

45, 1933

# In the Privy Council.

No. 61 of 1932.

## ON APPEAL FROM THE SUPREME COURT OF CANADA.

### APPEAL No. 1.

(*d'Argenson Street Subway.*)

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondent*

### APPEAL No. 2.

(*St. Antoine Street Subway.*)

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondent*

### APPEAL No. 3.

(*d'Argenson Street Subway.*)

BETWEEN

THE MONTREAL LIGHT HEAT & POWER  
CONSOLIDATED - - - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondent*

### APPEAL No. 4.

(*St. Antoine Street Subway.*)

BETWEEN

THE MONTREAL LIGHT HEAT & POWER  
CONSOLIDATED - - - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondent*

CASE FOR THE RESPONDENTS.

APPEAL No. 5.  
(*d'Argenson Street Subway.*)

BETWEEN  
THE MONTREAL TRAMWAYS COMPANY and  
THE MONTREAL TRAMWAYS COMMISSION *Appellants*  
AND  
THE CANADIAN NATIONAL RAILWAYS - *Respondent*

APPEAL No. 6.  
(*St. Antoine Street Subway.*)

BETWEEN  
THE MONTREAL TRAMWAYS COMPANY and  
THE MONTREAL TRAMWAYS COMMISSION *Appellants*  
AND  
THE CANADIAN NATIONAL RAILWAYS - *Respondent*

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APPEAL No. 7.  
(*St. Clair Avenue Toronto Subway.*)

BETWEEN  
THE BELL TELEPHONE COMPANY OF CANADA *Appellant*  
AND  
THE CANADIAN NATIONAL RAILWAYS - *Respondent*

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APPEAL No. 8.  
(*City of Hamilton Subways.*)

BETWEEN  
THE BELL TELEPHONE COMPANY OF CANADA *Appellant*  
AND  
THE TORONTO, HAMILTON AND BUFFALO  
RAILWAY COMPANY and THE CORPOR-  
ATION OF THE CITY OF HAMILTON - *Respondents.*

[Consolidated Appeals.]

CASE FOR THE RESPONDENTS.

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Record.  
pp. 47, 108.  
pp. 142, 177.  
pp. 220, 264.  
pp. 309 and  
402.

1. These are appeals by special leave from eight judgments of the Supreme Court of Canada, delivered on the 1st March, 1932, dismissing the Appellants' appeals from four orders of the Board of Railway Commissioners

for Canada (hereinafter called "the Board") number 45410 dated 16th September, 1930, number 45427 dated 9th September, 1930, number 46083 dated 8th January, 1931, and number 45813 dated 14th November, 1930. By His Majesty's Order granting special leave to appeal, dated the 21st July, 1932, the said appeals were consolidated.

Record.  
pp. 10, 71,  
273 and 350.  
p. 414, l. 46.

10 **2.** Numbers 1 to 6 of the above appeals arise out of the orders of the Board numbers 45410 and 45427 providing for the crossing of d'Argenson and St. Antoine Streets in the City of Montreal by the Canadian National Railways by means of subways. For many years before these orders were made the Board had given consideration to the question of the level crossings of the Canadian National Railways in the City of Montreal. The readjustment of the terminal facilities of the Railway and the question of level crossings had also been considered by the Railway and had been studied and reported upon by a prominent engineer. In 1929, the Canadian Parliament passed the Canadian National Montreal Terminals Act (19-20 Geo. V. c. 12) authorising certain works, including subways, and, pursuant to the Act, a general plan was approved by Order in Council.

p. 3, l. 26,  
et seq.  
pp. 418-437.  
p. 4, l. 6.  
p. 67.

