

Appeal by the Toronto Railway Company (by leave) from an order of the Ontario Railway and Municipal Board of the 16th March, 1920, whereby the appellants were required at their own expense to remove and replace or readjust certain structures erected by them in three streets of the City of Toronto and to pay the cost of all readjustments of poles and wires of the city corporation rendered necessary by their (the appellants') appliances upon these streets.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

D. L. MCCARTHY, K.C., for the appellants.

G. R. Geary, K.C., for the city corporation, respondents.

C. M. Colquhoun, for the Toronto Electric Commissioners, respondents.

RIDDELL, J., in a written judgment, said that the order appealed against was dissented from by Mr. Ingram, a member of the Board, who said that he disagreed with the finding of the Board and with the reasons upon which the finding was based; he made known his views to the Chairman at the time when the judgment of the Board was being prepared; but the Chairman declined to accept those views, and exercised his right under and pursuant to sec. 7 of the Railway and Municipal Board Act, R.S.O. 1914 ch. 186.

The order was valid, therefore, only if the decision were one of law; and the learned Chairman must be considered as deciding that the appellants were liable as a matter of law for this cost. The law he must draw from statute or common law or from the interpretation of an agreement.

There was no statute expressly making the Toronto Railway Company liable to pay to the Toronto Electric Commissioners the cost of the removal by the Commissioners of the poles and other appliances. The only statute that could be appealed to was sec. 59 of the Railway Act, R.S.O. 1914 ch. 185, but the Ontario Railway and Municipal Board was given no jurisdiction to determine the damages under that section. The fact that the Commissioners are a public utility body gives them no more rights in that regard than any other person. And, in any case, the determination of damages would be a finding of fact and not of law. At the common law there is no such liability: *Vaughan v. Taff Vale R.W. Co.* (1860), 5 H. & N. 679; and there is no agreement that the Toronto Railway Company shall pay anything to the Commissioners. If the Commissioners claim through the city corporation, they are met by the *res adjudicata* of the original order. The Commissioners repudiate the position of statutory