

45, 1933

In the Privy Council.

No. 61 of 1932.

**ON APPEAL FROM THE SUPREME COURT OF
CANADA.**

APPEAL No. 1.

IN THE MATTER of the Application of The Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN :

THE BELL TELEPHONE COMPANY OF CANADA - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

APPEAL No. 2.

IN THE MATTER of the application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4, dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN :

THE BELL TELEPHONE COMPANY OF CANADA - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

APPEAL No. 3.

IN THE MATTER of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN :

THE MONTREAL LIGHT HEAT & POWER

CONSOLIDATED - - - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

APPEAL No. 4.

IN THE MATTER of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN :

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

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

APPEAL No. 5.

IN THE MATTER of the application of the Canadian National Railways for an Order under Section 246 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN :

THE MONTREAL TRAMWAYS COMPANY and THE
MONTREAL TRAMWAYS COMMISSION - - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

APPEAL No. 6.

IN THE MATTER of the Application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4. dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN :

THE MONTREAL TRAMWAYS COMPANY and THE
MONTREAL TRAMWAYS COMMISSION - - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

APPEAL No. 7.

IN THE MATTER of the Application of the Canadian National Railways for an Order under Sections 178 and 257 of The Railway Act, for authority to construct a subway under their tracks where they cross St. Clair Avenue, in the City of Toronto, Province of Ontario, and to divert the main line of the railway to the west as shown on plan and profile No. C.-6426, dated November 20th 1930, on file with the Board under file No. 32453.11.

AND

IN THE MATTER of Order Number 46083 of The Board of Railway Commissioners for Canada, dated the 8th day of January A.D. 1931.

BETWEEN :

THE BELL TELEPHONE COMPANY OF CANADA - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondent.*

APPEAL No. 8.

IN THE MATTER of the joint application of the Toronto, Hamilton and Buffalo Railway Company, hereinafter called the "Applicant Company," and the Corporation of the City of Hamilton, hereinafter called the "City," under Sections 162, 178, 188, 199, 201, 252, 255, 256 and 262, and other appropriate sections of the Railway Act, for an Order approving and sanctioning the plan, profile, and book of reference of the Applicant Company, No. 2BRC, dated October 15th, 1930, on file with the Board under file No. 20161; authorizing a deviation, change, or alteration in the portion of the Applicant Company's railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton, and authorizing the said deviation, change or alteration from the present location of the said portion of the Applicant Company's railway in accordance with the said plan, profile, and book of reference; authorizing the Applicant Company to construct, maintain, and operate the said portion of its railway between the said points, in accordance with the change in grades as shown on the said plan and profile; authorizing the Applicant Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John, Catharine, Ferguson, Young, and Victoria by means of bridges and to carry each of the said streets beneath the said tracks by means of a subway; to take, without the consent of the owners, the lands not now owned by the Applicant Company or the City, shown bordered in red; directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington, and to divert Hunter, Aurora and Liberty Streets; authorizing a relocation of the Port Dover Line of the Canadian National Railways between Ferguson Avenue and Victoria

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AND

IN THE MATTER of Order No. 45813, dated the 14th day of November, 1930, made by the Board of Railway Commissioners for Canada, granting the said application.

BETWEEN :

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE TORONTO, HAMILTON AND BUFFALO
RAILWAY COMPANY and THE CORPORATION
OF THE CITY OF HAMILTON - - - - *Respondents.*

(Consolidated by His Majesty's Order in Council, dated 21st July, 1932.)

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4	Order of Board of Railway Commissioners for Canada No. 39079 directing Chief Engineer to make report (<i>Same as No. 4 in Appeal No. 1.</i>)	27th May 1927 - -	425
5	Plan No. D.C. 310-0.0-63.1 showing Montreal Terminals Scheme (<i>Separate document.</i>)	15th June 1929 - -	436
6	Application of Respondent to Board of Railway Commissioners for Canada for approval of plans Nos. WIA 19.14.1 and WIA 19.15.1 (<i>Same as No. 6 in Appeal No. 2.</i>)	28th January 1930 -	430
7	Order of Board of Railway Commissioners for Canada No. 44433 approving Plans WIA 19.14.1 and WIA 19.15.1 (<i>Same as No. 7 in Appeal No. 2.</i>)	13th March 1930 -	432

Schedule No.	Description of Document.	Date.	Page.
9	Drawing No. 1262 P.F. showing changes in lay-out of appellant's utilities necessitated by construction of proposed works - - - (<i>Separate document.</i>)	5th May 1931 - - -	437
APPEAL NO. 7.			
1	Extracts from Special Act of Incorporation of Appellant - - - (<i>Same as No. 2 in Appeal No. 1.</i>)	- - - - -	416
2	Order of Board of Railway Commissioners for Canada No. 35037 directing grade separation at crossing of respondents' tracks at St. Clair Avenue Toronto - - -	9th May 1924 - - -	437
3	Plan for construction of subway at St. Clair Avenue and for diversion of respondent's line No. C-6426 - - - (<i>Separate document.</i>)	20th November 1930 -	438
APPEAL NO. 8.			
1	Extracts from Special Acts of Incorporation of Appellant - - - (<i>Same as No. 2 in Appeal No. 1.</i>)	- - - - -	416
2	Order of Board of Railway Commissioners for Canada No. 19238 directing appellant to place certain of its lines underground - -	10th May 1913 - - -	439
3	Plan and profile for construction of diversion of portion of Respondent Railway's lines No. 2 BRC. (filed at hearing as Exhibit No. 2) - (<i>Separate document.</i>)	15th October 1930 -	440
4	Agreement between Toronto Hamilton and Buffalo Railway Company and Corporation of City of Hamilton - - -	20th October 1930 -	441
5	Resolution of the Council of the City of Hamilton and Report of Board of Control - - -	16th October 1930 -	446
6	By-law No. 4197 of the Corporation of the City of Hamilton - - -	14th April 1931 - - -	447
12	Application of Respondents for approval of plan and profile No. 2 BRC. (filed at hearing as Exhibit No. 1) - - -	30th October 1930 -	448
15	Draft Order prepared by Respondents and submitted to Board of Railway Commissioners for Canada at hearing - - -	1st November 1930 -	450

APPEAL No. 1.

d'Argenson Street Subway.

In the Privy Council.

No. 61 of 1932.

**ON APPEAL FROM THE SUPREME COURT OF
CANADA.**

IN THE MATTER OF the Application of The Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN :

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

RECORD OF PROCEEDINGS.

No. 1.

Statement of Facts.

APPEAL
No. 1.

No. 1.
Statement
of Facts.

1. d'Argenson Street is a highway extending in a northerly and southerly direction through the south-westerly section of the City of Montreal, lying north of the limits of the City of Verdun, as shown on the plan YIE 31.51.4 filed by the Respondent with its application to the Board of Railway Commissioners for Canada, hereinabove referred to, a copy of which said plan is attached hereto and marked as Schedule No. 1.

2. The said d'Argenson Street is crossed near the southerly end thereof 10 by the tracks of the Respondent, the Canadian National Railways, upon a grade separation; the street passing under the tracks by means of a subway created by depressing the level of the street below the general level

APPEAL
No. 1.
—
No. 1.
Statement
of Facts—
continued.

of the surrounding lands, and the railway tracks being carried over the street upon a bridge at an elevation above the general level of the surrounding lands.

3. The subway mentioned in paragraph 2 hereof was constructed prior to, and was in existence, at the time when the Appellant constructed its underground conduit system, hereinafter described, under d'Argenson Street, and the said subway continues to exist as originally built, up to the present time, in the location shown coloured in green upon the plan attached hereto as Schedule No. 1.

4. The Appellant, The Bell Telephone Company of Canada, was incorporated by Special Act of the Parliament of Canada, 43 Victoria (1880), Chapter 67, and Amending Acts. Copies of the sections of the said Acts as amended, relevant to this appeal, are set forth in the Schedule attached hereto as Schedule No. 2. 10

5. In the year 1914, the Appellant, The Bell Telephone Company of Canada, acting in pursuance of the powers conferred upon it in that behalf by its Special Acts of Incorporation, referred to in paragraph 4 hereof, and with the legal consent of the City of Montreal, constructed an underground conduit system, with the manholes necessary and incident thereto, under the surface of and within the limits of d'Argenson Street, extending from Chateauguay Street southerly through the subway under the tracks of the Canadian National Railways, mentioned in paragraph 2 hereof, and extending thence southerly to the bridge shown on the plan attached hereto as Schedule No. 1 and marked "Buffalo Bridge," for the purpose of containing its cables and lines of telephone necessary for rendering telephone service to its subscribers in the vicinity of d'Argenson Street and adjoining territory. The location of the said underground conduit system is indicated in green on the said plan attached hereto as Schedule No. 1, and the said conduit system has remained undisturbed in its present location from the date of its construction up to the present time. 20 30

6. The said conduit system consists of ducts or passages laid underground with associated manholes or chambers constructed in the line of the said duct runs at intervals varying in distance from about 50 feet to about 500 feet, depending upon local conditions.

The said conduit consists of eleven (11) ducts or passages, each having a cross sectional measurement of about $4\frac{1}{2}$ inches square, and is constructed of lengths of multiple vitrified clay tiles laid end to end longitudinally to form continuous passages, superimposed upon each other in four layers, three layers being of three ducts each and the uppermost layer being of two ducts; the whole of which is set into a trench in the ground and rests upon a bed or foundation of concrete of about four inches in thickness, to which the vitrified clay tiles adhere by reason of being laid upon the concrete immediately after the concrete has been poured and while it is still wet. The said vitrified clay tiles are further protected by a layer of concrete of about three inches in thickness poured over the top thereof, the whole 40

structure thus forming a homogeneous mass with the surrounding earth incapable of being moved or altered without being broken up and destroyed.

The manholes forming part of the said conduit system consist of underground chambers about seven feet in length by about five feet in height and width, the floor and walls of which are constructed of concrete of about six inches in thickness. The roof of the said manholes consists of a monolithic concrete slab lying about 14 inches below the surface of the street supporting a circular metal frame which is embedded in the street pavement and leads up through the pavement to the surface of the street, creating an opening over which rests a removable metal cover for the purpose of permitting access to the said manhole. The top of the said metal frame and cover lie flush with the surface of the street and form part thereof.

7. The said conduit system contains three cables each of 2,424 wires or 1,212 circuits, two cables of 1,818 wires or 909 circuits, one cable of 1,212 wires or 606 circuits, one cable of 808 wires or 404 circuits, and one cable of 606 wires or 303 circuits, all for use in rendering telephone service to the Appellant's subscribers.

8. Through the subway on d'Argenson Street hereinbefore described, the conduit system is located at a distance of about five feet easterly from the westerly wall of the said subway at a depth of about two feet below the surface of the street, and there is a manhole situate in each of the approaches to the said subway, the northerly manhole being about 29 feet six inches north of the north side of the westerly wall and the southerly manhole being about 34 feet southerly from the south side of the westerly wall of said subway.

9. For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and the Board of Railway Commissioners for Canada, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the Railway Company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War.

In the year 1927 this matter was again revived by the Board, and on the 27th day of May, 1927, a judgment of the Board was issued, which is reported in the Board's judgments, Volume 17, page 49, and a copy of the said judgment is attached hereto as Schedule No. 3.

The judgment in question provides that these matters be referred for a report to the Chief Engineer of the Board, who, by Order No. 39079, dated the 27th day of May, 1927, was appointed and directed to make a full inquiry and report to the Board upon the whole situation of level crossings in Montreal, from Bonaventure Station west and from Moreau Station east, and to evolve a scheme for the consideration of the Board. A copy of the

APPEAL
No. 1.
—
No. 1.
Statement
of Facts—
continued.

said Order No. 39079 is attached hereto as Schedule No. 4. No report covering the whole situation of level crossings in Montreal on the Canadian National Railways from Bonaventure Station west and from Moreau Street Station east, as required by the Board, was made to the Board by its Chief Engineer.

10. A study of the whole Canadian National Railway situation in Montreal was undertaken by the Railway Company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the station on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before the Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report, and by Act of the Parliament of Canada, 19-20 Geo. V, c. 12 (assented to June 14th, 1929), the Canadian National Railway Company was given power to construct and complete the works described in the Schedule to the Act, at and in the vicinity of Montreal; and, pursuant to the provisions of the said Act, the Governor in Council, by Order in Council P.C. 1197, dated July 2nd, 1929, approved General Plan No. DC 310-0.0-63.1. A copy of the said plan is attached hereto as Schedule No. 5.

A general plan No. WIE19-4.2, dated October 10th, 1929, showing, *inter alia*, a reconstruction of existing grade separation at d'Argenson Street, was, upon the application of the Railway Company and the recommendation of its Chief Engineer, approved by Order of the Board No. 44425, dated March 10th, 1930. A copy of the application of the Railway Company is attached hereto as Schedule No. 6.

11. The said Order No. 44425 directed that detail plans of individual grade separations be served on the City of Montreal and submitted for the approval of the Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of the Board. A copy of the said Order No. 44425 is attached hereto as Schedule No. 7.

12. On the 24th day of April, 1930, in pursuance of the provisions of the said Order No. 44425, the Respondent made a further application to the Board of Railway Commissioners for Canada for approval of a detailed plan for the reconstruction of the subway at d'Argenson Street, in accordance with a plan bearing Number YIE 31.51.4, attached hereto as Schedule No. 1, and for an Order directing the Appellant, The Bell Telephone Company of Canada, and others, to move such of their utilities as are affected by the reconstruction of the said subway, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by the Board. A copy of the application dated April 24th, 1930, as well as a copy of the plan, was served upon the City of Montreal, The Bell Telephone Company of Canada, and the Montreal Light, Heat & Power Consolidated. A copy of the said application is attached hereto as Schedule No. 8.

13. The reconstruction of the said subway in the manner provided for in the said plan appearing as Schedule No. 1 hereto involves the lengthening of the subway in northerly and southerly directions along the line of d'Argenson Street, in order that the Respondent's right of way and bridge may be widened to permit of two additional tracks to be constructed in the future; the relocating of the westerly wall of the subway at a distance of approximately ten feet easterly from its present location; and the relocation of the easterly wall of the said subway at a distance of approximately 28 feet east of its present location—the whole as indicated in red on the plan attached hereto as Schedule No. 1.

APPEAL
No. 1.
—
No. 1.
Statement
of Facts—
continued.

14. It is not contended that the reconstruction of the said subway will in any way confer any benefit or advantage to the Appellant or to its plant, and the Appellant has no interest in the promotion thereof; but on the contrary the relocation of the westerly wall of the said subway, as mentioned in the next preceding paragraph, will result in the said wall being constructed in a location which includes the site now occupied by part of the Appellant's said conduit system.

15. If the said plan attached hereto as Schedule No. 1 is adhered to by the Respondent, and the works provided for therein are constructed, that part of the Appellant's conduit system lying between the two manholes referred to in paragraph 8 hereof will be destroyed and the Appellant will be deprived of its rights to maintain the said part of its conduit system in the precise location in which it now exists, thereby rendering it necessary to rebuild the said part of the conduit system in another location under d'Argenson Street, to rebuild the said two manholes, as shown coloured red on the said plan attached hereto as Schedule No. 1, and to remove the existing cables and replace them with new cables in the new conduits.

16. The Appellant was served with a copy of the Respondent's said Application to the Board of Railway Commissioners for Canada, appearing as Schedule No. 8 hereto, on the 25th day of April, 1930, and on the 28th day of April, 1930, mailed its Answer thereto to the Secretary of the Board of Railway Commissioners for Canada, requesting a formal hearing of the said application. A copy of said Answer is attached hereto as Schedule No. 9.

17. On the 5th day of May, 1930, the Respondent filed its reply to the Appellant's Answer referred to in the next preceding paragraph. A copy of said Reply is attached hereto as Schedule No. 10.

18. On the 8th day of May, 1930, the Appellant filed a further Answer to the Respondent's said application. A copy of said further Answer is attached hereto as Schedule No. 11.

19. No further proceedings were served or taken by either of the parties hereto, and on the 16th day of September, 1930, without notice to the Appellant and without granting any hearing as requested in the Appellant's Answer, the Board made an Order bearing No. 45410 granting the Respondent's said application and directing the Appellant and others

APPEAL
No. 1.
—
No. 1.
Statement
of Facts—
continued.

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 Respondent. A copy of said Order is attached hereto as Schedule No. 12.

20. On the 13th day of October, 1930, the Appellant launched a motion returnable on the 21st day of October, 1930, before the presiding Judge of the Supreme Court of Canada, in Chambers, applying for an extension of the delay within which to apply for and for leave to appeal to the Supreme Court of Canada from said Order No. 45410 of the Board of Railway Commissioners for Canada, insofar as the said Order directed The Bell Telephone Company of Canada to move such of its facilities as may be affected by the construction of the said subway, as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that as a matter of law the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order, insofar as it directs The Bell Telephone Company of Canada to move its utilities as aforesaid. 10

21. The said motion came on for hearing on the date aforesaid before the Honorable Mr. Justice Rinfret, who granted said application by Order dated the 12th day of November, 1930, in the following terms : 20

“ AND IT IS FURTHER ORDERED that the said application for leave to appeal to this Court from the Order of the Board of Railway Commissioners for Canada, insofar as the said Order directs the Appellant to move such of its utilities as may be affected by the construction of the subway in question, as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said Appellant or in any event to make the said Order ex parte and without notice to the said Appellant, 30
be and the same is hereby granted.”

A copy of the said Order is attached hereto as Schedule No. 13.

No. 2.

Application of Respondent to Board of Railway Commissioners for Canada for approval of Plan YIE 31.51.4.

SCHEDULE NO. 8.

CANADIAN NATIONAL RAILWAYS.

April 24, 1930.
345-20.4.

A. D. Cartwright, Esq.,
Secretary, B.R.C.,
10 Ottawa, Ont.

Dear Sir :—

Pursuant to Order of the Board No. 44425 dated March 10th, 1930, I am forwarding two linen and one paper print of plan YIE 31.51.4 showing proposed reconstruction of subway at d'Argenson Street.

Copies of the plan are being served upon the City of Montreal; the Montreal Light, Heat & Power Consolidated; the Montreal Tramways Company; Montreal Tramways Commission; the Bell Telephone Company of Canada and the Electrical Commission of the City of Montreal.

This plan shows, in yellow, a new subway to be constructed over 20 Verdun Avenue to provide for two tracks leading from our main lines at Atwater Avenue, along the St. Pierre River outlet, to the proposed joint interchange yard on the River St. Lawrence. Application for this latter subway will be made later on, when construction of this line is undertaken.

I would be grateful if the Board would approve the present plan and in the Order approving it will direct that the various parties above mentioned move such of their utilities as are affected by the construction, as, and when, requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by the Board.

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Yours truly,
(Sgd.) ALISTAIR FRASER.

APPEAL
No. 1.

Before
the Board
of Railway
Commis-
sioners for
Canada.

No. 2.
Application
of Respon-
dent to
Board of
Railway
Commis-
sioners for
Canada for
approval of
Plan YIE
31.51.4,
24th April
1930.

APPEAL
No. 1.

Before
the Board
of Railway
Commissioners for
Canada.

No. 3.
Answer of
Appellant
requesting a
hearing,
28th April
1930.

No. 3.

Answer of Appellant requesting a hearing.

SCHEDULE NO. 9.

THE BELL TELEPHONE COMPANY OF CANADA.

Montreal, April 28, 1930.

A. D. Cartwright, Esq.,
Secretary, Board of Railway Commissioners for Canada,
Ottawa, Ont.

Dear Sir :—

Mr. Alistair Fraser has forwarded us copies of the ten applications of the 10
Canadian National Railways, for orders approving the following plans,
viz. :—

Date of Application	Plan No.	Location of Crossing	
April 21, 1930	YI A 31.10.2	St. Antoine Street	
April 22, 1930	YI B 31.12.3	St. James Street	
April 22, 1930	YI B 31.21.2	Notre Dame Street	
April 23, 1930	Y2 B 31.80.3	Bridge Street	
April 23, 1930	YI B 31.30.2	St. Maurice Street	
April 23, 1930	YI B 31.50.2	William Street	
April 23, 1930	YI B 31.40.2	St. Paul Street	20
April 23, 1930	YI B 31.60.2	Ottawa Street	
April 24, 1930	YI B 31.51.4	d'Argenson Street	
April 24, 1930	YI E 31.10.4	Wellington Street	

in connection with the new Montreal Terminal Station, and directing this
and other Companies to move such of their facilities as are affected by these
proposed works.

With respect to these applications, this Company wishes an opportunity
to be heard, and also to speak to Orders Nos. 44557-8-9 already made in
respect of this Company's facilities at the proposed crossings at Hibernia
Street, Charlevoix Street and St. Remi Street.

I shall be obliged if you will inform me of the date fixed for the hearing. 30
I understand that other utilities affected intend to appear.

Yours truly,
(Sgd.) PIERRE BEULLAC,
General Counsel.

No. 4.

Reply of Respondent.

SCHEDULE NO. 10.

CANADIAN NATIONAL RAILWAYS.

May 5, 1930.
345-20.2

A. D. Cartwright, Esq.,
Secretary, B.R.C.,
Ottawa, Ont.

10 Re C.N.R. Terminal.

Dear Sir :—

With reference to Mr. Pierre Beullac's letter to you of the 28th ultimo and Mr. Montgomery's letter of the 30th of April, I quite agree that all these interested parties should have ample opportunity of being heard before final disposition of the question of costs, and it was for that reason that I requested the Board to reserve consideration of cost to a later date. As well as the Companies affected by necessary changes in their facilities, the Board will have to consider both the position of the Canadian National, the City, the relative position of the Grade Crossing Fund and many other
20 factors and I would think, under these circumstances no useful purpose would be served by having a number of hearings on this question, but that the proper situation is to leave the whole matter in abeyance and dispose of it at one and the same time.

If the interests of the utility owners should in any way be affected by this reservation, I would, of course, think there was a good prima facie case for asking for immediate action, but nothing that is done now can in any way affect their position and I would, therefore, strongly urge upon the Board that a continuance of the procedure already adopted of insuring that the facilities be moved immediately and reserving the question of cost, is
30 the proper one.

I am sending a copy of this letter to Mr. Beullac and to Mr. Montgomery.

Yours truly,

(Sgd.) ALISTAIR FRASER.

AF/B
Dictated.

APPEAL
No. 1.

Before
the Board
of Railway
Commis-
sioners for
Canada.

No. 4.
Reply of
Respondent,
5th May
1930.

APPEAL
No. 1.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 5.
Further
Answer of
Appellant,
8th May
1930.

No. 5.

Further Answer of Appellant.

SCHEDULE NO. 11.

THE BELL TELEPHONE COMPANY OF CANADA.

C.N.R. TERMINAL: 345-20-2.

May 8th, 1930.

A. D. Cartwright, Esq.,
Secretary, Board of Railway Commissioners for Canada,
Ottawa, Ont.

Dear Sir:—

With reference to Mr. Alistair Fraser's letter to you of the 5th instant, a copy of which has been sent me, I wish to point out that our request for a hearing is based, among other things, upon a question of jurisdiction, consequently the reservation suggested by Mr. Fraser may not suffice to protect our interests fully. For this and other reasons I am unable to concede that a hearing upon this matter at the present time can be dispensed with.

Yours truly,
(Sgd.) PIERRE BEULLAC,
General Counsel.

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20

No. 6.
Order of
Board of
Railway
Commissioners for
Canada
No. 45410
directing
Appellant to
move its
utilities,
16th Sept-
ember 1930.

No. 6.

Order of Board of Railway Commissioners for Canada No. 45410 directing
Appellant to move its utilities.

SCHEDULE NO. 12.

Order No. 45410

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tuesday, the 16th day of
September, A.D. 1930.
S. J. MCLEAN,
Asst. Chief Commissioner.
HON. T. C. NORRIS,
Commissioner.

IN THE MATTER OF the application of the Canadian National Railways, hereinafter called the "Applicants," under Section 256 of the Railway Act, for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on general plan No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under file No. 9437.319.7:

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UPON the report and recommendation of the Chief Engineer of the Board, and reading the submissions filed—

THE BOARD ORDERS:

1. That the Applicants be, and they are hereby, authorised to construct a subway at d'Argenson Street, in the City of Montreal, on the line of the said railway between Point St. Charles and St. Henri, as shown on the said general plan on file with the Board under file No. 9437.319.7; detail plans

40

of the proposed structure to be filed for the approval of an Engineer of the Board.

2. That the City of Montreal, the Montreal Light, Heat & Power Consolidated, the Montreal Tramways Company, the Montreal Tramways Commission, the Bell Telephone Company of Canada, and the Electrical Commission of the City of Montreal be, and they are hereby, directed 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.

10 3. That all questions of costs be reserved for further consideration by the Board.

(Sgd.) S. J. McLEAN,
Assistant Chief Commissioner,
The Board of Railway Commissioners for Canada.

BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Examined and certified as a true copy
under Section 23 of "The Railway Act."

(Sgd.) A. D. CARTWRIGHT,
Sec'y of Board of Railway Commissioners for Canada.

20 Ottawa, September 19, 1930.

APPEAL
No. 1.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 6.
Order of
Board of
Railway
Commis-
sioners for
Canada
No. 45410
directing
Appellant to
move its
utilities,
16th Sept-
ember 1930
—continued.

No. 7.

**Order of Rinfret J., granting leave to Appeal to Supreme Court
of Canada.**

*In the
Supreme
Court of
Canada.*

SCHEDULE NO. 13.

IN THE SUPREME COURT OF CANADA.

The Honourable Mr. Justice Rinfret, } Wednesday, the 12th day of
in Chambers. } November, A.D., 1930.

**ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.**

30 **IN THE MATTER** of the Application of The Canadian National Railways
for an Order under Section 256 of the Railway Act for authority to
construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri as shown on General Plan
No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under
File No. 9437.319.7.

No. 7.
Order of
Rinfret J.,
granting
leave to
appeal to
Supreme
Court of
Canada,
12th Nov-
ember 1930.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA, *Appellants,*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

40 **UPON** the application of Counsel on behalf of the above named
Appellants made on the twenty-first day of October, A.D. 1930, in the

APPEAL
No. 1.

*In the
Supreme
Court of
Canada.*

No. 7.
Order of
Rinfret J.,
granting
leave to
appeal to
Supreme
Court of
Canada,
12th Nov-
ember 1930
—continued.

presence of Counsel for the above named Respondents for an Order extending the time for applying for and for leave to appeal to this Court under the provisions of Section 52 of The Railway Act from Order Number 45410 of The Board of Railway Commissioners for Canada bearing date the sixteenth day of September, A.D. 1930, in the matter of the above application, upon hearing read the Notice of Motion, the Affidavit of Geoffrey Swabey Ridout, and the exhibits therein referred to, all filed, and upon hearing what was alleged by Counsel aforesaid and judgment upon the Motion having been reserved until this day,

IT IS ORDERED that the time within which the said Appellants 10 may apply for leave to appeal to this Court from the said order of The Board of Railway Commissioners for Canada be and the same is hereby extended until this day.

AND IT IS FURTHER ORDERED that the said application for leave to appeal to this Court from the said order of The Board of Railway Commissioners for Canada in so far as the said Order directs the Appellants to move such of its utilities as may be affected by the construction of the subway in question as and when required to do so by the Chief Engineer, Operating Department, of The Canadian National Railways upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction 20 to make the said Order as directed against the said Appellants or in any event to make the said Order ex parte and without notice to the said Appellants, be and the same is hereby granted.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the said appeal.

(Sgd.) T. RINFRET, J.

No. 8.

Order approving Security for Costs.

SCHEDULE NO. 14.

IN THE SUPREME COURT OF CANADA.

Before
The Registrar,
In Chambers.

}

Wednesday, the 7th day of
January, A.D., 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

APPEAL
No. 1.

In the
Supreme
Court of
Canada.

No. 8.
Order
approving
Security for
costs,
7th January
1931.

10 IN THE MATTER of the Application of The Canadian National Railways
for an Order under Section 256 of the Railway Act for authority to
construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan
No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under
File No. 9437.319.7.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants

AND

20 THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

UPON the application of Counsel for the above named Appellants in
the presence of Counsel for the above named Respondents, upon hearing
read the notice of motion and the material therein referred to, and upon
hearing what was alleged by Counsel aforesaid,

IT IS ORDERED that the sum of \$250.00 paid into The Bank of
Montreal as appears by the receipt of the said Bank dated the 29th day of
December, A.D. 1930, duly filed as security that the Appellants will
effectually prosecute their appeal from Order Number 45410 of The Board
of Railway Commissioners for Canada bearing date the 16th day of
30 September, A.D. 1930, in the matter of the above application, and will
pay such costs and damages as may be awarded against them by this
Court, be and the same is hereby allowed as good and sufficient security.

AND IT IS FURTHER ORDERED that the costs of this Application
be costs in the cause.

(Sgd.) J. F. SMELLIE,
Registrar.

APPEAL
No. 1.

*In the
Supreme
Court of
Canada.*

No. 9.
Notice of
setting down
appeal for
hearing,
7th January
1931.

No. 9.

Notice of setting down appeal for hearing.

SCHEDULE NO. 15.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER of the Application of The Canadian National Railways
for an Order under Section 256 of the Railway Act for authority to
construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan 10
No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under
File No. 9437.319.7.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - -

Respondents.

TAKE NOTICE that the above appeal from Order Number 45410 of
The Board of Railway Commissioners for Canada has been set down by
the Registrar of this Court for hearing at the Session of this Court com- 20
mencing on the 3rd February, 1931.

DATED at Ottawa this seventh day of January, A.D. 1931.

POWELL, SNOWDON & MATHESON,

Agents for Pierre Beullac, K.C.,
Solicitor for Appellants.

To the above named Respondents,
and to ALISTAIR FRASER, K.C.,
their Solicitor,
and to The Board of Railway Commissioners
for Canada.

No. 10.

Certificate of Settlement of Appeal Case.

SCHEDULE NO. 17.

CERTIFICATE OF SETTLEMENT OF CASE

I, the undersigned, Counsel to the Board of Railway Commissioners for Canada, do hereby certify that the foregoing typewritten document from page 1 to 7, inclusive, together with copies of the Schedules therein referred to and set forth in the Index thereto is the case settled by me by direction of Hon. H. A. McKeown, Chief Commissioner of the said Board
 10 of Railway Commissioners for Canada, dated the 4th day of February, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada in a certain case pending before The Board of Railway Commissioners for Canada, IN THE MATTER OF the Application of The Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at d'Argenson Street in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan No. YIE 31.51.4 dated April 15th, 1930, on file with the Board under File No. 9437.319.7 BETWEEN The Bell Telephone Company of Canada, Appellant, and The Canadian National Railways, Respondent.

20 And I do further certify that I have applied to the Commissioners and to the Secretary of the said Board for the Board's opinions and reasons for making the order appealed from in this cause and that reasons have been delivered by none of the said Commissioners in response to my said applications; no such reasons having been given in respect of the making of the said order.

In testimony whereof I have hereunto subscribed my name this 16th day of April, 1931.

(Sgd.) A. GEORGE BLAIR.

APPEAL
No. 1.

—
*In the
Supreme
Court of
Canada.*

—
No. 10.
Certificate
of Settle-
ment of
Appeal Case,
16th April
1931.

No. 11.

Orders dispensing with printing of Schedules 1 and 5 and allowing blue prints to be filed.

SCHEDULE NO. 16.

IN THE SUPREME COURT OF CANADA.

Before the Registrar,
in Chambers.

} Monday, the Twentieth day of
April, A.D., 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER of the Application of The Canadian National Railways 10
for an Order under Section 256 of the Railway Act for authority to
construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan
No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under
File No. 9437.319.7.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - Respondents. 20

UPON the application of Counsel on behalf of the above named Appellants, in the presence of Counsel on behalf of the above named Respondents, for an Order dispensing with the printing of certain Exhibits in the Case in Appeal, upon hearing read the Affidavit of Pierre Beullac filed, and upon hearing what was alleged by Counsel aforesaid,

IT IS ORDERED that the printing in the Case in Appeal of the two Plans referred to in the Statement of Facts as Schedules Numbers 1 and 5 forming part of the Case in Appeal herein, be and the same is hereby dispensed with.

AND IT IS FURTHER ORDERED that seven blue print copies of 30 each of the said two Plans shall be provided by the Appellants for the use of this Court and filed with the Case in Appeal.

AND IT IS FURTHER ORDERED that the costs of this application be costs in the Appeal.

(Sgd.) J. F. SMELLIE,
Registrar.

APPEAL
No. 1.
—
*In the
Supreme
Court of
Canada.*
—
No. 11.
Orders
dispensing
with print-
ing of
Schedules 1
and 5 and
allowing
blue prints
to be filed,
(a) 20th
April 1931.

IN THE SUPREME COURT OF CANADA.

Before The Registrar,
In Chambers.

}

Monday, the Fifteenth day
of June, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

APPEAL
No. 1.

In the
Supreme
Court of
Canada.

No. 11.
Orders
dispensing
with print-
ing of
Schedules 1
and 5 and
allowing
blue prints
to be filed
—continued.
(b) 15th
June 1931.

10 IN THE MATTER OF the Application of The Canadian National
Railways for an Order under Section 256 of the Railway Act for
authority to construct a subway at d'Argenson Street, in the City
of Montreal, between Point St. Charles and St. Henri, as shown on
General Plan No. YIE 31.51.4, dated April 15th, 1930, on file with
the Board under File No. 9437.319.7.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA

Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

UPON the application of Counsel on behalf of the Appellants, in the
presence of Counsel for the Respondents, for an Order modifying the
provisions of the Order made herein on the Twentieth day of April, 1931,
20 in so far as the same directs the Appellants to furnish seven blue print
copies of the Plan referred to in the Case in Appeal as Schedule Number 5
in the Statement of Facts, upon hearing what was alleged by Counsel
aforesaid, Counsel for the Respondents consenting hereto, and the
Appellants by their Counsel undertaking to furnish said copies if and when
directed by the Court.

IT IS ORDERED that the furnishing by the Appellants of the seven
blue print copies of the Plan referred to in the Case in Appeal herein as
Schedule Number 5 in the Statement of Facts, as directed by the said
Order of the Twentieth day of April, 1931, be and the same is hereby
30 dispensed with.

AND IT IS FURTHER ORDERED that the seven blue print copies
of the said Plan to be furnished for the use of the Court and filed with
the Case in Appeal in a certain other Appeal to this Court between the
said The Bell Telephone Company of Canada, Appellants, and The
Canadian National Railways, Respondents, (St. Antoine Street Subway),
pursuant to Order made therein on the twentieth day of April, 1931, be
used for the purposes of the present Appeal as well as said other Appeal.

AND IT IS FURTHER ORDERED that a copy of this Order be
appended to the Case in Appeal herein and to each of the printed copies
40 thereof to be filed with this Court.

AND IT IS FURTHER ORDERED that the costs of and incidental
to this application be costs in the Appeal.

(Sgd.) J. F. SMELLIE,
Registrar.

APPEAL
No. 1.

*In the
Supreme
Court of
Canada.*

No. 12.

Certificate of Secretary of Board of Railway Commissioners for Canada.

SCHEDULE NO. 18.

**CERTIFICATE OF SETTLEMENT OF CASE AND AS TO
REASONS FOR JUDGMENT.**

No. 12.
Certificate of
Secretary of
Board of
Railway
Commis-
sioners for
Canada.

I, the undersigned, Secretary of The Board of Railway Commissioners for Canada, do hereby certify that the foregoing printed document from page 1 to page 36, inclusive, is the case settled by A. George Blair, K.C., Counsel for The Board of Railway Commissioners for Canada, by direction of Hon. H. A. McKeown, Chief Commissioner of the said Board, dated the 4th day of February, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in appeal to the Supreme Court of Canada in a certain case pending before the Board of Railway Commissioners for Canada, **IN THE MATTER OF** the Application of The Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7 **BETWEEN** The Bell Telephone Company of Canada, Appellant, and The Canadian National Railways, Respondent. 10

And I do further certify that I have applied to the Commissioners of the said Board for their opinions or reasons for making the order appealed from in this cause and that reasons have been delivered by none of the said Commissioners in response to my said application.

And I do further certify that no such reasons were delivered by any of the said Commissioners as appears from the records of the said Board.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Board of Railway Commissioners for Canada, this 23rd day of July, 1931. 20

(Sgd.) A. D. CARTWRIGHT,
Secy. The Board of Railway Comrs. for Canada.

(Seal)

No. 13.

Factum of Bell Telephone Company.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER OF the Application of The Canadian National Railways
for an Order under Section 256 of the Railway Act for authority to
construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan
10 No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under
File No. 9437.319.7.

APPEAL
No. 1.

In the
Supreme
Court of
Canada.

No. 13.

Factum
of Bell
Telephone
Company.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA

Appellant

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

NOTE.—*The page references have been altered so as to agree with the
Record.*

I N D E X.

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APPEAL
No. 1.

*In the
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No. 13.
Factum
of Bell
Telephone
Company—
continued.

PART I.

STATEMENT OF FACTS.

This is an appeal from Order No. 45410 of the Board of Railway Commissioners for Canada, dated September 16th, 1930 (Record, p. 10), pursuant to leave granted by Hon. Mr. Justice Rinfret, by Order dated November 12th, 1930 (Record, p. 11).

In the year 1914, the Appellant, acting in pursuance of the powers conferred upon it in that behalf by its Special Acts of Incorporation (Record, p. 416), and with the legal consent of the City of Montreal, constructed an underground conduit system with the manholes necessary and incident thereto under the surface and within the limits of d'Argenson Street, extending from Chateauguay Street southerly through the existing subway under the Respondent's tracks where they cross d'Argenson Street and continuing thence southerly to the bridge marked "Buffalo Bridge" on the plan filed with the Case as Schedule 1, and placed therein its cables and lines of telephone necessary for rendering telephone service to its subscribers. The said conduit system, manholes and cables have remained undisturbed in their present location from the date of the construction and installation thereof up to the present time (Record, p. 2, l. 15). 10

The Respondent, acting in pursuance of the provisions of the Canadian National Montreal Terminals Act (19-20 Geo. V, c. 12, Dom.) is elevating its line running from St. Henri to Point St. Charles, and which crosses d'Argenson Street (Record, p. 426, l. 26) which necessitates the reconstruction of the existing subway on d'Argenson Street. 20

On April 24th, 1930, the Respondent applied to the Board of Railway Commissioners for Canada for an Order approving a plan for the reconstruction of the said subway at d'Argenson Street, and directing, *inter alia*, the Appellant to move such of its utilities as are affected by the reconstruction of the said subway, as and when requested to do so by the Chief Engineer, Operating Department, of the Respondent (Record, p. 4, l. 34; p. 7). 30

By Order No. 45410 (Record, p. 10), made *ex parte*, the Board granted the Respondent's said application, and the Appellant now appeals from the said Order insofar as it directs the Appellant to move such of its utilities as may be affected by the reconstruction of the said subway.

The facts have been settled by the Board appealed from, the parties having been unable to agree thereupon. They are printed in the Record at page 1.

PART II.

RESPECTS IN WHICH ORDER NO. 45410 ERRONEOUS.

The Appellant contends that Order No. 45410 of the Board of Railway Commissioners for Canada is erroneous in the following respects :

1. The Board had no jurisdiction to direct the Appellant to move such of its utilities as may be affected by the reconstruction of the subway 40

on d'Argenson Street, as directed by paragraph 2 of the said Order, which is as follows :

10 “ That the City of Montreal, the Montreal Light, Heat & Power Consolidated, the Montreal Tramways Company, the Montreal Tramways Commission, the Bell Telephone Company of Canada, and the Electrical Commission of the City of Montreal be, and they are hereby, directed 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.”

2. In any event the Board had no jurisdiction to make paragraph 2 of the said Order ex parte and without notice to the Appellant.

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—
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of Bell
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PART III.

ARGUMENT ON BEHALF OF APPELLANT.

1. THERE IS NO PROVISION CONTAINED IN ANY STATUTE WHICH EXPRESSLY CONFERS ANY JURISDICTION UPON THE BOARD TO MAKE PARAGRAPH 2 OF ORDER NO. 45410.

20 (a) The jurisdiction of the Board of Railway Commissioners for Canada is not inherent, but statutory, and must be found in the Act constituting it. It can only exercise such powers as are by statute conferred upon it. See MacMurchy & Denison's "Railway Law of Canada" (3rd Edition), at page 60, citing :

G.T.R. v. Toronto, 1 C.R.C., at p. 92;
The Merritton Crossing Case, 3 C.R.C. 263, at p. 270;
City of Victoria v. Esquimalt, etc., Ry. Co., 24 C.R.C. 84;
Kelly v. G.T.R. Co., 24 C.R.C. 367;
Corporation of Parkdale v. West, 12 A.C. 611.
See also *Duthie v. G.T.R.*, 4 C.R.C. 304, at p. 311.

30 (b) Section 373 (6) of the Railway Act, R.S.C. (1927), C. 170, which is the only statutory provision conferring any jurisdiction upon the Board to order any change, alteration, moving or re-location of the Appellant's plant, does not apply, because there is no application to the Board by any municipality for an Order directing the Appellant's aerial plant to be placed underground, and Section 373 (6) only applies in such cases. The Appellant's plant on d'Argenson Street is already underground (Record, p. 2, l. 15). The relevant part of Sub-section 373 (6) is as follows :—

40 “ 373 (6). Notwithstanding any power or authority heretofore or hereafter conferred upon any company by or under any Act of the Parliament of Canada, or of the legislature of any province, or any other authority, the Board, upon the application of the municipality, and upon such terms and conditions as the Board may prescribe, may order any telegraph or telephone line, within

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Telephone
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continued.

the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company to construct or maintain, or to operate, or continue, any such line, or any pole or other works belonging thereto, except as directed by the Board;”

As to the Board’s jurisdiction under this section, see

City of Chatham v. Great North Western Telegraph and Bell Telephone Cos., 21 C.R.C. 183;

City of Woodstock v. Great North Western Telegraph Co., 19 C.R.C. 429.

Paragraph 2 of Order No. 45410 cannot, therefore, stand alone as an Order made by the Board in the exercise of any power vested in it, and unless jurisdiction can be implied under the sections of the Railway Act hereinafter dealt with, the Board had no jurisdiction whatsoever to make said Order, as directed against the Appellant.

2. ALL OF THE PROVISIONS OF THE RAILWAY ACT, R.S.C. (1927), C. 170, DO NOT APPLY TO THE APPELLANT OR TO ITS WORKS. 20

Section 375 of the said Act expressly limits the application of the Railway Act to, and the jurisdiction of the Board over, the Appellant and its works. The relevant portions of the said section are as follows:—

“ 375. In this section, unless the context otherwise requires,

“(a) ‘company’ means a railway company or person authorized to construct or operate a railway, having authority to construct or operate a telegraph or telephone system or line, and to charge telegraph or telephone tolls, and includes also telegraph and telephone companies and every company and person within the legislative authority of the Parliament 30 of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls;

“ 12. Without limitation of the generality of this subsection by anything contained in the preceding subsections, the jurisdiction and powers of the Board, and, in so far as reasonably applicable and not inconsistent with this section or the Special Act, the provisions of this Act respecting such jurisdiction and powers, and respecting proceedings before the Board and appeals to the Supreme Court or Governor in Council from the Board, and 40 respecting offences and penalties, and the other provisions of this Act, except sections seventy-two to two hundred and seventy, two hundred and seventy-two to two hundred and eighty-two, two hundred and eighty-seven to three hundred and thirteen,

three hundred and twenty-three, three hundred and forty-nine to three hundred and fifty-four, three hundred and sixty to three hundred and sixty-six, three hundred and ninety-four to four hundred and twenty-four, and four hundred and forty-nine to four hundred and fifty-seven, both inclusive in each case, shall extend and apply to all companies as in this section defined, and to all telegraph and telephone systems, lines and business of such companies within the legislative authority of the Parliament of Canada; and in and for the purposes of such application

10

“(a) ‘company’ or ‘railway company’ shall mean a company as in subsection one of this section defined;

“(b) ‘railway’ shall mean all property real and personal and works forming part of or connected with the telegraph or telephone system or line of the company;

“(c) ‘Special Act’ shall mean a Special Act as in subsection one of this section defined;”

20

None of the sections of the Railway Act within the exception contained in Section 375 (12) thereof, extend or apply to the Appellant or to its works, nor can any of the powers or jurisdictions conferred upon the Board by the said excepted sections be exercised against the Appellant or its plant.

See *The London, Chatham and Dover Ry. Co. v. The Board of Works for Wandsworth District*, L.R. 8 C.P. 185;

Boland v. C.N.R. (1926), 4 D.L.R. 193, at p. 200.

3. ALL OF THE PROVISIONS OF THE RAILWAY ACT, R.S.C. (1927), C. 170, DO NOT APPLY TO THE RESPONDENT OR TO ITS WORKS.

30

Section 17 of the Canadian National Railways Act, R.S.C. (1927), C. 172, as amended by 19-20 Geo. V. (1929), C. 10, S. 2, expressly limits the application of the Railway Act to the Respondent, and the jurisdiction of the Board in respect of the Respondent and its works is correspondingly limited. The relevant portions of Section 17 of the said Act are as follows:—

“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;

“(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;

40

“(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;”

See *Rattenbury v. Canadian National Railway Co.*, 30 C.R.C. 414.

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—
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continued.

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continued.

4. SECTION 257 OF THE RAILWAY ACT DOES NOT CONFER THE NECESSARY JURISDICTION UPON THE BOARD TO MAKE PARAGRAPH 2 OF ORDER NO. 45410.

The relevant provisions of Section 257 are as follows :—

“ 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 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 such portion or crossing, if any, or any other crossing directly or indirectly affected.”

(a) Neither Section 257 nor the Board's jurisdiction thereunder extend or apply to the Appellant or to its plant (*supra*, p. 22).

(b) The Board did not act “ of its own motion ” but acted upon the application of the Respondent. This is so stated in Order No. 45410 (Record, p. 10).

(c) The Board did not act “ upon the complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved ”, as required by Section 257. There is no evidence whatsoever before the Board to the effect that the existing subway at d'Argenson Street was not wholly satisfactory. The Railway was already carried over the street and the street carried beneath the Railway, in accordance with all requirements of public safety and convenience.

(d) The construction of the subway on d'Argenson Street was not ordered by the Board for the protection, safety and convenience of the public at an existing railway crossing.

There is no connection between the earlier proceedings taken before the Board prior to and during 1927, and the present proceedings out of which this appeal arises, and all reference to such earlier proceedings in the Statement of Facts (Record, p. 3, l. 26 *et seq.*) is irrelevant.

The said earlier proceedings terminated with Order No. 39079 (Record, p. 425), which directed the Board's Chief Engineer “ to make inquiry and report to the Board upon the whole situation of level

crossings in Montreal, on the Canadian National Railways, from Bonaventure Station west, and from Moreau Street Station east; to report progress to the Board from time to time; and to evolve a scheme for the consideration of the Board" (Record, p. 425, l. 38). This Order only related to "level crossings" and accordingly did not require the Board's Engineer to make any investigation of or report upon the d'Argenson Street Crossing where a grade separation and subway already existed. In any event "No report covering the whole situation of level crossings in Montreal on the Canadian National Railways from Bonaventure Station west and from Moreau Street Station east, as required by the Board, was made to the Board by its Chief Engineer" (Record, p. 4, l. 1).

Order No. 39079 was not acted upon, but in lieu thereof the Respondent itself evolved a comprehensive scheme, entirely different from any theretofore considered by the Board (Record, p. 4, ll. 6, 23), for readjusting its terminal facilities in the City of Montreal, and according to its own allegations for minimizing the danger to the public at level crossings (Record, p. 4, l. 6).

This scheme was not submitted to or considered by the Board, and, when Parliament took a hand in the matter, instead of referring the same to the Board they engaged the services of Mr. Frederick R. Palmer, an independent Engineer, to study and report upon the whole terminal situation in Montreal (Record, p. 4, l. 13).

Subsequent to Mr. Palmer's report, Parliament enacted the Canadian National Montreal Terminals Act, 19-20 Geo. V, C. 12. Section 2 and the Schedule therein referred to provide as follows:

"2. The Governor in Council may provide for the construction and completion by the Canadian National Railway Company (hereinafter called 'the Company') of terminal stations and offices, local stations, station grounds, yards, tracks, terminal facilities, power houses, pipes, wires and conduits for any purpose, bridges, viaducts, tunnels, subways, branch and connecting lines and tracks, buildings and structures of every description and for any purpose, and improvements, works, plant, apparatus and appliances for the movement, handling or convenient accommodation of every kind of traffic, also street and highway diversions and widenings, new streets and highways, subway and overhead streets, and also approaches, lanes, alleyways, and other means of passage, with the right to acquire or to take under the provisions of section nine of this Act or otherwise lands and interests in lands for all such purposes, all on the Island of Montreal, in the Province of Quebec, or on the mainland adjacent thereto, as shown generally on the plan or plans thereof to be from time to time approved by the Governor in Council under the provisions of section seven of this Act; the whole being hereinafter referred to as the 'said works',

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No. 13.
Factum
of Bell
Telephone
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continued.

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No. 1.

*In the
Supreme
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No. 13.
Factum
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continued.

and a short description whereof for the information of Parliament but not intended to be exhaustive, being set out in the schedule hereto.”

SCHEDULE.

“(a) Central Passenger Terminal facilities, and office buildings, including baggage, mail and express facilities, on the site of the present Tunnel Station, and generally covering the area bounded by Cathcart Street, St. Antoine Street; Inspector and Mansfield Streets, and St. Genevieve Street;

“(b) Viaduct and elevated railway between Inspector and Dalhousie Streets, and St. David’s Lane and Nazareth Street to near Wellington Street, and thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets, and with connections to existing railway facilities and Harbour Commissioners’ trackage; 10

“(c) Coach yard facilities at various points, with principal yard at Point St. Charles;

“(d) Grade separation by means of elevated, or depressed, or underground tracks, or streets, as may be determined on the existing railway between Bonaventure and Turcot and connection to the viaduct referred to in paragraph (b); 20

“(e) Grade separation by means of elevated, or depressed, or underground tracks, or streets, as may be determined between St. Henri and Point St. Charles;

“(f) Railway from Longue Pointe Yard to the Northwest and thence Southwest to connect with the existing railway at and near Eastern Junction;

“(g) Railway from the Cornwall Subdivision in the vicinity of Pointe Claire to the L’Original Subdivision in the vicinity of Val Royal; 30

“(h) Railway between the Cornwall Subdivision near Lachine and the Lachine, Jacques Cartier and Maisonneuve Railway, near Western Junction;

“(i) Railway from a point on the lines between St. Henri and Point St. Charles near Atwater Avenue, along the River St. Pierre and the Aqueduct Tail Race to the waterfront, and construction of yard facilities on the Waterfront with connection to existing lines and Harbour Commission trackage;

“(j) Local station facilities, engine and other railway facilities, signalling, electrification, and electrical equipment on present and proposed railways; 40

“(k) Connections and transfer facilities to the tracks of the Montreal Harbour Commission near Longue Pointe, and/or at a point further East, and connections and transfer facilities to the C.P.R. East and South of the Lachine Canal, and at other points, except at

Forsythe (now Rouen Street). The Company to pay part cost, to be determined, of facilities jointly owned or jointly used.

“ The estimated cost of the said works is \$51,409,000.

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

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Upon the passing of the said Act, and pursuant to the provisions of Section 21 of the Canadian National Railways Act, R.S.C. (1927), C. 172, the Respondent submitted a plan of the works authorized thereby to the Governor in Council, by whom the said plan was approved on the 2nd day of July, 1929, by P.C. 1197 (Record, p. 4, l. 19). The said plan appears as Schedule 5 to the Record.

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Section 21 of the Canadian National Railway Act provides as follows :

“ 21. With the approval of the Governor in Council and upon any location sanctioned by the Minister of Railways and Canals the Company may from time to time construct and operate railway lines, branches and extensions, or railway facilities or properties of any description in respect to the construction whereof respectively, Parliament may hereafter authorize the necessary expenditure, or the guarantee of an issue of the Company's securities.

“ 2. A copy of any plan and profile made in respect of any completed railway shall be deposited with the Board of Railway Commissioners for Canada.”

The portion of the said scheme involved in this appeal is the construction of grade separations, by means of elevated, or depressed, or underground tracks, or streets, as may be determined, on the Respondent's line between St. Henri and Point St. Charles, which crosses d'Argenson Street, as authorized by subsection (e) of the Schedule to the Canadian National Montreal Terminals Act (*supra*, p. 26). This subway is being reconstructed solely for the purposes of the Respondent, i.e., to permit of the elevation of its existing lines (Record, p. 426, l. 26), and to permit of two additional tracks being carried across the street at this location (Record, p. 426, l. 29; p. 5, l. 1; Plan, Schedule 1) which works were authorized by the Canadian National Montreal Terminals Act. There was no necessity for any application being made to the Board in respect of these works. They were authorized by statute and the Canadian National Montreal Terminals Act entirely ousted the Board of any jurisdiction it might have had to make Orders for the safety, protection and convenience of the public under Section 257 of the Railway Act in respect of this crossing. By providing for grade separations on this line, Parliament made all the provision necessary for the protection of the public and thereby deprived the Board of jurisdiction in respect thereof.

(e) Neither Section 257 of the Railway Act nor the jurisdiction of the Board thereunder apply to the Respondent or to its works because they are

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inconsistent with the provisions of the following Acts within the meaning of Section 17 of the Canadian National Railways Act (*supra*, p. 23), viz. :

(i) Canadian National Railways Act, R.S.C. (1927), Ch. 172 :

“ S. 22. The Company shall not construct or operate its railway along any highway, street or other public place without first obtaining the consent, expressed by by-law, of the municipality having jurisdiction over the said highway, street or other public place, and upon terms to be agreed upon with such municipality.”

(ii) Expropriation Act, R.S.C. (1927), Ch. 64 :

“ S. 2. In this Act, unless the context otherwise requires, 10

“ (d) ‘ land ’ includes all granted or ungranted, wild or cleared, public or private lands, and all real property, mes- suages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compen- sation is to be paid by His Majesty under this Act ;

“ (g) ‘ public work ’ or ‘ public works ’ means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, 20 booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry- docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, 30 but not any work for which the money is appropriated as a subsidy only ;”

“ S. 3. The minister may by himself, his engineers, superinten- dents, agents, workmen and servants,

“ (b) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, con- struction, maintenance or repair of the public work, or for obtaining better access thereto ;”

“ (f) alter the course of any river, canal, brook, stream or 40 watercourse, and divert or alter, as well temporarily as permanently, the course of any rivers, streams, railways, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the

side of the public work, as he thinks proper; but before discontinuing or altering any railway or public road or any portion thereof, he shall substitute another convenient railway or road in lieu thereof; and in such case the owner of such railway or road shall take over the substituted railway or road in mitigation of damages, if any, claimable by him under this Act, and the land theretofore used for any railway or road, or the part of a railway or road so discontinued, may be transferred by the minister to, and shall thereafter become the property of, the owner of the land of which it originally formed part;”

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(iii) Canadian National Montreal Terminals Act, 19-20 Geo V, Ch. 12 : Section 2 and Schedule, subsection (e), which authorized the elevation of the line and the construction of the subway on d'Argenson Street (*supra*, p. 26).

Under the foregoing enactments the Respondent has, with regard to the reconstruction of the subway and works in question, the same rights and powers as are accorded the Minister under the Expropriation Act. The Minister requires no leave or approval of the Board to reconstruct railway or other public works located in highways. The Respondent therefore required no such leave or approval. The Board had no jurisdiction whatsoever in respect of this work save to receive the plans thereof for filing pursuant to section 17 of the Canadian National Railways Act (*supra*, p. 23).

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5. SECTIONS 255 AND 256 OF THE RAILWAY ACT DO NOT CONFER THE NECESSARY JURISDICTION UPON THE BOARD TO MAKE PARAGRAPH 2 OF ORDER No. 45410.

The relevant provisions of Sections 255 and 256 are as follows :

“ 255. The railway of the company may, if leave therefor is first obtained from the Board as hereinafter authorized, but shall not without such leave, be carried upon, along or across any existing highway : Provided that the compensation, if any, payable by the company to adjacent or abutting landowners shall be determined under the arbitration sections of this Act in so far as such sections are applicable, and provided that the Board shall not grant leave to any company to carry any street railway or tramway, or any railway operated or to be operated as a street railway or tramway, along any highway which is within the limits of any city or incorporated town, until the company has first obtained the consent therefor by a by-law of the municipal authority of such city or incorporated town; and provided that where leave is obtained to carry any railway along a highway the Board may require the company to make compensation to the municipality if the Board deems proper, said compensation to be determined under the arbitration sections of this Act, in so far as such sections are applicable. (20-21 George V, C. 36, S. 2.)

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“ 2. The company shall, before obstructing any such highway by its works, turn the highway so as to leave an open and good passage for carriages, and, on completion of the works, restore the highway to as good a condition as nearly as possible as it originally had.

“ 3. Nothing in this section shall deprive any such company of rights conferred upon it by any Special Act of the Parliament of Canada, or amendment thereof, passed prior to the twelfth day of March, one thousand nine hundred and three.”

“ 256. Upon any application for leave to construct a railway upon, along or across any highway, or to construct a highway along 10
or across any railway, the applicant shall submit to the Board a plan and profile showing the portion of the railway and highway 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 20
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.”

(a) Neither Section 255 nor Section 256 of the Railway Act nor the Board's jurisdiction thereunder extend or apply to the Appellant or to its plant (*supra*, p. 22).

(b) Section 255 and 256 only apply to cases where the highway is not already crossed by the Railway. They are accordingly not applicable to 30
this case because the crossing has existed for a number of years.

(c) These sections are inconsistent with the provisions of section 22 of the Canadian National Railways Act, Sections 2 (d), (g), 3 (b), (f) of the Expropriation Act and The Canadian National Montreal Terminals Act upon the grounds set forth (*supra*, p. 29, l. 16 *et seq.*).

6. SECTION 39 (1) OF THE RAILWAY ACT IS NOT APPLICABLE.

Section 39 (1) provides as follows :

“ 39 (1). When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, 40
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.”

(i) The Board had no jurisdiction to “ direct or permit ” the reconstruction of the subway in question. This was authorized and permitted by Statute (*supra*, p. 25), which superseded the power (if any) of the Board.

(ii) It is “ otherwise expressly provided ” that the Respondent shall move such of the Appellant’s facilities as may be affected by the reconstruction of the said subway.

10 This provision is contained both in Sections 162, 163 and 164 of the Railway Act, and in Section 3 of the Expropriation Act. These sections are as follows :

RAILWAY ACT :

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

“ (n) divert or alter the position of any water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric lines, wires or poles ;

20 “ 163. The company shall restore, as nearly as possible, to its former state, any river, stream, watercourse, highway, water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric line, wire or pole, which it diverts or alters, or it shall put the same in such a state as not materially to impair the usefulness thereof.

“ 164. The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.”

EXPROPRIATION ACT :

30 “ 3. The minister may by himself, his engineers, superintendents, agents, workmen and servants,

“ (g) divert or alter the position of any water-pipe, gas-pipe, sewer, drain, or any telegraph, telephone or electric light wire or pole.”

40 Since Parliament empowered the Respondent to do the work of moving or altering the Appellant’s plant without recourse to the Board, it was not the intention of Parliament that the Board should have jurisdiction to order changes in the Appellant’s telephone lines for railway purposes or to order the Appellant to make such changes. The only object which the Respondent can have had in resorting to the Board for an Order directing the Appellant to move its own plant instead of the Respondent doing the work itself under Section 162 of the Railway Act or Section 3 of the Expropriation Act, was to avoid liability for the expense

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and damage arising out of this work and to try to saddle the Appellant with the costs and expense thereof.

(c) Order No. 45410 (Record, p. 10) does not in fact order the Appellant to provide, construct, reconstruct, alter, install, operate, use or maintain any structure, appliances, equipment, works, renewals, or repairs which the Board in the exercise of any power vested in it has directed or permitted to be provided, constructed, reconstructed, altered, installed, operated, used or maintained.

The Appellant is not ordered to construct the Respondent's elevated railway across d'Argenson Street, nor is it ordered or directed to reconstruct the subway under the said elevated railway line. All that the Appellant is ordered to do is to move its own plant, and there is no jurisdiction in the Board to so order. 10

(d) The Appellant is not a party interested or affected within the meaning of Section 39 (1) of the Railway Act.

"Section 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an Order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision." 20

See *Canadian Pacific Railway Company and others v. Toronto Transportation Commission*; *Toronto Transportation Commission v. Canadian National Railways* (1930), A.C. 686 at p. 697.

It is not contended that the railway and other works authorized by Order No. 45410 will in any way confer any benefit or advantage upon the Appellant or its telephone lines or plant (Record, p. 5, l. 11). The Appellant has not the slightest interest in the promotion of the Respondent's project, and it is quite immaterial to the Appellant whether it is carried out or not. The Appellant's plant creates no public danger whatsoever, and on d'Argenson Street it is already placed underground. As it now stands, the Appellant's plant is wholly suitable, sufficient and satisfactory for the Appellant's service. The Appellant makes no special use of the present subway nor will it of the subway when reconstructed as proposed. 30

The removal or relocation of the Appellant's plant is not part of the general scheme evolved by the Respondent. The proposed changes in the Appellant's plant are not shown in the Respondent's plan (Schedule 1), nor does the said scheme or plan make any provision whatsoever therefor. 40

As is hereafter shown, the Appellant's plant and its right to maintain the same in its present locations is "land" within the meaning of the Railway Act. The Appellant is, therefore, in the identical position of the owner of land abutting on a highway, part of whose land is being taken for the purposes of a railway crossing. It would be absurd to hold that such

an abutting landowner is a party interested or affected so as to confer jurisdiction upon the Board to order him to move or tear down his house, or make excavation upon his land to permit of railway tracks being laid across it, and to finance such work himself pending distribution of the costs.

None of the sections of the Railway Act, pursuant to which the Order appealed from is made, extend or apply to the Appellant or to its plant (*supra*, p. 22). How then can it be said that the Appellant is a party interested or affected by an Order or by works which are made or constructed pursuant to legislation which by express terms does not extend or
 10 apply to the Appellant?

The Appellant is not a party interested or affected. It merely owns plant and land which must be acquired or moved to permit of railway works being carried out, consequently the Board has no jurisdiction under Section 39 (1) of the Railway Act to make paragraph 2 of Order No. 45410.

7. THE APPELLANT'S PLANT AND ITS RIGHT TO MAINTAIN THE SAME IN ITS EXISTING LOCATION IS "LAND," AN "INTEREST IN LAND" OR AN "IMMOVABLE."

By its Special Act of Incorporation, 43 Victoria (1880), Ch. 67, S. 3 (Dom.), as amended by 45 Victoria (1882), Ch. 95, S. 2, the Appellant was
 20 authorized to "construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, watercourses or other such places," etc. (Record, p. 416, l. 34).

The said Act conferred statutory rights upon the Appellant:

City of Toronto v. Bell Telephone Co. (1905), A.C. 52.

The Appellant's plant involved in this appeal was lawfully constructed upon d'Argenson Street, in pursuance of its statutory powers (Record p. 2, l. 15), and a detailed description of the nature and extent thereof is set forth in paragraphs 6, 7 and 8 of the Statement of Facts (Record, pp. 2, 3).

30 The plant belonging to the Appellant, and its right to maintain the same in the precise locations in which it now exists, are by their very nature "land" or "interests in land" or "immovables" owned by the Appellant, and in any event are "land" within the meaning of that term as defined by the Railway Act, Section 2 (15), and the Expropriation Act, Section 2 (d), the English and French versions of which are as follows:

RAILWAY ACT, R.S.C. (1927), Ch. 170:

"2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,

40 " (15) 'lands' means the lands, the acquiring, taking or using of which is authorized by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure, and any easement, servitude, right, privilege or interest in, to, upon, under, over or in respect of the same;

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“ 2. En la présente loi, ainsi qu'en toute loi spéciale ci-après définie, en tant que la présente loi s'applique et à moins que le contexte ne s'y oppose, l'expression ;

“ (34) ‘ terrains ’ signifie les terrains dont la présente loi ou la loi spéciale autorise l'acquisition, la prise de possession ou l'usage, et comprend des bien-fonds, dépendances, terrains, maisons et héritages de toute condition, ainsi que toutes servitudes actives ou passives, tous droits, privilèges ou intérêts existant dans, sous, ou sur ces terrains, ou à leur égard.”

10

EXPROPRIATION ACT, R.S.C. (1927), c. 64 :

“ 2. In this Act, unless the context otherwise requires,

“ (d) ‘ land ’ includes all granted or ungranted, wild or cleared, public or private lands, and all real property, mesuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act ;

“ 2. En la présente loi, à moins que le contexte ne s'y oppose, l'expression ;

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“ (i) ‘ terrains ’ et ‘ immeubles ’ comprend toutes terres concédées ou non concédées, incultes ou défrichées, publiques ou privées, ainsi que toutes propriétés immobilières, maisons et dépendances, terres, tenements et héritages de toute tenure, et tous droits réels, servitudes, dommages-intérêts et toutes autres choses faites conformément à la présente loi, pour lesquelles Sa Majesté peut avoir à payer une indemnité sous l'autorité de la présente loi ” ;

Consumers' Gas Company of Toronto v. City of Toronto, 27 S.C.R. 453 ;
City of Toronto v. Consumers' Gas Company (1916), 2 A.C. 618 ;
Montreal Light, Heat & Power Cons. v. City of Westmount (1926),
S.C.R. 515 ;
Re Ottawa Gas Co. and City of Ottawa, 48 O.L.R. 130 ;
Montreal Light, Heat & Power Cons. v. City of Outremont (1930),
R.J. 49 K.B. 456.

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See also

Kolodzi and Detroit and Windsor Subway Co. (1930), 65 O.L.R. 398 ;
affirmed S.C.C. (1931), 3 D.L.R. 337 ;

Ruel v. The King, 38 D.L.R. 613 ;

Calgary Gas and Water Works Co. v. City of Calgary, 2 Terr. L.R. 449 ;
The King v. Birchdale Ltd., 16 Ex. C.R. 375.

40

The Appellant can only be lawfully deprived of its said “ lands ” or “ interests in lands ” by expropriation proceedings lawfully taken or by the Respondent proceeding under Sections 162, 163 and 164 of the Railway Act or Section 3 of the Expropriation Act (*supra*, p. 31).

QUEBEC CIVIL CODE, ART. 407 :

“ No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.”

See Mignault upon this Article, Vol. 2, p. 468. See also *Jones v. Atlantic and North West Ry. Co.* (1903), R.J. 12 K.B. 392; *Corporation of Parkdale v. West*, 12 A.C. 611, Law Times 57 N.S. 602.

8. PARAGRAPH 2 OF ORDER NO. 45410 HAS THE EFFECT OF DEPRIVING THE APPELLANT OF ITS “ LANDS.”

10 If the Appellant moves its plant on d'Argenson Street in compliance with paragraph 2 of Order No. 45410, the grade of the said street will be lowered by the reconstruction of the subway therein below the present location of the Appellant's underground conduits, necessitating their being placed at a lower level under the street (Record, p. 5, l. 18). The Appellant will, therefore, be deprived of the right to maintain its said conduit system in the location in which it now stands.

The said underground conduit system of the Appellant cannot be moved without being broken up and destroyed (Record, p. 3, l. 1).

20 Paragraph 2 of Order No. 45410 directs the Appellant to move its plant which necessitates complete destruction thereof in order to get it out of the way to permit the Respondent to take and use the space now occupied thereby for the construction of the subway. This is a taking of the Appellant's lands, which can only be effected by expropriation.

City of Toronto v. Consumers' Gas Co. (1916), 2 A.C. 618;
Re Ottawa Gas Co. and City of Ottawa, 48 O.L.R. 130;
The King v. Birchdale Ltd., 16 Ex. C.R. 375;
Ruel v. The King, 38 D.L.R. 613.

30 9. THE BOARD HAS NO JURISDICTION TO MAKE ANY ORDER DEPRIVING THE APPELLANT OF LANDS OR WHICH IS TANTAMOUNT TO THE EXPROPRIATION THEREOF.

By Section 17 of the Canadian National Railways Act (*supra*, p. 23), neither the provisions of the Railway Act relating to the expropriation of lands nor any jurisdiction which the Board may have by virtue thereof, apply to the Respondent.

Boland v. C.N.R. (1926), 4 D.L.R. 193, at p. 200.

40 The Respondent's power to take lands is conferred upon it by the Canadian National Railways Act, R.S.C. (1927), C. 172, and the procedure therein provided must be strictly followed. Where the Respondent requires to take lands, it merely deposits a plan under the Expropriation Act, as made applicable to the Respondent, and thereupon the lands become vested in the Respondent. If any resistance is offered to the Respondent taking immediate possession of the lands Section 22 (1) of the Expropriation Act affords the remedy. The relevant provisions of the

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CANADIAN NATIONAL RAILWAYS ACT, R.S.C. (1927), Ch. 172 :
Section 17 (2) as amended by 19-20 Geo. V, c. 10, s. 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;

“(b) Any plan deposited under the provisions of the Expropriation Act may be signed by the Minister of Railways and Canals on behalf of the Company, or by the President or any Vice-President of the Company; no description need be deposited; 10

“(c) The land shown upon such plan so deposited shall thereupon be and become vested in the Company, unless the plan indicates that the land taken is required for a limited time only or that a limited estate or interest therein is taken; and by the deposit in such latter case the right of possession for such limited time or such limited estate or interest shall be and become vested in the Company;

“(d) The compensation payable in respect of any lands or interests therein taken by the Company under the provisions of the Expropriation Act as made applicable to the Company by this Act shall be ascertained in accordance with the provisions of the Expropriation Act, and for that purpose the Exchequer Court shall have jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the Company, of judicial proceedings and the conduct thereof: Provided that such compensation may, in any case where the offer of the Company does not exceed two thousand five hundred dollars, be ascertained under the provisions of the Railway Act, beginning with notice of expropriation to the opposite party. The amount of any judgment shall be payable by the Company.” 20 30

EXPROPRIATION ACT, R.S.C. (1927), Ch. 64 :

Section 22 :

“If any resistance or opposition is made by any person to the minister, or any person acting for him, entering upon and taking possession of any lands, a judge of the Court, or any judge of any superior court may, on proof of the execution of a conveyance of such lands to His Majesty, or agreement therefor, or of the depositing in the office of the registrar of deeds of a plan and description thereof as aforesaid, and after notice to show cause given in such manner as he prescribes, issue his warrant to the sheriff of the district or county within which such lands are situate directing him to put down such resistance or opposition, and to put the minister, or some person acting for him, in possession thereof.” 40

The foregoing statutory provisions confer no jurisdiction upon the Board in matters of expropriation or of obtaining possession of lands. The Board cannot make Orders dispensing with the taking of proper expropriation proceedings, nor can it determine the compensation to be paid for the lands taken, nor can it order the owner thereof to vacate and deliver them up to the Respondent.

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10. THE BOARD HAD NO JURISDICTION TO MAKE PARAGRAPH 2 OF ORDER No. 45410 EX PARTE.

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The Board of Railway Commissioners for Canada was constituted a court of record with full jurisdiction and power to inquire into, hear and determine all matters which may properly be brought before it. Subject, therefore, to the exceptions hereinafter dealt with, there must be a hearing by the Board of all matters brought before it, and all parties to such proceedings are entitled to a full opportunity to present and argue their case before the Board at such hearing before any Order concerning them is made. In support of this contention the Appellant relies upon the following sections of the Railway Act, R.S.C. (1927), Ch.170 :

20 “ 9. 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.”

“ 18. The Board may hold more than one sitting at the same time, and, whenever circumstances render it expedient to hold a sitting elsewhere than in Ottawa, may hold such sitting in any part of Canada.”

“ 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.

30 “ (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.”

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

40 “ (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

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“(b) requesting the Board to make any order, or give any direction, leave, sanction or approval, which by law it is authorized 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 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.”

“36. The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.”

“57. Unless otherwise provided, fifteen days' notice of any application to the Board, or of any hearing by the Board, shall be sufficient: Provided that the Board may in any case direct longer notice or allow notice for any period less than fifteen days.”

No hearing was had before the Board in respect of the Respondent's application which resulted in the making of Order No. 45410 now in appeal (Record, p. 5, l. 41).

The Appellant was served with a copy of the Respondent's Application to the Board herein (Record, p. 7) on or about April 25th, 1930, and on April 28th, 1930, mailed its Answer (Record, p. 8) to the Secretary of the Board requesting a formal hearing of the said Application (Record, p. 5, l. 28). On May 5th, 1930, the Respondent filed its Reply (Record, p. 9) to the Appellant's said Answer (Record, p. 8), and on May 8th, 1930, the Appellant filed a further Answer (Record, p. 10) to the Respondent's said Application (Record, p. 5, l. 35). No further proceedings were taken by either of the parties hereto, and on September 16th, 1930, without notice to the Appellant and without granting any hearing, the Board made Order No. 45410 (Record, p. 10), now in appeal, granting the Respondent's said Application (Record, p. 5, l. 41).

The only cases in which the Board may exercise its jurisdiction and powers without hearing all parties to the Application are those which come within the scope of Sections 47 and 59 of the Railway Act, R.S.C. (1927), C. 170, which are as follows:

“47. The Board may, if the special circumstances of any case so require, make an interim ex parte order authorizing, requiring or forbidding anything to be done which the Board would be empowered,

on application, notice and hearing, to authorize, require or forbid; but no such interim order shall be made for any longer time than the Board may deem necessary to enable the matter to be heard and determined."

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10 " 59. Except as herein otherwise provided, when the Board is authorized 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.

20 " 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."

This case does not come within the scope of either of the said sections for the following reasons :

As to Section 47 :

30 (a) There were no special circumstances requiring an interim ex parte Order. The Respondent's Application was before the Board from April 25th, 1930 (the date thereof), until September 16th, 1930 (the date of Order No. 45410), or for 144 days, which afforded an ample opportunity to proceed regularly and to permit of a hearing of the Application being had.

(b) The Order was wholly unnecessary (*supra*, p. 29).

(c) The Order is not an " interim " Order at all, but by its very terms is final. It deprives the Appellant of its rights, and compliance therewith would result in the complete destruction of the Appellant's property (*supra*, pp. 34-35), and it contains no provision for compensation being paid to the Appellant.

(d) The Order does not provide that it shall not be effective " for any longer time than the Board may deem necessary to enable the matter to be heard and determined."

40 As to Section 59 :

(a) There was no ground of urgency or other (i.e., similar) reason appearing to the Board to be sufficient which would justify the making of Order No. 45410 ex parte. As already stated (*supra*), the Application was before the Board for 144 days before the Order

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was made. The Application itself (Record, p. 7) contains no grounds of urgency nor does it request the Board to proceed *ex parte*.

(b) The Order was wholly unnecessary (*supra*, p. 29)

(c) It is only "interim" Orders which can be made under Section 59, and this must necessarily be so by reason of the provisions of Sub-section (2) thereof, because any person entitled to notice may demand as of right a re-hearing of the Application. As above stated (*supra*), Order No. 45410 is not an "interim" but is a final Order.

(d) In any event, under Section 59 (2) of the Railway Act, the Appellant was entitled to a hearing. 10

CONCLUSION.

Upon the grounds and for the reasons above set forth the Appellant submits that the Board of Railway Commissioners for Canada had no jurisdiction to make paragraph 2 of Order No. 45410, and that this appeal should be allowed with costs.

PIERRE BEULLAC,

Counsel for the Appellant,
The Bell Telephone Company of Canada.

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IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY
COMMISSIONERS FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway at D'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4 dated April 15th, 1930, on file with the Board under file No. 9437.319.7.

BETWEEN 30

THE BELL TELEPHONE COMPANY OF CANADA

Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

PART I.—STATEMENT OF FACTS

This is an appeal by leave granted by the Honourable Mr. Justice Rinfret from Order No. 45410 of the Board of Railway Commissioners for Canada, hereinafter called The Board, dated 16th September 1930 in so

far as the said Order directs the appellants to move such of their utilities as may be affected by the construction of a subway at D'Argenson Street, Montreal, as and when required to do so by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said appellants, or in any event to make the said Order ex parte and without notice to the said appellants.

D'Argenson Street is a highway extending in a Northerly and Southerly direction through the Southwesterly section of the City of Montreal as shown in part on the plan YIE 31.51.4 filed by the respondents with their application to the Board for authority to construct a subway at the said street. There was a subway in existence at the said street at the date of the said Order.

At the date of the said Order the appellants had certain utilities located upon, over and under the said highway, but constructed after the construction of the said subway.

For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and The Board, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the railway company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War.

In the year 1927 the matter was again revived by The Board and on 27th May 1927 a judgment of The Board was issued, shown at Record, page 418.

The judgment in question provides that these matters be referred for a report to the Chief Engineer of The Board, who, by Order No. 39079, dated 27th May 1927, was appointed and directed to make a full inquiry and report to The Board upon the whole situation of level crossings in Montreal, from Bonaventure Station West and from Moreau Street Station East, and to evolve a scheme for the consideration of The Board (Record, p. 425). No complete report covering the whole situation has yet been made by the said Chief Engineer, but he has made certain reports including one with regard to the subway in question herein.

A study of the whole Canadian National Railways situation in Montreal was undertaken by the Railway Company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the site on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before The Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were

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engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report and by Act of the Parliament of Canada, chapter 12 of the Statutes of 1929, the Canadian National Railway Company was given power to construct and complete the works described in the schedule to the said Act at and in the vicinity of Montreal; and pursuant to the provisions of the said Act, the Governor-in-Council, by Order-in-Council P.C. 1197, dated 2nd July, 1929, approved General Plan No. DC310-0, 0-63.1 (Record, schedule 5). General Plan WIE 19.4.2 dated 10th October, 1929, showing *inter alia* a reconstruction of existing grade separation at the street in question was, upon the applica- 10
tion of the Railway Company and the recommendation of its Chief Engineer, approved by The Board by Order No. 44425 dated 10th March 1930.

The said Order No. 44425 directed that detailed plans of individual grade separations be served upon the City of Montreal, and submitted for approval of The Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of The Board.

On 24th April 1930 in pursuance of the provisions of the said Order No. 44425, the respondents made a further application to The Board for approval of a detailed plan number YIE 31.51.4 for the reconstruction of the subway at D'Argenson Street, and for an Order directing the appellants 20
and others to move such of their utilities as are affected by the construction of the subway, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by The Board.

The appellants were served with a copy of the last named application on or about 25th April 1930, and on 28th April 1930 mailed their answer thereto to the Secretary of The Board, requesting a formal hearing of the said applica-
tion. On 5th May 1930 the respondents filed their reply to such answer. On the 8th May 1930 the appellants filed a further answer to such application, again requesting a hearing thereon. 30

On 9th September 1930, without granting any hearing, the Board made the above Order No. 45410.

PART II.—ERRORS IN THE ORDER APPEALED FROM.

The respondents submit that the Board had jurisdiction to make the order appealed from and that the same should be affirmed.

PART III.—ARGUMENT.

The subway referred to in the Order appealed from, and all things to be done in connection therewith, including procedure, were incidental to and parts of a comprehensive scheme initiated by the Board, as appears from its Order and judgment of 27th May 1927, for the protection, safety and 40
convenience of the public, and approved by Parliament, and including, among other things, the elimination of passenger traffic from Bonaventure Station to Turcot and from Moreau Street Station Easterly, the diversion of such passenger traffic to lines skirting the City of Montreal at the North and

converging at the present tunnel station at Lagauchetiere Street, the establishment of terminal facilities at the site of the said tunnel station, the construction of a viaduct and elevated railway between Inspector and Dalhousie Streets, and St. David's Lane and Nazareth Street to near Wellington Street, and thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets, including St. Antoine Street, and the providing of a grade separation by means of elevated or depressed or underground tracks, or streets, between St. Henri and Point St. Charles, the latter including, among other streets, d'Argenson Street.

10 The constitution and powers of the respondents are set forth in The Canadian National Railways Act, being chapter 172 of the Revised Statutes of Canada 1927, as amended by chapter 10 of the Statutes of Canada 1929, and under the said Act as amended the respondents had power to do the things mentioned in the preceding paragraph, upon securing approval of the Governor-in-Council, sanction as to location by the Minister of Railways and Canals, and authority by Parliament for the necessary expenditure or the guarantee of an issue of securities.

20 The Canadian National Montreal Terminals Act 1929, being chapter 12 of the Statutes of Canada 1929 was an Enabling Act, passed for the purpose of providing parliamentary authority for such expenditure and guarantee of securities, as applied to the scheme above referred to.

The powers and jurisdiction of the Board are set out and defined in The Railway Act, chapter 170 of the Revised Statutes of Canada 1927, and, unless otherwise specified, the sections hereinafter referred to are sections of The Railway Act.

By s. 33, sub-s. 1, the Board has 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 authorized to make or give, or 30 with respect to any matter, act or thing, which by this Act, or the Special Act is prohibited, sanctioned or required to be done. By sub-s. 2 it may order and require any Company or person to do forthwith, or within or at any specified time, and in any manner to be 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 shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or fact. By sub-s. 5 the Board's decision as to whether any company, municipality or person is or is not a party interested within the meaning of this section shall be binding 40 and conclusive upon all companies, municipalities and persons.

Sec. 34 empowers the Board to make orders with respect to any matter, act or thing which by the Act is sanctioned, required to be done or prohibited, and generally for carrying the Act into effect and for exercising any jurisdiction conferred upon it.

Under sec. 35 the Board may, of its own motion, . . . inquire into, hear and determine any matter or thing, which under this Act, it may

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inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.

By sec. 37 any power or authority vested in the Board may although not so expressed, be exercised from time to time, or at any time, as the occasion may require.

By sec. 256 in the case of a new highway crossing and by sec. 257 in the case of an existing highway crossing, the Board is authorized to make such orders as it deems expedient, as to the protection, safety and convenience of the public. 10

By sec. 259 the Board is authorized to 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, and it is submitted that it is immaterial, in view of the provisions above recited, whether the highway crossing is new or already in existence.

By sec. 39 (1) 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, re-constructed, 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, re-constructed, altered, installed, operated, used and maintained. Under sub-s. 2, the Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, re-constructing, 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. 20 30

If an order can be supported under sec. 39, it is unnecessary to consider whether it could also be supported under other sections of the Act.

Toronto Ry. Co. v. Toronto City—(1) [1920] A.C. 426, 437.

In view of the attitude taken by the appellants, they cannot be heard to say that they are not interested or affected by the order in question. The question whether or not they were benefited by the execution of the works in question is not material to the question of the jurisdiction of the Board. They could competently be required to contribute to the cost of such works, and the propriety of requiring them to do so and the extent of the contribution ordered are not matters for review by the Court. 40

*C.P.R. et al v. Toronto Transportation Commission et al and
Toronto Transportation Commission v. C.N.R. et al—[1930] A.C. 686.*

In the order appealed from, the Board has exercised the jurisdiction given to it under sec. 39 in :

1. Ordering by whom, namely, the appellants, the utilities should be moved. Such order is not only in accordance with jurisdiction, but also in accordance with common sense. It would obviously be foolish to authorize any party unfamiliar therewith to interfere with such utilities.

10 2. Directing when and within what time the removal of such utilities should be carried out, namely : as and when required to do so by the Chief Engineer, Operating Department, of the respondents.

3. By reserving all questions of costs, which would include consideration of payment of compensation and the proportion of such costs to be paid by all parties.

In the case above referred to in 1930 Appeal Cases, it is remarked, in connection with sec. 39, that the case was not "otherwise provided for in the Act," and the respondents submit that the same remark applies in this case.

20 The appellants are not the owners of land or of any interest in land which is subject to expropriation. In view of the provisions of the Canadian National Railways Act, as amended by chapter 10 of the Statutes of Canada 1929, the expropriation provisions of The Railway Act are not applicable to the respondents, and there is no provision in the said Acts for the expropriation of a highway or of any interest therein.

There are a number of sections of The Railway Act, under which the party by whom work shall be done or costs shall be borne are expressly provided, such as sections 185, 251-(6) and 260, but there is nothing in the Act inconsistent with the applicability of the provisions of sec. 39 to the situation in question herein.

30 Apart from the foregoing it may be pointed out that if any compensation is payable to the appellants, the ascertainment and payment thereof are not pre-requisite to the immediate exercise by the Board of its jurisdiction under sec. 39, but merely matters which may be taken into consideration by the Board in finally apportioning the cost of the work, which has been reserved.

As to the contention that the order appealed from was made *ex parte* or without notice to the appellants, the respondents deny that it was made either *ex parte* or without notice to the appellants. The appellants were served with the respondents' application for the said order and had and took the opportunity of replying to the same.

40 Under the provisions of sec. 39, the Commissioners may sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business, and they may, subject to the provisions of the Act sit either together or separately, and either in private or in open Court.

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The only exception to these provisions is that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open Court.

The application for the order in question was not a "complaint" within the meaning of sec. 19.

The Honourable Mr. Justice Rinfret in his reasons given in disposing of an application for leave to appeal in

City of Montreal v. Canadian National Railways

on or about the 26th day of February, 1931, says in part :

"A reference to section 33 of the Railway Act will, I think, show the true meaning of the word "complaint" in section 19. Section 33 provides that :

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

(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 direction, leave, sanction or approval, which by law it is authorized 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.

The application of the Canadian National Railway Company was not an application complaining of anything in the sense of sub-paragraph (a) of Section 33, but an application requesting the Board to give its approval to a plan and profile in the sense of sub-paragraph (b) of Section 33.

In point of law, therefore, it was not a complaint within the meaning of the provisions of section 19; but it was a case where the Commissioners were at liberty to sit at such times, either in private or in open court, and to conduct their proceedings in such manner as they deemed convenient."

The respondents submit :

(1) That so far as the general jurisdiction of the Board is concerned, there is nothing in principle to distinguish this case from numerous other cases decided by the Judicial Committee of the Privy Council, and by this Court, in which such jurisdiction has been affirmed.

(2) That, while the practice and procedure of the Board have been correct, an appeal on a mere question of practice and procedure is not one which this Court will, under its established jurisprudence, entertain.

(3) That the appeal should, therefore, be dismissed with costs.

Copies of The Railway Act and other relevant legislation will be furnished for use on the argument of this appeal.

A. FRASER,
Of Counsel for the Respondents.

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No. 15.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tuesday the 1st day of March, A.D. 1932.

Present : The Right Honourable F. A. ANGLIN, C.J.C., P.C.
The Right Honourable Mr. Justice DUFF, P.C.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice LAMONT.

IN THE MATTER OF the Application of The Canadian National Railways for
an Order under Section 256 of the Railway Act for authority to construct
a subway at d'Argenson Street, in the City of Montreal, between Point
St. Charles and St. Henri, as shown on General Plan No. YIE 31.51.4,
dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN :

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

The Appeal of the above-named appellant from Order No. 45410 of
the Board of Railway Commissioners for Canada dated, the 16th day of
September, A.D. 1930, in the above matter, having come on to be heard
before this Court on the 26th and 27th days of October, in the year of our
Lord one thousand nine hundred and thirty-one, constituted as above
with the addition of the Honourable Mr. Justice Newcombe, C.M.G., since
deceased, in the presence of Counsel as well for the appellant as for the

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respondent, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for Judgment, and the same coming on this day for Judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was dismissed, and that the said Order No. 45410 of the Board of Railway Commissioners for Canada should be and the same was affirmed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said appellant should and do pay to the said respondent the costs incurred by the said respondent in this Court.

(Sgd.) J. F. SMELLIE,
Registrar.

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No. 16.
Reasons for
Judgment.

(a) Anglin,
C.J.C.

(a) ANGLIN, C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Rinfret, and agree in his conclusions.

His reasoning, speaking generally, strikes me as being forcible, especially in the early part of his judgment. Taking everything into account, I would dismiss the appeal with costs.

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(b) Rinfret,
J. (con-
curred in by
Duff and
Lamont,
JJ.).

(b) RINFRET, J. (concurrent in by DUFF and LAMONT, JJ.).—These appeals were heard together. There are in each case special features with which it will be necessary to deal separately, but the main point involved is common to all the appeals and may be conveniently disposed of by a single set of reasons.

In all the cases a railway company within the legislative authority of the Parliament of Canada applied to the Board of Railway Commissioners for the approval of plans and profiles for carrying its tracks across certain highways, and the Board, in the final order granting the application, authorized the construction of subways or other structures in connection with the highway crossings and, at the same time, directed the appellants, amongst, others, to move such of their utilities as may be affected by the construction or changes so authorized.

30

The point raised by the appellants is that the Board of Railway Commissioners was without jurisdiction to make the orders in so far as it directed the appellants to move their utilities. There is a further point that, in any event, the orders were made irregularly and not in accordance with the rules binding upon the Board.

The appellants got leave to bring these matters before the court pursuant to subsection 2 of section 52 of the *Railway Act*.

We shall now proceed to discuss the first point.

40

The applications of the railway companies and the orders of the Board professed to be made under sections 255, 256 and 257 of the *Railway Act*. It is in those sections and, of course, in the enabling enactment contained in s. 39, that the authority of the Board to pronounce the Orders must be found, if at all—and we did not understand the respondents to contend otherwise, nor that the impugned Orders were sought to be supported by any other legislation. The logical way to approach these cases therefore is to begin by an examination of the powers conferred on the Board by the several sections just mentioned.

- 10 In the *Railway Act*, sections 255, 256 and 257 form part of a series of sections grouped under the heading: Highway Crossings. They provide for what is to be done in the case of a railway crossing a highway or *vice versa*. The first two sections deal with projected crossings and the other deals with existing crossings. Under section 255, before the railway may be carried upon, along or across an existing highway, leave therefor must first be obtained from the Board. There is a proviso that “the company shall make compensation to adjacent or abutting landowners,” but only “*if the Board so directs*,” in which case the compensation is to be determined under the arbitration sections of the *Railway Act*. Special provisions are made where
 20 the railway is to be carried along a highway, and also to take care of traffic on the highway during the construction of the railway. The highway must be restored “to as good a condition as nearly as possible as it originally had.”

On account of their bearing on the present cases, sections 256 and 257 ought to be quoted *in extenso*:

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 affected.
- 30 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
 40 crossing.
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.

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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.

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 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 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.

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.

Let it be observed that, under the sections quoted, the powers of the Board are set in motion not alone at the request of the railway companies, but equally, as occasion requires, at the request of the Crown, of any municipal or other corporation or of any person aggrieved; or the Board may act *proprio motu*. The primary concern of Parliament in this legislation is public welfare, not the benefit of railways. With that object in view, almost unlimited powers are given the Board to ensure the protection, safety and convenience of the public. It may prescribe such terms and conditions as it deems expedient. It may order that such work be executed or that such measures be taken as, under the circumstances, appear to it best adapted to remove the danger or obstruction; and, amongst the things that the Board may do, the following are particularly mentioned: it may order that the railway be carried over, under or along the highway, and that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted. As to the expediency of the measures so ordered to be taken, the Board is given the entire discretion to decide, and its decision is conclusive (Section 44-3 of the *Railway Act*).

In the cases now before this court, four distinct undertakings are involved:

1. The St. Antoine street subway, in the City of Montreal. In connection with a comprehensive scheme for readjusting its terminal

facilities in that city, the Canadian National Railway Company applied to the Board for the approval of a plan showing, *inter alia*, the proposed crossing of St. Antoine street by its railway. Up to that time, the street was not crossed by the tracks of the railway and the plan was to carry the street under the railway by means of a subway.

Pursuant to subsection 5 of section 256 of the *Railway Act*, the Board directed that detailed plans be served upon the appellants and other interested parties, some of whom filed written answers to the application. The Board subsequently made the order approving the plan and the construction of the subway and making the directions the validity of which is challenged by The Bell Telephone Company of Canada, The Montreal Light, Heat & Power Consolidated, The Montreal Tramways Commission and The Montreal Tramways Company.

2. The d'Argenson street subway, in the City of Montreal. This work is part of the same general scheme of the Canadian National Railway Company. The circumstances are similar, except that there was already a subway at d'Argenson street, and the Order provides for its reconstruction on a wider scale. The parties opposing the Order are the same as in the St. Antoine street appeal.

20 3. The St. Clair avenue subway, in the City of Toronto. In this case, the order of the Board came as a result of an application made by the City of Toronto. The application was that the Canadian Pacific Railway Company and the Canadian National Railways be required to collaborate with the city in the preparation of a joint plan for the separation of grades in the northwest portion of the city. It is unnecessary to recite the successive proceedings that took place. The outcome was a judgment ordering, *inter alia*, the construction of a subway under the Newmarket subdivision of the Canadian National Railways at St. Clair Avenue. No steps were taken for some time, but later the procedure already outlined under subsection 5 of section 256 was followed and an Order was made by the Board, similar in character to that in the St. Antoine and d'Argenson streets cases, directing The Bell Telephone Company of Canada and other public utilities' companies

30 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.

In this matter, The Bell Telephone Company is the sole appellant.

40 4. The Toronto, Hamilton & Buffalo Railway Company's lines in the City of Hamilton. This was a joint application of the railway and the corporation of the City of Hamilton for an order approving and sanctioning plans and profiles showing deviations and alterations in the railway company's lines between certain points in the City of Hamilton, and authorizing the railway company to construct, maintain and operate that portion of its railway between the points described in accordance with the change in grades shown in these plans and profiles, to carry its elevated tracks over certain highways therein designated by means of bridges, and to carry the

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highways beneath the tracks by means of subways, also directing the city to close certain streets, and authorizing a new location of the railway company's station and terminals building, at the same time directing the Hamilton street railway to reconstruct its tracks through and at each side of the subway at James street, and all public utility companies affected to reconstruct, alter or change the respective works of each in order to carry out the changes of the railway shown on said plan and profile.

In this case, as in the former one, The Bell Telephone Company is the sole appellant. The Toronto, Hamilton & Buffalo Railway Company and the City of Hamilton are the respondents. 10

The short description just given of the nature of the works forming, in each case, the subject-matter of the orders, is sufficient to establish—and, if necessary, a more complete reference to the text of the formal orders themselves, as well as to the proceedings leading thereto, would demonstrate—the following propositions :

The whole works,—or at least the constructions or changes with which the appellants are concerned—were designed

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 applications in whole or in part in connection with the crossings applied for, or arising or likely to arise * * * 20
in connection with existing crossings.

(*Railway Act*, sections 256 and 257.)

The orders, subject to what remains to be said of the directions affecting the appellants,—were made in the exercise of the powers vested in the Board by the *Railway Act*, more particularly sections 255, 256 and 257. In fact, 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*. What they disputed was the applicability of the sections relied on to the Canadian National Railway Company and the power to compel the public utility companies to remove their facilities 30
without previous compensation.

We shall deal first with the last of these two objections of the appellants, which is common to all the appeals.

In the exercise of the powers so vested in the Board, it is not clear, under the sections referred to, on whom it may impose the terms and conditions which, in its discretion, it finds expedient to insert in the orders it makes, nor by whom it may order the prescribed measures to be taken or the prescribed works to be executed. Whatever be the construction of those sections, any doubt on the point just mentioned is removed beyond question by section 39 of the *Railway Act*, which reads as follows : 40

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.

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.

The effect of this section was the subject of several pronouncements on the part of the Judicial Committee of the Privy Council. It is now
10 settled that the section

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. City of Toronto* (1) ; *Canadian Pacific Railway Co. v. Toronto Transportation Commission* (2).

There is, of course, the decision in *British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. Co.* (3) relied on by the appellants. But, as pointed out by Viscount Finlay in *Toronto Railway Co. v. City of Toronto* (4), the order of the Board in the British Columbia case was

20 not regarded as proceeding on any consideration of danger arising from the level crossing or as having anything to do with the railways as such. The matter was treated as one merely of street improvement for which a permissive order was given by the Railway Board, and as such not falling within either s. 59 (now 39) or s. 238 (now 257) of the *Railway Act*; indeed the latter section is not even mentioned in the judgment.

Another point of distinction which should be emphasized is this: In the *Vancouver* case (5), the Board's order was held merely permissive and as former section 59 was interpreted as applying only in cases where the order was "in substance mandatory," the discussion centred (as it did also to
30 a certain extent in the *Toronto* case (6),) on the question whether the terms of the impugned order satisfied the words of the enactment as it then was. The point is no longer open for discussion now that the provisions of the new section 39 have, by amendment, been declared to extend both to an order which "directs" and to an order which "permits." Further, we would add, applying the reasoning of the Privy Council in *Toronto Railway Co. v. City of Toronto* (7), that there can be no question here that the orders appealed from are mandatory.

40 We have it so far that the works involved in the orders now before us are works which the Board, in the exercise of the powers vested in it by the particular sections of the *Railway Act*, could competently direct or permit to be done, and to which accordingly section 39 of the *Railway Act*

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(1) [1920] A.C. 426, at 435.

(2) [1930] A.C. 686, at 695.

(3) [1914] A.C. 1067.

(4) [1920] A.C. 426, at 442.

(5) [1914] A.C. 1067.

(6) [1920] A.C. 426, at 436 to
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(7) [1920] A.C. 427, at 436.

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applies. It follows that the works in question were in the nature of those where the Board may

order by what company, municipality or person, interested or affected by such order, as the case may be * * * the same shall be provided and constructed;

and, consequently, that the appellants could competently be ordered to do the works, unless it be "otherwise expressly provided" somewhere else in the *Railway Act*.

We have no doubt that the appellants fall within the class of companies or persons "interested or affected" by the orders, within the meaning of section 39. In terms, the orders are directed against the companies only so far as "affected" by the works or changes therein involved; and the consequence would be either that the appellants are "affected" and therefore they come within the section, or they are not "affected" and the orders do not concern them. 10

But it seems evident that the appellants are companies "affected" as contemplated by the section. In *Canadian Pacific Ry. Co. v. Toronto Transportation Commission* (1), Lord Macmillan, delivering the judgment of the Judicial Committee, made the following observation at page 697:

Sect. 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision. 20

The question 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 (*Railway Act*, ss. 33-5, and 44-3). Nevertheless, we apprehend that we are called upon to consider the point on appeal as a question of law so as to determine the jurisdiction of the Board in the premises (2). In the *Toronto Transportation* case (3), the test was laid down in this way: 30

The question is * * * whether the company was interested in or affected by the engineering works designed for the removal of the level crossing.

If that test be applied here, the answer is plainly in the affirmative. In the present case, the alteration of the appellants' facilities is necessitated by the construction orders and they are obviously within the meaning of the statute.

In coming to that conclusion, we are further influenced by the consideration that, as was authoritatively decided in *Toronto Railway Co. v. City of Toronto* (4), the class of persons who may be ordered to contribute towards the cost and expenses under sub-s. 2 of section 39 is the same exactly as the class of persons who may be ordered to do the works under sub-s. 1. So far as we know, the question as to what constitutes a person "interested or affected" under sub-s. 1 comes before the courts for the first time, but it has been discussed in a number of cases under sub-s. 2; and, although fully 40

(1) [1930] A.C. 686.

(2) [1930] A.C. 686, at 696.

(3) [1930] A.C. 686, at 702-703.

(4) [1920] A.C. 426, at 435.

aware that any decision on that point must depend largely on the particular circumstances of each case, we are satisfied that if we should apply to the present instances the line of reasoning which obtained, amongst others, in the two *Toronto* cases (1), the conclusion is inevitable that the appellants fall within the relevant provisions of section 39.

