

# In the Privy Council.

No. 37 of 1934.

## ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF THE MUNICIPAL AND PUBLIC UTILITY BOARD ACT

AND

IN THE MATTER of an Order of the said BOARD dated 31st July, 1931, whereby Winnipeg Electric Company was directed to contribute to certain costs of Main Street and Norwood bridges and approaches thereto.

BETWEEN

THE CITY OF WINNIPEG and THE CITY OF ST. BONIFACE ... .. (Applicants) Appellants,

AND

WINNIPEG ELECTRIC COMPANY ... (Respondent) Respondent.

## RESPONDENT'S CASE.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 26th January, 1934, reversing a judgment of the Court of Appeal for the Province of Manitoba dated the 20th January, 1933, and setting aside Order No. 477 of the Municipal and Public Utility Board of Manitoba dated the 31st July, 1931. Record.  
p. 164.  
p. 154.  
p. 103.  
p. 94.

2. The question at issue is whether the Municipal and Public Utility Board (hereinafter referred to as "the Board") had jurisdiction to make or should have made the said Order No. 477 whereby the Respondent was ordered inter alia to pay the entire cost of placing rails, ties and the foundations therefor on the new Main Street and Norwood Bridges, then in course of construction, and one-half of the cost of certain works in connection with the several approaches to the said bridges. p. 96, l. 18.

Record.

3. Norwood Bridge crosses the Red River and connects the southerly end of Main Street South in the City of Winnipeg with the City of St. Boniface. The centre of the Red River forms the boundary line between the two Appellant Cities.

Main Street Bridge, which crosses the Assinaboine River, is entirely within the City of Winnipeg and forms part of Main Street South in the said City.

Plans 4  
& 27 (b).

The present bridges, the construction of which was commenced in 1931, replaced less substantial bridges formerly existing near the same points, but the alignments of the two new bridges differ from those of the old bridges. 10

pp. 166-169.

4. The Respondent (formerly the Winnipeg Electric Street Railway Company) is a Company incorporated by private Act of the Province of Manitoba and operates inter alia a street railway in the Cities of Winnipeg and St. Boniface and certain adjoining municipalities. The Respondent's franchise in respect of the City of Winnipeg was conferred by the City's By-law No. 543, which appears in a schedule to the Manitoba Statute of 1892, 55 Victoria, chapter 56. The Respondent's franchise in respect of the City of St. Boniface is conferred by that City's By-laws Nos. 111, 113, 203 and 221, and the Respondent's rights and obligations in relation to the Norwood Bridge are defined in certain agreements hereinafter referred to. 20

p. 170.

p. 170, l. 37.

p. 171, l. 21.

5. The old Norwood Bridge was built and operated as a toll bridge by the Norwood Improvement Company Limited. By an agreement between that Company and the Respondent dated the 10th May, 1904, the Respondent was granted the right to construct and operate a single track line on the easterly side of the bridge. By the said agreement the Respondent undertook at all times during the continuance of the agreement to keep the surface of the bridge between its rails and for two feet on the outside of each rail in good repair and that, should any strengthening or altering of the bridge be required to make it sufficient for the single track line, the work should be done by the Respondent at its own expense. 30

p. 171, l. 1.

Among the conditions set out in the said agreement is the following :—

“ 3. That the Improvement Company shall have the right whenever “ the Improvement Company shall deem it necessary, to take up the “ rails or that part of the bridge covered by the rails for the purpose of “ altering or repairing the said bridge or for any other purpose within “ the province or privilege of the Improvement Company ; the same “ being replaced by and at the expense of the Improvement Company, “ without being liable for any compensation or damage which may be “ occasioned to the working of the Street Railway Company or to the “ works connected therewith.” 40

pp. 173-175.

6. By an agreement, dated the 24th March, 1909, made between the Norwood Improvement Company Limited, the City of St. Boniface and the Respondent, the City agreed to purchase the Norwood Bridge and to make

the bridge free for all foot and vehicular traffic and for street car traffic subject to the agreement of 10th May, 1904, and the Respondent accepted the City in substitution for the Company. In September, 1929, owing to a report by the City's consulting engineer that street cars, trucks and horse drawn vehicles should be stopped from using the bridge, the Respondent's street car service over the bridge was discontinued. As a temporary measure permission was obtained from the City of Winnipeg to operate a bus service in lieu of the single track street car line service across the bridge and authority was obtained from the City of St. Boniface to construct a 10 loop line. Record.  
p. 174, l. 18.

