

In the Privy Council.

ON APPEAL
FROM THE EXCHEQUER COURT OF CANADA.

BETWEEN

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

AND

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

10 Appellant's Appendix of Statutes & Cases.

INDEX.

	PAGE
Act incorporating the Burrard Inlet Tunnel and Bridge Company	2
Railway Act	2
Navigable Waters Protection Act	8
CANADIAN CASES.	
(1856) Snure <i>vs.</i> Great Western Railway, 13 U.C. Q.B. 376.. .. .	10
(1875) "Czar," Cook's Report, (Quebec) 9	10
(1886) Ratte <i>v.</i> Booth, 11 Ontario Rep. 491	11
(1892) Joyce <i>v.</i> Halifax Street Railway, 24 N.S. Rep. 113	11
20 Lake Simcoe Ice Co. <i>vs.</i> McDonald (1898), 31 S.C.R. 130	12
(1899) Bonn <i>vs.</i> Bell Telephone Co., 30 Ontario Rep. 696	12
Re Vancouver-Westminster & Yukon Railway (1907)	12
Grand Trunk <i>vs.</i> B. C. Express (1916), 55 S.C.R. 328.. .. .	13
Champion <i>vs.</i> City of Vancouver (1918), 1 W.W.R. 216	13
King <i>vs.</i> Woldingham (1925), Can. Exch. Rep. 85	14
Maunsell <i>vs.</i> Lethbridge (1925), 3 W.W.R. 202 and (1926) S.C.R. 603	16
AMERICAN CASES.	
(1911) Hubbard <i>vs.</i> Fort, 188 Fed. Rep. 987	17
30 United States <i>vs.</i> Norfolk-Berkley Bridge Corporation (1928), 29 Fed. Rep. (2nd Series) 115	18

APPENDIX.

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

9-10 Edward VII (1910) Ch. 74.

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

Section 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

Section 16. The Railway Act shall apply to the Company and its undertaking. 20

CONSOLIDATED RAILWAY ACT (1919),

9-10 Geo. V, Ch. 68.

Section 3. Except as in this Act otherwise provided—

- (a) this Act shall be construed as incorporate with the Special Act; and
- (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. 30

Section 162. “The Company may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained . . .

- (k) make or construct in, upon, across, under or over any railway, tramway, river, stream, watercourse, canal or highway, which it intersects or touches, temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences.”

LOCATION OF LINE.

Section 167. (1) The Company shall prepare, and submit to the Board, in duplicate, a map showing the general location of the proposed line of the railway, the termini and the principal towns and places through which the railway is to pass, giving the names thereof, the railways, navigable streams and tidewaters, if any, to be crossed by the railway, and such as may be within a radius of thirty miles of the proposed railway, and, generally, the physical features of the country through which the railway is to be constructed, and shall give such further or other information as the Board
10 may require.

(2) Such map shall be prepared upon a scale not smaller than six miles to the inch, or upon such other appropriate scale as the Board may determine, and shall be accompanied by an application in duplicate, stating the Special Act authorizing the construction of such railway, and requesting the Board's approval of the general location as shown on the said map.

(3) The Board may approve such map and location, or any portion thereof, or may make or require such changes and alterations therein as it deems expedient.

(4-6) (Other sub-sections omitted).

20

PLAN, PROFILE AND BOOK OF REFERENCE.

Section 168. (1) Upon compliance with the provisions of the last preceding section, the Company shall make a plan, profile and book of reference of the railway.

(2) The plan shall show :—

- (a) the right-of-way, with lengths of sections in miles ;
- (b) the names of terminal points ;
- (c) the station grounds ;
- (d) the proper lines and owners' names ;
- (e) the areas and length and width of lands proposed to be taken,
30 in figures, stating every change of width ; or other accurate description thereof ;
- (f) the bearings ; and
- (g) all open drains, watercourses, highways and railways proposed to be crossed or affected.

(3-7) (Other sub-sections omitted).

RESPECTING NAVIGABLE WATERS.

Section 245. No company shall cause any obstruction in, or impede the free navigation of any river, water, stream or canal, to, upon, along, over, under, through or across which its railway is carried. R.S. c. 37, s. 230.

Section 246. No company shall run its trains over any canal, or over any navigable water, without having first laid, nor without maintaining, such proper flooring under and on both sides of its railway track over such canal or water as is deemed by the Board sufficient to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water. R.S. c. 37, s. 231. 10

Section 247. (1) Whenever the railway is, or is proposed to be carried over any navigable water or canal by means of a bridge, the Board may by order in any case, or by regulations, direct that such bridge shall be constructed with such span or spans of such headway and waterway, and with such opening span or spans, if any, as to the Board may seem expedient for the proper protection of navigation.

