

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A., and KELLY, J.

G. R. Geary, K.C., and Irving S. Fairty, for the appellant corporation.

I. F. Hellmuth, K.C., and C. A. Moss, for the railway company, the respondent.

GARROW, J.A., in a considered opinion, referred to the Ontario statute of 1877 incorporating the Metropolitan Street Railway Company, 40 Vict. ch. 84; to a certain agreement dated the 26th June, 1884, made between the railway company and the Corporation of the County of York, validated by 56 Vict. ch. 94; to a further agreement validated by 60 Vict. ch. 93, and to secs. 6, 7, and 11 of that Act.

The learned Judge then said that the application failed upon a ground which was applicable whether the power asserted was to be regarded as specific or general, or even necessarily to be implied, viz., that, so far as appeared, no plan of the proposed deviation and extension was ever submitted to or approved by the municipal officials of either the county or the city.

Such a plan, so approved, is expressly made, by the terms of the agreement of June, 1884, the very basis of all the work to be afterwards undertaken upon the highway; and its production and approval cannot be dispensed with by the Board. It is not the case of a violated agreement under sec. 260(1) of the Ontario Railway Act, R.S.O. 1914 ch. 185; while, under sec. 105, sub-sec. 8, the Board is powerless to alter or affect the number or location of the tracks agreed on.

The case really falls within the principle applied in the judgment of the Judicial Committee of the Privy Council in *Toronto and York Radial R.W. Co. v. City of Toronto* (1913), 25 O.W.R. 315, affirming the judgment of the Court of Appeal in *Re City of Toronto and Toronto and York Radial R.W. Co.* (1913), 28 O.L.R. 180, and also by Falconbridge, J., in *City of Toronto v. Metropolitan R.W. Co.* (1900), 31 O.R. 367. In both these cases, the real question was, as here, primarily one of locality.

In this view, it was not necessary to pronounce any opinion upon the situation presented by the transfer of the portion of the highway in question by the Corporation of the County of York to the Corporation of the Township of York, nor the effect to be given, in the circumstances, to the confirmation contained in sec. 15 of 60 Vict. ch. 92.

The appeal should be allowed with costs.