7. By-law 543 of the City of Winnipeg defining the Respondent's rights in that City contains the following :—

“ 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.” p. 162, l. 7.

8. In 1930 the two Appellants arranged for the construction of a new bridge to take the traffic of the old Norwood Bridge and the City of Winnipeg arranged for a new Main Street Bridge. The plans for both bridges made provision for a double line street car track. The cost of the two new bridges was estimated at \$1,100,000, and substantial contributions were obtained out of the grants made by the Dominion and Manitoba Governments for unemployment relief. The Respondent, having been asked to share in the cost of both bridges, replied on 17th October, 1930, that it was not in a position to incur any financial obligation in connection with public improvements and on the 23rd October, 1930, the President of the Respondent wrote to the Chairman of the Norwood Joint Bridge Committee making certain proposals, but these were not accepted. p. 157, l. 34.  
p. 186, l. 2.  
p. 187, l. 20.

9. On the 19th March, 1931, the Appellants made a joint application to the Board for an order defining or prescribing the terms and conditions upon which the Respondent might use the new bridges. pp. 1-2.

On the 1st June, 1931, the Board by Order No. 457 dismissed the Appellants' application so far as it related to a contribution by the Respondent to the cost of construction of the two bridges. The decision of the Board was that the Respondent was not in law liable to contribute to the cost of construction and that so far as the Board had a discretion the Respondent ought not to be required to contribute. p. 90, l. 34.

The Order states :—

“ Evidence is abundant that now and for some time this utility is not meeting and has not met costs properly chargeable to the p. 91, l. 44.

Record.

“ service with little or nothing whatever for the use of large sums of  
“ money fixed irrevocably in the assets of the utility. Having regard  
“ to the foregoing the Board finds that the conditions existing are not  
“ those on which it should make an order grounded on paragraph (c) of  
“ section 119 of the Municipal and Public Utility Board Act to provide  
“ from the revenues of this utility a sum to cover any portion of the  
“ costs of the construction of the bridges in question other than those  
“ costs which fall within the type of expenditure made by the utility  
“ in the cases of the Provencher Arlington and Maryland Bridges.”

p. 92, l. 23.

In dismissing the Appellants' application the Board gave leave to the 10  
Appellants to reopen the question of the Respondent's liability in respect of  
the expense of laying the street car rails on the bridges.

p. 93.

10. Pursuant to the leave reserved by Order No. 457 the Appellants  
on the 30th June, 1931, made a further application to the Board to fix the  
amount payable by the Respondent “ as its share of the cost of paving and  
for placing street car rails on the said bridges and the approaches ” thereto.

16 Geo. V.,  
Ch. 33.

11. Sections 114, 115 and 119 of the Manitoba Municipal and Public  
Utility Board Act, which are the sections of the Act relied upon by the  
Appellants as giving jurisdiction to the Board to make the Order now in  
question are so far as material as follows :—

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“ 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 con-  
“ ditions 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.

“ 115. (1) The Board shall have a general supervision over all  
“ public utilities and the owners thereof subject to the legislative 30  
“ authority of the Province and may make such Orders regarding  
“ equipment, appliances, safety devices, extension of works or systems,  
“ reporting and other matters, as are necessary for the safety or con-  
“ venience of the public or for the proper carrying out of any contract,  
“ charter or franchise involving the use of public property or rights.

\* \* \* \* \*

“ 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 40  
“ by-law affecting the public utility or its owner, and to conform to the  
“ duties imposed thereby or by the provisions of 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.” Record.

12. The Board by its Order No. 477 dated the 31st July, 1931, rejected the Respondent's suggestion to substitute for the proposed street railway across the bridges either a trackless trolley or a motor or gasoline bus service, stated that, although much of the evidence submitted was referable to the extension of existing facilities, the Board regarded the application as one for the renewal of former services, directed that the Respondent should pay the cost of the laying of a double line of rails and related works on the bridges, and, after pointing out that the new bridges cross the river from different bridge heads and in a different alignment from the old bridges and that the old bridges and the approaches thereto were single tracked, directed that the Respondent should pay one half of the cost of the works in connection with the several approaches to both bridges. p. 94, l. 23.  
p. 95, l. 11.  
p. 95, l. 27.  
p. 96, l. 19.

