

CASE STATED BY THE BOARD OF RAILWAY  
COMMISSIONERS FOR CANADA

1932

\*Oct. 13.

\*Nov. 28.

IN THE MATTER OF "THE RAILWAY GRADE CROSSING  
FUND" (SECTION 262 OF THE RAILWAY ACT)

*Railways—Board of Railway Commissioners for Canada—Jurisdiction—  
"Railway Grade Crossing Fund"—In what cases grant can be made—  
Interpretation of section 262 of the Railway Act.*

The Board of Railway Commissioners for Canada has jurisdiction to order that a grant will be made from "The Railway Grade Crossing Fund" to help construction work, only when the crossing is eliminated or such protection is provided by the work that the danger is lessened and the safety and convenience of the public increased—The Board has no power to grant an application for a contribution from that Fund towards the costs of highway diversions whereby rail level crossings are not eliminated, although they would relieve the crossings from a substantial volume of highway traffic.

CASE STATED by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada, under s. 43 of the *Railway Act*, R.S.C., 1927, c. 170, in the matter of a reference as to the jurisdiction of the Board of Railway Commissioners for Canada, under section 262 of *The Railway Act*, as amended by c. 43 of the statutes of Canada, 1928, to allow contributions from "The Railway Grade Crossing Fund" to aid actual construction work for the protection, safety, and convenience of the public in respect of highway crossings of railways at rail level.

The Case is fully stated in the judgment now reported.

*A. G. Blair K.C.* for the Board of Railway Commissioners for Canada.

*W. S. Gray K.C.* for the Attorneys General for Alberta and Saskatchewan.

*F. H. Chrysler K.C.* for the Attorney General for Manitoba.

The judgment of the court was delivered by

RINFRET J.—The Board of Railway Commissioners for Canada, in pursuance of the powers conferred upon it by section 43 of the *Railway Act*, submits for the opinion of the Court the following question:

Has the Board jurisdiction, under section 262 of the *Railway Act*, as amended by c. 43 of the statutes of Canada, 1928, to allow contributions

\*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

1932

In re  
"THERAILWAY  
GRADE  
CROSSING  
FUND"  
S. 262  
OF THE  
RAILWAY  
ACT.Rinfret J.  

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from "The Railway Grade Crossing Fund" in the case of highway diversions, whereby rail level crossings which are not eliminated are relieved from a substantial volume of highway traffic?

The material parts of section 262 of the *Railway Act*, as amended by c. 43 of the statutes of 1928, read as follows:

262. (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 highway crossings of railways at rail level shall be placed to the credit of a special account to be known as "The Railway Grade Crossing Fund," and shall (in so far as not already applied) be applied by the Board, subject to the limitations hereinafter set out, solely towards the cost, not including that of maintenance and operation, of actual construction work for the protection, safety and convenience of the public in respect of crossings (railway crossings of highways or highway crossings of railways) at rail level in existence on the first day of April, one thousand nine hundred and nine, and in respect of existing crossings (railway crossings of highway or highway crossings of railways) at rail level, constructed after the first day of April, one thousand nine hundred and nine, provided, however, that the Board shall not apply any moneys out of The Railway Grade Crossing Fund towards the cost of the actual construction work, for the protection, safety and convenience of the public in respect of any existing crossing (railway crossing of a highway or highway crossing of a railway), at rail level, constructed after the first day of April, one thousand nine hundred and nine, unless and except an agreement, approved of by the Board, has been entered into between the company and a municipal or other corporation or person by which agreement the municipal or other corporation or person has agreed with the company to bear a portion of the cost of the actual construction work for the protection, safety and convenience of the public in respect of such crossing (railway crossing of a highway or highway crossing of a railway), at rail level, constructed after the first day of April, one thousand nine hundred and nine.

The limitations referred to in the above subsection are set out in subsection 2 of the amending Act (c. 43 of S.C. 1928) and are not material here.

"Crossing," for the purposes of section 262, is defined as follows in subsection 4:

(4) In this section "crossing" means any railway crossing of a highway, or any highway crossing of a railway, at rail level, 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 the one or the other and any other work ordered by the Board to be provided as one work of protection, safety and convenience for the public in respect of one or more railways of as many tracks crossing or so crossed as in the discretion of the Board determined.

We are not concerned with the other subsections of section 262.

The "Railway Grade Crossing Fund" was created by c. 32 of the statute of Canada 8-9 Edw. VII, to be applied by the Board

solely towards the cost (not including that of maintenance and operation), of actual construction work \* \* \* for the purpose of providing \* \* \* protection, safety and convenience for the public in respect of highway crossings of the railway at rail level (Section 7 of c. 43 of 1909).

As originally enacted, the legislation was limited to crossings in existence on the 1st day of April, 1909; but its application was gradually extended by subsequent amendments until it assumed its present form in section 262 already reproduced in part at the beginning of this judgment.

The fund is made up of appropriations set apart from the Consolidated Revenue Fund of Canada and of such contributions as the provinces are willing to make, subject to the conditions and restrictions they may impose.

We now quote from the case stated by the Board:

In dealing with an application for a contribution from The Railway Grade Crossing Fund towards the cost of diversion of a highway which would withdraw a considerable portion of highway traffic from two crossings of the railway, neither of which, however, was closed, the then Chief Commissioner Carvell, in a memorandum dated June 9, 1921, said:

"I do not think this application can be favourably considered. In my opinion the intention of the Railway Grade Crossing Fund, the appropriation for which is provided for by Section 262 of the Railway Act, is for the protection, safety and convenience of the public in respect of the railway crossing itself, that is, either that the crossing must be eliminated or the protection provided must be such that the danger is lessened and the safety and convenience of the public increased.

