

In the Privy Council.

ON APPEAL

FROM THE EXCHEQUER COURT OF CANADA.

BETWEEN

THE S.S. "EURANA" (Defendant) - - - *Appellant*

AND

BURRARD INLET TUNNEL AND BRIDGE
COMPANY (Plaintiff) - - - *Respondent.*

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Case for the Respondent.

1. This is an appeal from that part of the Judgment of the President of the Exchequer Court of Canada dated the 7th day of December, 1929 which affirmed the Judgment given by The Honourable Mr. Justice Martin, L.J.A. for the Admiralty District of British Columbia, dismissing the Appellant's counter-claim with costs.

RECORD
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20 2. The Appellant's ship s.s. "Eurana" collided with the Respondent's bridge across the Second Narrows of Vancouver Harbour while endeavouring to navigate through the bascule lift in the bridge. The trial Judge dismissed the Respondent's claim in respect of injury to its bridge and also dismissed the Appellant's counter-claim for damages to its ship arising out of the bridge being an obstruction to navigation. He found that the collision was the result of an inevitable accident and that the bridge was constructed without negligence and under statutory authority.

p. 772. l. 4.
p. 776
ll. 16-30.

On appeal to the Exchequer Court of Canada, the Judgment of the trial Judge was affirmed on the same grounds.

p. 790,
ll. 18-36

This appeal is against the dismissal of the Appellant's counter-claim and involves the question as to whether or not the bridge was constructed under and in accordance with statutory authority.

30 3. The Respondent Company was created by Act of the Parliament of Canada, chapter 74 of the Statutes of 1910, with powers to build and operate a railway, including the bridge in question; and its undertaking was declared to be a work for the general advantage of Canada.

RESPONDENT'S CASE.

The shareholders of the Respondent Company are the City of Vancouver, the City of North Vancouver, and two municipalities known as the Districts of North Vancouver and West Vancouver.

The bridge spans the waters of Vancouver Harbour or Burrard Inlet at a location known as the Second Narrows. The Respondent's railway (of which the bridge forms part) connects with the main line of the Canadian Pacific Railway in the City of Vancouver on the south shore of the harbour. It extends across the bridge and runs along the north shore of the harbour, connecting there with the harbour railway. In addition to being a railway bridge, it also carries vehicles and foot passengers. 10

p. 824, l. 31.

4. The cost of construction of the bridge was \$1,718,111.00, part of which sum was granted during construction by Acts of the Parliament of Canada, part by the Legislature of British Columbia, and part by the Board of Harbour Commissioners for Vancouver Harbour, the remainder being contributed by the cities and municipalities above mentioned. The said Acts of the Parliament of Canada enact as follows:—

STATUTES OF CANADA 1913.

CHAP. 46.

* * * * *

3. The Governor in Council may grant the subsidy hereinafter mentioned towards the construction and completion of the bridge 20 hereinafter mentioned, that is to say:—

To the Burrard Inlet Tunnel and Bridge Company towards the construction and completion of a bridge over the Second Narrows of Burrard Inlet, as authorised by chapter 74 of 1910, in lieu of the subsidy granted by chapter 48 of 1912, section 3, item 1; not exceeding \$350,000.

STATUTES OF CANADA 1924.

CHAP. 75.

Assented to 19th July 1924.

* * * * *

2. From and out of the Consolidated Revenue Fund there 30 may be paid and applied a sum not exceeding in the whole one hundred and sixty-three million, four hundred and fifty-nine thousand, five hundred and forty-three dollars and thirty-nine cents, towards defraying the several charges and expenses of the public service, from the first day of April, one thousand nine hundred and twenty-four, to the thirty-first day of March, one thousand nine hundred and twenty-five, not otherwise provided for, and being two-thirds of the amount of each of the several items, less deductions, set forth in Schedule A to this Act.

SCHEDULE A.

No. of Vote.	Service.	Amount.	Total.
10	352 Grant to the Burrard Inlet Tunnel and Bridge Company towards construction of bridge over the Second Narrows of Burrard Inlet, B.C., being revote of portion of subsidy authorised by statute, chap. 46, sec. 3, 1913. Revote \$100,000.00	\$ cts. 100,000 00	

STATUTES OF CANADA 1925.

