

THE ATTORNEY GENERAL OF }
 QUEBEC AND THE MINISTER } APPELLANTS:
 OF ROADS FOR QUEBEC }

1965
 *May 20
 June 24

AND

CANADIAN PACIFIC RAILWAY }
 COMPANY } RESPONDENT.

APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS
 FOR CANADA

Railways—Inadequate railway subway—Application by municipality to enlarge—Proposal by company that highway be diverted to pass under existing bridge—Whether Board of Transport has power to authorize grant from Railway Grade Crossing Fund—Railway Act, R.S.C. 1952, c. 234, s. 265(1)(b).

The County of P applied to the Board of Transport Commissioners for Canada for an order authorizing the enlargement of a railway subway on the ground that it was inadequate for highway traffic. The railway company submitted that the subway should be closed and the highway diverted to pass under a nearby existing railway bridge. The Province, having taken over the responsibility for the highway, agreed to this. The Board authorized the diversion of the highway and held that it had no jurisdiction to authorize a contribution to the project from the Railway Grade Crossing Fund. The Province was assessed the full cost with the exception of \$5,000 offered by the railway company. The Province was granted leave to appeal to this Court.

Held: The appeal should be allowed.

The existing subway facilities had become inadequate. The proposed diversion was more efficient and less costly than it would have been to enlarge the existing subway. This diversion was an improvement of an existing grade separation within the meaning of s. 265(1)(b) of the *Railway Act*, and consequently, the Board was empowered to authorize a grant from the railway Grade Crossing Fund towards the cost of the work.

Chemins de fer—Viaduc insuffisant—Requête par la municipalité pour élargir—Contre-proposition par la compagnie que la voie routière soit détournée pour passer sous un pont existant—La Commission des Transports du Canada a-t-elle le pouvoir d'autoriser un octroi de la Caisse des passages à niveau de chemins de fer—Loi sur les chemins de fer, S.R.C. 1952, c.234, art. 265(1)(b).

Le comté de P fit une requête auprès de la Commission des Transports du Canada pour obtenir l'autorisation d'élargir un viaduc pour la raison qu'il ne répondait plus aux besoins de la circulation routière. La compagnie de chemin de fer proposa que le viaduc soit fermé et que la voie routière soit détournée pour passer sous un pont de chemin de

*PRESENT: Taschereau C.J. and Abbott, Judson, Hall and Spence JJ.

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fer qui se trouvait non loin. La province, qui avait assumé la responsabilité pour la voie routière, donna son consentement. La Commission autorisa le détournement de la voie routière et adjugea qu'elle n'avait pas la juridiction pour autoriser une contribution à ce projet de la part de la Caisse des passages à niveau de chemins de fer. La province a donc été cotisée pour le plein montant des frais à l'exception de \$5,000 qui avaient été offerts par la compagnie de chemins de fer. La province a obtenu la permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu.

Le viaduc ne répondait plus aux besoins de la circulation. Le détournement proposé était plus efficace et moins dispendieux que si on élargissait le viaduc. Ce détournement était une amélioration de croisements de voies superposées en existence dans le sens de l'art. 265(1)(b) de la *Loi sur les chemins de fer*, et en conséquence, la Commission avait le pouvoir d'autoriser une contribution à ce projet de la part de la Caisse des passages à niveau de chemins de fer.

APPEL d'une décision de la Commission des Transports du Canada. Appel maintenu.

APPEAL from an order of the Board of Transport Commissioners for Canada. Appeal allowed.

Jean Turgeon, Q.C., for the appellants.

K. D. M. Spence, Q.C., for the respondent.

M. M. Goldberg, for the Board.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal by leave, from Order No. 114705 of the Board of Transport Commissioners dated June 12, 1964, apportioning the cost of construction of a deviation of a highway and the closing of a subway under the tracks of the respondent. *Inter alia*, the said order had the effect of dismissing the application of the appellant, the Minister of Roads of the Province of Quebec, for a contribution from the Railway Grade Crossing Fund under s. 265 of the *Railway Act*, R.S.C. 1952, c. 234, towards the cost of the said work. No appeal has been taken against that part of the said order directing the respondent to pay \$5,000 towards the cost of the said work and to close the subway at its own expense.

By Order No. 33284 dated January 8, 1923, upon application of the Village of Pont Rouge in the County of Portneuf, Province of Quebec, the Board of Railway

Commissioners for Canada ordered the railway company to construct a subway under its tracks to eliminate a level highway crossing in the said Village.

In 1958 the County of Portneuf, finding the subway inadequate for highway traffic, applied to the Board of Transport Commissioners for an order authorizing the enlargement of the subway. The railway company submitted that instead of the subway being enlarged it should be closed and the highway diverted some five hundred feet, to pass under a nearby railway bridge which crossed the Jacques Cartier river.

The Department of Roads of the Province, having taken over from the County the responsibility for the highway, agreed to this proposal, and asked the Board to authorize the project. The Department estimated the cost of the diversion at \$113,190, and it asked that this be paid 50 per cent by the Railway Grade Crossing Fund, 15 per cent by Canadian Pacific Railway Company and the remainder by the Department of Roads, with costs of maintenance of the new road to be the responsibility of the Department.