20 General plans showing inter alia (A) the reconstruction of the existing grade separation at d'Argenson Street in the City of Montreal and (B) the construction of a new subway at St. Antoine Street were approved by the Board by Order number 44425 dated 10th March, 1930, and by Order number 44433 dated 13th March, 1930. In accordance with these Orders detailed plans of the works at the two crossings were in April, 1930, served on the City of Montreal and submitted for the approval of the Board. The applications to the Board included the request that the Appellants should be directed to move such of their utilities as were affected by the construction and copies of the plans were served on the Appellants. The Appellants subsequently communicated with the Railway Board requesting a hearing.

p. 4, l. 23.  
p. 67, l. 46.  
p. 428.  
p. 432.  
p. 7.  
p. 70.  
p. 8.  
p. 116.  
p. 185.

30 **3.** The Order of the Board number 45410, dated 16th September, 1930, out of which the above appeals numbers 1, 3 and 5 arise, authorised the construction by the Canadian National Railways of a subway at d'Argenson Street on the line of the Railway and directed the City of Montreal and the above-named Appellants, the Bell Telephone Company of Canada, the Montreal Light Heat & Power Consolidated, the Montreal Tramways Company and the Montreal Tramways Commission—

pp. 10-11.

“to move such of their utilities as may be affected by the construction of the said subway as and when requested to do so by the Chief Engineer Operating Department of the Applicant.”

p. 11, l. 7.

40 **4.** The Order of the Board number 45427, dated 9th September, 1930, out of which the above appeals numbers 2, 4 and 6 arise, authorised

pp. 71-72.

- Record. the construction by the Canadian National Railways of a subway on St. Antoine Street on its line of railway and the same companies and others were directed—
- p. 72, l. 6. “ to move such of their utilities as may be affected by the construction of the said subway as and when required to do so by the Chief Engineer Operating Department of the applicants.”
- p. 2, l. 15.  
p. 66, l. 1.
- p. 112, l. 30.  
p. 146, l. 17.
- p. 180, l. 28.  
p. 224, l. 17.
- 5.** The utilities affected by Orders numbers 45410 and 45427 consist of (A) underground conduit systems, containing cables with manholes belonging to the Bell Telephone Company of Canada (B) an eight inch gas main at d'Argenson Street and gas mains and equipment for transmission of electric power at St. Antoine Street belonging to the Montreal Light Heat & Power Commission and (c) a copper cable at d'Argenson Street and two lines of tracks and trolley wires at St. Antoine Street belonging to the Montreal Tramways Company. 10
- p. 273, l. 20.  
p. 267, l. 6.  
pp. 437-438.  
p. 269.
- p. 267, l. 32.  
p. 269, l. 30.
- pp. 270-272.
- p. 273, l. 20.
- 6.** The Order of the Board number 46083, out of which appeal number 7 arises, provided for the construction of a subway at St. Clair Avenue in the City of Toronto. On the application of the City of Toronto the construction of a subway at this crossing with other works had been directed in 1924 by an Order of the Board number 35037 ; but prior to 1930 no steps had been taken towards its construction. On the 30th December, 1930, the Canadian National Railways applied to the Board for authority for the construction of a subway at St. Clair Avenue in the City of Toronto and for a diversion of its line at the same point. The plan and profile showing these works had previously been approved by Order in Council and the plan had been approved by the Commissioner of Works for the City of Toronto. Copies of the plan and application were served on the City, the Bell Telephone Company of Canada and other utility Companies affected. The Bell Telephone Company of Canada delivered a written reply. 20
- p. 274, l. 3.
- p. 266, l. 7.
- pp. 350-352.
- p. 321, l. 28.
- Order number 46083 dated the 8th January, 1931, authorised the construction of the works and directed the Bell Telephone Company of Canada and others—
- “ to move such of their facilities as may be affected by the construction of the said subway when requested to do so by the Chief Engineer of the applicants.”
- The facilities affected belonging to the Bell Telephone Company of Canada consisted of an underground conduit system and manhole.
- 7.** The Order of the Board number 45813, out of which appeal number 8 arises, was made on the joint application of the Respondents the City of Hamilton and the Toronto, Hamilton and Buffalo Railway. The 40

application was made for the purpose of carrying out an agreement between the City and the Railway for extensive alterations in the railway line in the City of Hamilton, including the building of a new railway station. In accordance with the application, the Order, inter alia, approved a plan, profile and book of reference, showing a deviation, change and alteration of part of the railway line between Park Street and Victoria Avenue in the City of Hamilton, authorised the Railway to carry its elevated tracks over certain streets and to carry the streets beneath the tracks by means of subways, provided for the closing of certain streets and directed that the Appellant the Bell Telephone Company of Canada and other public utility companies affected—

Record.  
pp. 441-446.  
p. 351, l. 12.