CHAP. 56.

Assented to 27th June 1925.

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20 2. From and out of the Consolidated Revenue Fund there may be paid and applied a sum not exceeding in the whole one hundred and twenty-five million, five hundred and fifteen thousand, seven hundred and twenty dollars and fifty-three cents towards defraying the several charges and expenses of the public service, from the first day of April, one thousand nine hundred and twenty-five, to the thirty-first day of March, one thousand nine hundred and twenty-six, not otherwise provided for, and being two-thirds of the amount of each of the several items, less deductions, set forth in Schedule A to this Act.

SCHEDULE A.

No. of Vote.	Service.	Amount.	Total.
30	343 Grant to the Burrard Inlet Tunnel and Bridge Company towards construction of bridge over the Second Narrows of Burrard Inlet, B.C., being revote of portion of subsidy authorised by statute, Chap. 46, Sec. 3, 1913. Revote \$100,000.	\$ cts. 270,000 00	

5. The following sections of the Respondent's Act of Incorporation, above mentioned, and of the Railway Act of Canada have a bearing on the questions in issue in this appeal :—

STATUTES OF CANADA 1910.

CHAP. 74.

AN ACT TO INCORPORATE THE BURRARD INLET TUNNEL AND BRIDGE COMPANY.

* * * * *

2. The undertaking of the Company is declared to be a work for the general advantage of Canada.

* * * * *

8. The Company may lay out, construct, operate, maintain and use a tunnel under the First Narrows of Burrard Inlet, and a bridge over the Second Narrows of Burrard Inlet, for foot passengers, carriages, street railway and railway purposes, with the necessary approaches, from some convenient points on the south shore in or near the city of Vancouver to points on the opposite shore of Burrard Inlet, so as not to interfere with navigation, and may, to connect the said tunnel and bridge or either with the lines of the companies named in section 14 of this Act, lay out, construct and operate one or more lines of railway not exceeding ten miles in length of the gauge of four feet eight and one-half inches ; and the Company may lay water mains or pipes through the said tunnel and across the said bridge, or either of them. 10 20

9. The Company may lay out, construct and operate a railway of the gauge of four feet eight and one-half inches from the northern ends of the said bridge and tunnel, or either of them, easterly along the shore line of the district municipality of North Vancouver to a point at Deep Cove on the north arm of Burrard Inlet, and westerly from the northern ends of the said bridge and tunnel, or either, along the shore line of the city of North Vancouver and the said municipality to a point at or near Horse Shoe Bay on Howe Sound. 30

* * * * *

14. Subject to the provisions of sections 361, 362 and 363 of The Railway Act, the Company may enter into agreements with all or any of the companies hereinafter mentioned for any of the purposes specified in the said section 361 ; such companies being the Canadian Pacific Railway Company, the Grand Trunk Pacific Railway Company, the Canadian Northern Railway Company, the Great Northern Railway Company, the Northern Pacific Railroad Company, the Chicago, Milwaukee and St. Paul Railroad Company, the Vancouver, Westminster and Yukon Railway Company, the

Howe Sound, Pemberton Valley and Northern Railway Company, the Vancouver Power Company, Limited, and the British Columbia Electric Railway Company.

* * * * *

16. The Railway Act shall apply to the Company and its undertaking.

STATUTES OF CANADA 1919.

CHAP 68.

AN ACT TO CONSOLIDATE AND AMEND THE RAILWAY ACT.

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2. (21) " railway " means any railway which the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorised to construct ; and, except where the context is inapplicable, includes street railway and tramway.

3. Except as in this Act otherwise provided—

(a) this Act shall be construed as incorporate with the Special Act ; and

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(b) where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to over-ride the provisions of this Act. R.S., c. 37, s. 3.

* * * * *

9. (1) There shall be a commission, known as the Board of Railway Commissioners for Canada, consisting of six members appointed by the Governor in Council.

(2) Such commission shall be a court of record, and have an official seal which shall be judicially noticed.