If therefore, by force of sections 256 and 257, in respect of the highway crossings and so far as material here, the works were—as we decide they were—competently ordered by the Board, it may not be denied that the orders could be made on the railway companies or on the municipal corporations interested; and, as a mere matter of jurisdiction, we must hold that the orders could also be made with equal competence on any company or persons affected by the orders and, therefore, on the appellants.

Now 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. We see no reason to doubt that, in the exercise of the powers therein given, the Board may direct part of the work to be executed by one person and another part to be executed by another person. The moving of the utilities of the appellants as directed would obviously be part of the works designed and which could competently be ordered. It would seem, moreover, that the moving could be done much more advantageously by the companies owning and operating the utilities. So that, in the carrying out of the present orders, each company is called upon to contribute its part of the work in the manner best calculated to suit the convenience of all concerned. Nor are we impressed by the contention that the relevant sections of the Act so interpreted are likely to work hardship. It need not be repeated that this is a matter for Parliament's concern, which must not influence the construction of statutes where the intention is clear. But it may not be out of the way to point out that section 39 gives ample scope to the Board for making such provisions as to time, terms, conditions, and "as to the payment of compensation or otherwise," as may be found necessary to meet all situations, and for clothing the orders it makes under it with all the guarantees of fairness. In our view, the enactment as framed allows for directions that advances in money be made on account, by all or some of the parties interested or affected, towards the cost of construction ordered, executed by one or more of them (2), or that compensation, if any, be previously paid. We should not assume that in these, or in any other instances, the Board will make use of its powers in a way that would be unreasonable. At all events, this court has only to decide whether the Board has jurisdiction to require the appellants to contribute to the works as it did. The propriety of requiring them to do so is entirely a matter for the Board (3).

It remains to consider whether, as the appellants contend, these are cases where the *Railway Act* "otherwise expressly provided" so as to take them outside the application of section 39.

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(1) [1920] A.C. 426, and [1930]
A.C. 686.

(2) See [1920] A.C. 431.

(3) [1930] A.C. 703.

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Let it be first observed that in the section, the words "except as otherwise expressly provided" are inserted in the following sentence :

it (i.e., the Board) may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order * * * the same (i.e., the structure or works) shall be provided, constructed, etc.

The meaning of the words, in the place in which they are found, is to the effect that the Board may order the works to be constructed by any company interested or affected, unless it be otherwise expressly provided in some other part of the *Railway Act*. We know of no other section of the Act, and none was pointed out to us, which expressly provides otherwise, that is : 10
which provides that the Board may not order a subway or any other work contemplated by sections 256 and 257 to be constructed in whole or in part by a person other than a railway company.

Sections 162 and following are nothing but an enumeration of the several powers of a railway company under the Act. They provide for what the company may do "for the purposes of its undertaking," and how it may do it and for its obligations in the way of avoiding damage and making compensation. But section 162 is only permissive. That and the sections immediately following (which are only corollary thereto) apply where the railway, for itself and of its volition, does the work or exercises the powers granted therein. Besides, under section 162, the powers are granted and may be exercised only "subject to the provisions in this and the Special Act contained"; and thus we are carried back to section 39. 20

Then, there are in sub-s. 3 of section 256 and in sub-s. 2 of section 257, certain provisions in regard to the taking of land. The appellants urge that the Board has no jurisdiction in matters of expropriation or of obtaining possession of lands; that the utilities ordered removed are in the nature of lands, and that the Board cannot make orders dispensing with the taking of proper expropriation proceedings, nor can it determine the compensation to be paid for the lands taken, nor can it order the owner thereof to vacate and deliver them up to the respondent railway companies; and the conclusion follows that the orders to remove the facilities are therefore invalid. 30

The fallacy of the foregoing proposition lies in the fact that it is altogether predicated on the assumption that orders of this kind call for the taking of lands by the railway company. Of course, the orders appealed from do not. They provide for the works to be executed partly by the railway company and partly by the utilities companies—since removing the utilities is just as much part of the works as would be, for example, the removing of the earth in the subways. In the carrying out of the orders as framed, the railway company is not supposed to even touch the facilities of the appellants. So that, assuming the appellants' interest is in the nature of lands, the orders here do not call for the taking by the railway company of the lands of the appellants. 40

But the appellants say that the orders are not as they should be, and that orders of that nature properly made under sections 255, 256 and 257

necessarily involve the taking of lands by the railway company. We do not think they do. It is not difficult to imagine cases where the measures directed to be taken under these sections would necessitate the taking of lands by the railway. Sub-s. 3 of 256 and sub-s. 2 of 257 are there to take care of such cases. But an order, without more, that the railway be carried over or under a highway or that a highway be carried over or under a railway is hardly one of these cases. The orders with regard to the subway at St. Antoine or d'Argenson streets, in Montreal, are not; nor is the order in respect of the subway at St. Clair Avenue in Toronto. As for the Hamilton
 10 order, we have the admission of the appellant, The Bell Telephone Co. that the changes in the appellant's plant are only necessitated by the construction of the subways and the closing of the streets authorized by

the order. We shall take up later the question about the closing of streets. For the moment, we deal only with the matter of subways, with which all the appeals herein are concerned.

Now, "the provisions of law * * * applicable to the taking of land by the company" referred to in sub-s. 3 of 256 and in sub-s. 2 of 257 plainly mean the provisions applicable to the taking of land for the purposes of the railway or for the undertaking of the railway. It may be said generally
 20 that an order such as those we are now discussing is not made "for the purposes of the railway proper." The fact that the railway comes across a 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. All the railway needs is to cross the highway. But there are cases where this may not be done without danger or obstruction. Hence the order to carry the highway over or under the railway. As a result the utilities are not to be removed in order to allow the railway to pass. They must be removed because, for motives of public safety and convenience, the highways are to be lowered or carried above. It is idle to say that lowering a highway will
 30 not make it part of the railway undertaking, and neither will its being carried over the railway. This very question is dealt with by Viscount Dunedin delivering the judgment of the Judicial Committee in *Boland v. Canadian National Railway Company* (1). The noble lord puts the question: "Is the subway part of the undertaking of the railway?" And the answer is:

Their Lordships consider that it is not. The expression "subway" has been used, and it is convenient, but in fact, what has been done is merely a lowering of the road and the construction of a new railway bridge. Their Lordships do not doubt that the lowered road still remains, as it was, part of the road belonging to the municipality. They might put sewers under it or gas pipes along it, and could not be restrained by
 40 the railway authorities—assuming, of course, that those things so done did not interfere with the position of the railway proper.

Whether, in matters of railway crossings, the sub-sections invoked by the appellants apply to land at the crossing proper,—and the provision therein inserted: "shall apply to the land exclusive of the highway crossing" might indicate that they do not—it is not necessary, for the moment, to

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(1) [1927] A.C. 198, at 209.

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consider. We are of opinion, for the reasons stated, that the works ordered, by their very nature and quite independently of the direction concerning the appellants, do not call for the taking of land by the railway company, or for the undertaking of the railway. There is, in the present cases, no occasion for the application of sub-s. 3 of 256 or sub-s. 2 of 257; and those subsections do not, in these instances at least, preclude the application of section 39. Incidentally, it may be added that the provisions in sub-s. 4 of 256 and sub-s. 3 of 257 fully authorized the direction made in the impugned Orders to the effect that the works shall be carried out under the supervision of "the Chief Engineer, Operating Department of the Applicant." 10

The only other sections of the *Railway Act* invoked by the appellants were sections 259 and 260. It was expressly held in *Toronto Railway Co. v. City of Toronto* (1), that section 259 (or sub-s. 3 of section 238 as it then was) does not exclude section 39, in respect to the costs and expenses of providing the works. Of section 260, before it is said to have any application at all to the cases herein, it may be asked whether it is meant to cover any new construction made by any railway after the 19th of May, 1909, or whether it affects only railway lines or possibly railways wholly constructed after the date mentioned; whether the application of the whole section is or is not "subject to the order of the Board," and whether the section does not refer solely to level crossings (as a close analysis of the language used in section 260 compared with the language in sections 256 and 257 might show). Section 260 is not even mentioned in the judgments in the two Toronto cases (2). 20

But it is sufficient to say that sections 259 and 260 deal with quite a different thing from that with which we are now concerned. They deal with the apportionment of cost—a question which, in the orders appealed from, the Board did not pretend to decide and which, on the contrary, is expressly reserved for further consideration. The applicability of the two sections will therefore properly come up for discussion when the question of the apportionment of costs stands to be considered. It may have a bearing on sub-s. 2 of section 39; it has none on sub-s. 1. In our view, there is nothing in sections 259 and 260 to put an end to the application of section 39 sub-s. 1. (3). 30

Having now dealt with the main objection of the appellants, we come to the other point about the regularity of the proceedings and the contention that the applications were not brought in conformity with the rules binding upon the Board. The question submitted has to do with the absence or sufficiency of notice to the appellants, who urge that they were not accorded the hearing to which they were entitled. 40

Assuming the objection raises a question of jurisdiction—and our present view would be that it does not, but that it is rather a question of practice and procedure—the fact is that the Orders in each case were not issued until some time after the appellants had had an opportunity—of

(1) [1920] A.C. 437.

(2) [1920] A.C. 426, and [1930] A.C. 686.

(3) [1920] A.C. 426 at foot of 437.

which they availed themselves—of filing their submissions in writing, although there was afterwards no oral argument before the Board. We feel confident that the Board must have given proper consideration to the written submissions so made and have taken them into account in drafting the orders subsequently issued. In an earlier part of this judgment, attention was drawn to the fact that in these matters—as well as in any number of similar matters constantly coming before it—the Board is “dealing with what are obviously administrative provisions” of the *Railway Act*. Circumstances imperatively required that these matters may
 10 be disposed of with expedition and simplicity of procedure. For that reason, no doubt, the *Railway Act* provided that

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. (Section 19.)

They may sit either in private or in open court. The only exception is that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court.

What is meant by a complaint is shown, we think, in section 33 of the Act. Complaints are the applications described in sub-paragraph (a) of that section. The applications leading to the orders we are now discussing
 20 were not complaints. They were requests of the kind described in sub-paragraph (b) of the section. They were applications in respect of which, under the Act, the Commissioners were at liberty to “conduct their proceedings in such manner as may seem to them most convenient.”

The Board made and published rules regulating its practice and procedure, as it was authorized to do under the Act (sections 20, 50 and 53). One of those rules reads in part as follows:—

30 When the Board is authorised to hear an application or make an order, upon notice to the parties interested, it may, upon the ground of urgency, or for other reasons 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; but any 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 all 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.

40 The above rule is the reproduction practically *verbatim* of section 59 of the *Railway Act*. We need not say that the Board itself is the proper judge of the circumstances under which the rule and the section should be acted upon; and we do not think that the orders, upon their face, need show the existence of the circumstances which prompted the action of the Board. (See section 48.)

In our view, the rules and sections of the *Railway Act* to which we have referred are conclusive of the appeals on this point. We apprehend,

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however, that the appellants may yet find in the remedial parts of rule 6 and of section 59, the remedy to which they may be entitled—although of course it is not our province to express any opinion in regard to it.

That disposes of both of the appellants' points common to all the appeals. Incidentally, it also finally disposes of the appeal in the Hamilton case, for whatever remains to be considered is peculiar to the Canadian National Railways, who are not concerned in the Hamilton appeal.

We do not forget that The Bell Telephone Company raised the contention that, by force of sub-s. 12 of section 375 of the *Railway Act*, sections 256 and 257 thereof do not apply to telephone companies. We are not pressed by that objection. Section 375 appears in the Act in a fasciculus of sections (ss. 367-378) under the heading "Telegraphs, Telephones, Power, and Electricity." Those sections deal with telephones or telephone companies *qua* telephones or telephone companies. There is nothing in them to detract from the authority of the Board to exercise the powers vested in it under sections 39 or 256 or 257 or under any section of the *Railway Act*, over telephone companies *qua* companies or persons, in the same manner and with the same effect as against any other company or person. 10

But we should not part with the Hamilton appeal without making one more observation. The order provides for the closing of certain streets in the City of Hamilton. The Bell Telephone Company objects that the Board has no jurisdiction to order the closing of a highway. There is much to be said in favour of the proposition that 20

the power vested in the Board to order that a highway be temporarily or permanently diverted and the wide power to order such measures to be 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 such portion or crossing, if any, or any other crossing directly or indirectly affected, confers authority upon the Board to order that part of a highway be closed or, at all events, authority to require the proper municipal authority to close it. 30

(See *Brant v. Canadian Pacific Railway Company* (1). But the point does not come up for decision here. The Board did not order the closing of the streets in Hamilton. The city agreed to close them. All that the Board did, so far as that point is concerned, was

confined entirely to the extinguishment of the public right to cross the railway company's right-of-way.

(In *re Closing Highways at Railway Crossings* (2)), to "permit" the closing by the city, so far as that was necessary; (*Railway Act*, sect. 39),—and the incidental authority to make the orders, so far as concerned the utility companies, is amply provided for in section 39 of the *Railway Act*. 40
The Order comes as the result of an agreement between the railway company and the city. The city submits to it; it joined with the railway in the application to the Board; it was a party to all the proceedings before the Board and it is now respondent in this appeal, supporting the Order with the railway company. Under the circumstances, we do not think the point is

(1) (1916) 36 Ont. L.R. 619 at 628. (2) 15 Can Ry. Cases, 305.

open to the Bell Telephone Company. There is however a statement made in the factum of that company which reads as follows :

The closing of Hughson street was only agreed upon and ordered to enable the respondent railway to build its new station upon the portion to be closed.

So far as we can remember, in these rather involved and complicated appeals, no particular argument was addressed to us on that special point. Were it not that the appeal is on a question of jurisdiction, the point should be dismissed on the simple ground that it was not taken at bar. But if the situation be as represented in the factum, the powers of the Board to make
 10 the direction complained of, so far at least as it concerns the rights of the appellant in respect of that particular work, may have to be inquired into. The result may not be the same as in the case of works ordered in connection with the crossings. However, we have no facts or admissions on which to decide that issue. It was apparently lost sight of in the midst of the numerous other points submitted. It may be that it does not arise. If it does, when properly and rightly taken, it is no doubt susceptible of redress by the Board itself under sub-s. 2 of section 59 of the *Railway Act*. As for this court, it would have to be brought back before it upon a new statement
 20 of facts specially addressed to that feature. If the parties wish their rights to be reserved for that purpose, the point may be spoken to. Subject to that, the appeal of The Bell Telephone Company of Canada from Order No. 45813 of the Board of Railway Commissioners, and wherein the Toronto, Hamilton and Buffalo Railway Company and The Corporation of the City of Hamilton are respondents, should be dismissed with costs.

We may now turn our attention to the special features involved in the other appeals. They are of the same character in each case and they may be discussed together.

The main feature concerns what we would call the railway status of the Canadian National Railway Company, the sole respondent in each of the
 30 remaining appeals ;—and what is to be discussed is whether sections 39, 255, 256 and 257 of the *Railway Act* apply to the Canadian National Railways.

The Canadian National Railway Company was incorporated by a special Act of the Parliament of Canada now known as the *Canadian National Railways Act* (c. 172 of R.S.C., 1927). The application of the *Railway Act* to the undertakings of the company was provided for in section 17 of the Act, and the power to construct and operate railway lines was covered by section 21 thereof. Section 21 remained as it was up to the institution of these proceedings ; but section 17 was replaced (section 2 of c. 10 19–20 Geo. V.), by a new section. The new section 17 is what falls to be
 40 considered. It runs in part as follows—

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 ;
- (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.

APPEAL
No. 1.

—
*In the
Supreme
Court of
Canada.*

—
No. 16.
Reasons for
Judgment.
(b) Rinfret,
J. (con-
curred in by
Duff and
Lamont,
JJ.)—con-
tinued.

APPEAL
No. 1.
—
*In the
Supreme
Court of
Canada.*
—
No. 16.
Reasons for
Judgment.
(b) Rinfret,
J. (con-
curred in by
Duff and
Lamont,
JJ.)—con-
tinued.

The first point to be noted in the section is that “all the provisions of the *Railway Act* apply to the company, unless they are excluded by what follows. Now, if we look at what follows, we find that, by sub-s. (b) some provisions of the *Railway Act* are specially excepted. They are: “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*.” The effect of the enactment is that the provisions of the *Railway Act* relating to “highway and railway crossing plans” are applicable to the Canadian National Railways. That was plainly the intention of Parliament, as otherwise there would be no conceivable explanation why those provisions should be expressly excepted from the exclusion prescribed in sub-s. (b). To appreciate the full meaning of this exception, it will be useful to consider the manner in which the provisions referred to are grouped in the *Railway Act*. “Location of Line” is the heading of a series of sections beginning with section 167 and ending with section 188. They deal with the map showing the general location of the proposed line of railway, the plan, profile and book of reference, the deviations, the branch lines, the industrial spurs and the location of stations. Then, passing a number of sections, we come to another series grouped under the heading “Matters incidental to construction” beginning with section 244 and ending with section 275. In that group, under sub-heading “Crossings and Junctions with other railways,” are sections 252 to 254 inclusive, and, under the sub-heading “Highway crossings,” are sections 255 to 267 inclusive. It seems obvious that what sub-s. (b) of 17 (1) intends to exclude is the series of sections of the *Railway Act* (167–188) under the heading “Location of line”; and what it intends to preserve is the series of sections (252–267) under the sub-headings “Crossings and Junctions with other railways” and “Highway crossings.” It follows that sections 252, 255, 256 and 257 are preserved in any event and also, by way of consequence, section 39; and that they apply to the respondent, the Canadian National Railways. If that be so, we have not to inquire further whether they are inconsistent with the *Expropriation Act*.

We should add however that we are unable to find in the Special Act of the Canadian National Railways provisions inconsistent with the sections of the *Railway Act* just referred to. As for the *Expropriation Act*, plainly it cannot prevail against them. The effect of section 17–2 (a) is to make the *Expropriation Act* applicable, “except when inconsistent with the provisions of this Act,” i.e., the *Canadian National Railways Act*. It is part of “this Act” (to wit: the *Canadian National Railways Act*) that the provisions of the *Railway Act* relating to “highway and railway crossing plans” should apply in any event (section 17–1–b). Therefore, so far as they apply, they exclude the *Expropriation Act*. This is further supported by section 17–1–(c). The only provisions of the *Railway Act* thereby excluded are those that are inconsistent with the *Expropriation Act* “as made applicable,” and this carries us back to the reasoning we have just made.

Now, it would be interpreting the words “highway and railway crossing plans” too strictly if they were held to apply only to that part of the relevant sections dealing with the plans proper, as was urged by The Montreal

Tramways Company. That point was discussed by Viscount Dunedin in the *Boland* case (1). He said :

It does not seem to matter whether you read the expression " plans " and " railway crossing plans " as including the authorization of the construction of the crossing indicated by the plans, or if you confine the word " plans " to the meaning of a piece of paper with a drawing on it. In the latter view authorization of a railway crossing is not included in the enumerated exceptions. In the former it is included in the exception upon the exception, so that in either case the matter remains subject to the *Railway Acts*.

10 The section so construed by the Judicial Committee was the former section 17, before the amendment of 1929, but there was no material change, at least so far as concerns the present appeals, and the interpretation there given is conclusive on the matter: " The matter remains subject to the *Railway Acts*." And the same should be said about the *Canadian National Montreal Terminals Act*, 1929, which has reference to the two Montreal subways. We do not agree with the appellants that the *Terminals Act* is an Act by itself, nor that the whole power of the company to carry out the Terminals scheme of development must be found exclusively in the *Terminals Act*. In considering the question how far an enactment in a general statute
20 is varied or excepted by the Special Act, Lord Chancellor Westbury laid down the following rule; that if the particular Act gives in itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the general Act. (*Ex parte St. Sepulchre, In re The Westminster Bridge Act* (2); *London, Chatham & Dover Ry. v. Board of Works for the Wandsworth District* (3).)

The *Terminals Act*, 1929, does not in any way give " a complete rule " on the subject matter of the present appeals. It merely authorizes the Governor in Council to provide for the construction and completion by the Canadian National Railway Company of certain works described in a
30 schedule attached to the Act. The St. Antoine street subway and the d'Argenson street subway are part of the works so described. The following provision is to be found at the end of the 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 Acts relating to the Company.

In no respect is the Act self-contained. The powers therein referred to could never be carried out unless they were implemented by the *Canadian National Railways Act* and by the provisions of the other Acts applying under section 17 thereof. Far from detracting from the powers of the Board of Railway Commissioners under sections 252, 255, 256 and 257, the
40 Act, on the contrary, implicitly confirms those powers, as will be apparent by a reference to section 8 :

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, etc.

APPEAL
No. 1.

In the
Supreme
Court of
Canada.

No. 16.

Reasons for
Judgment.
(b) Rinfret,
J. (con-
curred in by
Duff and
Lamont,
JJ.)—con-
tinued.

(1) [1927] A.C. 198-205.

(2) (1864) 33 L.J. Ch. 372.

(3) (1873) L.R. 8 C.P. 185 at 189.

APPEAL
No. 1.

*In the
Supreme
Court of
Canada.*

No. 16.
Reasons for
Judgment.
(b) Rinfret,
J. (con-
curred in by
Duff and
Lamont,
JJ.)—con-
tinued.

The necessary inference is that the Board has jurisdiction with respect to the crossings under the relevant sections of the *Railway Act*.

The reference to crossings in section 8 is of the same order as the exception in regard to crossings in section 17-1 (b) of the *Canadian National Railways Act* previously discussed. It is consistent with it. It shows on the part of Parliament continuous intention of preserving the jurisdiction of the Board in matters of crossings. There is nothing to the contrary in section 9 of the *Terminals Act*. It deals in a general way with the vesting in His Majesty of the lands required for the undertaking and specifies out of what funds the compensation, if any, is to be paid. Obviously it does not give the "complete rule on the subject" which Lord Westbury said was the test as to whether "a general statute is varied or excepted by the Special Act." Section 9 does not deal with highway or railway crossings and leaves untouched all that we have said in regard to the application of sections 256, 257 and 39 of the *Railway Act*. It would be a question how far section 9 may be resorted to as being "the provisions of law at such time applicable to the taking of land by the company" referred to in sub-s. 3 of 256 and sub-s. 2 of 257. But we have already indicated that the occasion does not arise here. 10

Our conclusion is that the appellants fail in their contention that there is, in any of the Acts they invoked, anything to put an end to the application of sections 255, 256, 257 and 39 of the *Railway Act*; and as, in our view, those sections support the impugned Orders, the appeals should be dismissed. 20

We need not add that the Orders were competently issued notwithstanding that three of the appellants affected are provincial companies. The point is conclusively settled by several decisions of the Judicial Committee (*Toronto Corporation v. Canadian Pacific Railway* (1); *Toronto Railway Co. v. City of Toronto* (2); *Canadian Pacific Ry. v. Toronto Transportation Commission* (3)).

In the course of the judgment, in dealing with the matter of crossings, we have referred throughout to sections 255, 256 and 257 of the *Railway Act* as giving the law applicable in the circumstances. With regard to the Montreal Tramways Company, the orders are further supported by sections 252 and following relating to railway crossings. They apply to the Tramways Company by force of section 8 of the *Railway Act*. They are similar in all material respects to the sections relating to highway crossings. If anything, the provisions therein conferring jurisdiction on the Board are even more direct and decisive. 30

As for The Montreal Tramways Commission, it may have a distinct interest in these appeals, but from the legal viewpoint its position does not differ from that of The Montreal Tramways Company. 40

The appeals are dismissed with costs.

(1) [1908] A.C. 54. (2) [1920] A.C. 426.
(3) [1930] A.C. 686.

APPEAL No. 2.

St. Antoine Street Subway.

In the Privy Council.

No. 61 of 1932.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

10 IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - - *Respondent.*

No. 17.

Statement of Facts.

APPEAL
No. 2.

No. 17.
Statement
of Facts.

20 1. St. Antoine Street is a highway extending in an easterly and westerly direction through the southerly section of the City of Montreal, as shown in part on the Plan YIA 31.10.4, filed by the Respondent with its application to the Board of Railway Commissioners for Canada, hereinabove referred to, a copy of which said plan is attached hereto and marked as Schedule No. 1.

2. The said street has existed for a great many years and the lands comprising the same have been the property of the City of Montreal since about the time when the said street was laid out.

30 3. The Appellant, The Bell Telephone Company of Canada, was incorporated by Special Act of the Parliament of Canada, 43 Victoria, 1880, Chapter 67, and Amending Acts. A copy of the sections of the said Acts, as amended, relevant to this appeal, are set forth in the schedule attached hereto as Schedule No. 2.

APPEAL
No. 2.
—
No. 17.
Statement
of Facts—
continued.

4. In the year 1905, the Appellant, The Bell Telephone Company of Canada, acting in pursuance of the powers conferred upon it in that behalf by its Special Acts of Incorporation referred to in paragraph 3 hereof, and with the legal consent of the City of Montreal, constructed an underground conduit system with the manholes necessary and incident thereto, under the surface of and within the limits of St. Antoine Street, extending from Craig Street westerly to Windsor Street, for the purpose of containing its cables and lines of telephone necessary for rendering telephone service to its subscribers in the vicinity of St. Antoine Street and adjoining territory. The location of the said underground conduit system is indicated in green on the said plan attached hereto as Schedule No. 1, and the said conduit system has remained undisturbed in its present location from the date of its construction up to the present time. 10

5. The said conduit system consists of ducts or passages laid underground with associated manholes or chambers constructed in the line of the said duct runs at intervals varying in distance from about 50 feet to about 500 feet, depending upon local conditions.

The said conduit consists of five ducts or passages, each having a cross sectional measurement of about $4\frac{1}{2}$ inches square, and is constructed with lengths of single vitrified clay tiles laid end to end longitudinally to form continuous passages, cemented together, and superimposed upon each other in three layers; two layers being of two ducts each and the uppermost layer being of one duct; the whole of which is set into a trench in the ground and rests upon a bed or foundation of concrete of about four inches in thickness and to which the clay ducts adhere by reason of being laid upon the concrete immediately after the concrete has been poured and while it is still wet. The said tiles are further protected by a layer of concrete of about three inches in thickness poured over the top thereof; the whole structure thus forming a homogeneous mass with the surrounding earth incapable of being moved or altered without being broken up and destroyed. 20 30

The manholes forming part of the said conduit system consist of underground chambers about seven feet in length by about five feet in height and width, the floor and walls being constructed of concrete of about six inches in thickness and the roof consisting of a monolithic concrete slab lying about 14 inches below the surface of the street supporting a circular metal frame which is embedded in the street pavement and leads up through the pavement to the surface of the street creating an opening over which rests a removable metal cover for the purpose of permitting access to the said manholes. The top of the said metal frame and cover lie flush with the surface of the street and form part thereof. 40

6. The said conduit system contains one cable of 2,424 wires or 1,212 circuits for use in rendering telephone service to the Appellant's subscribers.

7. For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and the Board of Railway Commissioners for Canada, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the Railway Company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities.

10 This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War.

In the year 1927 this matter was again revived by the Board, and on the 27th day of May, 1927, a judgment of the Board was issued, which is reported in the Board's Judgments, Volume 17, page 49, and a copy of the said judgment is attached hereto as Schedule No. 3.

The judgment in question provides that these matters be referred for a report to the Chief Engineer of the Board, who, by Order No. 39079, dated the 27th day of May, 1927, was appointed and directed to make

20 a full inquiry and report to the Board upon the whole situation of level crossings in Montreal, from Bonaventure Station west and from Moreau Street Station east, and to evolve a scheme for the consideration of the Board. A copy of the said Order No. 39079 is attached hereto as Schedule No. 4. No report covering the whole situation of level crossings in Montreal on the Canadian National Railways from Bonaventure Station west and from Moreau Street Station east, as required by the Board, was made to the Board by its Chief Engineer.

8. A study of the whole Canadian National Railway situation in Montreal was undertaken by the Railway Company, and a comprehensive

30 scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the station on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before the Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report, and by Act of the Parliament of Canada, 19-20 Geo. V, c. 12 (assented to June 14th, 1929), the Canadian National Railway

40 Company was given power to construct and complete the works described in the Schedule to the Act, at and in the vicinity of Montreal; and, pursuant to the provisions of the said Act, the Governor in Council, by order in Council P.C. 1197, dated July 2nd, 1929, approved General Plan No. DC310-0.0-63.1. A copy of the said plan is attached hereto as Schedule No. 5.

General plans Nos. WIA19-14.1 and WIA19-15.1, both dated January 17th 1930, showing, *inter alia*, the construction of a subway on

APPEAL
No. 2.
—
No. 17.
Statement
of Facts—
continued.

APPEAL
No. 2.
—
No. 17.
Statement
of Facts—
continued.

St. Antoine Street, was, upon the application of the Railway Company and the recommendation of its Chief Engineer, approved by Order of the Board No. 44433, dated March 13th, 1930. A copy of the application of the Railway Company is attached hereto as Schedule No. 6.

9. At the present time St. Antoine Street is not crossed by the tracks of the Respondent at or near the location indicated on the said plans.

10. By Order No. 44433, dated the 13th day of March, 1930, the Board of Railway Commissioners for Canada granted the Respondent's application mentioned in paragraph No. 8 hereof, subject to the provision that the Respondent serve copies of detailed plans on the City of Montreal, the said plans to be then submitted for approval of the Board. A copy of said Order No. 44433 is attached hereto as Schedule No. 7. 10

11. On the 21st day of April, 1930, in pursuance of the provisions of said Order No. 44433, the Respondent made a further application to the Board of Railway Commissioners for Canada for approval of a detailed plan numbered YIA 31.10.4, a copy whereof appears as Schedule No. 1 hereto, for carrying its tracks across St. Antoine Street upon a grade separation by constructing a subway in St. Antoine Street, and for an order directing the Appellant and others to move such of their utilities as are affected by the construction of the said subway as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by the Board. A copy of said application is attached hereto as Schedule No. 8. 20

12. It is not contended that the construction of the said subway will in any way confer any benefit or advantage to the Appellant or to its plant, and the Appellant has no interest in the promotion thereof, but on the contrary the construction of the said subway will result in the lowering of the level of St. Antoine Street over a distance of about 500 feet to a depth which would leave part of the Appellant's said conduit system exposed above the then level of St. Antoine Street, if allowed to remain in its present location. 30

13. If the said plan attached hereto as Schedule No. 1 is adhered to by the Respondent, and the works provided for therein are constructed, a section of the Appellant's conduit system, including the cable contained therein, about 500 feet in length, together with one manhole, will be destroyed, and the Appellant will be deprived of its right to maintain the said section of its conduit system and cable in the precise location in which they now exist, thereby rendering it necessary to rebuild, at considerable expense, the said part of the said conduit system in another location under St. Antoine Street, at a depth of about two feet below the new street level, and to reconstruct one manhole, as shown coloured in red on the said plan attached hereto as Schedule No. 1, and to remove the existing cable and replace it with new cable in the new conduit. 40

14. The Appellant was served with a copy of the Respondent's said application to the Board of Railway Commissioners for Canada, appearing as Schedule No. 8 hereto, on or about the 22nd day of April, 1930, and on the 28th day of April, 1930, mailed its Answer thereto to the Secretary of the Board of Railway Commissioners for Canada, requesting a formal hearing of the said application. A copy of the said Answer is attached hereto as Schedule No. 9.

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No. 2.
—
No. 17.
Statement
of Facts—
continued.

15. On the 5th day of May, 1930, the Respondent filed its reply to the Appellant's Answer referred to in the next preceding paragraph. A copy of said Reply is attached hereto as Schedule No. 10.

16. On the 8th day of May, 1930, the Appellant filed a further Answer to the Respondent's said application. A copy of said further Answer is attached hereto as Schedule No. 11.

17. No further proceedings were served or taken by either of the parties hereto, and on the 9th day of September, 1930, without notice to the Appellant and without granting any hearing, as requested in the Appellant's Answer, the Board made an Order, bearing No. 45427, granting the Respondent's said application and directing the Appellant and others 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 Respondent. A copy of said Order is attached hereto as Schedule No. 12.

18. On the 13th day of October, 1930, the Appellant launched a motion returnable on the 21st day of October, 1930, before the presiding Judge of the Supreme Court of Canada, in Chambers, applying for an extension for the delay for applying for, and for leave to appeal to the Supreme Court of Canada from said Order No. 45427 of the Board of Railway Commissioners for Canada, insofar as the said Order directed The Bell Telephone Company of Canada to move such of its facilities as may be affected by the construction of the said subway as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that as a matter of law the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order, insofar as it directs The Bell Telephone Company of Canada to move its utilities aforesaid.

19. The said motion came on for hearing on the date aforesaid before the Honorable Mr. Justice Rinfret, who granted said application by Order dated the 12th day of November, 1930, in the following terms :

“ And it is further Ordered that the said application for leave to appeal to this Court from the Order of the Board of Railway Commissioners for Canada, insofar as the said Order directs the Appellant to move such of its utilities as may be affected by the construction of the subway in question, as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction to

APPEAL
No. 2.

No. 17.
Statement
of Facts—
continued.

make the said Order as directed against the said Appellant, or in any event to make the said Order *ex parte* and without notice to the said Appellant, be and the same is hereby granted.”

A copy of the said Order is attached hereto as Schedule No. 13.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 18.
Application
of Respon-
dent to
Board of
Railway
Commis-
sioners for
Canada for
approval of
Plan YIA
31.10.2,
21st April
1930.

No. 18.

Application of Respondent to Board of Railway Commissioners for Canada
for approval of Plan YIA 31.10.2.

SCHEDULE No. 8.

CANADIAN NATIONAL RAILWAYS.

April 21, 1930. 10
345-20.2

A. D. Cartwright, Esq.,
Secretary, B.R.C.,
Ottawa, Ont.

Dear Sir :—

In accordance with Order of the Board No. 44433 dated the 13th day of March, 1930, I am forwarding two linen prints and one paper print of plan No. YIA 31.10.2 showing proposed clearances in height and widths of roadways and sidewalks on St. Antoine Street, these being based upon the request of Mr. G. R. MacLeod, Assistant Chief Engineer of the City of Montreal. 20

At present only ten tracks are shown, although the Order approves of twelve for the future.

There is no change in the width of the street.

Copies of the plan are being served upon the City of Montreal; Montreal Light, Heat & Power Consolidated; Montreal Tramways Company; Bell Telephone Company of Canada; Electrical Commission of the City of Montreal; Canadian Pacific Railway, Telegraph Department; Dominion Electric Protection Company.

The enclosed plans will fix the various dimensions required at each crossing and detail plans of each structure will then be submitted to the Board's Chief Engineer for his approval. 30

I would be grateful if the Board would approve the present plan and in the Order approving it will direct that the various parties above-mentioned move such of their utilities as are affected by the construction, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by the Board.

Yours truly,

(Sgd.) ALISTAIR FRASER,
Assistant General Counsel. 40

No. 19.

Answer of Appellant requesting a hearing, 28th April 1930.

(Same as No. 3 at p. 8.)

Before
the Board
of Railway
Commissioners for
Canada.

No. 19.

No. 20.

Reply of Respondent, 5th May 1930.

(Same as No. 4 at p. 9.)

No. 20.

No. 21.

Further Answer of Appellant, 8th May 1930.

(Same as No. 5 at p. 10.)

No. 21.

No. 22.

Order of Board of Railway Commissioners for Canada No. 45427 directing Appellant to move its utilities.

SCHEDULE NO. 12.

Order No. 45427.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tuesday, the 9th day of
September, A.D. 1930.

HON. H. A. McKEOWN, K.C.,
Chief Commissioner.

S. J. McLEAN,
Asst. Chief Commissioner.

IN THE MATTER OF the application of the Canadian National Railways, hereinafter called the "Applicants," under Section 256 of the Railway Act for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on general plan and profile No. YIA 31.10.4, dated August 16th, 1930, on file with the Board under file No. 9437.319.13 :

No. 22.
Order of
Board of
Railway
Commis-
sioners for
Canada
No. 45427
directing
Appellant to
move its
utilities,
9th Sept-
ember 1930.

UPON the report and recommendation of the Chief Engineer of the Board and reading the submission filed,

THE BOARD ORDERS :

1. That the Applicants be, and they are hereby, authorized to construct a subway on St. Antoine Street, in the City of Montreal, Province of Quebec, as shown on the said general plan and profile on file with the Board under file No. 9437.319.13; detail plans of the proposed structure to be filed for the approval of an Engineer of the Board.

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APPEAL
No. 2.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 22.

Order of
Board of
Railway
Commissioners for
Canada
No. 45427
directing
Appellant to
move its
utilities,
9th Sept-
ember 1930
—continued.

2. That the City of Montreal, the Montreal Light, Heat & Power Consolidated, the Montreal Tramways Company, the Bell Telephone Company of Canada, the Electrical Commission of the City of Montreal, the Canadian Pacific Railway, Telegraph Department, the Dominion Electric Protection Company and the Montreal Tramways Commission be, and they are hereby, directed 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.

3. That all questions of costs be reserved for further consideration by the Board.

(Sgd.) H. A. McKEOWN,
Chief Commissioner,

The Board of Railway Commissioners for Canada.

10

BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Examined and certified as a true copy
under Section 23 of "The Railway Act."

(Sgd.) A. D. CARTWRIGHT,

Sec'y Board of Railway Commissioners for Canada.

Ottawa, October 2, 1930.

No. 23.

Order of Rinfret J., granting leave to appeal to the Supreme Court of Canada.

20

SCHEDULE NO. 13.

IN THE SUPREME COURT OF CANADA.

The Honourable Mr. Justice Rinfret, }
in Chambers. } Wednesday, the 12th day of
November, A.D., 1930.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER OF the Application of The Canadian National Railways
for an Order under Section 256 of the Railway Act, for authority to
construct a subway on St. Antoine Street, in the City of Montreal, as
shown on General Plan No. YIA 31.10.4, dated August 16th, 1930, and
filed with the Board under File No. 9437.319.13.

30

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

UPON the application of Counsel on behalf of the above named
Appellants made on the twenty-first day of October, A.D. 1930, in the

presence of Counsel for the above named Respondents for an Order extending the time for applying for and for leave to appeal to this Court under the provisions of Section 52 of The Railway Act from Order Number 45427 of The Board of Railway Commissioners for Canada bearing date the ninth day of September, A.D. 1930, in the matter of the above application, upon hearing read the Notice of Motion, the Affidavit of Geoffrey Swabey Ridout, and the exhibits therein referred to, all filed, and upon hearing what was alleged by Counsel aforesaid and judgment upon the Motion having been reserved until this day,

10 IT IS ORDERED that the time within which the said Appellants may apply for leave to appeal to this Court from the said order of The Board of Railway Commissioners for Canada be and the same is hereby extended until this day.

AND IT IS FURTHER ORDERED that the said application for leave to appeal to this Court from the said order of The Board of Railway Commissioners for Canada in so far as the said Order directs the Appellants to move such of its utilities as may be affected by the construction of the subway in question as and when required to do so by the Chief Engineer, Operating Department, of The Canadian National Railways upon the ground that the
20 Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said Appellants or in any event to make the said Order ex parte and without notice to the said Appellants, be and the same is hereby granted.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the said appeal.

(Sgd.) T. RINFRET, J.

APPEAL
No. 2.

—
*In the
Supreme
Court of
Canada.*

—
No. 23.
Order of
Rinfret J.,
granting
leave to
appeal to
the Supreme
Court of
Canada,
12th Nov-
ember 1930
—*continued.*

APPEAL
No. 2.

In the
Supreme
Court of
Canada.

No. 24.
Order
approving
security for
costs,
7th January
1931.

Before
The Registrar,
In Chambers.

} Wednesday, the 7th day of
January, A.D., 1931.

No. 24.

Order approving security for costs.

SCHEDULE NO. 14.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER of the Application of The Canadian National Railways 10
for an Order under Section 256 of The Railway Act, for authority to
construct a subway on St. Antoine Street, in the City of Montreal, as
shown on General Plan No. YIA 31.10.4, dated August 16th, 1930, and
filed with the Board under file No. 9437.319.13.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - -

Respondents.

UPON the application of Counsel for the above named Appellants in 20
the presence of Counsel for the above named Respondents, upon hearing
read the notice of motion and the material therein referred to, and upon
hearing what was alleged by Counsel aforesaid,

IT IS ORDERED that the sum of \$250.00 paid into The Bank of
Montreal as appears by the receipt of the said Bank dated the 29th day of
December, A.D. 1930, duly filed as security that the Appellants will
effectually prosecute their appeal from Order Number 45427 of The Board
of Railway Commissioners for Canada bearing date the 16th day of
September, A.D. 1930, in the matter of the above application, and will pay
such costs and damages as may be awarded against them by this Court, be 30
and the same is hereby allowed as good and sufficient security.

AND IT IS FURTHER ORDERED that the costs of the application
be costs in the cause.

J. F. SMELLIE,
Registrar.



No. 25.

Notice of setting down appeal for hearing.

SCHEDULE NO. 15.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

APPEAL
No. 2.

In the
Supreme
Court of
Canada.

No. 25.
Notice of
setting down
appeal for
hearing,
7th January
1931.

10 IN THE MATTER of the Application of The Canadian National Railways
for an Order under Section 256 of The Railway Act, for authority to
construct a subway on St. Antoine Street, in the City of Montreal, as
shown on General Plan No. YIA 31.10.4, dated August. 16th, 1930, and
filed with the Board under file No. 9437.319.13.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

20 TAKE NOTICE that the above appeal from Order Number 45427 of
The Board of Railway Commissioners for Canada has been set down by the
Registrar of this Court for hearing at the Session of this Court commencing
on the 3rd February, 1931.

DATED at Ottawa this seventh day of January, A.D. 1931.

POWELL, SNOWDON & MATHESON,

Agents for Pierre Beullac, K.C.,

Solicitor for Appellants.

To the above named Respondents,
and to ALISTAIR FRASER, K.C.,
their Solicitor,
and to The Board of Railway Commissioners
for Canada.

APPEAL
No. 2.

*In the
Supreme
Court of
Canada.*

No. 26.
Certificate
of settle-
ment of
Appeal Case,
16th April
1931.

No. 26.

Certificate of settlement of Appeal Case.

SCHEDULE NO. 17.

CERTIFICATE OF SETTLEMENT OF CASE.

I, the undersigned, Counsel to the Board of Railway Commissioners for Canada, do hereby certify that the foregoing typewritten document from page 1 to page 6, inclusive, together with copies of the Schedules therein referred to and set forth in the Index thereto, is the case settled by me by direction of Hon. H. A. McKeown, Chief Commissioner of the said Board of Railway Commissioners for Canada, dated the 4th day of February, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada in a certain case pending before The Board of Railway Commissioners for Canada: In the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13, between The Bell Telephone Company of Canada, Appellant, and The Canadian National Railways, Respondent. 10

And I do further certify that I have applied to the Commissioners and to the Secretary of the said Board for the Board's opinions and reasons for making the Order appealed from in this cause and that reasons have been delivered by none of the said Commissioners in response to my said application; no such reasons having been given in respect of the making of the said Order. 20

In testimony whereof I have hereunto subscribed my name this 16th day of April, 1931.

(Sgd.) A. GEORGE BLAIR.

No. 27.

Order dispensing with printing of Schedules 1 and 5 and allowing blue prints to be filed.

SCHEDULE NO. 16.

IN THE SUPREME COURT OF CANADA.

Before the Registrar,
in Chambers.

}

Monday, the Twentieth day of
April, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

10 IN THE MATTER OF the Application of The Canadian National Railways for an Order under Section 256 of The Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan No. YIA 31.10.4, dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

20 UPON the application of Counsel on behalf of the above named Appellants, in the presence of Counsel on behalf of the above named Respondents, for an Order dispensing with the printing of certain Exhibits in the Case in Appeal, upon hearing read the Affidavit of Pierre Beullac filed, and upon hearing what was alleged by Counsel aforesaid,

IT IS ORDERED that the printing in the Case in Appeal of the two Plans referred to in the Statement of Facts as Schedules Numbers 1 and 5 forming part of the Case in Appeal herein, be and the same is hereby dispensed with.

30 AND IT IS FURTHER ORDERED that seven blue print copies of each of the said two Plans shall be provided by the Appellants for the use of this Court and filed with the Case in Appeal.

AND IT IS FURTHER ORDERED that the costs of this application be costs in the Appeal.

(Sgd.) J. F. SMELLIE,

Registrar.

APPEAL
No. 2.*In the
Supreme
Court of
Canada.*

No. 27.

Order
dispensing
with print-
ing of
Schedules 1
and 5 and
allowing
blue prints
to be filed,
20th April
1931.

APPEAL
No. 2.

*In the
Supreme
Court of
Canada.*

No. 28.

Certificate of Board of Railway Commissioners for Canada.

SCHEDULE NO. 18.

No. 28.
Certificate
of Board of
Railway
Commis-
sioners for
Canada,
23rd July
1931.

**CERTIFICATE OF SETTLEMENT OF CASE AND AS TO REASONS
FOR JUDGMENT.**

I, the undersigned, Secretary of The Board of Railway Commissioners for Canada, do hereby certify that the foregoing printed document from page 1 to page 36, inclusive, is the case settled by A. George Blair, K.C., Counsel for the Board of Railway Commissioners for Canada, by direction of Hon. H. A. McKeown, Chief Commissioner of the said Board, dated the 4th day of February, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in appeal to the Supreme Court of Canada in a certain case pending before the Board of Railway Commissioners for Canada; In the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13, between The Bell Telephone Company of Canada, Appellant, and The Canadian National Railways, Respondent. 10

And I do further certify that I have applied to the Commissioners of the said Board for their opinions or reasons for making the Order appealed from in this cause and that reasons have been delivered by none of the said Commissioners in response to my said application. 20

And I do further certify that no such reasons were delivered by any of the said Commissioners as appears from the records of the said Board.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Board of Railway Commissioners for Canada this 23rd day of July, 1931.

(Sd.) A. D. CARTWRIGHT, 30
Secy. to Board Ry. Coms. for Canada.

(Seal of
B.R.C. of C.)

No. 29.

Factum of Bell Telephone Company.NOTE.—*The page references have been altered so as to agree with the Record.*

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR
CANADA.

IN THE MATTER OF the Application of the Canadian National Railways
for an Order under Section 256 of the Railway Act, for authority to
construct a subway on St. Antoine Street, in the City of Montreal, as
shown on General Plan YIA 31.10.4, dated August 16th, 1930, and
filed with the Board under File No. 9437.319.13.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

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Factum
of Bell
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APPEAL
No. 2.

In the
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Court of
Canada.

No. 29.

Factum
of Bell
Telephone
Company—
continued.

PART I.

STATEMENT OF FACTS.

This is an appeal from Order No. 45427 of the Board of Railway Commissioners for Canada, dated September 9th, 1930 (Record, p. 71), pursuant to leave granted by Hon. Mr. Justice Rinfret, by Order dated November 12th, 1930 (Record, p. 72).

In the year 1905, the Appellant, acting in pursuance of the powers conferred upon it in that behalf by its Special Acts of Incorporation (Record, p. 429) and with the legal consent of the City of Montreal, constructed an underground conduit system with the manholes necessary and incident thereto, under the surface and within the limits of St. Antoine Street, and placed therein its cables and lines of telephone necessary for rendering telephone service to its subscribers. The said conduit system, manholes and cables have remained undisturbed in their present location from the date of the construction and installation thereof up to the present time (Record, p. 66, l. 1). 10

The Respondent, acting in pursuance of the provisions of the Canadian National Montreal Terminals Act (19-20 Geo. V, C. 12, Dom.), is constructing a line of railway from Victoria Bridge to its new Terminal Station on Lagachetiere Street, which crosses St. Antoine Street at a point where the Appellant's said underground conduit system is located. The said railway line will be carried over St. Antoine Street on a bridge and St. Antoine Street will be carried under the said tracks by means of a subway, the construction of which will involve the lowering of the grade of the street. 20

On April 21st, 1930, the Respondent applied to the Board of Railway Commissioners for Canada for an Order approving its plan for carrying its tracks across St. Antoine Street and directing, *inter alia*, the Appellant to move such of its utilities as are affected by the construction of the said subway as and when requested to do so by the Chief Engineer, Operating Department, of the Respondent (Record, p. 68, l. 13; p. 70). 30

By Order No. 45427 (Record, p. 71), made *ex parte*, the Board granted the Respondent's said application, and the Appellant now appeals from the said Order insofar as it directs the Appellant to move such of its utilities as are affected by the construction of the said subway.

The facts have been settled by the Board appealed from, the parties having been unable to agree thereupon. They are printed in the Record at page 1.

PART II.

RESPECTS IN WHICH ORDER NO. 45427 ERRONEOUS.

The Appellant contends that Order No. 45427 of the Board of Railway Commissioners for Canada is erroneous in the following respects: 40

1. The Board had no jurisdiction to direct the Appellant to move such of its utilities as may be affected by the construction of the subway

on St. Antoine Street, as directed by paragraph 2 of the said Order, which is as follows :

10 “ That the City of Montreal, the Montreal Light, Heat & Power Consolidated, the Montreal Tramways Company, The Bell Telephone Company of Canada, the Electrical Commission of the City of Montreal, the Canadian Pacific Railway, Telegraph Department, the Dominion Electric Protection Company and the Montreal Tramways Commission be, and they are hereby, directed 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.”

2. In any event the Board had no jurisdiction to make paragraph 2 of the said Order ex parte and without notice to the Appellant.

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No. 2.

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Supreme
Court of
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—
No. 29.
Factum
of Bell
Telephone
Company—
continued.

PART III.

ARGUMENT ON BEHALF OF THE APPELLANT.

1. THERE IS NO PROVISION CONTAINED IN ANY STATUTE WHICH EXPRESSLY CONFERS ANY JURISDICTION UPON THE BOARD TO MAKE PARAGRAPH 2 OF ORDER NO. 45427.

20 (a) The jurisdiction of the Board of Railway Commissioners for Canada is not inherent, but statutory, and must be found in the Act constituting it. It can only exercise such powers as are by statute conferred upon it. See MacMurchy & Denison's "Railway Law of Canada" (3rd Edition), at page 60, citing

G.T.R. v. Toronto, 1 C.R.C. at p. 92;
The Merriton Crossing Case, 3 C.R.C. 263 at p. 270;
City of Victoria v. Esquimalt, etc, Ry. Co., 24 C.R.C. 84;
Kelly v. G.T.R. Co., 24 C.R.C. 367;
Corporation of Parkdale v. West, 12 A.C. 611.
See also *Duthie v. G.T. Ry. Co.*, 4 C.R.C. 304 at p. 311.

30 (b) Section 373 (6) of the Railway Act, R.S.C. (1927), C. 170, which is the only statutory provision conferring any jurisdiction upon the Board to order any change, alteration, moving or relocation of the Appellant's plant, does not apply, because there is no application to the Board by any municipality for an Order directing the Appellant's aerial plant to be placed underground, and Section 373 (6) only applies in such cases. The Appellant's plant on St. Antoine Street is already underground (Record, p. 66, l. 1). The relevant part of Section 373 (6) is as follows :

40 “ 373 (6). Notwithstanding any power or authority heretofore or hereafter conferred upon any company by or under any Act of the Parliament of Canada, or of the legislature of any province, or any other authority, the Board, upon the application of the municipality, and upon such terms and conditions as the Board may prescribe,

APPEAL
No. 2.

*In the
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No. 29.
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Company—
continued.

may order any telegraph or telephone line, within the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company to construct or maintain, or to operate, or continue, any such line, or any pole or other works belonging thereto, except as directed by the Board;”

As to the Board's jurisdiction under this section see 10
City of Chatham v. Great North Western Telegraph and Bell Telephone Cos., 21 C.R.C. 183;
City of Woodstock v. Great North-Western Telegraph Co., 19 C.R.C. 429.

Paragraph 2 of Order No. 45427 cannot, therefore, stand alone as an Order made by the Board in the exercise of any power vested in it, and unless jurisdiction can be implied under the sections of the Railway Act hereinafter dealt with, the Board had no jurisdiction whatsoever to make said Order, as directed against the Appellant.

2. ALL OF THE PROVISIONS OF THE RAILWAY ACT, R.S.C. 20
(1927), C. 170, DO NOT APPLY TO THE APPELLANT OR TO ITS WORKS.

Section 375 of the said Act expressly limits the application of the Railway Act to, and the jurisdiction of the Board over, the Appellant and its works. The relevant portions of the said section are as follows :

“ 375. In this section, unless the context otherwise requires,

“ (a) ‘ company ’ means a railway company or person authorized to construct or operate a railway, having authority to construct or operate a telegraph or telephone system or line, and to charge telegraph or telephone tolls, and includes 30
also telegraph and telephone companies and every company and person within the legislative authority of the Parliament of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls;

“ (12) Without limitation of the generality of this subsection by anything contained in the preceding subsections, the jurisdiction and powers of the Board, and, in so far as reasonably applicable and not inconsistent with this section or the Special Act, the provisions of this Act respecting such jurisdiction and powers, and respecting 40
proceedings before the Board and appeals to the Supreme Court or Governor in Council from the Board, and respecting offences and penalties, and the other provisions of this Act, except sections

seventy-two to two hundred and seventy, two hundred and seventy-two to two hundred and eighty-two, two hundred and eighty-seven to three hundred and thirteen, three hundred and twenty-three, three hundred and forty-nine to three hundred and fifty-four, three hundred and sixty to three hundred and sixty-six, three hundred and ninety-four to four hundred and twenty-four, and four hundred and forty-nine to four hundred and fifty-seven, both inclusive in each case, shall extend and apply to all companies as in this section defined, and to all telegraph and telephone systems, lines and business of such companies within the legislative authority of the Parliament of Canada; and in and for the purposes of such application

“(a) ‘company’ or ‘railway company’ shall mean a company as in subsection one of this section defined;

“(b) ‘railway’ shall mean all property real and personal and works forming part of or connected with the telegraph or telephone system or line of the company;

“(c) ‘Special Act’ shall mean a Special Act as in subsection one of this section defined;”

None of the sections of the Railway Act within the exception contained in Section 375 (12) thereof, extend or apply to the Appellant or to its works, nor can any of the powers or jurisdictions conferred upon the Board by the said excepted sections be exercised against the Appellant or its plant.

See *The London, Chatham, and Dover Ry. Co. v. The Board of Works for Wandsworth District*, L.R. 8 C.P. 185;
Boland v. C.N.R. (1926), 4 D.L.R. 193 at p. 200.

3. ALL OF THE PROVISIONS OF THE RAILWAY ACT, R.S.C. (1927), C. 170, DO NOT APPLY TO THE RESPONDENT OR TO ITS WORKS.

Section 17 of the Canadian National Railways Act, R.S.C. (1927), C. 172, as amended by 19-20 Geo. V (1929), C. 10, S. 2, expressly limits the application of the Railway Act to the Respondent, and the jurisdiction of the Board in respect of the Respondent and its works is correspondingly limited. The relevant portions of Section 17 of the said Act are as follows:

“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;

“(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.

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In the
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APPEAL
No. 2.

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“ (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;”

See *Rattenbury Co. v. Canadian National Railway Co.*, 30 C.R.C. 414.

4. SECTION 257 OF THE RAILWAY ACT DOES NOT CONFER THE NECESSARY JURISDICTION UPON THE BOARD TO MAKE PARAGRAPH 2 OF ORDER NO. 45427.

The relevant provisions of Section 257 are as follows :

“ 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 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 such portion or crossing, if any, or any other crossing directly or indirectly affected.”

(a) Neither Section 257 nor the Board's jurisdiction thereunder extend or apply to the Appellant or to its plant (*supra*, p. 82).

(b) Section 257 only applies to the case “ where a railway is already constructed upon, along or across any highway.” At the present time St. Antoine Street is not crossed by the tracks of the Respondent at or near the location where the proposed subway is to be constructed (Record, p. 68, l. 5).

(c) The construction of the subway on St. Antoine Street was not ordered by the Board for the protection, safety and convenience of the public at an existing railway crossing.

There is no connection between the earlier proceedings taken before the Board prior to and during 1927, and the present proceedings out of which this appeal arises, and all reference to such earlier proceedings in the Statement of Facts (Record, p. 67, l. 1) is irrelevant.

The said earlier proceedings terminated with Order No. 39079 (Record, p. 429), which directed the Board's Chief Engineer “ to make inquiry and report to the Board upon the whole situation of level crossings in Montreal, on the Canadian National Railways, from Bonaventure Station west, and

from Moreau Street Station east; to report progress to the Board from time to time; and to evolve a scheme for the consideration of the Board" (Record, p. 425, l. 24). "No report covering the whole situation of level crossings in Montreal on the Canadian National Railways from Bonaventure Station west and from Moreau Street Station east, as required by the Board, was made to the Board by its Chief Engineer" (Record, p. 67, l. 24).

Order No. 39079 was not acted upon, but in lieu thereof the Respondent itself evolved a comprehensive scheme, entirely different from any theretofore considered by the Board (Record, p. 67, l. 28), for readjusting its terminal facilities in the City of Montreal, and according to its own allegations for minimising the danger to the public at level crossings (Record, p. 67, l. 28).

This scheme was not submitted to or considered by the Board, and, when Parliament took a hand in the matter, instead of referring the same to the Board, they engaged the services of Mr. Frederick R. Palmer, an independent Engineer, to study and report upon the whole terminal situation in Montreal (Record, p. 67, l. 35).

Subsequent to Mr. Palmer's report, Parliament enacted the Canadian National Montreal Terminals Act, 19-20 Geo. V, C. 12; Section 2 and the Schedule therein referred to provide as follows:—

“ 2. The Governor in Council may provide for the construction and completion by the Canadian National Railway Company (hereinafter called ‘ the Company ’) of terminal stations and offices, local stations, station grounds, yards, tracks, terminal facilities, power houses, pipes, wires and conduits for any purpose, bridges, viaducts, tunnels, subways, branch and connecting lines and tracks, buildings and structures of every description and for any purpose, and improvements, works, plant, apparatus and appliances for the movement, handling or convenient accommodation of every kind of traffic, also street and highway diversions and widenings, new streets and highways, subway and overhead streets, and also approaches, lanes, alleyways, and other means of passage, with the right to acquire or to take under the provisions of section nine of this Act or otherwise lands and interests in lands for all such purposes, all on the Island of Montreal, in the Province of Quebec, or on the mainland adjacent thereto, as shown generally on the plan or plans thereof to be from time to time approved by the Governor in Council under the provisions of section seven of this Act; the whole being hereinafter referred to as the ‘ said works ’, and a short description whereof for the information of Parliament but not intended to be exhaustive, being set out in the schedule hereto.”

SCHEDULE.

“ (a) Central Passenger Terminal facilities, and office buildings, including baggage, mail and express facilities, on the site of the present Tunnel Station, and generally covering the area bounded by

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Cathcart Street, St. Antoine Street; Inspector and Mansfield Streets, and St. Genevieve Street;

“ (b) Viaduct and elevated railway between Inspector and Dalhousie Streets, and St. David’s Lane and Nazareth Street to near Wellington Street, and thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets, and with connections to existing railway facilities and Harbour Commissioners’ trackage;

“ (c) Coach yard facilities at various points, with principal yard at Point St. Charles;

“ (d) Grade separation by means of elevated, or depressed, or underground tracks, or streets, as may be determined on the existing railway between Bonaventure and Turcot and connection to the viaduct referred to in paragraph (b);

“ (e) Grade separation by means of elevated, or depressed, or underground tracks, or streets, as may be determined between St. Henri and Point St. Charles;

“ (f) Railway from Longue Pointe Yard to the Northwest and thence Southwest to connect with the existing railway at and near Eastern Junction;

“ (g) Railway from the Cornwall Subdivision in the vicinity of Pointe Claire to the L’Original Subdivision in the vicinity of Val Royal;

“ (h) Railway between the Cornwall Subdivision near Lachine and the Lachine, Jacques Cartier and Maisonneuve Railway, near Western Junction;

“ (i) Railway from a point on the lines between St. Henri and Point St. Charles near Atwater Avenue, along the River St. Pierre and the Aqueduct Tail Race to the waterfront, and construction of yard facilities on the Waterfront with connection to existing lines and Harbour Commission trackage;

“ (j) Local station facilities, engine and other railway facilities, signalling, electrification, and electrical equipment on present and proposed railways;

“ (k) Connections and transfer facilities to the tracks of the Montreal Harbour Commission near Longue Pointe, and/or at a point further East, and connections and transfer facilities to the C.P.R. East and South of the Lachine Canal, and at other points, except at Forsythe (now Rouen Street). The Company to pay part cost, to be determined, of facilities jointly owned or jointly used.

“ The estimated cost of the said works is \$51,409,000.

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

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Upon the passing of the said Act, and pursuant to the provisions of Section 21 of the Canadian National Railways Act, R.S.C. (1927), C. 172, the Respondent submitted a plan of the works authorized thereby to the Governor in Council, by whom the said plan was approved on the 2nd day of July, 1929, by P.C. 1197 (Record, p. 431, l. 23; p. 67, l. 42). The said plan appears as Schedule 5 to the Record.

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Section 21 of the Canadian National Railway Act provides as follows :

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10 “ 21. With the approval of the Governor in Council and upon any location sanctioned by the Minister of Railways and Canals the Company may from time to time construct and operate railway lines, branches and extensions, or railway facilities or properties of any description in respect to the construction whereof respectively, Parliament may hereafter authorize the necessary expenditure, or the guarantee of an issue of the Company's securities.

2. A copy of any plan and profile made in respect of any completed railway shall be deposited with the Board of Railway Commissioners for Canada.”

20 The portion of the said scheme involved in this appeal is the carrying of the Respondent's viaduct and elevated railway described in and authorized by subsection (B) of the Schedule to the Canadian National Montreal Terminals Act (*supra*, p. 86) over St. Antoine Street, and the construction of a subway therein (Record, p. 431, l. 12). This line is being constructed solely for the purpose of bringing the Respondent's trains into its new terminal station (see Schedule 5), and the subway in St. Antoine Street is being constructed solely for the purpose of permitting the said line, which at this point will consist of 12 tracks, being carried across the said street. The construction thereof is authorized by the Canadian National Montreal
30 at all, nor was it called upon to approve the plans therefor or otherwise deal with it. The Canadian National Montreal Terminals Act entirely ousted the Board of any jurisdiction it might have had to make Orders for the protection, safety and convenience of the public in respect of the lines and works of the Respondent therein authorized to be constructed.

By subsections (d) and (e) of the Schedule to the Canadian National Montreal Terminals Act (*supra*, p. 86), Parliament made provision for the protection, safety and convenience of the public in respect of the Respondent's existing lines, thereby depriving the Board of jurisdiction in respect thereof.

40 (d) Section 257 is inconsistent with the provisions of Section 22 of the Canadian National Railways Act, Sections 2 (d), (g), 3 (b), (f) of the Expropriation Act and the Canadian National Montreal Terminals Act upon the same grounds as are set forth with respect to Sections 255 and 256 (*post*, p. 89).

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5. SECTIONS 255 AND 256 OF THE RAILWAY ACT DO NOT
CONFER THE NECESSARY JURISDICTION UPON THE BOARD
TO MAKE PARAGRAPH 2 OF ORDER NO. 45427.

The relevant provisions of Sections 255 and 256 are as follows :

“ 255. The railway of the company may, if leave therefor is first obtained from the Board as hereinafter authorized, but shall not without such leave, be carried upon, along or across any existing highway : Provided that the compensation, if any, payable by the company to adjacent or abutting landowners shall be determined under the arbitration sections of this Act in so far as such sections are applicable, and provided that the Board shall not grant leave to any company to carry any street railway or tramway, or any railway operated or to be operated as a street railway or tramway, along any highway which is within the limits of any city or incorporated town, until the company has first obtained the consent therefor by a by-law of the municipal authority of such city or incorporated town ; and provided that where leave is obtained to carry any railway along a highway the Board may require the company to make compensation to the municipality if the Board deems proper, said compensation to be determined under the arbitration sections of this Act, in so far as such sections are applicable. (20-21 George V, C. 36, S. 2.)

“ 2. The company shall, before obstructing any such highway by its works, turn the highway so as to leave an open and good passage for carriages, and, on completion of the works, restore the highway to as good a condition as nearly as possible as it originally had.

“ 3. Nothing in this section shall deprive any such company of rights conferred upon it by any Special Act of the Parliament of Canada, or amendment thereof, passed prior to the twelfth day of March, one thousand nine hundred and three. 1919, c. 68, s. 255.”

“ 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 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.”

(a) Neither Section 255 nor Section 256 nor the Board's jurisdiction thereunder extend or apply to the Appellant or to its plant (*supra*, p. 82).

(b) Neither Section 255 nor Section 256 nor the Board's jurisdiction thereunder apply to the Respondent or to its works, because they are inconsistent with the provisions of the following sections of the following Acts, within the meaning of Section 17 of the Canadian National Railways Act (*supra*, p. 83), viz. :

(i) Canadian National Railways Act, R.S.C. (1927), Ch. 172 :

10 " S. 22. The Company shall not construct or operate its railway along any highway, street or other public place without first obtaining the consent, expressed by by-law, of the municipality having jurisdiction over the said highway, street or other public place, and upon terms to be agreed upon with such municipality."

(ii) Expropriation Act, R.S.C. (1927), Ch. 64 :

" S. 2. In this Act, unless the context otherwise requires,

20 " (d) ' land ' includes all granted or ungranted, wild or cleared, public or private lands, and all real property, mesuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act ;

30 " (g) ' public work ' or ' public works ' means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which the money is appropriated as a subsidy only ; "

40 " S. 3. The Minister may by himself, his engineers, superintendents, agents, workmen and servants,

" (b) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto ; "

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“(f) alter the course of any river, canal, brook, stream or watercourse, and divert or alter, as well temporarily as permanently, the course of any rivers, streams, railways, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the side of the public work, as he thinks proper; but before discontinuing or altering any railway or public road or any portion thereof, he shall substitute another convenient railway or road in lieu thereof; and in such case the owner of such railway or road shall take over the substituted railway or road in mitigation of damages, if any, claimable by him under this Act, and the land theretofore used for any railway or road, or the part of a railway or road so discontinued, may be transferred by the Minister to, and shall thereafter become the property of, the owner of the land of which it originally formed part;” 10

(iii) Canadian National Montreal Terminals Act, 19–20 Geo. V, Ch. 12 : Section 2 and Schedule, subsections (b) and (d), which authorized the construction of the line, the crossing of St. Antoine Street therewith and the construction of a grade separation therein (*supra*, p. 85). 20

Under the foregoing enactments the Respondent has, with regard to the construction of the subway and works in question, the same rights and powers as are accorded the Minister under the Expropriation Act. The Minister requires no leave or approval of the Board to construct railways across highways or grade separations at such crossings. The Respondent therefore required no such leave or approval. The Board had no jurisdiction whatsoever in respect of this crossing save to receive the crossing plans for filing pursuant to Section 17 of the Canadian National Railways Act (*supra*, p. 83).

6. SECTION 39 (1) OF THE RAILWAY ACT IS NOT APPLICABLE. 30
Section 39 (1) provides as follows :

“39 (1). 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.” 40

(i) The Board had no jurisdiction to ‘direct or permit’ the construction of the line in question, or the construction of the subway, or to permit the construction of the said line across St. Antoine Street (*supra*, p. 89). This was all authorized and permitted by Statute (*supra*, p. 85), which superseded the powers (if any) of the Board.

(ii) It is "otherwise expressly provided" that the Respondent shall move such of the Appellant's facilities as may be affected by the construction of the said subway.

The construction of the viaduct and elevated railway of the Respondent authorized by the Canadian National Montreal Terminals Act (ss. (b) of Schedule, (*supra*, p. 86) is the construction of a new line of railway within the meaning of Section 260 (1) of the Railway Act, as interpreted by Section 2(21) thereof, and is treated as such by the Respondent in making their application to the Board for leave to cross the highways therewith under Section 256 of the Railway Act (Record, p. 430, l. 5). See *Board of Trade of Penticton, B.C., et al. v. Canadian National and Kettle Valley Ry. Cos.*, 36 C.R.C. 130.

Sections 2 (21) and 260 (1) of the Railway Act are as follows :

" 2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,

" (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 authorized to construct; and, except where the context is inapplicable, includes street railway and tramway; "

" 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."

The moving of the Appellant's plant as directed by paragraph 2 of Order No. 45427 either is or is not part of the works which the said Order purports to direct or permit to be done.

If it is part of the said works it must necessarily be part of the work of constructing the subway on St. Antoine Street, because the moving of the Appellant's plant is only necessitated by the lowering of the street level, which is incidental to the subway construction. The subway itself is for the protection, safety and convenience of the public, and is a measure which the Respondent must provide under Section 260 (1) of the Railway Act (*supra*). If, therefore, the moving of the Appellant's plant is part of the said work, then it is itself a work for the protection, safety and convenience of the public, and consequently under said Section 260 of the Railway Act this work must be provided or done by the Respondent at its own expense.

If the moving of the Appellant's plant is not part of the work authorized by said Order No. 45427, then Section 39 (1) of the Railway Act (*supra*, p. 90)

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has no application at all, because this section only authorizes the Board to direct a party interested or affected to do the works authorized by the Order.

There is a second provision to the contrary which deprives the Board of jurisdiction under Section 39 (1). This provision is contained both in Sections 162, 163 and 164 of the Railway Act, and in Section 3 of the Expropriation Act. These sections are as follows :

RAILWAY ACT :

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

“ (n) divert or alter the position of any water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric lines, wires or poles; 10

“ 163. The company shall restore, as nearly as possible, to its former state, any river, stream, watercourse, highway, water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric line, wire or pole which it diverts or alters, or it shall put the same in such a state as not materially to impair the usefulness thereof.

“ 164. The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.” 20

EXPROPRIATION ACT :

“ 3. The minister may by himself, his engineers, superintendents, agents, workmen and servants,

“ (g) divert or alter the position of any water-pipe, gas-pipe, sewer, drain, or any telegraph, telephone or electric light wire or pole.”

Since Parliament empowered the Respondent to do the work of moving or altering the Appellant's plant without recourse to the Board, it was not the intention of Parliament that the Board should have jurisdiction to order changes in the Appellant's telephone lines for railway purposes, or to order the Appellant to make such changes. The only object which the Respondent can have had in resorting to the Board for an Order directing the Appellant to move its own plant instead of the Respondent doing the work itself under Section 162 of the Railway Act or Section 3 of the Expropriation Act, was to avoid liability for the expense and damage arising out of this work and to try to saddle the Appellant with the costs and expenses thereof. 30

(c) Order No. 45427 (Record, p. 71) does not in fact order the Appellant to provide, construct, reconstruct, alter, install, operate, use or maintain any structure, appliances, equipment, works, renewals, or repairs which the Board in the exercise of any power vested in it has directed or permitted to be provided, constructed, reconstructed, altered, installed, operated, used or maintained. 40

The Appellant is not ordered to construct the Respondent's viaduct or elevated railway across St. Antoine Street, nor is it ordered or directed to construct the subway under the said elevated railway line. All that the Appellant is ordered to do is to move its own plant, and there is no jurisdiction in the Board to so order.

(d) The Appellant is not a party interested or affected within the meaning of Section 39 (1) of the Railway Act.

10 "Section 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an Order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision."

See *Canadian Pacific Railway Company and others v. Toronto Transportation Commission* ;

20 *Toronto Transportation Commission v. Canadian National Railways*, 1930 A.C. 686 at p. 697.

It is not contended that the railway and other works authorized by Order No. 45427 will in any way confer any benefit or advantage upon the Appellant or its telephone lines or plant (Record p. 68, l. 25). The Appellant has not the slightest interest in the promotion of the Respondent's project, and it is quite immaterial to the Appellant whether it is carried out or not. The Appellant's plant creates no public danger whatsoever, and on St. Antoine Street it is already placed underground. As it now stands, the Appellant's plant is wholly suitable, sufficient and satisfactory for the Appellant's service. The Appellant makes no special use of the subway.
30 Its lines can be carried across a grade crossing just as well and as safely as through a subway.

The removal or relocation of the Appellant's plant is not part of the general scheme evolved by the Respondent. Neither the Appellant's existing plant nor the proposed changes therein are shown in the Respondent's plan (Schedule I), nor does the said scheme or plan make any provision whatsoever therefor.

40 As is hereafter shown, the Appellant's plant and its right to maintain the same in its present locations is "land" within the meaning of the Railway Act. The Appellant is, therefore, in the identical position of the owner of land abutting on a highway, part of whose land is being taken for the purposes of a railway crossing. It would be absurd to hold that such an abutting landowner is a party interested or affected so as to confer jurisdiction upon the Board to order him to move or tear down his house, or make excavation upon his land to permit of railway tracks being laid across it, and to finance such work himself pending distribution of the costs.

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None of the sections of the Railway Act, pursuant to which the Order appealed from is made, extend or apply to the Appellant or to its plant (*supra*, p. 82). How then can it be said that the Appellant is a party interested or affected by an Order or by works which are made or constructed pursuant to legislation which by express terms does not extend or apply to the Appellant?

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The Appellant is not a party interested or affected. It merely owns plant and land which must be acquired or moved to permit of railway works being carried out, consequently the Board has no jurisdiction under Section 39 (1) of the Railway Act to make paragraph 2 of Order No. 45427. 10

7. THE APPELLANT'S PLANT AND ITS RIGHT TO MAINTAIN THE SAME IN ITS EXISTING LOCATION IS "LAND," AN "INTEREST IN LAND" OR AN "IMMOVABLE."

By its Special Act of Incorporation, 43 Victoria (1880), Ch. 67, S. 3 (Dom.), as amended by 45 Victoria (1882), Ch. 95, S. 2, the Appellant was authorized to "construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, watercourses or other such places," etc. (Record, p. 416, l. 33.)

The said Act conferred statutory rights upon the Appellant:

City of Toronto v. Bell Telephone Co. (1905), A.C. 52. 20

The Appellant's plant involved in this appeal was lawfully constructed upon St. Antoine Street, in pursuance of its statutory powers (Record, p. 66, l. 1), and a detailed description of the nature and extent thereof is set forth in paragraphs 5 and 6 of the Statement of Facts (Record, pp. 66, 67).

The plant belonging to the Appellant, and its right to maintain the same in the precise locations in which it now exists, are by their very nature "land" or "interests in land" or "immovables" owned by the Appellant, and in any event are "land" within the meaning of that term as defined by the Railway Act, Section 2 (15), and the Expropriation Act, Section 2 (d), the English and French versions of which are as follows: 30

RAILWAY ACT, R.S.C. (1927), Ch. 170:

"2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,

"(15) 'lands' means the lands, the acquiring, taking or using of which is authorized by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure, and any easement, servitude, right, privilege or interest in, to, upon, under, over or in respect of the same."

"2. En la présente loi, ainsi qu'en toute loi spéciale ci-après 40 définie, en tant que la présente loi s'applique et à moins que le contexte ne s'y oppose, l'expression;

"(34) 'terrains' signifie les terrains dont la présente loi ou la loi spéciale autorise l'acquisition, la prise de possession

ou l'usage, et comprend des bien-fonds, dépendances, terrains, maisons et héritages de toute condition, ainsi que toutes servitudes actives ou passives, tous droits, privilèges ou intérêts existant dans, sous, ou sur ces terrains, ou à leur égard."

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EXPROPRIATION ACT, R.S.C. (1927), c. 64 :

" 2. In this Act, unless the context otherwise requires,

10 " (d) ' land ' includes all granted or ungranted, wild or cleared, public or private lands and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act ;

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" 2. En la présente loi, à moins que le contexte ne s'y oppose, l'expression ;

20 " (i) ' terrains ' et ' immeubles ' comprend toutes terres concédées ou non concédées, incultes ou défrichées, publiques ou privées, ainsi que toutes propriétés immobilières, maisons et dépendances, terres, tenements et héritages de toute tenure, et tous droits réels, servitudes, dommages-intérêts et toutes autres choses faites conformément à la présente loi, pour lesquelles Sa Majesté peut avoir à payer une indemnité sous l'autorité de la présente loi " ;

Consumers' Gas Company of Toronto v. City of Toronto, 27 S.C.R. 453 ;
City of Toronto v. Consumers' Gas Company, 1916 (2), A.C. 618 ;
Montreal Light, Heat & Power Cons. v. City of Westmount (1926),
S.C.R. 515 ;

Re Ottawa Gas Co. and City of Ottawa, 48 O.L.R. 130 ;

30 *Montreal Light, Heat & Power Cons. v. City of Outremont* (1930),
R.J. 49 K.B. 456 ;

See also *Kolodzi and Detroit and Windsor Subway Co.* (1930), 65 O.L.R.
398 ; affirmed S.C.C. (1931), 3 D.L.R. 337 ;

Ruel v. The King, 38 D.L.R. 613 ;

Calgary Gas and Water Works Co. v. City of Calgary, 2 Terr. L.R. 449 ;
The King v. Birchdale Ltd., 16 Ex. C.R. 375.

The Appellant can only be lawfully deprived of its said " lands " or " interests in lands " by expropriation proceedings lawfully taken or by the Respondent proceeding under Sections 162, 163 and 164 of the Railway Act or Section 3 of the Expropriation Act (*supra*, p. 92).

40 Quebec Civil Code, Art. 407 :

" No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid."

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See Mignault upon this Article, Vol. 2, p. 468. See also :
Jones v. Atlantic and North West Ry. Co. (1903), R.J. 12 K.B. 392;
Corporation of Parkdale v. West, 12 A.C. 611, Law Times, 57 N.S. 602.

8. PARAGRAPH 2 OF ORDER NO. 45427 HAS THE EFFECT OF DEPRIVING THE APPELLANT OF ITS "LANDS."

If the Appellant moves its plant on St. Antoine Street in compliance with paragraph 2 of Order No. 45427, the grade of the said street will be lowered by the construction of the subway therein below the present location of the Appellant's underground conduits, necessitating their being placed at a lower level under the street (Record, p. 68, l. 33). The Appellant will, therefore, be deprived of the right to maintain its said conduit system in the location in which it now stands. 10

The said underground conduit system of the Appellant cannot be moved without being broken up and destroyed (Record, p. 66, l. 28).

Paragraph 2 of Order No. 45427 directs the Appellant to move its plant which necessitates complete destruction thereof in order to get it out of the way to permit the Respondent to take and use the space now occupied thereby for the construction of the subway. This is a taking of the Appellant's lands, which can only be effected by expropriation.

City of Toronto v. Consumers' Gas Co. (1916), 2 A.C. 618; 20
Re Ottawa Gas Co. and City of Ottawa, 48 O.L.R. 130;
Ruel v. The King, 38 D.L.R. 613;
The King v. Birchdale Ltd., 16 Ex. C.R. 375.

9. THE BOARD HAS NO JURISDICTION TO MAKE ANY ORDER DEPRIVING THE APPELLANT OF LANDS OR WHICH IS TANTAMOUNT TO THE EXPROPRIATION THEREOF.

By Section 17 of the Canadian National Railways Act (*supra*, p. 83), neither the provisions of the Railway Act relating to the expropriation of lands nor any jurisdiction which the Board may have by virtue thereof, apply to the Respondent. 30

Boland v. C.N.R. (1926), 4 D.L.R. 193 at p. 200.

The Respondent's power to take lands is conferred upon it by the Canadian National Railways Act, R.S.C. (1927), C. 172, and the procedure therein provided must be strictly followed. Where the Respondent requires to take land, it merely deposits a plan under the Expropriation Act, as made applicable to the Respondent, and thereupon the lands become vested in the Respondent. If any resistance is offered to the Respondent taking immediate possession of the lands, Section 22 (1) of the Expropriation Act affords the remedy. The relevant provisions of the Canadian National Railways Act and of the Expropriation Act are as follows: 40

Canadian National Railways Act, R.S.C. (1927), C. 172 :
Section 17 (2), as amended by 19-20 Geo. V, C. 10, S. 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;

“ (b) Any plan deposited under the provisions of the Expropriation Act may be signed by the Minister of Railways and Canals on behalf of the Company, or by the President or any Vice-President of the Company; no description need be deposited;

“ (c) The land shown upon such plan so deposited shall thereupon be and become vested in the Company, unless the plan indicates that the land taken is required for a limited time only or that a limited estate or interest therein is taken; and by the deposit in such latter case the right of possession for such limited time or such limited estate or interest shall be and become vested in the Company;

“ (d) The compensation payable in respect of any lands or interests therein taken by the Company under the provisions of the Expropriation Act as made applicable to the Company by this Act shall be ascertained in accordance with the provisions of the Expropriation Act, and for that purpose the Exchequer Court shall have jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the Company, of judicial proceedings and the conduct thereof: Provided that such compensation may, in any case where the offer of the Company does not exceed two thousand five hundred dollars, be ascertained under the provisions of the Railway Act, beginning with notice of expropriation to the opposite party. The amount of any judgment shall be payable by the Company.”

Expropriation Act, R.S.C. (1927), C. 64:

Section 22:

“ If any resistance or opposition is made by any person to the minister, or any person acting for him, entering upon and taking possession of any lands, a judge of the Court, or any judge of any superior court may, on proof of the execution of a conveyance of such lands to His Majesty, or agreement therefor, or of the depositing in the office of the registrar of deeds of a plan and description thereof as aforesaid, and after notice to show cause given in such manner as he prescribes, issue his warrant to the sheriff of the district or county within which such lands are situate directing him to put down such resistance or opposition, and to put the minister, or some person acting for him, in possession thereof.”

The foregoing statutory provisions confer no jurisdiction upon the Board in matters of expropriation or of obtaining possession of lands. The Board cannot make Orders dispensing with the taking of proper expropriation proceedings, nor can it determine the compensation to be paid for the lands taken, nor can it order the owner thereof to vacate and deliver them up to the Respondent.

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—
*In the
Supreme
Court of
Canada.*

—
No. 29.
Factum
of Bell
Telephone
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continued.

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No. 2.

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continued.

10. THE BOARD HAD NO JURISDICTION TO MAKE
PARAGRAPH 2 OF ORDER NO. 45427 EX PARTE.

The Board of Railway Commissioners for Canada was constituted a court of record with full jurisdiction and power to inquire into, hear and determine all matters which may properly be brought before it. Subject, therefore, to the exceptions hereinafter dealt with, there must be a hearing by the Board of all matters brought before it, and all parties to such proceedings are entitled to a full opportunity to present and argue their case before the Board at such hearing before any Order concerning them is made. In support of this contention the Appellant relies upon the following sections of the Railway Act, R.S.C. (1927), C. 170 :

“ 9. 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.”

“ 18. The Board may hold more than one sitting at the same time, and, whenever circumstances render it expedient to hold a sitting elsewhere than in Ottawa, may hold such sitting in any part of Canada.”

“ 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.”

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

“ (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 direction, leave, sanction or approval, which by law it is authorized 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 is contrary to this Act, or the Special Act; and shall for the the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or of fact.”

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“36. The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.”

“57. Unless otherwise provided, fifteen days' notice of any application to the Board, or of any hearing by the Board, shall be sufficient: Provided that the Board may in any case direct longer notice or allow notice for any period less than fifteen days.”

20 No hearing was had before the Board in respect of the Respondent's application which resulted in the making of Order No. 45427 now in appeal (Record, p. 69, l. 14).

The Appellant was served with a copy of the Respondent's Application to the Board herein (Record, p. 70) on or about April 22nd, 1930, and on April 28th, 1930, mailed its Answer (Record, p. 71) to the Secretary of the Board requesting a formal hearing of the said Application (Record, p. 69, l. 1). On May 5th, 1930, the Respondent filed its Reply (Record, p. 71) to the Appellant's said Answer, and on May 8th, 1930, the Appellant filed a further Answer (Record, p. 71) to the Respondent's said Application (Record, 30 p. 69, l. 8). No further proceedings were taken by either of the parties hereto, and, on September 9th, 1930, without notice to the Appellant and without granting any hearing, the Board made Order No. 45427 (Record, p. 71) now in appeal, granting the Respondent's said Application (Record, p. 69, l. 14).

The only cases in which the Board may exercise its jurisdiction and powers without hearing all parties to the Application are those which come within the scope of Sections 47 and 59 of the Railway Act, R.S.C. (1927), C. 170, which are as follows:

40 “47. The Board may, if the special circumstances of any case so require, make an interim ex parte order authorizing, requiring or forbidding anything to be done which the Board would be empowered, on application, notice and hearing to authorize, require or forbid; but no such interim order shall be made for any longer time than the Board may deem necessary to enable the matter to be heard and determined.”

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“ 59. Except as herein otherwise provided, when the Board is authorized 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.

“ 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.” 10

This case does not come within the scope of either of the said sections for the following reasons :

As to Section 47 :

(a) There were no special circumstances requiring an interim 20
ex parte Order. The Respondent's Application was before the Board from April 21st, 1930 (the date thereof), until September 9th, 1930 (the date of Order No. 45427), or for 141 days, which afforded an ample opportunity to proceed regularly and to permit of a hearing of the Application being had.

(b) The Order was wholly unnecessary (*supra*, pp. 89-90).

(c) The Order is not an “ interim ” Order at all, but by its very terms is final. It deprives the Appellant of its rights, and compliance therewith would result in the complete destruction of the Appellant's property (*supra*, p. 96), and it contains no provision for 30
compensation being paid to the Appellant.

(d) The Order does not provide that it shall not be effective “ for any longer time than the Board may deem necessary to enable the matter to be heard and determined.”

As to Section 59 :

(a) There was no ground of urgency or other (i.e., similar) reason appearing to the Board to be sufficient which would justify the making of Order No. 45427 ex parte. As already stated (*supra*), the Application was before the Board for 141 days before the Order was made. The Application itself (Record, p. 70) contains no grounds 40
of urgency nor does it request the Board to proceed ex parte.

(b) The Order was wholly unnecessary (*supra*, p. 90).

(c) It is only “ interim ” Orders which can be made under Section 59, and this must necessarily be so by reason of the provisions

of Sub-section (2) thereof, because any person entitled to notice may demand as of right a re-hearing of the Application. As above stated (*supra*), Order No. 45427 is not an "interim" but is a final Order.

(d) In any event, under Section 59 (2) of the Railway Act, the Appellant was entitled to a hearing.

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CONCLUSION.

Upon the grounds and for the reasons above set forth the Appellant submits that the Board of Railway Commissioners for Canada had no jurisdiction to make paragraph 2 of Order No. 45427, and that this appeal should be allowed with costs.

PIERRE BEULLAC,
Counsel for the Appellant,
The Bell Telephone Company of Canada.

No. 30.

Factum of Canadian National Railways.

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IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

Between

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

THE CANADIAN NATIONAL RAILWAYS - - - *Respondents.*

PART I.—STATEMENT OF FACTS.

This is an appeal by leave granted by the Honourable Mr. Justice Rinfret from Order No. 45427 of the Board of Railway Commissioners for Canada, hereinafter called The Board, dated 9th September 1930 in so far as the said Order directs the appellants to move such of their utilities as may be affected by the construction of a subway at St. Antoine Street, Montreal, as and when required to do so by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that

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the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said appellants, or in any event to make the said Order ex parte and without notice to the said appellants.

St. Antoine Street is a highway extending in an Easterly and Westerly direction through the Southerly section of the City of Montreal as shown in part on the plan YIA 31.10.4 filed by the respondents with their application to the Board for authority to construct a subway at the said street. There was no such subway in existence at the said street at the date of the said Order.

At the date of the said Order the appellants had certain utilities located upon, over and under the said highway.

For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and The Board, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the railway company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War.

In the year 1927 the matter was again revived by The Board and on 27th May, 1927, a judgment of The Board was issued, shown at Record, page 429.

The judgment in question provides that these matters be referred for a report to the Chief Engineer of The Board, who, by Order No. 39079, dated 27th May, 1927, was appointed and directed to make a full inquiry and report to The Board upon the whole situation of level crossings in Montreal, from Bonaventure Station West and from Moreau Street Station East, and to evolve a scheme for the consideration of The Board (Record, p. 429). No complete report covering the whole situation has yet been made by the said Chief Engineer, but he has made certain reports including one with regard to the subway in question herein.

A study of the whole Canadian National Railways situation in Montreal was undertaken by the Railway Company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the site on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before The Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report and by Act of the Parliament of Canada chapter 12 of the Statutes of 1929, the Canadian National Railway Company was given power to construct and complete the works described

in the schedule to the said Act at and in the vicinity of Montreal; and pursuant to the provisions of the said Act, the Governor-in-Council, by Order-in-Council P.C. 1197, dated 2nd July, 1929, approved General Plan No. DC310-0, 0-63.1. (Record schedule 5). General Plans WIA 19.14.1 and WIA 19.15.1 dated 17th January, 1930, showing *inter alia* a crossing of the street in question herein by the respondents' tracks at a point where no such crossing previously existed from Victoria Bridge to the site of the tunnel terminal on Lagauchetiere Street, were, upon the application of the Railway Company and the recommendation of its Chief Engineer, approved
 10 by The Board by Order No. 44433 dated 13th March, 1930.

The said Order No. 44433 directed that detailed plans of individual grade separations be served upon the City of Montreal, and submitted for approval of The Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of The Board.

On 21st April, 1930, in pursuance of the provisions of the said Order No. 44433, the respondents made a further application to The Board for approval of a detailed plan number YIA 31.10.4 for carrying its tracks across St. Antoine Street upon a grade separation by constructing a subway in St. Antoine Street, and for an Order directing the appellants and others
 20 to move such of their utilities as are affected by the construction of the subway, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by The Board.

The appellants were served with a copy of the last named application on or about 22nd April, 1930, and on 28th April, 1930, mailed their answer thereto to the Secretary of The Board, requesting a formal hearing of the said application. On 5th May, 1930, the respondents filed their reply to such answer. On the 8th May, 1930, the appellants filed a further answer to such application, again requesting a hearing thereon.

30 On 9th September, 1930, without granting any hearing, the Board made the above Order No. 45427.

PART II.—ERRORS IN THE ORDER APPEALED FROM.

The respondents submit that the Board had jurisdiction to make the order appealed from and that the same should be affirmed.

PART III.—ARGUMENT.

The subway referred to in the Order appealed from, and all things to be done in connection therewith, including procedure, were incidental to and parts of a comprehensive scheme initiated by the Board, as appears from its Order and judgment of 27th May 1927, for the protection, safety and
 40 convenience of the public, and approved by Parliament, and including, among other things, the elimination of passenger traffic from Bonaventure Station to Turcot and from Moreau Street Station Easterly, the diversion of such passenger traffic to lines skirting the City of Montreal at the North and converging at the present tunnel station at Lagauchetiere Street, the

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establishment of terminal facilities at the site of the said tunnel station, the construction of a viaduct and elevated railway between Inspector and Dalhousie Streets, and St. David's Lane and Nazareth Street to near Wellington Street, and thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets, including St. Antoine Street, and the providing of a grade separation by means of elevated or depressed or underground tracks, or streets, between St. Henri and Point St. Charles, the latter including, among other streets, d'Argenson Street.

The constitution and powers of the respondents are set forth in The Canadian National Railways Act, being chapter 172 of the Revised Statutes of Canada 1927, as amended by chapter 10 of the Statutes of Canada 1929, and under the said Act as amended the respondents had power to do the things mentioned in the preceding paragraph, upon securing approval of the Governor-in-Council, sanction as to location by the Minister of Railways and Canals, and authority by Parliament for the necessary expenditure or the guarantee of an issue of securities. 10

The Canadian National Montreal Terminals Act 1929, being chapter 12 of the Statutes of Canada 1929 was an Enabling Act, passed for the purpose of providing parliamentary authority for such expenditure and guarantee of securities, as applied to the scheme above referred to. 20

The powers and jurisdiction of the Board are set out and defined in The Railway Act, chapter 170 of the Revised Statutes of Canada 1927, and, unless otherwise specified, the sections hereinafter referred to are sections of the Railway Act.

By s. 33, sub-s. 1, the Board has 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 authorized 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. By sub-s. 2 it may order and require any Company or person to do forthwith, or within or at any specified time, and in any manner to be 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 shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or fact. By sub-s. 5 the Board's decision 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. 30

Sec. 34 empowers the Board to make orders with respect to any matter, act or thing which by the Act is sanctioned, required to be done or prohibited, and generally for carrying the Act into effect and for exercising any jurisdiction conferred upon it. 40

Under sec. 35 the Board may, of its own motion, . . . inquire into, hear and determine any matter or thing, which under this Act, it may inquire

into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.

By sec. 37 any power or authority vested in the Board may, although not so expressed, be exercised from time to time, or at any time, as the occasion may require.

By sec. 256 in the case of a new highway crossing and by sec. 257 in the case of an existing highway crossing, the Board is authorized to make such orders as it deems expedient, as to the protection, safety and convenience
10 of the public.

By sec. 259 the Board is authorized to 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, and it is submitted that it is immaterial, in view of the provisions above recited, whether the highway crossing is new or already in existence.

By sec. 39 (1) when the Board in the exercise of any power vested in it,
20 in and by any order directs or permits any structure, appliances, equipment, works, renewals or repairs to be provided, constructed, re-constructed, 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, re-constructed, altered, installed, operated, used and maintained. Under sub-s. 2, the Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost
30 and expenses of providing, constructing, re-constructing, 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.

If an order can be supported under sec. 39, it is unnecessary to consider whether it could also be supported under other sections of the Act.

Toronto Ry. Co. v. Toronto City—(1) (1920) A.C. 426, 437.

In view of the attitude taken by the appellants, they cannot be heard to say that they are not interested or affected by the order in question. The question whether or not they were benefited by the execution of the works
40 in question is not material to the question of the jurisdiction of the Board. They could competently be required to contribute to the cost of such works, and the propriety of requiring them to do so and the extent of the contribution ordered are not matters for review by the Court.

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In the order appealed from, the Board has exercised the jurisdiction given to it under sec. 39 in :

1. Ordering by whom, namely the appellants, the utilities should be moved. Such order is not only in accordance with jurisdiction, but also in accordance with common sense. It would obviously be foolish to authorize any party unfamiliar therewith to interfere with such utilities.

2. Directing when and within what time the removal of such utilities should be carried out, namely : as and when required to do so by the Chief Engineer, Operating Department, of the respondents.

3. By reserving all questions of costs, which would include consideration of payment of compensation and the proportion of such costs to be paid by all parties.

In the case above referred to in 1930 Appeal Cases, it is remarked, in connection with sec. 39, that the case was not "otherwise provided for in the Act," and the respondents submit that the same remark applies in this case.

The appellants are not the owners of land or of any interest in land which is subject to expropriation. In view of the provisions of the Canadian National Railways Act, as amended by chapter 10 of the Statutes of Canada 1929, the expropriation provisions of The Railway Act are not applicable to the respondents, and there is no provision in the said Acts for the expropriation of a highway or of any interest therein.

There are a number of sections of The Railway Act under which the party by whom work shall be done or costs shall be borne are expressly provided, such as sections 185, 251-(6) and 260, but there is nothing in the Act inconsistent with the applicability of the provisions of sec. 39 to the situation in question herein.

Apart from the foregoing it may be pointed out that if any compensation is payable to the appellants, the ascertainment and payment thereof are not pre-requisite to the immediate exercise by the Board of its jurisdiction under sec. 39, but merely matters which may be taken into consideration by the Board in finally apportioning the cost of the work, which has been reserved.

As to the contention that the order appealed from was made *ex parte* or without notice to the appellants, the respondents deny that it was made either *ex parte* or without notice to the appellants. The appellants were served with the respondents' application for the said order and had and took the opportunity of replying to the same.

Under the provisions of sec. 39, the Commissioners may sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business, and they may, subject to the provisions of the Act sit either together or separately, and either in private or in open Court.

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The only exception to these provisions is that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open Court.

The application for the order in question was not a "complaint" within the meaning of sec. 19.

The Honourable Mr. Justice Rinfret in his reasons given in disposing of an application for leave to appeal in

City of Montreal v. Canadian National Railways

on or about the 26th day of February 1931, says in part :

10 " A reference to section 33 of the Railway Act will, I think, show the true meaning of the word "complaint" in section 19.

Section 33 provides that :

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

20 (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 direction, leave, sanction or approval, which by law it is authorized 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.

30 The application of the Canadian National Railway Company was not an application complaining of anything in the sense of subparagraph (a) of Section 33, but an application requesting the Board to give its approval to a plan and profile in the sense of subparagraph (b) of Section 33.

In point of law, therefore, it was not a complaint within the meaning of the provisions of section 19 ; but it was a case where the Commissioners were at liberty to sit at such times, either in private or in open court, and to conduct their proceedings in such manner as they deemed convenient."

The respondents submit :

40 (1) That so far as the general jurisdiction of the Board is concerned, there is nothing in principle to distinguish this case from numerous other cases decided by the Judicial Committee of the

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Privy Council, and by this Court, in which such jurisdiction has been affirmed.

(2) That, while the practice and procedure of the Board have been correct, an appeal on a mere question of practice and procedure is not one which this Court will, under its established jurisprudence, entertain.

(3) That the appeal should, therefore, be dismissed with costs.

Copies of The Railway Act and other relevant legislation will be furnished for use on the argument of this appeal.

A. FRASER, 10
of Counsel for the Respondents.

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Formal Judgment.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tuesday the 1st day of March, A.D. 1932.

Present : The Right Honourable F. A. ANGLIN, C.J.C., P.C.
The Right Honourable Mr. Justice DUFF, P.C.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice LAMONT. 20

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4, dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

The Appeal of the above named appellant from Order No. 45427 of 30 the Board of Railway Commissioners for Canada dated the 9th day of September, A.D. 1930, in the above matter, having come on to be heard before this Court on the 26th and 27th days of October, in the year of Our Lord one thousand nine hundred and thirty-one, constituted as above with the addition of the Honourable Mr. Justice Newcombe, C.M.G., since

deceased, in the presence of Counsel as well for the appellant as for the respondent, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for Judgment, and the same coming on this day for Judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was dismissed, and that the said Order No. 45427 of the Board of Railway Commissioners for Canada should be and the same was affirmed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE
 10 that the said appellant should and do pay to the said respondent the costs incurred by the said respondent in this Court.

APPEAL
 No. 2.

—
*In the
 Supreme
 Court of
 Canada.*

—
 No. 31.

Formal
 Judgment,
 1st March
 1932—*con-
 tinued.*

(Sgd.) J. F. SMELLIE,
 Registrar.

No. 32.

Reasons for Judgment.

(a) ANGLIN C.J.C.

(b) RINFRET J. (concurrent in by DUFF and LAMONT JJ.)

(Same as No. 16 at p. 48.)

No. 32.

APPEAL NO. 3.

d'Argenson Street Subway.

In the Privy Council.

No. 61 of 1932.

**ON APPEAL FROM THE SUPREME COURT OF
CANADA.**

10 IN THE MATTER OF the Application of the Canadian National Railways
for an Order under Section 256 of the Railway Act for authority to
construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan
YIE 31.51.4, dated April 15th, 1930, on file with the Board under
File No. 9437.319.7.

BETWEEN

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

AND

THE CANADIAN NATIONAL RAILWAYS - - - *Respondent.*

No. 33.

Statement of Facts.

