Privy Council Appeal No. 37 of 1934

The City of Winnipeg and others - - - - - *Appellants*

v.

Winnipeg Electric Company - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 4TH NOVEMBER 1935

Present at the Hearing:
LORD BLANESBURGH.
LORD MACMILLAN.
LORD WRIGHT.
[*Delivered by* LORD BLANESBURGH.]

In this appeal presented by the adjoining Cities of Winnipeg and St. Boniface in the Province of Manitoba, their Lordships have been engaged in investigating the validity or otherwise of an order made on the 31st July, 1931, by the Municipal and Public Utility Board of the Province.

By that order the respondent company, at the instance of the two Cities, was in effect held liable to make good to them in the amounts provided by each the whole of the expense of laying double lines of street railways upon two local bridges then in course of construction and now completed in the circumstances later to be stated and a half of the expense of laying these lines upon the approaches to one of the new bridges. The sum involved, not so far definitely ascertained, is estimated to be about $60,000.

Of the two bridges in question, one of them known as the Norwood Bridge is thrown across the Red River, in a reach where that river constitutes the boundary between the two Cities, so that the southern half of the bridge is within the area of St. Boniface, and the northern half within that of Winnipeg. The second bridge known as the Main Street Bridge spanning the Assiniboine River is situate entirely within the City of Winnipeg. The two bridges, although not in precisely the same situations, and as to the Norwood Bridge not in the same ownership, were in the circumstances to be stated later built to replace

corresponding bridges over the two rivers which had stood for years. Upon these earlier bridges the street rails of the respondent company had been laid and they were until 1929 in use by that company as part of its street railway undertaking.

The order of the Utility Board was upheld by the Court of Appeal of Manitoba but was declared invalid and set aside by the Supreme Court of Canada in an order made on the 26th January, 1934. The present is an appeal from that order.

The case was elaborately and carefully argued before their Lordships' Board. As the discussion proceeded, it became clear that intricate questions, some of them of Provincial, possibly of Dominion importance, were involved in the dispute. These matters had not been fully explored before the Utility Board, nor were they, all of them, dealt with or pronounced upon either by the Court of Appeal of the Province or by the Supreme Court of Canada. Both parties before their Lordships seemed gradually to become conscious that the full strength of their respective contentions had not so far been fully brought out and that the record did not contain all the material upon which a final decision by their Lordships could safely be asked for by either of them. Accordingly both joined in a request that their Lordships, without expressing any opinion of their own upon the merits or otherwise of the appeal, should humbly advise His Majesty to dismiss it with an intimation that the order of dismissal was not to preclude either of the parties from raising in any fresh proceedings and with whatever result any contentions with reference to the dispute between them that either of them might think fit.

Their Lordships have entertained this suggestion favourably. In the circumstances the course proposed seems to them to be only less attractive than—and fortunately it does not preclude—an amicable settlement of all matters in difference. They will accordingly embody the suggestion in the advice which they propose humbly to tender, confining themselves now to such a statement of the position as will leave the parties in no doubt as to the result of that advice should His Majesty be pleased to accept it.

The respondent company is the successor in interest of the Winnipeg Electric Street Railway Company—a company incorporated in the year 1892 by a Private Act of the Legislature of Manitoba. The respondent company has been clothed by statute with all the rights, privileges and benefits enjoyed by its predecessor and as successor in interest is subject to the obligations imposed by the franchise granted by each of the Cities to the Street Railway Company. The authorised utilities of the respondent company include the provision of electric light and power and gas.

It is, however, only its financial position in relation to these utilities separately or taken in conjunction with its street railway undertaking that may in later proceedings be thought relevant. The dispute itself is concerned only with the powers, obligations and activities of the respondent company as a street railway undertaker.

With reference to the franchises granted by bye-laws of the Cities of Winnipeg and St. Boniface respectively it need only here be said that the bye-law of Winnipeg was passed in the year 1892: it was for a term of 30 years, almost immediately extended to 40 years. The bye-law of St. Boniface was passed in the year 1893: it too was for a term of 30 years. At the date of this franchise the old Norwood Bridge had not been constructed. That bridge it would seem—and the circumstance may prove to be one of those to which sufficient attention has not so far been paid—was never, in any part of its length, within either franchise. Each bye-law contained a provision entitling the City concerned at the termination of the franchise to take over on prescribed terms the system thereby authorised.

