH MARCH, 1903.

Whereas by an Order of the Railway Committee of the Privy Council of Canada, dated the 19th day of December, 1902, upon the application of the Corporation of the County of Frontenac, it was ordered and directed as follows :—

1. That the said Montreal Road be diverted so as to pass under the Grand Trunk Railway by a subway to be constructed at the place shown on the said plan.

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2. The Corporations of the County of Frontenac and the City of Kingston, respectively, shall at their own cost procure all the said land and other property other than land belonging to the Grand Trunk Railway Company of Canada required for the construction of the diversion of the said highway, as hereby directed and shown on the said plan, and shall also bear and pay all the expense incurred in connection with all damages arising or payable by reason of the said diverted highway, including the cost of the excavation required for the said subway to be constructed upon or across the right of way of the Grand Trunk Railway Company of Canada, and shall thereafter assume the control of and at all times maintain the said diverted highway in a suitable and proper condition for the purpose intended. All costs and expenses hereby imposed upon and all damages payable by the said Corporations shall be borne and paid by them in equal proportions. The excavation required for the construction of the said subway under the tracks of the Grand Trunk Railway Company of Canada shall be made by the railway company and the cost thereof paid by the said corporations on presentation of properly certified accounts showing the amount thereof.

3. The Grand Trunk Railway Company of Canada shall, at its own cost, construct the overhead bridge required for the purpose of carrying its lines of railway across the said subway together with the necessary abutments and other works appertaining thereto and shall thereafter maintain the same.

4. All the said work shall be done in accordance with plans to be submitted to and approved by the Government Chief Engineer of Railways and Canals.

And whereas the Corporation of the City of Kingston having applied for leave to reopen the said application of the Municipal Council of the Corpora-

tion of the County of Frontenac, and for a variation of the said order dated the 19th day of December, 1902, and the said Committee having this day heard counsel for the said Corporations of the City of Kingston, the County of Frontenac, the Kingston and Storrington and Kingston Mills Consolidated Road Company and the Grand Trunk Railway Company, respectively, and duly considered the evidence submitted on their behalf, hereby orders :

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1. That the cost of the drainage of the said subway shall be borne in equal proportions by the said Corporations of the City of Kingston and the County of Frontenac respectively.

2. That a conveyance of that portion of the said diverted road not within the limits of the right of way of the Grand Trunk Railway Company shall be made to the Kingston and Storrington and Kingston Mills Consolidated Road Company, who shall at its own cost properly macadamize, maintain and keep in repair the whole of the said diverted road including that portion in the said subway and the approaches thereto.

3. As soon as the said subway and diverted road are completed and ready for public travel, that portion of the highway known as the Montreal Road used for crossing the tracks of the Grand Trunk Railway, at rail level, shall be conveyed by the Kingston and Storrington and Kingston Mills Consolidated Road Company, or the proper owner thereof, to the Grand Trunk Railway Company of Canada, who shall thereafter be entitled to occupy the same for the purpose of their railway, and that the said order dated the 19th December, 1902, be and the same is hereby amended accordingly.

And the said committee, in pursuance of section 22 of the Railway Act, further orders and directs that the Corporation of the City of Kingston shall pay to the

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Corporation of the County of Frontenac, within ninety days from the date hereof, fifty dollars as counsel fee and fifty dollars being the additional expenses of the counsel and county councillors in all, one hundred dollars, and the Kingston and Storrington and Kingston Mills Consolidated Road Company, the sum of fifty dollars, the said sum being in payment of all costs, charges and expenses which the Corporation of the County of Frontenac and the Kingston and Storrington and Kingston Mills Consolidated Road Company have incurred in and about the said application of the Corporation of the City of Kingston, and the said Committee in other respects confirms its said order of the 19th of December, 1902.

(Sgd.) ANDW. G. BLAIR,

*Chairman.*

ORDER OF 16TH JUNE, 1903.