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* * * * *

23. (1) It shall be the duty of the Secretary—

(a) to keep a record of all proceedings conducted before the Board or any commissioner under this Act ;

(b) to have the custody and care of all records and documents belonging or appertaining to the Board or filed in his office ;

- (c) to obey all rules and directions which may be made or given by the Board, or the Chief Commissioner, touching his duties or office, and in the event of a conflict of such rules or directions those made by the Board shall prevail ;
- (d) to have every regulation and order of the Board drawn pursuant to the direction of the Board, duly signed and sealed with the official seal of the Board, and filed in the office of the Secretary.

(2) The Secretary shall keep in his office suitable books of record, in which he shall enter a true copy of every such regulation 10 and order, and every other document which the Board may require to be entered therein, and such entry shall constitute and be the original record of any such regulation or order.

(3) Upon application of any person, and on payment of such fees as the Board may prescribe, the Secretary shall deliver to such applicant a certified copy of any such regulation or order. R.S., c. 37, s. 23. Am.

* * * * *

33. (1) The Board shall have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested—

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- (a) complaining that any company, or person, has failed to do any act, matter or thing required to be done by this Act, or the Special Act, or by any regulation, order or direction made thereunder by the Governor in Council, the Minister, the Board, or any inspecting engineer or other lawful authority, or that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act, or the Special Act, or any such regulation, order, or direction ; or,
- (b) requesting the Board to make any order, or give any 30 direction, leave, sanction or approval, which by law it is authorised to make or give, or with respect to any matter, act or thing, which by this Act, or the Special Act, is prohibited, sanctioned or required to be done.

(2) The Board may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required to do under this Act, or the Special Act, and may forbid the doing or continuing of any act, matter or thing which 40

is contrary to this Act, or the Special Act ; and shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or of fact.

(3) The Board shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction, have all such powers, rights and privileges as are vested in a superior court.

* * * * *

10 (5) The decision of the Board as to whether any company, municipality or person is or is not a party interested within the meaning of this section shall be binding and conclusive upon all companies, municipalities and persons. R.S., c. 37, s. 26, Am.

* * * * *

34. (1) The Board may make orders or regulations—

(a) with respect to any matter, act or thing which by this or the Special Act is sanctioned, required to be done, or prohibited ;

(b) generally for carrying this Act into effect ;

20 (c) for exercising any jurisdiction conferred on the Board by any other Act of the Parliament of Canada.

(2) Any such orders or regulations may be made to apply to all cases or to any particular case or class of cases, or to any particular district, or to any railway or other work, or section or portion thereof ; and the Board may exempt any railway or other work, or section or portion thereof, from the operation of any such order or regulation for such time or during such period as the Board deems expedient ; and such orders or regulations may be for such time as the Board deems fit, and may be rescinded, amended, changed, altered or varied as the Board thinks proper.

30 (3) The Board may by regulation or order provide penalties, when not already provided in this Act, to which every company or person who offends against any regulation or order made by the Board shall be liable.

* * * * *

44. (1) In determining any question of fact, the Board shall not be concluded by the finding or judgment of any other court, in any suit, prosecution or proceeding involving the determination of such fact, but such finding or judgment shall, in proceedings before the Board, be prima facie evidence only.

(2) The pendency of any suit, prosecution or proceeding, in any other court, involving questions of fact, shall not deprive the Board of jurisdiction to hear and determine the same questions of fact.

(3) The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive. R.S., c. 37, s 54.

45. (1) The Board may direct in any order that such order or any portion or provision thereof shall come into force at a future time or upon the happening of any contingency, event or condition 10 in such order specified, or upon the performance to the satisfaction of the Board, or a person named by it, of any terms which the Board may impose upon any party interested, and the Board may direct that the whole, or any portion of such order, shall have force for a limited time, or until the happening of a specified event.

* * * * *

48. No order of the Board need show upon its face that any proceeding or notice was had or given, or any circumstance necessary to give it jurisdiction to make such order. R.S., c. 37, s. 53.

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REVIEW AND APPEAL.

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51. The Board may review, rescind, change, alter or vary any order or decision made by it, or may rehear any application before deciding it. 1908, c. 62, s. 8.

52. (1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Board, whether such order or decision is made inter partes or otherwise, and whether such regulation is general or limited in its scope and application ; and any order which the Governor in Council 30 may make with respect thereto shall be binding upon the Board and upon all parties.