The Winnipeg bye-law, and the agreement with reference to the old Norwood Bridge presently to be referred to, contained a provision upon which the respondent company has strongly relied. The clause in the Winnipeg bye-law is as follows:

> "12. The city shall have the right to take up the streets traversed by the rails either for the purpose of altering the grades thereof constructing or repairing drains or for laying down or repairing water or gas pipes or for all other purposes now or hereafter within the province and privileges of the city, the same being replaced by and at the expense of the city without being liable for any compensation or damage that may be occasioned to the working of the railway or to the works connected therewith . . . ."

The privileges and duties of the respondent company in relation to the old Norwood Bridge were created by an agreement made on the 10th May, 1904, by the Electric Street Tramway Company with the Norwood Improvement Company, a company which, authorised by statute, had constructed the bridge and was maintaining it as a toll bridge. The agreement granted to the Street Railway Company authority to lay an electric street railway track upon the bridge and the approaches thereto and to operate passenger cars upon the tracks for a period of eight years. The agreement, as has been said, contained a clause, similar to that just cited from the Winnipeg bye-law. The company laid upon the bridge and the approaches a single track—the statement in the factum of Winnipeg (Record p. 120, line 36) that it laid a double track seems to be a mistake not elsewhere repeated —and thereafter its street railway over the Norwood Bridge, and over the Main Street Bridge, connected the St. Boniface system with that of Winnipeg and provided a continuous service at one fare between the two cities.

On the 24th March, 1909, the City of St. Boniface purchased the old Norwood Bridge from the Improvement Company and by the agreement of purchase to which the Electric Street Railway Company was a party that company accepted the City of St. Boniface in substitution for the Improvement Company in all agreements with it and the City took its place in respect of all duties owed by the Improvement Company to the Street Railway Company.

The subsequent history so far as it need be alluded to now can be shortly stated. The safety of the old Norwood Bridge was first in doubt. In 1926 the Street Railway Company put in some stringers to strengthen it for its own cars; but by 1929 the condition of both bridges had become so serious that the city consulting engineers, after examination, recommended that all street cars, trade and horse drawn vehicles should be stopped from using them.

It has not apparently been so far seriously suggested that the instability of the bridges or of either of them for motor or horse drawn vehicles was in any way due to the presence there of the tracks of the street railway company or to any default on its part and in this connection, as in others, the respondent company now refers to the charters of each city to show how the burden of repairing bridges within its area is thereby thrown upon the municipality.

The result of the engineering reports was that the respondent company's service over the bridges was discontinued, and by arrangement with the city councils of both cities, a substituted service was organised, the Provencher Avenue Bridge further down the Red River being utilized for the passage of the street cars to and from Winnipeg. This substituted service was temporary in the sense that permission to render it was given only during the pleasure of the councils and also in the sense that it was hoped that at some time the former service over new or stronger bridges would be restored. But there was no immediate or even early prospect that that hope would be realized.

For a year the substituted service was maintained, no step being taken to strengthen the bridges. In 1930 negotiations between the two cities took place with a view to the construction of new and stronger bridges across the Red River on or near the site of the old Norwood Bridge and across the Assiniboine River at Main Street, with the substitution of two lines of street railway track across both bridges for the single track by means of which the service had formerly been maintained. Both cities hoped to receive for the scheme contributions from Dominion and Provincial Government sources, out of the funds which were being provided for unemployment relief. In the end towards the $620,000

required for the new Norwood Bridge and the $480,000 for the new Main Street Bridge, 60 per cent. of the entire cost of the one bridge and 50 per cent. of the cost of the other was so provided. Efforts were then made to obtain from the respondent company a contribution towards the balance of the cost of both bridges: but no arrangement was reached. The bridges were completed without any agreement come to. It is by a happy arrangement, made, however, entirely without prejudice to the question still at issue that the street cars of the company are now running over them.

The position taken up by the respondent company was clearly stated by Mr. Tilley. It is, that it is not bound by any by-law or agreement to make any part of the payments ordered by the Utility Board, and that so far as the new Norwood Bridge at least is concerned it cannot be required even to use it, except if at all as an extension of each franchise and by a procedure thereby prescribed and not so far adopted: and that it is not ready or willing otherwise than without prejudice to use either bridge and will not do so, save under legal compulsion, if the claim of the cities in these proceedings is not either negatived or withdrawn.

