

GRAND TRUNK RAILWAY OF CANADA.

D R A F T

OF

Proposed Memorial

TO THE

DUKE OF NEWCASTLE, K.G.,

ONE OF HER MAJESTY'S PRINCIPAL SECRETARIES

OF STATE.

[FOR PRIVATE CIRCULATION.]

** * Copies may be obtained by any Preference Bondholder,
on applying to Messrs. ASHURST, SON, & MORRIS, 6, Old Jewry,
London, E.C., where the Memorial lies for signature.*

[DRAFT OF PROPOSED MEMORIAL.]

TO HIS GRACE
THE DUKE OF NEWCASTLE, K.G.,

ONE OF HER MAJESTY'S PRINCIPAL SECRETARIES
OF STATE.

*The Humble Memorial of the undersigned First
and Second Preference Bondholders of the Grand
Trunk Railway Company of Canada.*

SHEWETH,

That your Memorialists claim to be entitled, under several Statutes of the Legislature of Canada, to a first charge on the Railway and Property of the Grand Trunk Railway of Canada, and on the net income thereof, after deducting working expenses, by way of security for the First and Second Preference Bonds of the said Company, amounting together to £3,111,500, together with interest thereon at 6 per cent. per annum.

That an Act was passed in the recent Session of the Canadian Legislature, entitled "An Act to explain and

amend the Railway Clauses Consolidation Act," the 8th section of which is as follows :—

VIII. The interest of the purchase money or rent of any real property acquired or leased by any railway company, and necessary to the efficient working of such railway, and the price or purchase money of any real property or thing without which the railway could not be efficiently worked, shall be considered to be part of the expenses of working such railway, and shall be paid as such out of the earnings of the railway.

That the provisions of the said section seriously impair the right of your Memorialists, and they pray to have the said Act disallowed by Her Majesty ; and your Memorialists refer, in support of that prayer, to the petition of

and

to Her Majesty in Council, a copy whereof accompanies this Memorial.

That the claim of your Memorialists to a first charge on the railway and property of the Company, under the said Acts, is supported by high legal opinions, both in England and Canada, and also by a recent decision of the Court of Chancery in Upper Canada, in the case of "*Herrick v. The Grand Trunk Railway Company*," decided 17th June, 1861.

That independently of the serious objection to applying income to capital, as provided for by the said section 8, there is the still further objection that any Rolling Stock which might be purchased out of income would, in the present financial difficulties of the Company, be at once subject to seizure for debts or rents, except so far as the Preference Bondholders might succeed in preventing such seizure, by enforcing their said charge over the Rolling Stock of the Company, in which

extent they claim to be entitled to it, and are now taking proceedings, both in Upper and Lower Canada, to establish it, but which charge over the Rolling Stock is disputed, both by the Company and the Creditors who have already obtained judgments for their debts. Hence, if the earnings were applied as provided for by the said section 8, it might have the effect of confiscating the income to which the Preference Bondholders are entitled, not for the purpose of adding to their security, but for the benefit of judgment creditors and lessors.

That although the section in question is introduced into a general Railway Act, and does not specially refer to the Grand Trunk Railway Company, yet your Memorialists submit from the circumstances set forth out in the said Petition to Her Majesty in Council, that the Act was clearly intended to affect, and your Memorialists are advised that it does seriously affect the rights and interests of your Memorialists.

That even if, in the present difficulties of the Grand Trunk Railway Company, such a measure were justifiable as a temporary provision, it ought to be accompanied with ample provisions to protect the property purchased out of income from being seized for debts or rents.