“reconstruct, alter or change the respective works of each in order to carry out the changes in the railway shown on the said plan and profile.”

p. 352, l. 6.

The works of the Bell Telephone Company of Canada affected consist of underground conduit systems with manholes and certain pole lines.

p. 312, l. 34.

**8.** By the concluding paragraph of each of the four Orders above mentioned the question of the cost of the works was expressly reserved for further consideration by the Board.

p. 11, l. 10.  
p. 72, l. 9.  
p. 274, l. 6.  
p. 352, l. 12.

**9.** Under section 51 of the Railway Act of Canada (Revised Statutes 1927 ch. 170) the Board has power to “review, rescind, change, alter or vary” its Orders.

Under section 52 sub-section 1 of the Act the Governor in Council may “vary or rescind” any Order of the Board.

Under section 52 sub-section 2 of the Act an appeal lies to the Supreme Court of Canada by leave of a Judge of the Court “upon a question of jurisdiction.”

Under section 52 sub-section 3 of the Act an appeal lies to the Supreme Court, by leave of the Board, “upon any question which in the opinion of the Board is a question of law, or a question of jurisdiction or both.”

Sub-section 6 of section 52 provides that on the hearing of an appeal the Court may draw “all such inferences as are not inconsistent with the facts expressly found by the Board.”

Sub-section 10 of section 52 provides that “save as provided in this section (a) every decision or order of the Board shall be final . . .”

**10.** By eight orders, made by judges of the Supreme Court of Canada under section 52 sub-section 2 of the Railway Act, the Appellants

p. 11.  
p. 72.  
p. 118.  
p. 150.

Record.  
p. 195.  
p. 239.  
p. 274.  
p. 352.

severally obtained leave to appeal to the Supreme Court upon a question of jurisdiction, namely whether the Board had power to order the Appellants to move their utilities or to make such orders ex parte.

pp. 1-18.  
pp. 65-78.  
pp. 111-122.  
pp. 145-156.  
pp. 179-200.  
pp. 223-244.  
pp. 265-282.  
pp. 312-364.  
pp. 416-452.

**11.** The Record in the Supreme Court in each of the eight appeals consisted of a statement of facts, with documents and plans scheduled thereto, prepared and certified by the Board.

**12.** The main question involved in each of the eight appeals is whether the Board, when authorising the construction of subways or other structures in connection with highway crossings, has jurisdiction to order that changes in the position of utilities on such highways rendered necessary by the authorised alterations in the levels of the streets should be carried out by the Companies operating such utilities. The further question is raised whether the Orders in question were made irregularly and not in accordance with the rules binding upon the Board. 10

pp. 10, 71,  
273 & 350.

**13.** The four Orders of the Board numbered 45410, 45427, 46083 and 45813, out of which these appeals arise were made on applications by the Respondents under sections 255, 256 and 257 of the Railway Act whereby the Board is empowered when granting an application in whole or in part to impose such terms and conditions or make such order "as to protection, safety and convenience of the public" as it deems expedient. 20

**14.** Sections 255, 256 and 257 of the Railway Act are in part as follows :—

" 255. The railway of the company may, if leave therefor is first obtained from the Board as hereinafter authorised, but shall not without such leave, be carried upon, along or across any existing highway : \* \* \* \* \*

" 256. Upon any application for leave to construct a railway upon, along or across any highway, or to construct a highway along or across any railway, the applicant shall submit to the Board a plan and profile showing the portion of the railway and highway 30 affected.