(2) The Board may in like manner, if any such bridge is a draw or swing bridge, direct when, under what conditions and circumstances, and subject to what precautions, the same shall be opened and closed. R.S. c. 37, s. 232. 20

Section 248. (1) When the company is desirous of constructing any wharf, bridge, tunnel, pier or other structure or work in, upon, over, under, through or across any navigable water or canal, or upon the beach, bed or lands covered with the waters thereof, the company shall, before the commencement of any such work :

- (a) in the case of navigable water, not a canal, submit to the Minister of Public Works, and in the case of a canal to the Minister, for approval by the Governor in Council, a plan and description of the proposed site for such work, and a general plan of the work to be constructed, to the satisfaction of such Minister ; and, 30
- (b) upon approval by the Governor in Council of such site and plans, apply to the Board for an order authorizing the construction of the work, and, with such application, transmit to the Board a certified copy of the Order-in-Council and of the plans and description approved thereby, and also detail plans and profiles of the proposed work, and such other plans, drawings and specifications as the Board may, in any such case, or by regulation, require. 40

(2) No deviation from the site or plans approved by the Governor in Council, shall be made without the consent of the Governor in Council.

(3) Upon any such application, the Board may—

(a) make such order in regard to the construction of such work upon such terms and conditions as it may deem expedient ;

(b) make alterations in the detail plans, profiles, drawings and specifications so submitted ;

(c) give directions respecting the supervision of any such work ; and

10 (d) require that such other works, structures, equipment, appliances and materials be provided, constructed, maintained, used and operated, and measures taken, as under the circumstances of each case may appear to the Board best adapted for securing the protection, safety and convenience of the public.

(4) Upon such order being granted, the company shall be authorised to construct such work in accordance therewith.

20 (5) Upon the completion of any such work the company shall, before using or operating the same, apply to the Board for an order authorising such use or operation, and if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public, and that the provisions of this section have been complied with, the Board may grant such order. R.S. c. 37, s. 233.

BRIDGES, TUNNELS AND OTHER STRUCTURES.

30 Section 249. (1) The Governor in Council may, upon the report of the Board, authorise or require any railway company to construct fixed and permanent bridges, or swing, draw or movable bridges, or to substitute any of such bridges for bridges existing on the line of its railway, within such time as the Governor in Council directs.

(2) No company shall substitute any swing, draw or movable bridge for any fixed or permanent bridge already built and constructed without the previous consent of the Governor in Council. R.S. c. 37, s. 234.

Section 251. (1) The company shall not, within the limits of any incorporated city or town, or where its line of railway crosses a highway, whether within or without such limits, commence the construction or reconstruction of, or any material alteration in any bridge, tunnel, viaduct, trestle, or other structure, through, over, or under which the company's trains are to pass, the span, or proposed span or spans, or length of which

exceeds Eighteen feet, until leave therefor has been obtained from the Board; but the company may, without such leave, commence such construction, reconstruction or alteration at any place beyond the said limits, if such construction, reconstruction or alteration is not at a highway crossing and is in accordance with standard specifications and plans approved by the Board.

(2) Upon any application to the Board for such leave, the company shall submit to the Board the detail plans, profiles, drawings and specifications of any such work proposed to be constructed, and such other plans, profiles, drawings and specifications as the Board may, in any case, or by 10 regulation, require.

(3) Upon any such application the Board may—

- (a) make such order with regard to the construction of such work, and upon such terms and conditions, as it deems expedient ;
- (b) make alterations in the detail plans, profiles, drawings and specifications so submitted ;
- (c) give directions respecting the supervision of any such work ; and
- (d) require that such other works, structures, equipment, 20 appliances and materials be provided, constructed, maintained, used and operated, and that such measures be taken as, under the circumstances of each case, may appear to the Board best adapted for securing the protection, safety and convenience of the public.

(4) Upon such order being granted the company shall be authorized to construct such works in accordance therewith.

(5) Upon the completion of any such work the company shall, before using or operating the same, apply to the Board for an order authorizing such use or operation, and the Board may grant such order if it is satisfied that its orders and directions have been carried out, and that 30 such work may be used or operated without danger to the public, and that the provisions of this section have been complied with.

