IN THE MATTER OF THE APPLICATION OF THE METROPOLITAN RAILWAY COMPANY TO CONNECT ITS TRACKS WITH THE TRACKS OF THE CANADIAN PACIFIC RAILWAY COMPANY BY MEANS OF A SWITCH IN THE CITY OF TORONTO.

1900
April 10.

*Railways—Order of Railway Committee of Privy Council—Making same rule of Exchequer Court—Condition—Ex parte order—Practice.*

By section 29 of the Railways Act, 51 Vict. c. 17, the Exchequer Court is empowered to make an order of the Railway Committee of the Privy Council a rule of court; but where there are proceedings depending in another court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in granting the rule, may suspend its execution until further directions.

2. The court refused to make the order of the Railway Committee in this case a rule of court upon a mere *ex parte* application, and required that all parties interested in the matter should have notice of the same.

MOTION to make an order of the Railway Committee of the Privy Council of Canada a rule of court.

The following is a copy of the order of the Railway Committee:

"THE METROPOLITAN RAILWAY COMPANY, hereinafter called "the applicant," having applied to the Railway Committee of the Privy Council of Canada, for permission to connect its tracks with the tracks of the Canadian Pacific Railway Company hereinafter called the "C. P. R." by means of a switch in the City of Toronto, as shown on the plan submitted and filed under No. 8369."

"The said committee, having heard counsel for the applicant, the Corporation of the City of Toronto, the Town of North Toronto, the County of York and the C. P. R., respectively, and duly considered the evidence

1900

METROPOLITAN RAILWAY COMPANY.

Statement of Facts.

submitted, the counsel on behalf of the Corporation of the City of Toronto consenting thereto, hereby approves of the applicant connecting its tracks with the tracks of the C. P. R. by means of a switch in the City of Toronto, as shown on the plan hereunto annexed, in the following conditions, that is to say:

"That the connection is to be made at the east, not the west side of Yonge Street, at the place shown on the said plan hereunto annexed, the applicant to pay all the cost of the change of location shown on the last mentioned plan, up to two thousand five hundred dollars ($2,500). Should the cost exceed this amount, the excess to be borne by the applicant and the Corporation of the City of Toronto, so that the said city shall not be liable for more than one half of such excess."

"The point where the line of the applicant shall connect with the tracks of the C. P. R. to be on the property of the C. P. R., between its present northerly track and the southerly building north of said track.

"The applicant shall not run freight trains of more than three cars, exclusive of the motor, on Yonge Street, and shall not run freight trains at a greater speed than six miles an hour through the towns, incorporated villages, the unincorporated village of Thornhill, and that part of Yonge Street south of the town of North Toronto, or any other part of Yonge Street at a greater speed than fifteen miles an hour."

"The applicant shall not operate its railway by any other power than electricity on Yonge Street; and in its operation shall be subject to such agreements as may be, or have heretofore been, entered into between the County Council of York and the applicant."

"This order is subject to the reservation of the right by the said committee and the recognition of such right by the applicant to make such orders as may

1900

METRO-POLITAN RAILWAY COMPANY.

[Argument of Counsel.

hereafter be deemed expedient respecting the time and mode of running such freight cars and trains."

"Truck cars run in connection with a passenger car or cars, shall not be considered freight cars within the meaning of this order."

(Signed) ANDW. G. BLAIR,
*Chairman.*

Ottawa, November 23rd, 1899.

Certified true copy.

(Signed)

COLLINGWOOD SCHREIBER,
*Secretary, Railway Committee, P.C.*

December 14th, 1899.

*Glynn Osler* applied, on behalf of The Metropolitan Railway Company, for an *ex parte* order to make the above order of the Railway Committee a rule of court.

PER CURIAM.—The order ought not to go without previous notice to all parties interested in the matter that the application is to be made; so that they may have an opportunity of being heard. An order *nisi* may be issued.

April 10th, 1900.

An order *nisi* was applied for, and issued, returnable on April 14th, 1900.

*Glynn Osler* (with him *Walter Barwick Q.C.*) for the motion to make the order *nisi* absolute;

*H. L. Drayton* for the City of Toronto contra;

*W. H. Curle* appeared to watch the interests of the Canadian Pacific Railway Company.

*Mr. Osler.*—There is no doubt as to your lordship's jurisdiction to make the order asked for under section 17 of "The Railway Act." There was no doubt about the jurisdiction of the Railway Committee to make the order in the first instance, and your lordship will probably hold it not within your province to review any

1900

METROPOLITAN RAILWAY COMPANY.