" (2) The Board may, by order, grant such application in whole or in part and upon such terms and conditions as to protection, safety and convenience of the public as the Board deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, or that such other work be executed, watchmen or other persons employed, or measures taken as under

the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, in the opinion of the Board, arising or likely to arise in respect of the granting of the application in whole or in part in connection with the crossing applied for, or arising or likely to arise in respect thereof in connection with any existing crossing.

10       “ 3. When the application is for the construction of the railway, upon, along or across a highway, all the provisions of law at such time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, including compensation to be paid to adjacent or abutting landowners as provided by the last preceding section, shall apply to the land exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

“ 4. The Board may exercise supervision in the construction of any work ordered by it under this section, or may give directions respecting such supervision.

20       “ 5. When the Board orders the railway to be carried over or under the highway, or the highway to be carried over or under the railway, or any diversion temporarily or permanently of the railway or the highway, or any works to be executed under this section, the Board may direct that detailed plans, profiles, drawings and specifications be submitted to the Board.

“ 6. The Board may make regulations respecting the plans, profiles, drawings and specifications required to be submitted under this section.

\*       \*       \*       \*       \*       \*       \*

30       “ 257. Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons  
40       employed, or measures taken as under the circumstances appear

Record.

to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

“ 2. When the Board of its own motion, or upon complaint or application, makes any order that a railway be carried across or along a highway, or that a railway be diverted, all the provisions of law at such time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land, exclusive of the highway crossing, required for the proper carrying out of any order made by the Board. 10

“ 3. The Board may exercise supervision in the construction of any work ordered by it under this section, or may give directions respecting such supervision.”

**15.** Section 39 of the Railway Act is as follows :—

“ 39. When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained. 20

“ 2. The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid.” 30

It is now settled that section 39 “ applies to every case in which the Board by any Order directs works and gives it power to ‘ order by what Company, Municipality or person interested in or affected by such Order ’ they shall be constructed.” (*Toronto Railway Company v. Toronto* [1920] A.C. 426 at 435 and *Canadian Pacific Railway v. Toronto Transportation Commission* [1930] A.C. 686 at 695.)



16. The following further sections of the Railway Act are referred to :—

Record.

“ 19. The commissioners shall sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business.

“ (2) They may, subject to the provisions of this Act, sit either together or separately, and either in private or in open court : Provided that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court.

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\* \* \* \* \*

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

“ (b) requesting the Board to make any order, or give any 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.

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“ (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 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.

\* \* \* \* \*

“ (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.

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“ 44. . . . (3) The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive.

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Record.

“ 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.

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“ 59. Except as herein otherwise provided, when the Board is authorised to hear an application, complaint or dispute, or make any order, upon notice to the parties interested, it may, upon the ground of urgency, or for other reason appearing to the Board to be sufficient, notwithstanding any want of or insufficiency in such notice, make the like order or decision in the matter as if due notice had been given to all parties ; and such order or decision shall be as valid and take effect in all respects as if made on due notice. 10

“ (2) Any company or person entitled to notice and not sufficiently notified may, at any time within ten days after becoming aware of such order or decision, or within such further time as the Board may allow, apply to the Board to vary, amend or rescind such order or decision, and the Board shall thereupon, on such notice to other parties interested as it may in its discretion think desirable, hear such application, and either amend, alter or rescind such order or decision, or dismiss the application, as may seem to it just and right. 20

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“ 252. The railway lines or tracks of any railway company shall not cross or join or be crossed or joined by or with any railway lines or tracks other than those of such company, whether otherwise within the legislative authority of the Parliament of Canada or not, until leave therefor has been obtained from the Board as hereinafter provided.