**APPEAL
No. 3.**

**No. 33.
Statement
of Facts.**

20 1. d'Argenson Street is a highway extending in a northerly and
southerly direction through the southwesterly section of the City of
Montreal, lying north of the limits of the City of Verdun, as shown on the
plan YIE 31.51.4 filed by the Respondents with their application to the
Board of Railway Commissioners for Canada, hereinabove referred to,
a copy of which said plan is attached hereto and marked as Schedule No. 1.

30 2. The said d'Argenson Street is crossed near the southerly end
thereof by the tracks of the Respondent, the Canadian National Railways,
upon a grade separation; the street passing under the tracks by means
of a subway created by depressing the level of the street below the general
level of the surrounding lands, and the railway tracks being carried over
the street upon a bridge at an elevation above general level of the surrounding
lands.

APPEAL
No. 3.
—
No. 33.
Statement
of Facts—
continued.

3. The subway mentioned in paragraph 2 hereof was constructed prior to, and was in existence at, the time when the Appellant constructed its plant, hereinafter described, under d'Argenson Street, and the said subway continues to exist as originally built, up to the present time, in the location shown coloured in green upon the plan attached hereto as Schedule No. 1.

4. The Appellant Montreal Light, Heat & Power Consolidated was incorporated by Special Act of the Quebec Legislature, 6 George V, Chapter 82, under the name of "The Civic Investment and Industrial Company," which name was changed to "Montreal Light, Heat & Power Consolidated" by the Act 8 George V, Chapter III. It is both a holding and operating company, having power to enjoy and exercise the charter powers of its subsidiary companies. 10

It took over the operations of Montreal Light, Heat & Power Company, incorporated in 1901 (1 Edward VII, Chapter 66), which Company had under its own charter (section 10) the right to "enter upon and construct under and over streets and public highways, all such pipes, lines, conduits and other constructions as may be necessary for the purposes of its business."

Montreal Light, Heat & Power Company had itself taken over the property and franchise rights of "The Montreal Gas Company," "Royal Electric Company" and other subsidiaries with charters containing the fullest powers in respect to laying of mains, conduits, transmission lines, etc., in the City of Montreal (vide Quebec Statutes incorporating the New City Gas Co., 10-11 Victoria, Chapter 79, Section 13; Royal Electric Company, 61 Victoria, Chapter 66, Section 6; Standard Light & Power Company, 55-56 Victoria, Chapter 77, Sections 5 and 6, 56 Victoria, Chapter 73, Section 6). The Charter Powers of the Appellant Company are not contested. 20

5. Acting under the statutory authority conferred by the said Statutes the Appellant, with the legal consent of the City of Montreal, constructed and has since maintained a certain eight-inch gas main under the surface of and within the limits of d'Argenson Street extending through the said subway, said main being necessary for supplying gas to its subscribers in the vicinity of d'Argenson Street and adjoining territory. 30

6. For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and the Board of Railway Commissioners for Canada, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the railway company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War. 40

In the year 1927 this matter was again revived by the Board, and on the 27th day of May, 1927, a judgment of the Board was issued, which is reported in the Board's Judgments, Volume 17, page 49, and a copy of the said judgment is attached hereto as Schedule No. 2.

APPEAL
No. 3.

No. 33.
Statement
of Facts—
continued.

The judgment in question provides that these matters be referred for a report to the Chief Engineer of the Board, who, by Order No. 39079, dated the 27th day of May, 1927, was appointed and directed to make a full inquiry and report to the Board upon the whole situation of level crossings in Montreal, from Bonaventure Station west and from Moreau Street Station east, and to evolve a scheme for the consideration of the Board. A copy of the said Order No. 39079 is attached hereto as Schedule No. 3. No report covering the whole situation of level crossings in Montreal in the Canadian National Railways from Bonaventure Station west and from Moreau Street Station east, as required by the Board, was made to the Board by its Chief Engineer.

7. A study of the whole Canadian National Railway situation in Montreal was undertaken by the railway company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the station on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before the Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report, and by Act of the Parliament of Canada 19-20 Geo. V, c. 12 (assented to June 14th, 1929), the Canadian National Railway Company was given power to construct and complete the works described in the Schedule to the Act at and in the vicinity of Montreal; and, pursuant to the provisions of the said Act, the Governor in Council, by Order in Council P.C. 1197, dated July 2nd, 1929, approved General Plan No. DC310-0, 0-63.1. A copy of the said plan is attached hereto as Schedule No. 4.

A general plan No. WIE 19-4.2, dated October 10th, 1929, showing, *inter alia*, a reconstruction of existing grade separation at d'Argenson Street, was, upon the application of the railway company and the recommendation of its Chief Engineer, approved by Order of the Board No. 44425, dated March 10th, 1930. A copy of the application of the railway company is attached hereto as Schedule No. 5.

8. The said Order No. 44425 directed that detail plans of individual grade separations be served on the City of Montreal and submitted for the approval of the Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of the Board. A copy of the said Order No. 44425 is attached hereto as Schedule No. 6.

9. On the 24th day of April, 1930, in pursuance of the provisions of the said Order No. 44425, the Respondent made a further application

APPEAL
No. 3.
—
No. 33.
Statement
of Facts—
continued.

to the Board of Railway Commissioners for Canada for approval of a detailed plan for the reconstruction of the subway at d'Argenson Street, in accordance with a plan bearing Number YIE 31.51.4, attached hereto as Schedule No. 1, and for an Order directing the Appellant, Montreal Light, Heat & Power Consolidated, and others, to move such of their utilities as are affected by the reconstruction of the said subway, as when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways; all questions of cost to be reserved for further consideration by the Board. A copy of the application dated April 24th, 1930, as well as a copy of the plan, was served upon the City of Montreal, The Bell Telephone Company of Canada, and the Montreal Light, Heat & Power Consolidated. A copy of the said application is attached hereto as Schedule No. 7. 10

10. The reconstruction of the said subway in the manner provided for in the said plan appearing as Schedule No. 1 hereto involves the lengthening of the subway in northerly and southerly directions along the line of d'Argenson Street, in order that the Respondent's right of way and bridge may be widened to permit of two additional tracks to be constructed in the future; the relocating of the westerly wall of the subway at a distance of approximately ten feet easterly from its present location; and the relocation of the easterly wall of the said subway at a distance of approximately 28 feet east of its present location—the whole as indicated in red on the plan attached hereto as Schedule No. 1. 20

11. It is not contended that the reconstruction of the said subway will in any way confer any benefit or advantage to the Appellant or to its plant, and the Appellant has no interest in the promotion thereof, but on the contrary the relocation of the westerly wall of the said subway, as mentioned in the next preceding paragraph, will result in the said wall being constructed in a location which includes the site now occupied by part of the Appellant's said gas main. 30

12. If the said plan attached hereto as Schedule No. 1 is adhered to by the Respondent, and the works provided for therein are constructed, this will necessitate the destruction and/or removal of said main and the relocation of the same or similar equipment in the said street at substantial cost and expense. As appears from the plan YIE 31.51.4 attached hereto as Schedule No. 1, the plant of Appellant thus affected consists of one eight-inch gas main which was laid in the year 1911.

13. The Appellant was served with a copy of the Respondent's said application to the Board of Railway Commissioners for Canada appearing as Schedule No. 7 hereto on or about the 25th day of April, 1930, and on the 29th day of April, 1930, mailed its Answer thereto to the Secretary of the Board of Railway Commissioners for Canada, requesting a formal hearing of the said application. A copy of the said Answer is attached hereto as Schedule No. 8. 40

14. On the 5th day of May the Respondent filed its reply to the Appellant's said Answer. A copy of the said reply is attached hereto as Schedule No. 9.

15. On the 9th day of May, 1930, the Appellant filed a further Answer to Respondent's said application, again requesting a hearing thereon. A copy of said further Answer is attached hereto as Schedule No. 10.

APPEAL
No. 3.

16. On the 19th day of May, 1930, Appellant mailed a further letter requesting that a date be fixed for hearing on the said application. A copy of said further letter is attached hereto as Schedule No. 11.

No. 33.
Statement
of Facts—
continued.

17. No further proceedings were served or taken by either of the parties hereto, and on the 16th day of September, 1930, without notice to the Appellant and without granting any hearing, as requested in the Appellant's Answer, the Board made an Order, bearing No. 45410, granting the Respondent's said application and directing the Appellant and others 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 Respondent. A copy of said Order is attached hereto as Schedule No. 12.

18. On the 13th day of October, 1930, the Appellant launched a motion returnable on the 21st day of October, 1930, before the presiding Judge of the Supreme Court of Canada in Chambers, applying for an extension for the delay for applying for and for leave to appeal to the Supreme Court of Canada from said Order No. 45410 of the Board of Railway Commissioners for Canada, insofar as the said Order directed Montreal Light, Heat & Power Consolidated to move such of its facilities as may be affected by the reconstruction of the said subway as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that as a matter of law the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order, insofar as it directs Montreal Light, Heat & Power Consolidated to move its utilities as aforesaid.

19. The said motion came on for hearing on the date aforesaid before the Honourable Mr. Justice Rinfret, who granted said application by Order dated the 12th day of November, 1930, in the following terms :

" And it is further ordered that the said application for leave to appeal to this Court from the Order of the Board of Railway Commissioners for Canada, insofar as the said Order directs the Appellant to move such of its utilities as may be affected by the construction of the subway in question, as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said Appellant, or in any event to make the said Order ex parte and without notice to the said Appellant, be and the same is hereby granted."

A copy of said Order is attached hereto as Schedule No. 18.

APPEAL
No. 3.

Before
the Board
of Railway
Commissioners for
Canada.

No. 34.

No. 35.
Answer of
Appellant
requesting a
hearing,
29th April
1930.

116

No. 34.

Application of Respondent to Board of Railway Commissioners for Canada for
approval of Plan YIE 31.51.4, 24th April, 1932.

(Same as No. 2 at p. 7.)

No. 35.

Answer of Appellant requesting a hearing.

SCHEDULE 8.

29th April, 1930.
File No. 345-20.2.

A. D. Cartwright, Esq.,
Secretary, Board of Railway Commissioners for Canada,
Ottawa, Ont.

10

Dear Sir,

Montreal Light, Heat & Power Consolidated, for whom we appear, have been served with copies of a number of applications made to your Board by Mr. Alistair Fraser, Assistant General Counsel of Canadian National Railways, requesting the approval of their plans in connection with the new Montreal Terminal scheme and asking for an order directing the various public utility companies, including Montreal Light, Heat & Power Consolidated, to move such of their utilities as are affected by the construction as and when requested to do so by the Chief Engineer, Operation Department, Canadian National Railways. 20

The copies of the applications which have been received to date are those affecting the following streets:

St. Antoine Street	William Street
St. James Street	D'Argenson Street
Notre Dame Street	Wellington Street
Ottawa Street	St. Maurice Street
St. Paul Street	Bridge Street

We have also been handed copies of Orders already granted as follows: 30

No. 44557—St. Remi Street
No. 44558—Charlevoix Street
No. 44559—Hibernia Street

Before any further orders are granted we would like to have a hearing upon the subject and would be glad if the Board would fix a date when the parties could be heard.

A copy of this letter is being sent to Mr. Alistair Fraser.

Yours very truly,
(Sgd.) BROWN, MONTGOMERY & McMICHAEL.

No. 36.

Reply of Respondent, 5th May 1930.

*(Same as No. 4, at p. 9.)**Before
the Board
of Railway
Commissioners for
Canada.*

No. 36.

No. 37.

Further
Answer of
Appellant,
9th May
1930.

No. 37.

Further Answer of Appellant.

SCHEDULE 10.

9th May, 1930.

A. D. Cartwright, Esq.,
Secretary, Board of Railway Commissioners for Canada,
Ottawa, Ont.

10

Dear Sir,

re C.N.R. Terminal Development

We have before us a copy of Mr. Alistair Fraser's letter to you of the 5th instant, but would like to point out that there are a number of questions which we desire to submit to the Board before these Orders are granted, including the question of jurisdiction, so that as far as Montreal Light, Heat & Power Consolidated is concerned we respectfully renew our request for a hearing at Montreal if possible. We will be at the disposition of the Board whenever a hearing can be arranged.

20

We are sending a copy of this letter to Mr. Fraser.

Yours very truly,

(Sgd.) BROWN, MONTGOMERY & McMICHAEL.

No. 38.

Further letter of Appellant requesting date for hearing.

SCHEDULE 11.

19th May, 1930.

A. D. Cartwright, Esq.,
Secretary, Board of Railway Commissioners,
Ottawa, Ont.

30 Dear Sir,

I assume that we will be advised as to when and where the Board proposes to have the hearing in connection with the application of the Canadian National Railways for Orders requiring the public utility companies to re-arrange their equipment in connection with the new terminal scheme as I have been receiving inquiries from time to time from the interested parties.

Yours very truly,

(Sgd.) G. H. MONTGOMERY.

No. 38.
Further
letter of
Appellant
requesting
date for
hearing,
19th May
1930.

APPEAL
No. 3.

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Before
the Board
of Railway
Commissioners for
Canada.

No. 39.

Order of Board of Railway Commissioners for Canada No. 45410 directing Appellant to move its utilities, 16th September 1930.

(Same as No. 6, at p. 10.)

No. 39.

In the
Supreme
Court of
Canada.

No. 40.

Order of Rinfret J., granting leave to Appeal to the Supreme Court of Canada, 12th November 1930.

(Same as No. 7, at p. 11.)

No. 40.

No. 41.
Order
approving
security for
costs,
7th January
1931.

No. 41.

Order approving security for Costs.

10

SCHEDULE 14.

IN THE SUPREME COURT OF CANADA.

Before the Registrar, in Chambers.

Wednesday, the 7th day of January, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR
CANADA.

IN THE MATTER of the Application of The Canadian National Railways for an Order under Section 256 of The Railway Act, for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7. 20

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED
Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

UPON the application of Counsel for the above-named Appellants in the presence of Counsel for the above-named Respondents, upon hearing read the notice of motion and the material therein referred to, and upon hearing what was alleged by Counsel aforesaid, 30

IT IS ORDERED that the sum of \$250.00 paid into The Bank of Montreal as appears by the receipt of the said Bank dated the 29th day of

December, A.D. 1930, duly filed as security that the Appellants will effectually prosecute their appeal from Order Number 45410 of The Board of Railway Commissioners for Canada bearing date the 16th day of September, A.D. 1930, in the matter of the above application, and will pay such costs and damages as may be awarded against them by this Court, be and the same is hereby allowed as good and sufficient security.

AND IT IS FURTHER ORDERED that the costs of this Application be costs in the cause.

(Sgd.) J. F. SMELLIE,
Registrar.

10

APPEAL
No. 3.

*In the
Supreme
Court of
Canada.*

No. 41.
Order
approving
security for
costs,
7th January
1931—con-
tinued.

No. 42.

Notice of setting down appeal for hearing.

SCHEDULE 15.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR
CANADA.

IN THE MATTER of the Application of The Canadian National Railways for an Order under Section 256 of The Railway Act, for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

20

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED
Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

TAKE NOTICE that the above appeal from Order Number 45410 of The Board of Railway Commissioners for Canada has been set down by the Registrar of this Court for hearing at the Session of this Court commencing on the 3rd February, 1931.

30

DATED at Ottawa this seventh day of January, A.D. 1931.

POWELL, SNOWDON & MATHESON,
Agents for Brown, Montgomery & McMichael,
Appellants' Solicitors.

To the above-named Respondents,
and to ALISTAIR FRASER, K.C.,
their Solicitor,

and to The Board of Railway Commissioners for Canada.

No. 42.
Notice of
setting down
appeal for
hearing,
7th January
1931.

APPEAL
No. 3.

*In the
Supreme
Court of
Canada.*

No. 43.
Order
dispensing
with print-
ing of
Schedules 1
and 4 and
allowing
blue prints
to be filed,
20th April
1931.

No. 43.

Order dispensing with printing of Schedules 1 and 4 and allowing blue prints to be filed.

SCHEDULE 16

IN THE SUPREME COURT OF CANADA

Before the Registrar, in Chambers.

Monday, the Twentieth day of April, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER of the Application of The Canadian National Railways for an Order under Section 256 of The Railway Act, for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7. 10

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED
Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.* 20

UPON the application of Counsel on behalf of the above-named Appellants, in the presence of Counsel on behalf of the above-named Respondents, for an Order dispensing with the printing of certain Exhibits in the Case in Appeal, and upon hearing what was alleged by Counsel aforesaid,

IT IS ORDERED that the printing in the Case in Appeal of the two Plans referred to in the Statement of Facts as Schedules Numbers 1 and 4, forming part of the Case in Appeal herein, be and the same is hereby dispensed with.

AND IT IS FURTHER ORDERED that seven blue print copies of each of the said two Plans shall be provided by the Appellants for the use of this Court and filed with the Case in Appeal. 30

AND IT IS FURTHER ORDERED that the costs of this application be costs in the Appeal.

(Sgd.) J. F. SMELLIE,
Registrar.

No. 44.**Certificate of Settlement of Appeal Case.**

I, the undersigned, Counsel to the Board of Railway Commissioners for Canada, do hereby certify that the foregoing typewritten document from page 1 to page 48, inclusive, together with copies of the Schedules therein referred to and set forth in the Index thereto, is the case settled by me by direction of Hon. H. A. McKeown, Chief Commissioner of the said Board of Railway Commissioners for Canada, dated the 4th day of February, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada in a certain case pending before The Board of Railway Commissioners for Canada, In the matter of the Application of The Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7, between the Montreal Light, Heat & Power Consolidated, Appellant, and The Canadian National Railways, Respondent.

And I do further certify that I have applied to the Commissioners and to the Secretary of the said Board for the Board's opinions and reasons for making the Order appealed from in this cause and that reasons have been delivered by none of the said Commissioners in response to my said application; no such reasons having been given in respect of the making of the said Order.

In testimony whereof I have hereunto subscribed my name this 20th day of April, 1931.

(Sgd.) A. GEORGE BLAIR.

APPEAL
No. 3.

*In the
Supreme
Court of
Canada.*

No. 44.
Certificate
of settle-
ment of
Appeal Case,
20th April
1931.

No. 45.**Certificate of Board of Railway Commissioners for Canada.**

I, the undersigned, Acting Secretary of The Board of Railway Commissioners for Canada, do hereby certify that the foregoing printed document from page 1 to page 32, inclusive, is the case settled by A. George Blair, K.C., Counsel for the Board of Railway Commissioners for Canada, by direction of Hon. H. A. McKeown, Chief Commissioner of the said Board, dated the 4th day of February, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in appeal to the Supreme Court of Canada, in a certain case pending before the Board of Railway Commissioners for Canada, In the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7, Appellant, and The Canadian National Railways, Respondent.

No. 45.
Certificate
of Board of
Railway
Commis-
sioners for
Canada,
14th August
1931.

*In the
Supreme
Court of
Canada.*

And I do further certify that I have applied to the Commissioners of the said Board for their opinions or reasons for making the Order appealed from in this cause and that reasons have been delivered by none of the said Commissioners in response to my said application.

And I do further certify that no such reasons were delivered by any of the said Commissioners as appears from the records of the said Board.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Board of Railway Commissioners for Canada this 14th day of August, 1931.

(Sgd.) R. RICHARDSON,
Acting Secretary,
B.R.C.

10

No. 45.
Certificate
of Board of
Railway
Commis-
sioners for
Canada,
14th August
1931—con-
tinued.

No. 46.
Factum of
Montreal
Light, Heat
& Power
Company,
14th Sept-
ember 1931.

No. 46.

Factum of Montreal Light, Heat & Power Company.

NOTE.—The page references have been altered so as to agree with the Record.

DOMINION OF CANADA.

IN THE SUPREME COURT OF CANADA.

(OTTAWA.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF the application of the Canadian National Railways 20
for an Order under Section 256 of the Railway Act, for authority to
construct a subway at D'ARGENSON STREET, in the City of
Montreal, between Point St. Charles and St. Henri, as shown on
General Plan YIE 31.51.4, dated April 15th 1930, and filed with the
Board under File # 9437.319.7.

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER
CONSOLIDATED - - - - -

Appellant

AND

THE CANADIAN NATIONAL RAILWAYS - - -

Respondent. 30

INDEX.

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This is an Appeal under the provisions of Section 52, sub-sec. (2) of the Railway Act, from Order Number 45410 of the Board of Railway Commissioners for Canada, dated September 16th 1930, authorizing the reconstruction by Respondent of a subway on d'Argenson Street in the City of Montreal and directing the Appellant to move such of its utilities as may be affected by such reconstruction, at the same time reserving all questions of cost for further consideration by the Board.

APPEAL
No. 3.

*In the
Supreme
Court of
Canada.*

No. 46.
Factum of
Montreal
Light, Heat
& Power
Company,
14th Sept-
ember 1931
—continued.

PART I.—THE FACTS.

As Appellant was given no opportunity for a hearing in this case, no proof was made. There appears at pp. 111 et seq. of the Record, a "Statement of Facts," which was settled by the Board as appears upon reference to the certificate at Record, p. 121. Appellant would impress upon the Court at the outset the fact that by reason of the foregoing circumstances, there are parts of this "Statement of Facts" with which it cannot agree, and which in its submission should not have been included, and there is much which ought to have, and has not, been included in such statement.

The following, therefore, is a brief outline of the facts according to Appellant, based upon the Statement of Facts in the Appeal Case, so far as it goes, upon the documents and plans in the Record and upon such inferences as it is submitted may properly be drawn therefrom under Sec. 52, sub-sec. (6) of the Railway Act :—

Appellant owns and maintains in the City of Montreal under d'Argenson Street at the point affected certain equipment necessary for the distribution of gas consisting of an 8" gas main. This equipment was originally installed by Appellant under statutory authority and in the legal and proper exercise of its Charter powers and with the legal consent of the City of Montreal (Record, p. 112, l. 30). In order to carry out the reconstruction of the subway as authorized by and in accordance with the plan approved in the Order appealed from, it will be necessary to relocate and replace this equipment which will entail substantial cost and expense. (Record, p. 114, l. 32; Schedule No. 1.)

For many years the main line of Respondent between St. Henri and Point St. Charles, and thence across Victoria Bridge has been carried over d'Argenson Street, at the point where it crosses that Street, by an elevated subway. (Record, p. 112, l. 1). It is this subway the reconstruction of which the Board has authorized by the Order No. 45410 appealed from.

The Palmer report, prepared by an eminent Engineer, Mr. Frederick Palmer, who was engaged by the Government to devise a scheme for the construction of a Central Passenger Terminal for Respondent in the City of Montreal, unifying all passenger facilities of Respondent at one point and thus doing away with the three separate terminals presently operated by it, (Record, p. 113, l. 16), makes use of this main line of Respondent from St. Henri to Point St. Charles as a part of the general scheme. (v. Plan, Schedule # 4). The Palmer report, embodying this general scheme was, in view of the large amount of money which would be required to carry it out, (v. C. N. Mtl.

APPEAL
No. 3.

*In the
Supreme
Court of
Canada.*

No. 46.
Factum of
Montreal
Light, Heat
& Power
Company,
14th Sept-
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Terminals Act, *infra*), and in view of the financial position of Respondent, submitted to Parliament and resulted in the passing of the Canadian National Montreal Terminals Act (19–20 Geo. V., ch. 12), by which the scheme as evolved by Mr. Palmer was approved and the construction of a Central Passenger Terminal and the various works in connection therewith, as outlined by the schedule to the said Act, was authorized. As will be seen upon reference to this Statute, by clause (e) of the schedule thereto Respondent is authorized to construct and complete “grade separation by means of elevated, or depressed, or underground tracks, or streets, as may be determined between St. Henri and Point St. Charles.”

As has been stated, there is already a grade separation at the point where the said line from St. Henri to point St. Charles crosses d’Argenson Street. It will be seen upon reference to the Plan, Schedule No. (1) of the Record, that Respondent, quite naturally, does not seek to alter the nature of this existing grade separation. It merely seeks authority to reconstruct the existing subway by enlarging same to make provision for additional tracks, by altering the grade of the existing tracks to conform to the general scheme, (see Record, p. 428, l. 16) and by somewhat altering the present position of the subway.

Under the provisions of the above cited Act a general plan of the terminal scheme, (Schedule 4 of the Record,) was submitted to the Governor-in-Council and was approved by an Order-in-Council No. P.C.1197, on July 2nd, 1929, (Record, p. 113, l. 30). This plan is the equivalent of the location plan required by section 167 of the Railway Act.

Subsequently the Plan, Profile and Book of Reference required by section 168 and following of the Railway Act were prepared by Respondent and submitted to the Board, which approved of same by Order No. 44425, (Record, p. 428). This order, in accordance with the provisions of the Railway Act, requires Respondent to prepare detail plans of the individual grade separations to be served on the City of Montreal and thereafter to be submitted to the Board for its approval. The Plan No. YIE 31.51.4 showing detail of the reconstruction of the crossing at d’Argenson street, (Schedule No. 1, of the Record,) was accordingly prepared and submitted to the Board with the application of Respondent, (Record, p. 7,) for its approval.

In this application Respondent asks the Board not only for approval of the plan, but also for a direction to various parties including Appellant that they move their utilities as and when requested to do so by the Chief Engineer of Respondent and that all questions of cost be reserved for further consideration by the Board. A copy of the plan in question was served upon Appellant, when for the first time it had knowledge of the extent to which its equipment above referred to would be interfered with by the proposed reconstruction of the crossing. Numerous other copies of applications dealing with different crossings in connection with the carrying out of this terminal scheme were also received by Appellant at the same time, and Appellant by the undersigned, its Attorneys, forthwith communicated with the Board and requested that a hearing be granted upon such applications, (Record, p. 116) and objected to certain other similar Orders

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which had been granted entirely without reference to Appellant. Further correspondence, (Record, pp. 9 and 117) on the subject ensued in which Appellant throughout insisted upon a hearing, when on September 16th, 1930, without notice to Appellant and without any hearing whatsoever, the Board, by the Order No. 45410 appealed from (Record, p. 10), granted Respondent's application and, in particular, directed Appellant to move its utilities as and when required to so so by Respondent's Chief Engineer, and reserved all questions of cost for further consideration.

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PART II.—THE ORDER APPEALED FROM.

10 Appellant respectfully submits that the Order appealed from is erroneous and *ultra vires* because it was rendered *ex parte*; because it requires Appellant to move its utilities and reserves the question of the cost of so moving same, when no power is given to the Board by the Railway Act or any other Statute to so order; and because the said utilities constitute an interest in land, and the effect of the Order is to deprive Appellant of such interest in land, and is, therefore, expropriatory, and proceedings should have been taken under the appropriate Statutes to expropriate the same and to provide compensation to Appellant therefor.

PART III.—ARGUMENT.

20 Appellant would first of all submit that it was not within the power of the Board to make an *Ex parte* Order as was done in the case of the Order appealed from (Record, p. 115, line 18 sqq.). The opening words of Sec. 33 of the Railway Act (R.S.C. 1927, Cap. 170) dealing with the jurisdiction of the Board to the effect that:

“ 33. The Board shall have full jurisdiction to inquire into,
“ *HEAR and determine* any application”

coupled with the fact that, by Sections 41 and 47, the Board is given power, in certain specified cases, to make *Ex parte* Orders, makes it clear that it was not the intention of the legislator to permit the Board to exercise its
30 general jurisdiction in an *Ex parte* manner. The specified cases in Sections 41 and 47 clearly do not arise here, since there is no question in the present instance of an extension of time, and the Order appealed from is not an interim order, but is a final order disposing of the rights of the parties. Appellant would refer the Court particularly to the language of Sec. 47:—

“ 47. The Board *may*, if the special circumstances of any case,
“ so require, make an *interim ex parte* order . . . : *BUT no*
“ *such interim order shall be made for any longer time than the Board*
“ *may deem necessary to enable the matter to be HEARD and*
“ *determined.*”

40 The proviso in the above quoted section that the *interim ex parte* order shall be limited in its operation only until such time as the matter can be “ heard and determined ” and the definite implication that any such matter *must*

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be heard and determined, remove all doubt on the point and also make it clear that the broader language of Section 59 of the Railway Act is only designed to cover the case of insufficiency or want of notice. An *Ex parte* Order is an order made *in the absence* of the opposite party, and is entirely different from an Order made *where*, and despite the fact that, the opposite party has not received sufficient notice. Section 59 is obviously designed to prevent a party from holding up some matter which the Board deems sufficiently urgent by objecting to the sufficiency of the notice he has received. To interpret the Railway Act otherwise would be to run counter to one of the fundamental principles of justice that no party may be condemned unheard, and would deprive parties of their undoubted right to sway the opinion of the Board on matters of discretion from which there is no appeal. It would further place the unwarranted burden of carrying an appeal such as the present one upon a party and would tend greatly to increase the number of appeals to this Court. Such could not have been the intention of Parliament, and it is submitted is not the effect of the Statute upon a proper reading thereof. 10

The effect of the Order appealed from is not only to direct Appellant to move its equipment but also to condemn it to pay the cost of so doing, at least until the Board sees fit to order otherwise. This gives rise to two questions as to the jurisdiction of the Board, namely: Had the Board jurisdiction to order Appellant to move its equipment? and, Had the Board jurisdiction to condemn Appellant to payment of the cost of moving its equipment? Appellant proposes in this argument to deal with each of these questions separately. Before doing so, however, it should be stated as a general proposition that the Board, being in the nature of a statutory court, its jurisdiction, which is not inherent but statutory, must be found in the Act constituting it. It can only exercise such powers as are by statute conferred upon it: *G.T.R. v. Toronto* (1 C.R.C. 92); *Merritton Crossing Case*, (3 C.R.C. 263); *City of Victoria v. Esquimault Ry.* (24 CRC 84); *Kelly v. G.T.R.* (24 CRC 367). 20 30

I.—HAD THE BOARD JURISDICTION TO ORDER APPELLANT TO MOVE ITS EQUIPMENT?

Appellant respectfully submits if had not. Since Respondent's line of Railway in the present case is already constructed across the highway, the jurisdiction of the Board, if any, to deal with Respondent's application for leave to reconstruct the subway must be found in section 257 of the Railway Act, the pertinent portions of which read as follows:—

“ 257 where a railway is already constructed . . . across
“ any highway, the Board may of its own motion, or upon complaint 40
“ or application, by or on behalf of the Crown, or any person
“ aggrieved, order the Company to submit . . . a plan etc.,
“ . . . 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 etc. . . . and that such other work

“ be executed, . . . as under the circumstances appears 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 crossing”

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The Board has not, in the present instance, purported to act “ of its own motion,” and it is submitted that not having done so, it could only have made the Order appealed from upon the complaint or application of the parties enumerated in the section; namely the Crown, any municipal or other corporation, or some person aggrieved; and not upon the application of the “ Company ” (i.e. Respondent). In any event, it is clear from the language above quoted that, where a crossing already exists, the Board may only make orders as to the protection, safety and convenience of the public or as to the removal or diminishing of danger or obstruction. Since a grade separation already exists, there can be no question of danger or obstruction or of the safety of the public and it has been neither alleged nor proved that the convenience of the public is involved, or that the existing subway is in any way inadequate, save for the purposes of Respondent in carrying out its terminal development. It is therefore submitted that the Board had no power or jurisdiction to make the Order Appealed from either under section 257 above quoted or under any other provision of the Act.

Even if power were granted to the Board to order the reconstruction of the subway in question under section 257 or elsewhere, there is nothing in the language above quoted empowering the Board to order that the work shall be done by any person other than the applicant for leave to do it.

It is also true that, with the exception of section 39 (1), nowhere in the Railway Act nor in any other Statute is power conferred upon the Board to compel persons other than the applicant or complainant to do the work which it orders under section 257. Section 39 (1) reads as follows:—

“ 39.—(1) when the Board, *in the exercise of any power vested in it*, in and by any order *directs or permits* any structure . . . to be provided, constructed, reconstructed, etc. . . . it may, *except as otherwise expressly provided*, order by that company, municipality or person, *interested or affected* by such order, as the case may be the same shall be provided, constructed, reconstructed etc. . . .”

It will be noted that the jurisdiction conferred by this section is limited to cases in which the Board is acting “ in the exercise of any power vested in it.” Appellant submits that the foregoing discussion makes it clear that the Board in making the Order appealed from was not acting in the exercise of a power vested in it.

Apart from this, however, it will be seen upon a close reading of the language of section 39 (1) that the Board is only given power, in the circumstances contemplated, to order by what company, etc., the structure shall be provided, constructed, etc., which in the exercise of some power

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vested in it, it has by order directed or permitted to be provided or constructed. There is no power here or elsewhere in the Act given to compel the construction of anything other than the structure or work required or authorized by the Order given in the exercise of some power vested in the Board. With this in mind, it is clear that the Board had no power in the present case to order Appellant to move its equipment as an incidental to the Order permitting the reconstruction of the Subway in question, even admitting that the Board would have jurisdiction to order Appellant to move as an "exercise of power vested in it." There is, of course, no such power vested in the Board by the Railway Act, or by any other statute. In the Toronto Transportation Case, cited *infra*, the Privy Council, dealing with the Royce Avenue Subway, found that the adaptation of the Commission's tracks to allow for the subway approach was part of one and the same engineering operation with the construction of the Subway, in order to allow for the operation of Sec. 39. No such finding could be made in the present case. Appellant's equipment is no more a part of the Subway here authorized to be reconstructed than would be the land of an abutting landowner. To find that the Board had power to order the removal of Appellant's equipment by Appellant would be the equivalent of finding that the Board had power to order a farmer to tear down and remove his barn which happened to be in the path of a projected right of way.

Quite apart from the foregoing, too, before power can be found in the above language for the Board to order that the work be done by some party other than the applicant, two conditions must be fulfilled:—

(a) The party ordered to do the work must be "interested or affected" by the order.

(b) The Board can only so order in the absence of express provision otherwise.

(a) It is submitted that the Appellant is not a party, within the meaning of the section, "interested or affected" by the order appealed from insofar as it permits the structure or subway in question to be constructed. In *Toronto Transportation Commission vs. C.N.R. and C.P.R.* (1930 A.C. 686) the Privy Council has decided that a court of appeal is not precluded by Section 33 subsection (5) of the Railway Act from determining as a question of law whether a Company, municipality or person is "interested or affected" within the meaning of Section 39, (see Lord MacMillan speaking for the P. C. at p. 696). It is submitted that this decision could also be supported on the ground that Sec. 33 (5), as is stated therein, only has reference to the "party interested" within the meaning of Section 33 itself.

In the Toronto Transportation Commission case above cited the meaning of the phrase "interested or affected," as found in Sec. 39, was fully considered by the Privy Council. While on the facts as proved in that case it was found that the Commission was "interested or affected" by the order there under consideration, the case is clearly distinguishable from the

present one. In discussing the effect of Section 39, Lord MacMillan says at Page 697:—

“ Section 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. *It does not even prescribe that the interest must be beneficial or that the affection must not be injurious.* The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. *Where the matter is left so much at large, practical considerations of common sense must be applied especially in dealing with what is obviously an administrative provision.*”

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From the above language and from the fact that both in the case of the Bloor Street Subways and in the case of the Royce Avenue Subway what apparently influenced the decision of the Privy Council was the benefit which the Commission derived either directly or indirectly from the works in question, it seems clear that the interpretation placed upon the phrase ‘interested or affected’ by the Privy Council was that, upon a common sense view, the “interest” must be beneficial and the “affection” must not be adverse. Thus in dealing with the Bloor St. case, we find the following at p. 398:—

“ The whole circumstances must be taken into account. In the present instance there can be no question that *the existence of the level crossings with their attendant danger* constituted a barrier across the route of the Commission’s Bloor Street Railway. The Commission maintained that the removal of the crossings was immaterial to it, but this is hardly consistent with its immediate utilization of the substituted subways for linking up the detached ends of its system. Indeed, the situation of the level crossings was such that their removal could not but affect and affect beneficially the street railway;”

and in dealing with the Royce Ave. case, we find at p. 703:—

“ The question rather is whether the Transportation Commission as the operator of the Street railway in Dundas St. was interested in or affected by the engineering works designed for the removal of the *dangerous level crossing on Royce Avenue.*”

In the case at bar it is admitted (Record, p. 114, lines 25 sqq.) that Appellant is not in any way interested in or benefited by the proposed works or in the result they will accomplish; and Appellant is only affected adversely since its present plant, with the present position of which it is fully satisfied, will have to be moved at considerable inconvenience and expense.

It must not be forgotten too, in distinguishing the present case from that of the Toronto Transportation Commission above, that here we have no existing dangerous level crossing to be done away with for the public good. Here, Appellant is already lawfully established in the street, and a grade separation already exists. The reconstruction of the Subway providing this

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grade separation, has its origin purely in the need of the Respondent, which will derive the sole benefit therefrom. Appellant would here refer the Court to the decision of the Privy Council in *B.C. Electric vs. Vancouver* (1914 A.C. 1067) discussed at length below on the question of cost.

Appellant therefore submits that sec. 39 (1) can have no application in the present case, since Appellant is not interested or affected by the order approving the subway in question within the meaning of the section.

(b) Appellant further submits that section 39 (1) does not confer jurisdiction on the Board to order it to move its equipment because the section states that the Board “ may, except as otherwise expressly provided, 10
order . . . etc.”

There is express provision otherwise in the Railway Act itself, which by section 162, subsection (n) provides that :—

“ The Company (i.e. Respondent) may, for the purposes of the
“ undertaking, subject to the provisions in this and the Special Act
“ contained

“ (n) divert or alter the position of any water pipe, gas pipe,
“ sewer or drain, or any telegraph, telephone or electric lines, wires
“ or poles.”

By Section 163 it is provided that :—

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“ The Company shall restore, as nearly as possible to its former
“ state, any . . . water pipe, gas pipe etc. . . . which it
“ diverts or alters, or it shall put the same in such a state as not
“ materially to impair the usefulness thereof.”

and by section 164, that :—

“ The Company shall, in the exercise of the powers by this or
“ the Special Act granted, do as little damage as possible, and shall
“ make full compensation, in the manner herein and in the Special
“ Act provided, to all persons interested, for all damage by them
“ sustained by reason of the exercise of such powers.”

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It is clear under these sections that Respondent granting it to have secured proper authority to reconstruct the Subway in question, should have proceeded at its own expense to move Appellant's equipment, and it will be noted, that in addition to the duty of moving the plant, Respondent is also bound to compensate Appellant for all damage sustained by it by reason of such moving.

In addition to the foregoing, there is also express provision to the contrary in the Expropriation Act (R.S.C. 1927 c. 64) which by sec. 3, subsec. (g) provides that :—

“ The Minister may . . . (g) divert or alter the position of any 40
“ water-pipe, gas-pipe, sewer, drain, or any telegraph, telephone or
“ electric light wire or pole.”

For all of the foregoing reasons, therefore, Appellant respectfully submits that the Board of Railway Commissioners was without jurisdiction to make the Order complained of directing Appellant to move its equipment.

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II.—HAD THE BOARD JURISDICTION TO CONDEMN APPELLANT TO PAYMENT OF THE COST OF MOVING ITS EQUIPMENT?

Here again Appellant submits that the answer should be in the negative. As has been pointed out above, the effect of the Order appealed from is to compel Appellant to contribute to the cost of the work. Section 259 of the Railway Act, which is as follows:—

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10 “ 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 corpora-
“ tion, or person in respect of any order made by the Board under
“ any of the last three preceding sections. . . .”

is the section under which the Board is given power to apportion the cost of protective works at crossings. As will be seen, in giving power to the Board to apportion the cost of works ordered under Section 257, the section quoted specifically refers to Section 257. If, therefore, Section 257 does not
20 confer power on the Board to make the Order appealed from, then likewise Section 259 has no application. In Appellant's submission, Section 257, for the reasons already given, namely that the application is made by Respondent and there is no question here of danger or obstruction or of the protection, safety and convenience of the public, does not empower the Board to order either the reconstruction of the subway or more particularly the moving by Appellant of its equipment.

It is of course needless to say that jurisdiction to order Appellant to contribute to the cost cannot be found in sec. 39 (2), for the same reasons given above which excluded the operation of sec. 39 (1) in this case. Appell-
30 ant is merely content here to remark that while the words “ interested or affected ” do not appear in sec. 39 (2), the Privy Council has held in the case of *Toronto Ry. v. City of Toronto* (1920 A.C. at p. 435) in dealing with the similar section 59 of the old Act, that subsection (2) must be read with reference to subsection (1) and consequently an order under subsection (2) can only be made against a party “ interested or affected ” by the order directing the works.

40 Since there is at present a grade separation and consequently no danger to the public, since it is neither alleged nor proved that the convenience of the public is involved, since the only occasion for the construction of the subway in question arises out of the need of the Respondent in connection with its new terminal development, and since the whole benefit of the work involved will accrue to Respondent, it is clear that the case of *B.C. Electric Railway v. Vancouver*, (1914 A.C. 1067), applies and it was not competent to the Board to order Appellant to contribute to the cost of the work. The

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Order, whether made with or without jurisdiction, is purely permissive in its nature, and leaves it open to the Respondent to reconstruct the subway or not as it sees fit.

In the B.C. Electric case the Privy Council found that where no question of the safety and convenience of the public arose, it was not competent to the Board by a purely permissive order to compel contribution by a third party. They say at p. 1074 :—

“ It follows therefore that the application was a matter
“ between the corporation and the railway company alone. The 10
“ tramway company was entitled to be present to see that its interests
“ were not prejudiced by any order which might affect injuriously
“ property belonging to it. But the application was not made
“ against it, nor was it asking any privilege from the Railway Board,
“ so that its presence did not give to the Railway Board any jurisdic-
“ tion to make this order against it. If the Board possessed any such
“ jurisdiction it must be derived from the provisions of the statutes
“ which created it and gave to it its powers. Their Lordships can
“ find nothing in those statutes which empowers the Railway Board
“ to make any such order against the tramway company. The only
“ portion of the tramway lines which was subject to the jurisdiction 20
“ of the Railway Board was the actual crossings, and those only so
“ far as concern ss. 227 and 229 of the Railway Act, and these
“ sections have nothing whatever to do with such matters as these
“ street improvements. So far as concerns the cost of the bridges
“ or the cost of lowering the track of the railway company (which
“ by the order was included in the cost of the viaducts) the tramway
“ company was in precisely the same position as any private citizen
“ of the city of Vancouver. It is evident from the reasons given
“ by the Railway Board that they directed the tramway company
“ to pay a proportion of the cost of the improvements because they 30
“ were of opinion that the tramway company would benefit by them.
“ They say : ‘ It being a substantial benefit to them we are of opinion
“ ‘ that they should contribute to the cost of the two bridges they
“ ‘ will use. That is the bridges at Hastings Street and at Harris
“ ‘ Street.’

“ The same language might have been used about a private
“ citizen owning some large shop on one of the streets, or owning
“ premises on either side of the valley, who would profit by the
“ connection being on the level instead of by two steep and opposite
“ grades, and such a private individual would be just as much under 40
“ the jurisdiction of the Railway Board as was the tramway com-
“ pany. The fundamental error underlying the decision of the
“ Railway Board is that they have considered that the fact that the
“ tramway company would be benefited by the works gave them
“ jurisdiction to make them pay the cost or a portion of it. There
“ is nothing in the Railway Act which gives any such jurisdiction.

10 “ An attempt was made to treat the order of the Board as being
 “ made under the powers of s. 59 of the Railway Act, and it was
 “ contended that that section entitled the Railway Board to require
 “ that the tramway company should pay a portion of the expense.
 “ It is sufficient to point out that the order is not made under s. 59
 “ (now Sec. 39), nor does it come within its provisions. It does not
 “ direct that any work should be done. It is an order of a purely
 “ permissive character granting a privilege to the corporation
 “ which they may exercise at the expense of a third party, and it
 “ leaves it to the corporation to decide whether they shall avail
 “ themselves of it or not. The provisions of s. 59 relate to a wholly
 “ different class of cases.”

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It is submitted that the above quoted language may fittingly be applied to the present case.

Quite apart from the foregoing, Appellant respectfully submits that the Order appealed from, being expropriatory in its nature, was beyond the power of the Board to make. By sec. 17 of the Canadian National Railways Act (R.S.C. 1927, ch. 172) as amended by 19-20 Geo. V, ch. 10, sec. 2, it is provided that The Expropriation Act, so far as it relates to the
 20 taking of land, shall apply to Respondent.

The Expropriation Act (R.S.C. 1927, ch. 64) defines “ Land ” in sec. 2 (d) as follows :—

“ (d) Land includes . . . all *real property*, messuages, lands,
 “ tenements and hereditaments of any tenure, and *all rights* easements,
 “ servitudes and damages . . . ”

and by sec. (9) provides that in case of disagreement, the minister *shall* file plans and proceed to expropriate. Compensation is of course provided for in sections 23 and following.

30 It should also be noticed that sec. 17 of the Canadian National Railways Act, as amended contains the following wording in subsection (3) :—

“ Lands or *interests in lands* required by any company comprised
 “ in the Canadian National Railways, may be acquired for such
 “ company by the Company under the provisions of this Act.”

The term “ Lands ” is also defined in the Railway Act, sec. 2, subsection (15) as follows :—

40 “ (15) ‘ Lands ’ means the lands, the acquiring, taking or using
 “ of which is authorized by this *or the Special Act*, and includes real
 “ property, messuages, lands, . . . and any easement, servitude,
 “ *right*, privilege or *interest in, to, upon, under over or in respect of*
 “ *the same.*”

In the following cases, equipment such as that of Appellant involved in the present dispute when installed and maintained in the soil under statutory authority is held to constitute immovable property, real property, a right or interest in land within the meaning of the above definitions, and

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accordingly Appellant submits, that the Respondent, if it wished to deprive Appellant of such equipment, the right to maintain it in its present location, and its interest in the land where it is so located, should have proceeded by way of Expropriation under the appropriate provisions of law, in which case Appellant would be entitled to compensation.

The following cases are, it is submitted, conclusive on this point.

Consumers Gas Co. of Toronto v. Toronto (27 S.C.R. 453).

The Chief Justice at p. 457 says:—

“ I am of opinion that the gas pipes of the Appellants laid
“ under the streets of the City were under this Act *real property* 19
“ belonging to them, and as such liable to assessment. I regard
“ the case of the *Metropolitan Ry. v. Fowler* (1893 A.C. 416) as
“ conclusively showing that these pipes are not to be considered as
“ chattels placed beneath the public streets and highways in the
“ exercise of a mere easement, but being affixed to the land, as
“ actual real property within the meaning of the interpretation
“ clause. No matter in whom the fee in the soil of the surface of the
“ streets was vested, so much of the subsoil as is occupied by the
“ Appellant’s pipes, must be held to constitute part of the land,
“ unless we are altogether to disregard the decision of the House of 20
“ Lords in the case cited.”

Mr. Justice Gwynne at p. 455, says:—

“ Now this 13th section ” (of the Gas Company’s Charter which
conferred similar powers to those conferred by Appellant’s Charter
in the present case—vide Record, p. 112, line 15 et seq.) “ operates,
“ I think, clearly as a legislative grant to the company of so much of
“ the land of the said streets and below the surface as it shall find
“ necessary to take and hold under section (1) for the purposes of
“ the Company and for the convenient use of the gas works, and
“ when the places are designated by the corporation where the mains 30
“ may be laid, and they are placed there, the land occupied by such
“ mains is land taken and held by the company for the necessary
“ purposes of the Company and the convenient use of the gas works,
“ and is therefore liable to assessment as land . . . etc.”

This case was approved of by the Privy Council dealing with the same charter powers of the same company in a case dealing with the right of the gas company to compensation where its gas-mains were lowered by the City of Toronto. (Vide *City of Toronto vs. Consumers Gas Co.*—1916—2 A.C. 618). In this case Lord Shaw says at p. 621:—

“ Once the pipes were laid by statutory authority, then they, 40
“ in fact, became *partes soli*.”

and further, at p. 624:—

“ The reasons have already been assigned for holding that the
“ space occupied by the gas-mains and the gas-mains themselves of
“ the Appellants are of the nature of land in its ordinary sense. It

“ must, however, be added that in any view the definition of ‘ Land ’
“ in the Municipal Act unquestionably includes them. For it can
“ hardly be denied that the words ‘ a right or interest in, and an
“ easement over land ’ would embrace the right of the gas company
“ to have their pipes remain, and to have the interest and use of
“ them, and the space occupied by them undisturbed”

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See also *Ottawa Gas Co. vs. City of Ottawa* (54 D. L. R. 623) where the
Consumers Gas case was followed and the Gas Company was held entitled
to recover the cost of repairing its gas mains from the City.

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Montreal
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& Power
Company,
14th Sept-
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10 In *Montreal Light, Heat & Power vs. Westmount* (1926, S.C.R. 515) it
was held that the underground pipes, poles, wires and transformers of the
Power Company were “ immoveables ” and were included within the
meaning of the terms “ real property ” and “ real estate.”

It is, of course, hardly necessary to state that the Board has no
jurisdiction in matters of Expropriation. So far as Respondent is concerned
and depending upon the amount involved, this jurisdiction lies either in the
Exchequer Court, or the Superior Court, under the provisions of Section 17
of the Canadian National Railways Act as amended by 19-20 Geo. V.
chap. 10.

20 The whole respectfully submitted.

MONTREAL, September 14th, 1931.

BROWN, MONTGOMERY & McMICHAEL,
Attorneys for Appellants.

No. 47.

Factum of Canadian National Railways.

No. 47.
Factum of
Canadian
National
Railways.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways
for an Order under Section 256 of the Railway Act, for authority to
30 construct a subway at D'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan
YIE 31.51.4 dated April 15th, 1930, on file with the Board under
file No. 9437.319.7.

BETWEEN :

THE MONTREAL LIGHT, HEAT & POWER
CONSOLIDATED - - - - - *Appellants*

and

THE CANADIAN NATIONAL RAILWAYS - *Respondents.*

PART I.—STATEMENT OF FACTS.

40 This is an appeal by leave granted by the Honourable Mr. Justice
Rinfret from Order No. 45410 of the Board of Railway Commissioners for

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Canada, hereinafter called The Board, dated 16th. September 1930 in so far as the said Order directs the appellants to move such of their utilities as may be affected by the construction of a subway at D'Argenson Street, Montreal, as and when required to do so by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said appellants, or in any event to make the said Order ex parte and without notice to the said appellants.

D'Argenson Street is a highway extending in a Northerly and Southerly direction through the Southwesterly section of the City of Montreal as shown in part on the plan YIE 31.51.4 filed by the respondents with their application to the Board for authority to construct a subway at the said street. There was a subway in existence at the said street at the date of the said Order. 10

At the date of the said Order the appellants had certain utilities located upon, over and under the said highway, but constructed after the construction of the said subway.

For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and The Board, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the railway company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War. 20

In the year 1927 the matter was again revived by The Board and on 27th. May 1927 a judgment of The Board was issued, shown at Record, page 418. 30

The judgment in question provides that these matters be referred for a report to the Chief Engineer of The Board, who, by Order No. 39079, dated 27th. May 1927, was appointed and directed to make a full inquiry and report to The Board upon the whole situation of level crossings in Montreal, from Bonaventure Station West and from Moreau Street Station East, and to evolve a scheme for the consideration of The Board (Record p. 425). No complete report covering the whole situation has yet been made by the said Chief Engineer, but he has made certain reports including one with regard to the subway in question herein. 40

A study of the whole Canadian National Railways situation in Montreal was undertaken by the Railway Company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the site on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before The Board. The services

of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report and by Act of the Parliament of Canada chapter 12 of the Statutes of 1929, the Canadian National Railway Company was given power to construct and complete the works described in the schedule to the said Act at and in the vicinity of Montreal; and pursuant to the provisions of the said Act, the Governor-in-Council, by Order-in-Council P.C. 1197, dated 2nd. July, 1929, approved General Plan No. DC310-0, 0-63.1. (Record schedule 4). General Plan WIE 19.4.2
 10 dated 10th October, 1929, showing *inter alia* a reconstruction of existing grade separation at the street in question was, upon the application of the Railway Company and the recommendation of its Chief Engineer, approved by The Board by Order No. 44425 dated 10th. March, 1930.

The said Order No. 44425 directed that detailed plans of individual grade separations be served upon the City of Montreal, and submitted for approval of The Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of The Board.

On 24th April 1930 in pursuance of the provisions of the said Order No. 44425, the respondents made a further application to The Board for
 20 approval of a detailed plan number YIE 31.51.4 for the reconstruction of the subway at D'Argenson Street, and for an Order directing the appellants and others to move such of their utilities as are affected by the construction of the subway, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by The Board.

The appellants were served with a copy of the last named application on or about 25th. April 1930, and on 29th. April 1930 mailed their answer thereto to the Secretary of The Board, requesting a formal hearing of the said application. On 5th. May 1930 the respondents filed their reply to
 30 such answer. On the 9th. May 1930 the appellants filed a further answer to such application, again requesting a hearing thereon, and on 19th. May 1930 the appellants mailed a letter requesting that a date be fixed for hearing such application.

On 9th. September 1930, without granting any hearing, the Board made the above Order No. 45410.

PART II.—ERRORS IN THE ORDER APPEALED FROM.

The respondents submit that the Board had jurisdiction to make the order appealed from and that the same should be affirmed.

PART III.—ARGUMENT.

40 The subway referred to in the Order appealed from, and all things to be done in connection therewith, including procedure, were incidental to and parts of a comprehensive scheme initiated by the Board, as appears from its Order and judgment of 27th. May 1927, for the protection, safety and convenience of the public, and approved by Parliament, and including,

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among other things, the elimination of passenger traffic from Bonaventure Station to Turcot and from Moreau Street Station Easterly, the diversion of such passenger traffic to lines skirting the City of Montreal at the North and converging at the present tunnel station at Lagauchetiere Street, the establishment of terminal facilities at the site of the said tunnel station, the construction of a viaduct and elevated railway between Inspector and Dalhousie Streets, and St. David's Lane and Nazareth Street to near Wellington Street, and thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets, including St. Antoine Street, and the providing of a grade separation by means of elevated or depressed or underground tracks, or streets, between St. Henri and Point St. Charles, the latter including, among other streets, d'Argenson Street. 10

The constitution and powers of the respondents are set forth in The Canadian National Railways Act, being chapter 172 of the Revised Statutes of Canada 1927, as amended by chapter 10 of the Statutes of Canada 1929, and under the said Act as amended the respondents had power to do the things mentioned in the preceding paragraph, upon securing approval of the Governor-in-Council, sanction as to location by the Minister of Railways and Canals, and authority by Parliament for the necessary expenditure or the guarantee of an issue of securities. 20

The Canadian National Montreal Terminals Act 1929, being chapter 12 of the Statutes of Canada 1929 was an Enabling Act, passed for the purpose of providing parliamentary authority for such expenditure and guarantee of securities, as applied to the scheme above referred to.

The powers and jurisdiction of the Board are set out and defined in The Railway Act, chapter 170 of the Revised Statutes of Canada 1927, and, unless otherwise specified, the sections hereinafter referred to are sections of the Railway Act.

By s. 33, sub-s 1. the Board has jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested 30
(b) requesting the Board to make any order or give any direction, leave, sanction or approval, which by law it is authorized 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. By sub-s 2 it may order and require any Company or person to do forthwith, or within or at any specified time, and in any manner to be 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 shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or fact. By sub-s 5 the Board's 40
decision 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.

Sec. 34 empowers the Board to make orders with respect to any matter, act or thing which by the Act is sanctioned, required to be done or prohibited, and generally for carrying the Act into effect and for exercising any jurisdiction conferred upon it.

Under sec. 35 the Board may, of its own motion, . . . inquire into, hear and determine any matter or thing, which under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.

By sec. 37 any power or authority vested in the Board may although not so expressed, be exercised from time to time, or at any time, as the occasion may require.

10 By sec. 256 in the case of a new highway crossing and by sec. 257 in the case of an existing highway crossing, the Board is authorized to make such orders as it deems expedient, as to the protection, safety and convenience of the public.

By sec. 259 the Board is authorized to 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, and it is submitted that it is immaterial, in view of the provisions above recited, whether the highway crossing is new or
20 already in existence.

By sec. 39 (1) 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, re-constructed, 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, re-constructed, altered, installed, operated, used
30 and maintained. Under sub-s 2, the Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, re-constructing, 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.

If an order can be supported under sec. 39, it is unnecessary to consider whether it could also be supported under other sections of the Act.

Toronto Ry. Co. v. Toronto City—(1) (1920) A.C. 426, 437.

40 In view of the attitude taken by the appellants, they cannot be heard to say that they are not interested or affected by the order in question. The question whether or not they were benefited by the execution of the works in question is not material to the question of the jurisdiction of the Board. They could competently be required to contribute to the cost of such works, and the propriety of requiring them to do so and the extent of the contribution ordered are not matters for review by the Court.

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C.P.R. et al v. Toronto Transportation Commission et al and Toronto Transportation Commission v. C.N.R. et al—1930 A.C. 686.

In the order appealed from, the Board has exercised the jurisdiction given to it under sec. 39 in :

1. Ordering by whom, namely the appellants, the utilities should be moved. Such order is not only in accordance with jurisdiction, but also in accordance with common sense. It would obviously be foolish to authorize any party unfamiliar therewith to interfere with such utilities.

2. Directing when and within what time the removal of such utilities should be carried out, namely : as and when required to do so by the Chief Engineer, Operating Department, of the respondents.

3. By reserving all questions of costs, which would include consideration of payment of compensation and the proportion of such costs to be paid by all parties.

In the case above referred to in 1930 Appeal Cases, it is remarked, in connection with sec. 39, that the case was not "otherwise provided for in the Act," and the respondents submit that the same remark applies in this case.

The appellants are not the owners of land or of any interest in land which is subject to expropriation. In view of the provisions of the Canadian National Railways Act, as amended by chapter 10 of the Statutes of Canada 1929, the expropriation provisions of The Railway Act are not applicable to the respondents, and there is no provision in the said Acts for the expropriation of a highway or of any interest therein.

There are a number of sections of The Railway Act under which the party by whom work shall be done or costs shall be borne are expressly provided, such as sections 185, 251-(6) and 260, but there is nothing in the Act inconsistent with the applicability of the provisions of sec. 39 to the situation in question herein.

Apart from the foregoing it may be pointed out that if any compensation is payable to the appellants, the ascertainment and payment thereof are not pre-requisite to the immediate exercise by the Board of its jurisdiction under sec. 39, but merely matters which may be taken into consideration by the Board in finally apportioning the cost of the work, which has been reserved.

As to the contention that the order appealed from was made *ex parte* or without notice to the appellants, the respondents deny that it was made either *ex parte* or without notice to the appellants. The appellants were served with the respondents' application for the said order and had and took the opportunity of replying to the same.

Under the provisions of sec. 39, the Commissioners may sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business, and they may, subject to the provisions of the Act sit either together or separately and either in private or in open Court.

The only exception to these provisions is that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open Court.

The application for the order in question was not a "complaint" within the meaning of sec. 19.

The Honourable Mr. Justice Rinfret in his reasons given in disposing of an application for leave to appeal in

City of Montreal v. Canadian National Railways

on or about the 26th day of February 1931, says in part :

10 " A reference to section 33 of the Railway Act will, I think, show the true meaning of the word ' complaint ' in section 19. Section 33 provides that :

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

20 (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 direction, leave, sanction or approval, which by law it is authorized 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.

30 The application of the Canadian National Railway Company was not an application complaining of anything in the sense of subparagraph (a) of Section 33, but an application requesting the Board to give its approval to a plan and profile in the sense of subparagraph (b) of Section 33.

In point of law, therefore, it was not a complaint within the meaning of the provisions of section 19; but it was a case where the Commissioners were at liberty to sit at such times, either in private or in open court, and to conduct their proceedings in such manner as they deemed convenient."

The respondents submit :

40 (1) That so far as the general jurisdiction of the Board is concerned, there is nothing in principle to distinguish this case from numerous other cases decided by the Judicial Committee of the

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Privy Council, and by this Court, in which such jurisdiction has been affirmed.

(2) That, while the practice and procedure of the Board have been correct, an appeal on a mere question of practice and procedure is not one which this Court will, under its established jurisprudence, entertain.

(3) That the appeal should, therefore, be dismissed with costs.

Copies of The Railway Act and other relevant legislation will be furnished for use on the argument of this appeal.

A. FRASER, 10
of Counsel for the Respondents.

No. 48.
Formal
Judgment,
1st March
1932.

No. 48.
Formal Judgment.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.
Tuesday the 1st day of March, A.D. 1932.

Present : The Right Honourable F. A. ANGLIN, C.J.C., P.C.
The Right Honourable Mr. Justice DUFF, P.C.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice LAMONT. 20

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER
CONSOLIDATED *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.* 30

The Appeal of the above named appellant from Order No. 45410 of the Board of Railway Commissioners for Canada dated the 16th day of September, A.D. 1930, in the above matter, having come on to be heard before this Court on the 26th and 27th days of October, in the year of our Lord one thousand nine hundred and thirty-one, constituted as above with the addition of the Honourable Mr. Justice Newcombe, C.M.G., since

deceased, in the presence of Counsel as well for the appellant as for the respondent, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for Judgment, and the same coming on this day for Judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was dismissed, and that the said Order No. 45410 of the Board of Railway Commissioners for Canada should be and the same was affirmed.

10 AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said appellant should and do pay to the said respondent the costs incurred by the said respondent in this Court.

(Sgd.) J. F. SMELLIE,
Registrar.

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No. 49.

Reasons for Judgment.

(a) ANGLIN C.J.C.

(b) RINFRET J. (concurrent in by DUFF and LAMONT JJ.).

(Same as No. 16 at p. 48.)

APPEAL NO. 4.
St. Antoine Street Subway.

In the Privy Council.

No. 61 of 1932.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

10 IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN :

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED,
Appellant,

AND

THE CANADIAN NATIONAL RAILWAYS - - - *Respondent.*

No. 50.

Statement of Facts.

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Statement
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20 1. St. Antoine Street is a highway extending in an easterly and westerly direction through the southerly section of the City of Montreal, as shown in part on the Plan YIA 31.10.4, filed by the Respondent with its application to the Board of Railway Commissioners for Canada, hereinabove referred to, a copy of which said plan is attached hereto and marked as Schedule No. 1.

2. That said street has existed for a great many years and the lands comprising the same have been the property of the City of Montreal since about the time when the said street was laid out.

30 3. The Appellant, Montreal Light, Heat & Power Consolidated, was incorporated by Special Act of the Quebec Legislature, 6 George V, Chapter 82, under the name of "The Civic Investment and Industrial Company," which name was changed to "Montreal Light, Heat & Power Consolidated" by the Act 8 George V, Chapter III. It is both a holding and operating Company having power to enjoy and exercise the charter powers of its subsidiary companies.

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of Facts—
continued.

It took over the operations of Montreal Light, Heat & Power Company, incorporated in 1901 (1 Edward VII, Chapter 66), which Company had under its own charter (section 10) the right to "enter upon and construct under and over streets and public highways, all such pipes, lines, conduits and other constructions as may be necessary for the purposes of its business."

Montreal Light, Heat & Power Company had itself taken over the property and franchise rights of "The Montreal Gas Company," "Royal Electric Company" and other subsidiaries with charters containing the fullest powers in respect to laying of mains, conduits, transmission lines, etc., in the City of Montreal (Vide Quebec Statutes incorporating the New City Gas Co., 10-11 Victoria, Chapter 79, section 13; Royal Electric Company, 61 Victoria, Chapter 66, section 6; Standard Light & Power Company, 55-56 Victoria, Chapter 77, sections 5 and 6, 56 Victoria, Chapter 73, section 6). The Charter Powers of the Appellant Company are not contested. 10

4. Acting under the statutory authority conferred by the said statutes, the Appellant, with the legal consent of the City of Montreal, constructed and has since maintained certain gas mains and equipment for the transmission of electric power over, along and under the said St. Antoine Street and within the limits thereof, extending from Craig Street to Windsor Street, said mains and electrical equipment being necessary for supplying gas and electricity to its subscribers in the vicinity of St. Antoine Street and adjoining territory. 20

5. For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and the Board of Railway Commissioners for Canada, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the railway company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War. 30

In the year 1927 this matter was again revived by the Board, and on the 27th day of May, 1927, a judgment of the Board was issued, which is reported in the Board's Judgments, Volume 17, page 49, and a copy of the said judgment is attached hereto as Schedule No. 2. 40

The judgment in question provides that these matters be referred for a report to the Chief Engineer of the Board, who, by Order No. 39079, dated the 27th day of May, 1927, was appointed and directed to make a full inquiry and report to the Board upon the whole situation of level crossings in Montreal, from Bonaventure Station west and from Moreau Street Station east, and to evolve a scheme for the consideration

of the Board. A copy of the said Order No. 39079 is attached hereto as Schedule No. 3. No report covering the whole situation of level crossings in Montreal in the Canadian National Railways from Bonaventure Station west and from Moreau Street Station east, as required by the Board, was made to the Board by its Chief Engineer.

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Statement
of Facts—
continued.

7. A study of the whole Canadian National Railway situation in Montreal was undertaken by the railway company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the
10 tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the station on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before the Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report, and by Act of the Parliament of Canada 19-20 Geo. V., c. 12 (assented to June 14th, 1929), the Canadian National Railway Company was given power to construct and complete the works described in the Schedule to the Act at and in the vicinity of Montreal; and,
20 pursuant to the provisions of the said Act, the Governor in Council, by Order in Council P.C. 1197, dated July 2nd, 1929, approved General Plan No. DC310-0, 0-63.1. A copy of the said plan is attached hereto as Schedule No. 4. General plans Nos. WIA 19.14.1 and WIA 19.15.1 dated January 17th, 1930, showing *inter alia* a crossing of the said St. Antoine Street by the said Respondent's tracks at a point where no such crossing previously existed, from Victoria Bridge to the site of the tunnel terminal on Lagauchetiere Street, were, upon the application of the Railway Company and the recommendation of its Chief Engineer, approved by Order of the Board No. 44433 dated March 13th, 1930. A
30 copy of the application of the Railway Company is attached hereto as Schedule No. 5.

8. The said Order No. 44433 directed that detailed plans of individual grade separations be served on the City of Montreal and submitted for the approval of the Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of the Board. A copy of the said Order No. 44433 is attached hereto as Schedule No. 6.

9. On the 22nd day of April, 1930, in pursuance of the provisions of said Order No. 44433, the Respondent made a further application to
40 the Board of Railway Commissioners for Canada for approval of a detailed plan numbered YIA 31.10.4, a copy whereof appears as Schedule No. 1 hereto, for carrying its tracks across St. Antoine Street upon a grade separation by constructing a subway in St. Antoine Street, and for an order directing the Appellant and others to move such of their utilities as are affected by the construction of the said subway as and when requested to do so by the Chief Engineer, Operating Department, Canadian National

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No. 4.

Railways, all questions of cost to be reserved for further consideration by the Board. A copy of said application is attached hereto as Schedule No. 7.

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Statement
of Facts—
continued.

10. It is not contended that the construction of the said subway will in any way confer any benefit or advantage to the Appellant or to its plant and the Appellant has no interest in the promotion thereof; but on the contrary the construction of the said subway will result in the lowering of the level of St. Antoine Street over a distance of approximately 500 feet, which lowering will necessitate the destruction and/or removal of Appellant's aforementioned mains and equipment and the relocation 10 of the same or similar equipment in the said street at substantial cost and expense. As appears from the plan YIA 31.10.4, attached hereto as Schedule No. 1, the plant of Appellant thus affected includes among other things one 30-inch high pressure gas main laid in 1929, one 16-inch high pressure gas main laid in 1909, two six-inch mains and one four-inch main laid in 1905 and prior thereto, as well as certain electric cables and wires.

11. The Appellant was served with a copy of the Respondent's said application to the Board of Railway Commissioners for Canada appearing as Schedule No. 7 hereto on or about the 22nd day of April, 1930, and the 20 29th day of April, 1930, mailed its Answer thereto to the Secretary of the Board of Railway Commissioners for Canada, requesting a formal hearing of the said application. A copy of the said Answer is attached hereto as Schedule No. 8.

12. On the 5th day of May the Respondent filed its reply to the Appellant's said Answer. A copy of the said reply is attached hereto as Schedule No. 9.

13. On the 9th day of May, 1930, the Appellant filed a further Answer to Respondent's said application, again requesting a hearing thereon. A 30 copy of said further Answer is attached hereto as Schedule No. 10.

14. On the 19th day of May, 1930, Appellant mailed a further letter requesting that a date be fixed for hearing on the said application. A copy of said further letter is attached hereto as Schedule No. 11.

15. No further proceedings were served or taken by either of the parties hereto, and on the 9th day of September, 1930, without notice to the Appellant and without granting any hearing, as requested in the Appellant's Answer, the Board made an Order bearing No. 45427 granting the Respondent's said application and directing the Appellant and others 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, 40 Operating Department, of the Respondent. A copy of said Order is attached hereto as Schedule No. 12.

16. On the 13th day of October, 1930, the Appellant launched a motion returnable on the 21st day of October, 1930, before the presiding Judge of the Supreme Court of Canada in Chambers, applying for an

extension for the delay for applying for and for leave to appeal to the Supreme Court of Canada from said Order No. 45427 of the Board of Railway Commissioners for Canada, insofar as the said Order directed Montreal Light, Heat & Power Consolidated to move such of its facilities as may be affected by the construction of the said subway as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that as a matter of law the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order, insofar as it directs Montreal Light, Heat & Power Consolidated to move its utilities aforesaid.

APPEAL
No. 4.
—
No. 50.
Statement
of Facts—
continued.

17. The said motion came on for hearing on the date aforesaid before the Honourable Mr. Justice Rinfret, who granted said application by Order dated the 12th day of November, 1930, in the following terms :

“ And it is further ordered that the said application for leave to appeal to this Court from the Order of the Board of Railway Commissioners for Canada, insofar as the said Order directs the Appellant to move such of its utilities as may be affected by the construction of the subway in question, as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said Appellant, or in any event to make the said Order ex parte and without notice to the said Appellant, be and the same is hereby granted.”

A copy of said Order is attached hereto as Schedule No. 13.

No. 51.

Application of Respondent to Board of Railway Commissioners for Canada for approval of Plan YIA 31.10.4, 21st April, 1930.

(Same as No. 18 at p. 70.)

*Before
the Board
of Railway
Commis-
sioners for
Canada.*

No. 51.

No. 52.

No. 52.

Answer of Appellant requesting a hearing, 29th April, 1930.

(Same as No. 35 at p. 116.)

No. 53.

Reply of Respondent, 5th May, 1930.

(Same as No. 4 at p. 9.)

No. 53.

APPEAL
No. 4.

150

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 54.

Further Answer of Appellant, 9th May, 1930.

(Same as No. 37 at p. 117.)

No. 54.

No. 55.

Further letter of Appellant requesting date for hearing, 19th May, 1930.

(Same as No. 38 at p. 117.)

No. 55.

No. 56.

Order of Board of Railway Commissioners for Canada No. 45427 directing Appellant to move its utilities, 9th September, 1930.

(Same as No. 22 at p. 71.)

No. 56.

No. 57.

Order of Rinfret J., granting leave to appeal to Supreme Court of Canada.

*In the
Supreme
Court of
Canada.*

SCHEDULE 13.

IN THE SUPREME COURT OF CANADA.

The Honourable Mr. Justice Rinfret, in Chambers.
Wednesday, the 12th day of November, A.D. 1930.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER of the Application of The Canadian National Railways for an Order under Section 256 of The Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan No. YIA 31.10.4, dated August 16th, 1930, and filed with the Board under File No. 9437.319.13. 20

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED - - - - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - - *Respondents.*

UPON the application of Counsel on behalf of the above-named Appellants made on the twenty-first day of October, A.D. 1930, in the 30

No. 57.
Order of Rinfret J., granting leave to appeal to Supreme Court of Canada, 12th November 1930.

10

presence of Counsel for the above-named Respondents for an Order extending the time for applying for and for leave to appeal to this Court under the provisions of Section 52 of The Railway Act from Order Number 45427 of The Board of Railway Commissioners for Canada bearing date the ninth day of September, A.D. 1930, in the matter of the above application, upon hearing read the Notice of Motion, the Affidavits of George R. Whatley, and the exhibits therein referred to, all filed, and upon hearing what was alleged by Counsel aforesaid and judgment upon the Motion having been reserved until this day,

10 IT IS ORDERED that the time within which the said Appellants may apply for leave to appeal to this Court from the said Order of The Board of Railway Commissioners for Canada be and the same is hereby extended until this day.

AND IT IS FURTHER ORDERED that the said application for leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada in so far as the said Order directs the Appellants to move such of its utilities as may be affected by the construction of the subway in question as and when required to do so by the Chief Engineer, Operating Department, of The Canadian National Railways upon the
20 ground that the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said Appellants, or in any event to make the said Order ex parte and without notice to the said Appellants, be and the same is hereby granted.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the said appeal.

(Sgd.) T. RINFRET, J.

APPEAL
No. 4.

*In the
Supreme
Court of
Canada.*

No. 57.
Order of
Rinfret J.,
granting
leave to
appeal to
Supreme
Court of
Canada,
12th Nov-
ember 1930
—continued.

No. 58.

Order approving security for costs.

SCHEDULE 14.

IN THE SUPREME COURT OF CANADA.

Before the Registrar, in Chambers.

Wednesday, the 7th day of January, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER of the Application of The Canadian National Railways for an Order under Section 256 of The Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan No. YIA 31.10.4, dated August 16th, 1930, and filed with the Board under File No. 9437.319.13. 10

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED - - - - - Appellants

AND

THE CANADIAN NATIONAL RAILWAYS - - Respondents.

UPON the application of Counsel for the above-named Appellants in the presence of Counsel for the above-named Respondents, upon hearing read the notice of motion and the material therein referred to, and upon hearing what was alleged by Counsel aforesaid, 20

IT IS ORDERED that the sum of \$250.00 paid into The Bank of Montreal as appears by the receipt of the said Bank dated the 29th day of December, A.D. 1930, duly filed as security that the Appellants will effectually prosecute their appeal from Order Number 45427 of The Board of Railway Commissioners for Canada bearing date the 16th day of September, A.D. 1930, in the matter of the above application, and will pay such costs and damages as may be awarded against them by this Court, be and the same is hereby allowed as good and sufficient security. 30

AND IT IS FURTHER ORDERED that the costs of this Application be costs in the cause.

(Sgd.) J. F. SMELLIE,
Registrar.

APPEAL
No. 4.
In the
Supreme
Court of
Canada.
No. 58.
Order
approving
security for
costs,
7th January
1931.

No. 59.

Notice of setting down appeal for hearing.

SCHEDULE 15.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

10 IN THE MATTER of the Application of The Canadian National Railways for an Order under Section 256 of The Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan No. YIA 31.10.4, dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED - - - - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

20 TAKE NOTICE that the above appeal from Order Number 45427 of The Board of Railway Commissioners for Canada has been set down by the Registrar of this Court for hearing at the Session of this Court commencing on the 3rd February, 1931.

DATED at Ottawa this seventh day of January, A.D. 1931.

POWELL, SNOWDON & MATHESON,
Agents for Brown, Montgomery & McMichael,
Appellants' Solicitors.

To the above-named Respondents,
and to ALISTAIR FRASER, K.C.,
their Solicitor,
and to The Board of Railway Commissioners for Canada.

APPEAL
No. 4.
—
*In the
Supreme
Court of
Canada.*
—

No. 59
Notice of
setting down
appeal for
hearing.
7th January
1931.

APPEAL
No. 4.
—
*In the
Supreme
Court of
Canada.*
—

No. 60.

Order dispensing with printing of Schedules 1 and 4 and allowing blue prints to be filed.

SCHEDULE 16.

IN THE SUPREME COURT OF CANADA.

Before the Registrar, in Chambers.

Monday, the Twentieth day of April, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

No. 60.
Order
dispensing
with print-
ing of
Schedules 1
and 4 and
allowing
blue prints
to be filed,
20th April
1931.

IN THE MATTER of the Application of The Canadian National Railways 10
for an Order under Section 256 of The Railway Act, for authority to
construct a subway on St. Antoine Street, in the City of Montreal,
as shown on General Plan No. YIA 31.10.4, dated August 16th, 1930,
and filed with the Board under File No. 9437.319.13.

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER CON-
SOLIDATED *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS *Respondents.*

UPON the application of Counsel on behalf of the above-named 20
Appellants, in the presence of Counsel on behalf of the above-named
Respondents, for an Order dispensing with the printing of certain Exhibits
in the Case in Appeal, and upon hearing what was alleged by Counsel
aforesaid,

IT IS ORDERED that the printing in the Case in Appeal of the two
Plans referred to in the Statement of Facts as Schedules Numbers 1 and 4,
forming part of the Case in Appeal herein, be and the same is hereby
dispensed with.

AND IT IS FURTHER ORDERED that seven blue print copies of
each of the said two Plans shall be provided by the Appellants for the use 30
of this Court and filed with the Case in Appeal.

AND IT IS FURTHER ORDERED that the costs of this application
be costs in the Appeal.

(Sgd.) J. F. SMELLIE,
Registrar.



No. 61.

Certificate of settlement of Appeal Case.

SCHEDULE 17.

CERTIFICATE OF SETTLEMENT OF CASE.

I, the undersigned, Counsel to the Board of Railway Commissioners for Canada, do hereby certify that the foregoing typewritten document from page 1 to page 51, inclusive, together with copies of the Schedules therein referred to and set forth in the Index thereto, is the case settled by me by direction of Hon. H. A. McKeown, Chief Commissioner of the said
 10 Board of Railway Commissioners for Canada, dated the 4th day of February, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada in a certain case pending before the Board of Railway Commissioners for Canada, In the matter of the Application of The Canadian National Railways for an order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13, between the Montreal Light, Heat & Power Consolidated, Appellant, and The Canadian National Railways, Respondent.

20 And I do further certify that I have applied to the Commissioners and to the Secretary of the said Board for the Board's opinions and reasons for making the Order appealed from in this cause and that reasons have been delivered by none of the said Commissioners in response to my said application; no such reasons having been given in respect of the making of the said Order.

In testimony whereof I have hereunto subscribed my name this 20th day of April, 1931.

(Sgd.) A. GEORGE BLAIR.

APPEAL
No. 4.

—
*In the
Supreme
Court of
Canada.*

—
No. 61.
Certificate
of settle-
ment of
Appeal Case,
20th April
1931.

APPEAL
No. 4.

*In the
Supreme
Court of
Canada.*

No. 62.
Certificate
of Board of
Railway
Commis-
sioners for
Canada,
14th August
1931.

No. 62.

Certificate of Board of Railway Commissioners for Canada.

SCHEDULE 18.

**CERTIFICATE OF SETTLEMENT OF CASE AND AS TO REASONS
FOR JUDGMENT.**

I, the undersigned, Acting Secretary of The Board of Railway Commissioners for Canada, do hereby certify that the foregoing printed document from page 1 to page 34 inclusive, is the case settled by A. George Blair, K.C., Counsel for The Board of Railway Commissioners for Canada, by direction of Hon. H. A. McKeown, Chief Commissioner of the said Board, dated the 4th day of February, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in appeal to the Supreme Court of Canada in a certain case pending before The Board of Railway Commissioners for Canada, In the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13, Appellant, and The Canadian National Railways, Respondent. 10

And I do further certify that I have applied to the Commissioners of the said Board for their opinions or reasons for making the Order appealed from in this cause and that reasons have been delivered by none of the said Commissioners in response to my said application. 20

And I do further certify that no such reasons were delivered by any of the said Commissioners as appears from the records of the said Board.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Board of Railway Commissioners for Canada this 14th day of August, 1931.

(Sgd.) R. RICHARDSON,
Acting Secretary,
B.R.C. 30

No. 63.

Factum of Montreal Light, Heat & Power Company.

Note.—The page references have been altered so as to agree with the Record.

DOMINION OF CANADA.

IN THE SUPREME COURT OF CANADA.

(OTTAWA.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER of the application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on ST. ANTOINE STREET, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED, Appellant

AND

THE CANADIAN NATIONAL RAILWAYS - - Respondent.

INDEX

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This is an Appeal under the provisions of Section 52, subsec. (2) of the Railway Act from Order Number 45427 of the Board of Railway Commissioners for Canada dated September 9th 1930 authorizing the construction by Respondent of a subway on St. Antoine Street in the City of Montreal and directing the Appellant to move such of its utilities as may be affected by such construction, at the same time reserving all questions of cost for further consideration of the Board.

PART I.—THE FACTS.

As Appellant was given no opportunity for a hearing in this case, no proof was made. There appears at pp. 145 et seq. of the Record a "Statement of Facts" which was settled by the Board as appears upon reference

APPEAL No. 4.

In the Supreme Court of Canada.

No. 63. Factum of Montreal Light, Heat & Power Company.

APPEAL
No. 4.

*In the
Supreme
Court of
Canada.*

No. 63.
Factum of
Montreal
Light, Heat
& Power
Company—
continued.

to the certificate at Record, p. 155. Appellant would impress upon the Court at the outset the fact that by reason of the foregoing circumstances, there are parts of this "Statement of Facts" with which it cannot agree, and which in its submission should not have been included, and there is much which ought to have, and has not, been included in such statement.

The following, therefore, is a brief outline of the facts according to Appellant, based upon the Statement of Facts in the Record so far as it goes, upon the documents and plans in the Record and upon such inferences as it is submitted may properly be drawn therefrom under Sec. 52 subsec. (6) of the Railway Act:—

Appellant owns and maintains in the City of Montreal on St. Antoine Street at the point affected certain equipment necessary for the distribution of gas and electricity consisting principally of gas mains and electric wires and cables. This equipment was originally installed by Appellant under statutory authority and in the legal and proper exercise of its Charter powers and with the legal consent of the City of Montreal (Record, p. 146, l. 17). In order to carry out the construction of the subway as authorized by and in accordance with the plan approved in the Order appealed from, it will be necessary to relocate and replace this equipment which will entail substantial cost and expense. (Record, p. 148, l. 4; Schedule No. 1.)

As a part of its terminal scheme, Respondent proposes to carry its main line of twelve tracks across St. Antoine Street by means of the said subway in order that it may gain access to its new central passenger terminal now being constructed on Lagauchetière Street immediately above the proposed site of the subway in question. (See plans Schedules Nos. 4 and 1). Up till the present time there has been no line of railway at or anywhere near the proposed subway crossing. (Record, p. 147, l. 25.)

For a long time past the Respondent has been urgently in need of a new passenger station in the City of Montreal. A number of schemes were considered, and as the matter would involve the expenditure of a very large sum of money (vide C. N. Montreal Terminals Act, 19-20 Geo. V, c. 12), and in view of the financial position of Respondent, the question was submitted to Parliament. An eminent Engineer, Mr. Frederick Palmer, was engaged by the then Government to examine into the terminal situation of Respondent in Montreal, and his report recommended the adoption of the site on Lagauchetière street above referred to where the old Canadian Northern Tunnel Terminal stood, it being the object of the scheme evolved by Mr. Palmer to make use of the tunnel facilities and to unify all the passenger facilities of Respondent at one point thus doing away with the three separate terminals presently operated by it. (Record, p. 147, l. 6; Plan Schedule No. 4.)

In order to connect the existing lines of Respondent entering Montreal from the South by Victoria Bridge and from the West by Turcot and Bonaventure with the tunnel line at the level of the latter, which level could not be altered, it is necessary to construct an elevated line from Lagauchetière street South to the Victoria Bridge, with a connecting elevated line West to

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Bonaventure (v. Schedule to C. N. Montreal Terminals Act; Plan Schedule No. 4).

In order that the grade of this elevated line should be suitable for railway operation, the rail level thereof at the point where it is to cross St. Antoine Street must necessarily come some fifteen feet above the present level of St. Antoine Street (see Plan Schedule No. 1), hence the necessity for the construction of the subway here in question.

The fact that, in order to carry out the Palmer scheme and to make use of the tunnel site, it was necessary to build an elevated line, also enables
 10 the accomplishment of a subsidiary purpose, namely the avoiding of new grade crossings and the abolishing of certain previously existing grade crossings.

The Palmer report was submitted to and adopted by Parliament and resulted in the passing of the Canadian National Montreal Terminals Act (19-20 Geo. V, ch. 12) by which the construction of the terminal in general was authorized and the construction of the elevated line of which the subway here in question forms part in particular was authorized by the schedule to the said Act. (Record, p. 147, l. 13).

Under the provisions of this Act a general plan of the terminal scheme
 20 (Schedule 4 of the Appeal Case) was submitted to the Governor-in-Council and was approved by an Order-in-Council No. P. C. 1197 on July 2nd, 1929 (Record, p. 147, l. 20). This plan is the equivalent of the location plan required by section 167 of the Railway Act.

Subsequently the Plan, Profile and Book of Reference required by section 168 and following of the Railway Act were prepared by Respondent and submitted to the Board, which approved of same by Order No. 44433 (Record, p. 432). This order, in accordance with the provisions of the Railway Act, requires Respondent to prepare detail plans of the individual grade separations to be served on the City of Montreal and thereafter to be
 30 submitted to the Board for its approval. The Plan No. YIA 31.10.4 showing detail of the crossing of St. Antoine Street (Schedule No. 1 of the Record) was accordingly prepared and submitted to the Board with the application of Respondent (Record, p. 70) for its approval.

In this application Respondent asks the Board not only for approval of the plan, but also for a direction to various parties including Appellant that they move their utilities as and when requested to do so by the Chief Engineer of Respondent and that all questions of cost be reserved for further consideration by the Board. A copy of the plan in question was served upon Appellant, when for the first time it had knowledge of the extent to
 40 which its equipment above referred to would be affected by the proposed crossings. Numerous other copies of applications dealing with different crossings in connection with the carrying out of this terminal scheme were also received by Appellant at the same time, and Appellant by the undersigned, its Attorneys, forthwith communicated with the Board and requested that a hearing be granted upon such applications (Record, p. 116) and objected to certain other similar Orders which had been granted entirely without reference to Appellant. Further correspondence (Record, p. 117)

APPEAL
 No. 4.

—
*In the
 Supreme
 Court of
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—
 No. 63.
 Factum of
 Montreal
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 Company—
continued.

APPEAL
No. 4.

—
*In the
Supreme
Court of
Canada.*

—
No. 63.

Factum of
Montreal
Light, Heat
& Power
Company—
continued.

on the subject ensued in which Appellant throughout insisted upon a hearing, when on September 9th, 1930, without notice to Appellant and without any hearing whatsoever, the Board, by the Order No. 45427 appealed from (Record, p. 71), granted Respondent's application and, in particular, directed Appellant to move its affected utilities as and when required to do so by Respondent's Chief Engineer, and reserved all questions of cost for further consideration.

PART II.—THE ORDER APPEALED FROM.

Appellant respectfully submits that the Order appealed from is erroneous and *ultra vires* because it was rendered *ex parte*; because it requires Appellant to move its utilities and reserves the question of the cost of so moving same, when no power is given to the Board by the Railway Act or any other Statute to so order; and because the said utilities constitute an interest in land, and the effect of the Order is to deprive Appellant of such interest in land, and is, therefore, expropriatory, and proceedings should have been taken under the appropriate Statutes to expropriate the same and to provide compensation to Appellant therefor. 10

PART III.—ARGUMENT.

Appellant would first of all submit that it was not within the power of the Board to make an *Ex parte* Order as was done in the case of the Order appealed from. (Record, p. 148, l. 28 sqq.). The opening words of Sec. 33 of the Railway Act (R.S.C. 1927, Cap. 170) dealing with the jurisdiction of the Board to the effect that 20

“ 33. The Board shall have full jurisdiction to inquire into,
“ *HEAR and determine* any application . . . ”

coupled with the fact that, by Sections 41 and 47, the Board is given power, in certain specified cases, to make *Ex parte* Orders, makes it clear that it was not the intention of the legislator to permit the Board to exercise its general jurisdiction in an *Ex parte* manner. The specified cases in Sections 41 and 47 clearly do not arise here, since there is no question in the present instance of an extension of time, and the Order appealed from is not an interim order, but is a final order disposing of the rights of the parties. Appellant would refer the Court particularly to the language of Sec. 47 :— 30

“ 47. The Board *may*, if the special circumstances of any case
“ so require, make an *interim ex parte* order . . . : *BUT no*
“ *such interim order shall be made for any longer time than the Board*
“ *may deem necessary to enable the matter to be HEARD and deter-*
“ *mined.*”

The proviso in the above quoted section that the *interim ex parte* order shall be limited in its operation only until such time as the matter can be “ heard and determined ” and the definite implication that any such matter *must* be heard and determined, remove all doubt on the point and also make it clear that the broader language of Section 59 of the Railway Act is only 40

designed to cover the case of insufficiency or want of notice. An *Ex parte* Order is an order made *in the absence* of the opposite party, and is entirely different from an Order made *where*, and despite the fact that, the opposite party has not received sufficient notice. Section 59 is obviously designed to prevent a party from holding up some matter which the Board deems sufficiently urgent by objecting to the sufficiency of the notice he has received. To interpret the Railway Act otherwise would be to run counter to one of the fundamental principles of justice that no party may be condemned unheard, and would deprive parties of their undoubted right to sway the opinion of the Board on matters of discretion from which there is no appeal. It would further place the unwarranted burden of carrying an appeal such as the present one upon a party and would tend greatly to increase the number of appeals to this Court. Such could not have been the intention of Parliament, and it is submitted is not the effect of the Statute upon a proper reading thereof.

The effect of the order appealed from is not only to direct Appellant to move its equipment but also to condemn it to pay the cost of so doing, at least until the Board sees fit to order otherwise. This gives rise to two questions as to the jurisdiction of the Board, namely: Had the Board jurisdiction to order Appellant to move its equipment? and, Had the Board jurisdiction to condemn Appellant to payment of the cost of moving its equipment? Appellant proposes in this argument to deal with each of these questions separately. Before doing so, however, it should be stated as a general proposition that the Board, being in the nature of a statutory court, its jurisdiction, which is not inherent but statutory, must be found in the Act constituting it. It can only exercise such powers as are by statute conferred upon it: *G. T. R. v. Toronto* (1 CRC 92); *Merritton Crossing Case* (3 CRC 263); *City of Victoria v. Esquimault Ry.* (24 CRC 84); *Kelly v. G. T. R.* (24 CRC 367).

30 I.—HAD THE BOARD JURISDICTION TO ORDER APPELLANT TO MOVE ITS EQUIPMENT?

Appellant respectfully submits it had not. Respondent's application in the present case, being for leave to carry a new line of railway across an existing highway, the specific power of the Board to grant same must be found in Sec. 256 of the Railway Act, the pertinent portions of which read as follows:

“ 256. (1) Upon any application for leave to construct a railway upon, along or across any highway. . . . (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 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

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continued.

“ 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. . . .”

As will be seen, there is nothing in this section empowering the Board to order that the work shall be done by any person other than the applicant for leave to do it. There is not even the slightest implication to that effect, the Board being solely empowered to grant leave or refuse it, and in granting it, to attach terms and conditions for the protection of the public. These terms and conditions could only be complied with by the applicant, since he alone is given leave to do the work, which leave is restricted and so to speak governed by the terms and conditions. 10

It is also true that, with the exception of Sec. 39 (1), nowhere in the Railway Act nor in any other Statute is power conferred upon the Board to order that work, the doing of which it authorizes, shall be done by persons other than the applicant. As will be seen, the power conferred by Sec. 39 (1) is limited to certain specific cases by the language of that section, which is as follows:—

“ 39. (1) When the Board, in the exercise of any power vested
“ in it, in and by any order *directs or permits any structure to be* 20
“ *provided, constructed, etc.*, 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, the same shall be
“ provided, constructed, etc. . . .”

Particular attention should be given to the language of Sec. 39 (1) above quoted. The Board is here given power, in the circumstances contemplated, to order by what company, etc., the structure shall be provided, constructed, etc., which, in the exercise of some power vested in it, it has by order directed or permitted to be provided or constructed. There is no power here or elsewhere in the Act given to compel the provision or construction of anything other than the structure or work required or authorized by the Order given in the exercise of some power vested in the Board. With this in mind, it is clear that the Board had no power in the present case to order Appellant to move its equipment as an incidental to the Order permitting the construction of the Subway in question, even admitting that the Board would have jurisdiction to order Appellant to move as an “exercise of power vested in it.” There is, of course, no such power vested in the Board by the Railway Act, or by any other statute. In the Toronto Transportation Case cited *infra*, the Privy Council, dealing with the Royce Avenue Subway, found that the adaptation of the Commission’s tracks to allow for the subway approach was part of one and the same engineering operation with the construction of the Subway, in order to allow for the operation of Sec. 39. No such finding could be made in the present case. Appellant’s equipment is no more a part of the Subway here authorized to be constructed than would be the land of an abutting landowner. To find that the Board had power to order the removal of Appellant’s equipment 30 40

by Appellant would be the equivalent of finding that the Board had power to order a farmer to tear down and remove his barn which happened to be in the path of a projected right of way.

Quite apart from the foregoing, however, before power can be found in the above language for the Board to order that the work be done by some party other than the applicant, two conditions must be fulfilled :—

(a) The party ordered to do the work must be “ interested or affected ” by the order.

10 (b) The Board can only so order in the absence of express provision otherwise.

(a) It is submitted that the Appellant is not a party, within the meaning of the section, “ interested or affected ” by the order appealed from in so far as it permits the structure or subway in question to be constructed. In *Toronto Transportation Commission vs. C.N.R. and C.P.R.* (1930) A.C. 686 the Privy Council has decided that a court of appeal is not precluded by Section 33 subsection (5) of the Railway Act from determining as a question of law whether a Company, municipality or person is “ interested or affected”, within the meaning of Section 39, (see Lord MacMillan speaking for the P.C. at p. 696). It is submitted that this decision could also be supported
20 on the ground that Sec. 33 (5), as is stated therein, only has reference to the “ party interested ” within the meaning of Section 33 itself.

In the Toronto Transportation Commission case above cited the meaning of the phrase “ interested or affected,” as found in Sec. 39, was fully considered by the Privy Council. While on the facts as proved in that case it was found that the Commission was “ interested or affected ” by the order there under consideration, the case is clearly distinguishable from the present one. In discussing the effect of Section 39, Lord MacMillan says at page 697 :—

30 “ Section 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. *It does not even prescribe that the interest must be beneficial or that the affection must not be injurious.* The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. *Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.*”

40 From the above language and from the fact that both in the case of the Bloor Street Subways and in the case of the Royce Avenue Subway what apparently influenced the decision of the Privy Council was the benefit which the Commission derived either directly or indirectly from the works in question, it seems clear that the interpretation placed upon the phrase “ interested or affected ” by the Privy Council was that, upon a common sense view, the “ interest ” must be beneficial and the “ affection ” must

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not be adverse. Thus in dealing with the Bloor St. case, we find the following at p. 398 :—

“ The whole circumstances must be taken into account. In the present instance there can be no question that *the existence of the level crossings with their attendant danger* constituted a barrier across the route of the Commission’s Bloor Street Railway. The Commission maintained that the removal of the crossings was immaterial to it, but this is hardly consistent with its immediately utilization of the substituted subways for linking up the detached ends of its system. Indeed, the situation of the level crossings was such that their removal could not but affect and affect beneficially the street railway : . . . ” 10

and in dealing with the *Royce Ave. case*, we find at p. 703 :—

“ The question rather is whether the Transportation Commission as the operator of the Street railway in Dundas St. was interested in or affected by the engineering works designed for the removal of the *dangerous level crossing on Royce Avenue.* ”

In the case at bar it is admitted (Record, p. 148, lines 4–17) that Appellant is not in any way interested in or benefited by the proposed works or in the result they will accomplish; and Appellant is only affected adversely since its present plant, with the present position of which it is fully satisfied, will have to be moved at considerable inconvenience and expense. 20

It must not be forgotten, too, in distinguishing the present case from that of the Toronto Transportation Commission above, that here we have no existing dangerous level crossing to be done away with for the public good. Here, Appellant is already lawfully established in the street, which is senior to the railway, and the subway to be built has its origin purely in the need of the Respondent, which will derive the sole benefit therefrom. Appellant would here refer the Court to the decision of the Privy Council in *B. C. Electric vs. Vancouver* (1914 A.C. 1067) discussed at length below on the question of cost. 30

Appellant therefore submits that sec. 39 (1) can have no application in the present case, since Appellant is not interested or affected by the order approving the subway in question within the meaning of the section.

(b) Appellant further submits that section 39 (1) does not confer jurisdiction on the Board to order it to move its equipment because the section states that the Board “ may, except as otherwise expressly provided, order . . . etc. ”

There is express provision otherwise in the Railway Act itself, which by section 162, subsection (n) provides that :— 40

“ The Company (i.e. Respondent) may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained . . . ”

“ (n) divert or alter the position of any water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric lines, wires or poles.”

By Section 163 it is provided that :—

“ The Company shall restore, as nearly as possible to its former state, any . . . water pipe, gas pipe, etc. . . . which it diverts or alters, or it shall put the same in such a state as not materially to impair the usefulness thereof.”

and by section 164, that :—

10 “ The Company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.”

It is clear under these sections that Respondent should have proceeded at its own expense to move Appellant's equipment, and it will be noted, that in addition to the duty of moving the plant, Respondent is also bound to compensate Appellant for all damage sustained by it by reason of such moving.

20 In addition to the foregoing, there is also express provision to the contrary in the Expropriation Act (R.S.C. 1927 c. 64) which by sec. 3, subsec. (g) provides that :—

“ The Minister may . . . (g) divert or alter the position of any water-pipe, gas-pipe, sewer, drain, or any telegraph, telephone or electric light wire or pole.”

Appellant would also refer the Court to sec. 260 of the Railway Act, which, it is submitted, is an express provision “ otherwise,” and to sec. (2) of the Canadian National Montreal Terminals Act (19-20 Geo. V. Ch. 12), wherein power is given to the Respondent to construct and complete *inter alia* viaducts . . . subways . . .” which are to be “ provided for ” by the Governor-in-Council.

For all of the foregoing reasons, therefore, Appellant respectfully submits that the Board of Railway Commissioners was without jurisdiction to make the Order complained of, directing Appellant to move its equipment.

II.—HAD THE BOARD JURISDICTION TO CONDEMN APPELLANT TO PAYMENT OF THE COST OF MOVING ITS EQUIPMENT ?

Here again Appellant submits that the answer should be in the negative. As has been pointed out above, the effect of the Order appealed from is to compel Appellant to contribute to the cost of the works. The specific jurisdiction of the Board to apportion the cost of works authorized by section 256 of the Railway Act above cited is found in section 259 which reads :—

“ Notwithstanding anything in this Act, or in any other Act, the Board may, *subject to the provisions of the next following section*

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“ 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. . . . ”

Section 260, to which reference is made in the above quoted section, is as follows :—

“ In any case where a railway is constructed after the nineteenth day of May 1909, the Company (i.e., the Respondent) shall, at its own cost and expense . . . 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 a railway.” 10

It is submitted that section 260 is applicable in the present case, and ousts the jurisdiction of the Board to order Appellant to “ provide ” or to contribute to the cost of providing the subway in question, as well under Section 259 as under Section 39. The sole function of the Board in approving the order appealed from is to see to it that the safety and convenience of the public is protected, and this is more especially true of the present case, where the location of the viaduct and subway and their construction by the Railway, are expressly authorized by the Special Act of Parliament, the Canadian National Montreal Terminals Act (19-20 Geo. V., ch. 12). 20

Since there is at present no crossing, and consequently no danger to the public, since the only occasion for the construction of the subway in question arises out of the need of the Respondent to gain access to its new terminal at a fixed level, and since the whole benefit of the work involved will accrue to Respondent, it is clear that the case of *B. C. Electric Railways vs. Vancouver* (1914 A.C. 1067) applies and it was not competent to the Board to order Appellant to contribute to the cost of the work. The Order is purely permissive in its nature, and leaves it open to the Respondent to construct the subway or not as it sees fit.