That the Preference Bonds of the said Company are held almost exclusively by residents in Great Britain and Ireland; and your Memorialists know of only one Preference Bondholder resident in Canada—namely, the Hon. John Hildyard Cameron—one of the defendants in Herrick's suit, hereinbefore referred to; and it is believed that it was in consequence of his being the only Preference Bondholder who could be found in Canada, that he was made a Defendant in Herrick's suit, to represent the interests of the Preference Bondholders as a body, although he acts as Counsel for the Grand Trunk Railway Company in the suit instituted in the Courts of Upper Canada by a large Preference Bondholder, on behalf of himself and the other Preference Bondholders, to have their rights settled and deter-

mined as hereinbefore referred to ; and if, therefore, any other Preference Bondholder could have been found in the province, some more fitting Representative of the class would no doubt have been selected than the Counsel who in the other and principal suit is retained to oppose the claims of the Preference Bondholders.

That the said Preference Bonds were subscribed for on the faith of the provisions contained in the several statutes under which they were issued, and that to alter such provisions without the consent of the Preference Bondholders, would not only be to interfere with vested rights by *ex post facto* legislation in this particular case, but it would also tend to weaken the confidence of capitalists in colonial investments generally.

That your Memorialists are advised that their rights are as much vested rights, and entitled to protection, as the rights of any ordinary mortgagee of property in the Colony.

That under the Provincial Act of 19 and 20 Vic., cap. 111., in pursuance of which the first Preference Bonds were issued, the proceeds thereof were, as directed by that Act, paid not to the Company direct, but into the hands of the Government of Canada, by which the same were from time to time released to the Company upon the certificates of the Receiver-General, upon proof to the satisfaction of the Governor in Council of the progress of the several works in the Act mentioned.

That the said last-mentioned Act was a Government measure, and your Memorialists submit that it was both in form and substance a compact between the Province, the Company, and the Preference Bondholders, under which the money subscribed by the last-named passed through the hands of the Government, and was applied under its direction in the several works specified in the said Act, which works were deemed of public and general importance for the interest of the Province. The people of Canada have, therefore, had, and still enjoy, the benefit of the Preference Bond-

holders' money in these works. Your Memorialists submit, therefore, that the Government and people of Canada not only cannot dispute, but are bound to support the Preference Bondholders' claims.

That Messrs. Baring, Brothers, and Co., and Messrs. Glyn, Mills, and Co. were, in 1856, and still are, the Financial Agents for Canada in London, and, in that character, the proceeds of the said First Preferential Bonds were received by them as representing the Government of Canada, and the proceeds of the Second Preferential Bonds, issued in April, 1860, were, it is believed, received by them direct, in exchange for the Bonds which were at the time hypothecated either with them or with other creditors of the Company.

That Mr. Thomas Baring, M.P., one of the partners in the said firm of Baring, Brothers, and Co., is the Chairman, and Mr. G. C. Glyn, M.P., one of the partners in the said firm of Glyn, Mills, and Co., is one of the Directors of the said Company; and that both of them have been Directors of the said Company from the year 1853, when the concern was first introduced in London, to the present time, they having been at first nominated as such Directors on behalf of the Government of Canada.

That although a scheme of arrangement has been proposed by a Committee of the Share and Bondholders of the Grand Trunk Railway Company, and is intended to be submitted to the Government of Canada, yet that such scheme, if adopted, would still leave the claim of the Preference Bondholders for interest dependent upon the net Revenue of the Line, which is liable to be seriously affected by the operation of the said Section No. 8. In fact, under the said section, if it remains, the whole net Revenue of the Line may, instead of being applied in payment of Interest or Dividends on the Capital, be used exclusively for local purposes; that is, not merely (1) in payment of "the interest of the purchase money or rent of any real

property acquired, or leased," in the acquiring or leasing of which the Preference Bondholders have no voice ; but (2) in payment of the price or purchase money itself "of any real property or thing." With such a licence there can be no limit to the time when a Line of Railway, extending over 1,000 miles in length, will cease to require some real property or thing ; the latter word comprising Rolling Stock, and in fact whatever the Line may require of the nature of personal property, as distinguished from the preceding term "real property" ; so that the words "real property or thing" include together everything which the Railway may or can require of every kind, or that local interests, the influence of which no honesty or vigilance in the Directors of so vast a concern, particularly when for a large part resident at 3,000 miles' distance, can exclude, may represent the Railway as requiring.