“ (2) Upon any application for such leave the applicant shall submit to the Board a plan and profile of such crossing or junction, and such other plans, drawings and specifications as the Board may, in any case, or by regulation, require. 30

“ (3) The Board may, by order,

“ (a) grant such application on such terms as to protection and safety as it deems expedient ;

“ (b) change the plan and profile, drawings and specifications so submitted, and fix the place and mode of crossing or junction ;

“ (c) direct that one line or track or one set of lines or tracks be carried over or under another line or track or set of lines or tracks ;

“(d) direct that such works, structures, equipment, appliances and materials be constructed, provided, installed, maintained, used or operated, watchmen or other persons employed, and measures taken, as under the circumstances appear to the Board best adapted to remove and prevent all danger of accident, injury or damage ;

\* \* \* \* \*

10 “ 259. Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of the next following section of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person in respect of any order made by the Board, under any of the last three preceding sections, and such order shall be binding on and enforceable against any railway company, municipal or other corporation or person named in such order.

20 “ 260. In any case where a railway is constructed after the nineteenth day of May, one thousand nine hundred and nine, the company shall, at its own cost and expense, unless and except as otherwise provided by agreement, approved by the Board, between the company and a municipal or other corporation or person, provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway.”

17. The following extract from the Canadian National Railways Act section 17 as amended by section 2 of 19-20 Geo. V. ch. 10 is referred to.

“ 17. (1) All the provisions of the Railway Act shall apply to the Company, except as follows :

“ (a) such provisions as are inconsistent with the provisions of this Act ;

30 “ (b) the provisions relating to the location of lines of railway and the making and filing of plans and profiles, other than highway and railway crossing plans ;

“ (c) such provisions as are inconsistent with the provisions of the Expropriation Act as made applicable to the Company by this Act.

“ (2) (a) All the provisions of the Expropriation Act, except where inconsistent with the provisions of this Act, shall apply *mutatis mutandis* to the Company ; ” \* \* \* \*

18. By the Canadian National Montreal Terminals Act 1929, 19-20 Geo. V. ch. 12, the Governor in Council is authorised to provide for the

**Record.** construction and completion by the Canadian National Railway Company of terminal stations and other works, including subways, in the City of Montreal and provision is made for financing such works.

Section 8 of the Act and the last paragraph of the schedule are as follows :—

“ 8. Where streets or highways are affected by the said works but are not crossed by the Company’s tracks or diverted incidental to any such crossing and by reason thereof the Board of Railway Commissioners for Canada has no jurisdiction under the Railway Act with respect thereto, the Company may with the approval of the 10 Governor in Council enter into agreements, where it may be desirable, with the City of Montreal or with any other municipality with respect to such streets or highways or with respect to the opening of new streets, the closing of existing streets and ways, the making of diversions or widenings of such streets or highways, and the making of sub-streets, subways or overhead facilities in connection with such streets or highways, and the apportionment of the cost thereof.”

\* \* \* \* \*

SCHEDULE.

\* \* \* \* \*

“ Nothing in this Schedule is to be taken to restrict the general powers of the Company as expressed in the foregoing Act, or other 20 Acts relating to the Company.”

**19.** The main objections to the jurisdiction of the Board to direct the Appellants to move their utilities advanced by the Appellants in their Factums are summarized as follows :—

p. 19.  
p. 79.  
p. 122.  
p. 157.  
p. 201.  
p. 245.  
p. 283.  
p. 364.

(1) that there is no statutory provision which expressly confers jurisdiction upon the Board to make the part of the Order complained of ;

(2) that certain sections of the Railway Act do not apply to the Appellants or their works ;

(3) that certain sections of the Railway Act do not apply to 30 the Canadian National Railways ;

(4) that sections 255, 256 and 257 of the Railway Act do not confer upon the Board the necessary jurisdiction ;

(5) that sections 162, 163 and 164 of the Railway Act and section 3 of the Expropriation Act prevent the application of section 39 ;

(6) that the Appellants were not parties interested or affected within the meaning of section 39 ; Record.