The new bridges are stronger than the old: they are constructed to carry cars twice the weight of the respondent company's cars, and there are as already indicated two tracks of rails on each instead of one, as before. It has not been suggested that these changes were called for by present requirements: and it is, accordingly, one grievance of the respondent company in relation to the order of the Utility Board that, to the extent at least of the excess, it should be called upon to pay for expenditure from which its successors, probably the cities themselves, alone will benefit.

The Norwood Bridge besides being of a stronger construction is in a different position from the old Norwood Bridge. Whether it be in the joint ownership of both cities for its whole length, or in the sole ownership of each for half of its length, its ownership is different from that of the old bridge, and it is the contention of the respondent company that the provisions of the agreement with reference to that bridge did not survive its destruction and that with reference to the new bridge there is not so far existent any franchise or contract applicable to it or to any part of it.

As no agreement with the respondent company could be reached the cities applied to the Utility Board for an order that the company should contribute to the cost of constructing both bridges.

And here it may be convenient to refer to the powers of the Board in such a matter. Those to which in the proceedings below reference was mainly made are to be found in the following provisions of Section 119 in Part 3 of its

enabling Act, the Manitoba Municipal and Public Utilities Board Act, 16 Geo. 5, ch. 33:

> "119. The Board shall have power by order in writing and notice to and hearing of the parties interested to require every owner of a public utility
>
> "(*a*) To comply with the laws of this Province and any municipal by-law affecting the public utility or its owner and to conform to the duties imposed thereby or by the provisions or its own charter or by any agreement with any municipality or other owner;
>
> "(*c*) to establish, construct, maintain and operate any reasonable extension of its existing facilities when in the judgment of the Board such extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance of the same and when the financial condition of the owner reasonably warrants the original expenditure required in making and operating such extension."

At their Lordships' Board but at no earlier stage Section 114 became very prominent:

> "114. Subject to the terms of any contract between any owner of a public utility and any municipality and of the franchise or rights of the owner the Board may define or prescribe the terms and conditions upon which the owner shall or may use for any of the purposes of the public utility any highway or any public bridge or subway constructed or to be constructed by the municipality or two or more municipalities and may enforce compliance with such terms and conditions."

It may be added that the decisions and orders of the Board are by Section 53 made final, subject only to the right of appeal given by Section 57. By that section an appeal lies to the Court of Appeal from any final order or decision of the Board upon :—

> "(*b*) any point of law;
>
> "(*c*) any fact expressly found by the Board relating to a matter arising under Part III."

Section 113 too may be relevant also by way of contrast to Section 114, but their Lordships need not further refer to it here.

Upon the application so made to it the Utility Board on the 1st June, 1931, held that the respondent company was not liable to contribute to the construction cost of the bridges, but that a principle already adopted by the Board in the cases of the Arlington, Provencher and Maryland Bridges might again be applied. There the cost of construction being borne by the municipal authorities, the proportionate cost for street car track and pavement was ordered to be repaid by the street railway company. The application of the cities was accordingly dismissed, with liberty to renew it if no agreement could be reached with reference to those expenses for which, as had been indicated, the company might be made liable. In accordance with the liberty reserved this application was made on the 30th June, 1931, and upon

that application the order of the Board of the 31st July, 1931, now in question and the effect of which has already been summarised was made.

There has been much discussion as to the true basis of that order. The Court of Appeal approved it on the ground that it was really based upon and justified by section 119 (*a*) of the Board's Act. The Supreme Court were also of opinion that it was based upon that subsection, but, differing in this respect from the Court of Appeal, found neither there, nor in any other provision of the statute brought to their notice any justification for the order. The cities, at their Lordships' Bar, while not rejecting the view of the Court of Appeal, were inclined to insist that the order was based on section 119 (*c*), the Board on the first application having, as it was contended, in effect reached the conclusion of fact that the company was financially in a position to bear the strain now placed upon it, although financially unequal to the burden of bearing any part of the cost of constructing the bridges or either of them.

Their Lordships express no conclusion upon this or any other point, but they think it may well be a question whether the Utility Board in making the order went further than to follow the so-called precedents to which they had referred in their first judgment, without before their second pronouncement making any further inquiry into the question whether the orders there made were legally justified or whether they were really applicable to a case like the present in its special circumstance arising from the position here taken up by the respondent company in relation to both bridges.