That petitions to her Majesty for and against the confirmation of colonial statutes or ordinances have been on several occasions referred to Committees of the Privy Council, to report their opinion thereon, and that the petitioners have accordingly been heard by counsel before such committees. Your memorialists would refer, among others, to two instances relating to the island of Jersey, which occurred respectively in the years 1853 and 1858, and the proceedings on which are reported respectively in the 9th volume of Moore's Privy Council Reports, page 185, and the 11th volume of the same work, page 320, in each of which cases the Committee was a mixed one, composed of some members of the Judicial Committee, together with some members of Her Majesty's Government : also to the case of the Canada Church Synod Act, which was, as your Memorialists have been informed, referred to, and argued by counsel before, a Committee of the Privy Council, about March, 1857.

That the following is an extract from a letter dated 19th June, 1861, from Mr. Wagstaff, the English Solicitor of the Grand Trunk Railway Company, in reply to letters from the Solicitor of several large First Preference Bondholders, calling the attention of the London Directors of that Company to the clause in question :—

“ I have submitted to the London Directors of the Grand Trunk Railway Company our correspondence of the 12th, 13th, 15th, and 18th instant, and am authorised by them to disavow entirely all knowledge or authorship of the clause to which the correspondence refers, and to intimate that they were as much surprised at it as yourself. In the absence, however, of all communication from the Canadian Directors as to the clause in question, I am sure you will not think me unreasonable in declining to recommend the Directors to take any action upon it.”

That the following is a copy of a letter from the Secretary of the Great Western Railway of Canada, relating to the Act in question :—

“ Great Western Railway of Canada.

“ Gresham House, Old Broad Street,

“ London, E.C. June 28th, 1861.

“ Dear Sir,—I have laid your note of 20th inst. before my Board. With reference to the Act of the Canadian Legislature giving power to the Directors of any Railway in the Province to appropriate Revenue to Capital purposes without the concurrence of their Shareholders, my Board thinks this so vicious in principle, and so destructive of confidence in practice, that, when the proper time

arrives, they will be happy to oppose it in concert with you.

" I am, Dear Sir,

" Yours truly,

" BRACKSTONE BAKER.

" J. Morris, Esq., 6, Old Jewry."

That the following is a copy of a letter from the Secretary of the Buffalo and Lake Huron Railway Company, relating to the said Act :—

" Buffalo and Lake Huron Railway Company.

" 80, Lombard Street, London, E.C.

" July 10th, 1861.

" Dear Sir,—I am favoured with your communication of this morning in reference to an Act recently passed in Canada, to amend the Railway Clauses Act, more particularly with regard to the 8th Section. In reply, I have to state that my Board will be happy to co-operate with you in your endeavours to rescind the clause in question, which was viewed by them with grave surprise at the time it was enacted.

" I am, dear Sir,

" Yours very truly,

" THOMAS SHORT,

" J. Morris, Esq., 6, Old Jewry, E.C.

" *Secretary.*"

That the said Great Western of Canada and the Buffalo and Lake Huron Railway Companies are, besides the said Grand Trunk Railway Company, the principal railway companies in Canada.

That the following is an extract from the joint opinion of Counsel (Sir Hugh M. Cairns and Mr. Westlake) relating to this Act :—

- “ 2. The Colonial Act passed in the late Session, to amend the Railway Clauses Consolidation Act, does not affect the lien of the Preference Bondholders, but it materially affects the order of appropriation of the Company's earnings enacted in 1858, by placing among the working expenses, subject only to the vague condition of their being necessary to the efficient working of the Railway, whole classes of charges which, as being incurred for the improvement and augmentation, and not for the maintenance of the Company's property, would not, without the new Act, be chargeable against revenue under any condition whatever. This we say with full consideration of the case of *Corry v. Londonderry and Enniskillen Railway Company*, 9 W. R. 301, 7 Jur. N. S. 508, which, as having arisen between Shareholders of different classes, and not as between Shareholders on the one hand, and Creditors protected by a statutory appropriation of earnings on the other, does not, in our opinion, bear upon the construction to be put on working expenses in the Act of 1858.