Argument of Counsel.

question decided by the committee. Your lordship's duty with respect to the matter is the very simple one of confirming the order of the committee. I think my learned friend will not be able to show any sufficient ground under the statute why your lordship should not make an absolute order at the present time.

[*Mr. Drayton.*—I think it is very doubtful if your lordship should assume jurisdiction when the whole matter before you is open in proceedings before the High Court of Ontario at the present time.]

*Mr. Osler.*—There is no doubt about the jurisdiction of the Railway Committee to make this order. (Cites sections 11 and 173 of The Railway Act as amended by 55-56 Victoria, chapter 27, section 1.) It is true that when the Metropolitan Railway Company attempted to connect their tracks with the tracks of the Canadian Pacific Railway Company, the City of Toronto instituted an action, and upon application to Mr. Justice Falconbridge, obtained from him an injunction to restrain the crossing until the Metropolitan Railway Company had secured what he considered to be the necessary consent of the City of Toronto. It is also true that we have yet to obtain that consent before we can make our physical crossing, but that is no reason why the order of the Railway Committee of the Privy Council should not be made a rule of the Exchequer Court.

*Mr. Drayton.*—With reference to the jurisdiction of the Railway Committee we only admit it to this extent —that the Metropolitan Company could not cross without first having obtained the order of such Committee. But we say that it was necessary for the Metropolitan Company before they attempted to cross to have obtained something else, viz., the consent of the City of Toronto. If the order of this court were so framed as to make it necessary for the Metropolitan Company

1900

METRO-POLITAN RAILWAY COMPANY.

Argument of Counsel.

to obtain this consent before acting on the order, it would be satisfactory to us. If your lordship would be pleased to direct a clause to be inserted in the formal order to the effect that no steps may be taken under the order of the Privy Council until the consent of the City of Toronto is obtained, we would have no objection then to the order.

[*Mr. Osler.*—We have the order of the Privy Council, but in the opinion of Mr. Justice Falconbridge we are not entitled to act on it until we have obtained the consent of the City of Toronto. That point will have to be ultimately settled in the proceedings in the High Court, but surely that is no reason why the order of the Privy Council should not be made a rule of this court in the meanwhile.]

*Mr. Drayton.*—I submit that under the Dominion Railway Act it is necessary for a railway to obtain the consent of the Municipal Council before the Railway Committee of the Privy Council can authorize a crossing to be made. The exercise of the jurisdiction of the Railway Committee depends upon this condition being fulfilled. (Cites *In re* Canadian Pacific Railway Co. (1). Then, the order of the Railway Committee assumes to alter or vary documents under seal between the municipality and the Metropolitan Railway Company. What the Privy Council really does in this connection is to give one municipality the right to make new regulations governing another municipality. Then again, the deputation from the City of Toronto had no right to make the consent which was embodied in the order of the Privy Council. They acted in so doing in excess of their authority. Another objection is, as I before pointed out, with reference to this court exercising jurisdiction when another court of concurrent jurisdiction is seized of the matter. (Cites *The Queen*

(1) 25 Ont. A. R. 65.

1900

METROPOLITAN RAILWAY COMPANY.

Reasons for Judgment.

v. *Fisher* (1); *Wharton's Law Lexicon* (2); *Brooks* v. *Delaplain* (3); *The Queen* v. *Hurteau* (4); *Hawes* v. *Orr* (5).

*Mr. Osler* replied: The city could not withdraw the authority of the deputation, especially after its consent had been communicated to the Railway Committee.

THE JUDGE OF THE EXCHEQUER COURT now (April 17th, 1900) delivered judgment.

The order of the Honourable the Railway Committee of the Privy Council, dated the 23rd day of November, 1899, set out in the proceedings herein, is made a rule or order of this court.

But until further direction is given no step is to be taken to enforce such rule or order by the authority of this court.

This condition is attached to the order at present, because it appears that in a cause instituted in the High Court of Justice in Ontario, wherein the Corporation of the City of Toronto are plaintiffs and the Metropolitan Railway Company are defendants, proceedings are now depending in which the rights of the said parties under the said order of the Railway Committee may come in question.

*Judgment accordingly.*

---

(1) 2 Ex. C. R. 371.
(2) 8th ed. vbo. "Concurrent Jurisdiction."
(3) 1 Myld. Ch. Dec. 351.
(4) Audette's Practice, p. 84.
(5) 10 Ky. 431.