Whereas by two Orders of the Railway Committee of the Privy Council, dated the 19th day of December, 1902, and the 4th day of March, 1903, respectively, among other things, it was ordered that the present highway crossing of the Grand Trunk Railway at Kingston Junction be done away with and a subway constructed in lieu thereof, and that the Corporations of the County of Frontenac and the City of Kingston, respectively, shall at their own cost procure all the land and other property, other than land belonging to the Grand Trunk Railway Company of Canada, required for the construction of the diversion of the highway referred to in the said orders.

And whereas the Municipality of the County of Frontenac having applied for leave to vary the said orders, so as to provide that all the land and other property other than the land belonging to the Grand Trunk Railway Company of Canada required for the construction of the diversion of the said highway, as

directed by the said orders, shall be procured by the Grand Trunk Railway Company of Canada but at the expense, costs and charges of the Corporations of the County of Frontenac and the City of Kingston, and that all the work in connection with the said highway be done by the Grand Trunk Railway Company of Canada at the cost and expense of the said Corporations of the County of Frontenac and City of Kingston, and the said committee having this day duly considered the said application, hereby orders and directs, subject to the sanction of the Governor in Council, that all the land and other property other than land belonging to the Grand Trunk Railway Company of Canada required for the construction of the diversion of the said highway, as directed by the the orders dated the 19th of December, 1902, and the 4th of March, 1903, respectively, shall be procured by the Grand Trunk Railway Company of Canada but at the expense, costs and charges of the Corporations of the County of Frontenac and the City of Kingston, and that all the work in connection with said highway diversion be done by the Grand Trunk Railway Company of Canada at the cost and expense of the said Corporations of the County of Frontenac and City of Kingston, and the said Committee in other respects confirms its said orders of the 19th of December, 1902, and the 4th of March, 1903, and orders accordingly.

(Sgd.) ANDW. G. BLAIR,

*Chairman.*

June 1st, 1903.

An order *nisi* was obtained on the application of the Municipal Corporation of the County of Frontenac to make the two orders dated, respectively, the 19th of December, 1902, and 13th May, 1902, a rule of this court. On the return of the order *nisi*, which was

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supported by the Municipal Corporation of the County of Frontenac and by the Kingston and Storrington and Kingston Mills Consolidated Road Company, the City of Kingston opposed the application on the ground, *inter alia*, that the Railway Committee had no power under section 188 of *The Railway Act* to direct the city and county to construct the works. In view of this objection the applicants asked for, and obtained, an enlargement of this motion to allow them to apply to the Railway Committee for the amending order of the 16th June, 1903.

September 1st, 1903.

*D. M. McIntyre*, for the City of Kingston, showed cause.

Even with the amending order of June 16th, the application must fail, (1st) because the locus of the works ordered to be done is situated without the municipal limits of the City of Kingston; (2ndly) because it is an attempt by the Railway Committee of the Privy Council to enable a municipality to enlarge its power of taxing the ratepayers. The Dominion Parliament cannot legislate for this purpose, nor could it be seriously contended that the Railway Committee might enlarge the powers of the municipality in this regard. In the next place the procedure of the Railway Committee in granting the two last orders without the City of Kingston being represented at the hearing was irregular. (He cites *The Municipal Act* (R. S. O.) sec. 325; *Biggar's Municipal Manual* (1); *Grand Trunk Railway Company v. City of Toronto* (2); *Revised Statutes of Ontario*, chap. 193, sec. 145; *Madden v. Nelson and Port Simpson Railway Co.* (3)).

(1) 11 ed. pp. 321, 327.

(2) 32 Ont. R. 120.

(3) [1899] A. C. 626.



*J. McD. Mowat and Glyn Osler*, for the County of Frontenac and the Kingston and Storrington and Kingston Mills Consolidated Road Company, *contra*.