(6) Upon the application of any municipality or municipalities interested, the Board may, where it deems it reasonable and proper, require the company to construct under or alongside of its track upon any bridge being constructed, reconstructed or materially altered by the company a passageway for the use of the public either as a general highway or as a footway, the additional cost to the company of constructing, maintaining and renewing which, as fixed by or under the direction of the Board, shall be paid by the municipality or municipalities as the Board may direct, 40 and the Board may impose any terms or conditions as to the use of such passageway or otherwise which it deems proper.

OPENING RAILWAY FOR TRAFFIC.
INSPECTION AND LEAVE OF BOARD.

Section 276. (1) No railway, nor any portion thereof, shall be opened for the carriage of traffic, other than for the purposes of the construction of the railway by the company, until leave therefor has been obtained from the Board, as hereinafter provided.

10 (2) When the company is desirous of so opening its railway or any portion thereof, it shall make an application to the Board for authority therefor, supported by affidavit of its president, secretary, engineer or one of its directors, to the satisfaction of the Board, stating that the railway, or portion thereof, desired to be opened, is in his opinion sufficiently completed for the safe carriage of traffic, and ready for inspection.

(3) Before granting such application, the Board shall direct an inspecting engineer to examine the railway, or portion thereof proposed to be opened.

20 (4) If the inspecting engineer reports to the Board, after making such examination, that in his opinion the opening of the railway or portion thereof so proposed to be opened for the carriage of traffic, will be reasonably free from danger to the public using the same, the Board may make an order granting such application, in whole or in part, and may name the time therein for the opening of the railway or such portion thereof, and thereupon the railway, or such portion thereof as is authorized by the Board, may be opened for traffic in accordance with such order.

30 (5) If such inspecting engineer, after the inspection of the railway, or any portion thereof, reports to the Board that, in his opinion, the opening of the same would be attended with danger to the public using the same by reason of the incompleteness of the works or permanent way, or the insufficiency of the construction or equipment of such railway, or portion thereof, he shall state in his report the grounds for such opinion, and the company shall be entitled to notice thereof, and shall be served with a copy of such report and grounds, and the Board may refuse such application in whole or in part, or may direct a further or other inspection and report to be made.

40 (6) If thereafter, upon such further or other inspection, or upon a new application under this section, the inspecting engineer reports that such railway or portion thereof, may be opened without danger to the public, the Board may make an order granting such application in whole or in part, and may name the time therein for the opening of the railway, or such portion thereof, and thereupon the railway, or such portion thereof as is authorized by the Board, may be opened for traffic in accordance with such order.

(7) The Board, upon being satisfied that public convenience will be served thereby, may, after obtaining a report of an inspecting engineer, allow the company to carry traffic over any portion of the railway not opened for the carriage of traffic in accordance with the preceding provisions of this section.

Section 402. "Every company which erects, operates or maintains any bridge, approach, tunnel, viaduct, trestle or any building, erection or structure, in violation of this Act, or of any order or regulation of the Board, shall for each offence incur a penalty of Fifty dollars."

NAVIGABLE WATERS PROTECTION ACT.

10

Revised Statutes of Canada, 1906, Ch. 115
as amended by Statute of 1918, Ch. 33.

Section 2. In this Part, unless the context otherwise requires—

(a) "work" includes any bridge, boom, dam, aboiteau, wharf, dock, pier or other structure, tunnel or pipe, or telegraph or power cable or wire and the approaches or other works necessary or appurtenant thereto, or any work, structure or device, whether similar in character to the foregoing or not, which may interfere with navigation.

(b) "lawful work" means any work not contrary to the law in 20
force at the place of the construction thereof at the time of such construction.

R.S. c. 92, s. 1.

APPLICATION.

Section 3. Except so much of this Part as relates to rebuilding or repairing any lawful work, nothing hereinafter in this Part contained shall apply to any work constructed under the authority of any Act of the Parliament of Canada or of the legislature of the late Province of Canada, or of the legislature of any Province now forming part of Canada, passed before such Province became a part thereof.

30

R.S. c. 92, ss. 8 and 10.

Section 4. (1) No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council.

(2) The provisions of this section shall not apply to small wharves or groynes or other bank or beach protection works, or boat-houses, provided that, in the opinion of the Minister of Public Works, (a) they do not interfere with navigation, and (b) do not cost more than one thousand dollars.