In the *B. C. Electric* case the Privy Council found that where no question of the safety and convenience of the public arose, it was not competent to the Board by a purely permissive order to compel contribution by a third party. They say at p. 1074 :— 30

“ It follows therefore that the application was a matter between the corporation and the railway company alone. The tramway company was entitled to be present to see that its interests were not prejudiced by any order which might affect injuriously property belonging to it. But the application was not made against it, nor was it asking any privilege from the Railway Board, so that its presence did not give to the Railway Board any jurisdiction to make this order against it. If the Board possessed any such jurisdiction it must be derived from the provisions of the statutes which created it and gave to it its powers. Their Lordships can find nothing in those statutes which empowers the Railway Board to make any such order against the tramway company. The 40

“ only portion of the tramway lines which was subject to the
 “ jurisdiction of the Railway Board was the actual crossings, and
 “ those only so far as concern ss. 227 and 229 of the Railway Act,
 “ and these sections have nothing whatever to do with such matters
 “ as these street improvements. So far as concerns the cost of the
 “ bridges or the cost of lowering the track of the railway company
 “ (which by the order was included in the cost of the viaducts) the
 “ tramway company was in precisely the same position as any
 “ private citizen of the city of Vancouver. It is evident from the
 10 “ reasons given by the Railway Board that they directed the
 “ tramway company to pay a proportion of the cost of the improve-
 “ ments because they were of opinion that the tramway company
 “ would benefit by them. They say : ‘ It being a substantial benefit
 “ to them we are of opinion that they should contribute to the cost
 “ of the two bridges they will use. That is the bridges at Hastings
 “ Street and at Harris Street.’

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“ The same language might have been used about a private
 “ citizen owning some large shop on one of the streets, or owning
 “ premises on either side of the valley, who would profit by the
 20 “ connection being on the level instead of by two steep and opposite
 “ grades, and such a private individual would be just as much
 “ under the jurisdiction of the Railway Board as was the tramway
 “ company. The fundamental error underlying the decision of the
 “ Railway Board is that they have considered that the fact that the
 “ tramway company would be benefited by the works gave them
 “ jurisdiction to make them pay the cost of a portion of it. There
 “ is nothing in the Railway Act which gives any such jurisdiction.

“ An attempt was made to treat the order of the Board as
 “ being made under the powers of s. 59 of the Railway Act, and
 30 “ it was contended that that section entitled the Railway Board
 “ to require that the tramway company should pay a portion of
 “ the expense. It is sufficient to point out that the order is not
 “ made under s. 59 (now Sec. 39), nor does it come within its
 “ provisions. It does not direct that any work should be done.
 “ It is an order of a purely permissive character granting a privilege
 “ to the corporation which they may exercise at the expense of a
 “ third party, and it leaves it to the corporation to decide whether
 “ they shall avail themselves of it or not. The provisions of s. 59
 “ relate to a wholly different class of cases.”

40 It is submitted that the above quoted language may fittingly be applied to the present case.

It is of course needless to say that jurisdiction to order Appellant to contribute to the cost cannot be found in sec. 39 (2), for the same reasons given above which excluded the operation of sec. 39 (1) in this case. Appellant is merely content here to remark that while the words “ interested or affected ” do not appear in sec. 39 (2), the Privy Council has held in the

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case of *Toronto Ry. v. City of Toronto*, (1920-A.C. at p. 435) in dealing with the similar section 59 of the Old Act, that subsection (2) must be read with reference to subsection (1) and consequently an order under subsection (2) can only be made against a party "interested or affected" by the order directing the works.

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Quite apart from the foregoing, Appellant respectfully submits that the Order appealed from, being expropriatory in its nature, was beyond the power of the Board to make. By sec. 17 of the Canadian National Railways Act (R.S.C. 1927, ch. 172) as amended by 19-20 Geo. V., ch. 10, sec. 2, it is provided that The Expropriation Act, so far as it relates to the taking of land, shall apply to Respondent. 10

The Expropriation Act, (R.S., C. 1927, ch. 64) defines "Land" in sec. 2 (d) as follows:—

"(d) "Land includes . . . all *real property*, messuages,
"lands, tenements and hereditaments of any tenure, and all *real*
"rights easements, servitudes and damages"

and by sec. (9) provides that in case of disagreement, the minister *shall* file plans and proceed to expropriate. Compensation is of course provided for in sections 23 and following. 20

It should also be noticed that sec. 17 of the Canadian National Railways Act, as amended contains the following wording in subsection (3):—

"Lands or *interests in lands* required by any company comprised
"in the Canadian National Railways, may be acquired for such
"company by the Company under the provisions of this Act."

The Term "Lands" is also defined in the Railway Act, sec. 2, subsection (15) as follows:—

"(15) 'Lands' means the lands, the acquiring, taking or using
"of which is authorized by this or the Special Act, and includes real
"property, messuages, lands, . . . and any easement, servi- 30
"tude, *right*, privilege or *interest in, to, upon, under over or in respect*
"of the same."

In the following cases, equipment such as that of Appellant involved in the present dispute when installed and maintained in the soil under statutory authority is held to constitute immoveable property, real property, a right or interest in land within the meaning of the above definitions, and accordingly Appellant submits, that the Respondent, if it wished to deprive Appellant of such equipment, the right to maintain it in its present location, and its interest in the land where it is so located, should have proceeded by way of Expropriation under the appropriate provisions of law, in which case 40 Appellant would be entitled to compensation.

The following cases are, it is submitted, conclusive on this point.

Consumers Gas Co. of Toronto v. Toronto (27 S.C.R. 453).

The Chief Justice at p. 457 says :—

“ I am of opinion that the gas pipes of the Appellants laid under
 “ the streets of the City were under this Act *real property* belonging
 “ to them, and as such liable to assessment. I regard the case of
 “ the *Metropolitan Ry. v. Fowler* (1893 A.C. 416), as conclusively
 “ showing that these pipes are not to be considered as chattels placed
 “ beneath the public streets and highways in the exercise of a mere
 10 “ easement, but being affixed to the land, are actual real property
 “ within the meaning of the interpretation clause. No matter in
 “ whom the fee in the soil of the surface of the streets was vested,
 “ so much of the subsoil as is occupied by the Appellant’s pipes,
 “ must be held to constitute part of the land, unless we are altogether
 “ to disregard the decision of the House of Lords in the case cited.”

Mr. Justice Gwynne at p. 459, says :—

“ Now this 13th section ” (of the Gas Company’s Charter which
 conferred similar powers to those conferred by Appellant’s Charter in the
 present case—vide p. 146, line 1 et seq)

20 “ operates, I think, clearly as a legislative grant to the company of
 “ so much of the land of the said streets and below the surface as it
 “ shall find necessary to take and hold under section (1) for the
 “ purposes of the Company and for the convenient use of the gas
 “ works, and when the places are designated by the corporation
 “ where the mains may be laid, and they are placed there, the land
 “ occupied by such mains is land taken and held by the company
 “ for the necessary purposes of the Company and the convenient use
 “ of the gas works, and is therefore liable to assessment as land
 “ . . . etc.”

30 This case was approved of by the Privy Council dealing with the same
 charter powers of the same company in a case dealing with the right of the
 gas company to compensation where its gas-mains were lowered by the
 City of Toronto, (Vide *City of Toronto vs. Consumers Gas Co.*—1916—
 2 A.C. 618). In this case Lord Shaw says at p. 621 :—

“ Once the pipes were laid by statutory authority, then they,
 “ in fact, became *partes soli*.”

and further, at p. 624 :—

40 “ The reasons have already been assigned for holding that the
 “ space occupied by the gas-mains and the gas-mains themselves of
 “ the Appellants *are of the nature of land in its ordinary sense*. It
 “ must, however, be added that in any view the definition of “ Land ”
 “ in the Municipal Act *unquestionably includes them*. For it can
 “ hardly be denied that the words “ *a right or interest in, and an*

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“ easement over land ” would embrace the right of the gas company
“ to have their pipes remain, and to have the interest and use of
“ them, and the space occupied by them undisturbed”

See also *Ottawa Gas Co. vs. City of Ottawa* (54 D.L.R. 623) where the Consumers Gas case was followed and the Gas Company was held entitled to recover the cost of repairing its gas mains from the City.

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In *Montreal Light, Heat & Power vs. Westmount* (1926 S.C.R. 515) it was held that the underground pipes, poles, wires and transformers of the Power Company were “ immoveables ” and were included within the meaning of the terms “ real property ” and “ real estate.”

10

* * *

It is, of course, hardly necessary to state that the Board has no jurisdiction in matters of Expropriation. So far as Respondent is concerned and depending upon the amount involved, this jurisdiction lies either in the Exchequer Court, or in the Superior Court, under the provisions of Section 17 of the Canadian National Railways Act as amended by 19-20 Geo. V., chap. 10.

The whole respectfully submitted.

Montreal, September 14th, 1931.

BROWN, MONTGOMERY & McMICHAEL,
Attorneys for Appellants.

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IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

30

BETWEEN

THE MONTREAL LIGHT, HEAT & POWER
CONSOLIDATED - - - - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

PART I.—STATEMENT OF FACTS.

This is an appeal by leave granted by the Honourable Mr. Justice Rinfret from Order No. 45427 of the Board of Railway Commissioners for

Canada, hereinafter called The Board, dated 9th. September 1930 in so far as the said Order directs the appellants to move such of their utilities as may be affected by the construction of a subway at St. Antoine Street, Montreal, as and when required to do so by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said appellants, or in any event to make the said Order ex parte and without notice to the said appellants.

10 St. Antoine Street is a highway extending in an Easterly and Westerly direction through the Southerly section of the City of Montreal as shown in part on the plan YIA 31.10.4 filed by the respondents with their application to the Board for authority to construct a subway at the said street. There was no such subway in existence at the said street at the date of the said Order.

At the date of the said Order the appellants had certain utilities located upon, over and under the said highway.

For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal Prior to the War the Grand Trunk Railway Company, in conjunction with 20 the City of Montreal and The Board, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the railway company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War.

In the year 1927 the matter was again revived by The Board and on 27th. May 1927 a judgment of The Board was issued, shown at Record, 30 page 418.

The judgment in question provides that these matters be referred for a report to the Chief Engineer of The Board, who, by Order No. 39079, dated 27th. May 1927, was appointed and directed to make a full inquiry and report to The Board upon the whole situation of level crossings in Montreal, from Bonaventure Station West and from Moreau Street Station East, and to evolve a scheme for the consideration of The Board (Record, p. 425). No complete report covering the whole situation has yet been made by the said Chief Engineer, but he has made certain reports including one with regard to the subway in question herein.

40 A study of the whole Canadian National Railways situation in Montreal was undertaken by the Railway Company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the site on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before The Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by

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the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report and by Act of the Parliament of Canada chapter 12 of the Statutes of 1929, the Canadian National Railway Company was given power to construct and complete the works described in the schedule to the said Act at and in the vicinity of Montreal; and pursuant to the provisions of the said Act, the Governor-in-Council, by Order-in-Council P.C. 1197, dated 2nd. July, 1929, approved General Plan No. DC310-0, 0-63.1. (Record schedule 4). General Plans WIA 19.14.1 and WIA 19.15.1 dated 17th. January 1930, showing *inter alia* a crossing of the street in question herein by the respondents' tracks at a point where no such crossing previously existed from Victoria Bridge to the site of the tunnel terminal on Lagauchetiere Street, were, upon the application of the Railway Company and the recommendation of its Chief Engineer, approved by The Board by Order No. 44433 dated 13th. March 1930. 10

The said Order No. 44433 directed that detailed plans of individual grade separations be served upon the City of Montreal, and submitted for approval of The Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of The Board.

On 22nd. April 1930 in pursuance of the provisions of the said Order No. 44433, the respondents made a further application to The Board for approval of a detailed plan number YIA 31.10.4 for carrying its tracks across St. Antoine Street upon a grade separation by constructing a subway in St. Antoine Street, and for an Order directing the appellants and others to move such of their utilities as are affected by the construction of the subway, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by The Board. 20

The appellants were served with a copy of the last named application on or about 22nd. April 1930, and on 29th. April 1930 mailed their answer thereto to the Secretary of The Board, requesting a formal hearing of the said application. On 5th. May 1930 the respondents filed their reply to such answer. On the 9th. May 1930 the appellants filed a further answer to such application, again requesting a hearing thereon and on 19th May 1930 the appellants mailed a letter requesting that a date be fixed for hearing such application. 30

On 9th. September 1930, without granting any hearing, the Board made the above Order No. 45427.

PART II.—ERRORS IN THE ORDER APPEALED FROM.

The respondents submit that the Board had jurisdiction to make the order appealed from and that the same should be affirmed. 40

PART III.—ARGUMENT.

The subway referred to in the Order appealed from, and all things to be done in connection therewith, including procedure, were incidental to and

parts of a comprehensive scheme initiated by the Board, as appears from its Order and judgment of 27th. May 1927 for the protection, safety and convenience of the public, and approved by Parliament, and including, among other things, the elimination of passenger traffic from Bonaventure Station to Turcot and from Moreau Street Station Easterly, the diversion of such passenger traffic to lines skirting the City of Montreal at the North and converging at the present tunnel station at Lagauchetiere Street, the establishment of terminal facilities at the site of the said tunnel station, the construction of a viaduct and elevated railway between Inspector and Dalhousie Streets, and St. David's Lane and Nazareth Street to near Wellington Street, and thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets, including St. Antoine Street, and the providing of a grade separation by means of elevated or depressed or underground tracks, or streets, between St. Henri and Point St. Charles, the latter including, among other streets, d'Argenson Street.

The constitution and powers of the respondents are set forth in the Canadian National Railways Act, being chapter 172 of the Revised Statutes of Canada 1927, as amended by chapter 10 of the Statutes of Canada 1929, and under the said Act as amended the respondents had power to do the things mentioned in the preceding paragraph, upon securing approval of the Governor-in-Council, sanction as to location by the Minister of Railways and Canals, and authority by Parliament for the necessary expenditure or the guarantee of an issue of securities.

The Canadian National Montreal Terminals Act 1929, being chapter 12 of the Statutes of Canada 1929 was an Enabling Act, passed for the purpose of providing parliamentary authority for such expenditure and guarantee of securities, as applied to the scheme above referred to.

The powers and jurisdiction of the Board are set out and defined in The Railway Act, chapter 170 of the Revised Statutes of Canada 1927, and unless otherwise specified, the sections hereinafter referred to are sections of The Railway Act.

By s. 33, sub-s 1. the Board has 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 authorized 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. By sub-s 2 it may order and require any Company or person to do forthwith, or within or at any specified time, and in any manner to be 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 shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or fact. By sub-s 5 the Board's decision 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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continued.

Sec. 34 empowers the Board to make orders with respect to any matter, act or thing which by the Act is sanctioned, required to be done or prohibited, and generally for carrying the Act into effect and for exercising any jurisdiction conferred upon it.

Under sec. 35 the Board may, of its own motion, - - - inquire into, hear and determine any matter or thing, which under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.

By sec. 37 any power or authority vested in the Board may although not so expressed, be exercised from time to time, or at any time, as the occasion may require. 10

By sec. 256 in the case of a new highway crossing and by sec. 257 in the case of an existing highway crossing, the Board is authorized to make such orders as it deems expedient, as to the protection, safety and convenience of the public.

By sec. 259 the Board is authorized to 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, and it is submitted that it is immaterial, in view of the provisions above recited, whether the highway crossing is new or already in existence. 20

By sec. 39 (1) 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, re-constructed, 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, re-constructed, altered, installed, operated, used and maintained. Under sub-s 2, the Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, re-constructing, 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

If an order can be supported under sec. 39, it is unnecessary to consider whether it could also be supported under other sections of the Act. 40

Toronto Ry. Co. v. Toronto City—(1) (1920) A.C. 426, 437.

In view of the attitude taken by the appellants, they cannot be heard to say that they are not interested or affected by the order in question. The question whether or not they were benefited by the execution of the works in question is not material to the question of the jurisdiction of the Board.

They could competently be required to contribute to the cost of such works, and the propriety of requiring them to do so and the extent of the contribution ordered are not matters for review by the Court.

C.P.R. et al v. Toronto Transportation Commission et al and Toronto Transportation Commission v. C.N.R. et al—1930 A.C. 686.

In the order appealed from, the Board has exercised the jurisdiction given to it under sec. 39 in :

- 10 1. Ordering by whom, namely the appellants, the utilities should be moved. Such order is not only in accordance with jurisdiction, but also in accordance with common sense. It would obviously be foolish to authorize any party unfamiliar therewith to interfere with such utilities.
2. Directing when and within what time the removal of such utilities should be carried out, namely : as and when required to do so by the Chief Engineer, Operating Department, of the respondents.
3. By reserving all questions of costs, which would include consideration of payment of compensation and the proportion of such costs to be paid by all parties.

20 In the case above referred to in 1930 Appeal Cases, it is remarked, in connection with sec. 39, that the case was not "otherwise provided for in the Act," and the respondents submit that the same remark applies in this case.

The appellants are not the owners of land or of any interest in land which is subject to expropriation. In view of the provisions of the Canadian National Railways Act, as amended by chapter 10 of the Statutes of Canada 1929, the expropriation provisions of The Railway Act are not applicable to the respondents, and there is no provision in the said Acts for the expropriation of a highway or of any interest therein.

30 There are a number of sections of The Railway Act under which the party by whom work shall be done or costs shall be borne are expressly provided, such as sections 185, 251-(6) and 260, but there is nothing in the Act inconsistent with the applicability of the provisions of sec. 39 to the situation in question herein.

Apart from the foregoing it may be pointed out that if any compensation is payable to the appellants, the ascertainment and payment thereof are not pre-requisite to the immediate exercise by the Board of its jurisdiction under sec. 39, but merely matters which may be taken into consideration by the Board in finally apportioning the cost of the work, which has been reserved.

40 As to the contention that the order appealed from was made *ex parte* or without notice to the appellants, the respondents deny that it was made either *ex parte* or without notice to the appellants. The appellants were served with the respondents' application for the said order and had and took the opportunity of replying to the same.

Under the provisions of sec. 39, the Commissioners may sit at such times and conduct their proceedings in such manner as may seem to them

APPEAL
No. 4.

In the
Supreme
Court of
Canada.

No. 64.

Factum of
Canadian
National
Railways—
continued.

APPEAL
No. 4.

*In the
Supreme
Court of
Canada.*

No. 64.
Factum of
Canadian
National
Railways—
continued.

most convenient for the speedy despatch of business, and they may, subject to the provisions of the Act sit either together or separately, and either in private or in open Court.

The only exception to these provisions is that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open Court.

The application for the order in question was not a "complaint" within the meaning of sec. 19.

The Honourable Mr. Justice Rinfret in his reasons given in disposing of an application for leave to appeal in

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City of Montreal v. Canadian National Railways

on or about the 26th day of February 1931, says in part :

"A reference to section 33 of the Railway Act will, I think, show the true meaning of the word "complaint" in section 19.

Section 33 provides that :

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

- (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 direction, leave, sanction or approval, which by law it is authorized 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.

The application of the Canadian National Railway Company was not an application complaining of anything in the sense of subparagraph (a) of Section 33, but an application requesting the Board to give its approval to a plan and profile in the sense of subparagraph (b) of Section 33.

In point of law, therefore, it was not a complaint within the meaning of the provisions of section 19; but it was a case where the Commissioners were at liberty to sit at such times, either in private or in open court, and to conduct their proceedings in such manner as they deemed convenient."

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The respondents submit :

(1) That so far as the general jurisdiction of the Board is concerned, there is nothing in principle to distinguish this case from numerous other cases decided by the Judicial Committee of the Privy Council, and by this Court, in which such jurisdiction has been affirmed.

(2) That, while the practice and procedure of the Board have been correct, an appeal on a mere question of practice and procedure is not one which this Court will, under its established jurisprudence, entertain.

(3) That the appeal should, therefore, be dismissed with costs. Copies of The Railway Act and other relevant legislation will be furnished for use on the argument of this appeal.

APPEAL
No. 4.

*In the
Supreme
Court of
Canada.*

No. 64.
Factum of
Canadian
National
Railways—
continued.

10

A. FRASER,
of Counsel for the Respondents.

No. 65.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tuesday the 1st day of March, A.D. 1932.

Present : The Right Honourable F. A. ANGLIN, C.J.C., P.C.
The Right Honourable Mr. Justice DUFF, P.C.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice LAMONT.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway at St. Antoine Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

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BETWEEN

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

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

The Appeal of the above named appellant from Order No. 45410 of the Board of Railway Commissioners for Canada dated the 16th day of September, A.D. 1930, in the above matter, having come on to be heard

No. 65.
Formal
Judgment,
1st March
1932.

APPEAL
No. 4.

*In the
Supreme
Court of
Canada.*

No. 65.
Formal
Judgment,
1st March
1932—con-
tinued.

before this Court on the 26th and 27th days of October, in the year of our Lord one thousand nine hundred and thirty-one, constituted as above with the addition of the Honourable Mr. Justice Newcombe, C.M.G., since deceased, in the presence of Counsel as well for the appellant as for the respondent, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for Judgment, and the same coming on this day for Judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was dismissed, and that the said Order No. 45410 of the Board of Railway Commissioners for Canada should be and the same 10 was affirmed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said appellant should and do pay to the said respondent the costs incurred by the said respondent in this Court.

(Sgd.) J. F. SMELLIE,
Registrar.

No. 66.

No. 66.

Reasons for Judgment.

(a) ANGLIN C.J.C.

(b) RINFRET J. (concurring in by DUFF and LAMONT JJ.).

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(Same as No. 16 at p. 48.)

APPEAL No. 5.

*d'Argenson Street Subway.*In the Privy Council.

No. 61 of 1932.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

10 IN THE MATTER OF : The application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY

Respondent.

No. 67.

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Joint Statement of Facts.

APPEAL
No. 5.

PART I.—PLEADINGS.

No. 67.
Joint
Statement
of Facts.

1. D'Argenson street is a highway extending in a northerly and southerly direction through the south-westerly section of the City of Montreal, lying north of the limits of the City of Verdun, as shown on the plan YIE 31.51.4 filed by the Respondent with its application to the Board of Railway Commissioners for Canada, hereinabove referred to, a copy of which said plan is attached hereto and marked as Schedule No. 1.

30 2. The said d'Argenson street is crossed, near the southerly end thereof, by the tracks of the Respondent, the Canadian National Railways, upon a grade separation, the street passing under the tracks by means of a subway created by depressing the level of the street below the general level of the surrounding lands, and the railway tracks being carried over the street upon a bridge at an elevation above the general level of the surrounding lands.

3. The subway mentioned in paragraph 2 hereof was constructed prior to, and was in existence at the time when the Appellant the Montreal Tramways Company constructed through it its cable hereinafter described, and the said subway continues to exist as originally built, up to the present time, in the location shown upon the plan attached hereto as Schedule No. 1.

4. The Appellant, the Montreal Tramways Company, was incorporated by special Act of the Legislature of Quebec, 1 George V, (2nd session 1911) chap. 77, and amending Acts. By a special Act of the said Legislature of Quebec, 7 George V, (1916) chapter 60, sect. 28, a commission was created for the purposes of drawing up a contract between the City of Montreal and the Montreal Tramways Company. The said contract was duly executed before Mtre Jean Beaudoin of the City of Montreal, on the 25th of January 1916, and was duly ratified and confirmed by another special Act of the Legislature of Quebec, 8 George V, (1918) chap. 84, section 75. A printed copy of the text of the said contract is annexed to the said Act 8 George V (1918) chap. 84, as it appears in the statutes of Quebec for the year 1918. A printed copy of the said contract and of the sections of the said Act, as amended, relevant to this appeal, are set forth in the Schedule attached hereto as Schedule No. 2.

5. The Appellant, the Montreal Tramways Commission was created by contract passed between the City of Montreal and the Montreal Tramways Company, on the 25th day of January, 1918, before Mtre Jean Beaudoin, Notary Public for the Province of Quebec, as ratified and confirmed by an Act of the Legislature of Quebec, 8 George V, chapter 84, section 75, a copy of which is filed herein as Schedule No. 2, with the powers of supervision, regulation and control therein set out.

6. The Appellant, the Montreal Tramways Company, pursuant to its powers under its Acts of Incorporation and its franchises referred to in paragraph 4 hereof, and with the legal consent of the City of Montreal, constructed and still owns, and operates at d'Argenson street, one 500,000 circular mills copper cable, with double braid weatherproof insulation, passing through the existing subway described in paragraph 2 hereof, which was installed and put into service on April 27th, 1927, and is carried on thirty foot wooden poles, as shown on plan 2-G-716, dated May 19th, 1931, attached hereto as Schedule No. 3.

7. This cable was laid for the purpose of equalizing the track voltages on Centre and Wellington streets, and is connected to the rails of the Montreal Tramways Company, at the intersection of Wellington and Butler streets. It runs northwards via Butler street, through the existing subway to d'Argenson Street, where it is connected to the rails south of Centre street, and it is necessary for rendering tramway service to the public in the said territory.

8. (a) For many years, the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War, the Grand Trunk Railway Company, in

conjunction with the City of Montreal and the Board of Railway Commissioners for Canada, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the Railway Company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War.

APPEAL
No. 5.
—
No. 67.
Joint
Statement
of Facts—
continued.

10 (b) In the year 1927, this matter was again revived by the Board, and on the 27th day of May, 1927, a judgment of the Board was issued, which is reported in the Board's Judgments, Volume 17, page 49, and a copy of the said judgment is attached hereto as Schedule No. 4.

(c) The judgment in question provides that these matters be referred for a report to the Chief Engineer of the Board, who, by Order No. 39079, dated the 27th day of May, 1927, was appointed and directed to make a full inquiry and report to the Board upon the whole situation of level crossings in Montreal, from Bonaventure Station west and from Moreau Station east, and to evolve a scheme for the consideration of the Board. A copy of the said Order No. 39079 is attached hereto as Schedule No. 5. No report
20 covering the whole situation of level crossings in Montreal on the Canadian National Railways from Bonaventure Station west and from Moreau Street Station east, as required by the Board, was ever made to the Board by its Chief Engineer.

9. (a) A study of the whole Canadian National Railways situation in Montreal was undertaken by the Railway Company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetière Street was decided on for a passenger station. Up to that time, the use of the station on Lagauchetière Street for
30 a passenger station had not been contemplated in the proceedings before the Board. The services of Mr. Frederick R. Palmer, an eminent British Engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report, and by Act of the Parliament of Canada 19-20 Geo. V, c. 12 (assented to June 14th, 1929), the Canadian National Railway Company was given power to construct and complete the works described in the Schedule to the Act, at and in the vicinity of Montreal; and, pursuant to the provisions of the said Act, the Governor in Council, by Order in Council, P. C. 1197, dated July 2nd, 1929, approved General Plan No. DC310-0.0-63.1. A copy of
40 the said plan is attached hereto as Schedule No. 6.

(b) A general plan No. WIE 19.4.2, dated October 10th, 1929, showing inter alia, a reconstruction of existing grade separation at d'Argenson Street, was upon the application of the Railway Company and the recommendation of its Chief Engineer, approved by Order of the Board No. 44425, dated March 10th, 1930. A copy of the application of the Railway Company is attached hereto as Schedule No. 7.

APPEAL
No. 5.
—
No. 67.
Joint
Statement
of Facts—
continued.

10. The said Order No. 44425 directed that detail plans of individual grade separations be served on the City of Montreal and submitted for the approval of the Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of the Board. A copy of the said Order No. 44425 is attached hereto as Schedule No. 8.

11. On the 24th day of April, 1930, in the pursuance of the provisions of the said Order No. 44425, the Respondent made a further application to the Board of Railway Commissioners for Canada for approval of a detailed plan for the reconstruction of the subway at d'Argenson Street, in accordance with a plan bearing number YIE 31.51.4, filed herein, as Schedule No. 1, and for an Order directing the Appellants and others, to move such of their utilities as are affected by the reconstruction of the said subway, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by the Board. A copy of the application dated April 24th, 1930, as well as a copy of the plan, was served upon the City of Montreal, the Appellants, the Montreal Tramways Company and the Montreal Tramways Commission, the Bell Telephone Company of Canada, and the Montreal Light Heat & Power Consolidated. A copy of the said application is attached hereto as Schedule No. 9.

12. The reconstruction of the said subway in the manner provided for in the said plan appearing as Schedule No. 1 hereto, involves the lengthening of the subway in northerly and southerly directions along the line of d'Argenson Street, in order that the Respondent's right of way and bridge may be widened to permit of two additional tracks to be constructed in the future, the relocating of the westerly wall of the subway at a distance of approximately ten feet easterly from its present location, and the relocation of the easterly wall of the said subway at a distance of approximately 28 feet east of its present location—the whole as indicated in red on the plan attached hereto as Schedule No. 1.

13. It is not contended that the reconstruction of the said subway will in any way confer any benefit or advantage to the Appellant the Montreal Tramways Company or to its plant, and the said Appellant has no interest in the promotion thereof; but on the contrary, the said works will injuriously affect the plant of the said Appellant as hereinafter set forth.

14. If the said plan attached hereto as Schedule No. 1 is adhered to by the Respondent, and the works provided for therein are constructed, the two poles marked *A* and *B* in red on the said plan filed herein as Schedule No. 3, will have to be removed and reset approximately at points marked *C* and *D* in blue on the said plan; the cable will have to be restrung on the relocated poles, and supported by proper hangers and fastenings on the underside of the new viaduct, means will have to be taken adequately to protect the cable during the construction of the viaduct, and during the operations of displacing the cable and relocating it to its final position.

15. The Appellant, the Montreal Tramways Company, was served with a copy of the Respondent's said application to the Board of Railway

Commissioners for Canada, appearing as Schedule No. 9 hereto, on the 25th day of April, 1930, and, on the 26th day of April, 1930, mailed its Answer thereto to the Secretary of the Board of Railway Commissioners for Canada, requesting a formal hearing of the said application. A copy of said Answer is attached hereto as Schedule No. 10.

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No. 5.
—
No. 67.
Joint
Statement
of Facts—
continued.

16. On the 27th of April, 1930, the Appellant, the Montreal Tramways Company, filed a further Answer to the Respondent's said Application. A copy of the said further Answer is attached hereto as Schedule No. 11.

10 17. On May the 2nd, 1930, the Appellant, the Montreal Tramways Company, made a further answer to the Respondent's said Application, requesting that it be set down for hearing at Montreal. A copy of the said further answer is attached hereto as Schedule No. 12.

18. No further proceedings were served or taken by either of the parties hereto, and on the 16th day of September, 1930, without notice to the Appellants and without granting any hearing as requested in the said Appellant's Answer, the Board made an Order bearing No. 45410 granting the Respondent's said Application and directing the Appellants and others 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 Respondent. A copy of said Order is attached hereto as Schedule No. 13.

19. On the 12th day of June, 1931, the Appellants launched an application, returnable on the 18th day of June, 1931, before the presiding Judge of the Supreme Court of Canada, in Chambers, for leave to intervene in the said Supreme Court of Canada on the appeal of the Bell Telephone Company of Canada from the said Order No. 45427 of the Board of Railway Commissioners for Canada, in so far as the said Order directed the Appellants to move such of their utilities as may be affected by the construction of the said subway as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that as a matter of law, the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order, in so far as it directs the Appellants to move their utilities aforesaid.

20. The said application for leave to intervene came for hearing on the date aforesaid before the Honourable Mr. Justice L. A. Cannon, who granted leave to appeal by an Order dated the 19th day of June, 1931, in the following terms;

40 " Upon the application made by Counsel for the Appellant on the 18th day of June, 1931, in the presence of Counsel for the Respondents for leave to intervene in the appeal of the Bell Telephone Company against Order No. 45410 of the Board of Railway Commissioners of Canada bearing date the 16th day of September, 1930, upon hearing read the notice of motion and the affidavit of Paul Seurot and the exhibit therein referred to filed, and upon

APPEAL
No. 5.

No. 67.
Joint
Statement
of Facts—
continued.

hearing what was alleged by Counsel aforesaid, and judgment upon the motion having been reserved until this day.

IT IS ORDERED that under the special circumstances of the case the time within which the said Appellant may apply for leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada, on a question of jurisdiction only, be and the same is hereby extended until this day.

AND IT IS FURTHER ORDERED that upon giving the security required by sub-section 5 of section 52 of the Railway Act within ten days from the making of this Order the Appellant be, and it is hereby given leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada upon the question of jurisdiction only. 10

A copy of the said Order is attached hereto as Schedule No. 14.

21. A motion to quash the appeals of the Appellants the Montreal Tramways Company and the Montreal Tramways Commission was made by the Respondent and was heard by the Supreme Court of Canada on the 6th of October, 1931, no order being made by the said Supreme Court of Canada other than to grant leave to the Appellants to serve short notice of a new application for leave to appeal. 20

22. An application for leave to appeal to the Supreme Court of Canada from the said Order No. 45410 was made by the Appellants the Montreal Tramways Company and the Montreal Tramways Commission on the 7th day of October, 1931, before Hon. Mr. Justice Newcombe who granted said application by an Order dated the 7th day of October 1931 in the following terms :

“ UPON the application made this day by Counsel for the Appellants in presence of Counsel for the Respondent, for an Order extending the time to apply for an Order for leave to appeal against Order No. 45410 of the Board of Railway Commissioners for Canada, bearing date the 16th day of September, 1930, and for leave to appeal from the said Order, upon hearing read the notice of motion and the affidavit of Paul Seurot and the exhibit therein referred to and the joint exhibit of Thomas Vien and Frederic A. Beique, filed, and upon hearing what was alleged by Counsel aforesaid ; 30

“ IT IS ORDERED that the time within which the said Appellants may apply for leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada on a question of jurisdiction only be and the same is hereby extended until this day ; 40

“ AND IT IS FURTHER ORDERED that upon paying into Court, as security for costs, the sum of \$250.00 as required by sub-section 5 of section 52 of the Railway Act, within ten days from the

“ making of this Order, the Appellants be and they are hereby given
“ leave to appeal to this Court from the said Order of the Board of
“ Railway Commissioners for Canada, upon the question of juris-
“ diction only.

APPEAL
No. 5.
No. 67.
Joint
Statement
of Facts—
continued.

“ AND IT IS FURTHER ORDERED that there shall be no
“ costs of this application.”

A copy of the said Order is attached hereto as Schedule No. 15a.

No. 68.

Application of Respondent to Board of Railway Commissioners for Canada
for approval of Plan YIE 31.51.4, 24th April 1930.

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(Same as No. 2 at p. 7.)

*Before
the Board
of Railway
Commis-
sioners for
Canada.*
No. 68.

No. 69.

Answer of Appellant Montreal Tramways Company requesting a hearing.

III. SCHEDULE No. 10.

April 26, 1930.

A. D. Cartwright, Esq.,
Secretary,
Board of Railway Commissioners,
Ottawa.

No. 69.
Answer of
Appellant
Montreal
Tramways
Company
requesting a
hearing,
26th April
1930.

20

Re : Divers applications of the C. N. R.
re : street crossings, etc.

Dear Sir,

We have appeared in all these petitions made by the C. N. R. in the
above matters, and have received instructions from the Montreal Tramways
Company to ask to be heard in each one of those applications, and now ask
you to kindly take note of this request in connection with future applications.

Yours very truly,

PERRON, VALLEE & PERRON
per J. L. P.

APPEAL
No. 5.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 70.
Further
Answer of
Appellant
Montreal
Tramways
Company,
27th April
1930.

No. 70.

Further Answer of Appellant Montreal Tramways Company.

IV. SCHEDULE No. 11.

April 27th, 1930.

A. D. Cartwright, Esq.,
Secretary,
Board of Railway Commissioners,
Ottawa, Ont.

Re : Application C. N. R. d'Argenson St.,
and Montreal Tramways Company.

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Dear Sir,

On behalf of the Montreal Tramways Company, we beg to be heard on
the above matter.

Yours truly,

PERRON, VALLEE & PERRON
per J. L. P.

No. 71.

Further
Answer of
Appellant
Montreal
Tramways
Company,
2nd May
1930.

No. 71.

Further Answer of Appellant Montreal Tramways Company.

V. SCHEDULE No. 12.

May 2nd, 1930. 20

A. D. Cartwright, Esq.,
Secretary,
Board of Railway Commissioners,
Ottawa.

Re : C. N. R. TERMINAL DEVELOPMENTS.

Dear Sir,

May I suggest that the hearing in the above matter be fixed in
Montreal.

Yours very truly,

PERRON, VALLEE & PERRON 30
per J. L. P.

No. 72.

No. 72.

**Order of Board of Railway Commissioners for Canada No. 45410 directing
Appellants to move their utilities, 16th September 1930.**

(Same as No. 6 at p. 10.)

No. 73.

Order of Cannon J., granting Montreal Tramways Company leave to appeal to the Supreme Court of Canada.

APPEAL
No. 5.

In the
Supreme
Court of
Canada.

VI. SCHEDULE No. 14.

IN THE SUPREME COURT OF CANADA.

On Appeal from the Board of Railway Commissioners for Canada, Friday, the 19th day of June 1931.

No. 73.
Order of
Cannon J.,
granting
Montreal
Tramways
Company
leave to
appeal to
the Supreme
Court of
Canada,
19th June
1931.

Present : THE HONOURABLE MR. JUSTICE CANNON.

10 IN THE MATTER OF the application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

MONTREAL TRAMWAYS COMPANY - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

20 UPON the application made by Counsel for the appellant on the 18th day of June 1931 in the presence of Counsel for the Respondents for leave to intervene in the appeal of the Bell Telephone Company of Canada against Order No. 45410 of the Board of Railway Commissioners of Canada bearing date the 16th day of September 1930, upon hearing read the notice of motion and the affidavit of Paul Seurot and the exhibit therein referred to filed, and upon hearing what was alleged by Counsel aforesaid, and judgment upon the motion having been reserved until this day ;

IT IS ORDERED that under the special circumstances of the case the time within which the said appellant may apply for leave to appeal to this Court from the said Order of the Board of Railway Commissioners for 30 Canada on a question of jurisdiction only be and the same is hereby extended until this day.

AND IT IS FURTHER ORDERED that upon giving the security required by sub-section 5 of section 52 of the Railways Act within ten days from the making of this Order the appellant be and it is hereby given leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada upon the question of jurisdiction only.

L. A. CANNON, J.

No. 74.

Order of Cannon J., granting Montreal Tramways Commission leave to appeal to the Supreme Court of Canada.

VII. SCHEDULE No. 15.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Friday, the 19th day of June 1931.

Present : The Honourable Mr. Justice CANNON.

IN THE MATTER OF The application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

MONTREAL TRAMWAYS COMMISSION - - Appellant

AND

THE CANADIAN NATIONAL RAILWAYS - - Respondents.

UPON the application made by Counsel for the appellant on the 18th day of June 1931 in the presence of Counsel for the Respondents for leave to intervene in the appeal of the Bell Telephone Company of Canada against Order No. 45410 of the Board of Railway Commissioners of Canada bearing date the 16th day of September 1930, upon hearing read the notice of motion and the affidavit of Paul Seurot and the exhibit therein referred to filed, and upon hearing what was alleged by Counsel aforesaid, and judgment upon the motion having been reserved until this day;

IT IS ORDERED that under the special circumstances of the case the time within which the said appellant may apply for leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada on a question of jurisdiction only be and the same is hereby extended until this day.

AND IT IS FURTHER ORDERED that upon giving the security required by sub-section 5 of section 52 of the Railway Act within ten days from the making of this Order the appellant be and it is hereby given leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada upon the question of jurisdiction only.

L. A. CANNON, J.

APPEAL
No. 5.
—
In the
Supreme
Court of
Canada.
—
No. 74.
Order of
Cannon J.,
granting
Montreal
Tramways
Commission
leave to
appeal to
the Supreme
Court of
Canada,
19th June
1931.

No. 75.

Order approving security for costs re Montreal Tramways Company's appeal.

VIII. SCHEDULE No. 16.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tuesday, the 30th day of June, A.D. 1931.

Present : THE REGISTRAR IN CHAMBERS.

10 IN THE MATTER OF The application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

MONTREAL TRAMWAYS COMPANY - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - - *Respondents.*

20 UPON the application of the above named appellant made in presence of Counsel for the Respondent, and upon hearing what was alleged by Counsel for all parties,

IT IS ORDERED that the sum of \$250.00 paid into the Bank of Montreal, as appears by the receipt of the said Bank, dated the 29th day of June, A.D. 1931, duly filed as security that the appellant will effectually prosecute its appeal from the Order of the Board of Railway Commissioners for Canada, dated the 16th day of September, A.D. 1930, and will pay such costs and damages as may be awarded against it by this Court, be and the same is hereby allowed as good and sufficient security.

30 AND IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

J. F. SMELLIE,
Registrar.

APPEAL
No. 5.

—
*In the
Supreme
Court of
Canada.*

—
No. 75.
Order
approving
security for
costs re
Montreal
Tramways
Company's
appeal,
30th June
1931.

No. 76.

Order approving security for costs re Montreal Tramways Commission's appeal.

APPEAL
No. 5.
—
*In the
Supreme
Court of
Canada.*
—

IX. SCHEDULE No. 17.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

Tuesday, the 30th day of June, A.D. 1931.

Present: THE REGISTRAR IN CHAMBERS.

No. 76.
Order
approving
security for
costs re
Montreal
Tramways
Commis-
sion's
appeal,
30th June
1931.

IN THE MATTER OF The application of the Canadian National Railways
for an Order under section 256 of the Railway Act for authority to
construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan
YIE 31.51.4, dated April 15th, 1930, on file with the Board under
File No. 9437.319.7. 10

BETWEEN

MONTREAL TRAMWAYS COMMISSION - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

UPON the application of the above named appellant made in presence
of Counsel for the Respondent, and upon hearing what was alleged by
Counsel for all parties, 20

IT IS ORDERED that the sum of \$250.00 paid into the Bank of
Montreal, as appears by the receipt of the said Bank, dated the 29th day
of June, A.D. 1931, duly filed as security that the appellant will effectually
prosecute its appeal from the Order of the Board of Railway Commissioners
for Canada, dated the 16th day of September, A.D. 1930, and will pay such
costs and damages as may be awarded against it by this Court, be and the
same is hereby allowed as good and sufficient security.

AND IT IS FURTHER ORDERED that the costs of this application
be costs in the cause. 30

J. F. SMELLIE,
Registrar.



No. 77.

Notice by Montreal Tramways Company setting down appeal for hearing.

X. SCHEDULE No. 18.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

10 IN THE MATTER OF The application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

APPEAL
No. 5.
—
*In the
Supreme
Court of
Canada.*
—
No. 77.
Notice by
Montreal
Tramways
Company
setting down
appeal for
hearing,
4th July
1931.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAY COM-
PANY - - - - - *Respondent.*

20 TAKE NOTICE that this appeal has been set down for hearing at the Sittings of this Court to be holden at the City of Ottawa on the 6th day of October, 1931.

OTTAWA, July 4th, 1931.

BELCOURT, LEDUC & GENEST,
Agents for appellant's solicitors.

To GEO. F. MACDONNELL, K.C.,
Agent for Respondents' solicitors.



APPEAL
No. 5.

In the
Supreme
Court of
Canada.

No. 78.
Notice by
Montreal
Tramways
Commission
setting down
appeal for
hearing,
4th July
1931.

No. 78.

Notice by Montreal Tramways Commission setting down appeal for hearing.

XI. SCHEDULE No. 19.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER OF The application of the Canadian National Railways
for an Order under section 256 of the Railway Act for authority to
construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan 10
YIE 31.51.4, dated April 15th, 1930, on file with the Board under
File No. 9437.319.7.

BETWEEN

THE MONTREAL TRAMWAYS COMMISSION - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAY COM-
PANY - - - - - *Respondent.*

TAKE NOTICE that this appeal has been set down for hearing at
the Sittings of this Court to be holden at the City of Ottawa on the
6th day of October, 1931. 20

OTTAWA, July 4th, 1931.

BELCOURT, LEDUC & GENEST,
Agents for appellant's solicitors.

To GEO. F. MACDONNELL, K.C.,
Agent for Respondents' solicitors.



No. 79.

Order granting Appellants leave to consolidate appeals, print and file one joint case and factum.

APPEAL
No. 5.
—
*In the
Supreme
Court of
Canada.*
—

XII. SCHEDULE No. 20.

IN THE SUPREME COURT OF CANADA.

Tuesday, the 8th of September, 1931.

Before : THE REGISTRAR IN CHAMBERS.

No. 79.
Order
granting
Appellants
leave to
consolidate
appeals,
print and
file one
joint case
and factum,
8th Sept-
ember 1931.

10 IN THE MATTER OF the application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

MONTREAL TRAMWAYS COMMISSION - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents,*

AND BETWEEN

20 MONTREAL TRAMWAYS COMPANY - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - - *Respondents.*

UPON the application of Counsel for the above appellants made in presence of Counsel for the above respondents, upon hearing read the affidavits of Gustave Comte and S. F. MacDonnell, filed, and upon hearing what was alleged by Counsel aforesaid ;

30 IT IS ORDERED that the two above appeals be consolidated for the purposes of hearing, that the appellants herein have leave to file a joint Case, that the appellants file one joint Factum and that the respondents do file one Factum only, reserving however to the said respondents any right they may have to move to quash the two above appeals for want of jurisdiction ;

AND IT IS FURTHER ordered that the costs of and incidental to this application be costs in the cause.

J. F. SMELLIE,
Registrar.

APPEAL
No. 5.

*In the
Supreme
Court of
Canada.*

No. 80.
Order
dispensing
with print-
ing of
Schedules 1,
2, 3 and 6,
18th Sept-
ember 1931.

No. 80.

Order dispensing with printing of Schedules 1, 2, 3 and 6.

XIII. SCHEDULE No. 21.

IN THE SUPREME COURT OF CANADA.

Before the Registrar in Chambers.

Friday, the 18th day of September, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER of the Application of The Canadian National Railways
for an Order under Section 256 of the Railway Act, for authority to 10
construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan
No. YIE 31.51.4, dated April 15th, 1930, on file with the Board under
File No. 9437.319.7.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondents.*

UPON the application of Counsel on behalf of the above named 20
Appellants, in the presence of Counsel on behalf of the above named
Respondents, for an Order dispensing with the printing of certain Exhibits
in the Case in Appeal, and upon hearing what was alleged by Counsel
aforesaid.

IT IS ORDERED that the printing in the Case in Appeal of the
Plans referred to in the Statement of Facts as Schedules Numbers 1, 3
and 6, forming part of the Case in Appeal herein, be and the same is hereby
dispensed with, counsel for the Appellants undertaking to provide seven
copies of each if at any time requested to do so by the Court.

AND IT IS FURTHER ORDERED that the printing of Exhibit 2 30
in the Appeal Case be dispensed with, and that seven copies thereof be
provided by the Appellants for the use of the Court.

AND IT IS FURTHER ORDERED that the costs of this application
be costs in the Appeal.

(Sgd.) J. F. SMELLIE.

Registrar.

No. 81.

Order of Newcombe J.

SCHEDULE No. 15A.

IN THE SUPREME COURT OF CANADA.

Wednesday, the 7th day of October, A.D. 1931.

Present: The Honourable Mr. JUSTICE NEWCOMBE, C.M.G.

On Appeal from the Board of Railway Commissioners for Canada.

10 IN THE MATTER OF the Application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General plan YIE 31.51.4 dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY
THE MONTREAL TRAMWAYS COMMISSION - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY - *Respondent.*

20 UPON the application made this day by Counsel for the Appellants in presence of Counsel for the Respondent, for an order extending the time to apply for an order for leave to appeal against Order No. 45410 of the Board of Railway Commissioners for Canada, bearing date the 16th day of September, 1930, and for leave to appeal from the said order, upon hearing read the notice of motion and the affidavit of Paul Seurot and the exhibit therein referred to and the joint exhibit of Thomas Vien and Frederic A. Beique, filed, and upon hearing what was alleged by Counsel aforesaid,

30 IT IS ORDERED that the time within which the said appellants may apply for leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada on a question of jurisdiction only be and the same is hereby extended until this day;

AND IT IS FURTHER ORDERED that upon paying into Court, as security for costs, the sum of \$250.00 as required by subsection 5 of section 52 of the Railway Act, within ten days from the making of this Order, the appellants be and they are hereby given leave to appeal to this Court from said order of the Board of Railway Commissioners for Canada, upon the question of jurisdiction only.

AND IT IS FURTHER ORDERED that there shall be no costs of this application.

40

E. L. NEWCOMBE.

APPEAL
No. 5.

In the
Supreme
Court of
Canada.

No. 81.
Order of
Newcombe
J.,
7th October
1931.

APPEAL
No. 5.

*In the
Supreme
Court of
Canada.*

No. 82.
Order
approving
security for
costs,
9th October
1931.

No. 82.

Order approving security for costs.

SCHEDULE No. 17A.

IN THE SUPREME COURT OF CANADA.

Friday, the 9th day of October A.D. 1931.

Present : THE REGISTRAR IN CHAMBERS.

On Appeal from the Board of Railway Commissioners for Canada.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General plan YIE 31.51.4 dated April 15th, 1930, on file with the Board under File No. 9437.319.7. 10

BETWEEN

THE MONTREAL TRAMWAYS COMPANY
THE MONTREAL TRAMWAYS COMMISSION - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

UPON the application made by the above named appellants in presence of Counsel for the above named Respondent, upon hearing read the certificate of the Bank of Montreal, bearing No. 618 and upon hearing what was alleged by Counsel for all parties. 20

IT IS ORDERED that the sum of \$250.00 paid into the Bank of Montreal as appears by the said certificate dated the 7th day of October, A.D. 1931 filed as security that the appellants will effectually prosecute their appeal from the Order of the Board of Railway Commissioners for Canada, dated the 16th day of September 1930, and will pay such costs and damages as may be awarded against them by this Court, be and the same is hereby allowed as good and sufficient security;

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the cause. 30

J. F. SMELLIE,
Registrar.

No. 83.

Certificate of settlement of Appeal Case.

II. SCHEDULE No. 22.

CERTIFICATE OF SETTLEMENT OF CASE.

I, the undersigned, Counsel to the Board of Railway Commissioners for Canada, do hereby certify that the foregoing typewritten document from page 1 to page 38 inclusive, together with copies of the Schedules therein referred to and set forth in the Index thereto, is the case settled by me by direction of Hon. C. P. Fullerton, Chief Commissioner of the said Board of Railway Commissioners for Canada, dated the 13th day of October, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in a certain case pending before the Board of Railway Commissioners for Canada, In the matter of the Application of The Canadian National Railways for an Order, under Section 256 of the Railway Act, for authority to construct a subway on d'Argenson Street, in the City of Montreal, as shown on General Plan No. YIE 31.51.4 dated April 15th, 1930, on file with the Board under file No. 9437.319.7, between the Montreal Tramways Company and the Montreal Tramways Commission, Appellants, and the Canadian National Railways, Respondents.

AND I do further certify that I have applied to the Commissioners and to the Secretary of the said Board of Railway Commissioners for the Board's opinions and reasons for making the Order appealed from in this case, and that reasons have been delivered by none of the said Commissioners in response to my said application; no such reasons having been given in respect of the making of the said Order.

IN testimony whereof I have hereunto subscribed my name this 13th day of October, 1931.

(Sgd.) A. GEORGE BLAIR.

APPEAL
No. 5.

—
*In the
Supreme
Court of
Canada.*

—
No. 83.

Certificate
of settle-
ment of
Appeal Case,
13th Octo-
ber 1931.

APPEAL
No. 5.

In the
Supreme
Court of
Canada.

No. 84.
Notice of
setting down
for hearing,
14th Octo-
ber 1931.

No. 84.

Notice of setting down for hearing.

SCHEDULE No. 19A.

IN THE SUPREME COURT OF CANADA.

On Appeal from the Board of Railway Commissioners for Canada.

IN THE MATTER OF the Application of the Canadian National Rail-
ways for an Order under section 256 of the Railway Act for authority
to construct a subway at d'Argenson Street, in the City of Montreal,
between Point St. Charles and St. Henri, as shown on General Plan
YIE 31.51.4 dated April 15th, 1930, on file with the Board under File 10
No. 9437.319.7.

BETWEEN .

THE MONTREAL TRAMWAYS COMPANY
THE MONTREAL TRAMWAYS COMMISSION - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

TAKE NOTICE that this Appeal has been set down for hearing at
the present (October) sittings of this Court.

OTTAWA, October 14th, 1931.

BELCOURT, LEDUC & GENEST, 20
Agents for Appellants' Solicitors.

To: GEO. F. MACDONNELL, K.C.,
Fraser Bldg., Ottawa,
Agent for Respondent's Solicitor.



No. 85.

Order dispensing with printing of Exhibits 1, 2, 3 and 6.

SCHEDULE No. 21A.

IN THE SUPREME COURT OF CANADA.

Before the Registrar in Chambers.

Wednesday, the 14th day of October, 1931.

On Appeal from the Board of Railway Commissioners for Canada.

10 IN THE MATTER OF the Application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4 dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

20 UPON the application of Counsel on behalf of the above named Appellants, in the presence of Counsel on behalf of the above named Respondents, for an Order dispensing with the printing of certain Exhibits in the Case in Appeal, and upon hearing what was alleged by Counsel aforesaid.

IT IS ORDERED that the printing in the Case in Appeal of the Plans referred to in the Statement of Facts as Schedules Numbers 1, 3 and 6, forming part of the Case in Appeal herein, be and the same is hereby dispensed with, counsel for the Appellants undertaking to provide seven copies of each if at any time requested to do so by the Court.

30 AND IT IS FURTHER ORDERED that the printing of Exhibit 2 in the Appeal Case be dispensed with, and that seven copies thereof be provided by the Appellants for the use of the Court.

AND IT IS FURTHER ORDERED that the costs of this application be costs in the Appeal.

(Sgd.) J. F. SMELLIE.

APPEAL
No. 5.

*In the
Supreme
Court of
Canada.*

No. 85.
Order
dispensing
with print-
ing of
Exhibits 1,
2, 3 and 6,
14th Octo-
ber 1931.

APPEAL
No. 5.

*In the
Supreme
Court of
Canada.*

No. 86.
Certificate
of Secretary
of Board of
Railway
Commis-
sioners for
Canada,
20th Octo-
ber 1931.

No. 86.

Certificate of Board of Railway Commissioners for Canada.

III.—SCHEDULE No. 23.

**CERTIFICATE OF SETTLEMENT OF CASE AND AS TO REASONS
FOR JUDGMENT.**

I, the undersigned, Secretary of the Board of Railway Commissioners for Canada, do hereby certify that the foregoing printed document from page 1 to page 39 inclusive, is the case settled by A. George Blair, K.C., Counsel for the Board of Railway Commissioners for Canada, by direction of Honourable C. P. Fullerton, Chief Commissioner of the said Board, dated the 13th day of October, 1931, pursuant to section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in appeal to the Supreme Court of Canada, in a certain case pending before the Board of Railway Commissioners for Canada; In the matter of the Application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan No. YIE 31.51.4 dated April 15th, 1930, on file with the Board under File No. 9437.319.7, between the Montreal Tramways Company and the Montreal Tramways Commission, appellants, and the Canadian National Railways, Respondents, and I do further certify that I have applied to the Commissioners of the said Board for their opinions and reasons for making the Order appealed from in this case, and that reasons have been delivered by none of the said Commissioners in response to my said application. 10

And I do further certify that no such reasons were delivered by any of the said Commissioners as appears from the Records of the said Board. 20

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Board of Railway Commissioners for Canada, this 20th day of October, 1931.

A. D. CARTWRIGHT, 30
Secretary,
Board of Railway Commissioners for Canada.

No. 87.

Factum of Montreal Tramways Company and Montreal Tramways Commission.

NOTE.—*The page references have been altered so as to agree with the Record.*

DOMINION OF CANADA.

IN THE SUPREME COURT OF CANADA.

(OTTAWA).

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

10 IN THE MATTER OF : The application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4 dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION - - *Appellants*

AND

20 THE CANADIAN NATIONAL RAILWAY COMPANY

Respondent.

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APPEAL
No. 5.

*In the
Supreme
Court of
Canada.*

No. 87.
Factum of
Montreal
Tramways
Company
and
Montreal
Tramways
Commis-
sion—con-
tinued.

This is an appeal under the provisions of section 52 sub-section (2) of the Railway Act, from Order No. 45410 of the Board of Railway Commissioners for Canada, dated the 16th September, 1930, authorizing the Canadian National Railway Company to reconstruct the existing subway at d'Argenson Street, in order that the Respondent's right-of-way and bridge may be widened to permit of two additional tracks leading from its main lines at Atwater avenue to a proposed joint interchange yard on the River St. Lawrence, directing the Appellants and others to move such of their utilities as may be affected by such construction, and reserving all questions of cost for further consideration by the Board. 10

Leave for this appeal was granted by Honourable Mr. Justice Cannon, on the 19th of June, 1931.

PART I.—THE FACTS.

Order No. 45410 was made by the Board without a hearing. Notwithstanding their requests to be heard (Record, pp. 185-6) the Appellants were not granted their day in Court. The only evidence on record consists of Plans filed in support of the Respondent's application and approved by the said Order. No opinions or reasons for making the said Order were delivered by any of the Commissioners. (Record, pp. 197 and 200.)

The Joint Appeal Case herein was settled by Counsel for the Board of Railway Commissioners, under direction from the Chief Commissioner. (Record, p. 197.) 20

At the request of the Respondent, the Case was settled so as to include references to proceedings taken before the Board in other files, in 1927, (Record, pp. 180-1) and a judgment and an Order made therein. (Record, pp. 418 and 425.)

These proceedings, to which the Appellants were not a party, were exclusively concerned with certain complaints then pending before the Board with respect to the elimination of level crossings from Bonaventure Station westward and from Moreau Street Station eastward. 30

There was already then, and there is today, at d'Argenson Street, a grade separation and therefore this crossing could not be involved in the proceedings just referred to. The application leading to the Order appealed from sought, and the said Order itself granted authority to reconstruct the existing subway, by enlarging the same, to make provisions for two additional tracks leading from the Respondent's main lines, at Atwater Avenue, to the proposed joint interchange yard, on the River St. Lawrence.

The Appellants objected to the inclusion, in the Stated Case, of any reference to these irrelevant proceedings and to the judgment and Order made therein. Their objections were overruled. 40

The Appellants are at a disadvantage as regards the statement of facts in the Stated Case, inasmuch as it does not include any evidence, none having been adduced before the Board, and it contains matters which are, in the opinion of the Appellants, foreign to this Appeal, the issue herein being exclusively limited to the validity of the said Order No. 45410, and to the powers of the Board in connection therewith.

The Appellants, laboring under this double disadvantage, respectfully submit the following as a brief outline of the facts relevant to the issue, based on the Appeal Case, so far as it goes, and on such documents and plans in the record as may help this Court to draw the inferences of facts which are necessary for the determination of this Appeal.

APPEAL
No. 5.

—
*In the
Supreme
Court of
Canada.*

I

On d'Argenson Street, in the City of Montreal, at and near the point where the Respondent is authorized by the Order appealed from to reconstruct the existing subway in order to permit of the widening the Respondent's right-of-way and bridge and the construction of two additional tracks, the Appellant the Montreal Tramways Company lawfully owns, maintains and operates one 500,000 circular mills copper cable, with double braid weather-proof insulation, passing through the existing subway, installed and put into service on April 27th, 1927, and carried on 30 foot wooden poles, as shown on Plan No. 2-G-716 (Schedule No. 3).

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This cable was laid for the purpose of equalizing the track voltages on Centre and Wellington streets, and is connected to the rails of the Montreal Tramways Company, at the intersection of Wellington and Butler streets. It runs northwards via Butler street, through the existing subway to d'Argenson Street, where it is connected to the rails south of Centre street, and it is necessary for rendering tramway service to the public in the said territory.

These utilities are attached to the ground for a permanency, are immovable by destination and are the exclusive property of the said Appellant.

Under its statutory, contractual and chartered rights (Record, p. 180, par. 4 and 5, and Schedule No. 2), the said Appellant lawfully uses the said street of the City as its right of way, and it has therein an interest in land and a perpetual immovable right of possession and usage which it cannot be compelled to give up, except for public utility, and in consideration of a just indemnity previously paid. (Civil Code P. Q. Art, 375, 377, 380, 381 and 407; 19 & 20 Geo. V, c. 12, ss 6 & 9; R.S.C. (1927), C. 175 s. 17, as amended by 19 & 20 Geo. V, c. 10, s. 2; R.S.C. (1927), c. 64 ss. 3 (f) & 9).

II

After the acquisition in 1917 of the Canadian Northern Railway and its subsidiaries (7 and 8 Geo. V, c. 24), and in 1919, of the Grand Trunk Pacific and the Grand Trunk System (9 and 10 Geo. V, c. 22; 10 and 11 Geo. V, c. 13) it became necessary to create the Canadian National Railway Co. (9 and 10 Geo. V, c. 13) and to entrust its directors with the management and operation of all these lines and of the Canadian Government Railways, with a view to merging them all into a unified system of more than 22,000 miles of railway, the largest in America.

One of the many problems which the new management immediately had to face was centred at Montreal where the lack of proper station yard and terminal facilities was very acute.

There were there and then and there are still three separate and distinct Canadian National Railway depots: the Bonaventure, Tunnel and Moreau

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Street Stations, having no connection with each other save by going miles around.

All these stations were obsolete. They had sufficed, more or less, for the particular lines which they had served theretofore, but they had all become inadequate for the purposes of the great National Railway System just created with Headquarters at Montreal, and for which more concentrated and modern passenger terminal and station facilities were urgently needed.

A study of the situation with a view to developing the most satisfactory plan was initiated. After some investigation, the Dominion Government sought advice from outside, and retained the services of Mr. Frederick R. Palmer, an eminent British Engineer, to review these terminal conditions and report thereon. (Record, p. 181, par. 9.) 10

Mr. Palmer studied various schemes which had been urged, and reported that, in his opinion, the site of the Tunnel Terminal was the most advantageous for the construction of the desired concentrated facilities.

Mr. Palmer's plan was adopted by the Government because it adequately provided for the Canadian National Railways' requirements, without closing the door to a possible unionizing of all the passenger traffic entering the City, should that be decided upon by the parties interested (House of Commons, Hansard (1929) pp. 2494 & s.) 20

Thereupon the Canadian National Montreal Terminals Act was passed (19 & 20 Geo. V, c. 12), enabling the Governor in Council to provide for the construction and completion by the Canadian National Railway Company of terminal, station and yard facilities etc., at Montreal, and also in respect of the said works, to guarantee the notes, obligations or bonds of the Company, in principal and interest, to an amount not exceeding fifty million dollars.

Pursuant to the provisions of the said Act, on the 2nd of July, 1929, His Excellency in Council (P.C. 1197) approved General Plan No. D.C. 310-0.0-63.1. (Schedule No. 6.) 30

It is provided in the said Act (Sections 6 and 9) that the works authorized were to be constructed upon the property owned or to be acquired or taken by His Majesty or the Respondent, according to expropriation plans and descriptions to be deposited under the Expropriation Act, which applies to the undertaking of the Respondent.

This General Plan (Schedule No. 5) is the equivalent and takes the place of the location plan which all Railway Companies are required to file with the Board, under section 167 of the Railway Act.

The provisions of the Railway Act relating to the location of lines of railways and the making and filing of plans and profiles, (other than highway and railway crossing plans), do not apply to the Respondent's undertaking generally, (19 & 20 Geo. V, c. 10, sec. 2) nor to the General Plan or Plans of the Canadian National Montreal Terminals, which are subject to the approval of the Governor in Council only. (19 and 20 Geo. V, c. 12, sec. 7.) 40

But the Company filed with the Board, plans and profiles of highway and railway crossings under Section 256 of the Railway Act.

On the 11th of February 1930, the Respondent made application to the Board under sections 256 and 257 of the Railway Act for the approval of a plan showing several street crossings in the City of Montreal, including the reconstruction of the existing subway at d'Argenson Street, where the Respondent proposed to widen its right-of-way and bridge and to construct two additional tracks leading from its main lines, at Atwater avenue, to a proposed joint interchange yard, on the River St. Lawrence. (Record, p. 436.)

10 On the 10th of March 1930, without a hearing, by its Order No. 44425, the Board granted the Respondent's application, subject to the provision that the Respondent serve copies of detailed plans on the City of Montreal. (Record, page 436, Schedule No. 8.)

Pursuant to the said Order, on the 24th of April, 1930 the Respondent filed with the Board detailed Plan No. YIE 31.51.4 showing the proposed reconstruction of the subway at d'Argenson Street (Schedule No. 1 copies filed), and made application for its approval (Record, page 7, Schedule No. 9).

Mr. Fraser, on behalf of the Respondent, concluded his application as follows :—

20 " I would be grateful if the Board would approve the present plan and in the Order approving it will direct that the various parties above mentioned move such of their utilities as are affected by the construction, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by the Board." (Record, p. 7, Schedule No. 9.)

Copies of this application and of the Plan therein referred to were served upon the Appellants who then heard for the first time of the Respondent's proposals, and of the extent to which their equipment would
30 be interfered with, if the works therein set out were allowed to be constructed.

The Montreal Tramways Company, by its Attorneys, forthwith filed with the Board several requests for a hearing. (Record, pp. 185-6.)

No further proceedings were served or taken by either of the parties, and on the 16th of September 1930, without notice to the Appellants, without a hearing, and without delivering any reasons or opinions, the Board made its Order bearing No. 45410, granted the Respondent authority to reconstruct its subway at d'Argenson Street, as per plan submitted, directed the Appellants, (and others,) to move such of their utilities as may
40 be affected by the reconstruction of the said subway, as and when requested to do so by the Chief Engineer of the Respondent and reserved all question of cost for further consideration. (Record, p. 10.)

The reconstruction of the said subway will not in any way confer any benefit or advantage to the Appellants or to the plant of the Montreal Tramways Company, and the said Appellants have no interest in the promotion thereof; on the contrary, the said works will injuriously affect

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the said plant of the Montreal Tramways Company. (Record, p. 182, paras. 13 & 14.)

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PART II.—THE ORDER COMPLAINED OF.

The Appellants respectfully submit that the Order appealed from is erroneous and “ultra vires”:

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1. Because under the provisions of the Canadian National Montreal Terminals Act the Canadian National Railways Act and all other Special Acts, the Railway Act is not applicable to the location of lines of railway and the taking of land by the Canadian National Railway Company, these matters being governed by the provisions of the Expropriation Act; 10

2. Because the Appellant, the Montreal Tramways Company, at the location herein in question, owns and possesses an immoveable property, an interest in land and a perpetual immoveable right of possession and usage which cannot be taken or injuriously affected without expropriation proceedings being first taken and proper compensation paid.

3. Because under the provisions of the Acts just cited, the Minister of Railways and Canals and/or the Canadian National Railway Company cannot alter or divert, temporarily or permanently, the course of any railway, road, street or way, or raise or sink the level of the same without first substituting another convenient railway or road in lieu thereof and paying proper compensation for the damages suffered, and the Board is without power to make the Order appealed from directing the Appellants to move their utilities at their own expense, pending a decision by the Board on the reserved question of distribution of cost. 20

PART III.—THE ARGUMENT.

I.

Under the provisions of the Canadian National Montreal Terminals Act, the Canadian National Railways Act and all other Special Acts, the Railway Act is not applicable to the location of lines of railway and the taking of land by the Canadian National Railway Company, these matters being governed by the provisions of the Expropriation Act. 30

The existing subway to be reconstructed at d'Argenson Street form part of the works authorized under the provisions of the Canadian National Montreal Terminals Act (19 & 20 Geo. V., c. 12) whereof sections 2, 3, 6, 7 and 9 read as follows:

“ 2.—The Governor in Council may provide for the construction
“ and completion by the Canadian National Railway Company
“ (hereinafter called “the Company”) of terminal stations and
“ offices, local stations, station grounds, yards, tracks, terminal
“ facilities, power houses, pipes, wires and conduits for any purpose, 40
“ bridges, viaducts, tunnels, subways, branch and connecting lines
“ and tracks, buildings and structures of every description and for
“ any purpose, and improvements, works, plant, apparatus and

“ appliances for the movement, handling or convenient accommodation of every kind of traffic, also street and highway diversions and widenings, new streets and highways, subway and overhead streets, and also approaches, lanes alleyways, and other means of passage, *with the right to acquire or to take under the provisions of section nine of this Act or otherwise lands and interests in lands* for all such purposes, all on the Island of Montreal in the Province of Quebec, or on the mainland adjacent thereto, as shown generally on the plan or plans thereof to be from time to time approved by the Governor in Council under the provisions of section seven of this Act; the whole being hereinafter referred to as ‘the said works,’ and a short description whereof for the information of Parliament but not intended to be exhaustive, being set out in the schedule hereto.

“ 3. Subject to the provisions of this Act, the Company may issue notes, obligations, bonds and other securities (hereinafter called “ securities ”) in respect of the construction and completion of the said works, and the Governor in Council may authorize the guarantee of the principal and interest of such securities to an amount not exceeding fifty million dollars (\$50,000.00).* The Company shall not, without the approval of the Governor in Council, spend upon the said works more than ten million dollars (\$10,000,000.) per annum.

“ 6. The proceeds of any sale, pledge or other disposition of the securities shall be deposited in a bank or banks in a fund to the credit of the Minister of Finance in trust for the Company, and shall from time to time be released to the Company by the Minister of Finance in his discretion, to be applied in meeting expenditures made or indebtedness incurred in connection with the said works. The proceeds also of any sales of lands acquired by the Company or taken by His Majesty under section nine of this Act for the said works and not abandoned nor required for such purposes and contributions made toward the cost of the said works under section eight of this Act or from any other source shall be deposited to the credit of the said Minister and shall by him be similarly released. The cost of financing or temporary financing, including interest and discounts, shall be deemed to be part of the cost of the said works. *The said works may be constructed upon property from time to time owned acquired or taken by the Company, and, in so far as may be necessary, upon the property of any other Company comprised in the Canadian National Railways operating within the territory described in section two of this Act, and, without restricting the generality of the foregoing language, upon the property of the Canadian Northern Railway Company, the Canadian Northern Ontario Railway Company, the Canadian Northern Quebec Railway Company, the Mount Royal Tunnel and Terminal Company, Limited, the Canadian National Realities*

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“ Limited, and, with the approval of the Governor in Council
“ evidenced by the approval of plans under the provisions of section
“ seven of this Act, upon the property owned or taken by His Majesty
“ the King in the right of the Dominion of Canada.

“ 7. The general plan or plans of the said works and amendments
“ or additions to such general plan at any time made, shall, on the
“ recommendation of the Minister of Railways and Canals, be subject
“ to the approval of the Governor in Council

“ 9. Certain expropriation plans and descriptions heretofore
“ deposited, under the Expropriation Act, by or on behalf of the 10
“ Minister of Railways and Canals for the purposes of the Govern-
“ ment Railways having vested in His Majesty lands now required
“ for part of the said works, other plans and descriptions showing
“ lands or interests in lands required or taken from time to time in
“ connection with the said works may be deposited by or on behalf of the
“ said Minister under the Expropriation Act. The compensation to
“ be paid in respect of any such taking, subject to the usual right of
“ abandonment as provided in the Expropriation Act, may be paid
“ out of the trust funds deposited to the credit of the Minister of Finance
“ under section six of this Act, and upon such payment the lands 20
“ or interests in lands thereby taken or vested in His Majesty shall
“ upon request be transferred by His Majesty to the Company.”

These provisions are in keeping with those of the Canadian National
Railways Act, (R. S. C. (1927) c. 172, sec. 17, as amended by 19 & 20 Geo. V
(1929) ch. 10, sec. 2) reading as follows :

“ 2. Section seventeen of the Canadian National Railways Act
“ is hereby repealed and the following enacted in lieu thereof :

“ 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 30
of this Act;

(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;

(b) 40

(c)

(d) The compensation payable in respect of any lands or
interests therein taken by the Company under the provisions of the
Expropriation Act as made applicable to the Company by this

Act, shall be ascertained in accordance with the provisions of the *Expropriation Act*, and for that purpose the *Exchequer Court* shall have jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the Company, of judicial proceedings and the conduct thereof; Provided that such compensation may, in any case where the offer of the Company does not exceed two thousand five hundred dollars, be ascertained under the provisions of the *Railway Act*, beginning with notice of expropriation to the opposite party. The amount of any judgment shall be payable by the Company.

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The pertinent sections of the Expropriation Act (R. S. C. (1927) c. 64) are the following :

“ S. 2 In this Act, unless the context otherwise requires.

“ (d) “ land ” includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act;

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“ (g) “ public work ” or “ public works ” means and includes the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose

“ S. 3. The Minister may by himself, his engineers, superintendents, agents, workmen and servants,

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“ (b) enter upon and take possession of any land, real property the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto; ”

(f) divert or alter, as well temporarily as permanently, the course of any railways, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the side of the public work, as he thinks proper; but before discontinuing or altering any railway or public road or any portion thereof, he shall substitute another convenient railway or road in lieu thereof; and in such case, the owner of such railway or road shall take over the substituted railway or road in mitigation of damages, if any, claimable by him under this Act, and the land theretofore used for any railway or road, or the part of a railway or

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road so discontinued, may be transferred by the Minister to, and shall thereafter become the property of, the owner of the land of which it originally formed part;”

The foregoing sections of the Acts just cited clearly establish, we submit, the inapplicability of the Railway Act to the location of lines of railway, the taking of land and the compensation payable by the Canadian National Railway Company.

It is also obvious that these matters are governed by the provisions of the Expropriation Act.

This submission is in keeping with the following section of the Railway Act : 10

“ 256. (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 next 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.” 20

The Board had therefore no jurisdiction to order the Appellants to move such of their utilities as may be affected by the construction of the said subway on d'Argenson Street, as directed in paragraph 2 of the Order appealed from.

The jurisdiction of the Board is not inherent but statutory, and it is limited to such powers as are by statute conferred upon it.

II.

The Appellant, the Montreal Tramways Company, at the location herein in question, owns and possesses an immoveable property, an interest in land and a perpetual immoveable right of possession and usage which cannot be taken or injuriously affected without expropriation proceedings being first taken and proper compensation paid. 30

The Appellant, the Montreal Tramways Company, was incorporated by a Special Act of the Legislature of Quebec, 1 Geo. V, (2nd Session, 1911) c. 77, and amending Acts.

By another special Act of the same Legislature, (7 Geo. V (1916) c. 60, sec. 28) a commission was created for the purpose of drawing up a contract between the City of Montreal and the said Appellant. This contract, duly executed before Mtre. Jean Beaudoin, on the 28th of January 1918, was ratified and confirmed by another Act of the Legislature, 8 Geo. V (1918) ch. 84, sec. 75. (Schedule No. 2.) 40

Under the provisions of the said contract, the Montreal Tramways Commission, the other Appellant, was created and given powers of supervision, regulation, and control, as therein set out. (Schedule No. 2, pp. 4 & s., Articles 2 & s.)

The scope and duration of this contract are given at page 8 of Schedule No. 2, (Articles 23 & s.), and at page 33, (Article 92, parag. 8) reading in part as follows :

10 “ 24.—In execution of the Acts 1 George V (2nd Session) chapter 77, sections 14 and 15, and 7 George V, chapter 60, section 28, the City grants to the Company, on the conditions mentioned in the present contract, the privilege of constructing, equipping, maintaining and operating, from the coming into force of the present contract until the twenty-fourth (24th) of March, one thousand nine hundred and fifty-three (1953) a system of surface tramways in the City, as it now exists and as it may later be extended, and the Company obliges itself to construct, equip, maintain, keep up and operate at its cost the said system of tramways, in accordance with the stipulations and during the term of the present contract.”

20 “ 8.—(Expropriation) On March twenty-fourth (24th) nineteen hundred and fifty-three (1953) and at the expiration of every subsequent five-years period, the City shall have the right, after six months notice given to the Company within the twelve months immediately preceding March twenty-fourth (24th), nineteen hundred and fifty-three (1953) and also after a similar notice of six months and on the same conditions at the end of each subsequent five-years period, to appropriate for itself the railways of the said company as well as the immoveables and dependencies, plant and cars belonging to it and necessary for the operation of the said railway, situate within and without the limits of the said City, by paying the values thereof, to be fixed by arbitrators, and ten per cent. (10%) over and above the estimate. Such arbitrators shall be appointed as follows : one by the City, one by the Company, and the third by a judge of the Superior Court sitting in and for the

30 district of Montreal.

As herein above set out, the said Appellant possesses a perpetual Charter. Its utilities are attached to the ground, are immoveable by destination and are its exclusive property. They are assessable for municipal and other taxes. (Schedule No. 2 p. 22, art. 84.)

40 The said Appellant lawfully possesses, within the meaning of the word “land” as defined in section 2 (d) of the Expropriation Act, an interest in land, an immoveable right of usage and occupancy in the portions of the streets of the City where its facilities are located, and in particular on d'Argenson Street, at and near the point where, by the Order appealed from, the Board purported to grant authority to the Respondent to construct a subway, and such rights cannot be taken away or injuriously affected by the Respondent without expropriation proceedings being first taken and proper compensation paid.

III

Under the provisions of the Acts just cited, the Minister of Railways and Canals and/or the Canadian National Railway Company cannot alter

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or divert, temporarily or permanently, the course of any railway, road, street or way, or raise or sink the level of the same, without first substituting another convenient railway or road in lieu thereof and paying proper compensation for the damages suffered, and the Board is without power to make the Order appealed from directing the Appellants to move their utilities at their own expense, and reserving for further consideration by the Board all questions of cost.

The Respondent's application and the Board's Order granting it are made under sections 256 and 257 of the Railway Act.

These sections are exclusively concerned with a railway applying to 10
cross a highway.

So far as the Appellants' utilities are concerned, however, the Respondent's application involves the crossing of a railway by another railway.

Any other railway company under the jurisdiction of the Board would have had therefore to make two applications, one under sections 256 and 257 to cross the highway, and one under 252 to cross another railway, *i.e.*, the Montreal Tramways.

In the case of the C.N.R., however, all these sections 252, 255, 256 and 257 are inapplicable, because they are inconsistent with the Exprop- 20
riation Act (R.S.C. chap. 64. sect. (3) sub-section (f) wherein it is provided that the Minister or the Company cannot divert or alter either temporarily or permanently the course of any railway, road, street or ways, or raise or sink the level of the same in order to carry them over or under, on the level of, or by the side of the public work, as he thinks proper, before substituting another convenient railway or road in lieu thereof.

The Board had therefore no jurisdiction to hear and decide the Respondent's application under sections 256 and 257 of the Railway Act which are superseded, in respect of the Canadian National Railway Com- 30
pany's undertaking, by the above quoted provisions of the Expropriation Act.

CONCLUSION.

Under the provisions of the Canadian National Montreal Terminals Act, the Canadian National Railways Act and the Expropriation Act, the Respondent has, with regard to the construction of the subway and works herein in question, the same rights or powers as are accorded to the Minister under the Expropriation Act.

Subject to taking the proper proceedings under the foregoing Acts and making provision for proper compensation, the Minister and the 40
Company require no leave or approval of the Board to construct railway or highway crossings or grade separations thereat.

The Respondent should never have made application for and the Board should never have made the Order appealed from, the Board's

jurisdiction being limited to receiving the crossing plan for filing, pursuant to section 17 of the Canadian National Railways Act.

We respectfully submit that this appeal should be allowed with costs.

MONTREAL, September 30, 1931.

VALLEE, VIEN, BEAUDRY, FORTIER & MATHIEU,
Attorneys for the Appellant
the Montreal Tramways Company.

BEIQUE & BEIQUE
Attorneys for the Appellant
the Montreal Tramways Commission.

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IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway at D'Argenson Street, in the City of Montreal, as shown on General Plan YIE 31.51.4 dated April 15th, 1930, and filed with the Board under File No. 9437.319.7.

20 BETWEEN

THE MONTREAL TRAMWAYS COMPANY
THE MONTREAL TRAMWAYS COMMISSION - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

PART I.—STATEMENT OF FACTS.

This is an appeal by leave granted by the Honourable Mr. Justice Newcombe from Order No. 45410 of the Board of Railway Commissioners for Canada, hereinafter called The Board, dated 16th September 1930 in so far as the said Order directs the appellants to move such of their utilities as may be affected by the construction of a subway at St. Antoine Street, Montreal, as and when required to do so by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said appellants, or in any

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event to make the said Order *ex parte* and without notice to the said appellants.

St. Antoine Street is a highway extending in a Northerly and Southerly direction through the Southwesterly section of the City of Montreal as shown in part on the plan YIE 31.51.4 filed by the respondents with their application to the Board for authority to construct a subway at the said street. There was a subway in existence at the said street at the date of the said Order.

At the date of the said Order the appellants had certain utilities located upon, over and under the said highway, but constructed after the construction of the said subway. 10

For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and The Board, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the railway company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War. 20

In the year 1927 the matter was again revived by The Board and on 27th May, 1927, a judgment of The Board was issued, shown at Record, page 418.

The judgment in question provides that these matters be referred for a report to the Chief Engineer of The Board, who, by Order No. 39079, dated 27th May, 1927, was appointed and directed to make a full inquiry and report to The Board upon the whole situation of level crossings in Montreal, from Bonaventure Station West and from Moreau Street Station East, and to evolve a scheme for the consideration of The Board. No complete report covering the whole situation has yet been made by the said Chief Engineer, but he has made certain reports including one with regard to the subway in question herein. 30

A study of the whole Canadian National Railways situation in Montreal was undertaken by the Railway Company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the site on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before The Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report and by Act of the Parliament of Canada chapter 12 of the Statutes of 1929, the Canadian National Railway 40

Company was given power to construct and complete the works described in the schedule to the said Act at and in the vicinity of Montreal; and pursuant to the provisions of the said Act, the Governor-in-Council, by Order-in-Council P.C. 1197, dated 2nd July, 1929, approved General Plan No. DC310-0, 0-63.1. (Record schedule 6). General Plan WIE 19.4.2 dated 10th October, 1929, showing *inter alia* a reconstruction of existing grade separation at the street in question was upon the application of the Railway Company and the recommendation of its Chief Engineer, approved by The Board by Order No. 44425 dated 10th March, 1930.

10 The said Order No. 44425 directed that detailed plans of individual grade separations be served upon the City of Montreal, and submitted for approval of The Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of The Board.

On 24th April, 1930, in pursuance of the provisions of the said Order No. 44425, the respondents made a further application to The Board for approval of a detailed plan number YIE 31.51.4 for the reconstruction of the subway at D'Argenson Street, and for an Order directing the appellants and others to move such of their utilities as are affected by the construction of the subway, as and when requested to do so by the Chief
20 Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by The Board.

The appellants were served with a copy of the last named application on or about 25th April, 1930, and on 26th April, 1930, mailed their answer thereto to the Secretary of The Board, requesting a hearing of the said application.

On 9th September 1930, without granting any hearing, the Board made the above Order No. 45427.

PART II.—ERRORS IN THE ORDER APPEALED FROM.

The respondents submit that the Board had jurisdiction to make the
30 order appealed from and that the same should be affirmed.

PART III.—ARGUMENT.

The subway referred to in the Order appealed from, and all things to be done in connection therewith, including procedure, were incidental to and parts of a comprehensive scheme initiated by the Board, as appears from its Order and judgment of 27th May 1927, for the protection, safety and convenience of the public, and approved by Parliament, and including, among other things, the elimination of passenger traffic from Bonaventure Station to Turcot and from Moreau Street Station Easterly, the diversion of such passenger traffic to lines skirting the City of Montreal at the North
40 and converging at the present tunnel station at Lagauchetiere Street, the establishment of terminal facilities at the site of the said tunnel station, the construction of a viaduct and elevated railway between Inspector and Dalhousie Streets, and St. David's Lane and Nazareth Street to near

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Wellington Street, and thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets, including St. Antoine Street, and the providing of a grade separation by means of elevated or depressed or underground tracks, or streets, between St. Henri and Point St. Charles, the latter including, among other streets, d'Argenson Street.

The constitution and powers of the respondents are set forth in the Canadian National Railways Act, being chapter 172 of the Revised Statutes of Canada 1927, as amended by chapter 10 of the Statutes of Canada 1929, and under the said Act as amended the respondents had power to do the things mentioned in the preceding paragraph, upon securing approval of the Governor-in-Council, sanction as to location by the Minister of Railways and Canals, and authority by Parliament for the necessary expenditure or the guarantee of an issue of securities. 10

The Canadian National Montreal Terminals Act 1929, being chapter 12 of the Statutes of Canada 1929 was an Enabling Act, passed for the purpose of providing parliamentary authority for such expenditure and guarantee of securities, as applied to the scheme above referred to.

The powers and jurisdiction of the Board are set out and defined in The Railway Act, chapter 170 of the Revised Statutes of Canada 1927, and, unless otherwise specified, the sections hereinafter referred to are sections 20 of the Railway Act.

By s. 33, sub-s 1, the Board has 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 authorized 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. By sub-s 2 it may order and require any Company or person to do forthwith, or within or at any specified time, and in any manner to be prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing, which such Company 30 or person is or may be required to do under 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 fact. By sub-s 5 the Board's decision 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.

Sec. 34 empowers the Board to make orders with respect to any matter, act or thing which by the Act is sanctioned, required to be done or prohibited, and generally for carrying the Act into effect and for exercising any jurisdiction conferred upon it. 40

Under sec. 35 the Board may, of its own motion, . . . inquire into, hear and determine any matter or thing, which under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.

By sec. 37 any power or authority vested in the Board may although not so expressed, be exercised from time to time, or at any time, as the occasion may require.

By sec. 256 in the case of a new highway crossing and by sec. 257 in the case of an existing highway crossing, the Board is authorized to make such orders as it deems expedient, as to the protection, safety and convenience of the public.

10 By sec. 259 the Board is authorized to 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, and it is submitted that it is immaterial, in view of the provisions above recited, whether the highway crossing is new or already in existence.

20 By sec. 39 (1) 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, re-constructed, 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, re-constructed, altered, installed, operated, used and maintained. Under sub-s 2, the Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, re-constructing, 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 If an order can be supported under sec. 39, it is unnecessary to consider whether it could also be supported under other sections of the Act.

Toronto Ry. Co. v. Toronto City—(1) (1920) A.C. 426, 437.

40 In view of the attitude taken by the appellants, they cannot be heard to say that they are not interested or affected by the order in question. The question whether or not they were benefited by the execution of the works in question is not material to the question of the jurisdiction of the Board. They could competently be required to contribute to the cost of such works, and the propriety of requiring them to do so and the extent of the contribution ordered are not matters for review by the Court.

C.P.R. et al v. Toronto Transportation Commission et al and Toronto Transportation Commission v. C.N.R. et al—1930 A.C. 686.

In the order appealed from, the Board has exercised the jurisdiction given to it under sec. 39 in :

1. Ordering by whom, namely the appellants, the utilities should be moved. Such order is not only in accordance with jurisdiction,

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but also in accordance with common sense. It would obviously be foolish to authorize any party unfamiliar therewith to interfere with such utilities.

2. Directing when and within what time the removal of such utilities should be carried out, namely : as and when required to do so by the Chief Engineer, Operating Department, of the respondents.

3. By reserving all questions of costs, which would include consideration of payment of compensation and the proportion of such costs to be paid by all parties.

In the case above referred to in 1930 Appeal Cases, it is remarked, in 10
connection with sec. 39, that the case was not "otherwise provided for in
the Act," and the respondents submit that the same remark applies in this
case.

The appellants are not the owners of land or of any interest in land which is subject to expropriation. In view of the provisions of the Canadian National Railways Act, as amended by chapter 10 of the Statutes of Canada 1929, the expropriation provisions of The Railway Act are not applicable to the respondents, and there is no provision in the said Acts for the expropriation of a highway or of any interest therein.

There are a number of sections of The Railway Act under which the 20
party by whom work shall be done or costs shall be borne are expressly provided, such as sections 185, 251-(6) and 260, but there is nothing in the Act inconsistent with the applicability of the provisions of sec. 39 to the situation in question herein.

Apart from the foregoing it may be pointed out that if any compensation is payable to the appellants, the ascertainment and payment thereof are not pre-requisite to the immediate exercise by the Board of its jurisdiction under sec. 39, but merely matters which may be taken into consideration by the Board in finally apportioning the cost of the work, which has been reserved.

As to the contention that the order appealed from was made ex parte 30
or without notice to the appellants, the respondents deny that it was made either ex parte or without notice to the appellants. The appellants were served with the respondents' application for the said order and had and took the opportunity of replying to the same.

Under the provisions of sec. 39, the Commissioners may sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business, and they may, subject to the provisions of the Act, sit either together or separately, and either in private or in open Court.

The only exception to these provisions is that any complaint made 40
to them shall, on the application of any party to the complaint, be heard and determined in open Court.

The application for the order in question was not a "complaint" within the meaning of sec. 19.

The Honourable Mr. Justice Rinfret in his reasons given in disposing of an application for leave to appeal in

City of Montreal v. Canadian National Railways

on or about the 26th day of February 1931, says in part :

“ A reference to section 33 of the Railway Act will I think, show the true meaning of the word “ complaint ” in section 19. Section 33 provides that :

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

- 10 (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
- 20 (b) requesting the Board to make any Order, or give any direction, leave, sanction or approval, which by law it is authorized 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.

The application of the Canadian National Railway Company was not an application complaining of anything in the sense of subparagraph (a) of Section 33, but an application requesting the Board to give its approval to a plan and profile in the sense of subparagraph (b) of Section 33.

30 In point of law, therefore, it was not a complaint within the meaning of the provisions of section 19 ; but it was a case where the Commissioners were at liberty to sit at such times, either in private or in open court, and to conduct their proceedings in such manner as they deemed convenient.”

The respondents submit :

- (1) That so far as the general jurisdiction of the Board is concerned, there is nothing in principle to distinguish this case from numerous other cases decided by the Judicial Committee of the Privy Council, and by this Court, in which such jurisdiction has been affirmed.
- 40 (2) That, while the practice and procedure of the Board have been correct, an appeal on a mere question of practice and procedure

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is not one which this Court will, under its established jurisprudence, entertain.

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(3) That the appeal should, therefore, be dismissed with costs.

Copies of The Railway Act and other relevant legislation will be furnished for use on the argument of this appeal.

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A. FRASER,
of Counsel for the Respondents.

No. 89.

Formal Judgment.

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IN THE SUPREME COURT OF CANADA.

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Tuesday the 1st day of March, A.D. 1932.

Present : The Right Honourable F. A. ANGLIN, C.J.C., P.C.
The Right Honourable Mr. Justice DUFF, P.C.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice LAMONT.

IN THE MATTER of the application of the Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan YIE 31.51.4, dated April 15th, 1930, on file with the Board under File No. 9437.319.7. 20

BETWEEN

THE MONTREAL TRAMWAYS COMPANY AND
THE MONTREAL TRAMWAYS COMMISSION - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondent.*

The Appeal of the above named appellants from Order No. 45410 of the Board of Railway Commissioners for Canada dated the 16th day of September, A.D. 1930, in the above matter, having come on to be heard before this Court on the 26th and 27th days of October, in the year of our Lord one thousand nine hundred and thirty-one, constituted as above with the addition of the Honourable Mr. Justice Newcombe, C.M.G., since deceased, in the presence of Counsel as well for the appellants as for the respondent, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for Judgment, and the same coming on this day for Judgment, 30

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was dismissed, and that the said Order No. 45410 of the Board of Railway Commissioners for Canada should be and the same was affirmed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said appellant should and do pay to the said respondent the costs incurred by the said respondent in this Court.

(Sgd.) J. F. SMELLIE,
Registrar.

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No. 90.

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Reasons for Judgment.

(a) ANGLIN C.J.C.

(b) RINFRET J. (concurrent in by DUFF and LAMONT JJ.)

(Same as No. 16 at p. 48.)

APPEAL No. 6.

*St. Antoine Street Subway.*In the Privy Council.

No. 61 of 1932.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

IN THE MATTER OF the Application of the Canadian National Railways
for an Order under section 256 of the Railway Act for authority to
construct a subway on St. Antoine Street, in the City of Montreal, as
shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed
with the Board under File No. 9437.319.13.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

No. 91.

Statement of Facts.

PART I.—PLEADINGS.

1. St. Antoine Street is a highway extending in an easterly and westerly
direction through the southerly section of the City of Montreal, as shown in
part on the Plan YIA 31.10.4 filed by the Respondent with its application
to the Board of Railway Commissioners for Canada, hereinabove referred
to, a copy of which said plan is attached hereto and marked as Schedule
No. 1.

2. The said street has existed for a great many years and the lands
comprising the same have been the property of the City of Montreal since
about the time when the said street was laid out.

3. The Appellant the Montreal Tramways Company was incorporated
by special act of the Legislature of Quebec 1 George V (2nd session 1911)
chap. 77 and amending acts. By a special Act of the said Legislature of
Quebec 7 George V (1916) chapter 60, sect. 28, a commission was created

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for the purposes of drawing up a contract between the City of Montreal and the Montreal Tramways Company. The said contract was duly executed before Mtre. Jean Baudouin of the City of Montreal, on the 28th of January 1918, and was duly ratified and confirmed by another Special Act of the Legislature of Quebec, 8 George V (1918) chap. 84, section 75. A printed copy of the text of the said contract is annexed to the said Act 8 George V (1918) chap. 84, as it appears in the statutes of Quebec for the year 1918. A printed copy of the said contract and of the sections of the said Act, as amended, relevant to this appeal, are set forth in the Schedule attached hereto as Schedule No. 2.

4. In the year 1892, the Appellant's predecessor in title, The Montreal Street Railway, acting in pursuance of the powers conferred upon it in that behalf by its special Acts of incorporation, under direction from and with the legal consent of the City of Montreal, laid a first set of tracks on St. Antoine Street, and in 1910 laid a second set of tracks parallel to the first one. These tracks were renewed from time to time as became necessary.

5. The Appellant, the Montreal Tramways Company, pursuant to its powers under its special Acts of incorporation and the franchises referred to in paragraph 3 hereof, lawfully owns and maintains on St. Antoine Street, at the location herein involved between Inspector and Ste Genevieve Streets, two sets of tracks laid to the line and level lawfully given and prescribed by the City of Montreal.

6. The eastbound track was renewed in 1906; it consists of tee rails weighing 87 lbs. per yard, laid on 6 by 8 inch ties, 8 feet long, spaced 24 inches centre to centre, and ballasted with broken stone to a depth of 8 inches under the ties, on a well rolled and tamped bed. The surface of the street, along this track, is paved with granite blocks laid over a sand cushion 1 inch thick, overlying a concrete bed 6 inches deep.

7. The westbound track was renewed in 1929; it consists of grooved girder rails weighing 115 lbs. per yard, laid on 6 by 8 inch ties, 8 feet long, spaced 20 inches centre to centre, with granite paving blocks laid on a broken stone foundation.

8. The existing tracks above referred to are bonded as follows :—

(a) Bonding on the Eastbound track consists of one No. 0000 stranded copper cable, approximately 124 ft. long, laid between the rails and connected to two No. 0000 stranded copper cable joint bonds at each joint. All joints are bolted and bonded with two No. 0000 stranded copper cable bonds at each joint. Cable and joint bonds are painted with preservative paint.

(b) On the Westbound track there are two $\frac{1}{2}$ Million C.M. stranded copper cross bonds connected to rails with three No. 0000 stranded copper tail bonds per rail. These cross bonds are in turn connected with a No. 0000 stranded copper cable in the Eastbound track. All joints on the Westbound track are welded. These $\frac{1}{2}$ Million cross bonds are laid in wood trough filled with preservative compound, and all tail bonds are painted with preservative paint.

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9. The overhead line on St. Antoine Street, within the limits of the proposed change in profile consists of two No. 2 "O" trolley wires held by standard transverse span wires attached to 8 steel poles, 4 on each side of the street, within the sidewalk allowance, and the base of each pole being imbedded in a concrete foundation below the sidewalk.

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10. All these works are the property of the Appellant, the Montreal Tramways Company and are necessary for rendering tramway service to the public in the vicinity of St. Antoine Street and the adjoining territory.

11. The Appellant, the Montreal Tramways Commission, was created 10 by contract passed between the City of Montreal and the Montreal Tramways Company on the twenty-eighth day of January 1918, before Mtre. Jean Beaudoin, Notary Public for the Province of Quebec, as ratified and confirmed by an Act of the Legislature of Quebec, 8 George V, Chapter 84, Section 75, a copy of which is attached hereto as Schedule No. 2, with the powers of supervision regulation and control therein set out.

12. (a) For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and the Board of Railway Com- 20 missioners for Canada, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the raising of the tracks of the Railway Company in this area to a sufficient extent to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War.

(b) In the year 1927 this matter was again revived by the Board, and on the 27th day of May, 1927, a judgment of the Board was issued, which is reported in the Board's Judgments, Volume 17, page 49, and a copy of the 30 said judgment is attached hereto as Schedule No. 3.

(c) The judgment in question provides that these matters be referred for a report to the Chief Engineer of the Board, who, by Order No. 39079, dated the 27th day of May, 1927, was appointed and directed to make a full inquiry and report to the Board upon the whole situation of level crossings in Montreal, from Bonaventure Station west and from Moreau Station east, and to evolve a scheme for the consideration of the Board. A copy of the said Order No. 39079 is attached hereto as Schedule No. 4. No report covering the whole situation of level crossings in Montreal on the Canadian National Railways from Bonaventure Station West and from Moreau Street Station 40 East, as required by the Board, was ever made to the Board by its Chief Engineer.

13. (a) A study of the whole Canadian National Railway's situation in Montreal was undertaken by the Railway Company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetière Street was decided on for a passenger station. Up

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to that time the use of the station on Lagachetière Street for a passenger station had not been contemplated in the proceedings before the Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report, and by Act of the Parliament of Canada, 19-20 Geo. V. c. 12 (assented to June 14th, 1929) the Canadian National Railway Company was given power to construct and complete the works described in the Schedule to the Act, at and in the vicinity of Montreal; and pursuant to the provisions of the said Act of the Governor in Council, by order in Council P.C. 1197, dated July 2nd, 1929, approved General Plan No. DC310-0.0-63.1. A copy of the said plan is attached hereto as *Schedule No. 5.* 10

(b) General plans Nos. WIA19-14.1 and WIA19-15.1, both dated January 17th, 1930, showing, inter alia, the construction of a subway on St. Antoine Street, were upon the application of the Railway Company and the recommendation of its Chief Engineer, approved by Order of the Board No. 44433, dated March 13th, 1930. A copy of the application of the Railway Company is attached hereto as *Schedule No. 6.*

14. By Order No. 44433, dated the 13th day of March, 1930, the Board of Railway Commissioners for Canada granted the Respondent's application mentioned in paragraph No. 13 hereof, subject to the provision that the Respondent serve copies of detailed plans on the City of Montreal, the said plans to be then submitted for approval of the Board. A copy of said Order No. 44433 is attached hereto as *Schedule No. 7.* 20

15. On the 21st day of April 1930, in pursuance of the provisions of said Order No. 44433, the Respondent made a further application to the Board of Railway Commissioners for Canada for approval of a detailed plan numbered YIA 31.10.4, a copy whereof appears as Schedule No. 1 hereto, for carrying its tracks across St. Antoine Street upon a grade separation by constructing a subway in St. Antoine Street, and for an order directing the Appellant the Montreal Tramways Company and others to move such of their utilities as are affected by the construction of the said subway as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways all questions of cost to be reserved for further consideration by the Board. A copy of said application is attached hereto as *Schedule No. 8.* 30

16. At the present time, St. Antoine Street is not crossed by the tracks of the Respondent at or near the location indicated on the said plans.

