

1905  
 \*Jan. 20. THE MONTREAL STREET RAIL- } APPELLANTS;  
 WAY COMPANY..... }

AND

THE MONTREAL TERMINAL }  
 RAILWAY COMPANY AND THE } RESPONDENTS.  
 BOARD OF RAILWAY COMMIS-  
 SIONERS FOR CANADA .....

ON APPEAL FROM THE BOARD OF RAILWAY COMMIS-  
 SIONERS FOR CANADA.

*Appeal—Special leave—"Railway Act, 1903"—Order of Board of Rail-  
 way Commissioners—Use of public streets—Removal of tracks—Con-  
 stitutional law—Property and civil rights—Jurisdiction of board—  
 Imposing terms.*

Where the judge entertained doubt as to the jurisdiction of the  
 Board of Railway Commissioners for Canada to make the order  
 complained of and the questions raised were of public import-  
 ance, special leave for an appeal was granted, on terms, under the  
 provisions of sec. 44 (3) of "The Railway Act, 1903."

PETITION for leave to appeal from an order of the  
 Board of Railway Commissioners for Canada made on  
 the 27th of December, 1904, directing the removal of  
 the rails of the Montreal Street Railway Company on  
 Pius IX. avenue in the Town of Maisonneuve.

The petitioners are incorporated for the purpose of  
 constructing and operating an electric passenger rail-  
 way on the Island of Montreal and given the necessary  
 powers for that purpose under the several acts of the  
 legislature of the Province of Quebec and, in the exer-  
 cise of their statutory powers, they laid a double line of  
 rails along Pius IX. avenue in the Town of Maisonneuve,  
 about the 15th of October, 1904. The respondent com-  
 pany are incorporated under a provincial statute and

\*PRESENT :—His Lordship Mr. Justice Sedgewick (in chambers).

declared to be a work for the general advantage of Canada by enactments of Parliament, giving them powers; also, to construct and operate an electric railway on the Island of Montreal. They are constructing a railway through the Town of Maisonneuve which will intersect Pius IX. avenue and on 27th December, 1904, they obtained an order from the Board of Railway Commissioners for Canada directing the petitioners, at their own cost and expense, within forty-eight hours after service of such order upon them, to remove their double line of rails on Pius IX. avenue at the intersection of Ernest street and restore the roadway as nearly as possible to its original condition, the costs of the application of the respondents for the order in question to be paid by the appellants. Leave to appeal is sought under the provisions of sec. 44 (3) of the "Railway Act, 1903."

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*Campbell K.C.* for the petition. The board had no jurisdiction to make the order, because the respondent company had no power to construct the line of railway as they proposed to do at the place in question, while the petitioners had such power and the line they had constructed was their property. The order could not be carried out without interfering with property and civil rights which are subject exclusively to provincial jurisdiction. The Railway Act of 1903 does not and cannot authorise the board to allow Dominion railways to use the streets belonging to municipalities nor to interfere with property and civil rights in a province. Section seven refers only to connections and crossings and does not bring provincial railways within the purview of the Act as regards the removal and alteration of their physical condition. If it is to be so construed, it is *ultra vires* to that extent.

These are all matters of great public importance and should entitle us to leave for an appeal.

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*A. G. Blair* for the Board of Railway Commissioners.

We do not oppose the granting of leave for an appeal although we consider that the order in question was necessary to enforce two former orders made in June and September, 1904, in respect to the construction of the Montreal Terminal Railway and was perfectly justified under the circumstances and by sub-section (a) of section 23 of the Railway Act, 1903.

*Dandurand K.C.* and *Belcourt K.C.* for the Montreal Terminal Railway Co. We oppose the petition on the ground that the order was within the jurisdiction of the board under sec. 23 (a) of the Act and necessary for the enforcement of the former orders made in June and September, which are clearly within the jurisdiction of the board. The order does not affect the status of the petitioners and only affects their property to the extent necessary for our crossing. This is a matter clearly within the jurisdiction of the board.

The petitioners have merely laid a few rails, without connections at either end with any part of their system; their sole purpose is to obstruct the construction of our line and if leave for the appeal should be granted there should be terms imposed to prevent delays and to allow us to go on with our construction.

SEDGEWICK J. (Oral).—I have read the petition and the clauses of the "Railway Act, 1903," which affect the case and it appears to me, on the face of the proceedings, that there is grave doubt as to the jurisdiction of the Board of Railway Commissioners to make the order complained of and whether or not it amounts to an interference with a matter falling exclusively within the jurisdiction of the Superior Court for the District of Montreal. It is possible that the proper course would have been to proceed before the provin-

cial court by way of injunction or some other appropriate action. I think the questions raised of sufficient public importance to call for a decision of this court as to the conflict of jurisdiction and the construction of the provisions of the statute constituting the Board of Railway Commissioners and defining their powers. I therefore grant leave for the appeal as prayed for, on the understanding that the case shall be inscribed for hearing at the next session of the Supreme Court of Canada. I also consider it proper, in the exercise of my discretion, to impose terms, (all parties assenting thereto), and to order that, while the appeal is pending, the Montreal Terminal Railway Company may, at any time, remove the rails of the Montreal Street Railway Company so far as may be necessary for the construction of their railway across Pius IX. avenue, in the Town of Maisonneuve, subject to replacement should the final decision of the appeal require it.

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The costs of the present application will be costs in the cause.

*Petition granted.*

Solicitors for the petitioners: *Campbell, Meredith,  
Macpherson & Hague.*