40

Section 5. (1) Any work to which this part applies which is built or placed upon a site not approved by the Governor in Council, or which is not built or placed in accordance with plans so approved, or which, having been so built or placed, is not maintained in accordance with such plans and regulations, may be removed and destroyed under the authority of the Governor in Council by the Minister of Public Works, and the materials contained in the said work may be sold, given away or otherwise disposed of, and the costs of and incidental to the removal, destruction or disposition of such work, deducting therefrom any sum which may be realized by sale or otherwise, shall be recoverable with costs in the name of His Majesty from the owner: Provided however that the Governor in Council may approve of works constructed, or in process of construction, on the First day of June, One thousand nine hundred and eighteen, subject to the provisions of section seven hereof and such approval shall have the same effect as approval of works to be constructed.

(2) In this section "owner" includes the person authorizing or otherwise responsible for the erection or maintenance of any work referred to in this section, and the actual or reputed owner or person in possession or claiming ownership thereof for the time being, and all or any of such persons jointly and severally.

Section 6. The provisions of the two sections last preceding shall not affect any bridge constructed before the seventeenth day of May, one thousand eight hundred and eighty-two, which hereafter requires to be built or repaired, if such bridge, when so rebuilt or repaired, does not interfere to a greater extent with navigation than on the said day or theretofore. R.S. c. 92, s. 4.

Section 7. (1) The local authority, company or person proposing to construct any work in navigable waters, for which no sufficient sanction otherwise exists, may deposit the plans thereof and a description of the proposed site with the Minister of Public Works, and a duplicate of each in the office of the Registrar of deeds for the district, county or province in which such work is proposed to be constructed, and may apply to the Governor in Council for approval thereof.

(2) Such local authority, company or person shall give one month's notice of the said deposit of plans and application by advertisement in the Canada Gazette, and in two newspapers published in or near the locality where such work is to be constructed. R.S. c. 92, s. 5.

Section 8. Any local authority, company or person may proceed in like manner to obtain the approval by the Governor in Council of the site and plans of any work constructed prior to the first day of March, One thousand eight hundred and ninety-nine. 62-63 V., c. 32, s. 1.

CANADIAN CASES.

(1856) *SNURE vs. GREAT WESTERN RAILWAY*, 13 Upper Canada Queen's Bench, 376.

Action for damages by a riparian proprietor on a navigable river for damages caused by a bridge built by defendants, by which access to plaintiff's factory was impeded.

Defendants set up their Act of Incorporation which empowered them to "construct and maintain piers and arches across rivers, etc., etc. and to take land, etc., in, upon, along and across any navigable stream, river or water whatsoever and to take any easement thereto being of a public 10 or private character provided always that the free and uninterrupted navigation of the said streams, lakes, rivers and other waters for all boats, etc., shall not be interfered with by the said railway," and alleged that they had built the bridge as part of the railway and in "so doing unavoidably obstructed a little the navigation of the said stream for a short space of time." Plaintiff replied that the obstruction was still continuing. Defendant demurred to the replication. The Court (of four Judges) gave judgment for the plaintiff on the demurrer and said "They (defendants) do not however allege that they removed the bridge or made such alteration in it as to put an end to the nuisance complained of and at any rate what 20 the Statute directs is that the navigation shall not be interfered with but shall be free and uninterrupted. We consider that it (i.e. the Private Act) requires that the navigation shall be left open at all times."

(1875) "CZAR," *Cook's Rep. (Quebec)* 9.

Plaintiffs were a cable company empowered to lay cables in the St. Lawrence River "without hindering navigation," and sued for negligent damage done to their cable by a ship.

Held that if the cable had impeded navigation the plaintiff would have no right to recover.

Action by Montreal Telegraph Co. incorporated in 1847 by 10 & 11 30 Vic., c. 83, of the Province of Canada, which empowered them to "cross the line on all bridges and over all rivers from Toronto to Quebec without hindering the navigation."

By an amendment of 1855 the promoters were authorised to extend their line across "any of the waters within the Province of Canada" by the erection of the necessary fixtures including posts for sustaining the cords or wires of the lines but so as not injuriously to interrupt the navigation of such waters." Mr. Justice Stuart: "If the submarine cable of the promoters had interfered with the navigation and the "Czar" had been injuriously affected thereby in passing up or down the river while navigating 40 as vessels usually do, an injury to the cable done by her would be the result of misconduct on the part of the promoters, etc."

(1886) *RATTE vs. BOOTH*, 11 Ontario Rep. 491.