20 Order No. 477 further provided that the Respondent was authorised to charge its expenses occasioned by the said works to its street railway depreciation fund. No such fund in fact exists. p. 96, l. 24.

13. By Order dated the 20th August, 1931, the Respondent obtained leave to appeal to the Court of Appeal for Manitoba from Order No. 477 of the Board. On the application for leave the Affidavits of the Respondent's Manager of the Railway Utility and Internal Auditor were filed. As appears from these Affidavits the street car service in St. Boniface and an adjoining Municipality had been carried on at a loss; the revenues of the Respondent's Railway Utility in 1930 fell short by \$488,857 of providing sufficient money to pay bond interest; the revenue for the first seven months of 1931 was less than that for the corresponding period of 1930 by approximately \$85,000; the Respondent had not the money available wherewith to comply with the Order of the Board and had no depreciation reserve fund out of which the money could be obtained and in order to comply with the Order of the Board a capital expenditure of approximately \$65,000 would be necessary. In the opinion of the Manager, the construction of street car tracks on the two bridges would not make any appreciable improvement in the Respondent's revenue, reasonable adequate service being already provided, and under existing conditions the service required by the Order of the Board would not furnish sufficient business to justify its construction, maintenance and operation. p. 100, l. 15.  
pp. 97-100.  
p. 99, l. 34.

14. On the 20th January, 1933, the Court of Appeal for Manitoba (Prendergast C.J., Dennistoun, Trueman, Robson and Richards J.J.A.) delivered judgment dismissing the Respondent's appeal. p. 103.

15. The judgment of the Court was delivered by Robson J.A. The submission of the present Respondent that the work was an extension and pp. 104-107.

Record.  
p. 107, l. 27.

as such came within subsection (c) of section 119 of the Municipal and Public Utility Board Act and that the financial condition of the Respondent did not warrant the expenditure was rejected, the learned judge considering that the case rather came within subsection (a) of section 119 which provides that the Board may order the owner of a public utility to comply with the laws of the 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 of its own charter or by any agreement with any municipality or other owner.

pp. 154-155. 16. The Respondent appealed to the Supreme Court of Canada and on the 26th January, 1934, the judgment of the Court (Sir L. P. Duff C.J., Lamont, Smith, Cannon and Crocket J.J.) allowing the appeal and setting aside Order No. 477 of the Board, was delivered by Mr. Justice Crocket.

pp. 155-163.  
p. 159, l. 6. 17. Mr. Justice Crocket, after setting out the facts and the material parts of subsections (a) and (c) of section 119 of the Municipal and Public Utility Board Act, stated that it was quite apparent from the Board's memorandum of judgment that it dealt with the application as one for the restoration of an abandoned service under section 119 (a) and not as one for the extension of existing facilities under section 119 (c); that consequently no consideration was given to the question whether the financial condition of the Respondent reasonably warranted the expenditure ordered and that without such consideration no Order could properly have been made under section 119 (c). It was clear therefore, that the validity of Order 477 must rest upon section 119 (a) and that it could only be justified as an Order requiring the Respondent to perform some duty or obligation which was imposed upon it by some act of the Legislature or by some Municipal by-law or by the provisions of its own charter or by some agreement made with the Appellants.

The learned Judge said :

p. 159, l. 32. " It is not contended that there is any provision in the Company's charter by which any such obligation is imposed as that which the Board has ordered. No provision of any Act of the Legislature was cited as the ground of the Company's liability to make the payments which the order requires. The only municipal by-laws and agreements, as regards the City of St. Boniface, which are relied upon by that City, are those which have already been mentioned, viz.: the by-law of 1893 granting to the Company the right to construct and operate single or double lines of street railway on the streets of the town; the by-law of 1902; the agreement entered into between the Norwood Improvement Co. and the Railway Co. in 1904; and that of 1909 between the Improvement Co. and the City, in which the Railway Co. joined."