(2) An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction, upon leave therefor being obtained from a judge of the said Court upon application made within one month after the making of the order, decision, rule or regulation sought to be appealed from, or within such further time as the judge under special circumstances shall allow, and upon notice to the parties and the Board, and upon hearing such of them as appear and desire to be heard, and the costs of such application 40 shall be in the discretion of the judge.

(3) An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, or a question of jurisdiction, or both, upon leave therefor having been first obtained from the Board within one month after the making of the order or decision sought to be appealed from, or within such further time as the Board under special circumstances shall allow, and after notice to the opposite party stating the grounds of appeal ; and the granting of such leave shall be in the discretion of the Board.

10 (4) No appeal, after leave therefor has been obtained under subsection two or three of this section, shall lie unless it is entered in the said Court within sixty days from the making of the order granting leave to appeal.

20 (5) Upon such leave being obtained the party so appealing shall deposit with the Registrar of the Supreme Court of Canada the sum of two hundred and fifty dollars, by way of security for costs, and thereupon the Registrar shall set the appeal down for hearing at the nearest convenient time ; and the party appealing shall, within ten days after the appeal has been so set down, give to the parties affected by the appeal, or the respective solicitors by whom such parties were represented before the Board, and to the Secretary, notice in writing that the case has been so set down to be heard in appeal as aforesaid ; and the said appeal shall be heard by such Court as speedily as practicable.

30 (6) On the hearing of any appeal, the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board, and are necessary for determining the question of jurisdiction, or law, as the case may be, and shall certify its opinion to the Board, and the Board shall make an order in accordance with such opinion.

(7) The Board shall be entitled to be heard by counsel or otherwise, upon the argument of any such appeal.

(8) The Court shall have power to fix the costs and fees to be taxed, allowed and paid upon such appeals, and to make rules of practice respecting appeals under this section ; and, until such rules are made, the rules and practice applicable to appeals from the Exchequer Court shall be applicable to appeals under this Act.

40 (9) Neither the Board nor any member of the Board shall in any case be liable to any costs by reason or in respect of any appeal or application under this section.

(10) Save as provided in this section—

(a) every decision or order of the Board shall be final ;
and,

(b) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari, or any other process or proceeding in any court. R.S., c. 37, s. 56 ; 1910, c. 50, s. 1, Am.

6. The history of the steps leading up to the construction and completion of the bridge is as follows :—

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p. 804.

(A) A plan of a bridge over the Second Narrows was prepared by Sir John Wolfe Barry (Ex. 32). The Governor in Council approved of this plan by P. C. Order No. 1395, dated June 10th, 1913. The plan was subsequently abandoned on account of the cost of construction being too great. P.C. Order 1395, above mentioned, was filed at the trial as part of Exhibit 1, but should not be confused with P. C. Order No. 718, dated April 25th 1923 and also marked as Exhibit 1.

p. 803.

(B) Other plans were prepared gratuitously by other Engineers, without any authority from the Respondent. However, in the year 1922 the Respondent entered into an agreement (Ex. 44) with a firm of Contractors known as the Northern Construction Company and J. W. Stewart, whereby the Contractors agreed to make borings and test the foundations at the site of the proposed bridge and prepare plans. The cost of the bridge was estimated then at \$1,250,000.00.

p. 796.

p. 461, l. 37.
p. 427,
ll. 1-47.

(C) These Contractors prepared a plan which had a swing span for an opening. The Government of Canada insisted upon a bascule lift instead of a swing span, and paid the additional cost thereof. Accordingly, the plan Exhibit 2, bearing the number 1815, was prepared, showing a bascule lift. It was submitted to the Minister of Public Works and to the Governor in Council and was approved on April 25th 1923 by Order in Council No. 718 (Ex. 1), which recited that the Acting Chief Engineer had advised that the amended plan, No. 1815, be approved.

p. 803.

(D) Subsequently the following Orders were made by the Board of Railway Commissioners for Canada :—

p. 806.

(1) 24th July 1923, Order No. 33948 (Ex. 3), approving of the general location of the proposed bridge as shown on plan Exhibit 3A.

p. 812.

(2) 30th July 1923, Order No. 33950 (Ex. 4), approving of plan, profile, and book of reference (Ex. 4A).