The court has no jurisdiction to review the order of the Railway Committee. The Dominion Parliament has a paramount right to legislate as to railways, and what the Railway Committee have done here is absolutely within their jurisdiction. (*City of Toronto v. Metropolitan Railway Co.* (1); *Canadian Pacific Railway Co. v. County of York* (2).

Again, the City of Kingston cannot be heard against the orders because the order of 19th December, 1902, was made on its application.

THE JUDGE OF THE EXCHEQUER COURT now (November 23rd, 1903) delivered judgment.

This was, when the motion first came before the court, an application on behalf of the Municipal Corporation of the Township of Frontenac that two certain orders of the Railway Committee of the Privy Council dated respectively the 19th day of December, 1902, and the 4th day of March, 1903, and approved by the Governor in Council on the 13th day of May, 1903, should be made a rule of this court.

On the return of the order *nisi* the application was supported by the County of Frontenac and by The Kingston and Storrington and Kingston Mills Consolidated Road Company, and opposed by the City of Kingston. Upon the argument that took place it appeared, among other things, that by the orders in question the City of Kingston and the County of Frontenac were directed to do certain things at their own cost, while the 187th section of *The Railway Act* gave the Railway Committee authority to direct that the railway company should execute

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(1) 31 Ont. R. 367.

(2) 27 Ont. R. 559.

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the works and take the measures that the Committee thought to be necessary, the Committee having by the 188th section authority to apportion the cost of such works and measures of protection between the railway company and any person interested therein as to the Committee might seem just and reasonable. It being, among other things, objected on behalf of the City of Kingston that the orders as made in this respect exceeded the jurisdiction of the Railway Committee, the application was, at the request of the applicants, enlarged to afford time to bring the matter again before the Railway Committee. Subsequently the two orders were amended by an order of the Railway Committee of the 16th of June, 1903, approved by the Governor in Council on the 25th of June, 1903. By the amending order the Grand Trunk Railway Company is directed to do the things that the City of Kingston and the County of Frontenac had been directed to do, but at the expense of the latter.

The present application is to make the three orders of the Railway Committee, mentioned, a rule of this court. To that application the City of Kingston maintains its opposition. The objections urged against the application are of three kinds or classes:—

1. Objections to the jurisdiction of the Railway Committee;
2. Objections to the procedure before the Railway Committee; and
3. Objections that go to the merits of the three several orders.

With objections that relate to the merits of the orders, or the procedure before the Railway Committee, the court has, I think, nothing to do. All that it has to be satisfied of is that the Railway Committee had jurisdiction to make the orders, as amended

The statute (*The Railway Act*, s. 188) provides, as has been stated, that the Railway Committee may

make such orders and give such directions respecting the works mentioned in section 187, and the execution thereof, and the apportionment of the costs thereof, and of any measures of protection, between the said company and any person interested therein, as appears to the Railway Committee just and reasonable; and the question of jurisdiction turns upon the proper answer to the question: Was the City of Kingston interested in the works that were directed to be done? If that question is answered in the affirmative the Railway Committee had jurisdiction to make the orders as amended. If it is answered in the negative then the Committee had no jurisdiction to impose upon the City of Kingston the obligation to bear any part of the costs of such works. I think the question should be answered in the affirmative. Although the works directed to be carried out, are not within the limits of the City of Kingston, they are in close proximity thereto and are intended to protect the public from the danger of crossing the Grand Trunk Railway by a level crossing on a road that within a short distance from the crossing connects with one of the city streets. In addition to this it appears that the City of Kingston was one of the movers in the application to the Railway Committee for an order to have the works in question undertaken. And it seems to me that one could not now with fairness say that the City of Kingston was not interested therein.

The three orders mentioned will be made a rule of this court.

*Order made accordingly.*

Solicitor for the County of Frontenac: *J. McD. Mowat.*

Solicitor for the Kingston, &c. Road Co.: *G. Osler.*

Solicitor for the City of Kingston: *D. M. McIntyre.*

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