17. It is not contended that the construction of the said subway will in any way confer any benefit or advantage to the Appellant the Montreal Tramways Company or to its plant, and the said Appellant has no interest in the promotion thereof, but on the contrary, the construction of the said subway will result in the lowering of the level of St. Antoine Street over a distance of about 500 feet to a depth which will require the removal of the said works of the said Appellant and their re-location to the new street line and level. 40

18. If the said Plan, attached hereto as Schedule No. 1, is adhered to by the Respondent and the works provided for therein are constructed, it will be necessary, at considerable expense, completely to renew the eastbound track, including joints and fastenings, and to bring down both the eastbound and westbound tracks to the new profile; the paving base and paving surface will have to be renewed on the whole trackway, that is for a width of 18 feet for the entire length of the change in profile; the paving and material under the tracks will have to be removed and the ground to be excavated to a depth of 23 inches; this excavation will be wedge-shaped, tapering down from 23 inches to nothing, where the proposed profile intersects the present street grade, for a distance of about 400 feet in length, on St. Antoine Street eastward, from its intersection with the centre line of Inspector Street, as shown on drawing No. 1262 P. F. dated May 5th, 1931, and attached hereto as *Schedule No. 9*.

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19. The tracks will have to be reconstructed and new bonding provided to conform to standards.

20. The Appellant the Montreal Tramways Company was served with a copy of the Respondent's said application to the Board of Railway Commissioners for Canada, appearing as Schedule No. 8 hereto, on or about the 22nd of April, 1930, and on the 26th of April, 1930, mailed its Answer thereto to the Secretary of the said Board, at Ottawa, and to Mr. Alistair Fraser, K.C., of Counsel for the Canadian National Railways, at Montreal, requesting a formal hearing of the said application. A copy of the said Answer is attached hereto as *Schedule No. 10*.

21. No further proceedings were served or taken by either of the parties hereto, and on the 9th day of September, 1930, without notice to the Appellants and without granting any hearing, as requested in the Appellant's Answer, the Board made an Order, bearing No. 45427, granting the Respondent's said application and directing the Appellants and others 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 Respondent. A copy of said Order is attached hereto as *Schedule No. 11*.

22. On the 12th day of June, 1931, the Appellants launched an application, returnable on the 18th day of June, 1931, before the presiding Judge of the Supreme Court of Canada, in Chambers, for leave to intervene in the said Supreme Court of Canada on the appeal of the Bell Telephone Company of Canada from the said Order No. 45427 of the Board of Railway Commissioners for Canada, in so far as the said Order directed the Appellants to move such of their utilities as may be affected by the construction of the said subway as and when requested so to do by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that as a matter of law, the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order, in so far as it directs the Appellants to move their utilities aforesaid;

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23. The said application for leave to intervene came for hearing on the date aforesaid before the Honourable Mr. Justice L. A. Cannon, who granted leave to appeal by an Order dated the 19th day of June, 1931, in the following terms :

“ Upon the application made by Counsel for the Appellant on the 18th day of June, 1931, in the presence of Counsel for the Respondents for leave to intervene in the appeal of the Bell Telephone Company of Canada against Order No. 45427 bearing date the 9th day of September, 1930, upon hearing read the notice of motion and the affidavit of Paul Seurot and the exhibit therein referred to filed, and upon hearing what was alleged by Counsel aforesaid, and judgment upon the motion having been reserved until this day. 10

IT IS ORDERED that under the special circumstances of the case, the time within which the said Appellant may apply for leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada on a question of jurisdiction only be and the same is hereby extended until this day.

AND IT IS FURTHER ORDERED that upon giving the security required by sub-section 5 of the section 52 of the Railway Act within ten days from the making of this Order, the Appellant be and it is hereby given leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada upon the question of jurisdiction only. 20

(Sgd.) L. A. CANNON, J.

A copy of the said Order is attached hereto as *Schedule No. 12.*

24. A motion to quash the appeals of the appellants the Montreal Tramways Company and the Montreal Tramways Commission was made by the respondent and was heard by the Supreme Court of Canada on the 6th of October, 1931, no order being made by the said Supreme Court of Canada other than to grant leave to the appellants to serve short notice of a new application for leave to appeal. 30

25. An application for leave to appeal to the Supreme Court of Canada from the said Order No. 45427 was made by the appellants the Montreal Tramways Company and the Montreal Tramways Commission on the 7th day of October, 1931 before Hon. Mr. Justice Newcombe who granted said application by an Order dated the 7th day of October, 1931 in the following terms :

“ UPON the application made this day by Counsel for the Appellants in presence of Counsel for the Respondent, for an Order extending the time to apply for an Order for leave to appeal against Order No. 45427 of the Board of Railway Commissioners for Canada bearing date the 9th day of September, 1930, and for leave to appeal from the said Order, upon hearing read the notice of motion and the affidavit of Paul Seurot and the exhibit therein referred to and the 40

joint exhibit of Thomas Vien and Frederic A. Beique, filed, and upon hearing what was alleged by Counsel aforesaid;

APPEAL
No. 6.

IT IS ORDERED that the time within which the said appellants may apply for leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada on a question of jurisdiction only be and the same is hereby extended until this day;

No. 91.
Statement
of Facts—
continued.

10 AND IT IS FURTHER ORDERED that upon paying into Court, as security for costs, the sum of \$250.00 as required by subsection 5 of section 52 of the Railway Act, within ten days from the making of this Order, the appellants be and they are hereby given leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada, upon the question of jurisdiction only.

AND IT IS FURTHER ORDERED that there shall be no costs of this application.

A copy of the said Order is attached hereto as Schedule No. 13a.

No. 92.

Application of Respondent to Board of Railway Commissioners for Canada for approval of Plan YIA 31.10.4, 21st April 1930.

(Same as No. 18, at p. 70.)

*Before
the Board
of Railway
Commis-
sioners for
Canada.*

No. 92.

APPEAL
No. 6.

Before
the Board
of Railway
Commissioners for
Canada.

No. 93.
Answer of
Appellant
requesting
a hearing,
26th April
1930.

No. 93.

Answer of Appellant requesting a hearing.

III. SCHEDULE No. 10.

PERRON, VALLEE et PERRON

Avocats

Edifice Thémis
10, Ouest rue St-Jacques

MONTREAL

L'hon. J. L. Perron, C.R., M.P.P.

Arthur Vallée, C.R.

Richard Beaudry, C.R.

J. Y. Fortier, C.R.

J. N. Décarie, B.C.L.

Auguste Mathieu, LL.B.

E. C. Monk, B.C.L.

E. M. MacDonald, B.C.L.

Chas. E. Roy, LL.L.

J. E. Coderre, N.P.

Prière d'adresser
toute correspondance
Casier Postal 2038
Montréal

Adresse Télégraphique
" LEX "

Téléphone Bell
HArbour 6121-22-23-24-25

Montreal, April 26th, 1930.

A. D. Cartwright, Esq.,

Secretary, Board of Railway Commissioners,
Ottawa, Ont.

Dear Sir,

Re : Application C. N. R.

St. Antoine St. crossing and
Montreal Tramways.

On behalf of the Montreal Tramways Company, we beg to be
heard in the above matter.

Yours very truly,

PERRON, VALLEE & PERRON,
per (signed) J. L. Perron.

No. 94.

No. 94.

Order of Board of Railway Commissioners for Canada No. 45427 directing
the Appellants to move their utilities, 9th September 1930.

(Same as No. 22, at p. 71.)

No. 95.

Order of Cannon J. granting the Montreal Tramways Company leave to appeal to the Supreme Court of Canada.

APPEAL
No. 6.

In the
Supreme
Court of
Canada.

IV. SCHEDULE No. 12.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Before the HONOURABLE MR. JUSTICE CANNON.

Friday the 19th day of June, A.D. 1931.

No. 95.
Order of
Cannon J.,
granting the
Montreal
Tramways
Company
leave to
appeal to
the Supreme
Court of
Canada,
19th June
1931.

10 IN THE MATTER OF the application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street in the City of Montreal, as shown on General Plan No. YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN

MONTREAL TRAMWAYS COMPANY - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - - *Respondents.*

20 UPON the application made by Counsel for the appellant on the 18th day of June 1931 in the presence of Counsel for the Respondents for leave to intervene in the appeal of the Bell Telephone Company of Canada against Order No. 45427 bearing date the 9th of September 1930, upon hearing read the notice of motion and the affidavit of Paul Seurot and the exhibit therein referred to filed, and upon hearing what was alleged by Counsel aforesaid, and judgment upon the motion having been reserved until this day.

30 IT IS ORDERED that under the special circumstances of the case the time within which the said appellant may apply for leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada on a question of jurisdiction only be and the same is hereby extended until this day.

AND IT IS FURTHER ORDERED that upon giving the security required by subsection 5 of section 52 of the Railway Act within ten days from the making of this Order the appellant be and it is hereby given leave to appeal to this Court from the said Order of the Board of Railway Commissioners for Canada upon the question of jurisdiction only.

L. A. CANNON, J.

APPEAL
No. 6.

*In the
Supreme
Court of
Canada.*

No. 96.

Order of Cannon J. granting the Montreal Tramways Commission leave to
appeal to the Supreme Court of Canada.

V. SCHEDULE No. 13.

IN THE SUPREME COURT OF CANADA.

On Appeal from the Board of Railway Commissioners for Canada.

Before the HONOURABLE MR. JUSTICE CANNON.

Friday the 19th day of June, A.D. 1931.

No. 96.
Order of
Cannon J.,
granting the
Montreal
Tramways
Commission
leave to
appeal to
the Supreme
Court of
Canada,
19th June
1931.

IN THE MATTER OF the application of the Canadian National Railways
for an Order under Section 256 of the Railway Act, for authority to
construct a subway on St. Antoine Street in the City of Montreal, as
shown on General Plan No. YIA 31.10.4 dated August 16th, 1930, and
filed with the Board under File No. 9437.319.13. 10

BETWEEN

MONTREAL TRAMWAYS COMMISSION - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondents.*

UPON the application made by Counsel for the appellant on the 18th
day of June 1931 in the presence of Counsel for the Respondents for leave
to intervene in the appeal of the Bell Telephone Company of Canada against
Order No. 45427 of the Board of Railway Commissioners of Canada bearing
date the 9th day of September 1930, upon hearing read the notice of motion
and the affidavit of Paul Seurot and the exhibit therein referred to filed,
and upon hearing what was alleged by Counsel aforesaid, and Judgment
upon the motion having been reserved until this day. 20

IT IS ORDERED that under the special circumstances of the case
the time within which the said appellant may apply for leave to appeal
to this Court from the said Order of the Board of Railway Commissioners for
Canada on a question of jurisdiction only be and the same is hereby extended
until this day. 30

AND IT IS FURTHER ORDERED that upon giving the security
required by subsection 5 of section 52 of the Railway Act within ten days
from the making of this Order the appellant be and it is hereby given leave
to appeal to this Court from the said Order of the Board of Railway Commis-
sioners for Canada upon the question of jurisdiction only.

L. A. CANNON, J.



No. 97.

Order approving security for costs re Montreal Tramways Company.

VI. SCHEDULE No. 14.

IN THE SUPREME COURT OF CANADA.

On Appeal from the Board of Railway Commissioners for Canada.

Tuesday, the 30th day of June, A.D. 1931.

Present : THE REGISTRAR IN CHAMBERS.

10 IN THE MATTER OF the application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street in the City of Montreal, as shown on General Plan No. YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN

MONTREAL TRAMWAYS COMPANY - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondents.*

UPON the application of the above named appellant made in presence of Counsel for the Respondent and upon hearing what was alleged by Counsel for all parties.

20 IT IS ORDERED that the sum of \$250.00 paid into the Bank of Montreal, as appears by the receipt of the said Bank, dated the 29th day of June, A.D. 1931, duly filed as security that the appellant will effectually prosecute its appeal from the Order of the Board of Railway Commissioners of Canada, dated the 16th day of September, A.D., 1930, and will pay such costs and damages as may be awarded against it by this Court, be and the same is hereby allowed as good and sufficient security.

AND IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

J. F. SMELLIE,
Registrar.

30

APPEAL
No. 6.

*In the
Supreme
Court of
Canada.*

No. 97.
Order
approving
security for
costs re
Montreal
Tramways
Company,
30th June
1931.

No. 98.

Order approving security for costs re Montreal Tramways Commission.

VII. SCHEDULE No. 15.

IN THE SUPREME COURT OF CANADA.

On Appeal from the Board of Railway Commissioners for Canada.

Tuesday, the 30th day of June, A.D. 1931.

Present : THE REGISTRAR IN CHAMBERS.

APPEAL
No. 6.
—
In the
Supreme
Court of
Canada.
—
No. 98.
Order
approving
security for
costs re
Montreal
Tramways
Commission,
30th June
1931.

IN THE MATTER OF the application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street in the City of Montreal, as shown on General Plan No. YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13. 10

BETWEEN

MONTREAL TRAMWAYS COMMISSION - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondents.*

UPON the application of the above named appellant, made in presence of Counsel for the Respondent and upon hearing what was alleged by Counsel for all parties.

IT IS ORDERED that the sum of \$250.00 paid into the Bank of Montreal, as appears by the receipt of the said Bank, dated the 29th day of June, A.D. 1931, duly filed as security that the appellant will effectually prosecute its appeal from the order of the Board of Railway Commissioners for Canada, dated the 9th day of September, 1930, and will pay such costs and damages as may be awarded against it by this Court, be and the same is hereby allowed as good and sufficient security. 20

AND IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

J. F. SMELLIE,
Registrar. 30



No. 99.

Notice of setting down appeal for hearing re Montreal Tramways Company.

VIII. SCHEDULE No. 16.

IN THE SUPREME COURT OF CANADA.

IN THE MATTER OF the application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street in the City of Montreal, as shown on General Plan No. YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

10 BETWEEN

MONTREAL TRAMWAYS COMPANY - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

TAKE NOTICE that this appeal has been set down for hearing at the Sittings of this Court to be holden at the City of Ottawa on the 6th day of October, 1931.

OTTAWA, July 4th, 1931.

BELCOURT, LEDUC & GENEST,
Agents for appellant's solicitors.

20 To : GEO. MACDONNELL, K.C.,
Agents for Respondents' solicitors.

APPEAL
No. 6.

—
*In the
Supreme
Court of
Canada.*

—
No. 99.
Notice of
setting down
appeal for
hearing re
Montreal
Tramways
Company,
4th July
1931.

APPEAL
No. 6.

—
*In the
Supreme
Court of
Canada.*
—

No. 100.

Notice of setting down appeal for hearing re Montreal Tramways Commission.

IX. SCHEDULE No. 17.

IN THE SUPREME COURT OF CANADA.

No. 100.
Notice of
setting down
appeal for
hearing re
Montreal
Tramways
Commission,
4th July
1931.

IN THE MATTER OF the application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street in the City of Montreal, as shown on General Plan No. YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN

10

MONTREAL TRAMWAYS COMMISSION - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondents.*

TAKE NOTICE that this appeal has been set down for hearing at the sittings of this Court to be holden at the City of Ottawa, on the 6th day of October, 1931.

OTTAWA, July 4th, 1931.

BELCOURT, LÉDUC & GENEST,
Agents for appellant's solicitors.

To: GEO. MACDONNELL, K.C.,
Agents for Respondents' solicitors.

20



No. 101.

Order granting leave to Appellants to print one joint stated case.

X. SCHEDULE No. 18.

IN THE SUPREME COURT OF CANADA.

Tuesday, the 8th day of September, 1931.

Before : THE REGISTRAR IN CHAMBERS.

APPEAL
No. 6.

—
*In the
Supreme
Court of
Canada.*
—

No. 101.
Order
granting
leave to
Appellants
to print one
joint stated
case,
8th Sept-
ember 1931.

10 IN THE MATTER OF the application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street in the City of Montreal, as shown on General Plan No. YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN

MONTREAL TRAMWAYS COMMISSION - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - - *Respondents,*

AND BETWEEN

MONTREAL TRAMWAYS COMPANY - - - *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - - *Respondents.*

20 UPON the application of Counsel for the above appellants made in presence of Counsel for the above respondents, upon hearing read the affidavits of Gustave Comte and G. F. MacDonnell filed, and upon hearing what was alleged by Counsel aforesaid ;

IT IS ORDERED that the two above appeals be consolidated for the purposes of hearing ; that the appellants herein have leave to file a joint Case ; that the appellants file one joint Factum and that the respondents do file one Factum only, reserving however to the said respondents any right they may have to move to quash the two above appeals for want of jurisdiction ;

30 AND IT IS FURTHER ordered that the costs of and incidental to this application be costs in the cause.

J. F. SMELLIE,
Registrar.



APPEAL
No. 6.

*In the
Supreme
Court of
Canada.*

No. 102.
Order
dispensing
with print-
ing of
Schedules 1,
2, 5 and 9,
18th Sept-
ember 1931.

No. 102.

Order dispensing with printing of Schedules 1, 2, 5 and 9.

XI. SCHEDULE No. 19.

IN THE SUPREME COURT OF CANADA.

Before the Registrar in Chambers.

Friday, the 18th day of September, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY
COMMISSIONERS FOR CANADA.

IN THE MATTER of the Application of The Canadian National Railways
for an Order under Section 256 of the Railway Act, for authority to
construct a subway on St. Antoine Street, in the City of Montreal, as
shown on General Plan No. YIA 31.10.4, dated August 16th, 1930, and
filed with the Board under File No. 9437.319.13. 10

BETWEEN

THE MONTREAL TRAMWAYS COMPANY
THE MONTREAL TRAMWAYS COMMISSION - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

UPON the application of Counsel on behalf of the above named
Appellants, in the presence of Counsel on behalf of the above-named 20
Respondents, for an Order dispensing with the printing of certain Exhibits
in the Case in Appeal, and upon hearing what was alleged by Counsel
aforesaid.

IT IS ORDERED that the printing in the Case in Appeal of the Plans
referred to in the Statement of Facts as Schedules Numbers 1, 5 and 9,
forming part of the Case in Appeal herein, be and the same is hereby
dispensed with, counsel for the Appellants undertaking to provide seven
copies of each if at any time requested to do so by the Court.

AND IT IS FURTHER ORDERED that the printing of Exhibit 2
in the Appeal Case be dispensed with, and that seven copies thereof be pro- 30
vided by the Appellants for the use of the Court.

AND IT IS FURTHER ORDERED that the costs of this application
be costs in the Appeal.

(Sgd.) J. F. SMELLIE,
Registrar.



No. 103.

Order of Newcombe J.

SCHEDULE No. 13A.

IN THE SUPREME COURT OF CANADA.

Wednesday, the 7th day of October, A.D. 1931.

Present : The Honourable Mr. JUSTICE NEWCOMBE, C.M.G.

On Appeal from the Board of Railway Commissioners for Canada

IN THE MATTER OF the Application of the Canadian National Railways
for an Order under section 256 of the Railway Act for authority to
construct a subway on St. Antoine Street, in the city of Montreal, as
shown on General Plan YIA 31.10.4 dated August 16th, 1931, and filed
with the Board under File No. 9437.319.13.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION - - *Appellants.*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

UPON the application made this day by Counsel for the Appellants in
presence of Counsel for the Respondent, for an order extending the time to
apply for an order for leave to appeal against Order No. 45427 of the Board
of Railway Commissioners for Canada, bearing date the 9th day of
September, 1930, and for leave to appeal from the said order, upon hearing
read the notice of motion and the affidavit of Paul Seurot and the exhibit
therein referred to and the joint exhibit of Thomas Vien and Frederic A.
Beique, filed, and upon hearing what was alleged by Counsel aforesaid,

IT IS ORDERED that the time within which the said appellants may
apply for leave to appeal to this Court from the said Order of the Board of
Railway Commissioners for Canada on a question of jurisdiction only be
and the same is hereby extended until this day ;

AND IT IS FURTHER ORDERED that upon paying into Court, as
security for costs, the sum of \$250.00 as required by subsection 5 of section 52
of the Railway Act, within ten days from the making of this Order, the
appellants be and they are hereby given leave to appeal to this Court from
said order of the Board of Railway Commissioners for Canada, upon the
question of jurisdiction only.

AND IT IS FURTHER ORDERED that there shall be no costs of
this application.

E. L. NEWCOMBE.

APPEAL
No. 6.*In the
Supreme
Court of
Canada.*No. 103.
Order of
Newcombe
J.,
7th October
1931.

APPEAL
No. 6.

*In the
Supreme
Court of
Canada.*

No. 104.
Order
approving
security for
costs
9th October
1931.

No. 104.

Order approving security for costs.

SCHEDULE No. 15A.

IN THE SUPREME COURT OF CANADA.

Friday, the 9th day of October, A.D. 1931.

Present : THE REGISTRAR IN CHAMBERS.

On Appeal from the Board of Railway Commissioners for Canada.

IN THE MATTER OF the application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway on St. Antoine Street, in the city of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13. 10

BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

UPON the application made by the above named appellants in presence of Counsel for the above named Respondent, upon hearing read the certificate of the Bank of Montreal, bearing No. 617 and upon hearing what was alleged by Counsel for all parties. 20

IT IS ORDERED that the sum of \$250.00 paid into the Bank of Montreal as appears by the said certificate dated the 7th day of October, A.D. 1931, filed as security that the appellants will effectually prosecute their appeal from the Order of the Board of Railway Commissioners for Canada, dated the 9th day of September, 1930, and will pay such costs and damages as may be awarded against them by this Court, be and the same is hereby allowed as good and sufficient security ;

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the cause. 30

J. F. SMELLIE,
Registrar.



No. 105.

Certificate of settlement of Appeal Case.

II. SCHEDULE No. 20.

CERTIFICATE OF SETTLEMENT OF CASE.

I, the undersigned, Counsel to the Board of Railway Commissioners for Canada, do hereby certify that the foregoing typewritten document from page 1 to page 37 inclusive, together with copies of the Schedules therein referred to and set forth in the Index thereto, is the case settled by me by direction of Hon. C. P. Fullerton, Chief Commissioner of the said Board of Railway Commissioners for Canada, dated the 13th day of October, 1931, pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in a certain case pending before the Board of Railway Commissioners for Canada, In the matter of the Application of The Canadian National Railways for an Order, under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4, dated August 16th, 1930, and filed with the Board under file No. 9437.319.13, between the Montreal Tramways Company and the Montreal Tramways Commission, Appellants, and the Canadian National Railways, Respondents.

AND I do further certify that I have applied to the Commissioners and to the Secretary of the said Board of Railway Commissioners for the Board's opinions and reasons for making the Order appealed from in this case, and that reasons have been delivered by none of the said Commissioners in response to my said application; no such reasons having been given in respect of the making of the said Order.

IN testimony whereof I have hereunto subscribed my name this 13th day of October, 1931.

(Sgd.) A. GEORGE BLAIR.

APPEAL
No. 6.

In the
Supreme
Court of
Canada.

No. 105.
Certificate
of settle-
ment of
Appeal Case,
13th Octo-
ber 1931.

APPEAL
No. 6.

*In the
Supreme
Court of
Canada.*

No. 106.
Notice of
setting down
appeal for
hearing,
14th Octo-
ber 1931.

No. 106.

Notice of setting down appeal for hearing.

SCHEDULE No. 17A.

IN THE SUPREME COURT OF CANADA.

On Appeal from the Board of Railway Commissioners for Canada.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1931, and filed with the Board under File No. 9437.319.13.

10

BETWEEN

THE MONTREAL TRAMWAYS COMPANY
THE MONTREAL TRAMWAYS COMMISSION - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

TAKE NOTICE that this Appeal has been set down for hearing at the present (October) sittings of this Court.

OTTAWA, October 14th, 1931.

BELCOURT, LUDUC & GENEST,
Agents for Appellants' Solicitors.

20

To GEO. F. MACDONNELL, K.C.,
Fraser Bldg., Ottawa,
Agents for Respondent's Solicitor.



No. 107.

Order dispensing with printing Exhibits 1, 2, 5 and 9.

SCHEDULE NO. 19A.

IN THE SUPREME COURT OF CANADA.

Before the Registrar in Chambers.

Wednesday, the 14th day of October, 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

10

BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

UPON the application of Counsel on behalf of the above named Appellants, in the presence of Counsel on behalf of the above named Respondents, for an Order dispensing with the printing of certain Exhibits in the Case in Appeal, and upon hearing what was alleged by Counsel aforesaid.

20

IT IS ORDERED that the printing in the Case in Appeal of the Plans referred to in the Statement of Facts as Schedules Numbers 1, 5 and 9, forming part of the Case in Appeal herein, be and the same is hereby dispensed with, counsel for the Appellants undertaking to provide seven copies of each if at any time requested to do so by the Court.

AND IT IS FURTHER ORDERED that the printing of Exhibit 2 in the Appeal Case be dispensed with, and that seven copies thereof be provided by the Appellants for the use of the Court.

30

AND IT IS FURTHER ORDERED that the costs of this application be costs in the Appeal.

(Sgd.) J. F. SMELLIE.

APPEAL
No. 6.

*In the
Supreme
Court of
Canada.*

No. 107.
Order
dispensing
with print-
ing Exhibits
1, 2, 5 and 9,
14th Octo-
ber 1931.

APPEAL
No. 6.

*In the
Supreme
Court of
Canada.*

No. 108.
Certificate
of Board of
Railway
Commis-
sioners for
Canada,
20th Octo-
ber 1931.

No. 108.

Certificate of Board of Railway Commissioners for Canada.

III. SCHEDULE NO. 21.

**CERTIFICATE OF SETTLEMENT OF CASE AND AS TO REASONS
FOR JUDGMENT.**

I, the undersigned, Secretary of the Board of Railway Commissioners for Canada, do hereby certify that the foregoing printed document from page 1 to page 38 inclusive, is the case settled by A. George Blair, K.C., Counsel for the Board of Railway Commissioners for Canada, by direction of Honourable C. P. Fullerton, Chief Commissioner of the said Board, dated the 13th day of October, 1931, pursuant to section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in appeal to the Supreme Court of Canada, in a certain case pending before the Board of Railway Commissioners for Canada; In the matter of the Application of the Canadian National Railways for an Order under section 256 of the Railway Act for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under file No. 9437.319.13 between the Montreal Tramways Company and the Montreal Tramways Commission, appellants, and the Canadian National Railway Company, Respondent, and I do further certify that I have applied to the Commissioners of the said Board for their opinions and reasons for making the Order appealed from in this case, and that reasons have been delivered by none of the said Commissioners in response to my said application. 10

And I do further certify that no such reasons were delivered by any of the said Commissioners as appears from the Records of the said Board.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Board of Railway Commissioners for Canada, this 20th day of October, 1931. 20

A. D. CARTWRIGHT,
Secretary,
Board of Railway Commissioners for Canada.

30

No. 109.

Factum of Montreal Tramways Company and Montreal Tramways Commission.

NOTE.—The page references have been altered so as to agree with the Record.

DOMINION OF CANADA

IN THE SUPREME COURT OF CANADA.

(OTTAWA.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways
for an Order under section 256 of the Railway Act for authority to
construct a subway on St. Antoine Street, in the City of Montreal, as
shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed
with the Board under File No. 9437.319.13.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

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This is an appeal under the provisions of section 52, sub-section (2) of the Railway Act, from Order No. 45427 of the Board of Railway Commissioners for Canada, dated September 9th, 1930, authorizing the Canadian National Railway Company to carry its tracks across St. Antoine Street, in the City of Montreal, upon a grade separation, by depressing the said street into a subway under the said Respondent's tracks, and directing the Appellants and others to move such of their utilities as may be affected by such construction, and reserving all questions of cost for further consideration by the Board.

Leave to appeal was granted to Appellants by Honourable Mr. Justice Cannon, by Orders dated June 19th, 1931. 10

PART I.—THE FACTS.

Order No. 45427 was made by the Board without a hearing. Notwithstanding their request to be heard (Record, p. 230) the Appellants were not granted their day in Court. The only evidence on record consists of Plans filed in support of the Respondent's application and approved by the said Order. No opinions or reasons for making the said Order were delivered by any of the Commissioners. (Record, pp. 241 and 244.)

The Joint Appeal Case herein was settled by Counsel for the Board, under direction from the Chief Commissioner. (Record, p. 241.) 20

At the request of the Respondent, the Case was settled so as to include references to proceedings taken before the Board in other files, in 1927, (Record, p. 225,) and a judgment and an Order made therein. (Record, pp. 418 and 425.)

These proceedings, to which the Appellants were not a party, were exclusively concerned with certain complaints then pending before the Board with respect to the elimination of level crossings from Bonaventure Station westward and from Moreau Street Station eastward.

St. Antoine Street is not in that territory, was not then and is not yet crossed by the tracks of the Respondent and, therefore, it could not be involved in the said proceedings. The Appellants objected to the inclusion in the Stated Case of any reference to these irrelevant proceedings and to the judgment and Order made therein. Their objections were overruled. 30

The Appellants are at a disadvantage as regards the statement of facts in the said Stated Case, inasmuch as it does not include any evidence, none having been adduced before the Board, and it contains matters which are, in the opinion of the Appellants, foreign to this Appeal, the issue herein being exclusively limited to the validity of the said Order No. 45427, and to the powers of the Board in connection therewith.

The Appellants, laboring under this double disadvantage, respectfully submit the following as a brief outline of the facts relevant to the issue, based on the Appeal Case, so far as it goes, and on such documents and plans in the record as may help this Court to draw the inferences of facts which are necessary for the determination of this Appeal. 40

I.

On St. Antoine Street in the City of Montreal, at and near the point where the Respondent is authorized by the Order appealed from to build overhead tracks, to depress the street and construct a subway, the Appellant, the Montreal Tramways Company, to render tramway service to the public, lawfully owns, maintains and operates two sets of tracks laid to the line and level lawfully given and prescribed by the City of Montreal, and two trolley wires held by standard transverse span wires, attached to steel poles imbedded in a concrete foundation within the sidewalk allowance.

10 Summarily described, these utilities consist of a well-rolled and tamped bed of eight inches of broken stone supporting six by eight inch ties, eight feet long, spaced twenty-four inches centre to centre, on which are laid two sets of steel rail tracks, imbedded in six inches of concrete, covered with a pavement of granite blocks, laid over a sand cushion one inch thick. (Record, pp. 224 and 225, paras. 5 to 10.)

These utilities are attached to the ground for a permanency, are immoveable by destination, and are the exclusive property of the said Appellant.

20 Under its statutory, contractual and chartered rights, (Record, pp. 223-224, paras. 3 and 5, and Schedule No. 2), the said Appellant lawfully uses the said street of the City as its right of way, and it has therein an interest in land and a perpetual immoveable right of possession and usage which it cannot be compelled to give up, except for public utility, and in consideration of a just indemnity previously paid. (Civil Code P.Q. Art. 375, 377, 380, 381 and 407; 19 & 20 Geo. V, c. 12, ss. 6 & 9; R. S. C. (1927), C. 172 s. 17, as amended by 19 & 20 Geo. V, c. 10 s. 2; R. S. C. (1927), c. 64, ss. 3 (f) & 9.)

II.

30 After the acquisition in 1917 of the Canadian Northern Railway and its subsidiaries (7 and 8 Geo. V, c. 24), and in 1919, of the Grand Trunk Pacific and the Grand Trunk System (9 and 10 Geo. V, c. 22; 10 and 11 Geo. V, c. 13) it became necessary to create the Canadian National Railway Co. (9 and 10 Geo. V, c. 13) and to entrust its directors with the management and operation of all these lines and of the Canadian Government Railways, with a view to merging them all into a unified system of more than 22,000 miles of railway, the largest in America.

One of the many problems which the new management immediately had to face was centred at Montreal, where the lack of proper station yard and terminal facilities was very acute.

40 There were there and then and there are still three separate and distinct Canadian National Railway depots: the Bonaventure, Tunnel and Moreau Street Stations, having no connection with each other save by going miles around.

All these stations were obsolete. They had sufficed, more or less, for the particular lines which they had served theretofore, but they had all become inadequate for the purposes of the great National Railway System just

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created with Headquarters at Montreal, and for which more concentrated and modern passenger terminal and station facilities were urgently needed.

A study of the situation with a view to developing the most satisfactory plan was initiated. After some investigation, the Dominion Government sought advice from outside and retained the services of Mr. Frederic R. Palmer, an eminent British Engineer, to review these terminal conditions and report thereon. (Record, p. 225, par. 13.)

Mr. Palmer studied various schemes which had been urged, and reported that, in his opinion, the site of the Tunnel Terminal was the most advantageous for the construction of the desired concentrated facilities. 10

Mr. Palmer's plan was adopted by the Government because it adequately provided for the Canadian National Railways' requirements, without closing the door to a possible unionizing of all the passenger traffic entering the City, should that be decided upon by the parties interested (House of Commons, Hansard (1929), pp. 2494 & s.).

Thereupon the Canadian National Montreal Terminals Act was passed (19 & 20 Geo. V, c. 12) enabling the Governor in Council to provide for the construction and completion by the Canadian National Railway Company of terminal, station and yard facilities, etc., at Montreal, and also in respect of the said works, to guarantee the notes, obligations or bonds of the Company, in principal and interest, to an amount not exceeding fifty million dollars. 20

Pursuant to the provisions of the said Act, on the 2nd of July, 1929, His Excellency in Council (P.C. 1197) approved General Plan No. D. C. 310-0-0-63.1 (Schedule No. 5).

It is provided in the said Act (Sections 6 and 9) that the works authorized were to be constructed upon the property owned or to be acquired or taken by His Majesty or the Respondent, according to expropriation plans and descriptions to be deposited under the Expropriation Act, which applies to the undertaking of the Respondent. 30

This General Plan (Schedule No. 5) is the equivalent and takes the place of the location plan which all Railway Companies are required to file with the Board, under section 167 of the Railway Act.

The provisions of the Railway Act relating to the location of lines of railways and the making and filing of plans and profiles (other than highway and railway crossing plans), do not apply to the Respondent's undertaking generally (19 & 20 Geo. V, c. 10, sec. 2) nor to the General Plan or Plans of the Canadian National Montreal Terminals, which are subject to the approval of the Governor in Council only (19 & 20 Geo. V, c. 12, sec. 7).

But the Company did file with the Board plans and profiles of highway and railway crossings, under Section 256 of the Railway Act. 40

On the 28th of January, 1930, the Company made application to the Board, under the said section, for authority to cross, with overhead tracks, *inter alia*, St. Antoine Street, where it was proposed to depress the street and build a subway. (Record, p. 430, Schedule No. 6.)

On the 13th of March, 1930, without a hearing, by its Order No. 44433, the Board granted the Respondent's application, subject, however, to the

provision that the Respondent serve copies of detailed plans on the City of Montreal. (Record, p. 432, Schedule No. 7.)

Pursuant to the said Order, on the 21st of April, 1930, the Respondent filed with the Board detailed Plan No. YIA 31.10.4, showing the proposed overhead tracks and subway at St. Antoine Street (Schedule No. 1, copies filed) and made application for its approval. (Record, p. 70, Schedule No. 8.)

Mr. Fraser, on behalf of the Respondent, concluded his application as follows :—

10 “ I would be grateful if the Board would approve the present plan and in the Order approving it will direct that the various parties above mentioned move such of their utilities as are affected by the construction, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by the Board.” (Record, p. 70, Schedule No. 8.)

Copies of this application and of the Plan therein referred to were served upon the Appellants, who then heard for the first time of the Respondent's proposals, and of the extent to which their equipment would be interfered with, if the works therein set out were allowed to be constructed.

20 The Montreal Tramways Company, by its Attorneys, forthwith filed with the Board a request for a hearing. (Record, p. 230.)

No further proceedings were served or taken by either of the parties, and on the 9th of September 1930, without notice to the Appellants, without a hearing, and without delivering any reasons or opinions, the Board made its Order bearing No. 45427, granted the Respondent authority to construct a subway on St. Antoine Street, as per plan submitted, directed the Appellants (and others) 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 of the Respondent, and reserved all questions of cost for

30 further consideration. (Record, p. 71.)

The construction of the said subway will not in any way confer any benefit or advantage to the Appellants or to the plant of the Montreal Tramways Company, and the said Appellants have no interest in the promotion thereof but, on the contrary, the construction of the said subway will result in the lowering of the level of St. Antoine Street, over a distance of about five hundred (500) feet, to a depth which will require the removal of the works of the said Appellant, the Montreal Tramways Company, and their relocation to the new street line and level. (Record, pp. 226-7, paras. 17 & 18.)

40 PART II.—THE ORDER COMPLAINED OF.

The Appellants respectfully submit that the Order appealed from is erroneous and “ ultra vires ” :

1. Because under the provisions of the Canadian National Montreal Terminals Act, the Canadian National Railways Act and all other Special Acts, the Railway Act is not applicable to the

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location of lines of railway and the taking of land by the Canadian National Railway Company, these matters being governed by the provisions of the Expropriation Act.

2. Because the Appellant, the Montreal Tramways Company, at the location herein in question, owns and possesses an immoveable property, an interest in land and a perpetual immoveable right of possession and usage which cannot be taken or injuriously affected without expropriation proceedings being first taken and proper compensation paid.

3. Because under the provisions of the Acts just cited the Minister of Railways and Canals and/or the Canadian National Railway Company cannot alter or divert, temporarily or permanently, the course of any railway, road, street or way, or raise or sink the level of the same, without first substituting another convenient railway or road in lieu thereof and paying proper compensation for the damages suffered, and the Board is without power to make the Order appealed from directing the Appellants to move their utilities at their own expense, and reserving for further consideration by the Board all questions of cost. 10

PART III.—THE ARGUMENT. 20

I.

Under the provisions of the Canadian National Montreal Terminals Act, the Canadian National Railways Act and all other Special Acts, the Railway Act is not applicable to the location of lines of railway and the taking of land by the Canadian National Railway Company, these matters being governed by the provisions of the Expropriation Act.

The overhead tracks and subway to be constructed at St. Antoine Street form part of the new lines of railway from Victoria Bridge to the new passenger station which the Respondent proposes to build at the Tunnel Terminal, pursuant to the provisions of the Canadian National Montreal Terminals Act (19 & 20 Geo. V, c. 12) whereof sections 2, 3, 6, 7 and 9 read as follows :— 30

“ 2. The Governor in Council may provide for the construction
“ and completion by the Canadian National Railway Company
“ (hereinafter called ‘ the Company ’) of terminal stations and
“ offices, local stations, station grounds, yards, tracks, terminal
“ facilities, power houses, pipes, wires and conduits for any purpose,
“ bridges, viaducts, tunnels, subways, branch and connecting lines
“ and tracks, buildings and structures of every description and for
“ any purpose, and improvements, works, plant, apparatus and 40
“ appliances for the movement, handling or convenient accommoda-
“ tion of every kind of traffic, also street and highway diversions
“ and widenings, new streets and highways, subway and overhead
“ streets, and also approaches, lanes alleyways, and other means of
“ passage, with the right to acquire or to take under the provisions of

“ *section nine of this Act or otherwise lands and interests in lands* for all such purposes, all on the Island of Montreal in the Province of Quebec, or on the mainland adjacent thereto, as shown generally on the plan or plans thereof to be from time to time approved by the Governor in Council under the provisions of section seven of this Act; the whole being hereinafter referred to as ‘the said works,’ and a short description whereof for the information of Parliament but not intended to be exhaustive, being set out in the schedule hereto.

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“ 3. Subject to the provisions of this Act, the Company may issue notes, obligations, bonds and other securities (hereinafter called ‘securities’) in respect of the construction and completion of the said works, and the Governor in Council may authorize the guarantee of the principal and interest of such securities to an amount not exceeding fifty million dollars (\$50,000.00)*. The Company shall not, without the approval of the Governor in Council, spend upon the said works more than ten million dollars (\$10,000,000) per annum.

* *Sic.*

20

“ 6. The proceeds of any sale, pledge or other disposition of the securities shall be deposited in a bank or banks in a fund to the credit of the Minister of Finance in trust for the Company, and shall from time to time be released to the Company by the Minister of Finance in his discretion, to be applied in meeting expenditures made or indebtedness incurred in connection with the said works. The proceeds also of any sales of lands acquired by the Company or taken by His Majesty under section nine of this Act for the said works and not abandoned nor required for such purposes and contributions made toward the cost of the said works under section eight of this Act or from any other source shall be deposited to the credit of the said Minister and shall by him be similarly released. The cost of financing or temporary financing, including interest and discounts, shall be deemed to be part of the cost of the said works. *The said works may be constructed upon property from time to time owned acquired or taken by the Company, and, in so far as may be necessary, upon the property of any other Company comprised in the Canadian National Railways operating within the territory described in section two of this Act, and, without restricting the generality of the foregoing language, upon the property of the Canadian Northern Railway Company, the Canadian Northern Ontario Railway Company, the Canadian Northern Quebec Railway Company, the Mount Royal Tunnel and Terminal Company, Limited, the Canadian National Realities Limited, and, with the approval of the Governor in Council evidenced by the approval of plans under the provisions of section seven of this Act, upon the property owned or taken by His Majesty the King in the right of the Dominion of Canada.*

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“ 7. *The general plan or plans of the said works and amendments or additions to such general plan at any time made, shall, on the recommendation of the Minister of Railways and Canals, be subject to the approval of the Governor in Council . . .*”

“ 9. *Certain expropriation plans and descriptions heretofore deposited, under the Expropriation Act, by or on behalf of the Minister of Railways and Canals for the purposes of the Government Railways having vested in His Majesty lands now required for part of the said works, other plans and descriptions showing lands or interests in lands required or taken from time to time in connection with the said works may be deposited by or on behalf of the said Minister under the Expropriation Act. The compensation to be paid in respect of any such taking, subject to the usual right of abandonment as provided in the Expropriation Act, may be paid out of the trust funds deposited to the credit of the Minister of Finance under section six of this Act, and upon such payment the lands or interests in lands thereby taken or vested in His Majesty shall upon request be transferred by His Majesty to the Company.*”

10

These provisions are in keeping with those of the Canadian National Railways Act (R. S. C. (1927) c. 172, sec. 17, as amended by 19 & 20 Geo. V (1929) ch. 10, sec. 2) reading as follows:—

20

“ 2. Section seventeen of the Canadian National Railways Act is hereby repealed and the following enacted in lieu thereof:

“ 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;

(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;

30

(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;

(b)

(c)

(d) The compensation payable in respect of any lands or interests therein taken by the Company under the provisions of the *Expropriation Act* as made applicable to the Company by this Act, shall be ascertained in accordance with the provisions of the *Expropriation Act*, and for that purpose the *Exchequer Court* shall have jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the Company, of judicial

40

proceedings and the conduct thereof; Provided that such compensation may, in any case where the offer of the Company does not exceed two thousand five hundred dollars, be ascertained under the provisions of the *Railway Act*, beginning with notice of expropriation to the opposite party. The amount of any judgment shall be payable by the Company.

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The pertinent sections of the Expropriation Act (R. S. C. (1927) c. 64) are the following :

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10 “ S. 2. In this Act, unless the context otherwise requires,
 “ (d) ‘ land ’ includes all granted or ungranted, wild or cleared,
public or private lands, and all real property, messuages, lands,
tenements and hereditaments of any tenure, and all real rights,
easements, servitudes and damages, and all other things done in
pursuance of this Act, for which compensation is to be paid by His
Majesty under this Act;

 “ (g) ‘ public work ’ or ‘ public works ’ means and includes

the works and properties acquired, constructed, extended, enlarged,
repaired or improved at the expense of Canada, or for the acquisition,
20 construction, repairing extending, enlarging or improving of which
any public moneys are voted and appropriated by Parliament, and
every work required for any such purpose

 “ S. 3. The Minister may by himself, his engineers, super-
intendents, agents, workmen and servants,

 “ (b) enter upon and take possession of any land, real pro-
perty
the appropriation of which is, in his judgment, necessary for the
use, construction, maintenance or repair of the public work, or for
obtaining better access thereto;”

30 (f)
divert or alter, as well temporarily as permanently, the course of
any railways, roads, streets or ways, or
raise or sink the level of the same, in order to carry them over or
under, on the level of, or by the side of the public work, as he
thinks proper; but before discontinuing or altering any railway or
public road or any portion thereof, he shall substitute another
convenient railway or road in lieu thereof; and in such case, the
owner of such railway or road shall take over the substituted
railway or road in mitigation of damages, if any, claimable by him
40 under this Act, and the land theretofore used for any railway or
road, or the part of a railway or road so discontinued, may be
transferred by the Minister to, and shall thereafter become the
property of, the owner of the land of which it originally formed
part;”

The foregoing sections of the Acts just cited clearly establish, we submit, the inapplicability of the *Railway Act* to the location of lines

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of railway, the taking of land and the compensation payable by the Canadian National Railway Company.

It is also obvious that these matters are governed by the provisions of the Expropriation Act.

This submission is in keeping with the following section of the Railway Act :

“ 256. (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 next 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.”

The Board had therefore no jurisdiction to order the Appellants to move such of their utilities as may be affected by the construction of the subway on St. Antoine Street, as it directed in paragraph 2 of the Order appealed from.

The jurisdiction of the Board is not inherent but statutory, and it is limited to such powers as are by statute conferred upon it.

II.

The Appellant, the Montreal Tramways Company, at the location herein in question, owns and possesses an immoveable property, an interest in land and a perpetual immoveable right of possession and usage which cannot be taken or injuriously affected without expropriation proceedings being first taken and proper compensation paid.

The Appellant, the Montreal Tramways Company, was incorporated by a Special Act of the Legislature of Quebec, 1 Geo. V (2nd Session, (1911) c. 77,) and amending Acts.

By another special Act of the same Legislature (7 Geo. V (1916) c. 60, sec. 28) a commission was created for the purpose of drawing up a contract between the City of Montreal and the said Appellant. This contract, duly executed before Mtre. Jean Beaudoin, on the 28th of January 1918, was ratified and confirmed by another Act of the Legislature, 8 Geo. V (1918) ch. 84, sec. 75 (Schedule No. 2).

Under the provisions of the said contract, the Montreal Tramways Commission, the other Appellant, was created and given powers of supervision, regulation, and control, as therein set out. (Schedule No. 2, pp. 4 & s., Articles 2 & s.)

The scope and duration of this contract are given at page 8 of Schedule No. 2 (Articles 23 & s.), and at page 33 (Article 92, parag. 8) reading in part as follows :

“ 24.—In execution of the Acts 1 George V (2nd Session) chapter 77, sections 14 and 15, and 7 George V, chapter 60, section 28, the City grants to the Company, on the conditions mentioned in the

present contract, the privilege of constructing, equipping, maintaining and operating, from the coming into force of the present contract until the twenty-fourth (24th) of March, one thousand nine hundred and fifty-three (1953) a system of surface tramways in the City, as it now exists and as it may later be extended, and the Company obliges itself to construct, equip, maintain, keep up and operate at its cost the said system of tramways, in accordance with the stipulations and during the term of the present contract.”

10 “ 8.—(Expropriation) On March twenty-fourth (24th) nineteen hundred and fifty-three (1953) and at the expiration of every subsequent five-years period, the City shall have the right, after six months notice given to the Company within the twelve months immediately preceding March twenty-fourth (24th), nineteen hundred and fifty-three (1953) and also after a similar notice of six months and on the same conditions at the end of each subsequent five-years period, to appropriate for itself the railways of the said company as well as the immoveables and dependencies, plant and cars belonging to it and necessary for the operation of the said railway, situate within and without the limits of the said City, by paying the values
20 thereof, to be fixed by arbitrators, and ten per cent (10%) over and above the estimate. Such arbitrators shall be appointed as follows : one by the City, one by the Company, and the third by a judge of the Superior Court sitting in and for the district of Montreal.”

As herein above set out, the said Appellant possesses a perpetual Charter. Its utilities are attached to the ground, are immoveable by destination and are its exclusive property. They are assessable for municipal and other taxes. (Schedule No. 2, p. 22, art. 84.)

30 The said Appellant lawfully possesses, within the meaning of the word “ land ” as defined in section 2 (d) of the Expropriation Act, an interest in land, an immoveable right of usage and occupancy in the portions of the streets of the City where its facilities are located, and in particular on St. Antoine Street, at and near the point where, by the Order appealed from, the Board purported to grant authority to the Respondent to build overhead tracks and a subway, and such rights cannot be taken away or injuriously affected by the Respondent without expropriation proceedings being first taken and proper compensation paid.

III.

40 Under the provisions of the Acts just cited, the Minister of Railways and Canals and/or the Canadian National Railway Company cannot alter or divert, temporarily or permanently, the course of any railway, road, street or way, or raise or sink the level of the same, without first substituting another convenient railway or road in lieu thereof and paying proper compensation for the damages suffered, and the Board is without power to make the Order appealed from directing the Appellants to move their utilities at their own expense, and reserving for further consideration by the Board all questions of cost.

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The Respondent's application and the Board's Order granting it are made under section 256 of the Railway Act.

Section 256 of the Railway Act is exclusively concerned with a railway applying to cross a highway.

So far as the Appellants' utilities are concerned, however, the Respondent's application involves the crossing of a railway by another railway.

Any other railway company under the jurisdiction of the Board would have had therefore to make two applications, one under section 256 to cross the highway, and one under section 252 to cross another railway, 10
i.e.: the Montreal Tramways.

In the case of the C. N. R., however, all these sections 252, 255, 256 and 257 are inapplicable, because they are inconsistent with the Expropriation Act (R. S. C. chap. 64, sect. (3) sub-section (f)) wherein it is provided that the Minister or the Company cannot divert or alter either temporarily or permanently the course of any railway, road, street or ways, or raise or sink the level of the same in order to carry them over or under, on the level of, or by the side of the public work, as he thinks proper, before substituting another convenient railway or road in lieu thereof.

The Board had therefore no jurisdiction to hear and decide the 20
Respondent's application under section 256 or any other Section of the Railway Act, which are superseded, in respect of the Canadian National Railway Company's undertaking, by the above quoted provisions of the Expropriation Act.

CONCLUSION.

Under the provisions of the Canadian National Montreal Terminals Act, the Canadian National Railways Act and the Expropriation Act, the Respondent has, with regard to the construction of the subway and works herein in question, the same rights or powers as are accorded to the Minister under the Expropriation Act. 30

Subject to taking the proper proceedings under the foregoing Acts and making provision for proper compensation, the Minister and the Company require no leave or approval of the Board to construct railway or highway crossings or grade separations thereat.

The Respondent should never have made application for and the Board should never have made the Order appealed from, the Board's jurisdiction being limited to receiving the crossing plan for filing, pursuant to section 17 of the Canadian National Railways Act.

We respectfully submit that this appeal should be allowed with costs.

MONTREAL, September 30, 1931. 40

VALLEE, VIEN, BEAUDRY, FORTIER & MATHIEU,
Attorneys for the Appellant
the Montreal Tramways Company

BEIQUE & BEIQUE
Attorneys for the Appellant
the Montreal Tramways Commission.

No. 110.

Factum of Canadian National Railways.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1390, and filed with the Board under File No. 9437.319.13.

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No. 6.

In the
Supreme
Court of
Canada.

No. 110.
Factum of
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Railways.

10 BETWEEN

THE MONTREAL TRAMWAYS COMPANY

THE MONTREAL TRAMWAYS COMMISSION - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAY COMPANY *Respondent.*

PART I.—STATEMENT OF FACTS.

This is an appeal by leave granted by the Honourable Mr. Justice Newcombe from Order No. 45427 of the Board of Railway Commissioners for Canada, hereinafter called The Board, dated 9th September, 1930, in so far as the said Order directs the appellants to move such of their utilities
20 as may be affected by the construction of a subway at St. Antoine Street, Montreal, as and when required to do so by the Chief Engineer, Operating Department, of the Canadian National Railways, upon the ground that the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said appellants, or in any event to make the said Order ex parte and without notice to the said appellants.

St. Antoine Street is a highway extending in an Easterly and Westerly direction through the Southwesterly section of the City of Montreal as shown in part on the plan YIA 31.10.4 filed by the respondents with their application to the Board for authority to construct a subway at the said street. There
30 was no such subway in existence at the said street at the date of the said Order.

At the date of the said Order the appellants had certain utilities located upon, over and under the said highway.

For many years the Board has given consideration to the question of level crossings of the Canadian National Railways in the City of Montreal. Prior to the War the Grand Trunk Railway Company, in conjunction with the City of Montreal and The Board, had made a study of the situation affecting principally the separation of grades between Bonaventure Station and Victoria Bridge and Turcot, and had developed a plan involving the
40 raising of the tracks of the railway company in this area to a sufficient extent

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to permit vehicular traffic to pass underneath the railway facilities. This plan involved the construction of a new passenger station upon the site of Bonaventure Station. These proceedings died down during the period of the War.

In the year 1927 the matter was again revived by The Board and on 27th May, 1927, a judgment of The Board was issued, shown at Record, page 418.

The judgment in question provides that these matters be referred for a report to the Chief Engineer of The Board, who, by Order No. 39079, dated 27th May, 1927, was appointed and directed to make a full inquiry and report to The Board upon the whole situation of level crossings in Montreal, from Bonaventure Station West and from Moreau Street Station East, and to evolve a scheme for the consideration of The Board (Record, p. 425). No complete report covering the whole situation has yet been made by the said Chief Engineer, but he has made certain reports including one with regard to the subway in question herein. 10

A study of the whole Canadian National Railways situation in Montreal was undertaken by the Railway Company, and a comprehensive scheme evolved for readjusting its terminal facilities in the said City and minimizing the danger to the public at level crossings. The site of the tunnel terminal on Lagauchetiere Street was decided on for a passenger station. Up to that time the use of the site on Lagauchetiere Street for a passenger station had not been contemplated in the proceedings before The Board. The services of Mr. Frederick R. Palmer, an eminent British engineer, were engaged by the Government to study and report upon the whole terminal situation in Montreal. Subsequent to Mr. Palmer's report and by Act of the Parliament of Canada chapter 12 of the Statutes of 1929, the Canadian National Railway Company was given power to construct and complete the works described in the schedule to the said Act at and in the vicinity of Montreal; and pursuant to the provisions of the said Act, the Governor-in-Council, by 30 Order-in-Council P.C. 1197, dated 2nd July, 1929, approved General Plan No. DC310-0, 0-63.1. (Record, schedule 5). General Plans WIA 19.14.1 and WIA 19.15.1 dated 17th January, 1930, showing *inter alia* a crossing of the street in question herein by the respondents' tracks at a point where no such crossing previously existed from Victoria Bridge to the site of the tunnel terminal on Lagauchetiere Street, were, upon the application of the Railway Company and the recommendation of its Chief Engineer, approved by The Board by Order No. 44433 dated 13th March, 1930.

The said Order No. 44433 directed that detailed plans of individual grade separations be served upon the City of Montreal, and submitted for approval of The Board, the question of the division of the cost of the work being, by the said Order, reserved for further consideration of The Board. 40

On 21st April, 1930, in pursuance of the provisions of the said Order No. 44433 the respondents made a further application to The Board for approval of a detailed plan number YIA 31.10.4 for carrying its tracks across St. Antoine Street upon a grade separation by constructing a subway in St. Antoine Street, and for an Order directing the appellants and others

to move such of their utilities as are affected by the construction of the subway, as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by The Board.

The appellants were served with a copy of the last named application on or about 22nd April, 1930, and on 26th April, 1930, mailed their answer thereto to the Secretary of The Board, requesting a hearing of the said application.

10 On 9th September 1930, without granting any hearing, the Board made the above Order No. 45427.

PART II.—ERRORS IN THE ORDER APPEALED FROM.

The respondents submit that the Board had jurisdiction to make the order appealed from and that the same should be affirmed.

PART III.—ARGUMENT.

20 The subway referred to in the Order appealed from, and all things to be done in connection therewith, including procedure, were incidental to and parts of a comprehensive scheme initiated by the Board, as appears from its Order and judgment of 27th May 1927, for the protection, safety and convenience of the public, and approved by Parliament, and including, among other things, the elimination of passenger traffic from Bonaventure Station to Turcot and from Moreau Street easterly, the diversion of such passenger traffic to lines skirting the City of Montreal at the north and converging at the present tunnel station at Lagauchetiere Street, the establishment of terminal facilities at the site of the said tunnel station, the construction of a viaduct and elevated railway between Inspector and Dalhousie Streets, and St. David's Lane and Nazareth Street to near Wellington Street, and thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets, including St. Antoine Street, and the providing of a grade separation by means of elevated or depressed or underground tracks, or streets, between St. Henri and Point St. Charles, the latter including, among other streets, d'Argenson Street.

30 The constitution and powers of the respondents are set forth in the Canadian National Railways Act, being chapter 172 of the Revised Statutes of Canada 1927, as amended by chapter 10 of the Statutes of Canada 1929, and under the said Act as amended the respondents had power to do the things mentioned in the preceding paragraph, upon securing approval of the Governor-in-Council, sanction as to location by the Minister of Railways and Canals, and authority by Parliament for the necessary expenditure or the guarantee of an issue of securities.

40 The Canadian National Montreal Terminals Act 1929, being chapter 12 of the Statutes of Canada 1929 was an Enabling Act, passed for the purpose of providing parliamentary authority for such expenditure and guarantee of securities, as applied to the scheme above referred to.

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The powers and jurisdiction of the Board are set out and defined in The Railway Act, chapter 170 of the Revised Statutes of Canada 1927, and, unless otherwise specified, the sections hereinafter referred to are sections of the Railway Act.

By s. 33, sub-s 1. the Board has 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 authorized 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. By sub-s 2 it may order and require any Company or person to do forthwith, or within or at any specified time, and in any manner to be 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 shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or fact. By sub-s 5 the Board's decision 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. 10

Sec. 34 empowers the Board to make orders with respect to any matter, act or thing which by the Act is sanctioned, required to be done or prohibited, and generally for carrying the Act into effect and for exercising any jurisdiction conferred upon it. 20

Under sec. 35 the Board may, of its own motion, . . . inquire into, hear and determine any matter or thing, which under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.

By sec. 37 any power or authority vested in the Board may although not so expressed, be exercised from time to time, or at any time, as the occasion may require. 30

By sec. 256 in the case of a new highway crossing and by sec. 257 in the case of an existing highway crossing, the Board is authorized to make such orders as it deems expedient, as to the protection, safety and convenience of the public.

By sec. 259 the Board is authorized to 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, and it is submitted that it is immaterial, in view of the provisions above recited, whether the highway crossing is new or already in existence. 40

By sec. 39 (1) 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, re-constructed, 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, re-constructed, altered, installed, operated, used and maintained. Under sub-s 2, the Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, re-constructing, 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.

If an order can be supported under sec. 39, it is unnecessary to consider whether it could also be supported under other sections of the Act.

Toronto Ry. Co. v. Toronto City—(1) (1920) A.C. 426, 437.

In view of the attitude taken by the appellants, they cannot be heard to say that they are not interested or affected by the order in question. The question whether or not they were benefited by the execution of the works in question is not material to the question of the jurisdiction of the Board. They could competently be required to contribute to the cost of such works, and the propriety of requiring them to do so and the extent of the contribution ordered are not matters for review by the Court.

C.P.R. et al v. Toronto Transportation Commission et al and Toronto Transportation Commission v. C.N.R. et al—1930 A.C. 686.

In the order appealed from, the Board has exercised the jurisdiction given to it under sec. 39 in :

1. Ordering by whom, namely the appellants, the utilities should be moved. Such order is not only in accordance with jurisdiction, but also in accordance with common sense. It would obviously be foolish to authorize any party unfamiliar therewith to interfere with such utilities.

2. Directing when and within what time the removal of such utilities should be carried out, namely : as and when required to do so by the Chief Engineer, Operating Department, of the respondents.

3. By reserving all questions of costs, which would include consideration of payment of compensation and the proportion of such costs to be paid by all parties.

In the case above referred to in 1930 Appeal Cases, it is remarked, in connection with sec. 39, that the case was not "otherwise provided for in the Act," and the respondents submit that the same remark applies in this case.

The appellants are not the owners of land or of any interest in land which is subject to expropriation. In view of the provisions of the Canadian National Railways Act, as amended by chapter 10 of the Statutes of Canada 1929, the expropriation provisions of The Railway Act are not applicable to

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the respondents, and there is no provision in the said Acts for the expropriation of a highway or of any interest therein.

There are a number of sections of The Railway Act under which the party by whom work shall be done or costs shall be borne are expressly provided, such as sections 185, 251-(6) and 260, but there is nothing in the Act inconsistent with the applicability of the provisions of sec. 39 to the situation in question herein.

Apart from the foregoing it may be pointed out that if any compensation is payable to the appellants, the ascertainment and payment thereof are not pre-requisite to the immediate exercise by the Board of its jurisdiction under sec. 39, but merely matters which may be taken into consideration by the Board in finally apportioning the cost of the work, which has been reserved. 10

As to the contention that the order appealed from was made *ex parte* or without notice to the appellants, the respondents deny that it was made either *ex parte* or without notice to the appellants. The appellants were served with the respondents' application for the said order and had and took the opportunity of replying to the same.

Under the provisions of sec. 39, the Commissioners may sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business, and they may, 20 subject to the provisions of the Act sit either together or separately, and either in private or in open Court.

The only exception to these provisions is that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open Court.

The application for the order in question was not a "complaint" within the meaning of sec. 19.

The Honourable Mr. Justice Rinfret in his reasons given in disposing of an application for leave to appeal in

City of Montreal v. Canadian National Railways 30

on or about the 26th day of February 1931, says in part :

"A reference to section 33 of the Railway Act will, I think, show the true meaning of the word "complaint" in section 19.

Section 33 provides that :

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

- (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 40 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 direction, leave, sanction or approval, which by law it is authorized 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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The application of the Canadian National Railway Company was not an application complaining of anything in the sense of subparagraph (a) of Section 33, but an application requesting the Board to give its approval to a plan and profile in the sense of subparagraph (b) of Section 33.

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10

In point of law, therefore, it was not a complaint within the meaning of the provisions of section 19; but it was a case where the Commissioners were at liberty to sit at such times, either in private or in open court, and to conduct their proceedings in such manner as they deemed convenient."

The respondents submit :

(1) That so far as the general jurisdiction of the Board is concerned, there is nothing in principle to distinguish this case from numerous other cases decided by the Judicial Committee of the Privy Council, and by this Court, in which such jurisdiction has been affirmed.

20

(2) That, while the practice and procedure of the Board have been correct, an appeal on a mere question of practice and procedure is not one which this Court will, under its established jurisprudence, entertain.

(3) That the appeal should, therefore, be dismissed with costs.

Copies of The Railway Act and other relevant legislation will be furnished for use on the argument of this appeal.

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A. FRASER,
of Counsel for the Respondents.

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Formal
Judgment,
1st March
1932.

No. 111.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tuesday the 1st day of March, A.D. 1932.

Present : The Right Honourable F. A. ANGLIN, C.J.C., P.C.
The Right Honourable Mr. Justice DUFF, P.C.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice LAMONT.

IN THE MATTER OF the Application of the Canadian National Railways 10
for an Order under Section 256 of the Railway Act, for authority
to construct a subway on St. Antoine Street, in the City of Montreal,
as shown on General Plan YIA 31.10.4, dated August 16th, 1930,
and filed with the Board under File No. 9437.319.13.

BETWEEN

THE MONTREAL TRAMWAYS COMPANY AND
THE MONTREAL TRAMWAYS COMMISSION - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - *Respondent.*

The Appeal of the above named appellants from Order No. 45427 of 20
the Board of Railway Commissioners for Canada dated the 9th day of
September, A.D. 1930, in the above matter, having come on to be heard
before this Court on the 26th and 27th days of October, in the year of
our Lord one thousand nine hundred and thirty-one, constituted as above
with the addition of the Honourable Mr. Justice Newcombe, C.M.G., since
deceased, in the presence of Counsel as well for the appellants as for the
respondent, whereupon and upon hearing what was alleged by Counsel
aforesaid, this Court was pleased to direct that the said appeal should stand
over for Judgment, and the same coming on this day for Judgment.

THIS COURT DID ORDER AND ADJUDGE that the said appeal 30
should be and the same was dismissed, and that the said Order No. 45427
of the Board of Railway Commissioners for Canada should be and the same
was affirmed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE
that the said appellant should and do pay to the said respondent the costs
incurred by the said respondent in this Court.

(Sgd.) J. F. SMELLIE,
Registrar.

No. 112.

No. 112.

Reasons for Judgment.

- (a) ANGLIN C.J.C.
(b) RINFRET J. (concurring in by DUFF and LAMONT JJ.)
(Same as No. 16 at p. 48.)

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APPEAL No. 7.

*St. Clair Avenue, Toronto, Subway.*In the Privy Council.

No. 61 OF 1932.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

IN THE MATTER OF the Application of the Canadian National Railways
for an Order under Sections 178 and 257 of The Railway Act, for
authority to construct a subway under their tracks where they cross
10 St. Clair Avenue, in the City of Toronto, Province of Ontario, and to
divert the main line of the railway to the west as shown on plan and
profile No. C-6426, dated November 20th, 1930, on file with the Board
under file No. 32453.11.

AND IN THE MATTER OF Order Number 46083 of The Board of Railway
Commissioners for Canada, dated the 8th day of January, A.D. 1931.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

20

No. 113.

APPEAL
No. 7.

Statement of Facts.

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Statement
of Facts.

1. The Appellant, The Bell Telephone Company of Canada, was
incorporated by Special Act of the Parliament of Canada, 43 Victoria,
1880, Chapter 67, and amending Acts. A true copy of the Sections of
the said Acts, as amended, relevant to this Appeal, are set forth in the
schedule attached hereto as Schedule No. 1.

2. In the year 1913, the Appellant, The Bell Telephone Company of
Canada, acting in pursuance of the powers conferred upon it in that behalf
by its Special Acts of Incorporation referred to in paragraph 1 hereof,
30 and with the legal consent of the City of Toronto, constructed an under-
ground conduit system, with the manholes and lateral duct runs necessary
and incident thereto, under the surface of and within the limits of St. Clair

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continued.

Avenue, in the City of Toronto, extending through, and for a considerable distance both easterly and westerly of, that part of St. Clair Avenue wherein the proposed subway under the tracks of the Canadian National Railways, hereinafter referred to, is to be built, and placed its telephone lines and cables therein, the whole for the purpose of rendering telephone service to its subscribers.

3. In that portion of St. Clair Avenue in which the said proposed subway is to be built, namely, extending easterly from a point 235 feet east of the easterly limit of Laughton Avenue for a distance of about 500 feet, the underground conduit system of The Bell Telephone Company of Canada is located within the limits of St. Clair Avenue at a depth of about 30 inches below the surface of the street and at a distance of about 19 feet north of the southerly limit thereof and is constructed and consists of six ducts or passages, each having a cross sectional measurement of about $4\frac{1}{2}$ inches square, and is composed of lengths of multiple vitrified clay tiles laid end to end longitudinally to form continuous passages, superimposed upon each other in three layers of two ducts each; the whole of which is set into a trench in the ground and rests upon a foundation of concrete of about four inches in thickness to which the vitrified clay tiles adhere by reason of being laid upon the concrete immediately after the concrete has been poured and while it is still wet. The said vitrified clay tiles are further protected by a layer of concrete of about three inches in thickness poured over the top thereof, the whole of these thus forming a homogeneous mass with the surrounding earth incapable of being moved or altered without being broken up and destroyed.

4. Associated and connected with the portion of the said conduit located in that part of St. Clair Avenue, hereinbefore described, is one man-hole which consists of an underground chamber about seven feet in length by about five feet in height and width; the floor and walls of which are constructed of concrete of about six inches in thickness. The roof of the said man-hole consists of a monolithic concrete slab lying about 14 inches below the surface of the street supporting a circular metal frame which is embedded in the street pavement and leads up through the pavement to the surface of the street, creating an opening over which rests a removable metal cover for the purpose of permitting access to the said man-hole. The tops of the said metal frame and cover lie flush with the surface of the street and form part thereof.

5. The said conduit system contains two 404 pair 22 gauge cables, each containing 808 wires all for use in rendering telephone service to the Appellant's subscribers.

6. That in addition to the plant hereinbefore described the Appellant owns underground conduits and cables constructed and placed under the surface of Prescott Avenue, Caledonia Road and McRoberts Street, in the City of Toronto, all of which connect with the conduits and cables located in St. Clair Avenue.

7. That from the time of the construction of the said conduit system and the installation of the cables therein up to the present time, the Appellant, The Bell Telephone Company of Canada, has continuously maintained its said conduit system and cables in the precise location above described and continues so to do.

8. In the month of November, 1922, the City of Toronto made application to the Board of Railway Commissioners for Canada for an Order that the Canadian Pacific Railway Company and the Canadian National Railways be required to collaborate with the said City in the preparation of a joint plan for the separation of grades in the northwest portion of the City of Toronto. The said application came on for hearing before the Board at Toronto on the 14th of February, 1923, when, after considerable discussion, it was suggested that the City and the two Railways endeavour to arrive at a satisfactory agreement among themselves, and the proceedings were stayed to enable them to do so. The said parties were unable to effect any such agreement, and the City's said application having finally come on for hearing before the Board at Toronto on the 8th day of January, 1924, a judgment of the Board was issued on May 9th, 1924, which is reported in the Board's Judgments, Volume 14, page 67. Pursuant to the said Judgment, Order No. 35037, dated May 9th, 1924, directing, *inter alia*, that a subway be constructed under the Newmarket Subdivision of the Canadian National Railways at St. Clair Avenue, Toronto. A copy of said Order No. 35037 is attached hereto as Schedule 2. The Appellant was not a party to the proceedings referred to in this paragraph, and no steps were taken towards the construction of the said subway until the institution of the further proceedings hereinafter set forth.

9. The Canadian National Railways prepared a plan and profile dated the 20th day of November, 1930, and bearing the number C-6426 showing and providing for a diversion of its Newmarket Subdivision line to the west and the construction of a subway where the said line crosses St. Clair Avenue; the whole as shown upon the said plan and profile, a true copy whereof is annexed hereto as Schedule No. 3. The said plan and profile were approved, and the works therein provided for were authorized by the Governor-in-Council pursuant to the provisions of Section 21 of the Canadian National Railways Act, R.S.C. (1927), Chapter 172, by Order in Council No.P.C. 2685 dated the 19th day of November, 1930.

10. On or about the 30th day of December, 1930, the Appellant, The Bell Telephone Company of Canada, received by mail a copy of an application made by the Canadian National Railways to the Board of Railway Commissioners for Canada, for approval of the said Plan No. C-6426, dated the 20th November, 1930, and for authority to divert its said Newmarket Subdivision Line to the west and to construct a subway under its said line where it crosses St. Clair Avenue, Toronto, in accordance with the said Plan and Profile No. C-6426. A true copy of the said application is hereto annexed as Schedule 4.

11. On or about the 2nd day of January, 1931, the Appellant, The Bell Telephone Company of Canada, duly filed and served its answer to the

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continued.

said application of the Canadian National Railways, requesting a formal hearing of the said application. A true copy of the said answer is hereto annexed as Schedule 5.

12. On our about the 6th day of January, 1931, The Bell Telephone Company of Canada received by mail a copy of the Canadian National Railways' reply to the Appellant's said answer. A true copy of the said reply is hereto annexed as Schedule 6.

13. No further proceedings were served or taken by either of the parties hereto, and on the 8th day of January, 1931, without notice to the Appellant and without granting any hearing, as requested in the Appellant's answer, the Board of Railway Commissioners for Canada made an Order, being Order No. 46083, granting the Respondent's said application and directing the Appellant and others 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 of the Respondent. A copy of the said Order is attached hereto as Schedule 7. 10

14. The diversion of the said line of railway and the construction of the said subway, in accordance with the said Plan and Profile No. C-6426, will result in the alteration in the grade level of St. Clair Avenue, over a distance of about 500 feet, at a point where the hereinbefore described telephone lines and plant of the Appellant are constructed. It is not contended that the diversion of the said line and/or the construction of the said subway will in any way confer any benefit or advantage upon the Appellant or its telephone lines and plant. On the contrary it is admitted that the diversion of the said line of railway and the construction of the said subway will necessitate the destruction and/or removal of the Appellant's aforementioned conduit system and telephone lines and plant at the location of the said proposed subway, and will necessitate the re-location of the said conduit system, telephone lines and plant, or the reconstruction of similar lines and plant, at substantial cost and expense. 20

15. On the 17th day of March, 1931, the Appellant launched a motion, returnable on the 24th day of March, 1931, before the presiding Judge of the Supreme Court of Canada, in Chambers, applying for leave to appeal to the Supreme Court of Canada from the said Order No. 46083 of the Board of Railway Commissioners for Canada, insofar as the said Order directed the Appellant to move such of its utilities as may be affected by the construction of the said subway, when requested to do so by the Chief Engineer of the Canadian National Railways, upon the ground that as a matter of law the Board of Railway Commissioners for Canada is without jurisdiction to make the said Order insofar as it directs the Appellant to move its utilities as aforesaid. 30 40

16. The said motion came on for hearing on the date aforesaid, before the Honourable Mr. Justice Rinfret, who granted said application by Order dated the 7th day of April, 1931, in the following terms:—

“AND IT IS FURTHER ORDERED that the said application for leave to appeal to this Court from the said Order Number 46083

of The Board of Railway Commissioners for Canada, in so far as the said Order directs the Appellants to move such of their facilities as may be affected by the construction of the subway authorized to be constructed by the said Order when requested to do so by the Chief Engineer of The Canadian National Railways, upon the ground that The Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said Appellants or in any event to make the said Order ex parte and without notice to the said Appellants, be and the same is hereby granted."

10

A copy of the said Order is attached hereto as Schedule 8.

No. 114.

Application of Respondent to Board of Railway Commissioners for Canada for authority to construct subway &c.

SCHEDULE No. 4.

CANADIAN NATIONAL RAILWAYS.

December 30, 1930.

349-1-M.

20 A. D. Cartwright, Esq.,
Secretary, B.R.C.,
Ottawa, Ont.

File 32458.3—Northwest Grade Separation, Toronto.

Dear Sir:

Since my letter to you of the 6th of October last, arrangements for the construction of a subway at St. Clair Avenue on the Newmarket Subdivision of the Canadian National Railways have been completed and I enclose two linen and one paper copy of plan C-6426 dated the 20th of November, 1930, for which approval is requested under Section 257 of the Railway Act.

30 Work of constructing this subway has been authorized by Order-in-Council P.C. 2685 and the plan has been approved also by the City Commissioner of Works, Mr. R. C. Harris.

Authority is requested—

- (1) For the construction of the subway;
- (2) For a diversion of our main line to the west, as shown on the plan. This diversion is made for the purpose of avoiding excessive changes in the grade of the street and consequent land damages.

It is requested that the Board order the Bell Telephone Company, the Toronto Hydro Electric System, the Consumers' Gas Company and

APPEAL
No. 7.

No. 113.
Statement
of Facts—
continued.

*Before
the Board
of Railway
Commis-
sioners for
Canada.*

No. 114.
Application
of Respon-
dent to
Board of
Railway
Commis-
sioners for
Canada for
authority to
construct
subway &c.,
30th Dec-
ember 1930.

APPEAL
No. 7.

Before
the Board
of Railway
Commissioners for
Canada.

No. 114.
Application
of Respondent
to
Board of
Railway
Commissioners for
Canada for
authority to
construct
subway &c.,
30th Dec-
ember 1930
—contin ed.

the Hydro-Electric Power Commission of Ontario to make the necessary changes in their facilities when requested to do so by the Chief Engineer of the Canadian National Railway Company.

It is requested that the cost of the subway be divided in the same manner as has already been established by the Board in the case of Bloor Street and Royce Avenue subways and that the maximum grant from the Grade Crossing Fund be made.

In any event, however, I would be grateful if the plans can receive the immediate approval of the Board and the utilities be ordered to move so that the work may be proceeded with, even if it be necessary for the Board to reserve the question of cost, which I submit has been so well established in the Bloor and Royce cases that any delay in distributing the cost would not seem to be necessary. 10

Copies of this application and of the plan are being served upon the City of Toronto; the Toronto Transportation Commission; the Bell Telephone Company of Canada; the Toronto Hydro Electric System; the Consumers' Gas Company and the Hydro-Electric Power Commission of Ontario.

Yours truly,

(Sgd.) ALISTAIR FRASER,
Assistant General Counsel. 20

No. 115.
Answer of
Appellant,
2nd Janu-
ary 1931.

No. 115.

Answer of Appellant.

SCHEDULE No. 5.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways, under Section 257 of the Railway Act, for authority to construct a subway under its tracks where they cross St. Clair Avenue, Toronto; also to divert the main line of the said Railway to the West, as shown on Plan C-6426 dated the 20th November, 1930, filed : File No. 32458.3. 30

The Bell Telephone Company of Canada in answer to the said application of the Canadian National Railways herein, dated the 30th day of December, 1930, states :

1. That this Respondent was served with a copy of the said application on the 31st day of December, 1930;

2. That this Respondent owns and maintains telephone plant lawfully constructed and erected upon and/or under St. Clair Avenue in the City of Toronto at the points where the proposed subway, which the Applicant is seeking to have proceeded with, is to be constructed, and has other plant in the vicinity thereof; 40

3. That such telephone plant, together with the right to maintain the same in its present locations, constitutes a right or interest in lands belonging to this Respondent, within the meaning of the definition of the word "land" in the Railway Act and in the Expropriation Act, for the taking of or interference with which this Respondent is entitled to be paid compensation, in pursuance of the provisions of the said Acts;

4. That this Respondent may not lawfully be deprived of such rights except by expropriation proceedings properly carried out according to law;

5. That insofar as the works, in respects of which the Applicant is now seeking an Order to proceed with the construction thereof, may interfere with plant belonging to this Respondent, or with the location thereof, the right of this Respondent must be expropriated by proceedings lawfully taken;

6. This Respondent, therefore, requests that, in the Order made upon the said application, the Railway or other party which is ordered to do the work be ordered and directed to proceed to expropriate the rights of this Respondent and to pay compensation therefor;

7. This Respondent opposes that part of the said application which seeks an Order directing this Respondent to make the necessary changes in its facilities when requested to do so by the Chief Engineer of the Canadian National Railways, on the ground that the Board of Railway Commissioners for Canada has no jurisdiction to make any such Order as against this Respondent;

8. This Respondent is willing to proceed to make any changes that may be necessary in the location of its plant to permit of the construction of the said subway upon the Applicant agreeing to pay to this Respondent its full costs of making such alterations or re-locations in this Respondent's plant;

9. This Respondent opposes that part of the said Application which seeks an Order for the division of the cost of the subway in the same manner as was established in the case of Bloor Street and Royce Avenue Subways, upon the ground that the Board of Railway Commissioners for Canada has no jurisdiction to make any Order against this Respondent requiring it to contribute to the cost of the said subway or to bear any expenses that may be involved in removing this Respondent's plant to another location in order to permit of the subway being constructed as this Respondent is not a party interested or affected by the proposed subway works, and upon the further ground that the Board has no jurisdiction under the Railway Act to order this Respondent to bear any expense whatsoever in connection with this matter either by way of contributing to the cost of the subway or by bearing the expense of removing its own plant.

10. This Respondent submits that it is entitled to be paid its full cost of moving or re-locating or changing its said plant rendered necessary by the proposed works and that such costs should be charged to and payable by

APPEAL
No. 7.

Before
the Board
of Railway
Commissioners for
Canada.

No. 115.
Answer of
Appellant,
2nd January 1931—
continued.

APPEAL
No. 7.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 115.
Answer of
Appellant,
2nd January 1931—
continued.

the City of Toronto and/or the Canadian National Railways, as the Board may direct.

11. This Respondent requires that no Order be made in respect of this application, except after a formal hearing has been had, at which this Respondent may be given a full opportunity to present its case upon the questions of jurisdiction raised in this Answer.

Dated this 2nd day of January, 1931.

(Sgd.) PIERRE BEULLAC,
Solicitor for The Bell Telephone Company
of Canada,
1050 Beaver Hall Hill, Montreal, P.Q.

10

Copy to :

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA,
Ottawa, Ont.

ALISTAIR FRASER, K.C.,
Solicitor for Canadian National Railways.

No. 116.
Reply of
Respondent,
5th January 1931.

No. 116.

Reply of Respondent.

SCHEDULE NO. 6.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

20

IN THE MATTER OF the Application of the Canadian National Railways, under Section 257 of the Railway Act, for authority to construct a subway under its tracks where they cross St. Clair Avenue, Toronto; also to divert the main line of the said Railway to the West, as shown on Plan C-6426 dated the 20th November, 1930, filed : File No. 32458.3.

THE CANADIAN NATIONAL RAILWAYS in reply to the answer of the Bell Telephone Company of Canada dated the 2nd day of January, 1931, state :

- (1) That they deny that the Telephone Plant together with the right to maintain the same constitutes an interest in land as alleged in paragraph three;
- (2) That they deny paragraph four of the said reply;
- (3) That they deny paragraph five of the said reply;
- (4) That they deny that the Order requested should be made upon the Railway or any party other than the Bell Telephone Company of Canada;
- (5) That they submit that the Board has full jurisdiction to make the Order requested;

30

(6) That the question of the division of cost is entirely within the discretion of the Board and that the principles upon which such division of cost is made are already well established in the cases of Bloor and Royce Avenue subways, Toronto;

(7) That the railways have no objection to the Bell Telephone Company being heard by the Board both upon the questions of jurisdiction and the distribution of cost.

Dated at Montreal, P.Q., this 5th day of January, 1931.

(Sgd.) ALISTAIR FRASER,
Assistant General Counsel,
Canadian National Railways.

10

Copy to :

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA,
Ottawa, Ont.

PIERRE BEULLAC, Esq., K.C.,
Solicitor for the Bell Telephone Company of Canada.

APPEAL
No. 7.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 116.
Reply of
Respondent,
5th January 1931—
continued.

No. 117.

Order of Board of Railway Commissioners for Canada No. 46083 directing
Appellant to move its utilities.

20

SCHEDULE NO. 7.

Order No. 46083.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Thursday, the 8th day of
January, A.D. 1931.

HON. H. A. McKEOWN, K.C.,
Chief Commissioner.

30 S. J. McLEAN,
Asst. Chief Commissioner.

IN THE MATTER OF the Application of the Canadian National Railways, hereinafter called the "Applicants," under Sections 178 and 257 of the Railway Act, for authority to construct a subway under their tracks where they cross St. Clair Avenue, in the City of Toronto, Province of Ontario, and to divert the main line of the railway to the west, as shown on the plan and profile No. C-6426, dated November 20th, 1930, on file with the Board under file No. 32453.11.

No. 117.
Order of
Board of
Railway
Commissioners for
Canada
No. 46083
directing
Appellant to
move its
utilities,
8th January 1931.

UPON reading what has been filed on behalf of the Bell Telephone Company of Canada; and upon the report and recommendation of the Chief Engineer of the Board—

40 IT IS ORDERED that the Canadian National Railways be, and they are hereby, authorized to construct a subway under their tracks where they cross St. Clair Avenue, in the City of Toronto, Province of Ontario, and to divert the main line of the railway to the west, as shown on the said plan and profile on file with the Board under file No. 32453.11; detail plans of the work to be filed for the approval of an Engineer of the Board.

*Before
the Board
of Railway
Commissioners for
Canada.*

2. That the Bell Telephone Company of Canada, the Toronto Hydro-Electric System, The Consumers' Gas Company, and the Hydro-Electric Power Commission of Ontario, be, and they are hereby, directed 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.

3. That the question of the cost herein be reserved for the further consideration by the Board.

No. 117.
Order of
Board of
Railway
Commissioners for
Canada
No. 46083
directing
Appellant
to move its
utilities,
8th Janu-
ary 1931—
continued.

(Sgd.) H. A. McKEOWN,
Chief Commissioner,
Board of Railway Commissioners for Canada.

10

BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Examined and certified as a true copy
under Section 23 of "The Railway Act."

(Sgd.) A. D. CARTWRIGHT,
Sec'y of Board of Railway
Commissioners for Canada.

Ottawa, January 20, 1931.

No. 118.

Order of Rinfret J., granting leave to appeal to Supreme Court of Canada.

SCHEDULE NO. 8.

20

IN THE SUPREME COURT OF CANADA.

The Honourable Mr. Justice Rinfret, } Tuesday, the Seventh day of
In Chambers. } April, A.D. 1931.

**ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.**

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Sections 178 and 257 of The Railway Act, for authority to construct a subway under their tracks where they cross St. Clair Avenue, in the City of Toronto, Province of Ontario, and to divert the main line of the railway to the west as shown on plan and profile No. C-6426 dated November 20th, 1930, on file with the Board under file No. 32453.11.

AND IN THE MATTER OF Order Number 46083 of The Board of Railway Commissioners for Canada dated the 8th day of January, A.D. 1931.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

UPON the application of Counsel on behalf of the above-named Appellants made on the Twenty-fourth day of March, A.D. 1931, in the 40

*In the
Supreme
Court of
Canada.*

No. 118.
Order of
Rinfret J.,
granting
leave to
appeal to
Supreme
Court of
Canada,
7th April
1931.

presence of Counsel for the Corporation of the City of Toronto, no one appearing for the above-named Respondents although duly notified as appears by the Notice of Motion and proof of service thereof duly filed, for an Order extending the time for applying for and for leave to appeal to this Court under the provisions of Section 52 of The Railway Act from Order Number 46083 of The Board of Railway Commissioners for Canada bearing date the Eighth day of January, A.D. 1931, in the matter of the above application, upon hearing read the Notice of Motion, the Affidavit of Anthony Meredith Reid and the Exhibits therein referred to, all filed, and
 10 upon hearing what was alleged by Counsel aforesaid and Judgment upon the Motion having been reserved until this day.

IT IS ORDERED that the time within which the said Appellants may apply for leave to appeal to this Court from the said Order Number 46083 of The Board of Railway Commissioners for Canada, be and the same is hereby extended until this day.

AND IT IS FURTHER ORDERED that the said application for leave to appeal to this Court from the said Order Number 46083 of The Board of Railway Commissioners for Canada, in so far as the said Order directs the Appellants to move such of their facilities as may be affected by
 20 the construction of the subway authorized to be constructed by the said Order when requested to do so by the Chief Engineer of The Canadian National Railways, upon the ground that The Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said Appellants or in any event to make the said Order ex parte and without notice to the said Appellants, be and the same is hereby granted.

AND IT IS FURTHER ORDERED that the said Appeal be inscribed for Hearing at the next Session of this Court and be set down at the head of the list of appeals from the Province of Ontario, that the Case in Appeal be filed on or before the thirtieth day of April, A.D. 1931, and the Factums of
 30 all parties be deposited on or before the Ninth day of May, A.D. 1931.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the said appeal.

(Sgd.) T. RINFRET, J.

APPEAL
No. 7.

In the
Supreme
Court of
Canada.

No. 118.
Order of
Rinfret J.,
granting
leave to
appeal to
Supreme
Court of
Canada,
7th April
1931—con-
tinued.

APPEAL
No. 7.

*In the
Supreme
Court of
Canada.*

No. 119.
Order
approving
security for
costs,
11th April
1931.

No. 119.

Order approving security for costs.

SCHEDULE NO. 9.

IN THE SUPREME COURT OF CANADA.

Before The Registrar, } Saturday, the Eleventh day of April,
In Chambers. } A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways
for an Order under Sections 178 and 257 of The Railway Act, for
authority to construct a subway under their tracks where they cross
St. Clair Avenue, in the City of Toronto, Province of Ontario, and to
divert the main line of the railway to the west as shown on plan and
profile No. C-6426 dated November 20th, 1930, on file with the Board
under file No. 32453.11. 10

AND IN THE MATTER OF Order Number 46083 of The Board of
Railway Commissioners for Canada dated the 8th day of January, A.D. 1931.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.* 20

UPON the application of Counsel for the above-named Appellants in
the presence of Counsel for the above-named Respondents, upon hearing
read the Notice of Motion and the material therein referred to, and upon
hearing what was alleged by Counsel aforesaid,

IT IS ORDERED that the sum of \$250.00 paid into The Bank of
Montreal as appears by the receipt of the said Bank dated the 8th day of
April, A.D. 1931, duly filed, as security that the Appellants will effectually
prosecute their Appeal from Order Number 46083 of The Board of Railway
Commissioners for Canada bearing date the 8th day of January, A.D. 1931, 30
in the matter of the above application, and will pay such costs and damages
as may be awarded against them by this Court, be and the same is hereby
allowed as good and sufficient security.

AND IT IS FURTHER ORDERED that the costs of this application
be costs in the cause.

(Sgd.) J. F. SMELLIE,
Registrar.

No. 120.

Notice of setting down appeal for hearing.

SCHEDULE NO. 10.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

10 IN THE MATTER OF the Application of the Canadian National Railways
for an Order under Sections 178 and 257 of The Railway Act, for
authority to construct a subway under their tracks where they cross
St. Clair Avenue, in the City of Toronto, Province of Ontario, and to
divert the main line of the railway to the west as shown on plan and
profile No. C-6426 dated November 20th, 1930, on file with the Board
under file No. 32453.11.

AND IN THE MATTER OF Order Number 46083 of The Board of Railway
Commissioners for Canada dated the 8th day of January, A.D. 1931.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

20 TAKE NOTICE that the above Appeal from Order Number 46083 of
The Board of Railway Commissioners for Canada has been set down by the
Registrar of this Court for hearing at the Session of this Court commencing
on the 28th April, 1931.

Dated at Ottawa this eleventh day of April, A.D. 1931.

POWELL, SNOWDEN & MATHESON,

Agents for Pierre Beullac, K.C.,

Solicitor for Appellants.

To the above-named Respondents,

and to ALISTAIR FRASER, K.C.,

30 their Solicitor,

and to THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

APPEAL
No. 7.

In the
Supreme
Court of
Canada.

No. 120.
Notice of
setting down
appeal for
hearing,
11th April
1931.

APPEAL
No. 7.

In the
Supreme
Court of
Canada.

No. 121.

Order of Anglin C.J.C., postponing hearing of appeal.

SCHEDULE No. 11.

IN THE SUPREME COURT OF CANADA.

No. 121.
Order of
Anglin
C.J.C.,
postponing
hearing of
appeal,
5th May
1931.

The Right Honourable F. A. Anglin, P.C.,
Chief Justice of Canada. } Tuesday, the Fifth day
In Chambers. } of May, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER OF the Application of the Canadian National Railways 10
for an Order under Sections 178 and 257 of The Railway Act, for
authority to construct a subway under their tracks where they cross
St. Clair Avenue, in the City of Toronto, Province of Ontario, and to
divert the main line of the railway to the west as shown on plan and
profile No. C-6426 dated November 20th, 1930, on file with the Board
under file No. 32453.11.

AND IN THE MATTER OF Order Number 46083 of The Board of Railway
Commissioners for Canada dated the 8th day of January, A.D. 1931.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellants* 20

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

UPON the application of Counsel on behalf of the above-named
Appellants, in the presence of Counsel for the above-named Respondents,
and upon hearing what was alleged by Counsel aforesaid,

IT IS ORDERED that this Appeal be withdrawn from the list of
appeals inscribed for hearing at the present Session of this Court, and that
the hearing of the said Appeal be postponed until the October Session of
this Court commencing on the sixth day of October, A.D. 1931.

AND IT IS FURTHER ORDERED that the costs of and incidental 30
to this application be costs in the said Appeal.

(Sgd.) FRANK A. ANGLIN,
C.J.C.



No. 122.

Agreement as to Contents of Case.

SCHEDULE No. 13.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

APPEAL
No. 7.

In the
Supreme
Court of
Canada.

No. 122.
Agreement
as to con-
tents of
Case,
13th July
1931.

10 IN THE MATTER OF the Application of the Canadian National Railways for an Order under Sections 178 and 257 of The Railway Act, for authority to construct a subway under their tracks where they cross St. Clair Avenue, in the City of Toronto, Province of Ontario, and to divert the main line of the railway to the west as shown on the plan and profile No. C-6426 dated November 20th, 1930, on file with the Board under file No. 32453.11.

AND IN THE MATTER OF Order Number 46083 of The Board of Railway Commissioners for Canada dated the 8th day of January, A.D. 1931.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

20 The parties hereto agree that the contents of the case on appeal in this matter shall be as follows :—

Schedule

No.	Description.	Date.
	Statement of facts settled by the parties as in annexed case set forth.	
1.	Extracts from Special Acts of Incorporation of Appellant as in annexed case set forth.	
2.	Order, B.R.C. of C. No. 35037 directing grade separation at crossing of Respondent's tracks and St. Clair Avenue, Toronto - - -	May 9, 1924
3.	Plan for construction of Subway at St. Clair Avenue and for diversion of Respondent's line No. C-6426 - - - - -	Nov. 20, 1930
4.	Application of Respondent to B.R.C. of C. for authority to construct Subway, and divert line and for approval of Plan C-6426 - - -	Dec. 30, 1930

30

APPEAL No. 7.	Schedule No.	Description.	Date.	
<i>In the Supreme Court of Canada.</i> No. 122. Agreement as to con- tents of Case, 13th July 1931—con- tinued.	5.	Answer of Appellant - - - - -	Jan. 2, 1931	
	6.	Reply of Respondent - - - - -	Jan. 5, 1931	
	7.	Order, B.R.C. of C. No. 46083 directing Appellant to move its facilities - - - - -	Jan. 8, 1931	
	8.	Order, Rinfret, J., granting leave to appeal to Supreme Court of Canada - - - - -	Apr. 7, 1931	
	9.	Order approving Security for Costs - - - - -	Apr. 11, 1931	
	10.	Notice of Setting Appeal down for hearing - - - - -	Apr. 11, 1931	10
	11.	Order, Anglin, C.J.C., postponing hearing of appeal until October, 1931, session - - - - -	May 5, 1931	
	12.	Order dispensing with printing of Schedule 3 and allowing blue prints to be filed - - - - -	(To be obtained)	
	13.	Agreement as to contents of Case.		

Dated at Montreal this 13th day of July, 1931.

(Sgd.) PIERRE BEULLAC,
Solicitor for Appellant.

(Sgd.) ALISTAIR FRASER,
Solicitor for Respondent. 20

No. 123.

Order dispensing with printing of Plans.

SCHEDULE No. 12.

IN THE SUPREME COURT OF CANADA.

Before the Registrar,
In Chambers.

Saturday, the Eighteenth day of July,
A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR
CANADA.

10 IN THE MATTER OF the Application of the Canadian National Railways
for an Order under Sections 178 and 257 of the Railway Act, for
authority to construct a subway under their tracks where they cross
St. Clair Avenue, in the City of Toronto, Province of Ontario, and
to divert the main line of the railway to the west as shown on plan
and profile No. C-6426 dated November 20th, 1930, on file with the
Board under file No. 32453.11.

AND IN THE MATTER OF Order Number 46083 of The Board of Railway
Commissioners for Canada dated the 8th day of January, A.D. 1931.

BETWEEN

20 THE BELL TELEPHONE COMPANY OF CANADA *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents.*

UPON the application of Counsel on behalf of the above-named
Appellants, in the presence of Counsel on behalf of the above-named
Respondents, for an Order dispensing with the printing of one Exhibit in
the Case in Appeal, upon hearing read the affidavit of Pierre Beullac
filed, and upon hearing what was alleged by Counsel aforesaid.

30 IT IS ORDERED that the printing in the Case in Appeal of the Plan
No. C-6426 referred to in the Statement of Facts as Schedule Number 3
forming part of the Case in Appeal herein, be and the same is hereby dispensed
with.

AND IT IS FURTHER ORDERED that eight blue print copies of
the said Plan shall be provided by the Appellants for the use of this court
and filed with the Case in Appeal.

AND IT IS FURTHER ORDERED that the costs of and incidental
to this application be costs in the Appeal.

(Sgd.) J. F. SMELLIE,
Registrar.

APPEAL
No. 7.

In the
Supreme
Court of
Canada.

No. 123.
Order
dispensing
with print-
ing of
Plans,
18th July
1931.

APPEAL
No. 7.

*In the
Supreme
Court of
Canada.*

No. 124.
Certificate
of Board of
Railway
Commis-
sioners for
Canada,
30th July
1931.

No. 124.

Certificate of Board of Railway Commissioners for Canada.

SCHEDULE No. 14.

**CERTIFICATE OF SETTLEMENT OF CASE AND AS TO REASONS
FOR JUDGMENT.**

I, the undersigned, Secretary of The Board of Railway Commissioners for Canada, do hereby certify that the foregoing printed document from page 1 to page 28 inclusive, is the case stated by the parties pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in an appeal to the Supreme Court of Canada in a certain case pending before The Board of Railway Commissioners for Canada: **IN THE MATTER OF** the Application of the Canadian National Railways for an Order under Sections 178 and 257 of the Railway Act, for authority to construct a subway under their tracks where they cross St. Clair Avenue, in the City of Toronto, Province of Ontario, and to divert the main line of the railway to the west as shown on plan and profile No. C-6426 dated November 20th, 1930, on file with the Board under file No. 32453.11; **AND IN THE MATTER OF** Order Number 46083 of the Board of Railway Commissioners for Canada dated the 8th day of January, 1931, **BETWEEN** The Bell Telephone Company of Canada, Appellant, and The Canadian National Railways, Respondent.

And I do further certify that I have applied to the Commissioners of the said Board for their opinions or reasons for making the Order appealed from in this cause and that reasons have been delivered by none of the said Commissioners in response to my said Application.

And I do further certify that no such reasons were delivered by any of the said Commissioners as appears from the records of the said Board.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Board of Railway Commissioners for Canada this 30th day of July, 1931.

(Sgd.) **A. D. CARTWRIGHT,**
Secretary to Board of Railway
Commissioners for Canada.

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Note.—The page references have been altered so as to agree with the Record.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

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10 IN THE MATTER OF the Application of the Canadian National Railways for an Order under Sections 178 and 257 of the Railway Act, for authority to construct a subway under their tracks where they cross St. Clair Avenue, in the City of Toronto, Province of Ontario, and to divert the main line of the railway to the west, as shown on plan and profile No. C-6426, dated November 20th, 1930, on file with the Board under File No. 32453.11.

AND IN THE MATTER OF Order Number 46083 of the Board of Railway Commissioners for Canada, dated the 8th day of January, A.D. 1931.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

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PART I.

STATEMENT OF FACTS.

This is an appeal from Order No. 46083 of the Board of Railway Commissioners for Canada, dated January 8th, 1930 (Record, p. 273), pursuant to leave granted by Hon. Mr. Justice Rinfret, by Order dated April 7th, 1931 (Record, p. 274).