By Order No. 111583 dated June 28, 1963, the Board authorized the Department of Roads to construct and maintain the said deviation of the highway, and reserved the question of allocation of cost for further consideration and order of the Board.

In subsequent correspondence between the parties and the Board upon the question of allocation of cost the railway company stated its willingness to contribute the full value of the benefit that it would receive from the project. This benefit consisted of relief from the future cost of maintenance of the subway that was to be closed, which the railway company estimated at a capitalized amount of \$5,000. In this correspondence the Board also questioned its own authority under s. 265 of the *Railway Act* to authorize a contribution to the project from the Railway Grade Crossing Fund, but as this point did not involve the railway company the respondent made no submissions thereon.

The matter of apportionment of the cost of the project was set down for public hearing and heard by the Board in Quebec City on May 5, 1964.

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On June 12, 1964, concurrently with Order No. 114705 which is the subject of this appeal, Deputy Chief Commissioner Dumontier delivered reasons for judgment concurred in by Commissioner Woodard. After an examination of the relevant facts, the nature of the project, the provisions of s. 265 and the arguments of the parties, he held, (1) that he was unable to find in the Railway Act the power and jurisdiction to authorize a grant from the Railway Grade Crossing Fund and (2) that the offer of the railway company to contribute \$5,000 representing the value of its relief from the cost of future maintenance of the subway was fair and reasonable, and that the remainder of the cost should be paid by the Department of Roads.

Upon application of the Attorney General of Quebec and the Minister of Roads for leave to appeal, counsel for the applicants stated that the proposed appeal was directed only to the question of the Board's power to authorize a contribution from the Railway Grade Crossing Fund, and that no appeal was proposed against the amount ordered by the Board to be paid by the railway company. Counsel for the railway company thereupon stated that as the railway company was not involved in the issue to be raised it would have no purpose or interest in opposing the appeal and would not do so.

Leave to appeal to this Court was granted by Hall J. upon the following question of law:

"Did the board of Transport Commissioners for Canada err in holding, as it did by its judgment of June 12, 1964, that it had neither the power nor the jurisdiction under section 265 (1)(b) of the Railway Act to authorize a grant from the Railway Grade Crossing Fund towards the cost of the work authorized by its Order 111583?"

The relevant portions of s. 265 of the *Railway Act* are as follows:

265. (1) The sums heretofore or hereafter appropriated and set apart to aid actual construction work for the protection, safety and convenience of the public in respect of crossings shall be placed to the credit of a special account to be known as "The Railway Grade Crossing Fund", and shall, insofar as not already applied, be applied by the Board in its discretion, subject to the limitations set forth in this section, solely towards the cost, not including that of maintenance and operation, of

- (a) work actually done for the protection, safety and convenience of the public in respect of existing crossings at rail level,
- (b) work actually done in respect of reconstruction and improvement of grade separations that are in existence at crossings upon the

coming into force of this subsection and that, in the opinion of the Board, are not adequate, by reason of their location, design or size, for the highway traffic using them, and

(c) placing reflective marking on the sides of railway cars.

* * *

(9) In this section, "crossing" means any railway crossing of a highway, or any highway crossing of a railway, and every manner of construction of the railway or of the highway by the elevation or the depression of the one above or below the other, or by the diversion of one or the other, and any work ordered or authorized by the Board to be provided as one work for the protection, safety and convenience of the public in respect of one or more railways of as many tracks crossing or so crossed as the Board in its discretion determines.

The sole issue in this appeal is whether the highway diversion referred to, was an improvement of an existing grade separation within the meaning of s. 265 (1) (b) of the *Railway Act*.

Under the provisions of ss. 39 and 266 of the said Act, the Board is vested with exclusive authority to authorize grade crossing changes and to apportion the cost of making such changes.

The "Railway Grade Crossing Fund" consists of monies voted from time to time by Parliament. The Fund was established to provide financial assistance to the railways and to local authorities towards the cost of the construction, reconstruction and improvement of grade crossings, required for the protection, safety and convenience of the public and made necessary by changing traffic conditions. Within the limits set by the Act the contribution, if any, to be made out of the Fund to the cost of a particular work, is fixed by the Board.

In the present case the existing subway facilities at Pont Rouge admittedly had become inadequate. The diversion proposed by the railway company was more efficient and less costly than it would have been to enlarge the existing underpass. In my opinion this diversion is an improvement of an existing grade separation within the meaning of s. 265 (1) (b) and that in consequence the Board is empowered to authorize a grant from the Railway Grade Crossing Fund towards the cost of the work authorized by its Order No. 111583.

I would allow the appeal and answer the question submitted in the affirmative. That portion of Order No. 114705 requiring that the cost of constructing the work in question

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in excess of \$5,000 be paid by appellant, is therefore set aside and the matter referred back to the Board.

The appeal was argued immediately after another appeal in which the same parties were involved. In the circumstances, there should be no order as to costs.

Abbott J.

Appeal allowed; no order as to costs.

Attorney for the appellants: J. Turgeon, Quebec.

Attorney for the respondent: K. D. M. Spence, Ottawa.