- “ 3. We are of opinion that a very strong case exists for appealing to the Crown to disallow the Act of the late Session referred to, and we recommend that a petition to that effect be presented to Her Majesty, and, at the same time, a memorial mentioning the petition be laid before the Colonial Secretary, in which he should be prayed to advise Her Majesty to disallow the Act in question, or at least to advise that the petition be referred to a Committee of the Privy Council, before which the petitioners might be heard in support of its prayer.”

PRAYER

Your Memorialists therefore respectfully represent to your Grace :

1. That the said Act of the Canadian Legislature ought to be disallowed by Her Majesty ;
and
2. That, if your Grace should not otherwise be able to satisfy yourself of the propriety of advising such disallowance, then that, considering the importance of the interests at stake, and the gravity of the allegations herein and therein contained, it would be proper to refer the said petition to Her Majesty to the consideration of a Committee of the Privy Council, before which counsel might be heard on behalf of the prayer of your Memorialists.

For which purposes your Memorialists refer themselves with confidence to your Grace's wisdom and justice.

[DRAFT PETITION.]

TO THE
QUEEN'S MOST EXCELLENT MAJESTY.

*The Humble Petition of A. B. (a First Preference
Bondholder of the Grand Trunk Railway of
Canada)
and C. D. (a Second Preference Bondholder).*

SHEWETH as follows :—

1. Prior to the year 1856, the province of Canada had advanced to the Grand Trunk Railway Company of Canada £3,111,500 sterling, for which it had, by several Provincial Acts, a first lien or charge on the railway and property of the Company.

2. In 1856 the Company, being unable to raise the further Capital required to proceed with the works, applied to the Government of Canada for aid; and, as the result of negotiation between the Company and the Government, the Provincial Act of the 19th and 20th years of your Majesty's reign, c. 111, was passed, which provides as follows :—

“For the purpose of enabling the Grand Trunk Railway Company of Canada to complete their undertaking, the Governor in Council shall be and is hereby authorised to

carry into effect the arrangement provisionally entered into between the Government of Canada and the said Company, based upon the following terms—viz. :—

“The said Company shall be authorised to issue Preferential Bonds to the extent of £2,000,000 sterling. The Holders of such Bonds to have priority of claim therefor over the present first lien of the Province.”

3. Shortly after the passing of this Act, subscriptions were solicited towards the Preferential Bonds thereby authorised, in a circular signed by the Secretary of the Company, and dated the 9th day of December, 1856, in which it was stated that “the holders of such bonds are to have priority of claim over the present first lien of the Province.” In the same circular, the Act of 1856 was described as a concession by the Government of “the first charge on the undertaking, amounting to upwards of three millions sterling.” The last paragraph of the circular is in these words :—

“It has been before mentioned that these debentures are to have priority of claim over the present first lien of the Province, and there cannot, therefore, be any doubt as to their security and value as an investment.”

4. Under the said Act, Preferential Bonds, which (through the second issue, presently to be mentioned,) have acquired the name of First Preferential Bonds, were issued by the Company to the whole authorised amount of £2,000,000 sterling, and were in consequence of the representations contained in the said circular, taken up almost exclusively by subjects of Your Majesty, resident in the United Kingdom of Great Britain and Ireland.