In the year 1913, the Appellant, acting in pursuance of the powers conferred upon it in that behalf by its Special Acts of Incorporation (Record, p. 416), and with the legal consent of the City of Toronto, constructed an underground conduit system, with the manholes and lateral duct runs 10 necessary and incident thereto, under the surface and within the limits of St. Clair Avenue, in the City of Toronto, extending through, and for a considerable distance both easterly and westerly of, that part of St. Clair Avenue wherein the Respondent proposes to construct the subway authorized by Order No. 46083 of the Board of Railway Commissioners for Canada, now in appeal, and placed its telephone lines and cables therein; the whole for the purpose of rendering telephone service to its subscribers (Record, p. 265, l. 27).

From the time of the construction of the said conduit system and the installation of the cables therein up to the present time, the Appellant has 20 continuously maintained its said conduit system and cables in the precise location in which they now exist (Record, p. 267, l. 1).

On December 30th, 1930, the Respondent applied to the Board of Railway Commissioners for Canada for authority to divert its Newmarket Subdivision line to the west and to construct a subway under the said diverted line where it crosses St. Clair Avenue, Toronto, in accordance with a plan dated the 20th November, 1930, bearing No. C-6426 (Record, p. 269), and also for an Order directing, *inter alia*, the Appellant to make such changes in its facilities as may be necessary to permit of the said works being carried out when requested to do so by the Chief Engineer of the 30 Respondent (Record, p. 269).

By Order No. 46083 (Record, p. 273), made *ex parte*, the Board granted the Respondent's said application and the Appellant now appeals from the said Order insofar as it directs the Appellant to move such of its facilities as may be affected by the construction of the said subway.

The facts have been settled by the parties and are printed in the Record at page 265.

PART II.

RESPECTS IN WHICH ORDER No. 46083 ERRONEOUS.

The Appellant contends that Order No. 46083 of the Board of Railway 40 Commissioners for Canada is erroneous in the following respects :

1. The Board had no jurisdiction to direct the Appellant to move such of its facilities as may be affected by the construction of the subway

on St. Clair Avenue, as directed by paragraph 2 of the said Order, which is as follows :

“ That the Bell Telephone Company of Canada, the Toronto Hydro-Electric System, the Consumers' Gas Company, and the Hydro-Electric Power Commission of Ontario, be, and they are hereby, directed 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.”

2. In any event the Board had no jurisdiction to make paragraph 2 of the said Order ex parte and without notice to the Appellant.

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PART III.

ARGUMENT ON BEHALF OF APPELLANT.

1. THERE IS NO PROVISION CONTAINED IN ANY STATUTE WHICH EXPRESSLY CONFERS ANY JURISDICTION UPON THE BOARD TO MAKE PARAGRAPH 2 OF ORDER No. 46083.

(a) The jurisdiction of the Board of Railway Commissioners for Canada is not inherent, but statutory, and must be found in the Act constituting it. It can only exercise such powers as are by statute conferred upon it. See MacMurchy & Denison's " Railway Law of Canada " (3rd Edition), page 60, citing :

G.T.R. v. Toronto, 1 C.R.C. at p. 92;
The Merritton Crossing Case, 3 C.R.C. 263 at p. 270;
City of Victoria v. Esquimalt, etc., Ry. Co., 24 C.R.C. 84;
Kelly v. G.T.R., 24 C.R.C. 367;
Corporation of Parkdale v. West, 12 A.C. 611.
See also *Duthie v. G.T.R.*, 4 C.R.C. 304 at p. 311.

(b) Section 373 (6) of the Railway Act, R.S.C. (1927), C.170, which is the only statutory provision conferring any jurisdiction upon the Board to order any change, alteration, moving or relocation of the Appellant's plant, does not apply, because there is no application to the Board by any municipality for an Order directing the Appellant's aerial plant to be placed underground, and Section 373 (6) only applies in such cases. The Appellant's plant on St. Clair Avenue is already underground (Record, p. 265, l. 27). The relevant part of Sub-section 373 (6) is as follows :—

“ 373 (6). Notwithstanding any power or authority heretofore or hereafter conferred upon any company by or under any Act of the Parliament of Canada, or of the legislature of any province, or any other authority, the Board, upon the application of the municipality, and upon such terms and conditions as the Board may prescribe, may order any telegraph or telephone line, within the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any

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case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company to construct or maintain, or to operate, or continue, any such line, or any pole or other works belonging thereto, except as directed by the Board;”

As to the Board’s jurisdiction under this section see :

City of Chatham v. Great North Western Telegraph and Bell Telephone Cos., 21 C.R.C. 183;

City of Woodstock v. Great North Western Telegraph Co., 19 C.R.C. 429. 10

Paragraph 2 of Order No. 46083 cannot, therefore, stand alone as an Order made by the Board in the exercise of any power vested in it, and unless jurisdiction can be implied under the sections of the Railway Act hereinafter dealt with, the Board had no jurisdiction whatsoever to make said Order, as directed against the Appellant.

2. ALL OF THE PROVISIONS OF THE RAILWAY ACT, R.S.C. (1927), C. 170, DO NOT APPLY TO THE APPELLANT OR TO ITS WORKS.

Section 375 of the said Act expressly limits the application of the Railway Act to, and the jurisdiction of the Board over, the Appellant and 20 its works. The relevant portions of the said section are as follows :

“ 375. In this section, unless the context otherwise requires,

“ (a) ‘ company ’ means a railway company or person authorized to construct or operate a railway, having authority to construct or operate a telegraph or telephone system or line, and to charge telegraph or telephone tolls, and includes also telegraph and telephone companies and every company and person within the legislative authority of the Parliament of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone 30 tolls ;

“ 12. Without limitation of the generality of this subsection by anything contained in the preceding subsections, the jurisdiction and powers of the Board, and, in so far as reasonably applicable and not inconsistent with this section or the Special Act, the provisions of this Act respecting such jurisdiction and powers, and respecting proceedings before the Board and appeals to the Supreme Court or Governor in Council from the Board, and respecting offences and penalties, and the other provisions of this Act, except sections seventy-two to two hundred and seventy, two hundred and seventy-two to two hundred and eighty-two, two hundred and eighty-seven to three hundred and thirteen, three hundred and twenty-three, three hundred and forty-nine to three hundred and fifty-four, three hundred and sixty to three hundred and sixty-six, 40

three hundred and ninety-four to four hundred and twenty-four, and four hundred and forty-nine to four hundred and fifty-seven, both inclusive in each case, shall extend and apply to all companies as in this section defined, and to all telegraph and telephone systems, lines and business of such companies within the legislative authority of the Parliament of Canada; and in and for the purposes of such application

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- 10 “(a) ‘company’ or ‘railway company’ shall mean a company as in subsection one of this section defined;
 “(b) ‘railway’ shall mean all property real and personal and works forming part of or connected with the telegraph or telephone system or line of the company;
 “(c) ‘Special Act’ shall mean a Special Act as in subsection one of this section defined;”

None of the sections of the Railway Act, within the exception contained in Section 375 (12) thereof, extend or apply to the Appellant or to its works, nor can any of the powers or jurisdictions conferred upon the Board by the said sections be exercised against the Appellant or its plant.

- 20 See *The London, Chatham and Dover Ry. Co. v. The Board of Works for Wandsworth District*, L.R. 8 C.P. 185;
 Boland v. C.N.R. (1926), 4 D.L.R. 193 at p. 200.

3. ALL OF THE PROVISIONS OF THE RAILWAY ACT, R.S.C. (1927), C. 170, DO NOT APPLY TO THE RESPONDENT OR TO ITS WORKS.

Section 17 of the Canadian National Railways Act, R.S.C. (1927), C. 172, as amended by 19-20 Geo. V (1929), C. 10, S. 2, expressly limits the application of the Railway Act to the Respondent, and the jurisdiction of the Board in respect of the Respondent and its works is correspondingly limited. The relevant portions of Section 17 of the said Act are as follows:

- 30 “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;
 “(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.

- 40 “(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;”

See *Rattenbury v. Canadian National Railway Co.*, 30 C.R.C. 414.

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4. SECTION 257 OF THE RAILWAY ACT DOES NOT CONFER THE NECESSARY JURISDICTION UPON THE BOARD TO MAKE PARAGRAPH 2 OF ORDER NO. 46083.

The relevant provisions of Section 257 are as follows :

“ 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 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 such portion or crossing, if any, or any other crossing directly or indirectly affected.”

(a) Neither Section 257 nor the Board's jurisdiction thereunder extend or apply to the Appellant or to its plant (*supra*, p. 286).

(b) The Board did not act “ of its own motion ” but upon the application of the Respondent. This is so stated in Order No. 46083 (Record, p. 273).

(c) The Board did not act “ upon the complaint or application by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved,” in respect of an existing crossing as required by Section 257. Order No. 46083 does not relate to an existing railway crossing but applies to a new crossing to be constructed at a place where no crossing now exists, i.e., at the point where the new diversion of the Respondent's line crosses St. Clair Avenue. This Order is in effect such an one as is contemplated by Section 255 of the Railway Act (*post*, p. 289).

(d) The construction of the subway on St. Clair Avenue provided for by Order No. 46083 was not ordered for the protection, safety and convenience of the public at an existing railway crossing.

There is no connection between the proceedings of 1922 to 1924, referred to in the Record at page 267, line 6, which culminated in Order No. 35037 (Record, p. 437), and the proceedings in which Order No. 46083 was made.

The said earlier proceedings directed that a subway be built where the Respondent's Newmarket Subdivision line crossed St. Clair Avenue. No diversion of the Respondent's line was directed by this Order. This Order was not, insofar as St. Clair Avenue is concerned, acted upon or enforced.

In fact the Board declined to enforce the said Order upon two different occasions, viz.: in 1928 (see *City of Toronto v. Canadian Pacific and Canadian National Railway Companies*, 34 C.R.C. 143), and in 1930 (see *City of Toronto v. Canadian Pacific and Canadian National Railway Companies*, 36 C.R.C. 243). These earlier proceedings have not been further continued or acted upon. It is inconceivable that any element of public safety or convenience warranted the making of Order No. 35037 (Record, p. 437) since it has not been acted upon during the seven years which have elapsed since the making thereof. In any event these earlier proceedings can have no bearing upon the issues in this appeal since the Appellant was not a party thereto (Record, p. 267, l. 23).

The present proceedings arise out of the construction by the Respondent of a new line of railway, by way of a diversion of its existing line. This new line will cross St. Clair Avenue some distance to the west of the existing crossing. The construction of this new line and of the subway in St. Clair Avenue in question in this appeal were authorized by Order-in-Council P.C. No. 2685 (Record, p. 267, l. 33), pursuant to the provisions of Section 21 of the Canadian National Railway Act, which provides as follows:

“21. With the approval of the Governor in Council and upon any location sanctioned by the Minister of Railways and Canals the Company may from time to time construct and operate railway lines, branches and extensions, or railway facilities or properties of any description in respect to the construction whereof respectively, Parliament may hereafter authorize the necessary expenditure, or the guarantee of an issue of the Company’s securities.

“2. A copy of any plan and profile made in respect of any completed railway shall be deposited with the Board of Railway Commissioners for Canada.”

By authorizing the construction of the subway in question, the Governor-in-Council has made all the provision necessary for the protection, safety and convenience of the public in respect of the Respondent’s diverted line and has thereby deprived the Board of jurisdiction in respect thereof.

This is an entirely new railway crossing, consequently neither the earlier proceedings before the Board, above referred to, nor Section 257 of the Railway Act have any application thereto.

(e) Section 257 is inconsistent with the provisions of Section 22 of the Canadian National Railways Act, and Sections 2 (d), (g), 3 (b), (f) of the Expropriation Act upon the same grounds as are hereinafter set forth with respect to Sections 255 and 256 (*post*).

5. SECTIONS 255 AND 256 OF THE RAILWAY ACT DO NOT CONFER THE NECESSARY JURISDICTION UPON THE BOARD TO MAKE PARAGRAPH 2 OF ORDER NO. 46083.

The relevant provisions of Sections 255 and 256 are as follows:

“255. The railway of the company may, if leave therefor is first obtained from the Board as hereinafter authorized, but shall

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not without such leave, be carried upon, along or across any existing highway: Provided that the compensation, if any, payable by the company to adjacent or abutting landowners shall be determined under the arbitration sections of this Act in so far as such sections are applicable, and provided that the Board shall not grant leave to any company to carry any street railway or tramway, or any railway operated or to be operated as a street railway or tramway, along any highway which is within the limits of any city or incorporated town, until the company has first obtained the consent therefor by a by-law of the municipal authority of such city or incorporated town; and provided that where leave is obtained to carry any railway along a highway the Board may require the company to make compensation to the municipality if the Board deems proper, said compensation to be determined under the arbitration sections of this Act, in so far as such sections are applicable. (20-21 George V, C. 36, S. 2.) 10

“ 2. The company shall, before obstructing any such highway by its works, turn the highway so as to leave an open and good passage for carriages, and, on completion of the works, restore the highway to as good a condition as nearly as possible as it originally had. 20

“ 3. Nothing in this section shall deprive any such company of rights conferred upon it by any Special Act of the Parliament of Canada, or amendment thereof, passed prior to the twelfth day of March, one thousand nine hundred and three.

“ 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 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.” 30 40

(a) Neither Section 255 nor Section 256 nor the Board's jurisdiction thereunder extend or apply to the Appellant or to its plant (*supra*, p. 286).

(b) Neither Section 255 nor Section 256 nor the Board's jurisdiction thereunder apply to the Respondent or to its works, because they are

inconsistent with the provisions of the following sections of the following Acts, within the meaning of Section 17 of the Canadian National Railways Act (*supra*, p. 287), viz. :

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(i) CANADIAN NATIONAL RAILWAYS ACT, R.S.C. (1927),
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“ S. 22. The Company shall not construct or operate its railway along any highway, street or other public place without first obtaining the consent, expressed by by-law, of the municipality having jurisdiction over the said highway, street or other public place, and upon terms to be agreed upon with such municipality.”

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(ii) EXPROPRIATION ACT, R.S.C. (1927), Ch. 64 :

“ S. 2. In this Act, unless the context otherwise requires,

“ (d) ‘ land ’ includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act ;

“ (g) ‘ public work ’ or ‘ public works ’ means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which the money is appropriated as a subsidy only ;

“ S. 3. The minister may by himself, his engineers, superintendents, agents, workmen and servants,

“ (b) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto ; ”

“ (f) alter the course of any river, canal, brook, stream or watercourse, and divert or alter, as well temporarily as permanently, the course of any rivers, streams, railways, roads, streets or ways, or raise or sink the level of the same, in

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order to carry them over or under, on the level of, or by the side of the public work, as he thinks proper; but before discontinuing or altering any railway or public road or any portion thereof, he shall substitute another convenient railway or road in lieu thereof; and in such case the owner of such railway or road shall take over the substituted railway or road in mitigation of damages, if any, claimable by him under this Act, and the land theretofore used for any railway or road, or the part of a railway or road so discontinued, may be transferred by the minister to, and shall thereafter become the property of, the owner of the land of which it originally formed part; ” 10

Under the foregoing enactments the Respondent has, with regard to the construction of the subway and works in question, the same rights and powers as are accorded the Minister under the Expropriation Act. The Minister requires no leave or approval of the Board to construct railways across highways or grade separations at such crossings. The Respondent therefore required no such leave or approval. The Board had no jurisdiction whatsoever with respect to this crossing save to receive the crossing plans for filing pursuant to Section 17 of the Canadian National Railways Act 20 (*supra*, p. 287).

6. SECTION 39 (1) OF THE RAILWAY ACT IS NOT APPLICABLE.

Section 39 (1) provides as follows :

“ 39.—(1) 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 30 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.”

(i) The Board had no jurisdiction to “ direct or permit ” the construction of the line in question, or the construction of the subway, or to permit the construction of the said line across St. Clair Avenue (*supra*). This was authorized and permitted by the combined effect of Section 21 of the Canadian National Railways Act (*supra*, p. 288) and Order-in-Council No. P.C. 2685, which superseded the powers, if any, of the Board.

(ii) It is “ otherwise expressly provided ” that the Respondent shall 40 move such of the Appellant’s facilities as may be affected by the construction of the said subway.

The construction of the deviated line of railway and the subway on St. Clair Avenue, authorized by Order-in-Council No. P.C. 2685, is the

construction of a new line of railway within the meaning of Section 260 (1) of the Railway Act, as interpreted by Section 2 (21) thereof, which said sections are as follows :

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“ 2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,

“ (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 authorized to construct; and, except where the context is inapplicable, includes street railway and tramway; ”

10

“ 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.”

20

See *Board of Trade of Penticton, B.C., et al. v. Canadian National and Kettle Valley Ry. Cos.*, 36 C.R.C. 130.

The moving of the Appellant's plant, as directed by paragraph 2 of Order No. 46083, either is or is not part of the works which the said Order purports to direct or permit to be done.

If it is part of the said works, it must necessarily be part of the work of constructing the subway on St. Clair Avenue, because the moving of the Appellant's plant is only necessitated by the lowering of the street level, which is incidental to the subway construction. The subway itself is for the protection, safety and convenience of the public, and is a measure which the Respondent must provide under Section 260 (1) of the Railway Act (*supra*). If, therefore, the moving of the Appellant's plant is part of the said work, then it is itself a work for the protection, safety and convenience of the public, and consequently under said Section 260 of the Railway Act this work must be provided or done by the Respondent at its own expense.

If the moving of the Appellant's plant is not part of the work authorized by said Order No. 46083, then Section 39 (1) of the Railway Act (*supra*, p. 292) has no application at all, because this section only authorizes the Board to direct a party interested or affected to do the works authorized by the Order.

There is a second provision to the contrary which deprives the Board of jurisdiction under Section 39 (1). This provision is contained both in

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Sections 162, 163 and 164 of the Railway Act, and in Section 3 of the Expropriation Act. These sections are as follows :

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

“ (n) divert or alter the position of any water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric lines, wires or poles.”

“ 163. The company shall restore, as nearly as possible, to its former state, any river, stream, watercourse, highway, water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric line, wire or pole which it diverts or alters, or it shall put the same in such a state as not materially to impair the usefulness thereof.” 10

“ 164. The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein, and in the Special Act provided, to all persons interested, for all damages by them sustained by reason of the exercise of such powers.”

EXPROPRIATION ACT :

“ 3. The minister may by himself, his engineers, superintendents, agents, workmen and servants, 20

“ (g) divert or alter the position of any water-pipe, gas-pipe, sewer, drain, or any telegraph, telephone or electric light wire or pole.”

Since Parliament empowered the Respondent to do the work of moving or altering the Appellant's plant without recourse to the Board, it was not the intention of Parliament that the Board should have jurisdiction to order changes in the Appellant's telephone lines for railway purposes, or to order the Appellant to make such changes. The only object which the Respondent can have had in resorting to the Board for an Order directing the Appellant to move its own plant instead of the Respondent doing the work itself under Section 162 of the Railway Act or Section 3 of the Expropriation Act, was to avoid liability for the expense and damage arising out of this work and to try to saddle the Appellant with the costs and expenses thereof. 30

(c) Order No. 46083 (Record, p. 273) does not in fact order the Appellant to provide, construct, reconstruct, alter, install, operate, use or maintain any structure, appliances, equipment, works, renewals or repairs which the Board in the exercise of any power vested in it has directed or permitted to be provided, constructed, reconstructed, altered, installed, operated, used or maintained. 40

The Appellant is not ordered to construct the deviation of the Respondent's line of railway or the subway on St. Clair Avenue. All that the

Appellant is ordered to do is to move its own plant, and there is no jurisdiction in the Board to so order.

(d) The Appellant is not a party interested or affected within the meaning of Section 39 (1) of the Railway Act.

10 "Section 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision." See *Canadian Pacific Railway Company and others v. Toronto Transportation Commission ; Toronto Transportation Commission v. Canadian National Railways* (1930), A.C. 686, at p. 697.

20 It is not contended that the railway and other works authorized by Order No. 46083 will in any way confer any benefit or advantage upon the Appellant or its telephone lines or plant (Record, p. 268, l. 21). The Appellant has not the slightest interest in the promotion of the Respondent's project, and it is quite immaterial to the Appellant whether it is carried out or not. The Appellant's plant creates no public danger whatsoever, and on St. Clair Avenue it is already placed underground. As it now stands, the Appellant's plant is wholly suitable, sufficient and satisfactory for the Appellant's service. The Appellant makes no special use of the subway. Its lines can be carried across a grade crossing just as well and as safely as through a subway.

30 The removal or re-location of the Appellant's plant is not part of the general scheme evolved by the Respondent. Neither the Appellant's existing plant nor the proposed changes therein are shown in the Respondent's plan (Schedule 3), nor does the said scheme or plan make any provision whatsoever therefor.

40 As is hereafter shown, the Appellant's plant and its right to maintain the same in its present locations is "land" within the meaning of the Railway Act (*post*, p. 296). The Appellant is, therefore, in the identical position of the owner of land abutting on a highway, part of whose land is being taken for the purposes of a railway crossing. It would be absurd to hold that such an abutting landowner is a party interested or affected so as to confer jurisdiction upon the Board to order him to move or tear down his house, or make excavation upon his land to permit of railway tracks being laid across it, and to finance such work himself pending distribution of the costs.

None of the sections of the Railway Act, pursuant to which the Order appealed from is made, extend or apply to the Appellant or to its plant (*supra*, p. 286). How then can it be said that the Appellant is a party

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interested or affected by an Order or by works which are made or constructed pursuant to legislation which by express terms does not extend or apply to the Appellant?

The Appellant is not a party interested or affected. It merely owns plant and land which must be acquired or moved to permit of railway works being carried out, consequently the Board has no jurisdiction under Section 39 (1) of the Railway Act to make paragraph 2 of Order No. 46083.

7. THE APPELLANT'S PLANT AND ITS RIGHT TO MAINTAIN THE SAME IN ITS EXISTING LOCATION IS "LAND", AN "INTEREST IN LAND" OR AN "IMMOVABLE".

By its Special Act of Incorporation, 43 Victoria (1880), Ch. 67, S. 3 (Dom.), as amended by 45 Victoria (1882), Ch. 95, S. 2, the Appellant was authorized to "construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, water-courses or other such places", etc. (Record, p. 416, l. 34.)

The said Act conferred statutory rights upon the Appellant :

City of Toronto v. Bell Telephone Co. (1905), A.C. 52.

The Appellant's plant involved in this appeal was lawfully constructed upon St. Clair Avenue, in pursuance of its statutory powers (Record, p. 265, l. 27), and a detailed description of the nature and extent thereof is set forth in paragraphs 3, 4, 5 and 6 of the Statement of Facts (Record, p. 266).

The plant belonging to the Appellant, and its right to maintain the same in the precise locations in which it now exists, are by their very nature "land" or "interests in land" or "immovables" owned by the Appellant, and in any event are "land" within the meaning of that term as defined by the Railway Act, Section 2 (15), and the Expropriation Act, Section 2 (d). These sections are as follows :

RAILWAY ACT, R.S.C. (1927), Ch. 170 :

"2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,

"(15) 'lands' means the lands, the acquiring, taking or using of which is authorized by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure, and any easement, servitude, right, privilege or interest in, to, upon, under, over or in respect of the same ;"

EXPROPRIATION ACT, R.S.C. (1927), Ch. 64 :

"2. In this Act, unless the context otherwise requires,

"(d) 'land' includes all granted or ungranted, wild or cleared, public or private lands and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act ;"

Consumers' Gas Company of Toronto v City of Toronto, 27 S.C.R. 453;
City of Toronto v. Consumers' Gas Company (1916), 2 A.C. 618;
Montreal Light, Heat & Power Cons. v. City of Westmount (1926),
 S.C.R. 515;
Re Ottawa Gas Co. and City of Ottawa, 48 O.L.R. 130;
Montreal Light, Heat & Power Cons. v. City of Outremont (1930), R.J.
 49, K.B. 456.

See also *Kolodzi and Detroit and Windsor Subway Co.* (1930), 65 O.L.R.
 398; affirmed S.C.C. (1931), 3 D.L.R. 337;

10 *Ruel v. The King*, 38 D.L.R. 613;
Calgary Gas and Water Works Co. v. City of Calgary, 2 Terr. L.R. 449;
The King v. Birchdale, Ltd., 16 Ex. C.R. 375.

The Appellant can only be lawfully deprived of its said "lands" or
 "interests in lands" by expropriation proceedings lawfully taken or by the
 Respondent proceeding under Sections 162, 163 and 164 of the Railway
 Act or Section 3 of the Expropriation Act (*supra*, p. 294).

Jones v. Atlantic and North West Ry. Co. (1903), R.J. 12 K.B. 392.

See also *Corporation of Parkdale v. West*, 12 A.C. 611, Law Times,
 57 N.S. 602.

20 8. PARAGRAPH 2 OF ORDER NO. 46083 HAS THE EFFECT OF
 DEPRIVING THE APPELLANT OF ITS "LANDS".

If the Appellant moves its plant on St. Clair Avenue in compliance
 with paragraph 2 of Order No. 46083, the grade of the said street will be
 lowered by the construction of the subway therein below the present location
 of the Appellant's underground conduits, necessitating their being placed
 at a lower level under the street (Record, p. 268, l. 17). The Appellant will,
 therefore, be deprived of the right to maintain its said conduit system in the
 location in which it now stands.

30 The said underground conduit system of the Appellant cannot be moved
 without being broken up and destroyed (Record, p. 266, l. 21).

Paragraph 2 of Order No. 46083 directs the Appellant to move its
 plant which necessitates complete destruction thereof in order to get it
 out of the way to permit the Respondent to take and use the space now
 occupied thereby for the construction of the subway. This is a taking of
 the Appellant's land, which can only be effected by expropriation.

City of Toronto v. Consumers' Gas Co. (1916), 2 A.C. 618;

Re Ottawa Gas Co. and City of Ottawa, 48 O.L.R. 130;

The King v. Birchdale Ltd., 16 Ex. C.R. 375;

Ruel v. The King, 38 D.L.R. 613.

40 9. THE BOARD HAS NO JURISDICTION TO MAKE ANY
 ORDER DEPRIVING THE APPELLANT OF LANDS OR WHICH IS
 TANTAMOUNT TO THE EXPROPRIATION THEREOF.

By Section 17 of the Canadian National Railways Act (*supra*, p. 287),
 neither the provisions of the Railway Act relating to the expropriation of

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lands nor any jurisdiction which the Board may have by virtue thereof, apply to the Respondent.

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Bolaud v. C.N.R. (1926), 4 D.L.R. 193 at p. 200.

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The Respondent's power to take lands is conferred upon it by the Canadian National Railways Act, R.S.C. (1927), Ch. 172, and the procedure therein provided must be strictly followed. Where the Respondent requires to take land, it merely deposits a plan under the Expropriation Act, as made applicable to the Respondent, and thereupon the lands become vested in the Respondent. If any resistance is offered to the Respondent taking immediate possession of the lands, Section 22 (1) of the Expropriation Act affords the remedy. The relevant provisions of the Canadian National Railways Act and of the Expropriation Act are as follows : 10

CANADIAN NATIONAL RAILWAYS ACT, R.S.C. (1927), Ch. 172 :

Section 17 (2), as amended by 19-20 Geo. V, C.10, S. 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 ;

“ (b) Any plan deposited under the provisions of the Expropriation Act may be signed by the Minister of Railways and Canals on behalf of the Company, or by the President or any Vice-President of the Company ; no description need be deposited ; 20

“ (c) The land shown upon such plan so deposited shall thereupon be and become vested in the Company, unless the plan indicates that the land taken is required for a limited time only or that a limited estate or interest therein is taken ; and by the deposit in such latter case the right of possession for such limited time or such limited estate or interest shall be and become vested in the Company ;

“ (d) The compensation payable in respect of any lands or interests therein taken by the Company under the provisions of the Expropriation Act as made applicable to the Company by this Act shall be ascertained in accordance with the provisions of the Expropriation Act, and for that purpose the Exchequer Court shall have jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the Company, of judicial proceedings and the conduct thereof ; Provided that such compensation may, in any case where the offer of the Company does not exceed two thousand five hundred dollars, be ascertained under the provisions of the Railway Act, beginning with notice of expropriation to the opposite party. The amount of any judgment shall be payable by the Company.” 30 40

EXPROPRIATION ACT, R.S.C. (1927), Ch. 64 :

Section 22 :

10 “ If any resistance or opposition is made by any person to the minister, or any person acting for him, entering upon and taking possession of any lands, a judge of the Court, or any judge of any superior court may, on proof of the execution of a conveyance of such lands to His Majesty, or agreement therefor, or of the depositing in the office of the registrar of deeds of a plan and description thereof as aforesaid, and after notice to show cause given in such manner as he prescribes, issue his warrant to the sheriff of the district or county within which such lands are situate directing him to put down such resistance or opposition, and to put the minister, or some person acting for him, in possession thereof.”

The foregoing statutory provisions confer no jurisdiction upon the Board in matters of expropriation or of obtaining possession of lands. The Board cannot make Orders dispensing with the taking of proper expropriation proceedings, nor can it determine the compensation to be paid for the lands taken, nor can it order the owner thereof to vacate and deliver them up to the Respondent.

20 10. THE BOARD HAD NO JURISDICTION TO MAKE PARAGRAPH 2 OF ORDER NO. 46083 EX PARTE.

The Board of Railway Commissioners for Canada was constituted a court of record with full jurisdiction and power to inquire into, hear and determine all matters which may properly be brought before it. Subject, therefore, to the exceptions hereinafter dealt with, there must be a hearing by the Board of all matters brought before it, and all parties to such proceedings are entitled to a full opportunity to present and argue their case before the Board at such hearing before any Order concerning them is made. In support of this contention the Appellant relies upon the following sections of the Railway Act, R.S.C. (1927), C. 170 :

30 “ 9. 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.”

“ 18. The Board may hold more than one sitting at the same time, and, whenever circumstances render it expedient to hold a sitting elsewhere than in Ottawa, may hold such sitting in any part of Canada.”

40 “ 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 :

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Provided that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court.”

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

“ (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 direction, leave, sanction or approval, which by law it is authorized 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 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.”

“ 36. The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.”

“ 57. Unless otherwise provided, fifteen days’ notice of any application to the Board, or of any hearing by the Board, shall be sufficient: Provided that the Board may in any case direct longer notice or allow notice for any period less than fifteen days.”

No hearing was had before the Board in respect of the Respondent’s application which resulted in the making of Order No. 46083, now in appeal (Record, p. 268, l. 8), notwithstanding the fact that in its Answer to the Respondent’s application (Record, p. 272, l. 3) the Appellant requested a formal hearing, and in the Respondent’s Reply (Record, p. 273, l. 6) the Respondent expressly stated that it had no objection to a hearing being had.

The Appellant was served with a copy of the Respondent's application to the Board herein (Record, p. 269) on or about December 30th, 1930, and on January 2nd, 1931, filed and served its answer thereto requesting a formal hearing of the said application (Record, p. 270). On January 6th, 1931, the Respondent filed and served its reply to the Appellant's answer (Record, p. 272). No further proceedings were served or taken by either of the parties hereto, and on the 8th day of January, 1931, without notice to the Appellant and without granting any hearing, the Board made Order No. 46083 (Record, p. 273), now in appeal, granting the Respondent's said
 10 application (Record, p. 267, l. 37, *et seq.*).

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The only cases in which the Board may exercise its jurisdiction and powers without hearing all parties to the application are those which come within the scope of Sections 47 and 59 of the Railway Act, R.S.C. (1927), C. 170, which are as follows :

“ 47. The Board may, if the special circumstances of any case so require, make an interim *ex parte* order authorizing, requiring or forbidding anything to be done which the Board would be empowered, on application, notice and hearing, to authorize, require or forbid; but no such interim order shall be made for any longer time
 20 than the Board may deem necessary to enable the matter to be heard and determined.”

“ 59. Except as herein otherwise provided, when the Board is authorized 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.

“ 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.”
 30

This case does not come within the scope of either of the said sections
 40 for the following reasons :

As to Section 47 :

(a) There were no special circumstances requiring an interim *ex parte* Order. The question of grade separation on St. Clair Avenue had been pending since 1924, or for the past seven years.

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The crossing in question is protected with gates and there had been no accidents at the said crossing since 1927.

See *City of Toronto v. Canadian Pacific and Canadian National Ry. Cos.*,
36 C.R.C. 243.

(b) The Order was wholly unnecessary (*supra*, p. 292).

(c) The Order is not an "interim" order at all, but by its very terms is final. It deprives the Appellant of its rights, and compliance therewith would result in the complete destruction of the Appellant's property (*supra*, p. 297), and it contains no provision for compensation being paid to the Appellant. 10

(d) The Order does not provide that it shall not be effective "for any longer time than the Board may deem necessary to enable the matter to be heard and determined." 10

As to Section 59 :

(a) There was no ground of urgency or other (i.e., similar) reason appearing to the Board to be sufficient which would justify the making of Order No. 46083 ex parte. The Application itself (Record, p. 269) contains no grounds of urgency nor does it request the Board to proceed ex parte, but on the contrary the Respondent expressly pleaded that they had no objection to a hearing being had (Record, p. 273, l. 5). 20

(b) The Order was wholly unnecessary (*supra*, p. 292).

(c) It is only "interim" Orders which can be made under Section 59, and this must necessarily be so by reason of the provisions of Sub-section (2) thereof, because any person entitled to notice may demand as of right a re-hearing of the Application. As above stated (*supra*), Order No. 46083 is not an "interim" but is a final Order.

(d) In any event, under the provisions of Section 59 (2), the Appellant was entitled to a hearing. 30

CONCLUSION.

Upon the grounds and for the reasons above set forth the Appellant submits that the Board of Railway Commissioners for Canada had no jurisdiction to make paragraph 2 of Order No. 46083, and that this appeal should be allowed with costs.

PIERRE BEULLAC,

Counsel for the Appellant,
The Bell Telephone Company of Canada.

No. 126.

Factum of Canadian National Railways.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR
CANADA.

IN THE MATTER OF the Application of the Canadian National Railways
for an Order under Sections 178 and 257 of The Railway Act, for
authority to construct a subway under their tracks where they cross
St. Clair Avenue, in the City of Toronto, Province of Ontario, and to
divert the main line of the railway to the West as shown on plan and
profile No. C-6426, dated November 20th, 1930, on file with the Board
under file No. 32453.11.

AND IN THE MATTER OF Order Number 46083 of The Board of Railway
Commissioners for Canada, dated the 8th day of January, A.D. 1931.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondents*.

PART I.—STATEMENT OF FACTS.

This is an appeal by leave granted by the Honourable Mr. Justice
Rinfret from Order No. 46083 of The Board of Railway Commissioners for
Canada hereinafter called The Board, dated 8th January 1931, in so far as
the said Order directs the Appellants to move such of their utilities as may
be affected by the construction of the subway authorized to be constructed
by the said Order, when requested to do so by the Chief Engineer of the
Canadian National Railways upon the ground that the Board of Railway
Commissioners for Canada is without jurisdiction to make the said Order as
directed against the said Appellants, or in any event to make the said
Order ex parte and without notice to the said Appellants.

St. Clair Avenue is a highway extending in an Easterly and Westerly
direction through the North Westerly section of the City of Toronto, as
shown on the plan and profile on file with the Board under file No. 32453.11.
There was an existing crossing of the said highway by the tracks of the
Respondents at the time of the application for the said Order.

In the month of November, 1922, the City of Toronto made application
to the Board of Railway Commissioners for Canada for an Order that the
Canadian Pacific Railway Company and the Canadian National Railways be
required to collaborate with the said City in the preparation of a joint plan
for the separation of grades in the northwest portion of the City of Toronto.
The said application came on for hearing before the Board at Toronto on

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the 14th of February, 1923, when, after considerable discussion, it was suggested that the City and the two Railways endeavour to arrive at a satisfactory agreement among themselves, and the proceedings were stayed to enable them to do so. The said parties were unable to effect any such agreement, and the City's said application having finally come on for hearing before the Board at Toronto on the 8th day of January, 1924, a judgment of the Board was issued on May 9th, 1924, which is reported in the Board's Judgments, Volume 14, page 67. Pursuant to the said judgment, Order No. 35037, dated May 9th, 1924, was issued, directing, *inter alia*, that a subway be constructed under the Newmarket Subdivision of the Canadian National Railways at St. Clair Avenue, Toronto. 10

The Canadian National Railways prepared a plan and profile dated the 20th day of November, 1930, and bearing the number C-6426 showing and providing for a diversion of its Newmarket Subdivision Line to the West and the construction of a subway where the said Line crosses St. Clair Avenue; the whole as shown upon the said plan and profile (Schedule No. 3). The said plan and profile were approved, and the works therein provided for were authorized by the Governor-in-Council pursuant to the provisions of Section 21 of the Canadian National Railways Act, R.S.C. (1927), Chapter 172, by Order in Council No. P.C. 2685 dated the 19th day of November, 1930. 20

On or about 30th December 1930 the Appellants received by mail a copy of application made by the Respondents for approval of the said plan No. C-6426, and for authority to divert the said Newmarket Subdivision Line to the West and to construct a subway under its said Line where it crosses St. Clair Avenue, Toronto, in accordance with the said plan and profile.

On or about 2nd January 1931, the Appellants filed and served their answer to the said application requesting a formal hearing thereof. On or about 6th January 1931 the Appellants received by mail a copy of the Respondents' reply to the said answer. 30

On 8th January 1931, without granting any hearing, the Board made the above Order No. 46083.

PART II.—ERRORS IN THE ORDER APPEALED FROM.

The Respondents submit that the Board had jurisdiction to make the order appealed from and that the same should be affirmed.

PART III.—ARGUMENT.

The subway referred to in the Order appealed from and all things to be done in connection therewith, including procedure, were incidental to and parts of a comprehensive scheme, as appears from the Board's Order and judgment of 9th May 1924, for the separation of grades in the North West portion of the City of Toronto and for the protection, safety and convenience of the public. 40

The constitution and powers of the Respondents are set forth in The Canadian National Railways Act, being chapter 172 of the Revised Statutes of Canada 1927, as amended by chapter 10 of the Statutes of Canada, 1929.

The powers and jurisdiction of the Board are set out and defined in The Railway Act, chapter 170 of the Revised Statutes of Canada, 1927, and, unless otherwise specified, the sections hereinafter referred to are sections of The Railway Act.

By s. 33, sub-s 1. the Board has jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested
 10 (b) requesting the Board to make any order or give any direction, leave, sanction or approval, which by law it is authorized 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. By sub-s 2 it may order and require any Company or person to do forthwith, or within or at any specified time, and in any manner to be 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
 20 and shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or fact. By sub-s 5 the Board's decision 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.

Sec. 34 empowers the Board to make orders with respect to any matter, act or thing which by the Act is sanctioned, required to be done or prohibited, and generally for carrying the Act into effect and for exercising any jurisdiction conferred upon it.

Under sec. 35 the Board may, of its own motion, . . . inquire into, hear and determine any matter or thing, which under this Act, it may inquire into, hear and determine upon application or complaint, and with respect
 30 thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.

By sec. 37 any power or authority vested in the Board may although not so expressed, be exercised from time to time, or at any time, as the occasion may require.

By sec. 256 in the case of a new highway crossing and by sec. 257 in the case of an existing highway crossing, the Board is authorized to make such orders as it deems expedient, as to the protection, safety and convenience of the public.

By sec. 259 the Board is authorized to order what portion, if any, of
 40 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, and it is submitted that it is immaterial, in view of the provisions above recited, whether the highway crossing is new or already in existence.

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By sec. 39 (1) 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, re-constructed, 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, re-constructed, altered, installed, operated, used and maintained. Under sub-s 2, the Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, re-constructing, 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. 10

If an order can be supported under sec. 39, it is unnecessary to consider whether it could also be supported under other sections of the Act.

Toronto Ry. Co. v. Toronto City—(1) (1920) A.C. 426, 437.

In view of the attitude taken by the appellants, they cannot be heard to say that they are not interested or affected by the order in question. The question whether or not they were benefited by the execution of the works in question is not material to the question of the jurisdiction of the Board. They could competently be required to contribute to the cost of such works, and the propriety of requiring them to do so and the extent of the contribution ordered are not matters for review by the Court. 20

C.P.R. et al v. Toronto Transportation Commission et al and *Toronto Transportation Commission v. C.N.R. et al*—1930 A.C. 686.

In the order appealed from, the Board has exercised the jurisdiction given to it under sec. 39 in :

1. Ordering by whom, namely the appellants, the utilities should be moved. Such order is not only in accordance with jurisdiction, but also in accordance with common sense. It would obviously be foolish to authorize any party unfamiliar therewith to interfere with such utilities. 30

2. Directing when and within what time the removal of such utilities should be carried out, namely : as and when required to do so by the Chief Engineer of the respondents.

3. By reserving all questions of costs, which would include consideration of payment of compensation and the proportion of such costs to be paid by all parties. 40

In the case above referred to in 1930 Appeal Cases, it is remarked, in connection with sec. 39, that the case was not "otherwise provided for in the Act," and the respondents submit that the same remark applies in this case.

The appellants are not the owners of land or of any interest in land which is subject to expropriation. In view of the provisions of the Canadian National Railways Act, as amended by chapter 10 of the Statutes of Canada 1929, the expropriation provisions of The Railway Act are not applicable to the respondents, and there is no provision in the said Acts for the expropriation of a highway or of any interest therein.

There are a number of sections of The Railway Act, under which the party by whom work shall be done or costs shall be borne are expressly provided, such as sections 185, 251-(6) and 260, but there is nothing in the
10 Act inconsistent with the applicability of the provisions of sec. 39 to the situation in question herein.

Apart from the foregoing it may be pointed out that if any compensation is payable to the appellants, the ascertainment and payment thereof are not pre-requisite to the immediate exercise by the Board of its jurisdiction under sec. 39, but merely matters which may be taken into consideration by the Board in finally apportioning the cost of the work, which has been reserved.

As to the contention that the order appealed from was made ex parte or without notice to the appellants, the respondents deny that it was made either ex parte or without notice to the appellants. The appellants
20 were served with the respondents' application for the said order and had and took the opportunity of replying to the same.

Under the provisions of sec. 39, the Commissioners may sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business, and they may, subject to the provisions of the Act sit either together or separately, and either in private or in open Court.

The only exception to these provisions is that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open Court.

30 The application for the order in question was not a "complaint" within the meaning of sec. 19.

The Honourable Mr. Justice Rinfret in his reasons given in disposing of an application for leave to appeal in

City of Montreal v. Canadian National Railways

on or about the 26th day of February 1931, says in part :

"A reference to section 33 of the Railway Act will, I think, show the true meaning of the word "complaint" in section 19. Section 33 provides that :

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

(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,

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No. 7.

*In the
Supreme
Court of
Canada.*

No. 126.
Factum of
Canadian
National
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continued.

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No. 7.

*In the
Supreme
Court of
Canada.*

No. 126.
Factum of
Canadian
National
Railways—
continued.

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 direction, leave, sanction or approval, which by law it is authorized 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.

The application of the Canadian National Railway Company was not an application complaining of anything in the sense of subparagraph (a) of Section 33, but an application requesting the Board to give its approval to a plan and profile in the sense of subparagraph (b) of Section 33. 10

In point of law, therefore, it was not a complaint within the meaning of the provisions of section 19; but it was a case where the Commissioners were at liberty to sit at such times, either in private or in open court, and to conduct their proceedings in such manner as they deemed convenient."

The respondents submit :

20

(1) That so far as the general jurisdiction of the Board is concerned, there is nothing in principle to distinguish this case from numerous other cases decided by the Judicial Committee of the Privy Council, and by this Court, in which such jurisdiction has been affirmed.

(2) That, while the practice and procedure of the Board have been correct, an appeal on a mere question of practice and procedure is not one which this Court will, under its established jurisprudence, entertain.

(3) That the appeal should, therefore, be dismissed with costs. 30

Copies of The Railway Act and other relevant legislation will be furnished for use on the argument of this appeal.

A. FRASER,
of Counsel for the Respondents.

No. 127.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tuesday the 1st day of March, A.D. 1932.

Present : The Right Honourable F. A. ANGLIN, C.J.C., P.C.
 The Right Honourable Mr. Justice DUFF, P.C.
 The Honourable Mr. Justice RINFRET.
 The Honourable Mr. Justice LAMONT.

APPEAL
No. 7.

*In the
 Supreme
 Court of
 Canada.*

 No. 127.
 Formal
 Judgment,
 1st March
 1932.

10 IN THE MATTER OF the Application of the Canadian National Railways
 for an Order under sections 178 and 257 of The Railway Act, for
 authority to construct a subway under their tracks where they cross
 St. Clair Avenue, in the City of Toronto, Province of Ontario, and to
 divert the main line of the railway to the west as shown on plan and
 profile No. C-6426, dated November 20th, 1930, on file with the Board
 under file No. 32453.11.

AND IN THE MATTER OF ORDER NUMBER 46083 of The Board of
 Railway Commissioners for Canada, dated the 8th day of January
 A.D. 1931.

20 BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA *Appellant*

AND

THE CANADIAN NATIONAL RAILWAYS - - *Respondent.*

The Appeal of the above named appellant from Order No. 46083 of
 the Board of Railway Commissioners for Canada dated the 8th day of
 January, A.D. 1931, in the above matter, having come on to be heard
 before this Court, on the 26th and 27th days of October, in the year of
 our Lord one thousand nine hundred and thirty-one, constituted as above
 with the addition of the Honourable Mr. Justice Newcombe, C.M.G., since
 30 deceased, in the presence of Counsel as well for the appellant as for the
 respondent, whereupon and upon hearing what was alleged by Counsel
 aforesaid, this Court was pleased to direct that the said appeal should stand
 over for Judgment, and the same coming on this day for Judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal
 should be and the same was dismissed, and that the said Order No. 46083

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of the Board of Railway Commissioners for Canada should be and the same was affirmed.

*In the
Supreme
Court of
Canada.*

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said appellant should and do pay to the said respondent the costs incurred by the said respondent in this Court.

(Sgd.) J. F. SMELLIE,
Registrar.

No. 127.
Formal
Judgment,
1st March
1932—con-
tinued.

No. 128.

No. 128.

Reasons for Judgment.

- (a) ANGLIN C.J.C. 10
(b) RINFRET J. (concurrent in by DUFF and LAMONT JJ.)

(Same as No. 16 at p. 48.)

APPEAL No. 8.

*(City of Hamilton Subways, &c.)*In the Privy Council.

No. 61 of 1932.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

IN THE MATTER OF the joint application of the Toronto, Hamilton
& Buffalo Railway Company, hereinafter called the "Applicant
Company", and the Corporation of the City of Hamilton, hereinafter
called the "City", under Sections 162, 178, 188, 199, 201, 252, 255,
256 and 262, and other appropriate sections of the Railway Act, for
an Order approving and sanctioning the plan, profile, and book of
reference of the Applicant Company No. 2BRC, dated October 15th,
1930, on file with the Board under File No. 20161; authorizing a
deviation, change, or alteration in the portion of the Applicant
Company's railway between a point at or near the east side of Park
Street on the west and a point just east of Victoria Avenue on the east,
in the City of Hamilton, and authorizing the said deviation, change, or
alteration from the present location of the said portion of the Applicant
Company's railway in accordance with the said plan, profile, and book
of reference; authorizing the Applicant Company to construct,
maintain, and operate the said portion of its railway between the said
points, in accordance with the change in grades as shown on the said
plan and profile; authorizing the Applicant Company to carry its
elevated tracks over the highways known as Hunter, McNab, James,
John, Catharine, Ferguson, Young and Victoria by means of bridges,
and to carry each of the said streets beneath the said tracks by means
of a subway; to take, without the consent of the owners, the lands
not now owned by the Applicant Company or the City, shown bordered
in red; directing the City to close the streets known as Hunter, Charles,
Hughson, Walnut, Baillie, Augusta and Wellington, and to divert
Hunter, Aurora and Liberty Streets; authorizing a relocation of the
Port Dover Line of the Canadian National Railways between Ferguson
Avenue and Victoria Avenue, and the change in grade thereof;
approving the new location of the Applicant Company's station and
terminal buildings; directing the Hamilton Street Railway Company

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to reconstruct its tracks through and at each side of the subway at James Street,—All as shown on the said plan, profile, and book of reference filed; and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the railway; File No. 20161.

AND IN THE MATTER OF Order No. 45813, dated the 14th day of November, 1930, made by the Board of Railway Commissioners for Canada, granting the said Application.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA

10

Appellant

AND

THE TORONTO, HAMILTON AND BUFFALO
RAILWAY COMPANY, AND THE CORPORATION
OF THE CITY OF HAMILTON - - -

Respondents.

No. 129.
Statement
of Facts.

No. 129.

Statement of Facts.

1. The Appellant, The Bell Telephone Company of Canada, was incorporated by Special Act of the Parliament of Canada, 43 Victoria, 1880, Chapter 67, and Amending Acts. A copy of the sections of the said Acts, as amended, relevant to this appeal, are set forth in the schedule attached hereto as Schedule No. 1. 20

2. Acting in pursuance of the powers conferred upon it in that behalf by its Special Acts of incorporation, referred to in paragraph No. 1 hereof, and with the legal consent of the City of Hamilton and of the Order of the Board of Railway Commissioners for Canada, No. 19238, dated May 10th, 1913, a copy of the said Order being attached hereto as Schedule No. 2, the Appellant, The Bell Telephone Company of Canada, lawfully constructed its lines of telephone and plant over, along the sides of, upon, under, and within the limits of the following streets, highways and public places within the limits of the City of Hamilton, namely: Charles Street, McNab Street, James Street, Hughson Street, Catharine Street, Aurora Street, Victoria Avenue, Wood Market Square and Baillie Street. 30

3. A description of the nature and type of the telephone lines and plant constructed upon and/or under those portions of the streets, highways, and public places mentioned in paragraph 2 hereof, over which the proposed railway works are to be constructed, is as follows:

(a) On Charles Street there is an underground conduit system consisting of five ducts or passages superimposed upon each other in two layers, the lower layer consisting of three ducts and the upper 40

layer of two ducts, with one manhole, through which ducts and manhole there is placed one 404 pair cable containing 808 wires, and one 1212 pair cable containing 2424 wires;

(b) On McNab Street there is a pole line carrying two twisted pairs of wires and one stranded steel anchor guy wire;

(c) On James Street there is an underground conduit system consisting of four ducts or passages superimposed upon each other in two layers of two ducts each, with one manhole, through which ducts and manhole there is placed two 101 pair cables each containing 202 wires;

(d) On Hughson Street there is an underground conduit system consisting of 8 ducts or passages, superimposed upon each other in two layers, of four ducts each, with one manhole, through which ducts and manhole there is placed four 404 pair cables each containing 808 wires, and one type 52-S cable containing 104 wires;

(e) On Catharine Street there is a pole line carrying one 16 pair cable containing 32 wires;

(f) On Aurora Street there is a pole line carrying one twisted pair of wires; one stranded steel messenger wire, and one anchor guy wire;

(g) On Victoria Avenue there is a pole line carrying one 16 pair cable containing 32 wires, one 26 pair cable containing 52 wires, and one 51 pair cable containing 102 wires;

(h) On Woodmarket Square there is a pole line carrying one 26 pair cable containing 52 wires;

(i) On Baillie Street there is a pole line carrying one 16 pair cable containing 32 wires.

4. The conduit systems referred to in the next preceding paragraph consist of ducts or passages laid underground beneath the surface of the street with associated manholes or chambers constructed in the line of the said duct runs at intervals varying in distance from about 50 to about 500 feet, depending upon local conditions.

The said conduits consist of a series of ducts or passages, each having a cross sectional measurement of about $4\frac{1}{2}$ inches square, and are constructed of lengths of vitrified clay tiles laid end to end longitudinally and cemented together, to form continuous passages and are superimposed upon each other in layers; the whole of which is set into a trench in the ground and rests upon a bed or foundation of concrete of about 4 inches in thickness to which the vitrified clay tiles adhere by reason of being laid upon the concrete immediately after the concrete has been poured and while it is still wet. The said vitrified clay tiles are further protected by a layer of concrete of about 3 inches in thickness poured over the tops and generally over the sides thereof; the whole structure thus forming a homogeneous mass with the surrounding earth incapable of being moved or altered without being broken up and destroyed.

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Statement
of Facts—
continued.

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Statement
of Facts—
continued.

The manholes forming part of the said conduit system consist of underground chambers about 7 feet in length by about 5 feet in width and 5 feet 6 inches in height, the floors and walls of which are constructed of concrete, the floors being about 2 inches in thickness and the walls about 6 inches in thickness. The roofs of the said manholes consist of concrete re-inforced with steel "I" beams and re-inforced steel and are of about 10 inches in thickness. The tops of the said roofs lie about 14 inches below the surface of the street and support a circular steel metal frame which is embedded in the street pavement and leads up through the pavement to the surface of the street, creating an opening over which rests a removable metal cover for the purpose of permitting access to the said manholes. The tops of the said metal frames and covers lie flush with the surface of the street and form part thereof and the said manholes form a homogeneous mass with the surrounding earth incapable of being moved or altered without being broken up and destroyed. 10

5. The telephone lines and plant belonging to the Appellant, described in paragraphs 3 and 4 hereof, are necessary for supplying telephone service to the Appellant's subscribers in and about the City of Hamilton, and particularly in the vicinity of the streets, highways and public places upon and/or under which the said lines are located, and the said lines and plant have been maintained in the locations in which they now are from the respective dates of construction thereof up to the present time. 20

6. The Toronto, Hamilton & Buffalo Railway Company was incorporated in the year 1884, by an Act of the Legislature of the Province of Ontario, 47 Victoria, Chapter 75, and in the year 1891 the undertaking of the company was declared to be a work for the general advantage of Canada, by 54-55 Victoria, Chapter 86 (Canada), and subject to the provisions of the Dominion Railway Act. The Statutes relating to the said railway company, both Dominion and Provincial, shall be deemed to be, and to be read as, part of this Case. 30

7. The railway lines and facilities of the Toronto, Hamilton & Buffalo Railway Company, situated within the corporate limits of the City of Hamilton, were constructed and subsequently maintained upon the terms and conditions set forth in By-law No. 755 of the City of Hamilton, which was passed on the 29th day of October, 1894, pursuant to a vote of the electors of the said City, taken on the 11th day of October, 1894. By an Act of the Legislature of the Province of Ontario, 58 Victoria (1895), Chapter 68, and by an Act of the Parliament of Canada, 58-59 Victoria (1895), Chapter 66, the said By-law No. 755, and the terms and conditions therein contained, were declared to be valid and binding upon the Corporation of the City of Hamilton and upon the Toronto, Hamilton & Buffalo Railway Company. The said railway was so constructed in or about the year 1895. The said By-law is set forth in the schedules to the said Acts. 40

8. The Respondents, The Toronto, Hamilton & Buffalo Railway Company, and the Corporation of the City of Hamilton entered into an agreement, bearing date the 20th day of October, 1930, providing for the

diversion of the lines of the Respondent railway between Park Street and a point just east of Victoria Avenue, in the said City of Hamilton, in accordance with a plan and profile, dated the 15th day of October, 1930, and bearing the number 2 B.R.C. A true copy of the said plan and profile No. 2 B.R.C. is attached hereto as Schedule No. 3, and a true copy of the said agreement is attached hereto as Schedule No. 4.

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of Facts—
continued.

9. That the said agreement, dated the 20th day of October, 1930, was executed on behalf of the City of Hamilton under its corporate seal by John Peebles, Mayor, and S. H. Kent, City Clerk, pursuant to a resolution of its
10 Council passed on the 16th day of October, 1930, and confirmed by By-law No. 4197 passed on the 14th day of April, 1931. A copy of the said resolution and of the said By-law is set forth in the schedules annexed hereto as Schedules Nos. 5 and 6, respectively. The said resolution, by-law, and/or agreement were not submitted to any vote of the electors, nor otherwise sanctioned by any parliamentary, legislative or other constituted authority.

10. By letter dated October 6th, 1930, addressed to the Secretary, the Mayor of the City of Hamilton took up with the Board the question of grade separation of the Toronto, Hamilton & Buffalo Railway in the City
20 of Hamilton, involving the building of a new station, pointing out the desirability of immediate action in view of the present unemployment situation in the City. A copy of the said letter is attached hereto as Schedule No. 7. On October 28th the Mayor was advised by wire that, to meet the emergency situation, the Board would be in Hamilton, Saturday, November 1st, 1930, to hear the joint application of the City and the Toronto, Hamilton & Buffalo Railway Company re track elevation between the east end of the tunnel on Hunter Street and Victoria Avenue, if arrangements could be made to have representatives of the railway company and other parties interested present. A copy of the telegram is attached hereto as Schedule
30 No. 8. A copy of the Mayor's reply by wire of October 29th, 1930, is attached hereto as Schedule No. 9, and the further wire of the Assistant Secretary of the Board to notify all parties on October 29th, 1930, attached as Schedule No. 10.

Mayor Peebles caused notices of the said Sittings to be given to all interested parties so far as known, including The Bell Telephone Company of Canada, and also caused notices of the Sittings to be published in the Hamilton Herald and the Hamilton Spectator, two newspapers published daily in the City of Hamilton, except Sunday.

11. On the 31st day of October, 1930, the Appellant, The Bell Telephone Company of Canada, was served with a notice of a sitting of the Board
40 of Railway Commissioners for Canada, to be held at 10.30 in the forenoon of Saturday, the 1st day of November, 1930, in the Council Chamber, Hamilton, to consider a joint application of the Corporation of the City of Hamilton and the Toronto, Hamilton & Buffalo Railway Company respecting railway grade separation, and inviting all parties interested to attend. A true copy of the said notice is set forth in the Schedule attached hereto as Schedule No. 11.

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continued.

12. At the time the Appellant received the notice referred to in paragraph No. 11 hereof, it had no knowledge of any application such as is mentioned in the said notice having been made to the Board of Railway Commissioners for Canada, and had not been served with any copy of any such application or of the plan and profile therein referred to, and the said notice constituted the first and only intimation that the Appellant had of the said proceedings, and in fact no application had been made to or filed with the Board of Railway Commissioners for Canada at that date.

13. On the 1st day of November, 1930, in pursuance of the Notice attached hereto as Schedule No. 11, the Board of Railway Commissioners for Canada held a sitting at the City of Hamilton to hear the application referred to in the said Notice. After the said hearing had commenced, the Respondents produced and filed as Exhibit No. 1 a joint application to the Board, dated October 30th, 1930, for an Order (1) approving and sanctioning a deviation, change, or alteration in the portion of The Toronto, Hamilton & Buffalo Railway Company's railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton; (2) authorizing the Respondent Railway to construct, maintain, and operate said portion of its railway between said points in accordance with certain changes in the grades thereof; (3) authorizing the Respondent Railway to carry its elevated tracks over McNab Street, James Street, John Street, Catharine Street, Ferguson Avenue, Young Street and Victoria Avenue, by means of bridges, and to carry each of said streets beneath such tracks by means of subways, in accordance with detailed plans of such subways to be submitted to the Board; (4) authorizing the Respondent Railway to take certain lands without the consent of the owners thereof; (5) directing the Respondent City to close Hunter, Charles, Hughson, Baillie, Augusta, and Wellington Streets, and to divert Hunter, Aurora, and Liberty Streets; (6) directing and authorizing the re-location of a portion of the Port Dover Line of the Canadian National Railways; (7) approving of the new location of the Respondent Railway's new station and terminal buildings; (8) directing the Hamilton Street Railway to reconstruct its tracks on James Street; (9) directing *inter alia* The Bell Telephone Company of Canada to reconstruct, alter, or change its plant and works in order to carry out the proposed changes in the said Railway, and (10) directing a contribution from The Railway Grade Crossing Fund towards the cost of the said works; the whole in accordance with the plan and profile No. 2 B.R.C., dated October 15th, 1930, filed with the Board as Exhibit No. 2, and attached hereto as Schedule No. 3, and the Board of Railway Commissioners for Canada thereupon proceeded to hear and dispose of the said application without further notice. A true copy of the said application, dated the 30th day of October, 1930, is set forth in the schedule attached hereto as Schedule No. 12.

14. At the conclusion of the said hearing the Board of Railway Commissioners for Canada delivered its judgment and reasons therefor orally. A true copy of the said judgment and reasons is set forth in the schedule attached hereto as Schedule No. 13.

15. No opportunity was afforded the Appellant to study the said application or the plans filed therewith or to prepare and file its answer thereto or to fully present its opposition to the said application or its arguments against the same. The said application was not served upon the Appellant until the 5th day of November, 1930, four days after the said hearing.

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continued.

16. Attached hereto as Schedule No. 14 is a true copy of the transcript of the Proceedings before the Board at the hearing of the said application.

10 17. At the said hearing Counsel for the Respondent Railway produced and filed a draft order to be made by the Board granting the said application. A true copy of said draft order is set forth in the schedule attached hereto as Schedule No. 15.

18. In its judgment the Board directed that a formal order in connection with the said application would be issued by the Board after consideration of the draft order referred to in paragraph 17 hereof and after consideration also of representations which any of the parties may send to the Board within one week from the date of the said hearing.

20 19. Attached hereto as Schedule No. 16 is a true copy of a letter dated November 4th, 1930, written by Pierre Beullac, K.C., General Counsel of the Appellant, to the Chairman of the Board of Railway Commissioners for Canada containing the Appellant's representations and submissions relating to the said draft order.

30 20. On the 14th day of November, 1930, the Board of Railway Commissioners for Canada made and issued Order No. 45813 from which this appeal is taken. The said Order grants the application of the Respondents and approves the plan and profile therein referred to, and by paragraph 9 thereof directs the Appellant and others to reconstruct, alter or change their respective works in order to permit of the carrying out of the changes in the railway shown on the said plan; and, further, by paragraph 10 thereof, orders that the question of the apportionment of the cost of carrying out the said works be reserved for further consideration by the Board. A true copy of the said Order is annexed hereto as Schedule No. 17.

40 21. The construction of the proposed deviation of the Toronto, Hamilton & Buffalo Railway Company's line through the City of Hamilton, and of the other works mentioned in the said Order No. 45813 in accordance with the aforementioned plan and profile, will result in the said railway being built across, *inter alia*, Charles Street, MacNab Street, James Street, Hughson Street, Catharine Street, Aurora Street, Baillie Street, and Victoria Avenue, the said line being carried across MacNab, James, Catharine and Victoria Streets by means of elevated tracks over the highways and the construction of subways in the streets under the said tracks; in the diversion of Aurora Street; and in the closing of Charles, Baillie, and Hughson Streets, at points where the telephone lines and plant of the Appellant are constructed, and will render necessary changes in the Appellant's plant on Wood Market Square. It is not contended that the said works will in any way confer

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continued.**

any benefit or advantage upon the Appellant or its telephone lines and plant ; on the contrary, the construction of the said deviated line of railway and other works will obviously necessitate the destruction and/or removal of the Appellant's aforementioned telephone lines and plant at the crossings in question, and from the said streets being closed and/or diverted, and will necessitate the relocation of the same or the reconstruction of similar lines and plant at substantial cost and expense.

22. That no expropriation proceedings have been instituted by the Respondents with a view to acquiring the right or interest of the Appellant to maintain its said lines and plant in the precise locations in which they are now constructed. 10

23. On the 17th day of March, 1931, the Appellant launched a motion, returnable on the 24th day of March, 1931, before the presiding Judge of the Supreme Court of Canada, applying for leave to appeal to the Supreme Court of Canada from the said Order No. 45813 of the Board of Railway Commissioners for Canada, in so far as the said Order directed the Appellant to reconstruct, alter, or change its said works in order to permit of the changes in the railway shown on the said plan and profile being carried out upon the ground that, as a matter of law, the Board of Railway Commissioners for Canada was without jurisdiction to make the said Order, and in any event to make the said Order, in the present proceedings, claimed to have been irregularly taken and not properly brought before the Board in accordance with the rules established by the Board. 20

24. That the said motion came on for hearing before the Honorable Mr. Justice Rinfret, who granted the said application by Order dated the 7th day of April, 1931, in the following terms :

AND IT IS FURTHER ORDERED that the said application for leave to appeal to this Court from the said Order Number 45813 of The Board of Railway Commissioners for Canada, in so far as the said Order directs the Appellants to move, reconstruct, alter or change such of their works and facilities as may be affected by the construction of the railway works authorised to be constructed by the said Order, upon the ground that The Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said Appellants or in any event to make the said Order in the present proceedings which are claimed by the Appellants to have been irregularly taken and not properly brought before the Board in accordance with the rules established by the Board, be and the same is hereby granted. 30

A copy of the said Order is attached hereto as Schedule No. 18.

No. 130.

Letter Mayor of Hamilton to Secretary Board of Railway Commissioners for Canada.

SCHEDULE No. 7.

MAYOR'S OFFICE,
HAMILTON.

October 6th, 1930.

A. D. Cartwright, Esq.,
Secretary,
Board of Railway Commissioners,
Parliament Buildings,
Ottawa, Ont.

10

Dear Mr. Cartwright,

In view of the present unemployment situation the City of Hamilton took up the matter of grade separation with the Toronto, Hamilton and Buffalo Railway with the idea of abolishing a number of grade crossings in Hamilton. The Railway Company agreed to co-operate with the City and the alterations proposed by them will entail the building of a new station and the expenditure of approximately three million dollars.

Of course the City of Hamilton will be called upon to pay their share of the cost of this work and because of this we felt that we could look for liberal treatment at the hands of the Board of Railway Commissioners from the fund for the elimination of level crossings.

In this connection we would like to have the privilege of appearing before the Board and placing our claims before it. As the T. H. and B. Railway is ready to start upon this work immediately upon receiving the approval of the Board, we would very much appreciate having an appointment at the earliest possible date.

Yours very truly,
(Sgd.) JOHN PEEBLES,

Mayor.

30

P.S.—The solicitors for the railway and the city are preparing a consent order which will reach you within the next day or two.

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Before
the Board
of Railway
Commissioners for
Canada.

No. 130.
Letter
Mayor of
Hamilton to
Secretary
Board of
Railway
Commissioners for
Canada,
6th October
1930.

APPEAL
No. 8.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 131.
Telegram
Assistant
Secretary
Board of
Railway
Commis-
sioners for
Canada to
Mayor of
Hamilton,
28th Octo-
ber 1930.

No. 131.

**Telegram Assistant Secretary Board of Railway Commissioners for Canada
to Mayor of Hamilton.**

SCHEDULE No. 8.

CANADIAN NATIONAL TELEGRAPHS.

Original Message telephoned.

Standard Time.
C14R C 61 DL.

Ottawa, Ont., 538P., Oct. 28.

John Peebles,
Mayor, Hamilton, Ont.

10

To meet the urgency of your situation Railway Commission can be in Hamilton Saturday next to hear joint application of City and T. H. and B. re track elevation between east end of tunnel on Hunter Street and Victoria Avenue if you can arrange to have the representatives of the railway company and other parties interested present stop please wireanswer.

R. RICHARDSON.

608P

No. 132.
Telegram
Mayor of
Hamilton to
Assistant
Secretary
Board of
Railway
Commis-
sioners for
Canada,
29th Octo-
ber 1930.

No. 132.

**Telegram Mayor of Hamilton to Assistant Secretary Board of Railway
Commissioners for Canada.**

20

SCHEDULE No. 9.

CANADIAN NATIONAL TELEGRAPHS.

October 29th, 1930.

To R. Richardson,
Dominion Railway Commissioners,
Ottawa, Ont.

Meeting Saturday satisfactory. Will notify Canadian National Railway, Street Railway and Telephone Company. Shall I notify property owners affected? At what hour is meeting? Can meet in Council Chamber. Awaiting reply.

JOHN PEEBLES,
Mayor.

Charge to City.
Mayor's Office.

No. 133.

**Telegram Assistant Secretary Board of Railway Commissioners for Canada
to Mayor of Hamilton.**

*Before
the Board
of Railway
Commis-
sioners for
Canada.*

SCHEDULE No. 10.

CANADIAN NATIONAL TELEGRAPHS.

Standard Time.

No. 133.
Telegram
Assistant
Secretary
Board of
Railway
Commis-
sioners for
Canada to
Mayor of
Hamilton,
29th Octo-
ber 1930.

RA 208 12.

Ottawa, Oct., 29, 1930.

10 John Peebles,
Mayor, Hamilton, Ont.

Please notify property owners and others interested for ten thirty
Saturday morning.

R. RICHARDSON.

No. 134.

Notice of sitting of Board of Railway Commissioners for Canada.

No. 134.
Notice of
sitting of
Board of
Railway
Commis-
sioners for
Canada.

SCHEDULE No. 11.

NOTICE.

20 NOTICE IS HEREBY GIVEN of a sitting of The Board of Railway
Commissioners for Canada, to be held at 10.30 in the forenoon of Saturday
1st November, 1930, at the Council Chamber, City Hall, Hamilton, to
consider the joint application of the Corporation of the City of Hamilton
and the Toronto, Hamilton and Buffalo Railway Company, respecting
railway grade separation, at which all parties interested may attend.

No. 135.

Application of Respondents for approval of plan and profile No. 2 B.R.C.

No. 135.
Application
of Respon-
dents for
approval of
plan and
profile No.
2 B.R.C.,
30th Octo-
ber 1930.

SCHEDULE No. 12.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Application No.....

30 **THE TORONTO, HAMILTON AND BUFFALO RAILWAY COM-
PANY, herein called the Applicant Company, and THE CORPORATION
OF THE CITY OF HAMILTON, herein called the City, jointly apply to
the Board :**

1. For an Order under section 178 of the Railway Act approving
and sanctioning the Plan, Profile and Book of Reference submitted herewith

**APPEAL
No. 8.**

*Before
the Board
of Railway
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sioners for
Canada.*

No. 135.
Application
of Respon-
dents for
approval of
plan and
profile No.
2 B.R.C.,
30th Octo-
ber 1930—
continued.

in triplicate showing a deviation, change or alteration in the portion of the Applicant Company's Railway between a point at or near the East side of Park Street on the West and a point just East of Victoria Avenue on the East in the City of Hamilton, in the County of Wentworth, in the Province of Ontario, and authorizing such deviation, change or alteration from the present location of said portion of the Applicant Company's Railway in accordance with said Plan, Profile and Book of Reference.

2. And also for an Order authorizing the Applicant Company to construct, maintain and operate said portion of its Railway between said points in accordance with the change in grades as shown on said Plan and Profile and including the reconstruction of the approaches to its tunnel on Hunter Street at the East portal thereof. 10

3. And also for an Order under Sections 255 and 256 of the Railway Act authorizing the Applicant Company to carry its elevated tracks over the highways known as MacNab Street, James Street, John Street, Catharine Street, Ferguson Avenue, Young Street and Victoria Avenue by means of bridges and to carry each of said streets beneath such tracks by means of a subway, all in accordance with said Plan and Profile and detailed Plans of said subways to be submitted to the Board.

4. And also for an Order authorizing the Applicant Company to take without the consent of the owners the lands not now owned by the Applicant Company or the City shown in red on the said Plan or Profile and mentioned in said Book of Reference. 20

5. And also for an Order directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington within the limits as indicated on said Plan, and to divert Hunter, Aurora and Liberty Streets as shown on said Plan.

6. And also for an Order directing and authorizing a relocation of the Port Dover Line of the Canadian National Railway between Ferguson Avenue and Victoria Avenue and the change in grade thereof as indicated on said Plan and Profile. 30

7. And also for an Order under Section 188 of the Railway Act approving of the new location of the Applicant Company's Station and other terminal buildings in connection therewith on the south side of Hunter Street as shown on said Plan.

8. And also for an Order directing the Hamilton Street Railway Company to reconstruct its tracks through and on each side of the subway on James Street as shown on said Plan and Profile.

9. And also for an Order directing United Gas and Fuel Company of Hamilton Limited, The Bell Telephone Company of Canada, The Hamilton Hydro-Electric Power Commission, The Dominion Power and Transmission Company Limited and any other public utility Company or Companies affected, to reconstruct, alter or change the respective works of each in order to carry out the changes in the Railway shown on said Plan and Profile. 40

10. And also for an Order under Section 262 of the Railway Act directing a contribution from "The Railway Grade Crossing Fund" towards the cost of the works.

AND STATES :

(1) The Applicant Company and the City have approved of the Plan accompanying this Application and the works covered by the Plan are necessary for the safety, convenience and protection of the public and for the efficient maintenance and operation of the Railway of the Applicant Company.

10 (2) The Applicant Company and the City have agreed that the Board shall apportion the cost of the works between the City, the Applicant Company and all other parties that may be benefited by or interested in the carrying out of the said works.

(3) The Applicant Company and the City desire that the Board shall order the maximum contribution out of The Railway Grade Crossing Fund; the amount or amounts to be fixed by the Board on the hearing of the evidence of all parties at a hearing on a date to be fixed by the Board.

20 (4) The City, the Applicant Company and Canadian National Railway Company have conferred and are in accord upon the proposed scheme of grade separation, and the Applicant Company and the City desire that the Board should issue an Order at once so that the work may be commenced as soon as possible in ease of the present serious unemployment situation at Hamilton, which is one of the important considerations for the Applicants joining in this Application at this time.

Dated at Hamilton this 30th day of October, 1930.

THE TORONTO, HAMILTON AND BUFFALO
RAILWAY COMPANY,

30 Per JOHN A. SOULE,
General Solicitor.

THE CORPORATION OF THE CITY OF
HAMILTON,

Per A. J. POLSON,
Assistant City Solicitor.

APPEAL
No. 8.

Before
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No. 135.
Application
of Respondents for
approval of
plan and
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2 B.R.C.,
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Before
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No. 136.
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1st Nov-
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No. 136.

Transcript of Proceedings on hearing before Board of Railway Commissioners for Canada.

SCHEDULE No. 14.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Hamilton, Ont., Saturday, 1st November, 1930.

HON. H. A. MCKEOWN, K.C., Chief Commissioner.

HON. T. C. NORRIS, Commissioner.

H. A. K. Drury,
Assistant Chief Engineer.

R. Richardson,
Assistant Secretary and Registrar. 10

(Nelson R. Butcher & Company, Official Reporters, per J.B.)

File 20161.

1. Application of the Toronto, Hamilton & Buffalo Railway Company for hearing of the joint application of the City of Hamilton and the T. H. & B. Ry. Co. for approval of the plans of the track elevation between the east end of the tunnel on Hunter Street and a point near Victoria Avenue, which plans include the construction of a new station at Hamilton; and the distribution of costs between the interested parties.

JOHN A. SOULE (General Solicitor), H. T. MALCOLMSON (Vice-President and General Manager), R. L. LATHAM (Chief Engineer), for the Toronto, Hamilton & Buffalo Railway Company. 20

A. J. POLSON (Assistant City Solicitor), for the City of Hamilton.

R. E. LAIDLAW and T. J. IRVING (Chief Engineer), for the Canadian National Railways.

GEORGE E. WALLER, for the Hamilton Street Railway Company.

PETER WHITE, K.C., for the Executors of the Estate of Stephen F. Lazier; Emma A. Husband and Mary B. McQuesten.

D. L. MCCARTHY, K.C. (per Peter White, K.C.), for the McNab Street Presbyterian Church. 30

J. R. MARSHALL and H. C. WALFORD (Division Plant Superintendent), for the Bell Telephone Company.

ORVAL WALSH, for the United Gas & Fuel Company.

ALEXANDER STARK, for the Alexandra Dancing Academy (Louisa Hicks, Owner).

WALTER H. FRASER, for the Storage and Transfer Company.

W. O. SEELING, personally, as a property owner.

The Chief Commissioner : The only case listed for hearing to-day is the application of the Toronto, Hamilton & Buffalo Railway Company for hearing of the joint application of the City of Hamilton and the T. H. & B. Railway Company for approval of plans of track elevation between the east end of the Hunter Street Tunnel and the point near Victoria Avenue, including the construction of a new station, and the distribution of the costs between the interested parties.

We will take the appearances.

10 Mr. Soule : Along with Mr. Malcolmson and Mr. Latham, I am for the T. H. & B. Railway Company; Mr. A. J. Polson appears for the City of Hamilton; Mr. R. E. Laidlaw for the Canadian National Railways.

Mr. White : I appear for the executors of the estate of Stephen F. Lazier, for Emma A. Husband and Mary B. McQuesten, and on behalf of my learned friend, Mr. D. L. McCarthy, K.C., for the McNab Street Presbyterian Church.

Mr. Waller : I appear for the Hamilton Street Railway Company.

Mr. Walsh : I represent the United Gas & Fuel Company.

There are a number of property owners, I think, appearing in person.

The Chief Commissioner : Individual property owners ?

Mr. Walsh : Yes, Mr. Chairman.

20 Mr. Marshall : I appear for The Bell Telephone Company, along with Mr. H. C. Walford, our Division Plant Superintendent.

Mr. Stark : I appear for the Alexandra Dancing Academy, Mr. Chairman, of which a Mrs. Hicks is the owner.

Mr. Fraser : I appear for the Storage & Transfer Company.

The Chief Commissioner : Mr. Soule, through the kindness of some of the parties interested, my colleague, Mr. Commissioner Norris, and myself have had an opportunity of going over the whole situation this morning, and of observing what is intended to be done at the different crossings and streets, and discussing the plans to some extent.

30 As a result, we do not think it is necessary for you to spend any time at the moment in giving a detailed description of the whole layout, because we are already pretty familiar with it. I would suggest, if it occurs to you as wise, that those who are opposed to this move from any particular standpoint, be given an opportunity now to state their objections, and you can then meet them as best you can with the evidence of the engineers, and others, who know something about it.

Mr. Soule : That is quite agreeable, Mr. Chairman. I had it in mind to file our application, which, by the way, is a joint application of the City of Hamilton and the Toronto, Hamilton & Buffalo Railway Company.

40 The Chief Commissioner : You might file this with the Registrar as an Exhibit.

Exhibit No. 1 : Filed by Mr. Soule, 1 Nov., 1930 : Application.

Mr. Soule : I think I might perhaps explain this application a little, Mr. Chairman. Briefly, it is an application under section 178 of the Railway Act for a change, alteration or deviation in the railway from the east side of Park Street and extending east to the east side of Victoria Avenue, and asking for the usual Order to make that deviation or change, also for an

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Order to construct, maintain and operate our railway between those two points in accordance with the elevated grades.

Then we are asking under sections 255 and 256 of the Railway Act for permission to carry our railway across certain highways which are mentioned in paragraph 3 of the application, and to carry highways beneath our tracks by means of subways at these streets.

We are also asking for authority to take, without leave of the owners, certain lands. I might explain in that connection that the railway company has been purchasing land for this project for a great many years past, and there are comparatively few parcels which now need to be obtained, but there are still a few isolated pieces which we still require, in order to complete the undertaking. 10

We are also asking for an Order directing the City of Hamilton to close certain streets and divert others as set forth in paragraph 5 of the application. That has been agreed to by the city; there is no opposition in regard to that. We have an agreement in that respect.

Under paragraph 6 of our agreement, we are asking for a relocation of the Port Dover Line of the Canadian National Railways between Ferguson Avenue and Victoria Avenue. I think there will be no trouble about that.

The Chief Commissioner: Mr. Laidlaw agrees to that? 20

Mr. Soule: Then we are asking for approval of the new location of the station buildings and terminals there, and for an Order directing the Hamilton Street Railway Company to reconstruct its tracks through the subway on James Street.

There will be a number of public utility companies affected, and we want an Order in respect of them, directing them to make the necessary changes in their works in order to carry out this project.

Then this is a very important feature for both the City of Hamilton and the Railway Companies, in fact it is a matter of some vital importance, that is, a liberal contribution from the Grade Crossing Fund. 30

I might explain that, as is very well known, railway earnings do not justify undertaking such a large financial outlay at a time like this. One of the chief reasons why we have embarked on this enterprise is that the Government had displayed a disposition to be liberal towards the Grade Crossing Fund in this respect, and we are making bold to ask for the maximum allowance the Board can give us in respect of protection under the Railway Act.

Then I have the plans, Mr. Chairman, four on linen. I do not know how many you want, but we have more of them, or we can furnish more if desired. 40

The Chief Commissioner: Four will do to start with.

Exhibit No. 2: Filed by Mr. Soule, 1 Nov., 1930: Plans (four, on linen).

Mr. Soule: This plan shows the proposed work, Mr. Chairman. I think I might explain briefly that there is an agreement between the city and the railway company, and that under that agreement the question of the apportionment of the performance of the work and so on is to be

reserved, if agreeable, to be heard at a later date. We are not prepared to go on with that now.

The Chief Commissioner: What you want now is to learn from the Board whether you will be permitted to go on?

Mr. Soule: Yes, Mr. Chairman. My understanding is that this is all that is required of me.

The Chief Commissioner: At the opening we thought it would abbreviate matters if those who were opposed to any portion of the scheme would lay their objections before the Board now, and they can be met or an
10 endeavour can be made to meet them, by the applicants. Mr. White is senior counsel.

Mr. White: Mr. Chairman and gentlemen of the Board: I act, as I stated, for the estate of Stephen F. Lazier, and for Mr. E. F. Lazier, who are interested in Lots Numbers 133 and 134 on the east side of Charles Street, at the corner of Bold and Charles Streets. The top of the plan, as usual, represents the north. We understand, although the plan is not very definite about it, the detail as shown on the plan does not clearly indicate just exactly what is to be done, but we understand that it is the intention of the city to close Charles Street and thereby injuriously affect this
20 property.

The Chief Commissioner: Mr. Soule, it is the intention to close that street, is it not?

Mr. Soule: Yes, sir.

Mr. White: The city has agreed to close it, under that agreement?

The Chief Commissioner: Yes.

Mr. White: Then the Emma A. Husband property is on Hunter Street and extends from McNab to Jackson Street, and consists of Lots 79 and 80 on Jackson Street, and Lots 103 and 104 on Hunter Street. The difficulty there of course is the closing of Hunter Street and the substitution of what
30 appears to be upon the plan a very narrow strip which it is intended to leave open along the works that are now contemplated, and approval of which is asked for in this application.

The plan, to me at least, does not indicate exactly what is to be done there, but we need not discuss that now, because when the proper time comes, I have no doubt we will find out.

Then Mr. McQuesten is with me in acting for Emma B. McQuesten, who is the owner of lots Nos. 101 and 102 on Hunter Street, and lots 81 and 82 on Jackson Street, both affected by the closing of Hunter Street. We understand that in respect of these properties the grade is to be changed
40 in front of them, in order to lower the grade sufficiently for the purposes of the subway or an under-passage.

I am also speaking for Mr. McCarthy, whose clients are the trustees of the McNab Street Presbyterian church. That property consists of lots 128 and 129 on McNab Street, and is on the south-west corner of McNab and Hunter Streets, marked "church" on the plan. The street in front of it is, we understand, to be cut down some 15 feet both on Hunter Street

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and McNab Street, and in respect of that the trustees feel that they are in a somewhat special and peculiar position.

When the railway tracks were originally completed on the street, according to the state of the law at that time there was no compensation payable to abutting and adjacent proprietors. Section 255 of the Railway Act came into force a long time afterwards. So that there has never been any compensation paid in respect of the operation of the railway upon that street.

Now, sir, the proposed works render the property wholly unfit for the purposes of a place of public worship, and while of course the trustees must submit to the general law applicable to all parties whose properties are injuriously affected, they submit their rights to the Board and ask the good offices of the Board, if the Board feels like making a suggestion, that perhaps the best way out of this difficulty would be for the city and the railway company to purchase the property, as it is wholly unfit for public worship. Of course, that is something we cannot ask for except as a friendly matter.

Now, sir, my only concern—I am not arguing on the question of whether or not the plans should be approved, or the scheme as a whole, because that matter seems, as far as we are concerned, to be pretty well determined by the City Council and the Railway Company getting together, so I do not propose to occupy the time of the Board discussing that. There are, however, one or two matters which I would like to bring to the attention of the Board as affecting these property owners for whom I am acting.

Paragraph 4 of the application asks for an Order authorizing the applicant company to take, without the consent of the owners, the lands not now owned by the applicant company or the city, also for an Order directing the city to close the streets known as Hunter, Charles, Hughson, and other streets within the limits as indicated on the plan, and so forth.

My submission is that that Order is not at all necessary because under the agreement between the city of Hamilton and the railway company the city has agreed to close these streets, which they may do under the authority of the Ontario Municipal Act. It will be urged, I understand, that the reason for asking for this particular Order is that if the Board orders these streets to be closed it will not be necessary to submit to a vote of the electors of the City of Hamilton a debenture by-law, which would be passed to raise the necessary moneys, but that can be done by the consent and approval of the Ontario Railway & Municipal Board, as provided by the Municipal Act, Chapter 233, sections 483 and 484, relating to the closing of streets.

The subsection F of section 297 of the Ontario Municipal Act states : “ Except where otherwise provided by this or any other Act, a corporation shall not incur any debt the payment for which is not provided for in the estimates for the current year, unless a by-law of the Council authorizing it has been passed with the assent of the electors.” Except, and one of the exceptions is : “ (f) By the council of any municipality with the approval of the Municipal Board for raising such sum as is required to pay the share ordered to be paid by the corporation of the cost of any work constructed under the Order of the Board of Railway Commissioners for Canada,” —

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My submission to the Board therefore is that a simple authorization of the work is quite sufficient, without a specific order, asking the Board to direct the Municipality to close the streets. They have agreed to do so, and have quite sufficient machinery for that purpose under the appropriate sections of the Municipal Act. The objection to it is, the difficulty which one experiences in an endeavour to come to a conclusion as to the exact meaning of the present section 255 of the Railway Act as passed at the second last session of the Dominion Parliament, Statutes of 1930. Formerly, when an application of this kind was made, as section 255 then stood, the Board would make an Order subject to the payment of compensation to an abutting landowner or proprietor. I think that was the expression used. Now the section reads in rather a hazy sort of way, and as I said before, one experiences difficulty in coming to a conclusion as to whom, in a case of this kind, we should look for our compensation. The section reads :—

“255. The railway of the company may, if leave therefor is first obtained from the Board as hereinafter authorized, but shall not without such leave, be carried upon, along or across any existing highway; provided that the compensation, if any, payable by the company to adjacent or abutting landowners shall be determined under the Arbitration sections of this Act.”

I have discussed this section with quite a number of my confreres who are very familiar with Railway law, and I understand that the intention at least, whether it was carried out by the wording of the Act is another matter, was that where it is a case of payment to abutting and adjacent proprietors, as distinguished from proprietors whose lands or part of whose lands are taken for the purposes of a railway, the Board still has the right to order compensation, leaving it to the arbitration clauses to determine who are abutting and adjacent proprietors entitled to compensation, and the amount, if any, of such compensation.

Now, sir, we are proprietors. If my first contention or my first request is acceded to, that part of the Order is not necessary. If the city, as a city undertakes, as it has undertaken, to close these streets, which they do by by-law, and if they pass such a by-law and the grade is changed, then we, of course, look to the city for our compensation, primarily, anyway. We are content to occupy that position, and the debenture matter can be gotten over by the Board, I suggest, simply ordering the work to be done, and the city to pay its share, which brings it within sub-section (f) of section 297 of the Railway Act.

If, however, the Board should not agree with me, then I would like if I can to have it made quite clear in any Order the Board makes, that the approval of the Board is subject to the payment of compensation to abutting and adjacent proprietors.

The Chief Commissioner: The insertion of those words “if any” in that section had rather this intent; it was contended in various applications made before the Board that sending the question to arbitration meant, as

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the section previously stood, that the Board in so sending it to arbitration made a finding that compensation was assessable.

Mr. White: I understand that, sir.

The Chief Commissioner: That is all, as far as I know. These words were put in so that the County Court Judge, or whoever it might be, might not consider that it was absolutely necessary to make an assessment.

Mr. White: Of course if the Board now intends to find it necessary to make any Order at all in regard to the payment of compensation for lands injuriously affected, if any, that can be provided for in their Order, and the Order itself can be made quite clear, that it is not a finding of the Board that compensation is in any event payable, and that the only function of the arbitrator would be to fix the amount. 10

I would like just to call the attention of the Board, if I may, to one matter, that is, in the agreement between the city and the railway company—

The Chief Commissioner: Will you put the agreement in evidence now, Mr. Soule? We have not got a copy of it before us. I would like to refer to it as Mr. White is discussing it.

Mr. Soule: Yes, sir. I have a copy here, which I will hand to you.

Mr. White: I call your attention to paragraph 3, which reads: 20

“ 3. After the issue of the Order of the Board, pursuant to said application, the railway company shall thereupon proceed with the clearing of the site, the letting of contracts and the carrying out of the work so approved by the Board ”——

Reading on down, they deal with gas mains, and all sorts of things. Then we have:

“ together with the cost of all lands used for such works, and all compensation awards, damages, costs and expenses awarded to the owners of said land and/or adjoining properties by reason of the construction of the works herein provided for.” 30

That is not the wording of the section, and I would like to ask that if there is any doubt about it in the minds of the members of the Board, it be made clear that the Board is not in any way limiting compensation to adjoining proprietors, but that those who are entitled are entitled under the general law, namely, abutting and adjacent proprietors whose lands are injuriously affected.

The Chief Commissioner: Are there any others who desire to be heard?

Mr. White: May I be excused from further attendance this morning, Mr. Chairman?

The Chief Commissioner: Certainly, Mr. White. We are glad that you were able to be present with us even for this short time. 40

Mr. White: I appreciate very much the courtesy of the Board in listening to my brief presentation of this case.

Mr. Marshall: On behalf of the Bell Telephone Company, Mr. Chairman, I may say that the plans necessitate changing some of our aerial

lines and conduits underground. I presume that it is well understood that the rights of the Bell Telephone Company are something like those of the Consumers' Gas Company in the 1916 case, as reported in the Ontario Law Reports. When the question of cost or damages comes up, it will be a matter of an Order being made allowing for a satisfactory new location for their lines, and compensation in damages for the cost of removal at least.

As far as that is concerned, I think the Bell Telephone Company is not opposing the Order in any way, except that they wish to have some understanding that the cost will not be borne by them, that a new location satisfactory to them will be arranged. No doubt they can work that out with the engineers as between themselves. But having an interest in lands, there is the question of compensation, and their rights will be protected, just as Mr. White has mentioned.

Mr. Walsh : Representing the United Gas & Fuel Company, I take a similar position to that taken by Mr. Marshall. Our lines were laid out around that section of the city in 1904. We have not had the opportunity of seeing the plans as finally settled, and we have been unable to figure out just what damages will be necessary, or changes, with reference to our work. I am asking the Board to take care of any necessary expense incurred in connection with the changing of the location of the mains and so forth of the Gas Company.

Mr. Stark : As I said a while ago, I represent the Alexandra Dancing Academy, of which Mrs. Hicks is the owner. This property is on James Street, just at the point where the new street will be put in. The property north of ours has been purchased, and our property will be seriously damaged by the lowering of the grade level of the street. We endorse Mr. White's views, and we are anxious that any Order made shall not prejudice the rights of our clients for future compensation.

Mr. Fraser : I represent the Storage and Transfer Company, which is located on the west side of Walnut Street. You will see the plan marked "Storage Warehouse." My clients ask that their rights in the matter be protected by compensation, when the Order is finally granted.

The Chief Commissioner : Does anybody else wish to be heard ?

Mr. W. O. Seeling : We live at Number 61 Hunter Street West at the southwest corner of Hunter and Charles Street.

We have built 32 apartments there, and we maintain an office for renting them and so on. Our estimate is that people inquiring for apartments to rent and living there, 90 per cent. of them approach the premises by Charles Street, from north of Hunter Street largely.

We are strongly opposed to Charles Street being closed, because I predict that with Charles Street closed we will not receive more than 20 per cent. of the applicants of the class of tenants that we are receiving now. And if they were advised that they of necessity had to approach the premises by a detour to Park Street, and go up a very steep incline, over the top of the tunnel, or that they would have to detour to McNab Street, come to a subway and perhaps land half way up the block, very few people will find the place at all. For that reason, we are anxious that the street

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should be left open. It has been there in use for the past 35 years and with carefulness on the part of the railway company there has not been an accident in all that time at the level crossing.

The fact that the street is within two blocks of where the depot is at present, and where the new depot I suppose will be, especially with the sharp curve that has been made in the vicinity of McNab Street, in the main track, two blocks from the depot, they would have to go moderately slow, they could not go very rapidly, and that would continue to add to the safety of the level crossing.

I suppose one of the reasons why the railway company is anxious to close the street would be the cost of maintenance. As to the cost of maintenance, we could afford and would be willing to contribute personally from our property \$100 a year, or considerably more if necessary, towards the maintenance of the gates rather than have the street closed, and I think the other property owners in the vicinity would do the same, so that we could probably arrange to provide a sufficient fund to operate the gates and employ watchmen, and keep the street as it is. It would be a serious hardship if it were otherwise.

We feel that inasmuch as we have had 35 years of operation with perfect safety, we should have good reason to expect that we would enjoy 35 years more of safety, with the street continued in operation.

Now, sir, at the outset, I expect the city of Hamilton gave the railway their permission to operate on that street without cost, free gratis, which is all right, but now that they are going a little farther, and want to close the streets, they are doing a serious injustice, which even compensation would not pay us for. With the little inconvenience of continuing on that street, we urge your Board to so decide, if you can see your way clear at all in that respect.

As to the payment, if newspaper reports are right, that the Dominion Government is proposing to pay 25 per cent. of the cost, the Provincial Government 25 per cent. of the cost and the city of Hamilton 50 per cent. of the cost, it would seem, if there is still some little inconvenience to the railway, and if the public are sharing the expense to that extent, that the public should not bear the greater part of the expense and the serious inconvenience, loss of business and everything else in that line. For that reason we urge you strongly to protect us in this respect, and leave the street open, because our contributions to the various taxations that will have to be met for the contributions by the Dominion and Provincial Governments and the city will be heavy, and it does not look as though we would be able to continue, or succeed or prosper under the new conditions that would exist there.

I trust, therefore, your honorable body will give this matter your full consideration and leave the street open for a good long time to come. I thank you.

Mr. Laidlaw : As I understand the procedure presently being followed, it is that the Board desires to know whether or not there is any objection to the scheme as a general scheme.

The details of the application itself are totally unfamiliar to us; we heard them read for the first time this morning.

I simply wanted to make this statement to the Board, that so far as the general scheme of grade separation proposed by the city and this railway company is concerned, the Canadian National is quite ready to co-operate in any way possible, but, at the same time, I thought I ought to have it placed upon the record this morning that we do not go farther than that, because we are not instructed, we are not informed, and are totally unfamiliar with the details. We want a full preservation of all the rights of
 10 the Canadian National that might be infringed by any Order that might be contemplated.

The Chief Commissioner: I want to be advised a little better about the Canadian National, as to these plans.

Mr. Laidlaw: I did not hear that, sir.

The Chief Commissioner: I was under the impression that the matter had been discussed between the city and the railway company, and that they were in complete knowledge of it.

Mr. Laidlaw: The plan before the Board was received this morning by the Canadian National Railway Company, and the details of the applica-
 20 tion, that is, as far as I am instructed, were read this morning before the Board. I do not want the Board to get the impression that I am going to make any objections to this grade separation.

The Chief Commissioner: From what you say, the Board might be considered as acting precipitately if we made an Order such as is requested.

Mr. Laidlaw: What I intend to convey is this, that I am not fully instructed this morning to discuss in detail the various matters as to which the application is made.

The Chief Commissioner: There are certain features of the application which have to do with the necessary procedure, but the detail of the plan
 30 generally says that the work to be carried on must be in accordance with the plan. I want to know whether you feel that you are sufficiently familiar with these plans.

Mr. Laidlaw: I am sufficiently familiar with them to say this, sir, that the Canadian National has no objection to the layout.

Commissioner Norris: You agree with the general principle?

Mr. Laidlaw: I agree with the general principle, and the layout on the plan is admitted by us. I did understand my learned friend in opening to say that there was a relocation of the Canadian National tracks. Of course, I anticipate that we will have a full opportunity to consider detail
 40 plans.

Mr. Soule: In that connection I may say that our Vice-President, Mr. Malcolmson, His Worship the Mayor, Mr. Kingsland of the Canadian National and some of their engineers went over the situation. Mr. Malcolmson might explain that.

Mr. Laidlaw: Do not understand that I am objecting to the layout. I got this plan that is before the Board yesterday for the first time. I do not want any suggestion to be made that the Canadian National is raising

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any objection to this layout or scheme. I simply want to preserve the rights of the Canadian National in respect to anything that may transpire in the future. I want to have a full opportunity of presenting my views to the Board on any question which may affect our rights.

Mr. McQuesten: I would like to be allowed to put upon the record what the plan means at the point at which I am interested, for a number of owners, that is, at the corner of Hunter Street and McNab Street. I want it to be put on the record as to what portion of Hunter Street is being closed, the portion left open and the elevations.

The Chief Commissioner: Perhaps that might be explained to you now 10
by one of the engineers.

Mr. O. S. Payzant (of Messrs. Fellheimer & Wagner, Architects and Engineers, New York): In answer to Mr. McQuesten's question as to what portion of Hunter Street is being closed, I would say from the mouth of the tunnel to James Street, the central portion of the street, 39 feet in width.

Mr. McQuesten: Closed in red lines?

Mr. Payzant: In red lines.

Mr. McQuesten: Marked 1 and 3?

Mr. Payzant: Marked 1 and 3, between Park Street and McNab 20
Street.

Mr. McQuesten: What is the situation with regard to these small sections of Hunter Street at the southeast corner of McNab and east of McNab Street appearing in white?

Mr. Payzant: The entire street is open; the area indicated has a structure over the street. The entire street surface is open in that block.

Mr. McQuesten: So that the railway is merely reserving the right to overhang the street. Is that a fair statement?

Mr. Payzant: That is correct.

Mr. McQuesten: What width of Hunter Street on each side of the area closed between Park Street and McNab Street is open? 30

Mr. Payzant: 18 feet on each side.

Mr. McQuesten: What will be the levels at McNab Street and Hunter Street?

Mr. Payzant: Approximately 14 feet below the existing grade.

Mr. McQuesten: And the elevation of the closed portion of Hunter Street at that point in the existing grade.

Mr. Payzant: Some two feet higher than the existing grade.

Mr. E. F. Lazier: Mr. Payzant, Charles Street will be closed entirely?

Mr. Payzant: No, sir.

Mr. Lazier: I mean across Charles Street. 40

Mr. Payzant: That portion of Charles Street on the rails will be shut off.

Mr. Lazier: It is a through street?

Mr. Payzant: It is a through street, but it is shut off.

Mr. Lazier: What will be the elevation of Charles Street to the railway, by comparison, right at Hunter Street?

Mr. Payzant : There will be no change in the elevation of the tracks at Charles Street.

Mr. Lazier : What change in the grade will there be at Charles Street south of Hunter Street ?

Mr. Payzant : The present down grade to the tracks will be eliminated, and the level of Charles Street which intersects the new road at Hunter Street will be raised about six feet, bringing the new roadway approximately to the level of the existing sidewalk.

Mr. Lazier : How far will that go south ?

10 Mr. Payzant : To the extent of the present track.

Mr. Lazier : You do not know the numbers of the lots ?

Mr. Payzant : Charles Street is not yet ended ; it diverts into the east and west roadway of Hunter Street. On the south side of East Hunter Street the grade change is 130 feet in length. It lifts that portion of the street which now dips down below the sidewalk up to the grade of the present sidewalk, making it a completely level roadway and restoring it to the one level.