Chancellor Boyd, at page 497 sets out the meaning of the reservation in the Crown Grant : "Saving excepting and reserving unto Us and Our Successors the free uses passage and enjoyment of in and over all navigable waters etc." as follows :—

10 "What then is this reservation and what its effect ? It is not a reservation of the water itself, as in *Kirchhoffer v. Stanbury*, 25 Gr. 413, nor of the watercourse or flow of water as in *Egremont v. Williams*, 11 Q.B. 700. It is restricted to the free use, passage, and enjoyment of, in, over and upon navigable waters which are upon any part of the parcel conveyed, and such a reservation is not of a proprietary but of a usufructuary enjoyment. This clause is intended to preserve that right of the public to navigate which is paramount to any right of property in the Crown : *Williams vs. Wilcox*, 8 A. & E. 314. The effect of the grant is to pass all the right of property possessed by the Crown in the land and water subject to the public easement. The grant of the river bed two chains out carries as parcel of it, the water thereon, so that we have to this extent the bed, the bank, and the water vested as private property in the Patentee, subject to the servitude of a common public right-of-way for the purposes of navigation. In brief the use of the river quoad this locality is public, but the property therein is private."

20

(1892) *JOYCE vs. HALIFAX STREET RAILWAY*, 24 Nova Scotia Rep. 113 (affirmed by Supreme Court of Canada, 22 S.C.R. 258).

Action for damages for injury to a horse owing to a caulk in its shoe catching on a rail of defendants' tramway. The defendants' Private Act (Sec. 5 & 6 of chapter 124 of 1886) provided that the "rails shall be laid and maintained at such levels and gradients as the City Engineer shall direct and determine," and also that the roadway between the rails shall be "kept constantly in good repair and level with the rails under the direction of the Engineer." These rails were not exactly level with the street but projected slightly above the level of the street surface and the defendants urged that to comply strictly with the Statute they would have to pave the street. The Court held that the rails not being level with the street were not laid in strict accordance with the Statute and were a nuisance and un-authorised obstruction of traffic and that defendants were liable. They found as a fact that the City Engineer had not approved of the condition of the roadway but that even if he had done so it would not have excused the defendants since the Engineer "could no more approve anything short of the actual requirements of the Statute than he could dispense with it altogether."

30

40

LAKE SIMCOE ICE CO. *vs.* McDONALD (1898) 31 Supreme Court Rep. 130.

McDonald, the plaintiff, was the owner of land on the shore of Lake Simcoe and also owned the water-lot adjoining, which he held under a Grant from the Crown in right of the Province of Ontario containing a reservation to the Crown of "the free use, passage and enjoyment of, in, over and upon all navigable waters which shall or may be hereafter found in, or under or be flowing through or upon any part of the said parcel or tract of land hereby granted." It is held that this reservation gave a right to the public to navigate over plaintiff's water-lot.

See also Cullerton *vs.* Miller (1894) 26 Ontario Reports, 36. 10

(1899) BONN *vs.* BELL TELEPHONE Co., 30 Ontario Rep. 696 (a decision of a Divisional Court).

This was an action for damages to a horse by collision with a telephone pole erected by the defendants on a public highway. The defendant company had erected the pole pursuant to Section 3 of a Statute of Canada, 43 Vic., c. 67 (1880) which gave them power to put poles on highways "provided the company shall not interfere with the public rights of travelling on or using" the highway. Another section of the same Act provided that :

"the location of the line and the opening of the street for the 20 erection of poles shall be made under the direction and supervision of the engineer or such other officer as the Council may appoint and in such manner as the Council may direct."

The location of this pole was made under the direction of an officer appointed by the Council for the purpose (see p. 701).

Chancellor Boyd, at page 702 says :

"The company had not an absolute right to use the highways. It is only a permission—they may construct provided that it shall not interfere with the public right of travelling on or using the highways. That is a general and all-controlling provision which 30 has a paramount place as to the use of all highways" . . .

Speaking of the clause as to the location of poles under Municipal supervision he says :

"that further safeguard however does not nullify the provision placed first in the statute that the company is not to interfere with the public right of travel."

RE VANCOUVER-WESTMINSTER & YUKON RAILWAY (1907) a decision of the Board of Railway Commissioners reported in the Board's Fourth Annual Printed Report, page 222, and referred to in the 2nd edition of Macmurchy & Dennison's work on the Railway Act. 40

That company applied (under what are now sections 180 and 181 of the Railway Act) for leave to build branches or spurs in the City of

Vancouver, one of which was to cross False Creek (part of Vancouver Harbour). The City opposed the application and amongst other arguments contended that an order under section 233 (now 248) approving of the plans of the necessary bridge, was a condition precedent to the right to apply for authority to build the branch line. The Board however held otherwise and the Chairman, the late Mr. Justice Killam, said "the converse is to my mind the case; the authority to build a branch is a condition precedent to the application for approval of the site and plans of so much as crosses navigable water."