5. In 1858 a further Provincial Act was passed, that of the twenty-second year of Your Majesty's reign, c. 52, by which the Company was authorised to increase its capital, and whereby

it was enacted that the further capital so authorised might be raised by Preferential Bonds, which should be deemed to be Preferential Bonds within the meaning of the said Act of the 19th and 20th years of Your Majesty's reign, c. 111, and that such bonds, together with the Preferential Bonds already issued under the authority of the said Act, should be entitled to the privileges conferred on Preferential Bonds by the said Act; or that such increase of capital might be effected by bonds not preferential, or by mortgage, or by the issue of new shares; and it was thereby farther enacted that, subject to the rights and powers of the Atlantic and St. Lawrence Railroad Company under a certain lease, as to the portion of the undertaking thereby demised, the earnings of the Grand Trunk Railway Company of Canada, after deduction of working expenses, should in each half year be appropriated and applied as follows :—First, in and towards the payment of the interest upon the amount which for the time being should have been raised by the issue of Preferential Bonds as therein and hereinbefore mentioned; Secondly, in and towards payment of the interest upon the loan capital of the Company, for the time being raised and subsisting upon and in respect of the several classes of its bonds and debentures other than the said Preferential Bonds; and Thirdly, in and towards payment of a dividend at the rate of 6 per cent. per annum on the stock and shares of the Company; and after payment of such dividend, then in or towards the payment of the interest on the Provincial Debentures, issued in aid of the Company from time to time the extent of £3,111,500 sterling in all; and after payment of such interest, the surplus, if any, should be applied in payment of a further dividend upon the stock and shares of the Company.

6. Your Petitioner, A. B——, is the holder of First Preferential Bonds of the Grand Trunk Railway Company of

Canada to a large amount, and purchased many of those he now holds since the passing of the last-mentioned Act.

7. Under the last-mentioned Act, Second Preferential Bonds have been issued for £1,111,500 sterling, being the residue of the amount of the provincial lien, after deducting that of the First Preferential Bonds; but such Second Preferential Bonds have not even yet been all taken up, nor has the Company adequately increased its capital in any of the methods prescribed by the last-mentioned Act, but has incurred heavy debts, called floating debts, for the completion and equipment of its railway, and for other purposes which should have been provided for out of capital, and were by no means chargeable against earnings.

8. In a circular dated the 3rd day of March, 1859, signed by all the London directors of the Company, and soliciting subscriptions for the Second Preferential Bonds, the following statement appears :—"The sum of £3,111,500 has been raised on bonds of the Province of Canada, the interest on which formed the first claim on the railroad." In the same circular the directors state that "the proposed new issue of £1,111,500 Second Preferential Debentures will, with the £2,000,000 of First Preferential already issued, assume the position originally occupied by the Provincial Debentures of £3,111,500." And so late as the month of April, 1860, subscriptions were solicited by the Company for the Second Preferential Bonds, on a representation that a certain amount of gross traffic would, after deducting working expenses, leave sufficient to pay the interest on the First and Second Preferential Debentures; but without making any mention of the said floating debts, then already considerable, and which it was most important to mention if they, as well as the working expenses, were to be met out of the earnings of the Company before payment of any interest to the Preferential Bondholders.

9. Your Petitioner, C. D., is the holder of several Second Preferential Bonds of the Company, many of which he subscribed for since the foregoing representations were made, and in reliance on them.

10. Nevertheless, in their report, dated 29th December, 1860, the directors stated that they were applying the net earnings, beyond working expenses, in meeting pressing claims for past expenditure in rolling stock and stores, and that the interest to accrue due on the 1st of January upon the First Preferential Bonds could not be paid, as in the event it was not, and has not yet been.

11. Thereupon the solicitor acting on behalf of several large Preferential Bondholders communicated with the solicitor of the Company, and learnt from him that he had taken the opinion of two English counsel of eminence, Sir H. M. Cairns, Q.C., M.P., and Mr. J. H. Lloyd, upon such appropriation of the earnings to past expenditure, and that it had been unfavourable to the course taken by the directors: and in the month of January last the London directors of the Company passed, and communicated to your petitioners through the said solicitors, a resolution calling upon the Canadian board to apply the earnings of the undertaking in conformity with the opinions of Sir. H. M. Cairns and Mr. J. H. Lloyd, and to remit the balance to England, towards payment of the Preferential Bondholders.