Mr. Lazier : When it turns at Hunter Street does it dip down, turning from Charles Street into Hunter Street ?

20 Mr. Payzant : There is an upgrade from Charles Street to Park Street, and a downgrade from Charles Street to McNab Street.

Mr. Lazier : Can you tell me how much grade there is from Charles Street to McNab, how far it goes down ?

Mr. Payzant : In feet ?

Mr. Lazier : Yes, just as a matter of record.

Mr. McQuesten : Am I to understand that this plan is not the plan which will be approved, or are the details of these various crossings to be settled yet ?

The Chief Commissioner : What do you say to that ?

30 Mr. Latham : We will furnish detailed plans of all the crossings for approval by the Board.

The Chief Commissioner : For further approval by the Board ?

Mr. Latham : Yes, sir.

Mr. McQuesten : So that I am right in understanding that this does not settle definitely the variations in the crossings and street levels, but that this is a general approval of the project.

Mr. Latham : The detail plans will be based upon the general plan.

The Chief Commissioner : But when the detail plans come in for approval, they can be challenged or criticized in any particular.

40 Mr. McQuesten : That is what I understand.

Mr. Soule : Mr. Latham, there will be detail plans of the subway, but on Charles Street, are there further details of that ?

Mr. Latham : Yes. There will be detail plans of the sidewalks and the raising of grades.

Mr. Soule : I thought it was in connection with subways.

Mr. Payzant : We will prepare working drawings showing the raising of the street to the levels I have described. I can answer the previous

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question now, if you wish it. Hunter Street descends from Charles to McNab Street 21 feet.

Commissioner Norris : It declines that much ?

Mr. Payzant : In the whole block, from Charles to McNab.

Commissioner Norris : There will be no change in that, in any of the details ?

Mr. Payzant : No, sir. There will be no deviations from that grade on the working plans.

Mr. McQuesten : Details of the crossing and subway at McNab Street are not immediately available? 10

Mr. Payzant : No, I have no plans available as yet.

Mr. McQuesten : We will be given an opportunity of passing upon them, or making submissions to the Board before they are finally approved ?

Mr. Drury : This plan shows the profile above the streets.

Mr. McQuesten : Yes, but it does not show the height that they will go to.

Mr. Drury : No, but Mr. Latham says that that will be in the details.

Mr. McQuesten : I only want to understand that we will have an opportunity of making submissions to the Board with regard to these details, before they are finally passed. 20

Mr. Soule : Are not the details settled by the Chief Engineer or one of the engineers of the Board ?

The Chief Commissioner : They are settled by the Board upon the recommendation of the Chief Engineer.

We look to him or to one of his staff. The Chief Engineer is the one who deals with it, but we are open to receive suggestions from anybody.

Mr. McQuesten : All I want to understand is that we will have an opportunity to study these details.

The Chief Commissioner : We had better put it clearly upon the record that these plans are approved by the Board, but subject to further detail plans being submitted. 30

Mr. McQuesten : Before approval by the City.

Mr. Fallheimer : It is obvious in the grade crossing programme discussion here that this is not final. It must necessarily be so. We cannot take a particular condition existing at one street without having regard to the others. It is like a chain made up of links. The only point I want to make clear, if I may, is that while the details of walls and all that sort of thing, the height and so forth would possibly be affected one way or the other, the general arrangements of street grades, and track alignment are, of course, inter-related things. You just cannot do one thing at one street without thinking of another. 40

Mr. Walsh : May I speak now on behalf of the United Gas & Fuel Company ?

The Chief Commissioner : Certainly, Mr. Walsh.

Mr. Walsh : This is the first time I have had the minutes of the Council meeting before me. I notice by paragraph 9 it states that an application be made for the companies affected, the public utilities companies affected,

to alter or change their respective works in order to carry out the changes in the railways shown on the plan and profile.

Then by paragraph number 3 of the agreement between the Toronto, Hamilton & Buffalo Railway Company and the Corporation of the city of Hamilton, entered into on the 7th day of October, 1930, it states that an application will be made to this Board for an Order for the removal of these works to a new location, and for an apportionment of the cost.

Now, sir, is it the intention of the Board to take up the argument, or to hear argument with reference to the cost to be borne, this morning, or
10 that to be heard at a later date?

The Chief Commissioner: It will not be heard this morning.

Mr. Walsh: So that our rights in respect of that are reserved to a later date?

The Chief Commissioner: Yes.

Mr. Walsh: The same thing applies to the Bell Telephone Company and all other public utility companies?

The Chief Commissioner: Yes, to them all.

Commissioner Norris: And to private owners, too.

Mr. McQuesten: I would like to ask that I be furnished with one of
20 these plans for the people for whom I act.

Mr. Walsh: I think the public utility companies ought to have some details of the plans or changes the railway companies wish to make with respect to the location of the public utilities because, if we have to estimate the cost and have evidence as to the cost at the next hearing, we will certainly have to have plans and details as to the new location.

The Chief Commissioner: They are filed in the public offices, are they not?

Mr. Soule: This plan will be filed, Mr. Chairman, when it is sanctioned.

Mr. McQuesten: I do not think anything has been filed as yet.

30 The Chief Commissioner: Not yet, but it will be there for inspection, will it not?

Mr. Soule: I beg your pardon?

The Chief Commissioner: It will be in the City Clerk's office?

Mr. Soule: I think it has been on exhibition for six weeks in the Mayor's office.

The Chief Commissioner: Has been or will be?

Mr. Soule: It has been, and it will be necessary to have it filed in the Registry Office when it is sanctioned.

The Chief Commissioner: It must be filed in the Registry Office as
40 well?

Mr. Soule: Yes, sir.

The Chief Commissioner: So that it will be available to the different companies interested. I feel like giving a little more consideration to individuals like Mr. McQuesten, who have not all the resources of the Bell Telephone Company or the Gas Company. If you can meet Mr. McQuesten's request, Mr. Soule, you might do it.

Mr. Soule: There will be no trouble about that, sir.

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Mr. Payzant : I will have to make a correction in one of my figures. The width of that part of Hunter Street which is closed in the centre is 29 and not 39 feet.

Mr. Soule : Mr. Chairman, I have a draft order approved by both parties. Perhaps it does not cover the matter to the satisfaction of the Board, but it provides a basis for the Board to work on.

Mr. Waller : On behalf of the Hamilton Street Railway, I make the same request here as has been made by these other parties. We have not been supplied with any detail plans. I have seen them in the engineer's office, but not officially before the company. I know from the general plans that the grade is 7 per cent. 10

The Chief Commissioner : At what street ?

Mr. Waller : James Street, sir. That creates the same condition of grade on our entire surface. As to the general layout, the company can have no objection, but we wish to be heard at a later date, so that we may be in a position to put in some evidence. It will be necessary, if these grades are retained, to rehabilitate our motors practically the entire system of street railway.

Mr. Drury : What grade do you say it should be ?

Mr. Waller : Five per cent. I also ask to have detail plans submitted to the company. 20

The Chief Commissioner : Detail plans will be on file. You can see them, can you not ?

Mr. Waller : We are very much interested, Mr. Chairman. We are senior, and I think they should be supplied to us as to that particular crossing.

The Chief Commissioner : Which street is it ?

Mr. Waller : James Street. That is the only one we are interested in.

Mr. Soule : Mr. Payzant can deal with that now.

Mr. Payzant : As to a 7 per cent. grade, Mr. Chairman, that is a rate of grade which is familiar to almost everybody. It is a very common grade encountered on very many streets in practically all cities. At Hamilton, on James Street, with a street railway now in operation, there is an existing grade in daily operation of 7/91/100ths per cent. 30

The Chief Commissioner : On which street is that ?

Mr. Payzant : That is on James Street. It is the same street on which the 7 per cent. grade the street railway is objecting to, is found. I might add in regard to the 7 per cent. grade proposed, that the length of that 7 per cent. grade is but 90 feet on the northerly side, and on the southerly side, 135 feet, both exceedingly short. 40

Mr. Malcolmson : That is the only piece in the whole undertaking on which there is a 7 per cent. grade.

Mr. Payzant : Where there is a railroad track. These are the lengths of the grade on which there are street railway tracks on James Street, that is, proposed grades. At the present time there is a stiffer grade than 7 per cent. on Charles Street—I mean James Street, the same street.

Mr. Waller : A short piece of track from Herkimer Street to the main line. It can only be operated with a very light truck. Our big cars cannot go up that grade. It is only a short stretch from Herkimer Street.

Mr. Payzant : There is over 200 feet of grade at that point which now exists, 7 per cent., as compared with 135 feet. While I cannot speak with authority, it is my understanding that they do operate that grade.

Mr. Waller : We operate it with single truck cars. Our ordinary cars do not operate on it.

Mr. Payzant : Are not your single truck cars the least capable ?

10 Mr. Waller : No, they are much lighter. It is contemplated to carry trailers. The city has at different times asked us to carry trailers, but it is an impossibility to take trailers up a 7 per cent. grade with our class of cars. It will necessitate rehabilitating the line.

I suppose we will have an opportunity of submitting evidence, sir ?

The Chief Commissioner : As to what point ?

Mr. Waller : On the question of grades and of our particular cars operating there.

The Chief Commissioner : You do not require any evidence about the grade, do you ? It is admitted that it is 7 per cent.

20 Mr. Waller : But as to the rehabilitation of the line and of the cars.

The Chief Commissioner : You do not want to involve the Board in a great many extraneous hearings about it ? Would that not be a matter of compensation, after all ?

Mr. Waller : I think so.

Mr. Payzant : If the Chairman wishes, I can cite numerous cases of a 7 per cent. grade in trolley operation.

Mr. Waller : I think it should also be pointed out that the horsepower required is an important matter. It would require evidence to show the horse power motors in cars that negotiate a 7 per cent. grade.

30 Mr. Polson : Speaking on behalf of the City of Hamilton, this matter came before the Council, and they were unanimously in accord with the general scheme, and my confreres were anxious to have the conditions relieved as much as possible. We would require an Order from the Board of Railway Commissioners, because we think more than section 297 is involved. We would be safer to have an Order of the Board in that respect.

40 The Chief Commissioner : Is there anything further to be said ? The Board is desirous of giving everyone an opportunity to formulate his objections to the plan or the proposed scheme. The opportunity is now presented to them to do so. If not, as to this Order which has been submitted, it will be a matter for consultation between my colleague, Mr. Commissioner Norris, Dr. McLean, the Assistant Chief Commissioner, and myself, and a decision with reference to it will be announced later.

Mr. Soule : I may say that we are anxious to have a general plan. We hope it will be approved without being held up on a matter of detail, because one of the urgent things as between the City and the Railway Company is to get on with it.

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The Chief Commissioner : You will not be held up later than this afternoon, if you get it at all. I want an opportunity to read over carefully with my colleague and the Assistant Chief Commissioner this Order.

Mr. Laidlaw : My friend has handed me a copy of the Order, but I have not read it all. It will be left as a subject of discussion, if any point is raised. I mean the form in which it is drawn is so extensive that I have not had an opportunity of finding out what it means. Paragraph 5 states :

“ 5. And it is further ordered that the applicant company be and it is hereby authorized to take without consent of the owners the lands not now owned by the applicant company or the city shown bordered in red on said plan and profile and mentioned in the book of reference.” 10

I am not assenting to this form of Order. I do not know what the representatives of the Canadian National Railways may have to say.

Mr. Soule : Mr. Latham, do you know whether we are taking anything from the Canadian National ?

Mr. Latham : We are taking no Canadian National Railway lands.

Mr. Laidlaw : What about rights ?

Mr. Latham : All we do in respect of the Canadian National is to shift their existing tracks on their own lands. 20

Mr. Laidlaw : There is a crossing there of a line. That is apparent on the plan which you have included in red. I cannot say what our rights are. We might or might not have some rights.

Mr. Latham : The lands are indicated in red.

Mr. Laidlaw : That is what I say. The Order is so wide that I am in no position to make any representation in regard to it.

Mr. Latham : I would think the Canadian National would be glad to get rid of it.

Mr. Laidlaw : Do not misunderstand me. I only say that I have no instructions at all. 30

Mr. Latham : The city is willing to close it.

Mr. Laidlaw : But I do not know what rights we may have there.

Mr. Latham : There is a lane there.

The Chief Commissioner : The Canadian National does not own that ?

Mr. Laidlaw : I do not know what our rights are.

Mr. Latham : The Canadian National Railways do not own that. It belongs to the city, and the city is ready to close it.

The Chief Commissioner : If I remember rightly, there are two lines in there.

Mr. Latham : That is correct. 40

The Chief Commissioner : You are going to take yours out ?

Mr. Latham : Yes, Mr. Chairman.

The Chief Commissioner : So that left the Canadian National the sole monarch, in that regard ?

Mr. Latham : We are giving it to the Canadian National.

The Chief Commissioner : Your company does not own anything in there, Mr. Laidlaw ?

Mr. Laidlaw : I do not know, sir, I cannot say. I make no suggestion at all. I simply say that the form of Order submitted this morning is a form I have not considered. And I do not know what it may comprise.

Mr. Soule : We do not pretend that it is the last word to be spoken. We got it up as a working basis, when we heard the Board was coming here.

Mr. Laidlaw : If this is submitted as final, I am not accepting it.

The Chief Commissioner : Would you like an adjournment to have it
10 considered ?

Mr. Laidlaw : I would like an adjournment for whatever instructions I might get.

The Chief Commissioner : How long will it take you to get that instruction ?

Mr. Laidlaw : I cannot promise, sir. All I can do is to say that I will do my very utmost to expedite the Board and all parties.

The Chief Commissioner : You want it held up ?

Mr. Laidlaw : No, sir, I simply take the position that the applicant submits the Order to me on this issue this morning, and expects me to
20 assent to it holus bolus, when I have not had an opportunity to consider how far-reaching these clauses may be.

The Chief Commissioner : Suppose we adjourn until three o'clock. You can carefully examine the Order, and make it a point to get into touch with your people.

Mr. Laidlaw : Your Honour will understand that that is not a simple thing to do on a Saturday afternoon. I may have to get in touch with the Land Department. I want to expedite this hearing as much as I can.

The Chief Commissioner : You cannot expedite it and raise objections constantly.

Mr. Laidlaw : I can only do justice to my clients. I cannot sit back
30 to-day and think of the Canadian National as being protected by my keeping silent. If all of my rights to object to these clauses are preserved to me, all right. But I do not know how far-reaching some of these clauses may be.

Mr. Latham : It can go into the record that the T. H. & B. is not taking any Canadian National lands.

Mr. Laidlaw : Let it go on the record that you are not taking any of our rights.

The Chief Commissioner : You have the right to run over that street
40 there. They are not taking that.

Mr. Laidlaw : I do not know. That is what I am asking for.

Mr. Soule : We do not have the right to run over the street, as I understand it, Mr. Latham.

Mr. Latham : A portion of the lane is to be closed. A portion of it is on the C.N.R. end, and a portion of it on the T. H. & B.

Mr. Laidlaw : That is an enlightening statement. It is enclosed in red. Paragraph 5 of the Order permits the applicants to take all the

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property shown bordered in red; in other words, that paragraph gives permission to one railway company to take the lands of another.

I am not prepared on half an hour's notice to make admissions in regard to that, and I cannot reasonably be expected to do so.

The Chief Commissioner: Which one is that, Mr. Laidlaw?

Mr. Laidlaw: That is paragraph number 5, sir.

The Chief Commissioner: Paragraph 5 states that the applicant company is authorized to take without the consent of the owners the lands not now owned by the applicant company or the city shown bordered in red.

Mr. Latham: It is owned by the city.

Mr. Laidlaw: The paragraph just read says it is owned by the railway. This discussion simply emphasizes our difficulty.

Mr. Latham: The book of reference sets forth the status of the lanes, streets and crossings proposed to be taken without the consent of the owners.

Mr. Soule: We understand that the T. H. & B. is not taking any lands of the Canadian National Railways.

Mr. Laidlaw: That makes it somewhat clearer. We do not want any interference with our rights on Ferguson Avenue. Add after "owners" "excepting the Canadian National Railway Company."

The Chief Commissioner: Is that satisfactory?

Mr. Latham: Yes, sir.

Mr. Laidlaw: These are very impromptu suggestions, Mr. Chairman.

The Chief Commissioner: You can take until three or four o'clock, if you like.

Mr. Laidlaw: Paragraph 4 of the Order permits the applicant company to elevate its tracks over certain highways, but as I understand the plans submitted, there is a necessity also to elevate a portion of the Canadian National tracks, and there is no provision made in the Order for that.

Mr. Drury: It says, "In accordance with the said plans and profile."

Mr. Laidlaw: Paragraph 4 is what I am directing your attention to. It states that the applicant company is authorized to carry its elevated tracks over certain highways. But there is no provision for the Canadian National Railway Company.

Mr. Latham: Look at paragraph 7:

"And it is further ordered that Canadian National Railway Company re-locate the portion of its Port Dover Line between Ferguson Avenue and Victoria Avenue in accordance with said plan and profile."

Mr. Laidlaw: If it is necessary for the applicant company to have an authorization to carry its elevated tracks over the highways known as Hunter Street, and so on, it is necessary also for the Canadian National. What I am indicating is, that they have put in paragraph number 4 an authorization to the applicant company. Why do they exclude the Canadian National? If paragraph 7 is sufficient for our purposes, why is it not sufficient for theirs?

The Chief Commissioner : You cannot really suggest that they are on a parity, considering the vast scope of the operations.

Mr. Latham : It is only a side issue.

Mr. Laidlaw : If it is an authorization to raise railway tracks, it should be an authorization to all railways to raise their tracks.

The Chief Commissioner : We have your objection, anyway.

Mr. Laidlaw : As to the re-location, sir, that I understand will be shown in detail, and I will have full opportunity to get my instructions on that.

10 Mr. Malcolmson : I would like Mr. Soule to make an announcement here.

Mr. Soule : Mr. Chairman, this is just a suggestion we are making, but it is put before you as an Order. If there is any particular objection, we will withdraw the Order, and let the Board draw it up. It is only as a matter of convenience that we have submitted it.

The Chief Commissioner : That is all I take this to be, of course. We are not in a position to sign the Order yet. We would like to hear all you have to say against any of these particulars, Mr. Laidlaw, because we will probably take this as a basis.

20 Mr. Soule : We are not asking the Board to sign it holus bolus without any consideration at all.

Mr. Marshall : I should like to call your attention to paragraph 10, which refers to the Bell Telephone Company and the Gas Company. I do not know if the lines are to be located. That is a matter to be worked out. The lines are not shown. Hughson Street is closed entirely. I understand there was some talk between the engineers as to the company laying out their lines. We should have some other place to put our lines and conduits, or at least some idea of what is to be done with reference to that.

30 The Chief Commissioner : We have found that these things generally work themselves out as the work is going on. The railway change is indicated on the plan and profile. Would not that pretty well confine your changes to certain places? For instance, you have to get out, where the railway crosses your lines or interferes with your lines, I suppose.

Mr. Marshall : Yes, sir. But I do not know what is to be done, as yet.

The Chief Commissioner : We met the same difficulties, although magnified many times, in connection with the location of the Montreal Terminals, and we have not finished yet. They are just sort of going along together.

Mr. Laidlaw : Co-operating, I suppose?

40 The Chief Commissioner : Yes. We cannot sit here and work out plans for all these changes.

Mr. Soule : There will be no trouble about that, sir. If there is, we can go to the Board or to the Board's engineer.

The Chief Commissioner : There is no danger of anybody's rights being interfered with or taken from them without compensation. The carrying out of these large Corporation undertakings must involve changes in the layout of utilities, such as gas and telephone companies. It cannot

APPEAL
No. 8.

Before
the Board
of Railway
Commis-
sioners for
Canada.

No. 136.
Transcript
of Pro-
ceedings
on hearing
before
Board of
Railway
Commis-
sioners for
Canada,
1st Nov-
ember 1930
—continued.

APPEAL
No. 8.

Before
the Board
of Railway
Commissioners for
Canada.

No. 136.
Transcript
of Pro-
ceedings
on hearing
before
Board of
Railway
Commissioners for
Canada,
1st Nov-
ember 1930
—continued.

be otherwise. I do not think there is an engineer living who could take that Montreal layout or this layout and indicate where every telephone line should go or every sewer should go. The Board's procedure and jurisdiction is of such an expeditious and easily got at character that we will listen to an application for a change in an Order whenever necessity demands it.

Mr. Laidlaw : I only heard of this at five o'clock. If you were going to sign it today, I would want to communicate with the General Counsel.

The Chief Commissioner : We are not going to sign an Order today ; at least that is my idea just now, in view of the people expressing general acquiescence or the reverse, and knowing what is going on here. 10

Mr. Lazier : Following up what Mr. White said, there is no clause similar to the Order contained in the agreement. It was about adjoining properties, adjudging damages, costs, and so forth.

Paragraph 3 in the agreement is not in the Order.

Mr. Polson : But that is only in an agreement between the city and the T. H. & B., an agreement between themselves.

The Chief Commissioner : In some instances an Order for construction does carry a direction for compensation, and others it does not. At any rate, it is not essential that it should do so, in order to preserve your rights.

Mr. Latham : It seems to have been made with the express idea of making that unnecessary. 20

Mr. Laidlaw : May we have the right to put in suggestions in writing by Monday next ?

The Chief Commissioner : I think that is a very good suggestion indeed. Anybody else who has any objection may do likewise.

Mr. Laidlaw : You would not get it before Tuesday ? I think we should have a few days to settle the form of the Order.

The Chief Commissioner : There will be no attempt on the part of Counsel to settle the Order ?

Mr. Laidlaw : I think you had better settle it yourselves. 30

The Chief Commissioner : I think we had.

Mr. Malcolmson : It might be considered presumptuous on the part of the railway company and the city to present this Order, Mr. Chairman, but we did it purely and simple for the purposes of facilitating the entire matter. There has been more discussion over this Order than anything else this morning. If you like, we will withdraw it.

The Chief Commissioner : No, do not do that.

Mr. Malcolmson : It does not mean anything. So far as the Board is concerned, you are at liberty to do as you please with it. We thought we might facilitate matters this morning by merely suggesting that. 40

Mr. Laidlaw : If we have an opportunity of looking it over, we will be satisfied.

Mr. Malcolmson : We did not know about the meeting ourselves until Tuesday. The application was not signed until two days ago ; that is the reason they did not get a copy of it. The fact is that the plan has been on exhibition for two weeks. There is no desire on the part of the city or the railway company to precipitate matters to the detriment of anyone.

Mr. Latham : The Order was not finally engrossed until this morning.

Mr. Malcolmson : The fact that the Board is meeting today is most unusual.

Mr. Laidlaw : We want to do everything we can to facilitate matters. I am only asking if I may have the same opportunity the Chairman has given to others, to make any objections to the form of the Order. I will do it as quickly as I can during this coming week.

The Chief Commissioner : Well, this has been very instructive. Is there anything further anybody desires to say? If not, my colleague and I can discuss it together.

APPEAL
No. 8.

Before
the Board
of Railway
Commissioners for
Canada.

No. 136—
continued.

No. 137.

Reasons for Order of Board of Railway Commissioners for Canada.

SCHEDULE NO. 13.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Hamilton, Ont., Saturday, 1st November, 1930.

HON. H. A. MCKEOWN, K.C., Chief Commissioner.

HON. T. C. NORRIS, Commissioner.

H. A. K. Drury,
Assistant Chief Engineer.

R. Richardson,
Assistant Secretary
and Registrar.

20

(Nelson R. Butcher & Company, Official Reporters, per J.B.)

File 20161.

1. Application of the Toronto, Hamilton & Buffalo Railway Company for hearing of the joint application of the City of Hamilton and the T. H. & B. Ry. Co. for approval of the plans of the track elevation between the east end of the tunnel on Hunter Street and a point near Victoria Avenue, which plans include the construction of a new station at Hamilton; and the distribution of costs between the interested parties.

JOHN A. SOULE (General Solicitor), H. T. MALCOLMSON (Vice-President and General Manager), R. L. LATHAM (Chief Engineer), for the Toronto, Hamilton & Buffalo Railway Company.

A. J. POLSON (Assistant City Solicitor), for the City of Hamilton. R. E. LAIDLAW and T. J. IRVING (Chief Engineer), for the Canadian National Railways.

GEORGE E. WALLER, for the Hamilton Street Railway Company.

PETER WHITE, K.C., for the Executors of the Estate of Stephen F. Lazier; Emma A. Husband and Mary B. McQuesten.

D. L. MCCARTHY, K.C. (per Peter White, K.C.), for the MacNab St. Presbyterian Church.

No. 137.
Reasons for
Order of
Board of
Railway
Commissioners for
Canada,
1st Nov-
ember 1930.

APPEAL
No. 8.

*Before
the Board
of Railway
Commis-
sioners for
Canada.*

No. 137.
Reasons for
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sioners for
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1st Nov-
ember 1930
—continued.

J. R. MARSHALL and H. C. WALFORD (Division Plant Superintendent),
for The Bell Telephone Company.

ORVAL WALSH, for the United Gas & Fuel Company.

ALEXANDER STARK, for the Alexandra Dancing Academy (Louisa
Hicks, Owner).

WALTER H. FRASER, for the Storage & Transfer Company.

W. O. SEELING, personally, as a property owner.

ORDER.

The Chief Commissioner: We have had this morning the benefit of
a very open, and I think thorough discussion of the matter which is involved 10
in this application. We have also had an opportunity to visit the various
places which are affected by the proposed plans submitted.

We feel that it is advisable and desirable that a prompt decision be
made by the Board in connection with this application, in view of the
conditions which prevail here as elsewhere, and for that reason the Board
has come, perhaps unexpectedly, to the city on the only date which was
available to it for some little time to come.

My colleague, Mr. Commissioner Norris, and myself feel that while it
is impossible for us to determine the exact phraseology of the Order which
will be issued, it is desirable that we indicate our attitude in general terms, 20
in order that the parties in interest may know whether this general plan
will be approved by Order issued later, and which will give further details.

The effect of the application which has been heard this morning, and
the result of it, is that the Board expresses the view, and so directs, that
the general plan submitted be approved, and detail plans submitted for the
approval of an engineer of the Board of Railway Commissioners.

The procedure after that is, that the applicants take up with the
interested parties these detail plans, and when prepared they be submitted
for the approval of the engineer of the Board. Any dispute concerning
such detail plans will be settled by the Chief Engineer of the Board. 30

These detail plans will show the several phases of the work at the
different localities, where the interests of the parties are touched.

A formal Order in connection with this matter will be issued by the
Board after consideration of the draft Order submitted by the applicants,
and by the Railway Company in agreement, and after consideration also
of representations made by any of the interested parties which they may
send to the Board within one week from this date.

The foregoing is the disposition of the matter as it comes before us
today. The effect of this will be that the work be not held up for one
moment through any doubt as to the view the Board takes of this 40
application.

Is there anything else to be brought before the Board at this session?
If not, we will adjourn sine die.

Mr. Latham: I would like to call the attention of the Board to the
fact that our agreement with the City states that there will be a meeting

of the interested parties within sixty days, I think it is, from the date of the application, at which the question of the apportionment of the cost may be disposed of.

The Chief Commissioner: That is, you are going to talk it over with all the parties in interest?

Mr. Latham: Yes, Mr. Chairman. We have not gone into the question of apportionment at all. We will have to get together at a date within that period which is convenient to the Board.

Commissioner Norris: It will not be necessary to have the Board present when negotiations are going on?

Mr. Latham: The meeting I was referring to is one at which the Board will make the apportionment as to the cost as between the City and the Railway Company, and all the interested parties, the street railway and others.

Commissioner Norris: That will be after you have succeeded in coming to a conclusion or agreement amongst yourselves, after you have discussed it among yourselves?

Mr. Latham: Well, no, not necessarily.

The Chief Commissioner: Whenever you are in a position to take up the question of the distribution of the cost, the Board will set a date for you. I suppose the Railways have not in mind to pay it all, have they?

Mr. Latham: No, sir. One of the paragraphs in the agreement specifically provides that as between the City and the Railway Company it will be subject to the approval of the Board, whose Order will be binding upon both of them. Of course there will be others as well.

The Chief Commissioner: We will now adjourn sine die.

APPEAL
No. 8.

Before
the Board
of Railway
Commissioners for
Canada.

No. 137.
Reasons for
Order of
Board of
Railway
Commissioners for
Canada,
1st Nov-
ember 1930
—continued.

No. 138.

Letter Counsel for Bell Telephone Company to Chairman Board of Railway Commissioners for Canada.

30

SCHEDULE NO. 16.

Re T. H. & B. Grade Separation: Hamilton: File No. 20161.

THE BELL TELEPHONE COMPANY OF CANADA.

Montreal, Nov. 4, 1930.

Hon. H. A. McKeown, K.C.,
Chief Commissioner,
Board of Railway Commissioners for Canada,
Ottawa, Ont.

No. 138.
Letter
Counsel for
Bell Tele-
phone
Company to
Chairman
Board of
Railway
Commissioners for
Canada,
4th Nov-
ember 1930.

Dear Sir:—

I am advised by Mr. G. R. Marshall, who appeared for me on behalf of The Bell Telephone Company of Canada at the hearing of this application

APPEAL
No. 8.

Before
the Board
of Railway
Commissioners for
Canada.

No. 138.
Letter
Counsel for
Bell Tele-
phone
Company to
Chairman
Board of
Railway
Commissioners for
Canada,
4th Nov-
ember 1930
—continued.

in Hamilton, Ontario, on Saturday last, that you directed the parties represented to submit their suggestions as to the form of the Order at a very early date.

In dealing with this point I have before me a copy of the draft form of Order submitted to you at the hearing by the Solicitors for the T. H. & B. Railway. I am accordingly directing my comments and suggestions towards the said draft Order as follows :

1. As to paragraph numbered 1, I submit that the words " further notice to and service on the interested parties being hereby dispensed with " be deleted. This provision is wholly outside of the scope of the Application as filed, and so far as I am informed no application has been made to the Board for an Order dispensing with service of the application and there appears to be no good reason why all proper delays should not be allowed the other parties concerned to prepare to defend their rights. In this case The Bell Telephone Company of Canada was not served with this application nor with a copy of the plans nor any other material whatsoever. It is scarcely reasonable that the Applicants who have unlimited time to prepare their case should call upon other parties to appear and defend themselves on one day's notice given in a newspaper. I submit that any Order made must necessarily be an interim order only, conferring no authority to interfere with any vested rights; such Order to have effect only until the earliest date which the Board can fix for a full hearing. 10 20

2. I submit that paragraphs numbered five, six, ten, eleven and twelve be deleted from the draft Order for the following reasons :

(a) Paragraph 5 : The Board has no jurisdiction to authorize an applicant to expropriate lands. If the Applicant has the power of expropriation, no authority from the Board is necessary. The Applicant must necessarily proceed to expropriate under the legislative authority applicable. If, on the other hand, the Applicant has no power of expropriation, the Board has no jurisdiction or authority to confer such power. 30

(b) Paragraph 6 : The Board has no jurisdiction to order a Municipal Corporation to close streets. This must be carried out in accordance with the provisions of the Municipal Act. Since the City has agreed to close these streets and is apparently willing to proceed to do so lawfully, there is no need for a mandatory order to do so.

(c) Paragraph 10 : The Board has no jurisdiction to order The Bell Telephone Company of Canada to remove or relocate its plant. This Company has an interest in land in the highways in question of which it cannot be deprived except by expropriation proceedings lawfully taken and due compensation paid. The Board cannot order this Company to deliver up its said land interest and there is no provision of the Railway Act conferring jurisdiction upon the Board to make any such Order as is set forth in this paragraph. 40

(d) Paragraph 11: The Board has no jurisdiction to authorize a railway to enter into and occupy lands of others, hence this paragraph must be deleted as being governed by the Railway Act.

All that is required in this Order is the approval of the plans and a permission to the Railway to construct with a reservation as to the apportionment of costs. It is, I submit, unnecessary and improper that provisions such as those above commented upon be embodied in the Order.

10 I take this opportunity to record my vigorous protest against the manner in which the Applicants have carried on these proceedings which are of extreme importance and which if the work is proceeded with will materially interfere with vested rights of considerable value, and all parties whose rights are being dealt with are entitled to a full opportunity to place their arguments before the Court. We were not served with this application and only received notice of it the day before the hearing. This is not, I submit, proper procedure when matters of this importance are involved. It is clear that no such urgency exists as to justify applicants wholly disregarding the rights of others.

20 I finally submit that an Interim Order only be made, and that an early date be fixed for a full and complete hearing, allowing all parties sufficient time to prepare therefor.

Yours truly,

(Sgd.)

PIERRE BEULLAC,

General Counsel.

APPEAL
No. 8.

—
*Before
the Board
of Railway
Commissioners for
Canada.*

—
No. 138.
Letter
Counsel for
Bell Tele-
phone
Company to
Chairman
Board of
Railway
Commissioners for
Canada,
4th Nov-
ember 1930
—*continued.*

APPEAL
No. 8.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 139.
Order of
Board of
Railway
Commissioners for
Canada
No. 45813,
14th Nov-
ember 1930.

No. 139.

Order of Board of Railway Commissioners for Canada No. 45813.

SCHEDULE NO. 17.

Order No. 45813.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Friday, the 14th day of
November, A.D. 1930

HON. H. A. McKEOWN,
K.C.,
Chief Commissioner.

HON. T. C. NORRIS,
Commissioner.

IN THE MATTER OF the joint application of The Toronto, Hamilton & Buffalo Railway Company, hereinafter called the "Applicant Company" and the Corporation of the City of Hamilton, hereinafter called the "City," under Sections 162, 178, 188, 199, 201, 252, 255, 256, and 262, and other appropriate sections of the Railway Act, for an Order approving and sanctioning the plan, profile, and book of reference of the Applicant Company No. 2BRC, dated October 15th, 1930, on file with the Board under file No. 20161; authorizing a deviation, change, or alteration in the portion of the Applicant Company's railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton, and authorizing the said deviation, change, or alteration from the present location of the said portion of the Applicant Company's railway, in accordance with the said plan, profile, and book of reference; authorizing the Applicant Company to construct, maintain, and operate the said portion of its railway between the said points, in accordance with the change in grades, as shown on the said plan and profile; authorizing the Applicant Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John, Catharine, Ferguson, Young, and Victoria by means of bridges, and to carry each of the said streets beneath the said tracks by means of a subway; to take, without the consent of the owners, the lands not now owned by the Applicant Company or the City, shown bordered in red; directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta, and Wellington, and to divert Hunter, Aurora, and Liberty Streets; authorizing a relocation of the Port Dover Line of the Canadian National Railways between Ferguson Avenue and Victoria Avenue, and the change in grade thereof; approving the new location of the Applicant Company's station and terminal buildings; directing the Hamilton Street Railway Company to reconstruct its tracks through and at each side of the subway at James Street,—all as shown on the said Plan, Profile, and Book of Reference filed; and directing all public utility companies affected to reconstruct, alter, or change the respective works of each to carry out the changes in the railway: File No. 20161.

UPON hearing the application at the sittings of the Board held in Hamilton, Ontario, November 1st, 1930, in the presence of Counsel for and representatives of the Applicant Company, the City, the Canadian National Railways, the Hamilton Street Railway Company, The Bell Telephone Company of Canada, the Executors of the Estate of Stephen F. Lazier,

Emma A. Husband, and Mary B. McQuesten, the Alexandra Dancing Academy (Louisa Hicks), the McNab Presbyterian Church, the United Gas & Fuel Company of Hamilton Limited, and the Storage & Transfer Company, W. O. Seeling appearing in person, and what was alleged; upon proof of service of notice of the application upon The Bell Telephone Company of Canada, the United Gas & Fuel Company of Hamilton, Limited, the Hamilton Street Railway Company, the Dominion Power & Transmission Company, Limited, and the Hamilton Hydro-Electric Power Commission; upon reading the agreement, dated 20th October, 1930, entered into between
 10 the Applicant Company and the City of Hamilton; and upon the report and recommendation of the Chief Engineer of the Board.

IT IS ORDERED as follows :

1. That the said plan, profile and book of reference of the Applicant Company No. 2BRC, dated October 15th, 1930, on file with the Board under file No. 20161, showing a deviation, change, or alteration in the portion of the Applicant Company's railway between a point at or near the east side of Park Street, on the west, and a point just east of Victoria Avenue, on the east, in the City of Hamilton, in the County of Wentworth, in the Province of Ontario, be, and the same is, hereby approved and
 20 sanctioned; and the Applicant Company is hereby authorized to make such deviation, change, or alteration from the present location of the said portion of its railway in accordance with the said plan, profile and book of reference.

2. That the Applicant Company be, and it is hereby, authorized to construct and maintain the said portion of its railway between the said points, in accordance with the said plan and profile filed.

3. That the Applicant Company be, and it is hereby, authorized to carry its elevated tracks over the highways known as Hunter Street, McNab Street, James Street, John Street, Catharine Street, Ferguson Avenue, Young Street, and Victoria Avenue, by means of bridges; and to
 30 carry such of the said streets beneath the said tracks by means of a subway—in accordance with the said plan and profile, and of detail plans to be submitted for the approval of an Engineer of the Board.

4. That the Applicant Company be, and it is hereby authorized to take, without the consent of the owners, excepting the Canadian National Railway Company's lands, the lands not now owned by the Applicant Company or the City, shown bordered in red on the said plan and profile and mentioned in the said book of reference.

5. That the City close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington within the limits indicated on the
 40 said plan, and divert Hunter, Aurora and Liberty Streets as shown on the said plan.

6. That the Canadian National Railway Company relocate the portion of its Port Dover Line between Ferguson Avenue and Victoria Avenue, in accordance with the said plan and profile.

APPEAL
 No. 8.

Before
 the Board
 of Railway
 Commis-
 sioners for
 Canada.

No. 139.
 Order of
 Board of
 Railway
 Commis-
 sioners for
 Canada
 No. 45813,
 14th Nov-
 ember 1930
 —continued.

APPEAL
No. 8.

*Before
the Board
of Railway
Commissioners for
Canada.*

No. 139.
Order of
Board of
Railway
Commis-
sioners for
Canada
No. 45813,
14th Nov-
ember 1930
—continued.

7. That the Applicant Company be, and it is hereby, authorized to construct, maintain, and operate its new station and other terminal buildings in connection therewith, on the location shown on the said plan.

8. That the Hamilton Street Railway Company reconstruct its railway through the subway on James Street, as shown on the said plan and profile.

9. That the United Gas & Fuel Company of Hamilton, Limited, The Bell Telephone Company of Canada, the Hamilton Hydro-Electric Power Commission, and the Dominion Power & Transmission Company, Limited, and any other public utility company or companies affected, 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. 10

10. That the apportionment of the cost of the works between the Applicant Company, the City, and all other parties that may be benefited by or interested in the carrying out of the said works, and the contribution to be made out of "The Railway Grade Crossing Fund," be reserved for further consideration on a date to be fixed by the Board.

(Sgd.) H. A. McKEOWN,
Chief Commissioner,
Board of Railway Commissioners for Canada.

BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

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Examined and certified as a true copy
under Section 23 of "The Railway Act."

(Sgd.) A. D. CARTWRIGHT,
Sec'y of Board of Railway
Commissioners for Canada.

Ottawa, Nov. 26, 1930.

No. 140.

Order of Rinfret J., granting leave to appeal to Supreme Court of Canada.

SCHEDULE NO. 18.

IN THE SUPREME COURT OF CANADA.

30

The Honourable Mr. Justice Rinfret, } Tuesday, the Seventh day of
In Chambers. } April, A.D. 1931.

**ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.**

IN THE MATTER OF the joint application of the Toronto, Hamilton & Buffalo Railway Company, hereinafter called the "Applicant Company", and the Corporation of the City of Hamilton, hereinafter called the "City", under Sections 162, 178, 188, 199, 201, 252, 255,

*In the
Supreme
Court of
Canada.*

No. 140.
Order of
Rinfret J.,
granting
leave to
appeal to
Supreme
Court of
Canada,
7th April
1931.

256 and 262, and other appropriate sections of the Railway Act, for an Order approving and sanctioning the plan, profile and book of reference of the Applicant Company No. 2BRC, dated October 15th, 1930, on file with the Board under File No. 20161; authorizing a deviation, change or alteration in the portion of the Applicant Company's railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton, and authorizing the said deviation, change or alteration from the present location of the said portion of the Applicant Company's railway, in accordance with the said plan, profile and book of reference; authorizing the Applicant Company to construct, maintain and operate the said portion of its railway between the said points, in accordance with the change in grades as shown on the said plan and profile; authorizing the Applicant Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John, Catharine, Ferguson, Young and Victoria by means of bridges, and to carry each of the said streets beneath the said tracks by means of a subway; to take, without the consent of the owners, the lands not now owned by the Applicant Company or the City, shown bordered in red; directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington, and to divert Hunter, Aurora and Liberty Streets; authorizing a relocation of the Port Dover Line of the Canadian National Railways between Ferguson Avenue and Victoria Avenue, and the change in grade thereof; approving the new location of the Applicant Company's station and terminal buildings; directing the Hamilton Street Railway Company to reconstruct its tracks through and at each side of the subway at James Street,—all as shown on the said plan, profile and book of reference filed; and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the Railway; File No. 20161.

AND IN THE MATTER OF Order No. 45813, dated the 14th day of November, 1930, made by The Board of Railway Commissioners for Canada granting the said application.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants

AND

THE TORONTO, HAMILTON & BUFFALO RAILWAY COMPANY, and THE CORPORATION OF THE CITY OF HAMILTON

-Respondents.

UPON the application of Counsel on behalf of the above named Appellants made on the Twenty-fourth day of March, A.D. 1931, in the presence of Counsel for the above named Respondents, for an Order extending the time for applying for and for leave to appeal to this Court

APPEAL
No. 8.

*In the
Supreme
Court of
Canada.*

No. 140.
Order of
Rinfret J.,
granting
leave to
appeal to
Supreme
Court of
Canada,
7th April
1931—con-
tinued.

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APPEAL
No. 8.

*In the
Supreme
Court of
Canada.*

No. 140.

**Order of
Rinfret J.,
granting
leave to
appeal to
Supreme
Court of
Canada,
7th April
1931—con-
tinued.**

under the provisions of Section 52 of The Railway Act from Order Number 45813 of The Board of Railway Commissioners for Canada bearing date the fourteenth day of November, A.D. 1930, in the matter of the above application, upon hearing read the Notice of Motion, the Affidavits of Hugh Collins Walford and Harold T. Malcolmson and the Exhibits therein referred to, all filed, and upon hearing what was alleged by Counsel aforesaid and Judgment upon the Motion having been reserved until this day,

IT IS ORDERED that the time within which the said Appellants may apply for leave to appeal to this Court from the said Order Number 45813 of The Board of Railway Commissioners for Canada, be and the same is hereby extended until this day. 10

AND IT IS FURTHER ORDERED that the said application for leave to appeal to this Court from the said Order Number 45813 of The Board of Railway Commissioners for Canada, in so far as the said Order directs the Appellants to move, reconstruct, alter or change such of their works and facilities as may be affected by the construction of the railway works authorised to be constructed by the said Order, upon the ground that The Board of Railway Commissioners for Canada is without jurisdiction to make the said Order as directed against the said Appellants or in any event to make the said Order in the present proceedings which are claimed by the Appellants to have been irregularly taken and not properly brought before the Board in accordance with the rules established by the Board, be and the same is hereby granted. 20

AND IT IS FURTHER ORDERED that the said Appeal be inscribed for Hearing at the next Session of this Court and be set down at the head of the list of appeals from the Province of Ontario, that the Case in Appeal be filed on or before the thirtieth day of April, A.D. 1931, and the Factums of all parties be deposited on or before the Ninth day of May, A.D. 1931.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the said Appeal. 30

(Sgd.) T. RINFRET, J.

No. 141.

Order approving security for costs.

SCHEDULE NO. 19.

IN THE SUPREME COURT OF CANADA.

Before The Registrar,
In Chambers.

}

Saturday, the Eleventh day of
April, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

APPEAL
No. 8.

In the
Supreme
Court of
Canada.

No. 141.
Order
approving
security for
costs,
11th April
1931.

10 IN THE MATTER OF the joint application of the Toronto, Hamilton
& Buffalo Railway Company, hereinafter called the "Applicant
Company", and the Corporation of the City of Hamilton, hereinafter
called the "City", under Sections 162, 178, 188, 199, 201, 252, 255,
256 and 262, and other appropriate sections of the Railway Act, for
an Order approving and sanctioning the plan, profile and book of
reference of the Applicant Company No. 2BRC, dated October 15th,
1930, on file with the Board under File No. 20161; authorizing a
deviation, change or alteration in the portion of the Applicant
Company's railway between a point at or near the east side of Park
Street on the west and a point just east of Victoria Avenue on the east,
20 in the City of Hamilton, and authorizing the said deviation, change or
alteration from the present location of the said portion of the Applicant
Company's railway, in accordance with the said plan, profile and book
of reference; authorizing the Applicant Company to construct,
maintain and operate the said portion of its railway between the said
points, in accordance with the change in grades as shown on the said
plan and profile; authorizing the Applicant Company to carry its
elevated tracks over the highways known as Hunter, McNab, James,
John, Catharine, Ferguson, Young and Victoria by means of bridges,
and to carry each of the said streets beneath the said tracks by means
30 of a subway; to take, without the consent of the owners, the lands
not now owned by the Applicant Company or the City, shown bordered
in red; directing the City to close the streets known as Hunter, Charles,
Hughson, Walnut, Baillie, Augusta and Wellington, and to divert
Hunter, Aurora and Liberty Streets; authorizing a relocation of the
Port Dover Line of the Canadian National Railways between Ferguson
Avenue and Victoria Avenue, and the change in grade thereof;
approving the new location of the Applicant Company's station and
terminal buildings; directing the Hamilton Street Railway Company
to reconstruct its tracks through and at each side of the subway at
40 James Street,—All as shown on the said plan, profile and book of

APPEAL
No. 8.

In the
Supreme
Court of
Canada.

No. 141.
Order
approving
security for
costs,
11th April
1931—con-
tinued.

reference filed; and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the Railway; File No. 20161.

AND IN THE MATTER OF Order No. 45813, dated the 14th day of November, 1930, made by The Board of Railway Commissioners for Canada granting the said application.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA, *Appellants*

AND

THE TORONTO, HAMILTON & BUFFALO RAILWAY COMPANY, and THE CORPORATION OF THE CITY OF HAMILTON - - - - - *Respondents.*

10

UPON the application of Counsel for the above named Appellants in the presence of Counsel for the above named Respondents, upon hearing read the Notice of Motion and the material therein referred to, and upon hearing what was alleged by Counsel aforesaid,

IT IS ORDERED that the sum of \$250.00 paid into The Bank of Montreal as appears by the receipt of the said Bank dated the 8th day of April, A.D. 1931, duly filed, as security that the Appellants will effectually prosecute their Appeal from Order Number 45813 of The Board of Railway Commissioners for Canada bearing date the 14th day of November, A.D. 1930, in the matter of the above application, and will pay such costs and damages as may be awarded against them by this Court, be and the same is hereby allowed as good and sufficient security. 20

AND IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

(Sgd.) J. F. SMELLIE,
Registrar.



No. 142.

Notice of setting down appeal for hearing.

SCHEDULE NO. 20.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER OF the joint application of the Toronto, Hamilton
& Buffalo Railway Company, hereinafter called the "Applicant
Company", and the Corporation of the City of Hamilton, hereinafter
called the "City", under Sections 162, 178, 188, 199, 201, 252, 255,
256 and 262, and other appropriate sections of the Railway Act, for
an Order approving and sanctioning the plan, profile and book of
reference of the Applicant Company No. 2BRC, dated October 15th,
1930, on file with the Board under File No. 20161; authorizing a
deviation, change or alteration in the portion of the Applicant
Company's railway between a point at or near the east side of Park
Street on the west and a point just east of Victoria Avenue on the east,
in the City of Hamilton, and authorizing the said deviation, change or
alteration from the present location of the said portion of the Applicant
Company's railway, in accordance with the said plan, profile and book
of reference; authorizing the Applicant Company to construct,
maintain and operate the said portion of its railway between the said
points, in accordance with the change in grades as shown on the said
plan and profile; authorizing the Applicant Company to carry its
elevated tracks over the highways known as Hunter, McNab, James,
John, Catharine, Ferguson, Young and Victoria by means of bridges,
and to carry each of the said streets beneath the said tracks by means
of a subway; to take, without the consent of the owners, the lands
not now owned by the Applicant Company or the City, shown bordered
in red; directing the City to close the streets known as Hunter, Charles,
Hughson, Walnut, Baillie, Augusta and Wellington, and to divert
Hunter, Aurora and Liberty Streets; authorizing a relocation of the
Port Dover Line of the Canadian National Railways between Ferguson
Avenue and Victoria Avenue, and the change in grade thereof;
approving the new location of the Applicant Company's station and
terminal buildings; directing the Hamilton Street Railway Company
to reconstruct its tracks through and at each side of the subway at
James Street,—All as shown on the said plan, profile and book of
reference filed; and directing all public utility companies affected to
reconstruct, alter or change the respective works of each to carry out
the changes in the Railway; File No. 20161.

APPEAL
No. 8.*In the
Supreme
Court of
Canada.*No. 142.
Notice of
setting down
appeal for
hearing,
11th April
1931.

APPEAL
No. 8.

In the
Supreme
Court of
Canada.

No. 142.
Notice of
setting down
appeal for
hearing,
11th April
1931—con-
tinued.

AND IN THE MATTER OF Order No. 45813, dated the 14th day of
November, 1930, made by The Board of Railway Commissioners for
Canada granting the said application.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA, *Appellants*

AND

THE TORONTO, HAMILTON & BUFFALO RAILWAY
COMPANY, and THE CORPORATION OF THE
CITY OF HAMILTON - - - - - *Respondents.*

TAKE NOTICE that the above Appeal from Order Number 45813 10
of The Board of Railway Commissioners for Canada has been set down by
the Registrar of this Court for hearing at the Session of this Court
commencing on the 28th April, 1931.

Dated at Ottawa, this eleventh day of April, A.D. 1931.

POWELL, SNOWDON & MATHESON,
Agents for Pierre Beullac, K.C.,
Solicitor for Appellants.

To :

THE TORONTO, HAMILTON & BUFFALO RAILWAY COMPANY,
Respondents,

20

and to :

J. A. SOULE, Esq.,
their Solicitor.

And to :

THE CORPORATION OF THE CITY OF HAMILTON,
Respondents,

and to :

F. R. WADDELL, Esq., K.C.,
their Solicitor.

And to :

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

30



No. 143.

Order of Anglin C.J.C., postponing hearing of appeal.

SCHEDULE No. 22.

IN THE SUPREME COURT OF CANADA.

The Right Honourable F. A. Anglin, P.C.,
Chief Justice of Canada, In Chambers.

Friday, the Eighth day
of May, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

APPEAL
No. 8.

*In the
Supreme
Court of
Canada.*

No. 143.
Order of
Anglin
C.J.C.,
postponing
hearing of
appeal,
8th May
1931.

10 IN THE MATTER OF the joint application of the Toronto, Hamilton
& Buffalo Railway Company, hereinafter called the "Applicant
Company", and the Corporation of the City of Hamilton, hereinafter
called the "City", under Sections 162, 178, 188, 199, 201, 252, 255,
256 and 262, and other appropriate sections of the Railway Act, for
an Order approving and sanctioning the plan, profile and book of
reference of the Applicant Company, No. 2BRC, dated October 15th,
1930, on file with the Board under File No. 20161; authorizing a
deviation, change or alteration in the portion of the Applicant
Company's railway between a point at or near the east side of Park
20 Street on the west and a point just east of Victoria Avenue on the east,
in the City of Hamilton, and authorizing the said deviation, change or
alteration from the present location of the said portion of the Applicant
Company's railway, in accordance with the said plan, profile and book
of reference; authorizing the Applicant Company to construct,
maintain and operate the said portion of its railway between the said
points, in accordance with the change in grades as shown on the said
plan and profile; authorizing the Applicant Company to carry its
elevated tracks over the highways known as Hunter, McNab, James,
John, Catharine, Ferguson, Young and Victoria by means of bridges,
and to carry each of the said streets beneath the said tracks by means
30 of a subway; to take, without the consent of the owners, the lands
not now owned by the Applicant Company or the City, shown bordered
in red; directing the City to close the streets known as Hunter, Charles,
Hughson, Walnut, Baillie, Augusta and Wellington, and to divert
Hunter, Aurora and Liberty Streets; authorizing a relocation of the
Port Dover Line of the Canadian National Railways between Ferguson
Avenue and Victoria Avenue, and the change in grade thereof;
approving the new location of the Applicant Company's station and
terminal buildings; directing the Hamilton Street Railway Company
to reconstruct its tracks through and at each side of the subway at
40 James Street,—All as shown on the said plan, profile and book of

APPEAL
No. 8.

In the
Supreme
Court of
Canada.

No. 143.
Order of
Anglin
C.J.C.,
postponing
hearing of
appeal,
8th May
1931—con-
tinued.

reference filed; and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the Railway; File No. 20161.

AND IN THE MATTER OF Order No. 45813, dated the 14th day of November, 1930, made by The Board of Railway Commissioners for Canada granting the said application.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants,

AND

10

THE TORONTO, HAMILTON & BUFFALO RAILWAY
COMPANY, and THE CORPORATION OF THE
CITY OF HAMILTON - - - - -

Respondents.

UPON the application of Counsel on behalf of the above named Appellants in the presence of Counsel for the above named Respondents, upon hearing read the Affidavit of Pierre Beullac filed, and the Exhibits therein referred to and upon hearing what was alleged by Counsel aforesaid and the parties by their Counsel having entered into an Agreement dated February, 1931, to permit the work to proceed notwithstanding this Appeal.

20

IT IS ORDERED that this Appeal be withdrawn from the list of appeals inscribed for hearing at the present Session of this Court and that the hearing of the said Appeal be postponed until the October Session of this Court commencing on the 6th day of October, A.D. 1931.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the said Appeal.

(Sgd.) F. A. ANGLIN,
C.J.C.



No. 144.

Order dispensing with printing of Plans.

SCHEDULE No. 21.

IN THE SUPREME COURT OF CANADA.

Before The Registrar,
In Chambers.

Saturday, the Ninth day of
May, A.D. 1931.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

APPEAL
No. 8.
—
*In the
Supreme
Court of
Canada.*
—

No. 144.
Order
dispensing
with print-
ing of
plans,
9th May
1931.

10 IN THE MATTER OF the joint application of the Toronto, Hamilton
& Buffalo Railway Company, hereinafter called the "Applicant
Company", and the Corporation of the City of Hamilton, hereinafter
called the "City", under Sections 162, 178, 188, 199, 201, 252, 255,
256 and 262, and other appropriate sections of the Railway Act, for
an Order approving and sanctioning the plan, profile and book of
reference of the Applicant Company, No. 2BRC, dated October 15th,
1930, on file with the Board under File No. 20161; authorizing a
deviation, change or alteration in the portion of the Applicant
Company's railway between a point at or near the east side of Park
Street on the west and a point just east of Victoria Avenue on the east,
20 in the City of Hamilton, and authorizing the said deviation, change or
alteration from the present location of the said portion of the Applicant
Company's railway, in accordance with the said plan, profile and book
of reference; authorizing the Applicant Company to construct,
maintain and operate the said portion of its railway between the said
points, in accordance with the change in grades as shown on the said
plan and profile; authorizing the Applicant Company to carry its
elevated tracks over the highways known as Hunter, McNab, James,
John, Catharine, Ferguson, Young and Victoria by means of bridges,
and to carry each of the said streets beneath the said tracks by means
30 of a subway; to take, without the consent of the owners, the lands
not now owned by the Applicant Company or the City, shown bordered
in red; directing the City to close the streets known as Hunter, Charles,
Hughson, Walnut, Baillie, Augusta and Wellington, and to divert
Hunter, Aurora and Liberty Streets; authorizing a relocation of the
Port Dover Line of the Canadian National Railways between Ferguson
Avenue and Victoria Avenue, and the change in grade thereof;
approving the new location of the Applicant Company's station and
terminal buildings; directing the Hamilton Street Railway Company
to reconstruct its tracks through and at each side of the subway at
40 James Street,—All as shown on the said plan, profile and book of

APPEAL
No. 8.

In the
Supreme
Court of
Canada.

No. 144.

Order
dispensing
with print-
ing of
plans,
9th May
1931—con-
tinued.

reference filed; and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the Railway; File No. 20161.

AND IN THE MATTER OF Order No. 45813, dated the 14th day of November, 1930, made by The Board of Railway Commissioners for Canada granting the said application.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellants

AND

10

THE TORONTO, HAMILTON & BUFFALO RAILWAY
COMPANY, and THE CORPORATION OF THE
CITY OF HAMILTON - - - - -

Respondents.

UPON the application of Counsel on behalf of the above named Appellants, in the presence of Counsel on behalf of the above named Respondents, for an Order dispensing with the printing of one Exhibit in the Case in Appeal, upon hearing read the Affidavit of Pierre Beullac filed, and upon hearing what was alleged by Counsel aforesaid.

IT IS ORDERED that the printing in the Case in Appeal of the Plan No. 2BRC. referred to in the Statement of Facts as Schedule Number 3 forming part of the Case in Appeal herein, be and the same is hereby dispensed with. 20

AND IT IS FURTHER ORDERED that eight blue print copies of the said Plan shall be provided by the Appellants for the use of this Court and filed with the Case in Appeal.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the Appeal.

(Sgd.) J. F. SMELLIE,
Registrar.

30

“ Approved.”
(Sgd.) W. L. SCOTT.



No. 145.

Certificate of Board of Railway Commissioners for Canada.

SCHEDULE No. 23.

CERTIFICATE OF SETTLEMENT OF CASE AND AS TO REASONS
FOR JUDGMENT.

I, the undersigned, Secretary of the Board of Railway Commissioners for Canada, do hereby certify that the foregoing printed document from page 1 to page 84, inclusive, is the case settled by S. J. McLean, Assistant Chief Commissioner of the Board of Railway Commissioners for Canada,

10 pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada in appeal to the Supreme Court of Canada in a certain case pending before the Board of Railway Commissioners for Canada, IN THE MATTER OF the joint application of the Toronto, Hamilton and Buffalo Railway Company, hereinafter called the "Applicant Company", and the Corporation of the City of Hamilton, hereinafter called the "City", under Sections 162, 178, 188, 199, 201, 252, 255, 256 and 262, and other appropriate sections of the Railway Act, for an Order approving and sanctioning the plan, profile and book of reference of the Applicant Company, No. 2BRC, dated October 15th, 1930, on file with the Board under

20 File No. 20161; authorizing a deviation, change or alteration in the portion of the Applicant Company's railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton, and authorizing the said deviation, change, or alteration from the present location of the said portion of the Applicant Company's railway in accordance with the said plan, profile and book of reference; authorizing the Applicant Company to construct, maintain, and operate the said portion of its railway between the said points, in accordance with the change in grades as shown on the said plan and profile; authorizing the Applicant Company to carry its elevated

30 tracks over the highways known as Hunter, McNab, James, John, Catharine, Ferguson, Young and Victoria by means of bridges, and to carry each of the said streets beneath the said tracks by means of a subway; to take, without the consent of the owners, the lands not now owned by the Applicant Company or the City, shown bordered in red; directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington, and to divert Hunter, Aurora, and Liberty Streets; authorizing a relocation of the Port Dover Line of the Canadian National Railways between Ferguson Avenue and Victoria Avenue, and the change in grade thereof; approving the new location of the Applicant Company's station

40 and terminal buildings; directing the Hamilton Street Railway Company to reconstruct its tracks through and at each side of the subway at James Street—all as shown on the said plan, profile and book of reference filed; and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the railway; File

APPEAL
No. 8:

*In the
Supreme
Court of
Canada.*

No. 145.
Certificate
of Board of
Railway
Commis-
sioners for
Canada.

**APPEAL
No. 8.**

*In the
Supreme
Court of
Canada.*

No. 145.
Certificate
of Board of
Railway
Commis-
sioners for
Canada—
continued.

No. 20161; AND IN THE MATTER OF Order No. 45813, dated the 14th day of November, 1930, made by the Board of Railway Commissioners for Canada, granting the said application, BETWEEN The Bell Telephone Company of Canada, Appellants, and The Toronto, Hamilton and Buffalo Railway Company and The Corporation of the City of Hamilton, Respondents, and I do further certify that I have applied to the Commissioners of the said Board for their opinions or reasons for making the Order appealed from in this matter, and the only reasons delivered to me by the said Commissioners are those of the Honorable H. A. McKeown, Chief Commissioner, in which Commissioner Honorable T. C. Norris concurred, and I do further certify that no reasons were delivered by any of the other Commissioners of the said Board, as appears from the records of the said Board. 10

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the Board of Railway Commissioners for Canada, this 27th day of July, 1931.

(Sgd.) A. D. CARTWRIGHT,
Sec'y. to Board of Ry. Comrs.

(Seal)

No. 146.
Factum
of Bell
Telephone
Company.

No. 146.

Factum of Bell Telephone Company.

NOTE.—*The page references have been altered so as to agree with the Record.* 20

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

IN THE MATTER OF the joint application of the Toronto, Hamilton & Buffalo Railway Company, hereinafter called the "Applicant Company," and the Corporation of the City of Hamilton, hereinafter called the "City," under Sections 162, 178, 188, 199, 201, 252, 255, 256 and 262, and other appropriate sections of the Railway Act, for an Order approving and sanctioning the plan, profile and book of reference of the Applicant Company No. 2BRC, dated October 15th, 1930, on file with the Board under File No. 20161; authorizing a deviation, change or alteration in the portion of the Applicant Company's railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton, and authorizing the said deviation, change or alteration from the present location of the said portion of the Applicant Company's railway in accordance with the said plan, profile and book of reference; authorizing the Applicant Company to construct, maintain and operate the said portion of its railway between the said points, in accordance with the change in grades as shown on the said plan and profile; authorizing the Applicant Company to carry its 30 40

10 elevated tracks over the highways known as Hunter, McNab, James, John, Catharine, Ferguson, Young and Victoria by means of bridges, and to carry each of the said streets beneath the said tracks by means of a subway; to take, without the consent of the owners, the lands not now owned by the Applicant Company or the City, shown bordered in red; directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington, and to divert Hunter, Aurora and Liberty Streets; authorizing a relocation of the Port Dover Line of the Canadian National Railways between Ferguson Avenue and Victoria Avenue, and the change in grade thereof; approving the new location of the Applicant Company's station and terminal buildings; directing the Hamilton Street Railway Company to reconstruct its tracks through and at each side of the subway at James Street,—all as shown on the said plan, profile and book of reference filed; and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the Railway; File No. 20161.

20 AND IN THE MATTER OF Order No. 45813, dated the 14th day of November, 1930, made by the Board of Railway Commissioners for Canada, granting the said application.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellant

AND

THE TORONTO, HAMILTON & BUFFALO RAILWAY COMPANY, and THE CORPORATION OF THE CITY OF HAMILTON

-Respondents.

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APPEAL
No. 8.

*In the
Supreme
Court of
Canada.*

No. 146.
Factum
of Bell
Telephone
Company—
continued.

APPEAL
No. 8.

In the
Supreme
Court of
Canada.

No. 146.
Factum
of Bell
Telephone
Company—
continued.

PART I.

STATEMENT OF FACTS.

This is an appeal from Order No. 45813 of the Board of Railway Commissioners for Canada, dated November 14th, 1930 (Record, p. 350), pursuant to leave granted by Hon. Mr. Justice Rinfret, by Order dated April 7th, 1931 (Record, p. 352).

The Appellant owns and maintains lines of telephone lawfully constructed upon and/or under Charles Street, McNab Street, James Street, Hughson Street, Catharine Street, Aurora Street, Victoria Avenue, Wood Market Square and Baillie Street in the City of Hamilton, constructed in pursuance of the powers conferred upon it by its Special Acts of Incorporation (Record, p. 312, l. 23). 10

The Respondent Railway is desirous of elevating and diverting its line of railway running through the City of Hamilton, and made an application to the Board of Railway Commissioners for Canada, in which the Respondent City joined as an Applicant, for, *inter alia*, the approval of the plans for the said diversion and other works incidental thereto; leave to carry its elevated tracks across, *inter alia*, McNab, James, John and Catharine Streets and Victoria Avenue by means of bridges and to carry said streets beneath such tracks by means of subways; for an order directing the Respondent City to close, *inter alia*, Charles Street, Hughson Street and Baillie Street, and to divert Aurora Street; an order directing, *inter alia*, the Appellant to reconstruct, alter or change its works, in order to carry out the changes in the Railway shown upon the plan and profile filed therewith, and for leave to construct a new Station and Terminal Buildings (Record, p. 316, l. 9; p. 321). 20

The said works are to be constructed at locations where the Appellant's plant is already constructed upon and/or under the said streets (Record, p. 317, l. 33).

By Order No. 45813 (Record, p. 350), the Board granted the Respondents' said application, and the Appellant now appeals from the said order insofar as the said order directs the Appellant to move, reconstruct, alter or change its works and facilities as may be affected by the construction of the Railway works authorized by the said order. 30

The facts have been settled by the Board appealed from, the parties having been unable to agree thereupon. They are printed in the Record at page 312.

PART II.

RESPECTS IN WHICH ORDER ERRONEOUS.

The Appellant contends that Order No. 45813 of the Board of Railway Commissioners for Canada is erroneous in the following respects: 40

1. The Board had no jurisdiction to direct the Appellant to move, reconstruct, alter or change its works and facilities, as directed in paragraph 9 of said Order, which is as follows:

" 9. That the United Gas & Fuel Company of Hamilton, Limited, The Bell Telephone Company of Canada, the Hamilton

Hydro-Electric Power Commission, and the Dominion Power & Transmission Company, Limited, and any other public utility company or companies affected, 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."

2. In any event the Board had no jurisdiction to make paragraph 9 of the said Order in the present proceedings, which are claimed by the Appellant to have been irregularly taken and not properly brought before the Board in accordance with the rules established by the Board.

APPEAL
No. 8.

In the
Supreme
Court of
Canada.

No. 146.

Factum
of Bell
Telephone
Company—
continued.

10

PART III.

ARGUMENT ON BEHALF OF APPELLANT.

1. THERE IS NO PROVISION CONTAINED IN ANY STATUTE WHICH EXPRESSLY CONFERS ANY JURISDICTION UPON THE BOARD TO MAKE PARAGRAPH 9 OF ORDER 45813.

(a) The jurisdiction of the Board of Railway Commissioners for Canada is not inherent, but statutory, and must be found in the Act constituting it. It can only exercise such powers as are by statute conferred upon it. See MacMurchy & Denison's "Railway Law of Canada" (3rd Edition), at page 60, citing—

- 20 *G.T.R. v. Toronto*, 1 C.R.C. at p. 92;
The Merritton Crossing Case, 3 C.R.C. 263, at p. 270;
City of Victoria v. Esquimalt, etc. Ry Co., 24 C.R.C. 84;
Kelly v. G.T.R. Co., 24 C.R.C. 367;
Corporation of Parkdale v. West, 12 A.C. 611.

See also *Duthie v. G.T.R.*, 4 C.R.C. 304, at p. 311.

(b) Section 373 (6) of the Railway Act, R.S.C. (1927), C. 170, which is the only statutory provision conferring any jurisdiction upon the Board to order any change, alteration or reconstruction of the Appellant's plant, does not apply, because there is no application to the Board by any municipality for an Order directing the Appellant's aerial plant to be placed under-
30 ground and Section 373 (6) only applies in such cases. The relevant part of this Subsection is as follows:—

40 " 373 (6). Notwithstanding any power or authority heretofore or hereafter conferred upon any company by or under any Act of the Parliament of Canada, or of the legislature of any province, or any other authority, the Board, upon the application of the municipality, and upon such terms and conditions as the Board may prescribe, may order any telegraph or telephone line, within the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company

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to construct or maintain, or to operate, or continue, any such line, or any pole or other works belonging thereto, except as directed by the Board.”

As to the Board’s jurisdiction under this section see

City of Chatham v. Great North Western Telegraph and Bell Telephone Cos., 21 C.R.C. 183;

City of Woodstock v. Great North Western Telegraph Co., 19 C.R.C. 429.

Paragraph 9 of Order No. 45813 cannot, therefore, stand alone as an Order made by the Board in the exercise of any power vested in it, and unless jurisdiction can be implied under the sections of the Railway Act hereinafter dealt with, the Board had no jurisdiction whatsoever to make said Order, as directed against the Appellant. 10

2. ALL OF THE PROVISIONS OF THE RAILWAY ACT, R.S.C. (1927), C. 170, DO NOT APPLY TO THE APPELLANT OR TO ITS WORKS.

Section 375 of the said Act expressly limits the application of the Railway Act to, and the jurisdiction of the Board over, the Appellant and its works. The relevant portions of the said section are as follows :

“ 375. In this section, unless the context otherwise requires,

“ (a) ‘ company ’ means a railway company or person 20
authorized to construct or operate a railway, having authority to construct or operate a telegraph or telephone system or line, and to charge telegraph or telephone tolls, and includes also telegraph and telephone companies and every company and person within the legislative authority of the Parliament of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls ;

“ 12. Without limitation of the generality of this subsection by anything contained in the preceding subsections, the jurisdiction 30
and powers of the Board, and, in so far as reasonably applicable and not inconsistent with this section or the Special Act, the provisions of this Act respecting such jurisdiction and powers, and respecting proceedings before the Board and appeals to the Supreme Court or Governor in Council from the Board, and respecting offences and penalties, and the other provisions of this Act, except sections seventy-two to two hundred and seventy, two hundred and seventy-two to two hundred and eighty-two, two hundred and eighty-seven to three hundred and thirteen, three hundred and twenty-three, 40
three hundred and forty-nine to three hundred and fifty-four, three hundred and sixty to three hundred and sixty-six, three hundred and ninety-four to four hundred and twenty-four, and four hundred and forty-nine to four hundred and fifty-seven, both inclusive in

each case, shall extend and apply to all companies as in this section defined, and to all telegraph and telephone systems, lines and business of such companies within the legislative authority of the Parliament of Canada; and in and for the purposes of such application

“(a) ‘company’ or ‘railway company’ shall mean a company as in subsection one of this section defined;

“(b) ‘railway’ shall mean all property real and personal and works forming part of or connected with the telegraph or telephone system or line of the company;

“(c) ‘Special Act’ shall mean a Special Act as in subsection one of this section defined;”

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None of the sections of the Railway Act within the exception contained in Section 375 (12) thereof extend or apply to the Appellant or to its works, nor can any of the powers or jurisdictions conferred upon the Board by the said excepted sections be exercised against the Appellant or its plant.

See *The London, Chatham and Dover Ry. Co. v. The Board of Works for Wandsworth District*, L.R. 8 C.P. 185;
Boland v. C.N.R. (1926), 4 D.L.R. 193, at p. 200.

3. SECTIONS 256 AND 257 OF THE RAILWAY ACT DO NOT
CONFER THE NECESSARY JURISDICTION UPON THE BOARD TO
MAKE PARAGRAPH 9 OF ORDER 45813.

The relevant provisions of Sections 256 and 257 are as follows :

“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 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.

“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

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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 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 such portion or crossing, if any, or any other crossing directly or indirectly affected.” 10

(a) Neither Sections 256 and 257 nor the Board’s jurisdiction thereunder extend or apply to the Appellant or its plant (*supra*, p. 368).

(b) The Respondents’ project is not a work ordered by the Board for the projection, safety and convenience of the public within the meaning of Sections 256 and 257.

(i) The Respondents’ application to the Board for approval of the deviation of the line or railway was made under Section 178 of the Railway Act (Record, p. 321, l. 33), and leave to cross highways with such deviated line was sought under Section 256 (Record, p. 322, l. 13). Subsection (1) of Section 178 is as follows : 20

“ 178. If any deviation, change or alteration is required by the company to be made in the railway, or any portion thereof, as already constructed, or as merely located and sanctioned, a plan, profile and book of reference of the portion of such railway proposed to be changed, showing the deviation, change or alteration proposed to be made, shall, in like manner as hereinbefore provided with respect to the original plan, profile and book of reference, be submitted for the approval of the Board, and may be sanctioned by the Board.” 30

This section only applies where the deviation, change, or alteration “ is required by the company”. By Section 2 (4) of the Railway Act, “ ‘ company ’ includes a person, and where not otherwise stated or implied means ‘ railway company ’, unless immediately preceded by ‘ any ’, ‘ every ’ or ‘ all ’, in which case it means every kind of company which the context will permit of.” The deviation of the Railway line in question was sought by the Respondent Railway and it is this work which gives rise to all of the other matters involved in this proceeding. 40

The Board in making Order No. 45813 merely “ granted such application ” under Section 256 and permitted the deviated line of Railway to be carried across the highways in question in accordance with the application. The Board did not impose any terms or conditions upon the Respondents as it might have done under Section 256 had the plan for the crossings not been satisfactory to the Board.

No attempt was made to bring the case under Section 257. There was no complaint to the Board. The Mayor of Hamilton's letter dealt with the matter as a consent application. (Record, p. 319, l. 30).

(ii) No evidence whatsoever was adduced before the Board in attempt to establish that the works in question were necessary for the protection, safety and convenience of the public. There is no evidence that the existing line of railway or other railway facilities created any danger or inconvenience to the public, or that subways were rendered necessary by reason of the existing line, or that subways could not have been built under the existing line without the necessity for the deviation and change of grade, or that any accident had ever happened by reason thereof. Neither the Board's Judgment (Record, p. 345) or Order No. 45813 (Record, p. 350) afford the slightest suggestion that the Board was moved to make the Order for the protection, safety and convenience of the public.

(iii) If the works in question had been necessary for the protection, safety and convenience of the public the Respondent City would not have entered into the agreement dated October 20, 1930 (Record, p. 441), but would have applied to the Board directly for an Order against the Respondent Railway directing it to effect the same.

Without the agreement, the City would only be ordered to contribute to the cost of such subways or protection at highway crossings as may have been ordered by the Board. Under the agreement the Respondent City agrees to contribute to "the cost of replacing all existing facilities of the Railway Company or the equivalent thereof and of all works incidental thereto" (Record, p. 443, l. 9), which includes the entire cost of the deviation and elevation of the Respondent Railway's line and of the construction of its new station and terminal buildings. The effect of this agreement is further evidenced by the Mayor of Hamilton's letter to the Board dated October 6, 1930 (Record, p. 319), wherein he states "The Railway Company agreed to co-operate with the City and the alterations proposed by them will entail the building of a new station and the expenditure of approximately three million dollars. Of course the City of Hamilton will be called upon to pay their share of the cost of this work and because of this we felt that we could look for liberal treatment at the hands of the Board of Railway Commissioners from the fund for the elimination of level crossings."

(iv) The entire project was in fact one for the improvement of the Respondent Railway's facilities, and, so far as the Respondent City was concerned, for the relief of unemployment.

This has been admitted by the Respondents and is evidenced by the following extracts from the Case :

"In view of the present unemployment situation the City of Hamilton took up the matter of grade separation with the Toronto, Hamilton and Buffalo Railway, etc." (Mayor of Hamilton's letter to the Board dated Oct. 6, 1930, Record, p. 319, l. 13.)

"And the Applicant Company and the City desire that the Board should issue an Order at once so that the work may be

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commenced as soon as possible in ease of the present serious unemployment situation at Hamilton, which is one of the important considerations for the Applicants joining in this Application at this time.” (Application, Record, p. 323, l. 21.)

“9. The work shall be commenced by the Railway Company within sixty days after the issuance of the Order of the Board referred to in paragraph 2 hereof, and the Railway Company shall insert in all contracts a clause to the following effect :

“In the performance of all the works covered by this Contract the contractors and sub-contractors shall employ workmen and labourers who have been bona fide residents of Hamilton for a minimum of one year prior to September 1st, 1930—provided that a sufficient supply of such labor is available. Preference shall be given to the employment of married men over single men. The contractors and sub-contractors shall keep a proper record of all employment, indicating the name, address, terms of residence, date employed, date of leaving or dismissal, which record shall be available for inspection by or transmitted to the Chief Engineer as and when required.”

(See Agreement between Respondents, Record, p. 445, l. 10.)

“The works covered by the plan are necessary . . . for the efficient maintenance and operation of the Railway of the Applicant Company.” (Record, p. 323, l. 14.)

“And Whereas the changes in the said location of the railway necessitates the consideration and settlement of grade separation problems in the said City.” (Record, p. 442, l. 7.)

“And Whereas the works hereinafter set forth comprised in and connected with grade separation are of mutual benefit to the City and the Railway Company.” (Record, p. 442, l. 9.)

The project was entered into by the Respondent Railway merely because it could effect an improvement in its lines and facilities at a minimum of cost to itself by reason of the contribution which the Respondent City agreed to make under the agreement of October 20, 1930 (Record, p. 443, l. 7), and of the expectation of substantial contributions from the Grade Crossing Fund. The necessity for such financial assistance was stressed by Counsel for the Respondent Railway at the hearing of this matter before the Board, in the following language :

“Then this is a very important feature for both the City of Hamilton and the Railway Companies, in fact it is a matter of some vital importance, that is, a liberal contribution from the Grade Crossing Fund. I might explain that, as is very well known, railway earnings do not justify undertaking such a large financial outlay at at a time like this. One of the chief reasons why we have embarked on this enterprise is that the Government had displayed a disposition

to be liberal towards the Grade Crossing Fund in this respect, and we are making bold to ask for the maximum allowance the Board can give us in respect of protection under the Railway Act." (Record, p. 326, l. 28.)

In the Respondents' joint application they ask for an Order directing a contribution from "The Railway Grade Crossing Fund" (Record, p. 323, l. 1), and also for the maximum amount the Railway Board can allow (Record, p. 323, l. 14).

This project would not have been undertaken if the only reason there-
10 for had been the safety, protection and convenience of the public.

4. SECTION 39 (1) OF THE RAILWAY ACT IS NOT APPLICABLE.

Section 39 (1) provides as follows :

" 39 (1). 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
20 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."

(a) It is "otherwise expressly provided" that the Respondent Railway shall reconstruct, alter or change the Appellant's works.

(i) The approval of the plans for the deviation of the line of railway in question was sought by the Respondent Railway under Section 178 of the Railway Act (*supra*, p. 370). Section 178 treats the construction of a deviation, change or alteration of a railway as the construction of a new line, and the Respondents have so treated it by applying for leave to cross
30 highways therewith under Section 256 (*supra*, p. 369). The construction of the said deviation of the said railway line is therefore the construction of a railway after the 19th day of May, 1909, within the meaning of Section 260 (1) of the Railway Act, as interpreted by Section 2 (21). The said sections are as follows :

" 2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,

" (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,
40 stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway " ;

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“ 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.”

The reconstruction, alteration or change of the Appellant's plant either is or is not part of the works directed or permitted to be done by Order No. 45813. 10

If it is part of said works, it must necessarily be part of the works authorized by paragraphs 3 and 5 of Order No. 45813 (Record, p. 351), because the changes in the Appellant's plant is only necessitated by the construction of the subways and the closing of the streets authorized by these paragraphs. If the construction of the subways on McNab, James and Catharine Streets and on Victoria Avenue, and the closing of Charles, Hughson and Baillie Streets, are for the protection, safety and convenience of the public, and if the removal of the Appellant's plant is part of the said work, then the removal of the Appellant's plant is itself a work for the protection, safety and convenience of the public, and consequently under Section 260 of the Railway Act (*supra*) this work must be provided or done by the Respondent Railway at its own expense. 20

If the construction, alteration or changing of the Appellant's plant is not part of the work authorized by said Order No. 45813, then Section 39 (1) (*supra*, p. 373) has no application at all, because this section only authorizes the Board to direct a party interested or affected to do the works authorized by the Order.

(ii) There is a second provision to the contrary which deprives the Board of jurisdiction under Section 39 (1). 30

This is contained in Sections 162, 163 and 164 of the Railway Act, which provide as follows :

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

“ (n) divert or alter the position of any water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric lines, wires or poles ;

“ 163. The company shall restore, as nearly as possible, to its former state, any river, stream, watercourse, highway, water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric line, wire or pole, which it diverts or alters, or it shall put the same in such a state as not materially to impair the usefulness thereof. 40

“ 164. The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall

make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.”

Since Parliament empowered the Respondent Railway to do the work of diverting or altering the Appellant's plant without recourse to the Board, it was not the intention of Parliament that the Board should have jurisdiction to order changes in telephone lines for railway purposes. The only object which the Respondents can have in resorting to the Board for an Order directing the Appellant to change its own plant, instead of the Respondent Railway doing the work itself under Section 162 (*supra*) is to avoid liability under Sections 163 and 164 (*supra*), and to try to saddle the Appellant with the costs and expense of the work.

(b) In ordering the Respondent City to close portions of Charles, Hughson and Baillie Streets, and to divert Aurora Street, the Board did not act “in the exercise of any power vested in it” within the meaning of Section 39 (1) of the Railway Act.

The closing of Hughson Street was only agreed upon and ordered to enable the Respondent Railway to build its new station upon the portion to be closed (Plan, Schedule 3). The Respondent City agreed to convey the portions of the streets closed to the Respondent Railway in fee simple (Record, p. 444, l. 5). None of the streets ordered to be closed were ordered to be diverted, nor was any leave of the Board sought or granted to carry the Respondent Railway's lines across these streets.

The Board has no jurisdiction to order the closing of a highway.

Seguin v. Town of Hawkesbury, 11 D.L.R. 843;
In re Closing of Highways, 15 C.R.C. 305, 12 D.L.R. 389.

The only jurisdiction which the Board has over highways is that conferred by Sections 256 and 257 of the Railway Act (*supra*, p. 369), which is limited to ordering 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. The jurisdiction can only be exercised where a Railway applies for leave to cross a highway or where complaint is made with regard to an existing crossing. No application was made to cross Charles, Hughson or Baillie Streets, nor was any complaint made in respect thereof, nor did the Board order the diversion of these streets. The ordering of Hughson Street to be closed for the purposes of constructing a station thereon is not within the scope of Sections 256 and 257 of the Railway Act, nor is it within the scope of any jurisdiction conferred upon the Board.

In any event an Order directing a municipality to close streets is not an Order directing or permitting “any structure, appliances, equipment, works, renewals or repairs” to be constructed within the meaning of Section 39 (1), and since the closing of streets is effected by the passing of a By-law by the Municipal Corporation, the reconstruction, alteration or removal of the Appellant's plant cannot in any sense be considered as

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part of the work of effecting the closing as ordered by paragraph 5 of Order No. 45813 (Record, p. 351).

(c) Order No. 45813 (Record, p. 350) does not in fact order the Appellant to provide, construct, reconstruct, alter, install, operate, use or maintain, any structure, appliances, equipment, works, renewals or repairs which the Board, in the exercise of any power vested in it, has directed or permitted to be provided, constructed, reconstructed, altered, installed, operated, used or maintained.

The Appellant is not ordered to construct or maintain the deviated line of railway nor the bridges or subways in connection therewith. All that the Appellant is ordered to do is to move its own plant, and there is no jurisdiction in the Board to so order. (See Order 45813, Record, p. 350). 10

(d) The Appellant is not a party interested or affected within the meaning of Section 39 (1) of the Railway Act.

“Section 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an Order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.” See *Canadian Pacific Railway Company and others v. Toronto Transportation Commission; Toronto Transportation Commission v. Canadian National Railways* (1930), A.C. 686 at p. 697. 20

It is not contended that the railway and other works authorized by Order No. 45813 will in any way confer any benefit or advantage upon the Appellant or its telephone lines or plant (Record, p. 317, l. 46). The Appellant has not the slightest interest in the promotion of the Respondents' project, and it is quite immaterial to the Appellant whether it is carried out or not. The Appellant's plant creates no public danger whatsoever, and on Charles, Hughson and James Streets it is already placed underground. As it now stands, the Appellant's plant is wholly suitable, sufficient and satisfactory for the Appellant's service. The Appellant makes no special use of the subway. Its lines can be carried across a grade crossing just as well and as safely as through a subway. 30

The removal or relocation of the Appellant's plant is not part of the general scheme evolved by the Respondents. Neither the Appellant's existing plant nor the proposed changes therein are shown in the Respondent's plan (Schedule 3), nor does the said scheme or plan make any provision whatsoever therefor. 40

As is hereafter shown, the Appellant's plant and its right to maintain the same in its present locations is “land” within the meaning of the Railway Act. The Appellant is, therefore, in the identical position of the owner of land abutting on a highway, part of whose land is being taken for the purposes of a railway crossing. It would be absurd to hold that such an abutting landowner is a party interested or affected so as to confer

jurisdiction upon the Board to order him to move or tear down his house, or make excavation upon his land to permit of railway tracks being laid across it, and to finance such work himself pending distribution of the costs.

None of the sections of the Railway Act, pursuant to which the Order appealed from is made, extend or apply to the Appellant or to its plant (*supra*). How then can it be said that the Appellant is a party interested or affected by an Order or by works which are made or constructed pursuant to legislation which by express terms does not extend or apply to the Appellant?

- 10 The Appellant is not a party interested or affected. It merely owns plant and land which must be acquired or moved to permit of railway works being carried out, consequently the Board has no jurisdiction under Section 39 (1) of the Railway Act to make paragraph 9 of Order No. 45813.

5. THE APPELLANT'S PLANT AND ITS RIGHT TO MAINTAIN THE SAME IN ITS EXISTING LOCATION IS "LAND" OR "INTERESTS IN LAND".

- 20 By its Special Act of Incorporation, 43 Victoria (1880), C. 67, S. 3, as amended by 45 Victoria (1882), C. 95, S. 2 (Dominion), the Appellant was authorized to "construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, watercourses or other such places," etc. (Record, p. 416, l. 34).

The said Act conferred statutory rights upon the Appellant. See *City of Toronto v. Bell Telephone Co.* (1905), A.C. 52.

The Appellant's plant involved in this appeal was lawfully constructed upon the several highways in question, in pursuance of its statutory powers (Record, p. 312, l. 23), and a detailed description of the nature and extent thereof is set forth in paragraphs 3 and 4 of the Statement of Facts (Record, p. 312, l. 34 *et seq.*).

- 30 The plant belonging to the Appellant, and its right to maintain the same in the precise locations in which it now exists, are by their very nature "land" or "interests in land" owned by the Appellant, and in any event are "land" within the meaning of that term as defined by the Railway Act, Section 2 (15), which is as follows:

"2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,

- 40 "(15) 'lands' means the lands, the acquiring, taking or using of which is authorized by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure, and any easement, servitude, right, privilege or interest in, to, upon, under, over or in respect of the same";

The Consumers' Gas Company of Toronto v. City of Toronto, 27 S.C.R. 453;

City of Toronto v. Consumers' Gas Co. (1916), 2 A.C. 618;

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Montreal Light, Heat & Power Cons. v. City of Outremont (1930), R.J. 49, K.B. 456;
Montreal Light, Heat & Power Cons. v. City of Westmount (1926) S.C.R. 515;
Re Ottawa Gas Co. and City of Ottawa, 48 O.L.R. 130;
Bank of Montreal v. Kirkpatrick : Kirkpatrick v. Cornwall Elec. St. Ry. (1901), 2 O.L.R. 113;
 See also *Kolodzi and Detroit and Windsor Subway Co.* (1930), 65 O.L.R. 398; affirmed S.C.C. (1931), 3 D.L.R. 337;
Ruel v. The King, 38 D.L.R. 613;
Calgary Gas and Water Works Co. v. City of Calgary, 2 Terr. L.R. 449;
The King v. Birchdale Ltd., 16 Ex. C.R. 375.

10

The Appellant can only be lawfully deprived of its said "lands" or "interests in lands" by expropriation proceedings lawfully taken, or by the Respondent Railway proceeding under Sections 162, 163 and 164 of the Railway Act (*supra*).

Jones v. Atlantic and North West Ry. Co. (1930), R.J. 12, K.B. 392. See also *Corporation of Parkdale v. West*, 12 A.C. 611, Law Times 57 N.S. 602.

6. PARAGRAPH 9 OF ORDER No. 45813 HAS THE EFFECT OF DEPRIVING THE APPELLANT OF ITS "LANDS." 20

If the Appellant moves its plant from Charles, Hughson and Baillie Streets, in compliance with paragraph 9 of Order No. 45813, the said streets will be closed by the Respondent City and conveyed to the Respondent Railway, and the railway station and other structures will be built thereon. (See Plan, Schedule 3.)

The Appellant will thereby be deprived of its present location for its plant. On the other streets, either the grade of the streets will be lowered below the present location of the Appellant's underground conduits, necessitating their being placed at a lower level, or railway structures will be built so as to deprive the Appellant of the locations in which its plant now stands. 30

The underground conduit systems of the Appellant cannot be moved without being broken up and destroyed (Record, p. 313, l. 44, p. 314, l. 14).

Paragraph 9 of Order No. 45813 orders in effect the Appellant to move or destroy its plant in order to get it out of the way to permit of the Respondents taking and using the space presently occupied thereby. This is a taking of the Appellant's lands, which can only be lawfully effected by expropriation.

City of Toronto v. Consumers' Gas Co. (1916), 2 A.C. 618;
Re Ottawa Gas Co. and City of Ottawa, 48 O.L.R. 130;
The King v. Birchdale Ltd., 16 Ex. C.R. 375;
Ruel v. The King, 38 D.L.R. 613.

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7. THE BOARD HAS NO JURISDICTION TO MAKE ANY ORDER DEPRIVING THE APPELLANT OF LANDS OR WHICH IS TANTAMOUNT TO THE EXPROPRIATION THEREOF.

The Railway Act confers no jurisdiction upon the Board relating to the taking of lands by expropriation, or relating to the delivering up of possession of lands being expropriated. The power of a Railway to take lands without the consent of the owner is conferred upon it by the Railway Act, and the procedure therein provided must be strictly followed. Where the Railway requires immediate possession of any such lands it must secure an Order from the Judge of the County Court of the County wherein the lands lie. The Board cannot make Orders dispensing with the taking of proper expropriation proceedings, nor can it determine the compensation to be paid for the lands taken, nor can it order the owner thereof to vacate and deliver them up to a Railway.

The relevant provisions of the Railway Act are as follows :

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

“ (c) purchase, take and hold of and from any person, any lands or other property necessary for the construction, maintenance and operation of the railway,” etc.

“ 219. If within ten days after the service of such notice, or where service is made by advertisement, within one month after the first publication thereof, the opposite party does not give notice to the company that he accepts the sum offered by it, either party may apply to the judge of the county court of the county in which the lands lie, or, in the Province of Quebec or in any other part of Canada where there is no county court, to a judge of the superior court for the district or place in which the lands lie, to determine the compensation to be paid as aforesaid.”

“ 220. Such judge shall, upon application being made to him as aforesaid, become the arbitrator for determining such compensation :”

“ 238. Upon payment or legal tender of the compensation or annual rent awarded or agreed upon to the person entitled to receive the same, or upon the payment into court of the amount of such compensation, in the manner hereinbefore mentioned, the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation or annual rent has been awarded or agreed upon.”

“ 239. If any resistance or forcible opposition is made by any person to the exercise by the company of any such power the judge shall upon or without notice to the opposite party as he deems proper, on proof to his satisfaction of such award or agreement and of payment or tender of the sum awarded or agreed upon or of

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payment thereof into court, issue his warrant to the sheriff of the district or county, or to a bailiff, as he deems most suitable, to put down such resistance or opposition, and to put the railway company in possession.”

“240. Such warrant shall also be granted by the judge without such award or agreement, on affidavit to his satisfaction that the immediate possession of the lands or of the power to do the thing mentioned in the notice, is necessary for the construction or maintenance of some part of the railway with which the company is ready forthwith to proceed.” 10

“241. The judge shall not grant any warrant under the last preceding section, unless

“(a) ten days’ previous notice of the time and place when and where the application for such warrant is to be made has been served upon the owner of the lands, or the person empowered to convey the lands or interested in the lands sought to be taken or which may suffer damage from the taking of materials sought to be taken, or the exercise of the powers sought to be exercised, or the doing of the thing sought to be done by the company; and 20

“(b) the company gives security to his satisfaction, by payment into Court, of a sum in his estimation sufficient to cover the probable compensation and costs of the arbitration, and not less than fifty per centum above the amount offered by the company in the notice mentioned in section two hundred and fifteen or certified by the surveyor or engineer under section two hundred and sixteen, whichever is larger; or, if the judge deems proper, pays the party in part and gives security for the balance.”

8. IRREGULARITY OF PROCEEDINGS GOES TO THE ROOT 30 OF THE BOARD’S JURISDICTION.

Under the provisions of Section 53 of the Railway Act, the Board is authorized to make general rules regulating its practice and procedure. By Section 50, any such rule when made and published by the Board has like effect as if enacted in the Railway Act. The said Sections are as follows :

“53. The Board may make general rules regulating, so far as not inconsistent with the express provisions of this Act, its practice and procedure.”

“50. Any rule, regulation, order or decision of the Board, shall, 40
when published by the Board, or by leave of the Board, for three weeks in the Canada Gazette, and while the same remains in force, have the like effect as if enacted in this Act, and all courts shall take judicial notice thereof.”

The Board did make and publish Rules pursuant to the above enactments, and accordingly such have the effect of a statute and are binding upon, and must be complied with, not only by the Board itself but parties involved in proceedings before the Board.

The Rules relevant to this proceeding are as follows :

10 “ 2. Every proceeding before the Board under the Railway Act shall be commenced by an application made to it, which shall be in writing and signed by the applicant or his solicitor; or in the case of a corporate body or company being the applicants shall be signed by their manager, secretary or solicitor. It shall contain a clear and concise statement of the facts, the grounds of application, the section of the Act under which the same is made, and the nature of the order applied for, or the relief or remedy to which the applicant claims to be entitled. It shall be divided into paragraphs, each of which, as nearly as possible, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively. It shall be endorsed with the name and address of the applicant, or if there be a solicitor acting for him in the matter, with the name and address of such solicitor. The application shall be according to the forms in schedule No. 1.

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35 “ The application, so written and signed as aforesaid, shall be left with or mailed to the Secretary of the Board and copies thereof mailed or delivered to the parties affected, together with a copy of any document, or copies, of any maps, plans, profiles, and books of reference, as required under the provisions of the Act, referred to therein, or which may be useful in explaining or supporting the same. The Secretary shall number such applications according to the order in which they are received by him, and make a list thereof. From the said list there shall be made up a docket of cases for hearing which, as well as their order of entry on the docket, shall be settled by the Board. Said docket list when completed to be put upon a notice board provided for that purpose, which shall be open for inspection at the office of the Secretary during office hours.

40 “ 3. Unless the Board otherwise directs, the respondent or respondents shall mail or deliver to the applicant, or his solicitor, a written statement containing in a clear and concise form their answer to the application, and shall also leave or mail a copy thereof with or to the Secretary of the Board at its office, together with any documents that may be useful in explaining or supporting it. The answer may admit the whole or any part of the facts in the application. It shall be divided into paragraphs, which shall be numbered consecutively, and it shall be signed by the person making the same, or his solicitor. It shall be endorsed with the name and address of the respondents, or if there be a solicitor acting for them in the

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matter, with the name and address of such solicitor. It shall be according to the form in schedule No. 2.

“(a) The time limit for filing and delivery of answer shall be as follows : Where the subject matter of the complaint arises east of Port Arthur, Ont., fifteen days ; between Port Arthur and the Western boundary of the Province of Saskatchewan, twenty days ; and West thereof, thirty days.”

“ 6. In all proceedings under the Act, where notice is required, a copy or copies of said proceeding, or proceedings, for the purpose of service, shall be endorsed with notice to the parties in the forms of endorsement set forth in schedules Nos. 1 and 2 ; and in default of appearance the Board may hear and determine the application *ex parte*. 10

“ Endorsements shall be signed in accordance with the provisions of Section 55 of the Railway Act.

“ The Board may enlarge or abridge the periods for putting in the answer or reply, and for hearing the application, and in that case the period shall be endorsed in the notice accordingly.

“ Except in any case where it is otherwise provided, ten days' notice of any application to the Board, or of any hearing of the Board, shall be sufficient ; unless, in any case, the Board directs longer notice. The Board may, in any case, allow notice for any period less than ten days, which shall be sufficient notice as if given for ten days or longer. (Section 57 of the Railway Act.) 20

“ Notice may be given or served as provided by Section 55 of the Act.

“ When the Board is authorized to hear an application or make an 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 ; but any 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 all 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. 30
as it may seem to it just and right. (Section 45 of the Railway Act.) 40

“(a) Any party to any matter, application, or complaint pending before the Board may set the same down for hearing at the next monthly sitting of the Board, upon giving at least ten days, or such shorter notice as the Board may order, to all parties interested.

“(b) When contested matters, applications, or complaints are ready for hearing, and are not at once set down by any party interested, the Secretary shall set the same down for the first sittings, commencing after the expiration of ten days (or such shorter notice as the Board may order) from the date of such setting down.

“(c) When a matter, application, or complaint is set down for hearing by the Secretary, he shall give ten days’ notice of hearing (or such shorter time as the Board may order) to all parties interested.”

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No attempt was made to comply with these rules, and no Order was made by the Board dispensing with compliance therewith or abridging any of the periods of time for taking any steps in the proceeding in question. No application was filed with the Board or served upon the Appellant prior to the hearing (Record, p. 316, l. 1), and no opportunity was afforded the Appellant to prepare for and present its opposition to the said application (Record, p. 317, l. 1).

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There was no ground of urgency which would have justified the lack of observance of the Rules or which would have entitled the Board to proceed under Section 59 of the Railway Act. The only ground of urgency suggested was to get the project under way for the relief of unemployment, which is not a ground of urgency contemplated by the Railway Act. In any event, a period of at least 24 days elapsed between the time the Board received the Mayor of Hamilton’s letter dated October 6, 1930 (Record, p. 319) and the date of the hearing, November 1, 1930, which afforded an ample opportunity for the proceedings to be taken in accordance with the Rules. Section 59 of the Railway Act above referred to is as follows :

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“59. Except as herein otherwise provided, when the Board is authorized 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.”

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There being no application properly before the Board for determination (Record, p. 316, l. 8) the Board had no jurisdiction to make the Order in question. In purporting to deal with this matter the Board had no more jurisdiction than a Civil Court would have to try and determine an issue between parties in respect of which no writ or other proceeding necessary to commence an action had been issued or filed, and in connection with which there were no pleadings as required by the Rules of Court.

These irregularities were not raised at the hearing, because the Appellant’s Counsel was assured by the Chairman of the Board at the hearing that there was no danger of anybody’s rights being interfered with or taken from them without compensation (Record, p. 343, l. 44). At the hearing the

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Board acted upon the assumption that the agreement between the Respondents dated October 20, 1930 (Record, p. 441) was valid and binding upon the Respondent City, which is not the fact. The agreement was executed pursuant to a resolution of the Respondent City's Council (Record, p. 446) and was not authorized by by-law until April 14, 1931 (Record, p. 447), five months after the date of Order No. 45813. The said agreement involved the Respondent City in expenditures not provided for in the estimates for the current year. The said resolution, by-law and/or agreement, were not submitted to any vote of the electors or otherwise sanctioned by any parliamentary, legislative or other constituted authority (Record, p. 315, 10 l. 13). The said agreement is not, therefore, binding upon the Respondent City by reason of the following provisions of the Municipal Act, R.S.O. (1927), C. 233 :

“ 297. (1) Except where otherwise provided by this or any other Act, a corporation shall not incur any debt the payment of which is not provided for in the estimates for the current year, unless a by-law of the council authorizing it has been passed with the assent of the electors.”