In subsection (4) of the said section, 'crossing' is defined as—'any steam railway crossing of a highway, or highway crossing of a railway, at rail level, and every manner of construction of the railway or of the highway by the elevation or the depression of the one above the other, or by the diversion of the one or the other, and any other work ordered by the Board to be provided as one work of protection, safety and convenience for the public in respect of one or more railways not exceeding four tracks in all crossing or so crossed.

While it might be argued that the diversion referred to southwest of the Village of Acton will withdraw some of the traffic from the two crossings of the Grand Trunk Railway now existing, yet it in no way reduces the danger or increases the safety and convenience of the crossings themselves. The individual will be just as liable to an accident at either of these crossings after the new highway is constructed as at the present time, the only difference being there will not be as many individuals who possibly might meet with an accident.

Moreover, I cannot see that the construction of this new highway comes under the definition of 'any other work ordered by the Board to be provided as one work of protection,' etc. This Board has nothing whatever to do with it. Were a grant made in this case, every municipality in Canada which builds a road that might, by argument, withdraw traffic from an existing railway crossing, would be entitled to come to this Board for a contribution.

1932  
 In re  
 "THE  
 RAILWAY  
 GRADE  
 CROSSING  
 FUND"  
 S. 262  
 OF THE  
 RAILWAY  
 ACT.  
 Rinfrét J.

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FUND"  
S. 262  
OF THE  
RAILWAY  
ACT.

Rinfret J.

Another question would arise, were we to decide to grant a contribution from the Grade Crossing Fund, as to upon what basis it should be levied. Would be on the cost of the highway between the two crossings, or would it extend to the east or west thereof?

The whole question present so many difficulties that I think the application should be refused."

In 1928 this view was modified by Chief Commissioner McKeown, and the following issued as a ruling by the Board:

"In the case of highway diversions made for the protection, safety and convenience of the public in respect of highway crossings or railways at rail level whereby such crossings are relieved from a substantial volume of highway traffic, a proper contribution to the expense of such highway diversion may be made from The Railway Grade Crossing Fund although the complete elimination of such crossing be not possible in every instance, and such contributions will be accordingly so ordered."

Applications for contributions from the Fund are now pending before the Board in the case of highway diversions which would relieve existing highway rail level crossings from a substantial volume of traffic and which, under the later ruling, would be entitled to grants from The Railway Grade Crossing Fund.

It is because of the conflict of views referred to and to determine definitely the Board's authority that the opinion of the Court is sought by the Board.

It does not appear to us that, when enacting the legislation in question, Parliament intended to confer on the Board any special power distinct and independent from its normal railway jurisdiction. The fund was appropriated by Parliament towards actual construction work for the protection, safety and convenience of the public in respect of highway crossings of railways at rail level, and the Board was not to allow contributions from that fund, except in dealing with works over which it held jurisdiction and as an incident of the exercise of its ordinary powers in railway matters. The statute does not contemplate that direct applications for payments out of the fund may be made to the Board to aid works outside the sphere of its usual competence. The intention was that when the Board was regularly seized of an application in respect of an existing crossing at rail level (railway crossing of a highway or highway crossing of a railway), it might, when granting the application and subject to certain conditions and restrictions, order at the same time that a certain sum be allowed out of the Crossing Fund to aid the actual construction work ordered by it. This view is supported by the definition of "Crossing" as applying to that word in section 262. It refers to

a work ordered by the Board to be provided as one work of protection, safety and convenience for the public in respect of one or more railways

of as many tracks crossing or so crossed as in the discretion of the Board determined.

The section of the Act under which the Board has jurisdiction to make such an order, in respect of an existing crossing, is section 257. That section empowers the Board to order protection works at or on the crossing. In the exercise of the powers so given to it, the Board may order that a highway be permanently diverted, but its jurisdiction in that respect is limited to that portion of the highway which lies at the crossing proper. It

is confined entirely to the extinguishment of the public right to cross the railway company's right of way at that particular spot. (*In re Closing Highways at Railway Crossings*) (1).

The authority of the Board upon the highway exists only so far as concerns the crossing. Otherwise, the highway remains under the control of the provincial or municipal authorities and, in the words of Chief Commissioner Carvell, "the Board has nothing whatever to do with it."

Moreover, the question submitted assumes that the rail level crossing will not be eliminated. It follows that there will be no highway diversion at the crossing. The highway will continue to cross the railway. The new highway whereby it is claimed that the crossing is relieved from a substantial volume of traffic, was or will be constructed by the provincial or the municipal authorities entirely of their own motion, without any intervention of the Board and, in fact, without the Board having any right to interfere. It does not, therefore, come within the definition of "crossing" in section 262 as being

one work \* \* \* in respect of one or more railways of as many tracks crossing or so crossed as in the discretion of the Board determined; nor does it come within the classification of construction works ordered or authorized by the Board "in respect of highway crossings of railways at rail level."

Our conclusion is that the question submitted ought to be answered in the negative.

It is ordered that the matter be remitted to the Board of Railway Commissioners with the present opinion, which will be certified to the Board as being the opinion of the Court on the subject referred to.

There will be no costs on the reference.

*Question answered in the negative.*

(1) 15 Can. Ry. Cas. 305.

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