(7) that the Appellants' plants and the right to maintain them in their existing locations are "land" "interests in land" or "immoveables" and cannot be taken away by the Board or otherwise than by expropriation proceedings ;

10 (8) that certain provisions of the Railway Act including sections 39, 255, 256 and 257 do not apply to the Canadian National Railway Company's crossings in the City of Montreal, which are governed by the Canadian National Railways Act, the Expropriation Act and the Canadian National Montreal Terminals Act ;

(9) that by force of section 375, ss. 12 of the Railway Act sections 256 and 257 of the Act do not apply to telephone companies such as the Appellant The Bell Telephone Company of Canada ;

(10) that by section 260 of the Railway Act the Respondents are bound to provide at their own expense for the protection, safety and convenience of the public at new highway crossings ;

20 (11) that the direction in Order No. 45813 for the closing of certain streets in the City of Hamilton was not made in exercise of any power vested in the Board within the meaning of section 39 (1) of the Railway Act ;

(12) that the Board had no jurisdiction to make the part of the Order complained of ex parte.

**20.** On the 1st March, 1932, the Supreme Court (Anglin, C.J.C., Duff, Rinfret and Lamont, JJ.) delivered judgments in all eight appeals dismissing the appeals and affirming the Orders of the Board. pp. 47, 108,  
142, 177,  
220, 264,  
309 and 402.

**21.** The Reasons for judgment delivered by Mr. Justice Rinfret (with whom Mr. Justice Duff and Mr. Justice Lamont concurred) contain the following conclusions : pp. 48-64.

30 (1) The orders in question were made in exercise of the powers vested in the Board by the Railway Act more particularly sections 255, 256 and 257 ; and the Appellants did not take exception to the authority of the Board to pronounce orders of that kind in matters concerning railway companies governed by the Railway Act. p. 52, l. 23.

(2) What the Appellants disputed was :

(A) the applicability of the sections relied on to the Canadian National Railways and

(B) the power of the Board to compel public utility companies to remove their facilities without previous compensation.

Record.  
p. 53, l. 8.

(3) With regard to the second objection it is now settled by the decisions in *Toronto Railway Co. v. Toronto* [1920] A.C. 426 at 435 and *Canadian Pacific Railway v. Toronto Transportation Commission* [1930] A.C. 686 at 695 that section 39 of the Railway Act "applies to every case in which the Board by any order directs works and gives it power to 'order by what Company, municipality or person interested in or affected by such order' they shall be constructed," and it follows that the Appellants could competently be ordered to do the work unless it was "otherwise expressly provided" somewhere else in the Railway Act.

p. 54, l. 1.

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p. 54, l. 8.

(4) The Appellants fall within the class of persons "interested or affected" by the orders within the meaning of section 39 sub-sections 1 and 2. The question whether a person is "interested or affected" by the Order of the Board is primarily one of fact and the decisions herein carry the full weight that attaches to the finding of the Board on any question of fact under section 33, sub-section 5 and section 44, sub-section 3, of the Railway Act. The alteration of the Appellants' facilities is necessitated by the construction orders and they are obviously interested or affected.

p. 55, l. 13.

(5) There is nothing in section 39 to indicate that the Board must direct the whole of the works to be provided or constructed by the same company or person and, in the exercise of its powers, the Board may direct part of the work to be executed by one person and part by another. The moving could be done more advantageously by the Companies owning and operating the utilities and under section 39 the Board has power to make provisions "as to the payment of compensation or otherwise" and in the view of the Court the Board might direct payments in advance.

p. 56, l. 1.

(6) As regards the words in section 39 "except as otherwise expressly provided," no other section of the Railway Act has been pointed out which expressly provides that the Board may not order a work under sections 256 and 257 to be constructed in whole or in part by a person other than a railway company.

p. 56, l. 14.

(7) Section 162 and following of the Railway Act are nothing but an enumeration of the several powers of a railway company under the Act. Section 162 is only permissive. These sections apply where the railway for itself and of its volition does the work or exercises the powers granted and such powers may be exercised only subject to the provisions of the Railway Act, including section 39.

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p. 56, l. 24.