12. As the financial difficulties of the Company increased, and several creditors who had obtained judgments in Upper Canada for large floating debts threatened to take the rolling stock in execution, a large Preferential Bondholder, shortly after the default in payment of the interest due upon the First Preferential Bonds on the 1st day of January last, com-

menced proceedings in the courts both of Upper and Lower Canada, on behalf of himself and the said First Preferential Bondholders, to have his and their rights settled and determined, which proceedings are still pending ; and in them the Company, notwithstanding the opinion of counsel already referred to, and the resolution of the London directors thereon, have claimed the right of applying the surplus earnings, after deducting working expenses, in the purchase of additional rolling stock, and for other requirements of the Company.

13. Subsequently to the commencement of such proceedings, a bill was introduced into the Canadian Legislature, during its recent session, entitled "an Act to explain and amend the Railway Clauses Consolidation Act," which is incorporated with the Acts constituting and relating to the Grand Trunk Railway Company. It was submitted to the agent of your petitioners at Quebec, who was specially charged by them to watch, in the interest of the Preferential Bondholders, any legislation which might take place, and found to contain only three clauses, none of which in any way affected the Preferential Bondholders.

14. Shortly after, and without notice to the said agent, a fourth clause was added, which gave a definition to the word "railway," when occurring in any Railway Act, different from that contained in a previous Provincial Statute, on which, among other grounds, the claim of the Preferential Bondholders to a charge on the Company's rolling stock had been rested ; but the said clause was struck out on the objections existing thereto being urged by the said agent of your petitioners.

15. After the said bill had passed the Legislative Assembly, it was carried up to the Legislative Council, and was there referred to a Select Committee, the majority of whom consisted of directors of the Grand Trunk Railway Company ; the

Honourable John Ross, Minister of Agriculture and President of the Legislative Council, and also President of the Grand Trunk Railway Company, being Chairman of that Committee.

16. On the day but one before the prorogation of the Provincial Parliament, the Committee reported the bill to the Council with an additional section, which was in these words :—

“ 8. The interest of the purchase-money or rent of any real property acquired or leased by any railway company, and necessary to the efficient working of such railway, and the price or purchase-money of any real property or thing without which the railway could not be efficiently worked, shall be considered to be part of the expenses of working such railway, and shall be paid as such out of the earnings of the railway.”

17. In the hurry of passing a great number of bills through the two Houses, the section in question passed unobserved. The bill was read a second and third time in one sitting ; and on the day of the prorogation it received the Governor-General's assent, with a great number of other bills.

18. The said section was thus introduced, passed, and assented to, without notice to the said agent of your petitioners, although he had been promised by the said Mr. Ross that he should have notice of any legislation affecting the Grand Trunk Railway Company ; and it was not until some days after the prorogation that he discovered its existence, and up to that time the section had not even been printed.

19. Your petitioners are advised that the said 8th section of the said Act materially affects the order of appro-

priation of the Company's earnings, enacted in 1858, by placing among the working expenses, subject only to the vague condition of their being necessary to the efficient working of the railway, whole classes of charges which, as being incurred for the improvement and augmentation, and not for the maintenance of the Company's property, would not, without the new Act, be chargeable against revenue under any condition whatever.

20. Your petitioners submit that they and all other the holders of Preferential Bonds of the Company are aggrieved by such legislation, which impairs the faith of contracts, and deprives them of securities provided by the Provincial Parliament itself, and in reliance on which they have advanced their money.

P.RAYER.

Your petitioners therefore most humbly pray
 Your Majesty that Your Majesty would be graciously pleased to disallow, by an Order in Council, the said Act of the Canadian Legislature, entitled "an Act to explain and amend the Railway Clauses Consolidation Act;" or that Your Majesty would at least be graciously pleased to give your petitioners an opportunity of supporting by evidence the statements herein made, and of showing cause by counsel why it may be proper that the said Act should be disallowed by Your Majesty; or that your petitioners may have such further or other relief in the premises as to your Majesty, in your royal wisdom and justice, may seem meet. And your petitioners will ever pray, &c.