10 GRAND TRUNK *vs.* B. C. EXPRESS (1916), 55 Supreme Court Rep. 328.

Action for damages to a river navigation company by the construction of a railway bridge over the Fraser River in British Columbia. The bridge plans had been approved by the Governor-General in Council under section 248 of the Railway Act and a "construction Order" had been made by the Railway Board subject to a condition that the railway company "should provide passage for steamboats upon being directed." While the bridge was under construction they were asked to "submit plans" to provide passage for steamers but ignored the request. The railway company were held liable to the shipowner and Anglin, J. (now
20 Chief Justice of Canada) and Duff, J., held that the condition in the company's approval of works gave rise to an obligation on the part of the railway enforceable by action by any party aggrieved.

CHAMPION *vs.* CITY OF VANCOUVER (1918) 1 Western Weekly Report, 216.

(A decision of the Supreme Court of Canada.)

It was an action by a riparian proprietor to enjoin another riparian proprietor (the City) from building a sea-wall in False Creek (part of Vancouver Harbour) whereby plaintiff's access to his wharf would be impeded. The City's plans had been approved of by Order-in-Council under the Navigable Waters Act of Canada and the Chief Justice (Sir Charles
30 Fitzpatrick) speaks of it thus :

40 "The Order-in-Council above quoted is the only authority which the defendants have for building the sea-wall and this, I think, is wholly insufficient; the object and purposes of the Navigable Waters' Protection Act, as its very title indicates is to preserve public rights of navigation. It does not give any authority to the Governor-in-Council to take away such rights by closing up navigable waters; yet that is what the order in term does. False Creek is a public harbour and the District Engineer in his report recited in the Order-in-Council speaking of the 'upper end of False Creek' says: 'There is no objection to the granting of the desired approval, as . . . there will be no further need to maintain this channel for navigable purposes.'

“ Parliament alone can take away a public right of navigation since this clearly requires an exercise of legislative power. Whether and how far Parliament could delegate this power to the Governor-in-Council we need not inquire ; it certainly has not done so by the Navigable Waters’ Protection Act.

“ In considering the interpretation to be put upon this Act it must be borne in mind that every work constructed in navigable waters is not necessarily such an interference with navigation as to constitute an illegal obstruction. It may, however, be so, and as such, liable to be removed by the proper authority. It is therefore of great advantage to persons proposing to construct works for which there is no sanction to be able to obtain beforehand the approval of the Governor-in-Council under section 7 ; the provision is, however, purely permissive and the section does not provide for any consequences following upon the approval, certainly not that it shall render legal anything which would be illegal. Any interference with a public right of navigation is a nuisance which the Courts can order abated notwithstanding any approval by the Governor-in-Council under Section 7.”

It will be noted that the City were not, in the erection of their sea-wall, restrained by any such words as “ but so as not to impede navigation,” and yet the approval of their plans under the Navigable Waters Act was held not to justify an erection which would in fact impede navigation. The Railway Act being in substantially similar terms, it would seem clear that an Order-in-Council under that Act would not allow the obstructing of navigation by a company expressly bound not to impede navigation at all.

See the Canadian Cases quoted above :

Bonn *vs.* Bell Telephone Co., (1899) 30 Ontario Rep. 696.

Halifax *vs.* Joyce (1892) 24 Nova Scotia Rep. 113 and 22 30 Supreme Court Rep. 258.

Maunsell *vs.* Lethbridge (1925) 3 Western Weekly Rep. 202 and (1926) Supreme Court Rep. 603.

In North Shore *vs.* Pion (1889), 14 A.C. 612, the plans had been approved by the Government of Quebec under the Railway Act of Quebec (see pages 617 and 630) and yet it was held no protection in the absence of any statutory right to impede right of acces et sortie.

See also Bantwick *vs.* Rogers, 7 Times Rep. 542.

KING *vs.* WOLDINGHAM (1925) Can. Exchequer Rep. 85.