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(3) 31st July 1923, Order No. 33962 (Ex. 5), reciting that upon reading the Order in Council P. C. 718, dated 25th April 1923 (Ex. 1), approving of plan of the proposed bridge across the Second Narrows, and upon the report and recommendation of its Chief Engineer the Board ordered that the Company be authorised to construct the proposed bridge as shown on said plan. p. 813.

10 (E) During construction, a Board of Consulting Engineers was appointed to consider the best means of altering the bridge. As a result, plans showing changes in the bridge by increasing the height and substituting additional steel spans in the place of certain wooden trestles, were prepared. Plans showing these changes were approved of by the Governor in Council and by the Board of Railway Commissioners as follows :— p. 828.

(1) 6th March 1925, Railway Board Order No. 36137 (Ex. 30), approving of three plans therein mentioned, being Exhibits 27, 28 and 29. p. 826.

(2) 20th August 1925, Order of Governor in Council No. 1310 (Ex. 26), approving of three plans therein mentioned, being Exhibits 30A, 30B and 30C. p. 828.

20 The work of construction was not completed until 18th September 1925, so that all changes in plans had been approved of by the Governor in Council and the Board of Railway Commissioners prior to the completion of the work. p. 392, l. 26.

The bridge as constructed is strictly in accordance with the plans approved of by the Governor in Council and the Board of Railway Commissioners, consisting of Plan 1815 (Ex. 2) as amended by the plans approved by the Order in Council and Railway Board Order last above mentioned. p. 403, ll. 42-44.
p. 404, ll. 1-44.

30 On 31st October 1925, an Order was made by the Railway Board, No. 36996 (Ex. 31), authorising the use and operation of the bridge. Under Section 248 (5) of the Railway Act, the Board, before making such Order, must be satisfied that— p. 831.

(1) its orders and directions have been carried out ;

(2) such work may be used or operated without danger to the public ;

(3) the provisions of Section 248 have been complied with.

It must be presumed the Board was so satisfied.

In November 1925 the bridge was opened for traffic.

p. 322, l. 10.

40 7. In answer to the Appellant's objection that the Navigable Waters Act has not been complied with, it may be pointed out that such Act does not apply to any work of construction carried out under the authority of any Act of the Parliament of Canada except as to the rebuilding or repairing of such a work. p. 5, l. 24.

The provision in the Respondent's Crown Grant of a portion of the bed of Vancouver Harbour (Ex. 6) requiring the Respondent to comply with that Act can only relate to repairs or rebuilding.

8. It should be noted that in the drafting of Exhibit No. 30, being Railway Board Order No. 36137 of 6th March 1925, a clerical error occurs in the heading, which refers to Section 251 of the Railway Act, while the Order was obviously made under Section 248.

The same error occurs in Exhibit No. 31, being Railway Board Order No. 36996, dated 31st October 1925, where the reference made in the heading of the Order to Section 251 should likewise be 248. 10

9. The Respondent submits that the appeal should be dismissed for the following amongst other

REASONS.

- (1) BECAUSE the bridge was constructed under the authority of Acts of Parliament in accordance with plans approved of by those to whom such power was specially delegated by Act of Parliament, namely, the Governor in Council and the Board of Railway Commissioners.
- (2) BECAUSE the power of judging whether a proposed railway bridge across navigable water will interfere with navigation, within the meaning of the Statute, rests solely with the Governor in Council and the Board of Railway Commissioners under the provisions of the Railway Act. 20
- (3) BECAUSE, acting under the powers given to it by the Railway Act, the Board of Railway Commissioners made an Order authorising the Respondent Company to use and operate the bridge.
- (4) BECAUSE the Orders and decisions of the Railway Board are binding and final, subject only to review or appeal in the manner provided by the Railway Act. 30

DUGALD DONAGHY.

T. MATHEW.

No. 67 of 1930.

In the Privy Council.

ON APPEAL

From the Exchequer Court of Canada.

BETWEEN

THE S.S. "EURANA"

(Defendant) - - - *Appellant*

AND

BURRARD INLET TUNNEL

AND BRIDGE COMPANY

(Plaintiff) - - - *Respondent.*

Case for the Respondent.

BERRYMANS,

4 Tokenhouse Buildings,

Lothbury, E.C.2,

Respondent's Solicitors.