(8) The orders for moving the Appellants' utilities did not involve the taking of land by the Railway. Removing facilities

p. 57, l. 16.

is part of the work. "The provisions of law . . . applicable to the taking of land by the Company" referred to in sub-section 3 of section 256 and sub-section 2 of section 257 mean the provisions applicable to the taking of land for the purposes of the railway or for the undertaking of the railway. The fact that the railway crosses the highway is no doubt the occasion for the order but the reason or the purpose of the order is the protection or convenience of the public; the utilities must be moved because, for motives of public safety and convenience, the highway is to be lowered and this does not make it part of the railway undertaking. (*Boland v. Canadian National Railway Company* [1927] A.C. 198 at 209.) There is therefore no occasion in the present case for the application of the provisions of the sub-sections of sections 256 and 257 regarding the taking of lands and those sub-sections do not preclude the application of section 39.

Record.

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(9) Sub-section 4 of section 256 and sub-section 3 of section 257 fully authorised the direction in the orders in question that the works should be carried out under the supervision of the Respondents' Engineers. p. 58, l. 7.

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(10) Sections 259 and 260 of the Railway Act, apart from other considerations, deal only with the apportionment of cost, a question not decided in the orders appealed from, but on the contrary expressly reserved for further consideration. p. 58, l. 11.

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(11) Assuming the objection to absence of notice of the hearing to raise a question of jurisdiction—and not merely of practice and procedure—Rule 6 and section 59 of the Railway Act empower the Board upon the ground of urgency or for other reasons to make orders without notice and declare that such orders, notwithstanding want of notice, are as valid as if made on due notice. The Board itself is the proper judge of the circumstances under which the rule and the section should be acted upon. Every person entitled to notice is given the right to apply to the Board to vary, amend or rescind such orders and this may afford the Appellants a remedy. p. 58, l. 35.

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(12) With regard to the contention of the Appellant, the Bell Telephone Company of Canada, that, by force of sub-section 12 of section 375 of the Railway Act, sections 256 and 257 of the Act do not apply to telephone companies, section 375 is one of a group of sections dealing with telegraph and telephone companies *qua* telegraph or telephone companies and there is nothing in this group to detract from the authority of the Board to exercise its powers, under sections 39, 256 and 257, over such companies in the same manner and with the same effect as over any other company or person. p. 60, l. 8.

Record.  
p. 60, l. 19.

(13) The contention of the Bell Telephone Company that the provision in Order No. 45813, out of which Appeal number 8 arises, for the closing of certain streets in the City of Hamilton was in excess of the Board's jurisdiction did not arise since the Board did not order the closing of the streets, but the City of Hamilton agreed to close them. If the purpose of the closing of Hughson Street was merely to enable the railway to build its new station upon the portion closed, the result might not be the same as in the case of highway crossings. This was a matter susceptible of redress by the Board and to come before the Court a new statement of facts addressed to that feature would be required. 10

p. 61, l. 1.

p. 61, l. 28.

(14) On a consideration of section 17 of the Canadian National Railways Act (as enacted in section 2 of 19-20 Geo. V. ch. 10) it appears that the provisions of the Railway Act relating to "highway and railway crossing plans" are applicable to the Canadian National Railways. These include sections 252-254 under sub-heading "Crossings and Junctions with other railways" and sections 255-267 under the sub-heading "Highway Crossings."

p. 63, l. 26.

(15) The Canadian National Montreal Terminals Act, which authorised the Governor in Council to provide for the construction and completion by the Canadian National Railway of certain works described in a schedule to the Act, including the d'Argenson and St. Antoine Street subways, did not displace the provisions of the Railway Act, but on the contrary by section 8 implicitly confirmed the powers of the Board under sections 252, 255, 256 and 257. Moreover by the concluding paragraph of the schedule to the Act nothing contained in the schedule is to restrict the general powers of the Company. 20

p. 64, l. 24.

(16) The fact that three of the Appellants are Provincial Companies does not prevent the orders of the Board being competent. 30

p. 64, l. 30.

(17) With regard to the Montreal Tramways Company the orders of the Board are further supported by section 252 of the Railway Act dealing with the crossing of one railway by another.