But as the argument before their Lordships proceeded it became clear that the appellants desired strongly to rely on section 114 as justifying the order of the Utility Board, and they were then confronted with the difficulty that no reliance had been placed on that section as justifying any order for payment—it had been merely mentioned by the Utility Board in another connection—either by the Utility Board, the Court of Appeal or the Supreme Court; that the section does not seem to have been referred to in either of these Courts and is not alluded to in the factum of either party, presented to the Supreme Court: and it was on an intimation by their Lordships of their reluctance to express any conclusion on a section of such importance unassisted by any judicial opinion from Canada that the request was made to them as already stated. Doubtless the respondent company joined in it by reason of the fact that other questions not discussed in Canada had emerged on the appeal. What, for instance, was the true financial position of the respondent company in relation to the expenditure sought to be imposed upon it: again: if the agreement in relation to the old Norwood Bridge applied to the new bridge was not the position of the parties

as regards that bridge no less than the Main Street Bridge regulated by provisions in terms of clause 12 of the Winnipeg by-law, while if the Norwood Bridge agreement was at an end, could any payment in respect of the new bridge be demanded, until, if at all, by the procedure applicable, and on the conditions appropriate thereto, the franchise from each city had been extended to cover the new bridge. In addition the respondent company, it seemed for the first time, was anxious to stress as sections in its favour the responsibility for the repair of bridges within their boundaries imposed upon both cities by the provisions of their respective charters of incorporation already referred to. All of which matters had to be considered in connection with a truth which lay at the root of the order of the Utility Board that unless there was jurisdiction in that Board to require the respondent company to operate its system over both bridges there was no justification for an order requiring it to bear any expenditure upon either.

Their Lordships intending that thereby these and any other questions in relation to the dispute are to be left open will as requested recommend that the order of the Supreme Court be not now interfered with except as to one matter with reference to which they were specially invited to deal. That is the matter of costs.

The Utility Board, in accordance with their usual practice, made the order asked for by the cities without costs: the Court of Appeal dismissed the company's appeal therefrom also without costs. The Supreme Court, allowing the company's appeal, directed the cities to pay the company's costs before all three tribunals. Now their Lordships will propose that the appeal from the order of the Supreme Court be dismissed and in such circumstances it is not their practice to suggest any variation in an order so entirely within the discretion of the Supreme Court as one in respect of costs of proceedings before it. Nor would they venture to do so in the present case, if their recommendation to His Majesty were final, as was the order of the Supreme Court intended to be at the time it was made. But it is now asked by both parties that that order shall be, so far as it rests with them, provisional only. In other words it is their wish that the litigation between them so far shall be treated as exploratory only. In these circumstances it is, as their Lordships think, within the spirit of that desire, that each of them should so far bear their own costs of the litigation. Their Lordships in giving effect to that view in their advice feel that they are acting as the Supreme Court would itself have done in the now present circumstances.

Their Lordships will accordingly humbly advise His Majesty that this appeal be dismissed and that the order appealed from do stand except as to costs, the reference thereto being treated as deleted therefrom: but that His

Majesty's order should, in accordance with the request both of the appellants and respondents, be expressed to be without prejudice to any further application which the cities or either of them, or to any application which the respondent company may make to the Municipal and Public Utility Board of Manitoba or to the Court with regard to the running of street car services by the company across the Norwood and Main Street bridges or either of them and the approaches thereto or the terms or conditions upon which the company shall or may use the bridges or either of them or the approaches for the purpose of their street railway utility and without prejudice on any such application to any contention by the cities or either of them that the cities were not under any contractual obligation to provide any street car tracks or other facilities for street car services upon the bridges or either of them or the approaches thereto and without prejudice to any submissions in law or fact which the respondent company may raise on any such application, including a submission that there is no jurisdiction in law or in fact to make an order against it under section 119 (*c*) or otherwise.

There will be no costs of this appeal.

(32185—3A Wt. 8031—11 100 11/35 P. St. G. 338

In the Privy Council.

THE CITY OF WINNIPEG AND OTHERS

v.

WINNIPEG ELECTRIC COMPANY

DELIVERED BY LORD BLANESBURGH

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1935