It was an action by the Attorney-General of New Brunswick against a ship to recover damages done to a bridge built by the Government of that

Province over the Miramichi River (a tidal river). The Court held that as the Provincial Government had failed to obtain approval of the bridge plans under the Navigable Waters Protection Act it was an illegal obstruction and the ship had a right to abate the nuisance and was not liable for the damage done to the bridge.

In reference to the absence of authority under the Navigable Waters Protection Act Sir Douglas Hazen, J., says :

10 “ It is not alleged by the plaintiff that any such Order ever was passed and so far as the bridge is concerned it has been constructed without the site or plans being approved of, which are essential to its legal construction and is therefore as it stands to-day in my opinion an unlawful structure.”

Then speaking generally of unlawful impediments of navigation he says :

20 “ Now, I think it is beyond question that the bridge as erected constitutes an interference with navigation on the Miramichi River. Before its construction vessels could proceed up and down the river freely and wherever the depth of water would permit them to do so. Since the bridge has been constructed their passage is limited to the two comparatively small passageways in the vicinity of 100 feet wide, and this undoubtedly in the absence of legal authority for the construction of the bridge constitutes an interference with navigation. It is of course clear beyond question that the right of navigation can only be extinguished by an Act of Parliament, and without the authority of Parliament no one can lawfully put into tidal waters or maintain there anything which is an obstruction or a nuisance to the right of navigation and it has further been decided that it is no excuse that the obstruction only occurs at certain states of the tide.

30 “ It has been held in England that neither the Board of Trade as representing the unit interested in navigation, nor a board of surveyors—can legally authorize any erection in navigable waters which is a nuisance unless acting under special powers granted by Parliament, and no right to obstruct can be acquired by any length of user. The nuisance to navigation may be an actual erection in the soil as in the present case or it may be the mooring of floating structures with which we have no concern at present. I think it may reasonably be concluded that it was the intention by the Navigable Waters Protection Act that the Dominion Government when it gives its consent to plans requiring a draw-bridge, assumes that it will be available for traffic at all times of the tide, i.e. (as contended by counsel for defendant) that where a bridge is put across a navigable river the draw must be available to be opened at all times, not merely at certain times

40

of the tide, and that the bridge will be designed and protected so that the ordinary navigation of the river should not be held up, and this was the intention of the Navigable Waters Protection Act in providing that plans of the bridge should be filed with and approved by the Governor-in-Council.

“It was I think as contended by him obviously intended that the parties should provide a construction that would not interfere with navigation, and through which vessels could pass without undue hazard at all times of the tide. The bridge, however, apparently was built without due consideration as to the effect it would have upon navigation. It was constructed at an angle with the current, rendering approach to it much more dangerous than if it had been at right angles, and especially dangerous considering the physical nature of the river, as about a mile and a half above two large branches of the river join, the waters running towards the southern shore and then across at an angle of the river to the northern shore, causing a dangerous condition at the point where the drawbridge was provided.” 10

MAUNSELL *vs.* LETHBRIDGE (1925) 3 Western Weekly Rep. 202 and (1926) S.C.R. 603. (a decision of the Appellate Division of Alberta affirmed by the Supreme Court of Canada.) 20

Action against an Irrigation District for damages due to seepage of water from an irrigation canal. The defendant District had been formed under a Statute of the Province of Alberta (Chapter 114 of 1922) and had also the right to exercise powers under the Irrigation Act of Canada (Revised Statutes 1906, ch. 61).

Section 20 of that Act is as follows :—

“(1) The memorial and plans filed with the commissioner, as herein provided, shall be examined by the chief engineer, and, after they have been approved by him one copy shall be forwarded for record purposes to the department. 30

“(2) Upon receipt of such memorial and plans, properly approved, together with a certificate of the commissioner that the proper notice of the filing of such memorial and plans has been published, and that, if such is the case, permission has been granted by the provincial, municipal or other authorities respectively having jurisdiction in that behalf, or by the Board (i.e. Railway Board) as hereinafter provided, to construct the said works upon, along, across or under every road allowance, public highway, square or other public place affected thereby, and after considering all protests filed, the Minister may authorize 40

the construction of the proposed works with such changes and variations as he deems necessary, fixing in such authorization a term within which the construction of the works is to be completed.”

Under this section an “approval of plans” and a “construction order” are required as in the case at bar, and the Railway Act applied in both cases.

The effect to be given to these authorizations is dealt with by Stuart, J.A., at page 208 of 3 W.W.R. in these words :—

10 “The power so to apply (i.e., apply for the Commissioner’s approval of plans) and to use water must, of course, in so far as it is a capacity of the Corporation, be found in their constituting Act.”