The Chief Justice agreed with Mr. Justice Rinfret's conclusions.

**22.** The Respondents submit that the appeals should be dismissed and the judgments of the Supreme Court of Canada dated the 1st March, 1932, affirmed, for the following among other

### REASONS.

- (1) BECAUSE the Board had jurisdiction under sections 39, 252, 255, 256 and 257 of the Railway Act to make the Orders in question. 40



- (2) BECAUSE the said Orders were made for the “ protection, safety and convenience of the public.”
- (3) BECAUSE, in respect of any works the construction of which the Board has power to order, it has, under section 39 of the Railway Act, “ except as otherwise expressly provided,” entire discretion to direct “ by what Company, municipality or person interested or affected ” by the order for construction and “ under what supervision ” the works shall be constructed.
- 10 (4) BECAUSE it is not “ otherwise expressly provided ” within the meaning of section 39.
- (5) BECAUSE the Appellants were within the meaning of section 39 persons “ interested or affected.”
- (6) BECAUSE the Board found that the Appellants were persons “ interested or affected ” and by section 44 sub-section 3 of the Railway Act such finding is binding and conclusive.
- (7) BECAUSE it was competent to the Board to direct that different parts of the works should be constructed by different companies.
- 20 (8) BECAUSE the Orders in question do not involve the taking of land or an interest in land by the Railway.
- (9) BECAUSE there is no authority in the Expropriation Act or the Railway Act for the expropriation of a highway or any interest therein.
- (10) BECAUSE the Appellants’ rights to operate utilities under or over highways, do not make them “ owners ” of “ lands ” within the meaning of the definitions contained in section 2 sub-sections 15 and 18 of the Railway Act.
- 30 (11) BECAUSE, under section 59 of the Railway Act and Rule 6, the Board has power, for any reason appearing to the Board sufficient, to make Orders without notice.
- (12) BECAUSE the Appellants received notice of the applications and replied thereto.
- (13) BECAUSE the Appellants have the right, under section 59, to apply to the Board to vary, amend or rescind its orders.

- (14) BECAUSE the question how the cost of the works ordered is to be borne is expressly reserved for further consideration and does not arise.
- (15) BECAUSE the provisions of the Railway Act in regard to highway crossings and railway crossings, including sections 252, 256 and 257, are applicable to the Respondent the Canadian National Railways.
- (16) BECAUSE the provisions of the Canadian National Montreal Terminals Act do not affect the jurisdiction of the Board to make the orders in regard to the d'Argenson Street and St. Antoine Street subways in the City of Montreal. 10
- (17) BECAUSE, in appeal number 8, the special question regarding the jurisdiction of the Board to include Hughson Street in Order number 45813 cannot be decided on the statement of facts in the present Record.
- (18) BECAUSE the Board had jurisdiction to order the work as constructed at Hughson Street.
- (19) BECAUSE the Board had jurisdiction to divert Hughson Street and to direct it to be closed at its intersection with the Viaduct. 20
- (20) BECAUSE the Appellant in appeal number 8 has not obtained authority to carry its lines, wires, conductors, etc., over or beneath the Toronto Hamilton and Buffalo Railway as required by section 372 of the Railway Act.
- (21) BECAUSE Provincial Companies are subject to the provisions of the Railway Act.
- (22) FOR the reasons stated in the judgment of Mr. Justice Rinfret in the Supreme Court.

W. N. TILLEY.

C. F. H. CARSON.

**In the Privy Council.**

No. 61 of 1932.

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*On Appeal from the Supreme Court of  
Canada.*

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BETWEEN

THE BELL TELEPHONE COMPANY  
OF CANADA - - - *Appellants*

AND

THE CANADIAN NATIONAL  
RAILWAYS - - - *Respondents*

(AND SEVEN CONSOLIDATED APPEALS.)

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CASE FOR THE RESPONDENTS.

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BLAKE & REDDEN,

17 Victoria Street, S.W.1.