p. 160, l. 14. The by-law No. 111 of 1893 could not be said to imply an agreement by the Respondent to provide a service across the old Norwood Bridge, which it seemed was not in existence at the time; the Respondent's obligation under the agreements of 1904 and 1909 are clearly limited, so far as repairs are concerned, to the surface of the bridge between the rails of a

single track and for two feet on the outside and to strengthening or altering the bridge to make it sufficient for the purpose of the Respondent's single track street car service during the continuance of the agreement ; further the City of St. Boniface acquired the bridge with the rights, but also subject to the obligations of the Norwood Improvement Company and one of these obligations was that if the Improvement Company should at any time take up the rails it should replace them at its own expense. He thought that when the City of St. Boniface took down the entire bridge, in the absence of any new agreement, it relieved the Respondent of any further obligation in respect of its agreement with the Improvement Company or the City and that the Board had no authority to require the payments ordered either as a statutory or contractual liability.

Record.

p. 160, l. 25.

p. 161, l. 9.

p. 161, l. 25.

The learned Judge said :

“ Even if the Board had power to order a renewal of a former service—the ground upon which the Board states it dealt with the application—we cannot perceive upon what principle it can impose upon the Railway Co. any further outlay than that for which it was liable in the maintenance of such former service. The plans agreed upon between the two cities provided for the construction of both bridges on different alignments than those of the old bridges, necessitating additional expense in the building of approaches and otherwise, and for a double track instead of the former single track. An order requiring the Company to pay the entire cost of placing two lines of railway ties and foundations, across the whole length of both bridges and one half the cost of the new approaches, manifestly cannot be justified as an order for the renewal of the old service with respect to which, under its agreements with the City of St. Boniface, the City agreed, in the event of its removing the rails of the single track, to replace them at their own expense.”

p. 161, l. 35.

As regards the City of Winnipeg and the Main Street Bridge the learned Judge referred to section 12 of the City's By-law 543 (set out in paragraph 7 above) and he considered that the situation with respect to the taking down of the Main Street Bridge was practically the same as that with respect to the Norwood Bridge. Section 15 of By-law 543, which gives the City Council the right by written notice served on the Respondent to demand the construction of any new line or lines within the City, did not seem to have any application to the present question, there being nothing in the Record to show that any such demand was made.

p. 162, l. 26.

p. 116, l. 7.

p. 162, l. 31.

18. The Respondent submits that the judgment of the Supreme Court of Canada ought to be affirmed and the appeal dismissed for the following among other

## REASONS.

1. Because the Board had no jurisdiction to order the Respondent to bear the cost of the works in question.
2. Because the Respondent was not within the meaning of subsection (a) of section 119 of the Municipal and Public

Utility Board Act under any obligation either by statute, by-law, charter or agreement to do the said works.

3. Because the said works are an extension and as such come under subsection (c) of section 119 of the said Act.
4. Because the Board did not, as required by subsection (c) of section 119 of the said Act, take into consideration the questions whether the extension was reasonable and practicable and would furnish sufficient business to justify its construction and maintenance and whether the financial condition of the owner reasonably warranted 10 the expenditure of making and operating such extension.
5. Because the works in question will not furnish sufficient business to warrant their construction.
6. Because the Respondent's financial condition does not warrant the expenditure required.
7. Because the Respondent's rails on the old bridges were taken up by the Appellants and under the terms of Winnipeg By-law No. 543 section 12 and paragraph 3 of the Norwood Bridge agreement the Appellants were bound to replace them at their own expense. 20
8. Because no written notice demanding the construction of the new lines as required by section 15 of Winnipeg By-law No. 543 was served on the Respondent.
9. Because section 15 of By-law No. 543 does not impose any obligation to pay for works already constructed by the City.
10. For the reasons stated in the judgment of the Supreme Court of Canada.

W. N. TILLEY.

R. D. GUY.



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No. 37 of 1934.

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IN THE MATTER of an Order of the said Board dated  
31st July, 1931, whereby Winnipeg Electric Company  
was directed to contribute to certain costs of Main Street  
and Norwood bridges and approaches thereto.

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BETWEEN

THE CITY OF WINNIPEG AND THE  
CITY OF ST. BONIFACE (*Applicants*) *Appellants,*

AND

WINNIPEG ELECTRIC COMPANY  
(*Respondent*) *Respondent.*

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## RESPONDENT'S CASE.

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BLAKE & REDDEN,  
17, Victoria Street, S.W.1.