And at pages 213-4 he says :—

20 “The issue of the authorization by the Commissioner was a condition precedent to the exercise of the statutory powers, but I do not think the authorization itself or the plans to which it referred should be considered as part of the terms of the statutory power. That power was simply and plainly to construct an irrigation canal at a certain place and to convey water through it for irrigation purposes. I do not think it was the intention of the Parliament that in the exercise of that power the Board could shield itself from responsibility behind the action, possibly mistaken, of the Commissioner and his engineers.”

AMERICAN CASES.

(1911) HUBBARD *vs.* FORT, a decision of the Circuit Court of the State of New Jersey, reported in 188 Federal Reporter, at p. 987, is illustrative.

The plaintiff was a Water Company seeking to dredge in navigable waters a trench in which to lay its pipes.

30 By Act of Congress (United States River & Harbour Act 1899) it is provided as follows :—

“Section 9.—It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbour, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War, etc., etc.”

Plaintiff had obtained the permit of the Secretary of War, but had not obtained affirmative authority from Congress to lay pipes in navigable water, and it was held that consent of Congress was essential and that the permit from the Secretary of War was not enough.

The Court says :—

“ Authority to excavate and lay a pipe line in the bed of the Kill von Kull is one thing and authority relating to the time when and the plans in conformity to which the work is to be done is another. The Secretary of War’s authorization is supervisory and relates to the character and performance of the work 10 and not the directing and authorizing it to be done in the first instance. Section 9 clearly evinces that Congress intended to keep to itself the initial authorization of the crossing of interstate waters by bridges, dams, etc.”

UNITED STATES *vs.* NORFOLK-BERKLEY BRIDGE CORPORATION (1928)
29 Federal Reporter (2nd series) 115.

This case deals with a collision between a United States Government-owned ship and a bascule lift bridge over the Elizabeth River at Norfolk, Virginia. The Bridge Company had a Special Act empowering them to build a bridge across the river in accordance with the provisions of the 20 General Bridge Act of the United States.

The General Bridge Law provided as follows :—

“ 1. When, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and 30 Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works ; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.” 40

The Bridge Company obtained approval of its plans by the Secretary of War, one term of his approval being that "the clear width of opening between fenders shall be not less than 140 feet." The clear width as constructed was less than this by a few inches. This had been done with the knowledge of the District Government Engineer and it was urged that this was sufficient to legalize the slight encroachment, but the Court says :—

10 " The District Engineer and other subordinates of the War
Department had no authority to authorise a modification of the
plans attached to the permit. The terms of the General Bridge
Act are clear that this authority is vested in the Secretary of
War and Chief of Engineers. Discretion is doubtless lodged
in the permittee and the District Engineer as to the manner in
which the terms of a permit are carried out, but neither one nor
the other may alter the plans themselves. If by oversight or
otherwise a material departure from the general plan is approved
by the District Engineer or his assistants, the responsibility
of the bridge owner is in no way affected . . . It is the conclusion
20 of the court from the facts thus found that at the time of the
Poljama collision in December 1926 and at the time of the West
Alek collision in October 1927, the bridge was an unlawful
structure in respect to those portions of it with which the ships
came in contact. It is fundamental, as a general proposition of
law that any obstruction to navigation is unlawful since the public
is entitled to the unobstructed use of every part of a navigable
river (quoting cases). The bridge, having cited the Special Acts
of Congress and the permits of the Secretary of War as justifying
its existence, has the burden of proof to show that in its erection
and maintenance, it conformed to the requirements, for grants
30 of this kind against the public right must be strictly construed."

After dealing with bridges lawfully constructed, the Court again proceeds :—

40 " On the other hand, the rule as to a bridge which is an
unlawful obstruction to navigation is different. While such a
structure may not be injured negligently by a passing vessel with
impunity nevertheless the vessel which strikes it is not presump-
tively negligent or careless, but the bridge owner is presumptively
at fault unless he can show that the failure to comply with the
requirements was not one of the factors or causes which con-
tributed to the injury. The bridge owner is entitled to recover
from the ship only if he can show that the failure to comply with
the law was in no way responsible for or contributed to the
accident or disaster."

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 &
BRIDGE COMPANY** (Plaintiff)

Respondent.

**Appellant's Appendix of
Statutes and Cases.**

WILLIAM A. CRUMP & SON,
27 Leadenhall Street, E.C.3,
Solicitors for the (Defendant) Appellant.