“ (2) Subsection 1 shall not apply to a by-law passed

“ (f) By the Council of any municipality, with the 20 approval of the Municipal Board, for raising such sum as is required to pay the share ordered to be paid by the corporation of the cost of any work constructed under the order of the Board of Railway Commissioners of Canada or of the Municipal Board or of any work or improvement which, in the opinion of the Municipal Board, has been rendered necessary or expedient, owing to the construction of any work ordered by either of the boards ” ;

The Board did not act of its own motion under Section 36 of the Railway Act. Section 36 is as follows : 30

“ 36. The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing, which under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.”

It is clear from the Mayor of Hamilton's letter to the Board, dated October 6, 1930 (Record, p. 319), the Board's telegram in reply (Record, p. 320), the Application filed (Record, p. 321), and from the terms of Order No. 45813 (Record, p. 350), that the Board did not act of its own motion in 40 this matter. Furthermore, the Board would have had no jurisdiction to make Order No. 45813 upon its own motion, because the main project was the diversion of the Respondent Railway's line. See

City of Hamilton v. The Toronto, Hamilton and Buffalo Railway Co.
(1914), 50 S.C.R. 128.

The Appellant submits that these irregularities in the proceedings are matters of substance affecting the Board's jurisdiction and are not mere matters of form.

CONCLUSION.

Upon the grounds and for the reasons above set forth the Appellant submits that the Board of Railway Commissioners for Canada had no jurisdiction to make paragraph 9 of said Order No. 45813, and that this appeal should be allowed with costs.

PIERRE BEULLAC,

Counsel for the Appellant,
The Bell Telephone Company of Canada.

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Factum of Toronto, Hamilton and Buffalo Railway Company.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

No. 147.
Factum of
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Company.

IN THE MATTER OF the joint application of the Toronto, Hamilton & Buffalo Railway Company, hereinafter called the "Applicant Company", and the Corporation of the City of Hamilton, hereinafter called the "City", under Sections 162, 178, 188, 199, 201, 252, 255, 256 and 262, and other appropriate sections of the Railway Act, for an Order approving and sanctioning the plan, profile and book of reference of the Applicant Company No. 2BRC, dated October 15th 1930, on file with the Board under File No. 20161; authorizing a deviation, change or alteration in the portion of the Applicant Company's railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton, and authorizing the said deviation, change or alteration from the present location of the said portion of the Applicant Company's railway, in accordance with the said plan, profile and book of reference; authorizing the Applicant Company to construct, maintain and operate the said portion of its railway between the said points, in accordance with the change in grades as shown on the said plan and profile; authorizing the Applicant Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John, Catharine, Ferguson, Young and Victoria by means of bridges, and to carry each of the said streets beneath the said tracks by means of a subway; to take, without the consent of the owners, the lands not now owned by the Applicant Company or the City, shown bordered

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in red ; directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington, and to divert Hunter, Aurora and Liberty Streets; authorizing a relocation of the Port Dover Line of the Canadian National Railways between Ferguson Avenue and Victoria Avenue, and the change in grade thereof; approving the new location of the Applicant Company's station and terminal buildings; directing the Hamilton Street Railway Company to reconstruct its tracks through and at each side of the subway at James Street,—all as shown on the said plan, profile and book of reference filed; and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the Railway; File No. 20161. 10

AND IN THE MATTER OF Order No. 45813, dated the 14th day of November, 1930, made by The Board of Railway Commissioners for Canada granting the said application.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA,

Appellant,

AND

THE TORONTO, HAMILTON & BUFFALO RAILWAY
COMPANY, and THE CORPORATION OF THE
CITY OF HAMILTON - - - - -

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-Respondents.

PART I.

1. This is an appeal by leave of the Honourable Mr. Justice Rinfret from Order No. 45813 of the Board of Railway Commissioners for Canada herein referred to as the " Board " dated November 14, 1930, directing The Bell Telephone Company of Canada to alter its works in order to carry out the changes in the railway of The Toronto, Hamilton and Buffalo Railway Company shown on Plan and Profile No. 2 B.R.C. The question submitted is as to the jurisdiction of the Board to make the Order. 30

2. The Railway of the Respondent, The Toronto, Hamilton and Buffalo Railway Company, herein referred to as the " Railway Company " was constructed in or about the year 1895 between Park Street and Victoria Avenue pursuant to By-law No. 755 of The Corporation of the City of Hamilton and the validating legislation mentioned in paragraph 7 of the Appeal Case and was carried along Hunter Street to John Street, and thence on the route specified in said By-law to Victoria Avenue and all as provided in said By-law crossing at grade the highways known as Charles Street, McNab Street, James Street, Hughson Street, John Street, Catharine Street, Baillie Street and Walnut Street, Ferguson Avenue, Liberty Street, Aurora Street, Wellington Street and Victoria Avenue. 40

3. Prior to said Order highway traffic on Charles, McNab, James, Hughson and John Streets was protected by gates and on Catharine,

Walnut and Wellington Streets and Ferguson Avenue by watchmen and on Victoria Avenue by a wigwag signal.

4. The Order of the Board No. 45813 authorized the Railway Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John and Catharine Streets, Ferguson Avenue, Young Street and Victoria Avenue by means of bridges and to carry said streets beneath the tracks of the Railway Company by means of a subway and eliminate the present level crossings at grade at such streets and further provided for the closing of the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington Streets within the limits shown on Plan 2 B.R.C. and to divert Hunter, Aurora and Liberty Streets as shown on said Plan. The Statement of Facts shows that in issuing the Order in question the Board was acting for the protection, safety and convenience of the public.

5. The Respondent the Corporation of the City of Hamilton and the Railway Company were in accord as to the necessity of the changes shown on said Plan and the Application to the Board was a joint Application of the City and the Railway Company.

6. The first intimation of the sittings of the Board at Hamilton on the 1st of November, 1930, was received by the Railway Company on 28th October, 1930, when the Mayor notified the Vice-President and General Manager of the Railway Company that the Board intended to sit at Hamilton on 1st November, 1930, and the joint Application of the City and the Railway Company dated October 30, 1930, was then prepared and signed. The Railway Company was not consulted by the Board as to the date of the sitting or as to filing any formal application or serving any parties with a copy of the said Application prior to the said sittings and the Board acted on its own motion. The Order of the Board was not issued until 14th November, 1930, and after the Appellant had had an opportunity to file its submissions which it did by letter dated 4th November, 1930, written by Pierre Beullac, K.C., its General Counsel, to the Chairman of the Board. The Board has heretofore taken the position that it had power to compel a public utility Company to make changes in its facilities to carry out grade separation projects.

PART II.—QUESTIONS FOR DECISION.

The points in issue are set out in the Order giving leave to appeal as follows :—

1. Had the Board of Railway Commissioners for Canada under the circumstances of the case jurisdiction under the Railway Act of Canada to provide in Order No. 45813 dated November 14, 1930, that the Bell Telephone Company of Canada should move, reconstruct, alter or change such of its works and facilities as might be affected by the construction of the Railway work authorized or directed by said Order?

2. Had the Board of Railway Commissioners for Canada jurisdiction in any event to make the said Order by reason of the claim of

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the Appellant that the proceedings before the said Board were irregularly taken and not properly brought before the Board in accordance with the rules established by the Board?

PART III.—ARGUMENT.

1. In regard to the power of the Dominion Parliament to enact the material sections of the Railway Act it is submitted that the question is really governed by the following decisions :—

Toronto Corporation v. Canadian Pacific Ry. 1908 A.C. 54.
Toronto Railway Co. v. City of Toronto 1920 A.C. 426.
City of Toronto v. Grand Trunk Ry. 1906 37 S.C.R. 232. 10
County of Carleton v. City of Ottawa 1909 41 S.C.R. 552.
Toronto Railway Co. v. City of Toronto (Avenue Road) 1916 53 S.C.R. 222.

2. The Board acted in this matter for the protection, safety and convenience of the public and therefore had full jurisdiction, under the provisions of the Railway Act above referred to, to make the Order.

City of Toronto v. Grand Trunk Railway 1906 37 S.C.R. 232.
Ottawa Electric Ry. Co. v. City of Ottawa 1906 37 S.C.R. 354.
James Bay Ry. Co. v. Grand Trunk Ry. 1906 37 S.C.R. 372.
Toronto Corporation v. Canadian Pacific Ry. 1908 A.C. 54.
Toronto Railway Co. v. City of Toronto (Avenue Road) 1916 53 S.C.R. 222. 20
Toronto Railway Co. v. City of Toronto (Queen Street) 1920 A.C. 426.
Canadian Pacific Ry. v. Toronto Transportation Company 1930 A.C. 686.

See also :

Grand Trunk Ry. v. City of Kingston 1903 8 Ex. C.R. 349 (4 C.R.C. 102).

3. The decision of the Judicial Committee of the Privy Council in *British Columbia Electric Railway Company vs. Vancouver, Victoria & Eastern Railway and Navigation Company* is distinguishable from the present case.

British Columbia Electric Ry. Co. v. Vancouver, Victoria & E. Ry. & Nav. Co. 1914 A.C. 1067. 30
Toronto Railway Co. v. City of Toronto (Avenue Road) 1916 53 S.C.R. 222.
Toronto Railway Co. v. City of Toronto (Queen Street Bridge Case) 1920 A.C. 426.

4. The decision of the Board on the question as to whether the Appellant is a party interested in or affected by the works in question is in reality a decision on a point of fact and under the Act is final and conclusive on the parties.

City of Toronto v. Grand Trunk Railway 1906 37 S.C.R. 232.
James Bay Ry. Co. v. Grand Trunk Railway 1906 37 S.C.R. 372.
County of Carleton v. City of Ottawa 1909 41 S.C.R. 552. 40

See also :

In re Canadian Pacific Ry. and Township and County of York 1898 25 O.A.R. 65.
Grand Trunk Railway v. Cedar Dale 1906 7 C.R.C. 73.

5. The Board's decision in this case is in harmony with the practice which it has uniformly followed as indicated by the following decisions :

City of Toronto v. Grand Trunk Railway 1906 37 S.C.R. 232.

Ottawa Electric Ry. v. City of Ottawa 1906 37 S.C.R. 354.

County of Carleton v. City of Ottawa 1909 41 S.C.R. 552.

See also :

In re Canadian Pacific Ry. and Township and County of York 1898
25 O.A.R. 65.

Grand Trunk Railway v. Cedar Dale 1906 7 C.R.C. 73.

10 *Hamilton Street Ry. v. Grand Trunk Ry. (Kenilworth Avenue)* 1914
17 C.R.C. 393.

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6. Sections 34, 39, 257 and 259 of the Railway Act are in part as follows :

“ 34. 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.”

“ 39. (1) 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.

30 (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.

40 “ 257. (1) 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

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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 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 such portion or crossing, if any, or any other crossing directly or indirectly affected. 10

(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.

(3) The Board may exercise supervision in the construction of 20 any work ordered by it under this section, or may give directions respecting such supervision."

" 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." 30

7. The Appellant is not the Owner of lands with a conveyable interest within the meaning of Section 2, subsection 18 of the Railway Act :

" (18) " owner ", when, under the provisions of this Act or the Special Act, any notice is required to be given to the owner of any lands, or when any act is authorized or required to be done with the consent of the owner, means any person who, under the provisions of this Act, or the Special Act, or any Act incorporated therewith, is enabled to sell and convey the lands to the company, and includes also a mortgagee of the lands ; "

8. The Board's practice has been to direct a public utility Company 40 such as is the Appellant to make such changes as are required in grade separation projects and to do so at its own expense and without compensation.

Bell Telephone Co. of Canada vs. Canadian Pacific Ry. et al 14 C.R.C. p. 14.

City of Toronto v. Canadian National Ry. et al 32 C.R.C. p. 304.

9. The Board may hear a matter of its own motion. See sections 19, 20, 36, 37 and 57 of the Railway Act :

“ 19. (1) 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.”

“ 20. Subject to the provisions of this Act, the Board may make rules and provisions respecting

(a) the sittings of the Board;

(b) the manner of dealing with matters and business before the Board;

(c) the apportionment of the work of the Board among its members, and the assignment of members to sit at hearings, and to preside thereat; and

(d) generally, the carrying on of the work of the Board, the management of its internal affairs, and the duties of its officers and employees;

and in the absence of other rule or provision as to any such matter, such matter shall be in the charge and control of the Chief Commissioner or such other member or members of the Board as the Board directs.”

“ 36. The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.”

“ 37. Any power or authority vested in the Board may, though not so expressed be exercised from time to time, or at any time, as the occasion may require.”

“ 57. Unless otherwise provided, fifteen days' notice of any application to the Board, or of any hearing by the Board, shall be sufficient: Provided that the Board may in any case direct longer notice or allow notice for any period less than fifteen days.”

10. Rule 6 of the Rules and Regulations of the Board reads in part as follows :

“ 6. When the Board is authorized to hear an application or make an order, upon notice to the parties interested, it may, upon

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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; but any 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 all 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.”

Rule 26 of the Rules and Regulations of the Board reads as follows :

“ 26. No proceedings under the Act shall be defeated or affected by any technical objections or any objections based upon defects in form merely.”

11. The Appellant has not obtained authority to carry its lines, wires and conductors over or beneath the railway of the Railway Company as required by section 372 of the Railway Act, which section reads as follows :

“ 372. (1) Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in subsection five of this section, be constructed or maintained.

(a) along or across a railway, by any company other than the railway company owning or controlling the railway; or

(b) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

(2) Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works.

(3) The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

(4) Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

(5) Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under section

three hundred and sixty-seven of this Act, nor for the maintenance of works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes."

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The present section is derived from Section 246 of the Railway Act R.S.C. 1906, Chap. 37, reading as follows :—

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10 " 246. (1) No lines or wires for telegraphs, telephones, or the conveyance of light, heat, power or electricity, shall be erected, placed or maintained across the railway without leave of the Board.

(2) Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway proposed to be affected, showing the proposed location of such lines and wires and the works contemplated in connection therewith.

(3) The Board may grant such application and may order by whom, how, when, and on what terms and conditions, and under what supervision, such work shall be executed.

20 (4) Upon such order being made such lines and wires may be erected, placed and maintained across the railway subject to and in accordance with such order."

Section 246 was amended by 9-10 Edward VII Chap. 50 section 4 by adding the following subsection :—

" 5. An order of the Board shall not be required in the cases in which telephone, telegraph or electric light wires are erected across the railway with the consent of the company in accordance with any general regulations, plans or specifications adopted or approved by the Board for such purposes."

30 In 1911, 1-2 George 5, Chap. 22, Section 7, Sec. 4 of Chap. 50 of the Statutes of 1910 was repealed and the following subsection 5 was added to Section 246—

" 5. An order of the Board shall not be required in cases in which wires or other conductors for the transmission of electrical energy are to be erected or maintained over or under a railway, or over or under wires or other conductors for the transmission of electrical energy with the consent of the railway company or the company owning or controlling such last mentioned wires or conductors, in accordance with any general regulations, plans or specifications adopted or approved by the Board for such purposes."

40 In 1917 by 7-8 George 5, Chap. 37, Section 4, subsection 1 of section 246 of said Act was amended by inserting immediately after the word "maintained" in the third line thereof the words, "along or."

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In the Railway Act 1919, 9-10 George 5, Chap. 68, Sec. 372 appears in its present form.

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FOR THESE REASONS this Respondent therefore respectfully submits that the Order of the Board should not be disturbed and that this appeal should be dismissed with costs.

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Railway
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W. N. TILLEY

JOHN A. SOULE

Of Counsel for the Respondent,
The Toronto, Hamilton and
Buffalo Railway Company.

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poration of
the City of
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No. 148.

Factum of the Corporation of the City of Hamilton.

PART I.—THE FACTS.

1. This is an appeal by leave of the Honourable Mr. Justice Rinfret from Order No. 45813 of the Board of Railway Commissioners for Canada herein referred to as the "Board" dated November 14, 1930, directing the Bell Telephone Company of Canada to alter its works in order to carry out the changes in the railway of the Toronto, Hamilton and Buffalo Railway Company shown on Plan and Profile No. 2 B.R.C. The question submitted is as to the jurisdiction of the Board to make the Order.

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2. The Railway of the Respondent, the Toronto, Hamilton and Buffalo Railway Company, herein referred to as the "Railway Company" was constructed in or about the year 1895 between Park Street and Victoria Avenue pursuant to By-law No. 755 of the Corporation of the City of Hamilton and the validating legislation mentioned in paragraph 7 of the Statement of Facts in the Appeal Case and was carried along Hunter Street to John Street, and thence on the route specified in said By-law to Victoria Avenue and all as provided in said By-law crossing at grade the highways known as Charles Street, McNab Street, James Street, Hughson Street, John Street, Catharine Street, Baillie Street and Walnut Street, Ferguson Avenue, Liberty Street, Aurora Street, Wellington Street and Victoria Avenue.

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3. Prior to the said Order highway traffic on Charles, McNab, James, Hughson and John Streets was protected by gates and on Catharine, Walnut and Wellington Streets and Ferguson Avenue by watchmen and on Victoria Avenue by a wigwag signal.

4. The Order of the Board No. 45813 authorized the Railway Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John and Catharine Streets, Ferguson Avenue, Young Street and Victoria Avenue by means of bridges and to carry said streets beneath the

tracks of the Railway Company by means of a subway and eliminate the present level crossings at grade at such streets and further provided for the closing of the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington Streets within the limits shown on Plan 2 B.R.C. and to divert Hunter, Aurora and Liberty Streets as shown on said Plan. The Statement of Facts shows that in issuing the Order in question the Board was acting for the protection, safety and convenience of the public.

10 5. The Respondent the Corporation of the City of Hamilton and the Railway Company were in accord as to the necessity of the changes shown on said Plan and the Application to the Board was a joint Application of the City and the Railway Company.

20 6. The first intimation of the sittings of the Board at Hamilton on the 1st of November, 1930, was received by the Railway Company on 28th October, 1930, when the Mayor notified the Vice-President and General Manager of the Railway Company that the Board intended to sit at Hamilton on 1st November, 1930, and the joint Application of the City and the Railway Company dated October 30, 1930, was then prepared and signed. The Railway Company was not consulted by the Board as to the date of the sitting or as to filing any formal application or serving any parties with a copy of the said Application prior to the said sittings and the Board acted on its own motion. The Order of the Board was not issued until 14th November, 1930, and after the Appellant had had an opportunity to file its submissions which it did by letter dated 4th November, 1930, written by Pierre Beullac, K.C., its General Counsel, to the Chairman of the Board. The Board has heretofore taken the position that it had power to compel a public utility Company to make changes in its facilities to carry out grade separation projects.

PART II.—QUESTIONS FOR DECISION.

30 The points in issue are set out in the Order giving leave to appeal as follows :—

1. Had the Board of Railway Commissioners for Canada under the circumstances of the case jurisdiction under the Railway Act of Canada to provide in Order No. 45813 dated November 14, 1930, that the Bell Telephone Company of Canada should move, reconstruct, alter or change such of its works and facilities as might be affected by the construction of the Railway work authorized or directed by said Order ?

40 2. Had the Board of Railway Commissioners for Canada jurisdiction (in any event) to make the said Order in the present proceeding, the Appellant claiming that the said proceedings were irregularly taken and not properly brought before the Board in accordance with the rules established by the Board ?

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PART III.—ARGUMENT.

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1. In regard to the power of the Dominion Parliament to enact the material sections of the Railway Act it is submitted that the question is determined by the following decisions :—

Toronto Corporation v. Canadian Pacific Ry. 1908 A.C. 54.
Toronto Railway Co. v. City of Toronto 1920 A.C. 426.
City of Toronto v. Grand Trunk Ry. 1906 37 S.C.R. 232.
County of Carleton v. City of Ottawa 1909 41 S.C.R. 552.
Toronto Railway Co. v. City of Toronto (Avenue Road) 1916 53 S.C.R. 222.

2. The Board acted in this matter for the protection, safety and 10
convenience of the public and therefore had full jurisdiction, under the
provisions of the Railway Act above referred to, to make the Order.

City of Toronto v. Grand Trunk Railway 1906 37 S.C.R. 232.
Ottawa Electric Ry. Co. v. City of Ottawa 1906 37 S.C.R. 354.
James Bay Ry. Co. v. Grand Trunk Ry. 1906 37 S.C.R. 372.
Toronto Corporation v. Canadian Pacific Ry. 1908 A.C. 54.
Toronto Railway Co. v. City of Toronto (Avenue Road) 1916 53 S.C.R. 222.
Toronto Railway Co. v. City of Toronto (Queen Street) 1920 A.C. 426.
Canadian Pacific Ry. v. Toronto Transportation Company 1930 A.C. 686.

See also :

Grand Trunk Ry. v. City of Kingston 1903 8 Ex. C.R. 349 (4 C.R.C. 102). 20

3. The decision of the Judicial Committee of the Privy Council in *British Columbia Electric Railway Company vs. Vancouver, Victoria & Eastern Railway and Navigation Company* is distinguishable from the present case.

British Columbia Electric Ry. Co. v. Vancouver, Victoria & E. Ry. & Nav. Co. 1914 A.C. 1067.
Toronto Railway Co. v. City of Toronto (Avenue Road) 1916 53 S.C.R. 222.
Toronto Railway Co. v. City of Toronto (Queen Street Bridge Case) 1920
A.C. 426. 30

4. The decision of the Board on the question as to whether the Appellant is a party interested in or affected by the works in question is in reality a decision on a point of fact and under the Act is final and conclusive on the parties.

City of Toronto v. Grand Trunk Railway 1906 37 S.C.R. 232.
James Bay Ry. Co. v. Grand Trunk Railway 1906 37 S.C.R. 372.
County of Carleton v. City of Ottawa 1909 41 S.C.R. 552.

See also :

In re Canadian Pacific Ry. and Township and County of York 1898
25 O.A.R. 65. 40
Grand Trunk Railway v. Cedar Dale 1906 7 C.R.C. 73.

5. The Board's decision in this case is in harmony with the practice which it has uniformly followed as indicated by the following decisions :

City of Toronto v. Grand Trunk Railway 1906 37 S.C.R. 232.

Ottawa Electric Ry. v. City of Ottawa 1906 37 S.C.R. 354.

County of Carleton v. City of Ottawa 1909 41 S.C.R. 552.

See also :

In re Canadian Pacific Ry. and Township and County of York 1898
25 O.A.R. 65.

Grand Trunk Railway v. Cedar Dale 1906 7 C.R.C. 73.

10 *Hamilton Street Ry. v. Grand Trunk Ry. (Kenilworth Avenue)* 1914
17 C.R.C. 393.

6. Sections 34, 39, 257 and 259 of the Railway Act are in part as follows :

“ 34. 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.”

“ 39. (1) 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.

30 (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.

40 “ 257. (1) 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

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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 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 such portion or crossing, if any, or any other crossing directly or indirectly 10 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.

(3) The Board may exercise supervision in the construction of 20 any work ordered by it under this section, or may give directions respecting such supervision."

" 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." 30

7. The Appellant is not the Owner of lands with a conveyable interest within the meaning of Section 2, subsection 18 of the Railway Act :

" (18) " owner ", when, under the provisions of this Act or the Special Act, any notice is required to be given to the owner of any lands, or when any act is authorized or required to be done with the consent of the owner, means any person who, under the provisions of this Act, or the Special Act, or any Act incorporated therewith, is enabled to sell and convey the lands to the company, and includes also a mortgagee of the lands ; "

8. The Board's practice has been to direct a public utility Company 40 such as is the Appellant to make such changes as are required in grade separation projects and to do so at its own expense and without compensation.

Bell Telephone Co. of Canada vs. Canadian Pacific Ry. et al 14 C.R.C.
p. 14.

City of Toronto v. Canadian National Ry. et al 32 C.R.C.—304.

9. Paragraph 10 of the said order of the Board, Number 45813, provides that the apportionment of the costs of the works referred to in the said order shall be reserved for further consideration on a date to be fixed by the Board, and the said date has not yet been fixed.

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10. The Board may hear a matter of its own motion. See sections 19, 20, 36, 37 and 57 of the Railway Act :

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“ 19. (1) 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.

10 (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.”

“ 20. Subject to the provisions of this Act, the Board may make rules and provisions respecting

(a) the sittings of the Board ;

(b) the manner of dealing with matters and business before the Board ;

20 (c) the apportionment of the work of the Board among its members, and the assignment of members to sit at hearings, and to preside thereat ; and

(d) generally, the carrying on of the work of the Board, the management of its internal affairs, and the duties of its officers and employees ;

and in the absence of other rule or provision as to any such matter, such matter shall be in the charge and control of the Chief Commissioner or such other member or members of the Board as the Board directs.”

30 “ 36. The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.”

“ 37. Any power or authority vested in the Board may, though not so expressed, be exercised from time to time, or at any time, as the occasion may require.”

40 “ 57. Unless otherwise provided, fifteen days’ notice of any application to the Board, or of any hearing by the Board, shall be sufficient : Provided that the Board may in any case direct longer notice or allow notice for any period less than fifteen days.”

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poration of
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11. Rule 6 of the Rules and Regulations of the Board reads in part as follows :

“ 6. When the Board is authorized to hear an application or make an 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; but any person entitled to notice, and not sufficiently notified 10 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 all 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.” The Appellant has made no application to the Board under the said rule to vary, amend or rescind the said order of the Board, Number 45813. 20

Rule 26 of the Rules and Regulations of the Board reads as follows :

“ 26. No proceedings under the Act shall be defeated or affected by any technical objections or any objections based upon defects in form merely.”

12. The Appellant has not obtained authority to carry its lines, wires and conductors over or beneath the railway of the Railway Company as required by section 372 of the Railway Act, which section reads as follows :

“ 372. (1) Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, 30 without leave of the Board, except as provided in subsection five of this section, be constructed or maintained.

(a) along or across a railway, by any company other than the railway company owning or controlling the railway; or

(b) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

(2) Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway 40 or other work proposed to be affected, showing the proposed location and the proposed works.

(3) The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

(4) Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

(5) Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under section three hundred and sixty-seven of this Act, nor for the maintenance of works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes."

10

The present section is derived from Section 246 of the Railway Act R.S.C. 1906, Chap. 37, reading as follows :—

" 246. (1) No lines or wires for telegraphs, telephones, or the conveyance of light, heat, power or electricity, shall be erected, placed or maintained across the railway without leave of the Board.

(2) Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway proposed to be affected, showing the proposed location of such lines and wires and the works contemplated in connection therewith.

20

(3) The Board may grant such application and may order by whom, how, when, and on what terms and conditions, and under what supervision, such work shall be executed.

(4) Upon such order being made such lines and wires may be erected, placed and maintained across the railway subject to and in accordance with such order."

Section 246 was amended by 9-10 Edward VII Chap. 50, section 4, by adding the following subsection :—

" 5. An order of the Board shall not be required in the cases in which telephone, telegraph or electric light wires are erected across the railway with the consent of the company in accordance with any general regulations, plans or specifications adopted or approved by the Board for such purposes."

30

In 1911, by 1-2 George 5, Chap. 22, Section 7, Sec. 4 of Chap. 50 of the Statutes of 1910 was repealed and the following subsection 5 was added to Section 246—

" 5. An order of the Board shall not be required in cases in which wires or other conductors for the transmission of electrical energy are to be erected or maintained over or under a railway, or over or under wires or other conductors for the transmission of electrical energy with the consent of the railway company or the company owning or controlling such last mentioned wires or conductors, in accordance with any general regulations, plans or specifications adopted or approved by the Board for such purposes."

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continued.

In 1917 by 7-8 George 5, Chap. 37, Section 4, subsection 1 of section 246 of said Act was amended by inserting immediately after the word "maintained" in the third line thereof, the words, "along or."

In the Railway Act 1919, 9-10 George 5, Chap. 68, Sec. 372 appears in its present form.

FOR THESE REASONS this Respondent respectfully submits that the Order of the Board should not be disturbed and that this appeal should be dismissed with costs.

G. W. MASON,

A. J. POLSON,

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Counsel for the Respondent,
The Corporation of the City of Hamilton.

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Formal Judgment.

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS
FOR CANADA.

Tuesday the 1st day of March, A.D. 1932.

Present :

The Right Honourable F. A. ANGLIN, C.J.C., P.C.

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The Right Honourable Mr. Justice DUFF, P.C.

The Honourable Mr. Justice RINERET.

The Honourable Mr. Justice LAMONT.

IN THE MATTER OF the joint application of the Toronto, Hamilton and Buffalo Railway Company, hereinafter called the "Applicant Company," and the Corporation of the City of Hamilton, hereinafter called the "City," under Sections 162, 178, 188, 199, 201, 252, 256, and 262, and other appropriate sections of the Railway Act, for an Order approving and sanctioning the plan, profile, and book of reference of the Applicant Company, No. 2BRC, dated October 15th, 1930, on file with the Board under file No. 20161: authorising a deviation, change, or alteration in the portion of the Applicant Company's Railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton, and authorizing the said deviation, change, or alteration from the present location of the said portion of the Applicant Company's railway

10 in accordance with the said plan, profile, and book of reference; authorizing the Applicant Company to construct, maintain, and operate the said portion of its railway between the said points, in accordance with the change in grades as shown on the said plan and profile: authorizing the Applicant Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John, Catherine, Ferguson, Young and Victoria by means of bridges, and to carry each of the said streets beneath the said tracks by means of a subway: to take, without the consent of the owners, the lands not now owned by the Applicant Company or the City, shown bordered in red: directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta, and Wellington, and to divert Hunter, Aurora, and Liberty Street: authorizing a relocation of the Port Dover Line of the Canadian National Railways between Ferguson Avenue and Victoria Avenue, and the change in grade thereof: approving the new location of the Applicant Company's station and terminal buildings: directing the Hamilton Street Railway Company to reconstruct its tracks through and at each side of the subway at James Street:—all as shown on the said plan, profile, and book of reference filed: and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the railway: File No. 20161.

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tinued.

AND IN THE MATTER OF Order No. 45813, dated the 14th day of November, 1930, made by the Board of Railway Commissioners for Canada, granting the said application.

BETWEEN

THE BELL TELEPHONE COMPANY OF CANADA - *Appellant*

AND

30 THE TORONTO, HAMILTON & BUFFALO RAIL-
WAY COMPANY, AND THE CORPORATION OF
THE CITY OF HAMILTON - - - - *Respondents.*

40 The appeal of the above-named appellant from Order No. 45813 of the Board of Railway Commissioners for Canada dated the 14th day of November, A.D. 1930, in the above matter, having come on to be heard before this Court, on the 27th day of October, in the year of our Lord one thousand nine hundred and thirty-one, constituted as above with the addition of the Honourable Mr. Justice Newcombe, C.M.G., since deceased, in the presence of counsel as well for the appellant as for the respondents, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was dismissed, and that the said Order No. 45813

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of the Board of Railway Commissioners for Canada, should be and the same was affirmed.

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AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said appellant should and do pay to the said respondents the costs incurred by the said respondents in this Court.

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tinued.*

(Sgd.) J. F. SMELLIE,
Registrar.

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No. 150.

Reasons for Judgment.

(a) ANGLIN C.J.C.

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(b) RINFRET J. (Concurred in by DUFF and LAMONT JJ.)

(Same as No. 16, at p. 48.)

APPEALS
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APPEALS NOS. 1 TO 8 INCLUSIVE.

*In the
Privy
Council.*

No. 151.

Order in Council granting special leave to appeal to His Majesty in Council and consolidating eight appeals.

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Order in
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AT THE COURT AT BUCKINGHAM PALACE

The 21st day of July, 1932.

Present,

THE KING'S MOST EXCELLENT MAJESTY

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LORD CHANCELLOR
LORD IRWIN

LORD TYRBELL
SIR HENRY BETTERTON

SIR HORACE AVORY.

WHEREAS there was this day read at the Board eight Reports from the Judicial Committee of the Privy Council dated the 12th and 19th day of July 1932 in the words following viz. :—

“WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition (No. 1) of the Bell Telephone Company of Canada in the matter of an Appeal 30

from the Supreme Court of Canada in the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway at D'Argenson Street in the City of Montreal between Point St. Charles and St. Henri as shown on General Plan No. YIE 31.51.4 dated April 15th 1930, on file with the Board under File No. 9437.319.7. between the Petitioners Appellants and the Canadian National Railways Respondents setting forth (amongst other matters) that the Petitioners desire to obtain special leave to appeal from a Judgment of the Supreme Court dated the 1st March 1932 dismissing an Appeal by the Petitioners from an Order of the Board of Railway Commissioners for Canada dated the 16th September 1930 which authorised the Respondents to construct a subway at D'Argenson Street in the City of Montreal on the line of the Respondents' Railway and directed the Petitioners and other Public Utility Companies to move such of their utilities as might be affected by the construction of the subway and reserved all questions of costs for further consideration: that the Petitioners appealed from the Order of the Board only so far as that Order directed the Petitioners to move such of their utilities as might be affected by the construction of the said subway: that the Appeal was one of a series of eight Appeals from similar Orders made by the Board affecting a number of Public Utility Companies which were argued together and dealt with by one Judgment of the Supreme Court delivered by Rinfret J. approved of by Anglin C.J.C. and concurred in by Duff and Lamont JJ.: that the late Mr. Justice Newcombe died whilst the Judgment was under consideration: and reciting the facts out of which the Petition arises: that the main questions are as follows:—(a) Whether the construction and completion of the subway and all works appurtenant thereto including the work of removing and replacing the Petitioners' utilities is not fully provided for by the Special Act of the Parliament of Canada (the Canadian National Montreal Terminals Act 19–20 Geo. V. Ch. 12) thereinbefore referred to and whether by the terms of the Special Act, as well as by the terms of the Canadian National Railways Act (R.S.C. 1927 Ch. 172) as amended by 19–20 Geo. V. Ch. 10 the Board of Railway Commissioners for Canada have no jurisdiction under the Railway Act of Canada to deal with the subway crossing at D'Argenson Street; (b) Whether jurisdiction is conferred by the provisions of Section 256 or by any other provision of the Railway Act upon the Board of Railway Commissioners to order the Petitioners to move and destroy their utilities without compensation; (c) Whether the removal and restoration of the Petitioners' utilities and compensation for consequent damage are not provided for by Sections 162, 163 and 164 of the Railway Act; (d) Whether the Petitioners' statutory right to construct and maintain their utilities beneath the surface of D'Argenson Street and the utilities themselves constitute land

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or an interest in land within the meaning of the statutory definition thereof contained in the said Railway Act and in the Expropriation Act R.S.C. 1927 Ch. 64 and should be compensated for as therein provided and not by way of possible reimbursement after removal; (e) Whether the Board had any power to make the Order appealed from against the Petitioners without hearing the Petitioners: And humbly praying Your Majesty in Council to grant to the Petitioners special leave to appeal from the Judgment of the Supreme Court dated the 1st March 1932 or for such further or other Order as to Your Majesty in Council may appear fit:

“AND WHEREAS by virtue of the aforesaid Order in Council there was also referred unto this Committee a humble Petition (No. 2) of the Bell Telephone Company of Canada in the matter of an Appeal from the Supreme Court of Canada in the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th 1930, and filed with the Board under File No. 9437.319.13. between the Petitioners Appellants and the Canadian National Railways Respondents 10 setting forth (amongst other matters) that the Petitioners desire to obtain special leave to appeal from a Judgment of the Supreme Court dated the 1st March 1932 dismissing an Appeal by the Petitioners from an Order of the Board of Railway Commissioners for Canada dated the 9th September 1930 which authorised the Respondents to construct a subway on St. Antoine Street in the City of Montreal and directed the Petitioners and other Public Utility Companies to move such of their utilities as might be affected by the construction of the subway and reserved all questions of costs for further consideration; that the Petitioners appealed 20 from the Order of the Board only so far as that Order directed the Petitioners to move such of their utilities as might be affected by the construction of the subway: and reciting the facts out of which the Petition arises: that the main questions are as follows:—(a) Whether the construction and completion of the subway and all works appurtenant thereto including the work of removing and replacing the Petitioners' utilities is not fully provided for by the Special Act of the Parliament of Canada (the Canadian National Montreal Terminals Act 19–20 Geo. V. Ch. 12) thereinbefore referred to and whether by the terms of the Special Act as well 30 as by the terms of the Canadian National Railways Act (R.S.C. 1927 Ch. 172) as amended by 19–20 Geo. V. Ch. 10 the Board of Railway Commissioners for Canada have no jurisdiction under the Railway Act of Canada to deal with the said subway crossing at St. Antoine Street; (b) Whether jurisdiction is conferred by the provisions of the said Section 256 or by any other provision of the Railway Act upon the Board of Railway Commissioners to order 40

the Petitioners to move and destroy their utilities without compensation; (c) Whether the removal and restoration of the Petitioners' utilities and compensation for consequent damage are not provided for by Sections 162, 163 and 164 of the Railway Act; (d) Whether all the works necessary for carrying out the construction of the subway in question are not to be provided by the Respondents at their own cost and expense under Section 260 of the Railway Act; (e) Whether the Petitioners' statutory right to construct and maintain their utilities beneath the surface of the said St. Antoine Street and the utilities themselves constitute land or an interest in land within the meaning of the statutory definition thereof contained in the Railway Act and in the Expropriation Act R.S.C. 1927 Ch. 64 and should be compensated for as therein provided and not by way of possible reimbursement after removal; (f) Whether the Board had any power to make the Order appealed from against the Petitioners without hearing the Petitioners; And humbly praying Your Majesty in Council to grant to the Petitioners special leave to appeal from the Judgment of the Supreme Court dated the 1st March 1932 or for such further or other Order as to Your Majesty in Council may appear fit :

" AND WHEREAS by virtue of the aforesaid Order in Council there was also referred unto this Committee a humble Petition (No. 3) of the Montreal Light Heat and Power Consolidated in the matter of an Appeal from the Supreme Court of Canada in the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at D'Argenson Street in the City of Montreal between Point St. Charles and St. Henri as shown on General Plan YIE 31.51.4 dated April 15th 1930 on file with the Board under File No. 9437.319.7. between the Petitioners Appellants and the Canadian National Railways Respondents setting forth (amongst other matters) that the Petitioners desire to obtain special leave to appeal from a Judgment of the Supreme Court dated the 1st March 1932 dismissing an Appeal by the Petitioners from an Order of the Board of Railway Commissioners for Canada dated the 16th September 1930 which authorised the Respondents to construct a subway on D'Argenson Street in the City of Montreal on the line of the Respondent's Railway and directed the Petitioners and other Public Utility Companies to move such of their utilities as might be affected by the construction of the subway and reserved all questions of costs for further consideration : that the Petitioners appealed from the Order of the Board only so far as that Order directed the Petitioners to move such of their utilities as might be affected by the construction of the subway : and reciting the facts out of which the Petition arises : that the main questions are as follows :—(a) Whether the construction and completion of the subway and all works appurtenant thereto including the work of

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removing and replacing the Petitioners' utilities is not fully provided for by the Special Act of the Parliament of Canada (the Canadian National Montreal Terminals Act 19-20 Geo. V. Ch. 12) thereinbefore referred to and whether by the terms of the Special Act as well as by the terms of the Canadian National Railways Act (R.S.C. 1927 Ch. 172) as amended by 19-20 Geo. V. Ch. 10 the Board of Railway Commissioners for Canada have no jurisdiction under the Railway Act of Canada to deal with the said subway crossing at D'Argenson Street; (b) Whether the jurisdiction is conferred by the provisions of the said Section 256 or by any other provision of the Railway Act upon the Board of Railway Commissioners to order the Petitioners to remove and destroy their utilities without compensation; (c) Whether the removal and restoration of the Petitioners' utilities and compensation for consequent damage are not provided for by Sections 162, 163 and 164 of the Railway Act; (d) Whether the Petitioners' statutory right to construct and maintain their utilities beneath the surface of D'Argenson Street and the utilities themselves constitute land or an interest in land within the meaning of the statutory definition thereof contained in the said Railway Act and in the Expropriation Act R.S.C. 1927 Ch. 64 and should be compensated for as therein provided and not by way of possible reimbursement after removal; (e) Whether the Board had any power to make the Order appealed from against the Petitioners without hearing the Petitioners: And humbly praying Your Majesty in Council to grant to the Petitioners special leave to appeal from the Judgment of the Supreme Court dated the 1st March 1932 or for such further or other Order as to Your Majesty in Council may appear fit:

"AND WHEREAS by virtue of the aforesaid Order in Council there was also referred unto this Committee a humble Petition (No. 4) of the Montreal Light Heat and Power Consolidated in the matter of an Appeal from the Supreme Court of Canada in the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway on St. Antoine Street in the City of Montreal as shown on General Plan YIA 31.10.4 dated the 16th August 1930, and filed with the Board under File No. 9437.319.13. between the Petitioners Appellants and the Canadian National Railways Respondents setting forth (amongst other matters) that the Petitioners desire to obtain special leave to appeal from a Judgment of the Supreme Court dated the 1st March 1932 dismissing an Appeal by the Petitioners from an Order of the Board of Railway Commissioners for Canada dated the 9th September 1930 which authorised the Respondents to construct a subway on St. Antoine Street in the City of Montreal and directed the Petitioners and other Public Utility Companies to move such of their utilities as might be affected by the construction of the subway and reserved

all questions of costs for further consideration : that the Petitioners appealed from the Order of the Board only so far as that Order directed the Petitioners to move such of their utilities as might be affected by the construction of the subway : and reciting the facts out of which the Petition arises : that the main questions are as follows :—(a) Whether the construction and completion of the subway and all works appurtenant thereto including the work of removing and replacing the Petitioners' utilities is not fully provided for by the Special Act of the Parliament of Canada (the Canadian National Montreal Terminals Act 19-20 Geo. V. Ch. 12) thereinbefore referred to and whether by the terms of the Special Act, as well as by the terms of the Canadian National Railways Act (R.S.C. 1927 Ch. 172) as amended by 19-20 Geo. v. Ch. 10 the Board of Railway Commissioners for Canada have no jurisdiction under the Railway Act of Canada to deal with the subway crossing at St. Antoine Street; (b) Whether jurisdiction is conferred by the provisions of Section 256 or by any other provision of the Railway Act upon the Board of Railway Commissioners to order the Petitioners to move and destroy their utilities without compensation; (c) Whether the removal and restoration of the Petitioners' utilities and compensation for consequent damage are not provided for by Sections 162, 163 and 164 of the Railway Act; (d) Whether all the works necessary for carrying out the construction of the subway in question are not to be provided by the Respondents at their own cost and expense under Section 260 of the Railway Act; (e) Whether the Petitioners' statutory right to construct and maintain their said utilities beneath the surface of St. Antoine Street and the utilities themselves constitute land or an interest in land within the meaning of the statutory definition thereof contained in the said Railway Act and in the Expropriation Act R.S.C.1927 Ch. 64 and should be compensated for as therein provided and not by way of possible reimbursement after removal; (f) Whether the Board had any power to make the Order appealed from against the Petitioners without hearing the Petitioners : And humbly praying Your Majesty in Council to grant to the Petitioners special leave to appeal from the Judgment of the Supreme Court dated the 1st March 1932 or for such further or other Order as to Your Majesty in Council may appear fit :

“AND WHEREAS by virtue of the aforesaid Order in Council there was also referred unto this Committee a humble Petition (No. 5) of the Montreal Tramways Company and the Montreal Tramways Commission in the matter of an Appeal from the Supreme Court of Canada in the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a subway at D'Argenson Street in the City of Montreal between Point St. Charles and St. Henri as shown on General Plan YIE 31.51.4. dated April 15th 1930 on

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file with the Board under File No. 9437.319.7. between the Petitioners Appellants and the Canadian National Railways Respondents setting forth (amongst other matters) that the Petitioners desire to obtain special leave to appeal from a Judgment of the Supreme Court dated the 1st March, 1932, dismissing an Appeal by the Petitioners from an Order of the Board of Railway Commissioners for Canada dated the 16th September, 1930, which authorised the Respondents to construct a subway on D'Argenson Street in the City of Montreal on the line of the Respondents' Railway and directed the Petitioners and other Public Utility Companies 10 to move such of their utilities as might be affected by the construction of the subway and reserved all questions of costs for further consideration: that the Petitioners appealed from the Order of the Board only so far as that Order directed the Petitioners to move such of their utilities as might be affected by the construction of the subway: and reciting the facts out of which the Petition arises: that the main questions are as follows:—(a) Whether the construction and completion of the subway and all works appurtenant thereto including the work of removing and replacing the Petitioners' utilities is not fully provided for by the Special Act of the Parliament 20 of Canada (the Canadian National Montreal Terminals Act 19-20 Geo. V. Ch. 12) thereinbefore referred to and whether by the terms of the Special Act, as well as by the terms of the Canadian National Railways Act (R.S.C. 1927 Ch. 172) as amended by 19-20 Geo. V. Ch. 10 the Board of Railway Commissioners for Canada have no jurisdiction under the Railway Act of Canada to deal with the subway crossing at D'Argenson Street; (b) Whether jurisdiction is conferred by the provisions of the said Section 256 or by any other provision of the Railway Act upon the Board of Railway Commissioners to order the Petitioners to move and destroy their 30 utilities without compensation; (c) Whether the removal and restoration of the Petitioners' utilities and compensation for consequent damage are not provided for by Sections 162, 163, and 164 of the Railway Act; (d) Whether the Petitioners' statutory rights to construct and maintain their utilities on and in the said D'Argenson Street and the utilities themselves constitute land or an interest in land within the meaning of the statutory definition thereof contained in the Railway Act and in the Expropriation Act R.S.C. 1927 Ch. 64 and should be compensated for as therein provided and not by way of possible reimbursement after removal: And 40 humbly praying Your Majesty in Council to grant to the Petitioners special leave to appeal from the Judgment of the Supreme Court dated the 1st March 1932 or for such further or other Order as to Your Majesty in Council may appear fit:

“AND WHEREAS by virtue of the aforesaid Order in Council there was also referred unto this Committee a humble Petition (No. 6) of the Montreal Tramways Company and the Montreal

- Tramways Commission in the matter of an Appeal from the Supreme Court of Canada in the matter of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act, for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4 dated August 16th, 1930, and filed with the Board under File No. 9437. 319.13 between the Petitioners Appellants and the Canadian National Railways Respondents setting forth (amongst other matters) that the Petitioners desire to obtain special leave to appeal from a Judgment of the Supreme Court of Canada dated the 1st March, 1932 dismissing an Appeal by the Petitioners from an Order of the Board of Railway Commissioners for Canada dated the 9th September, 1930 which authorised the Respondents to construct a subway on St. Antoine Street in the City of Montreal and directed the Petitioners and other Public Utility Companies to move such of their utilities as might be affected by the construction of the subway and reserved all questions of costs for further consideration: that the Petitioners appealed from the Order of the Board only so far as that Order directed the Petitioners to move such of their utilities as might be affected by the construction of the subway: and reciting the facts out of which the Petition arises: that the main questions are as follows:—(a) Whether the construction and completion of the subway and all works appurtenant thereto including the work of removing and replacing the Petitioners' utilities is not fully provided for by the Special Act of the Parliament of Canada (the Canadian National Montreal Terminals Act 19–20 Geo. V. Ch. 12) therein before referred to and whether by the terms of the Special Act as well as by the terms of the Canadian National Railways Act (R.S.C. 1927 Ch. 172) as amended by 19–20 Geo. V. Ch. 10 the Board of Railway Commissioners for Canada have no jurisdiction under the Railway Act of Canada to deal with the subway crossing at St. Antoine Street; (b) Whether jurisdiction is conferred by the provisions of Section 256 or by any other provision of the Railway Act upon the Board of Railway Commissioners to order the Petitioners to move and destroy their utilities without compensation; (c) Whether the removal and restoration of the Petitioners' utilities and compensation for consequent damage are not provided for by Sections 162, 163 and 164 of the Railway Act; (d) Whether all the works necessary for carrying out the construction of the subway in question are not to be provided by the Respondents at their own cost and expense under Section 260 of the Railway Act; (e) Whether the Petitioners' statutory right to construct and maintain their utilities on and in St. Antoine Street and the utilities themselves constitute land or an interest in land within the meaning of the statutory definition thereof contained in the said Railway Act and in the Expropriation Act R.S.C. 1927 Ch. 64 and should be compensated for as therein

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provided and not by way of possible reimbursement after removal :
And humbly praying Your Majesty in Council to grant to the
Petitioners special leave to appeal from the Judgment of the
Supreme Court dated the 1st March 1932 or for such further or
other Order as to Your Majesty in Council may appear fit :

“ AND WHEREAS by virtue of the aforesaid Order in Council
there was also referred unto this Committee a humble Petition
(No. 7) of the Bell Telephone Company of Canada in the matter
of an Appeal from the Supreme Court of Canada in the matter
of the Application of the Canadian National Railways for an Order 10
under Sections 178 and 257 of the Railway Act for Authority to
construct a subway under their tracks where they cross St. Clair
Avenue in the City of Toronto Province of Ontario and to divert
the main line of the railway to the west as shown on Plan and
profile No. C-6426 dated November 20th 1930 on file with the
Board under File No. 32453.11 between the Petitioners Appellants
and the Canadian National Railways Respondents setting forth
(amongst other matters) that the Petitioners desire to obtain special
leave to appeal from a Judgment of the Supreme Court of Canada
dated the 1st March 1932 dismissing an Appeal by the Petitioners 20
from an Order of the Board of Railway Commissioners for Canada
dated the 8th June 1931 which authorised the Respondents to
construct a subway on St. Clair Avenue in the City of Toronto and
to divert the main line of railway to the west and directed the
Petitioners and other Public Utility Companies to move such of
their utilities as might be affected by the construction of the subway
and reserved all questions of costs for further consideration : that
the Petitioners appealed from the Order of the Board only so far as
that Order directed the Petitioners to move such of their utilities
as might be affected by the construction of the subway : and 30
reciting the facts out of which the Petition arises : that the main
questions are as follows:—(a) Whether jurisdiction is conferred
by the provisions of Section 256 or by any other provision of the
Railway Act upon the Board of Railway Commissioners to order
the Petitioners to move and destroy their utilities without com-
pensation ; (b) Whether the removal and restoration of the Peti-
tioners' utilities and compensation for consequent damage are not
provided for by Sections 162, 163 and 164 of the Railway Act ;
(c) Whether the Petitioners' statutory right to construct and 40
maintain their utilities beneath the surface of St. Clair Avenue
and the utilities themselves constitute land or an interest in land
within the meaning of the statutory definition thereof contained
in the Railway Act and should be compensated for as therein
provided and not by way of possible reimbursement after removal ;
(d) Whether the Board had any power to make the Order appealed
from against the Petitioners without hearing the Petitioners :
And humbly praying Your Majesty in Council to grant to the

Petitioners special leave to appeal from the Judgment of the Supreme Court dated the 1st March 1932 or for such further or other Order as to Your Majesty in Council may appear fit:

“AND WHEREAS by virtue of the aforesaid Order in Council there was also referred unto this Committee a humble Petition (No. 8) of the Bell Telephone Company of Canada in the matter of an Appeal from the Supreme Court of Canada in the matter of the joint Application of the Toronto Hamilton and Buffalo Railway Company, thereafter called the ‘Applicant Company’ and the Corporation of the City of Hamilton thereafter called the ‘City’ under Sections 162, 178, 188, 199, 201, 252, 255, 256 and 262, and other appropriate sections of the Railway Act, for an Order approving and sanctioning the plan profile and book of reference of the Applicant Company, No. 2 BRC, dated the 15th October 1930, on file with the Board under file No. 20161; authorising a deviation change or alteration in the portion of the Applicant Company’s railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton and authorising the said deviation change or alteration from the present location of the said portion of the Applicant Company’s railway in accordance with the said plan profile and book of reference authorising the Applicant Company to construct maintain and operate the said portion of its railway between the said points in accordance with the change in grades as shown on the said plan and profile authorising the Applicant Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John, Catharine, Ferguson, Young and Victoria by means of bridges and to carry each of the said streets beneath the said tracks by means of a subway; to take, without the consent of the owners the lands not now owned by the Applicant Company or the City shown bordered in red; directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta, and Wellington, and to divert Hunter, Aurora and Liberty Streets; authorising a relocation of the Port Dover Line of the Canadian National Railways between Ferguson Avenue and Victoria Avenue and the change in grade thereof; approving the new location of the Applicant Company’s station and terminal buildings; directing the Hamilton Street Railway Company to reconstruct its tracks through and at each side of the subway at James Street—all as shown on the said plan profile and book of reference filed and directing all public utility companies affected to reconstruct alter or change the respective works of each to carry out the changes in the railway; File No. 20161; and in the matter of Order No. 45813 dated the 14th November 1930 made by the Board of Railway Commissioners for Canada granting the Application between the Petitioners Appellants and the Toronto Hamilton and Buffalo

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Railway Company and the Corporation of the City of Hamilton Respondents setting forth (amongst other matters) that the Petitioners desire to obtain special leave to appeal from a Judgment of the Supreme Court dated the 1st March 1932 dismissing an Appeal by the Petitioners from an Order of the Board of Railway Commissioners for Canada dated the 14th November 1930: and reciting the facts out of which the Petition arises: that the main questions are as follows:—(a) Whether jurisdiction is conferred by the provisions of the said Section 256 or by any other provision of the Railway Act upon the Board of Railway Commissioners to order the Petitioners to move and destroy their utilities without compensation; (b) Whether the removal and restoration of the Petitioners' utilities and compensation for consequent damage are not provided for by Sections 162, 163, and 164 of the Railway Act; (c) Whether the Board has jurisdiction to order the closing by a Municipality of streets within the jurisdiction of the Municipality and to order the removal of public utilities from such streets; (d) Whether the Board has such jurisdiction when such closing is for the purpose of enabling a Railway Station to be built thereon or for a purpose incidental thereto; (e) Whether the Board has such jurisdiction when such closing is not necessary for the purposes of the Railway; (f) Whether the Board has jurisdiction to order the removal and destruction of Public Utilities in and about a street agreed to be closed by a Municipality by virtue of an agreement between the Municipality and a Railway Company; (g) Whether the Petitioners' statutory right to construct and maintain their utilities upon and beneath the surface of the streets in the City of Hamilton and the utilities themselves constitute land or an interest in land within the meaning of the statutory definition thereof contained in the said Railway Act and should be compensated for as therein provided and not by way of possible reimbursement after removal: And humbly praying Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Supreme Court dated the 1st March 1932 or for such further or other Order as to Your Majesty in Council may appear fit."

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petitions into consideration and having heard Counsel in support thereof and in opposition to Petitions Nos. 3, 4, 5, 6 and 8 only Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that leave ought to be granted to the Petitioners to enter and prosecute their Appeals against the Judgments of the Supreme Court of Canada dated the 1st day of March 1932 upon depositing in the Registry of the Privy Council the sum of £1,000 as security for costs (2) that the Appeals ought to be consolidated and heard together upon one Printed Case on each side

and (3) that the authenticated copies under seal of the Records produced by the Petitioners upon the hearing of the Petitions ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeals."

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HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

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- 10 Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

Exhibits.

EXHIBITS IN APPEALS Nos. 1 to 8 INCLUSIVE.

 APPEAL
 No. 1.

APPEAL No. 1.Schedule
No. 1.

**Schedule No. 1.—Plan for Construction of Subway at d'Argenson Street, No. YIE 31. 51.4,
15th April 1930.**

(Separate document.)
 Schedule
 No. 2.
 Extracts
 from Special
 Acts of
 Incorpora-
 tion of
 Appellant.
Schedule No. 2.—Extracts from Special Acts of Incorporation of Appellant.

AN ACT to incorporate "The Bell Telephone Company of Canada," 43 Victoria (1880), Chapter 67, as amended by 45 Victoria (1882), Chapter 95; 47 Victoria (1884), Chapter 88; 55-56 Victoria (1892), Chapter 67; 57-58 Victoria (1894), Chapter 108; 2 Edward VII (1902), Chapter 41; 6 Edward VII (1906), Chapter 61; 10-11 George V. (1920), Chapter 100, and 19 George V. (1929), Chapter 93. 10

The said Company shall have power to manufacture telephones and other apparatus connected therewith, and their appurtenances and other instruments, used in connection with the business of a telegraph or telephone company, and also such other electrical instruments and plant as the said Company may deem advisable, and to purchase, sell or lease the same and rights relating thereto, and to build, establish, construct, purchase, acquire or lease, and maintain and operate, or sell or let any line or lines for the transmission of messages by telephone, in Canada or elsewhere, and to make connection, for the purpose of telephone business, with the line or lines of any telegraph or telephone company in Canada or elsewhere, and to aid or advance money to build or work any such line to be used for telephone purposes; and also to borrow such sum of money not exceeding the amount of the paid-up capital of the Company as the Directors shall deem necessary for carrying out any of the objects or purposes of this Act, and to issue bonds therefor in sums of not less than one hundred dollars each, which shall be a first charge upon the whole lines, works and plant of the Company, in such sums and at such rate of interest, and payable at such times and places, as the Directors shall determine: Provided always that nothing in this Act shall be construed to authorize the Company to issue any note payable to the bearer thereof, or any promissory note intended to be circulated as money (45 Victoria (1882), Chapter 95, Sec. 1). 20 30

The said Company may construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways,

streets, bridges, water-courses or other such places, or across or under any navigable waters, either wholly in Canada or dividing Canada from any other country, provided the said Company shall not interfere with the public right of travelling on or using such highways, streets, bridges, water-courses or navigable waters; and provided that in cities, towns and incorporated villages the Company shall not erect any pole higher than forty feet above the surface of the street, nor affix any wire less than twenty-two feet above the surface of the street, nor carry more than one line of poles along any street without the consent of the Municipal Council having jurisdiction

10 over the streets of the said city, town or village, and that in any city, town or incorporated village, the poles shall be as nearly as possible straight and perpendicular, and shall, in cities, be painted if so required by any by-law of the Council; and provided further, that where lines of telegraph are already constructed, no poles shall be erected by the Company in any city, town or incorporated village along the same side of the street where such poles are already erected, unless with the consent of the Council having jurisdiction over the streets of such city, town or incorporated village: Provided also, that in so doing the said Company shall not cut down or mutilate any tree; and provided that in cities, towns and incorporated villages, the location

20 of the line or lines, and the opening up of the street for the erection of poles or for carrying the wires under ground shall be done 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, and that the surface of the street shall, in all cases, be restored to its former condition by and at the expense of the Company: Provided also, that no Act of Parliament requiring the Company (in case efficient means are devised for carrying telephone wires under ground) to adopt such means, and abrogating the right given by this section, to continue carrying lines on poles through cities, towns or incorporated villages, shall be deemed an infringement of the privileges granted

30 by this Act; and provided further, that whenever in case of fire, it becomes necessary for its extinction or the preservation of property that the telephone wires should be cut, the cutting under such circumstances of any of the wires of the Company under the direction of the chief engineer or other officer in charge of the fire brigade, shall not entitle the Company to demand or claim compensation for any damages that might be so incurred. (43 Victoria (1880), Chap. 67, Sec. 3; 45 Victoria (1882), Chap. 95, Sec. 2.)

Any person who shall wilfully or maliciously injure, molest or destroy any of the lines, posts or other material or property of the Company, or in any way wilfully obstruct or interfere with the working of the said

40 telephone lines, or intercept any message transmitted thereon, shall be guilty of a misdemeanour. (43 Victoria (1880), Chap. 67, Sec. 25.)

The said Company shall have power to purchase, lease or otherwise acquire and hold all such real estate as may, from time to time, be deemed requisite for the purposes of the Company, and also to sell, lease or otherwise dispose of, and to mortgage, pledge or incumber, such real estate or any part or parts thereof from time to time, in such manner and on such terms as they deem fit. (43 Victoria (1880), Chap. 67, Sec. 26.)

Exhibits.

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APPEAL
No. 1.—
Schedule
No. 2.Extracts
from Special
Acts of
Incorporation of
Appellant—
continued.

Exhibits.
 ———
 APPEAL
 No. 1.
 ———
 Schedule
 No. 2.
 Extracts
 from Special
 Acts of
 Incorpora-
 tion of
 Appellant—
continued.

The said Company shall have power, subject to existing rights, to extend its telephone lines from any one to any other of the several Provinces in the Dominion of Canada, and from any point in Canada to any point in the United States of America. (45 Victoria (1882), Chap. 95, Sec. 3.)

The said Act of incorporation as hereby amended, and the works there-
 under authorized, are hereby declared to be for the general advantage of
 Canada. (45 Victoria (1882), Chap. 95, Sec. 4.)

**Schedule No. 3.—Judgment of Board of Railway Commissioners for Canada directing
 investigation by Board's Engineer.**

Schedule
 No. 3.
 Judgment
 of Board of
 Railway
 Commis-
 sioners for
 Canada
 directing
 investiga-
 tion by
 Board's
 Engineer,
 27th May
 1927.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

10

Application for :

- (a) The elimination of all level crossings in the City of Montreal, on the lines of the Canadian National Railways, from the Bonaventure terminus westward to such points within the City as may be considered advisable ;
- (b) The complaint of the Business Men's Association of Montreal East, submitted by Mr. C. Robitaille, M.P., with respect to crossings in Montreal East, from Moreau Street Station to the Bout de l'Île, on the Canadian National Railways ;
- (c) Consideration of a general scheme for grade separation within the 20
 City of Montreal, on the Canadian National Railways, and the
 electrification of steam engines within the said city.

Files Nos. 13571 ; 9437.319 ; 9437.635 ; 9437.1141 ; 24218 ; 24218.1 ;
 27419 ; 35162 ; 34904.

THOMAS VIEN, K.C., the Deputy Chief Commissioner :

JUDGMENT.

These matters were heard in Montreal, on May 10th, 1927, before
 Mr. Commissioner Boyce, Mr. Commissioner Lawrence and myself.

There appeared before us :

ALISTAIR FRASER, K.C. (Commission Counsel), for the Canadian 30
 National Railways.

PAUL MERCIER, K.C., M.P., and HON. ALFRED LEDUC, M.P.P., for
 the various interests included in St. Henri, St. Cunegonde and other western
 parts of Montreal.

W. H. BUTLER, K.C., for the Corporation of the City of Montreal.

J. K. SMITH, for the Montreal Board of Trade.

FRANCOIS FAUTEUX, for the City of Verdun.

J. C. GROVES-CONTANT and S. OUMET, for the Montreal Chamber of Commerce.

C. N. ARMSTRONG, for the Montreal Central Terminal Company.

PIERRE BEULLAC, K.C., for the Bell Telephone Company.

WILLIAM TREMBLAY, for Maisonneuve.

WILLIAM L. BEST, for the Brotherhood of Locomotive Firemen and Enginemen.

W. L. SCOTT, K.C., for the New York Central Railway Company.

Exhibits.

APPEAL
No. 1.

Schedule
No. 3.

Judgment
of Board of
Railway
Commis-
sioners for
Canada
directing
investiga-
tion by
Board's
Engineer,
27th May
1927—con-
tinued.

10 The question of grade separation, or the abolition of grade crossings on the Canadian National Railways' tracks between Turcot Yard and Bonaventure Station, and St. Henri and Point St. Charles, was raised by the Montreal District Board of Trade in 1910. In the same year, the Mayor, in his inaugural address, stated that, among other things, the efforts of the Board of Control would be in the direction of urging the consideration of plans for the abolition of railway crossings on the street level. The matter was also referred to by Ex-Mayor Payette in his valedictory address, and by Alderman Lapointe in his reply to the inaugural address. On the 12th April, 1910, the Board made an Order (No. 10117) fixing the 28th April as the date for hearing the question of doing away with all level crossings 20 referred to by the Board of Trade of the District of Montreal, particularly those of the Grand Trunk Railway in the City of Montreal, west of Bonaventure Station. The City of Montreal, the Montreal Street Railway, the Montreal Water Power Company, the City Waterworks of Montreal, the Bell Telephone Company, the Canadian Pacific Railway Telegraph Company, the Great North-western Telegraph Company, and the Grand Trunk Railway were made parties to the proceedings.

At the hearing, there was no discussion as to the necessity of the construction of a viaduct, it appearing to be the general opinion that there should be grade separation, and Mr. Archambault, for the City, stated that 30 the City of Montreal was ready to abide by any decision which might be given by the Board in connection with the question of elevation of the tracks of the Grand Trunk Railway, and further, that the City had been given permission to borrow \$2,000,000 as its share of the cost of track elevation.

After further discussion, it was agreed that the Grand Trunk Railway should have until the 1st August to prepare preliminary plans and, after considerable delay, the railway filed plans about the end of April, 1911, and at a hearing in Montreal on the 18th May, 1911, the City asked for further delay so that it could prepare plans, together with criticism of the Grand Trunk proposition, which delay was granted.

40 The plan submitted by the railway shows track elevation from Bonaventure Station to the east end of the Turcot Yard, which I will call Section A, and from St. Henri Station to the west end of the Point St. Charles Yard at Wellington Street, which I will call Section B. On Section A there are street openings shown at Mountain, Guy, St. Martin, Chatham, Fulford, Vinet, Atwater, Rose de Lima, St. Henry Place, St. Marguerite

Exhibits.
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 APPEAL
 No. 1.
 —
 Schedule
 No. 3.
 Judgment
 of Board of
 Railway
 Commis-
 sioners for
 Canada
 directing
 investiga-
 tion by
 Board's
 Engineer,
 27th May
 1927—con-
 tinued.

and St. Elizabeth (now De Courcelles) Streets, and at Cote St. Paul Road (now St. Remi Street). The distances between these openings vary from 580 feet to 14900 feet.

On Section B openings are shown at Notre Dame, St. Ambroise, St. Patrick, Atwater, D'Argenson, Charlevoix, Hibernia and Wellington, varying in distance apart from 670 feet to 1610 feet.

The estimate of the Company, which is not of much value now, for a four track viaduct (five tracks from Atwater Avenue to the Bonaventure Station) and not including the station, amounted to \$5,600,000. In order to provide for this number of tracks, considerable land would have to be acquired. Mr. Mountain, then Chief Engineer of the Board, made estimates (1) of what it would cost to elevate the Grand Trunk Railway tracks at present on the level, and (2) in addition, what it would cost to elevate all the ground that the Grand Trunk now have without adding additional tracks, but leaving the embankment ready for additional tracks, if required, and not including the structures for the additional tracks. The estimate for the former was \$4,046,952.80 and for the latter \$5,000,000.

At the hearing in Montreal, 22nd February, 1912, it was practically decided that all the streets should be left open except one near Mountain Street. That would mean some thirty-one openings in all. As to seniority, it was claimed that twelve of the streets were in existence at the time the railway was built, and are therefore senior to the railway. The list follows :

Mountain,
 Aqueduct,
 Guy,
 Richmond,
 Seigneurs,
 Chatham,
 Canning,
 Upper Lachine Road (St. Henri Square),
 Côte St. Paul Road (now St. Remi Street),
 Charlevoix,
 Notre Dame (St. Henri Station),
 and Wellington, a total of 12.

The railway claimed seniority at the following :

Versailles	St. Philippe
Lusignan	St. Marguerite
St. Martin	St. Elizabeth (now De Courcelles Street)
Fulford	Notre Dame
Dominion	St. Ambroise
Vinet	St. Patrick
Atwater	Atwater
Rose de Lima	D'Argenson
Convent or Metcalfe	Hibernia
St. Ferdinand	

a total of 19.

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Between 1912 and 1916 a great deal of discussion took place, many details were settled, and on the 25th February, 1916, Mr. Mountain, Chief Engineer of the Board, made a new estimate of the cost of grade separation, placing it at \$7,680,787.00.

The matter dragged on until 1920, by which time everything had advanced so much in price that all the parties, apparently, were content to let it die, and nothing appears on the file as to grade separation since the above date.

Herewith is a list of the crossings where accidents have occurred, 10 the dates and the cause where it was ascertainable :

ST. HENRI SQUARE (Gates) :

October 10th, 1926 1 killed.
March 11th, 1914 1 injured.

ST. MARTIN STREET (Gates) :

January 22nd, 1910 1 injured.
October 9th, 1926 1 killed.

ST. ELIZABETH STREET (now De Courcelles Street) :

November 12th, 1910 1 killed. Passed under gates.
May 29th, 1913 1 killed. Passed under gates.
20 August 24th, 1918 1 injured. Passed under gates.
May 31st, 1921- 1 killed. Passed under gates.
October 14th, 1921 1 injured. Improper operation of gates.
January 6th, 1924 1 injured. Passed under gates.
May 4th, 1926 1 injured. Improper operation of gates.

VINET STREET :

February 21st, 1908 1 killed. Gates out of order.
June 5th, 1911 1 killed. Passed under gates.
December 22nd, 1914 1 killed. Intoxicated.
December 5th, 1916 1 killed. Walking on track.
30 May 15th, 1918 1 killed. Passed under gates.
October 18th, 1919 1 killed. Passed under gates.

ATWATER AVENUE :

October 8th, 1909 1 injured. Passed under gates.
November 11th, 1914 Ambulance wrecked. Gates being rebuilt. Two watchmen on duty.
November 25th, 1914 1 killed.
February 5th, 1916 1 killed. Passed under gates.
September 5th, 1918 1 injured. New gates being installed. Crossing protected by watchman.
40 October 2nd, 1923 1 injured. Passed under gates.
October 15th, 1924 1 injured. Passed under gates.
December 19th, 1925 1 injured. Passed under gates.

ST. MARGUERITE STREET :

February 27th, 1909- 1 killed. No protection.
December 20th, 1915 1 injured. No protection. Gates installed 1918.

Exhibits.
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APPEAL
No. 1.
—
Schedule
No. 3.
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of Board of
Railway
Commissioners for
Canada
directing
investigation
by
Board's
Engineer,
27th May
1927—con-
tinued.

Exhibits.	ROSE DE LIMA STREET :				
—	August 20th, 1907	-	-	-	1 injured.
APPEAL	May 5th, 1908	-	-	-	2 injured.
No. 1.	August 10th, 1913	-	-	-	1 injured. Passed under gates.
—	February 5th, 1921	-	-	-	1 injured.
Schedule	AQUEDUCT STREET :				
No. 3.	November 25th, 1911	-	-	-	1 killed. Passed under gates.
Judgment	August 1st, 1918	-	-	-	1 injured. Passed under gates.
of Board of	July 17th, 1922	-	-	-	1 injured. Passed under gates.
Railway	July 23rd, 1924	-	-	-	1 injured. Passed under gates.
Commis-					
sioners for	LUSIGNAN STREET :				
Canada	November 4th, 1925	-	-	-	1 injured. Passed under gates.
directing	April 21st, 1926	-	-	-	1 injured. Passed under gates.
investiga-	CHATHAM STREET :				
tion by	September 23rd, 1913	-	-	-	1 killed. No witnesses. Gates.
Board's	December 14th, 1917	-	-	-	1 killed. Passed under gates.
Engineer,	October 15th, 1918	-	-	-	1 injured. Passed under gates.
27th May	May 10th, 1920	-	-	-	1 injured. Passed under gates.
1927—con-	June 19th, 1920	-	-	-	1 injured. Passed under gates.
tinued.	April 19th, 1924	-	-	-	1 injured. Passed under gates.
	RICHMOND STREET :				
	September 9th, 1909	-	-	-	1 killed. Gates not lowered in time.
	January 17th, 1919	-	-	-	2 injured. Passed under gates.
	March 1st, 1921	-	-	-	1 injured. Trespasser.
	January 18th, 1923	-	-	-	1 killed, 1 injured. Passed under gates.
	September 22nd, 1925	-	-	-	1 injured. Passed under gates.
	June 7th, 1926	-	-	-	1 injured. Passed under gates.
	August 1st, 1926	-	-	-	1 injured. Passed under gates.
	CANNING STREET :				
	July 27th, 1915	-	-	-	1 killed. Passed under gates.
	October 13th, 1923	-	-	-	1 killed, 1 injured. Passed under gates.
	December 18th, 1923	-	-	-	1 injured. Passed under gates.
	ST. PHILIPPE STREET :				
	March 23rd, 1906	-	-	-	1 killed. No protection.
	August 6th, 1906	-	-	-	1 injured. No protection.
	December 12th, 1908	-	-	-	1 injured. No protection.
	February 2nd, 1916	-	-	-	1 injured. No protection. Gates installed 1918.
	September 13th, 1921	-	-	-	1 injured. Passed under gates.
	October 29th, 1923	-	-	-	1 injured. Passed under gates.
	February 2nd, 1924	-	-	-	1 injured. Passed under gates.
	NOTRE DAME STREET (near St. Ferdinand) :				
	December 28th, 1907	-	-	-	Collision between engine and street car. No one hurt.
	March 29th, 1908	-	-	-	1 trespasser injured.
	October 8th, 1908	-	-	-	1 injured. Passed under gates.
	October 28th, 1924	-	-	-	1 killed. Passed under gates.
	ST. AMBROISE STREET :				
	November 18th, 1913	-	-	-	1 killed. No protection. Gates installed 1918.

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						Exhibits.
HIBERNIA ROAD :						—
	October 23rd, 1911	-	-	1 injured.	Passed under gates.	APPEAL
	November 17th, 1913	-	-	1 injured.	Passed under gates.	No. 1.
	December 28th, 1918	-	-	1 injured.	Passed under gates.	—
	January 26th, 1919	-	-	1 injured.	Passed under gates.	Schedule
	December 6th, 1922	-	-	1 injured.	Passed under gates.	No. 3.
CONVENT STREET :						Judgment
	June 10th, 1909	-	-	1 injured.	No protection.	of Board of
	April 20th, 1913	-	-	1 injured.	Day watchman.	Railway
10	August 7th, 1916	-	-	1 injured.	Day watchman.	Commis-
	January 20th, 1917	-	-	2 injured.	Day watchman.	sioners for
	November 20th, 1917	-	-	1 injured.	Day watchman. Gates installed	Canada
					1918.	directing
FULFORD STREET :						investiga-
	May 27th, 1912	-	-	1 killed.	Passed under gates.	tion by
	June 9th, 1914	-	-	1 injured.	Passed under gates.	Board's
	June 22nd, 1920	-	-	1 killed.	Passed under gates.	Engineer,
						27th May
GUY STREET :						1927—con-
	November 1st, 1911	-	-	Collision with street car.	2 injured. Gate pro-	tinued.
20					tection and interlocking plant.	
	November 22nd, 1911	-	-	1 injured.	Engineer passed stop signal.	
	May 30th, 1914	-	-	1 injured.	Passed under gates.	
	December 9th, 1917	-	-	8 injured.	Collision with street car. Engineer	
					passed stop signal.	
	June 30th, 1922	-	-	1 injured.	Passed under gates.	
	July 8th, 1924	-	-	1 injured.	Passed under gates.	
VERSAILLES STREET :						
	December 10th, 1910	-	-	1 injured.	Passed under gates.	
	March 18th, 1913	-	-	2 injured.	Gates improperly operated.	
30	February 16th, 1918-	-	-	1 killed, 1 injured.	Gates improperly operated.	
	October 3rd, 1924	-	-	1 injured.	Passed under gates.	
MOUNTAIN STREET :						
There are thirteen tracks across Mountain Street, some protected by gates and others by watchmen.						
	August 12th, 1912	-	-	1 killed.	Passed under gates.	
	June 7th, 1913	-	-	1 killed.	Warned by conductor to keep off track.	
	October 28th, 1919	-	-	1 injured.	Passed under gates.	
	February 3rd, 1922	-	-	1 killed.	Flagman left crossing.	
	November 7th, 1925	-	-	1 injured.	Boy ran into side of car.	
40	ST. REMI STREET (Côte St. Paul Road) :					
	October 26th, 1908	-	-	1 killed.	Passed under gates.	
	February 9th, 1911	-	-	1 killed, 1 injured.	Passed under gates.	
	February 22nd, 1913	-	-	1 killed.	Passed under gates.	
	February 4th, 1914	-	-	1 injured.	Horse bolted under gates.	
	November 3rd, 1916	-	-	1 killed.	Passed under gates.	
	November 29th, 1916	-	-	1 injured.	Passed under gates.	
	July 25th, 1917	-	-	1 injured.	Passed under gates.	
	April 10th, 1920	-	-	1 injured.	Gates improperly operated.	
	April 4th, 1923	-	-	1 injured.	Passed under gates.	
50	October 21st, 1924	-	-	1 injured.	Passed under gates.	

Exhibits.

APPEAL
No. 1.

Schedule
No. 3.

Judgment
of Board of
Railway
Commis-
sioners for
Canada
directing
investiga-
tion by
Board's
Engineer,
27th May
1927—con-
tinued.

The above list, which is probably incomplete during the earlier years of the Board, covers the period from 1906 to the end of 1925 and shows that thirty-four people were killed and eighty-three people were injured. Quite a number of these accidents occurred through the improper operation of gates. It is the practice of some of the gatemen to leave the gates down for some minutes at a time until vehicles require to cross. During the intervals when the gates are down unnecessarily, pedestrians naturally get tired of waiting and pass under the gates. This sort of thing soon gets to be a habit, and eventually someone gets caught.

In 1925, the business men of St. Henri made application to the Board for relief and proposed that an overhead bridge for pedestrians be constructed at De Courcelles Street and one for general traffic connecting St. James and Notre Dame Streets, in the vicinity of St. Marguerite Street. The latter would cost a large amount, and, if constructed, would have to be scrapped in the event of a general scheme for grade separation being undertaken. 10

At Montreal, on the 10th of May, 1927, appearing on behalf of the City of Montreal, Mr. Butler (volume 512, page 8415 *et s.*) stated: "I do not think there can be any doubt—at all events it is the opinion of the Corporation of the City of Montreal—that these level crossings, at all events from Bonaventure west, are dangerous and they should disappear, both because they are dangerous and for the inconvenience and delay they cause to the circulation of traffic." 20

Mr. Fraser, appearing on behalf of the Canadian National Railways (volume 512, page 8418 *et s.*), stated: "Mr. Chairman, on behalf of the Canadian National Railways, we recognize that the time has arrived when the whole question of grade crossings in the City of Montreal will have to be faced. It was dealt with, as the Board knows, some years ago, and for various reasons it had to be postponed; but it will have to be faced in the immediate future." And at page 8419: "The Board might appoint your own Chief Engineer to take hold of the whole situation and make a report to the Board on what the situation is to-day." And further: "I am in agreement with Mr. Butler in that respect, except that I go further and suggest that this procedure be adopted, and so far as we are concerned, speaking for the management, we are prepared now to face the situation in a large way." 30

Mr. Paul Mercier, M.P., on behalf of the citizens of St. Henri, and the Honourable Alfred Leduc, M.P.P., on behalf of St. Cunegonde and other western parts of Montreal, also expressed their gratification at seeing the Board set this matter down for hearing and requested the Board energetically to deal with the whole problem. 40

This matter is of great importance and we must proceed very carefully. There is a great deal of money involved and a scheme of elimination must be evolved which will give the greatest possible degree of protection and convenience to the public, with the least possible expenditure of money.

Under Section 69 of the Railway Act, the Board may appoint, or direct any person to make an inquiry and report upon any application, complaint or dispute pending before the Board, or upon any matter or thing over which the Board has jurisdiction.

I am therefore of the opinion that all these matters should be referred to the Chief Engineer, who should be appointed and directed to make an inquiry and report on the whole situation of level crossings in Montreal, on the Canadian National Railways, from the Bonaventure Station west, and from the Moreau Street Station east. The Chief Engineer should report progress to the Board, from time to time, and evolve a scheme for the consideration of the Board.

The Board shall then act, after due notice to all interested parties.

(Sgd.) THOMAS VIEN,
Deputy Chief Commissioner.

"I agree."

(Sgd.) A. C. B.
(Sgd.) C. L.

Exhibits.
—
APPEAL
No. 1.
—
Schedule
No. 3.
Judgment
of Board of
Railway
Commis-
sioners for
Canada
directing
investiga-
tion by
Board's
Engineer,
27th May
1927—con-
tinued.

Schedule No. 4.—Order of Board of Railway Commissioners for Canada, No. 39079, directing Chief Engineer to make report.

20

Order No. 39079.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Friday, the 27th day of May,
A.D. 1927.

THOMAS VIEN, K.C.,
Deputy Chief Commissioner.

30 A. C. BOYCE, K.C.,
Commissioner

C. LAWRENCE,
Commissioner.

IN THE MATTER OF (a) the application for the elimination of all level crossings in the City of Montreal, on the Canadian National Railways, from the Bonaventure terminus westward to such points within the City as may be considered advisable; (b) the complaint of the Business Men's Association of Montreal East with respect to crossings in Montreal East, from Moreau Street Station to Bout de l'Île on the Canadian National Railways; and (c) the consideration of a general scheme for grade separation within the City of Montreal, on the Canadian National Railways, and the electrification of steam engines within the said City: Files Nos. 13571, 9437.319, 9437.635, 9437.1141, 24218, 24218.1, 27419, 35162, and 34904.

Schedule
No. 4.
Order of
Board of
Railway
Commis-
sioners for
Canada
No. 39079
directing
Chief
Engineer to
make report,
27th May
1927.

IN PURSUANCE OF the powers conferred by Sections 62 and 69 of The Railway Act, 1919—

THE BOARD ORDERS,

That Thomas L. Simmons, its Chief Engineer, be, and he is hereby, appointed and authorized to make inquiry and report to the Board upon the whole situation of level crossings in Montreal, on the Canadian National

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Exhibits. Railways, from Bonaventure Station west, and from Moreau Street Station east, to report progress to the Board from time to time; and to evolve a scheme for the consideration of the Board.

APPEAL
No. 1.

Schedule
No. 4.
Order of
Board of
Railway
Commis-
sioners for
Canada
No. 39079
directing
Chief
Engineer to
make report,
27th May
1927—con-
tinued.

(Sgd.) THOMAS VIEN,
Deputy Chief Commissioner,
Board of Railway Commissioners for Canada.

BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Examined and certified as a true copy under
Section 23 of "The Railway Act."

(Sgd.) R. RICHARDSON,
Asst. Sec'y of Board of Railway
Commissioners for Canada.

Ottawa, May 30, 1927.

10

Schedule
No. 5.

Schedule No. 5.—General Plan, No. D.C. 310-0.0-63.1, showing Montreal Terminals Scheme, 15th June 1929.

(Separate document.)

Schedule
No. 6.
Application
of Respon-
dent to
Board of
Railway
Commis-
sioners for
Canada for
approval of
Plan No.
WIE-19-4.2,
11th Febru-
ary 1930.

Schedule No. 6.—Application of Respondent to Board of Railway Commissioners for Canada for approval of Plan No. WIE-19-4.2.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Application No.....

20

The Canadian National Railway Company hereby applies to the Board of Railway Commissioners under Sections 256 and 257 of the Railway Act for approval of plan No. WIE-19-4.2 dated at Montreal and revised to the 10th of October, 1929, being a profile of proposed grade separation between Turcot and Point St. Charles, in the City of Montreal, and states :

THAT pursuant to Order of the Board No. 39079 dated the 27th day of May, 1927, and other applicable judgments and Orders preceding them, a study was given to the proposal of elevating tracks and separating grades on the lines of the Canadian National Railway Company west of Bonaventure Station in the City of Montreal, and South of St. Henri, and a profile showing a portion of the track, as elevated, with proposed grade separations between Turcot and Point St. Charles was prepared and submitted to the City Authorities for approval.

30

THAT by Chapter 12 of the Statutes of Canada 19-20 George V, provision was made and authorization granted to the Canadian National Railway Company for the construction of the necessary works to carry out the proposal, which authority is to be found in the Schedule to the said Act.

THAT on Monday, the 10th day of February, 1930, the said plan WIE-19-4.2 was approved by the City Council of Montreal upon the recommendation of the Engineers and the Executive Committee of the said City.

THAT pursuant to the authority of the said By-Law the plan has been signed on behalf of the City by Messrs. G. R. MacLeod, Assistant Chief Engineer, and Mr. H. A. Terreault, Director of Public Works.

THAT the tracks it is now proposed to elevate cross the following streets :

Wellington Street
 Shearer Street (Pedestrian Subway)
 Hibernia Street
 Charlevoix Street
 D'Argenson Street
 Atwater Avenue
 St. Patrick Street
 C.P.R. Subway
 St. Ambroise Street
 Notre Dame Street
 St. Ferdinand Street
 St. Philippe Street
 St. Marguerite Street
 De Courcelles Street
 St. Remi Street

20

THAT detail plans showing the proposed grade separations at each of the highways at which grade separation is to be provided are in the course of preparation and will be forwarded to the Board for approval as soon as prepared.

30

THAT approval is now asked from the Board for the said plan with provisos in the Board's Order that the said detail plans are to be submitted for the approval of the Board's Engineer and that questions of cost will be reserved for the further consideration of the Board.

I am sending a copy of this application to Messrs. Perron, Vallee & Perron, Solicitors for the Montreal Tramways; to Mr. W. H. Butler, Assistant City Attorney of Montreal, and to Judge J. F. St. Cyr, Chairman, Montreal Tramways Commission.

40

Dated at Montreal this 11th day of February, 1930.

(Sgd.) ALISTAIR FRASER,
 Solicitor for the Canadian National Ry. Co.

AF/B.

Exhibits.

—
 APPEAL
 No. 1.
 —

Schedule
 No. 6.
 Application
 of Respon-
 dent to
 Board of
 Railway
 Commis-
 sioners for
 Canada for
 approval of
 Plan No.
 WIE-19-4.2,
 11th Febru-
 ary 1930—
continued.

Exhibits. **Schedule No. 7.—Order of Board of Railway Commissioners for Canada, No. 44425**
 approving Plan No. WIE-19-4.2.

APPEAL
 No. 1.

Schedule
 No. 7.

Order No. 44425.

Order of
 Board of
 Railway
 Commis-
 sioners for
 Canada
 No. 44425
 approving
 Plan No.
 WIE-19-4.2,
 10th March
 1930.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Monday, the 10th day of
 March, A.D. 1930.

S. J. McLEAN,
 Asst. Chief Commissioner.

HON. T. C. NORRIS,
 Commissioner.

IN THE MATTER OF the application of the Canadian
 National Railway Company, hereinafter called the
 "Applicant Company," under Sections 256 and 257 of
 the Railway Act, for approval of Plan No. WIE-19-4.2,
 dated Montreal, October 10th, 1929, showing proposed
 revision of the grade of the tracks of the Applicant Com- 10
 pany between Turcot and Point St. Charles, and grade
 separations at certain streets hereinafter more particularly
 described, on file with the Board under file No. 9437.319.4 :

UPON the report and recommendation of the Chief Engineer of the
 Board, and the consent of the City of Montreal, filed—

THE BOARD ORDERS that the Applicant Company's said plan
 No. WIE-19-4.2, dated Montreal, October 10th, 1929, on file with the Board
 under file No. 9437.319.4, showing proposed revision of the grade of the
 tracks of the Applicant Company between Turcot and Point St. Charles, and
 grade separations at the following streets, namely : 20

Wellington Street
 Shearer Street (pedestrian subway)
 Hibernia Street
 Charlevoix Street.
 D'Argenson Street
 Atwater Avenue
 St. Patrick Street
 C.P.R. Subway
 St. Ambrose Street (grade crossing and pedestrian subway)
 Notre Dame Street 30
 St. Ferdinand Street
 St. Philippe Street
 St. Marguerite Street
 De Courcelles Street, and
 St. Remi Street

be, and it is hereby, approved, subject to the provision that detail plans of
 the proposed grade separations be served on the said City of Montreal, and

submitted for the approval of the Board; the question of cost to be reserved for further consideration.

(Sgd.) S. J. McLEAN,
Assistant Chief Commissioner,
Board of Railway Commissioners for Canada.

BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Examined and certified as a true copy
under Section 23 of "The Railway Act."

(Sgd.) A. D. CARTWRIGHT,
10 Sec'y of Board of Railway Commissioners for Canada.
Ottawa, March 18, 1930.

Exhibits.

APPEAL
No. 1.

Schedule
No. 7.
Order of
Board of
Railway
Commis-
sioners for
Canada
No. 44425
approving
Plan No.
WIE-19-4.2,
10th March
1930—con-
tinued.

APPEAL No. 2.

Schedule No. 1.—Plan for Construction of Subway at St. Antoine Street, No. YIA 31.10.4,
16th August, 1930.

(Separate document.)

APPEAL
No. 2.

Schedule
No. 1.

Schedule No. 2.—Extracts from Special Acts of Incorporation of Appellant.
(Same as No. 2 in Appeal No. 1, at p. 416.)

Schedule
No. 2.

Schedule No. 3.—Judgment of Board of Railway Commissioners for Canada directing
investigation by Board's Engineer, 27th May 1927.

20 (Same as No. 3 in Appeal No. 1, at p. 418.)

Schedule
No. 3.

Schedule No. 4.—Order of Board of Railway Commissioners for Canada, No. 39079,
directing Chief Engineer to make report, 27th May 1927.

(Same as No. 4 in Appeal No. 1, at p. 425.)

Schedule
No. 4.

Schedule No. 5.—General Plan, No. D.C. 310-0.0-63.1, showing Montreal Terminals
Scheme, 15th June 1929.

(Separate document.)

Schedule
No. 5.

Exhibits. **Schedule No. 6.—Application of Respondent to Board of Railway Commissioners for Canada for approval of Plans Nos. WIA 19-14.1 and WIA 19-15.1.**

APPEAL
No. 2.

SCHEDULE No. 6.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Schedule
No. 6.
Application
of Respon-
dent to
Board of
Railway
Commis-
sioners for
Canada for
approval of
Plans Nos.
WIA 19-
14.1 and
WIA 19-
15.1,
28th Janu-
ary 1930.

Application No.....

The Canadian National Railway Company hereby applies to the Board of Railway Commissioners under Section 256 of the Railway Act, for authority to cross the following streets with the number of tracks shown in each case and the method of crossing :

Street.	Number of Tracts.		Method of crossing.	10
	Present.	Proposed.		
Cathcart - - - -	2	4	In tunnel	
Lane south of Cathcart - -	Nil	9	Overhead structure	
Dorchester - - - -	4	26	Overhead structure (part of station structure)	
Lagauchetiere - - - -	Nil	20	Overhead structure	
St. Antoine - - - -	Nil	12	Subway	
St. James - - - -	Nil	10	Subway	
Notre Dame - - - -	Nil	8	Subway	
St. Maurice - - - -	Nil	6	Subway	20
St. Paul - - - -	Nil	6	Subway	
William - - - -	Nil	6	Subway	
Ottawa - - - -	Nil	6	Subway	
Dalhousie - - - -	Nil	6	Subway	
James Lane - - - -	Nil	3	Subway	
Ann-Wellington (Intersection)	Nil	4	Subway	
Ann - - - -	3 Industrial	3 Industrial	Grade crossing	
Colborne - - - -	Nil	4	Street to be diverted	
Bridge - - - -	2 Industrial	4 Main	Subway	30
		2 Industrial	Grade crossing	
Wellington - - - -	1 Industrial	1 Industrial	Grade crossing	
(Track to J. R. Walker Ltd.)				
Wellington - - - -	1 Industrial	1 Industrial	Grade crossing	
(Track to St. Patrick Street)				
St. Patrick - - - -	1 Industrial (on street)	1 Industrial	Diverted across instead of along street	
Inspector - - - -	Nil	2	Subway	
Montfort - - - -	Nil	2	Subway	
Cathedral - - - -	Nil	2	Subway	40
Proposed new street - - -	Nil	2	Subway	

In accordance with plan No. WIA19-14.1 dated the 17th day of January, 1930, and profile No. WIA19-15.1 dated the 17th day of January, 1930, and states :

THAT on the 27th day of May, A.D. 1927, following a judgment of the Deputy Chief Commissioner, concurred in by Commissioners Boyce and Lawrence, the Board issued Order No. 39079 providing for the evolution of

a scheme for improving the level crossing situation in Montreal and for reporting to the Board from time to time of progress made.

THAT following the issuance of this Order, the Canadian National Railway Company made an intensive study of the whole question and determined that the first step toward improving the situation would be the diversion of its passenger trains from their present routes and bringing those from the South into the City of Montreal on an elevated line.

10 THAT plans showing this scheme were prepared and submitted to the Board's Chief Engineer; from time to time numerous discussions took place with officials of the City of Montreal and other interested parties and a complete scheme was evolved making effective the above arrangement.

20 THAT after a thorough investigation of the proposals by an Engineer appointed by the Dominion Government, an Act of the Parliament of Canada was passed—19-20 George V, Chapter 12—approving, among other things, in Subsection " B " of the Schedule to the Act, the construction of a " Viaduct and elevated railway between Inspector and Dalhousie Streets and St. David's Lane and Nazareth Street to near Wellington Street; thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets and with connections to existing railway facilities and Harbor Commissioners' trackage."

THAT the plan and profile now submitted show this Viaduct and Elevated Railway with the street crossings, for which approval is now sought.

THAT subsequent to the passing of the Act above referred to, the Canadian National Railway Company, pursuant to the provisions of Section 21 of Chapter 172 of the Revised Statutes of Canada, 1927, submitted a plan showing the proposed construction to the Governor-in-Council, by whom the said plan was approved on the 2nd day of July, 1929, by P.C. 1197.

30 In the present application, authority is asked from the Board for the crossing of the various streets, as above set out, following which detail plans of the structures crossing over each of the highways will be submitted for the approval of the Board's Chief Engineer.

On the plan hereby submitted, St. Monique Street is shown, but no authority is asked to construct on this street, a concurrent application being made for its diversion.

Vitre Street is also shown on the plan but no authority is now asked to cross it, as a request will be made to the City to have it closed.

40 I am sending a copy of this application to Mr. W. H. Butler, Assistant City Attorney, City Hall, Montreal, and Messrs. Perron, Vallee & Perron, Solicitors for the Montreal Tramways.

Dated at Montreal this 28th day of January, 1930.

(Sgd.) ALISTAIR FRASER,
Solicitor for the Canadian National Ry. Co.

Exhibits.
—
APPEAL
No. 2.
—
Schedule
No. 6.
Application
of Respon-
dent to
Board of
Railway
Commis-
sioners for
Canada for
approval of
Plans Nos.
WIA 19-
14.1 and
WIA 19-
15.1,
28th Janu-
ary 1930—
continued.

Exhibits. **Schedule No. 7.—Order of Board of Railway Commissioners for Canada, No. 44433, approving plans WIA 19-14.1 and WIA 19-15.1.**

APPEAL
No. 2.

Order No. 44433.

Schedule
No. 7.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Order of Board of Railway Commissioners for Canada No. 44433 approving Plans WIA 19-14.1 and WIA 19-15.1, 13th March 1930.

Thursday, the 13th day of March, A.D. 1930.

S. J. McLEAN,
Assistant Chief Commissioner.

HON. T. C. NORRIS,
Commissioner.

IN THE MATTER OF the application of the Canadian National Railway Company, hereinafter called the "Applicant Company," under Section 256 of the Railway Act, for authority to construct its tracks across certain streets, hereinafter more particularly described, in the City of Montreal, Province of Quebec, as shown on the plans and profiles numbered WIA 19-14.1 and WIA 19-15.1, dated January 17th, 1930, on file with the Board under file No. 9437.319.2 : 10

UPON reading what has been filed in support of the application, and the report and recommendation of the Chief Engineer of the Board,

IT IS ORDERED that the Applicant Company be, and it is hereby authorized to construct its tracks in the City of Montreal, Province of Quebec, across the following streets, namely :

Cathcart Street	- - - - -	4 tracks in tunnel	
Lane south of Cathcart Street	- - - - -	9 tracks. Overhead Structure	20
Dorchester Street	- - - - -	26 tracks. Overhead Structure part of station structure	
Lagauchetiere Street	- - - - -	20 tracks Overhead Structure	
St. Antoine Street	- - - - -	12 tracks Subway	
St. James Street	- - - - -	10 tracks Subway	
Notre Dame Street	- - - - -	8 tracks Subway	
St. Maurice Street	- - - - -	6 tracks Subway	
St. Paul Street	- - - - -	6 tracks Subway	
William Street	- - - - -	6 tracks Subway	
Ottawa Street	- - - - -	6 tracks Subway	30
Dalhousie Street	- - - - -	6 tracks Subway	
James Lane	- - - - -	3 tracks Subway	
Ann-Wellington (Intersection)	- - - - -	4 tracks Subway	
Colborne Street	- - - - -	4 tracks Subway or diversion	
Bridge Street	- - - - -	4 tracks Subway	
Inspector Street	- - - - -	2 tracks Subway	
Montfort Street	- - - - -	2 tracks Subway	
Cathedral Street	- - - - -	2 tracks Subway	
Proposed new street	- - - - -	2 tracks Subway	

All as shown on the said plans and profiles on file with the Board under file No. 9437.319,2; subject to the provision that the Applicant Company 40

serve copies of detail plans on the City of Montreal, the said plans to be then submitted for the approval of the Board.

(Sgd.) S. J. McLEAN,
Assistant Chief Commissioner,
Board of Railway Commissioners for Canada.

BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Examined and certified as a true copy
under Section 23 of "The Railway Act."

(Sgd.) A. D. CARTWRIGHT,
10 Sec. of Board of Railway Commissioners for Canada.
Ottawa, March 18, 1930.

Exhibits.

APPEAL
No. 2.

Schedule
No. 7.
Order of
Board of
Railway
Commis-
sioners for
Canada
No. 44433
approving
Plans WIA
19-14.1 and
WIA 19-
15.1,
13th March
1930—*con-
tinued.*

APPEAL No. 3.

Schedule No. 1.—Plan No. YIE 31.51.4 for reconstruction of Subway at d'Argenson Street,
15th April 1930.

(Separate document.)

APPEAL
No. 3.

Schedule
No. 1.

Schedule No. 2.—Judgment of Board of Railway Commissioners for Canada directing
investigation by Board's Engineer, 27th May 1927.

(Same as No. 3 in Appeal No. 1, at p. 418.)

Schedule
No. 2.

20 Schedule No. 3.—Order of Board of Railway Commissioners for Canada, No. 39079,
directing Chief Engineer to make report, 27th May 1927.

(Same as No. 4 in Appeal No. 1, at p. 425.)

Schedule
No. 3.

Schedule No. 4.—General Plan, No. D.C. 310-0-0-63.1, showing Montreal Terminals
Scheme, 15th June 1929.

(Separate Document.)

Schedule
No. 4.

Exhibits. **Schedule No. 5.—Application of Respondent to Board of Railway Commissioners for Canada for approval of Plan No. WIE 19.4.2, 11th February 1930.**

APPEAL
No. 3.

(Same as No. 6 in Appeal No. 1, at p. 426.)

Schedule
No. 5.

Schedule **Schedule No. 6.—Order of Board of Railway Commissioners for Canada, No. 44425, approving Plan No. WIE 19.4.2, 10th March 1930.**
No. 6.

(Same as No. 7 in Appeal No. 1, at p. 428.)

APPEAL
No. 4.

APPEAL No. 4.

Schedule
No. 1.

Schedule No. 1.—Plan No. YIA 31.10.4 for Construction of Subway at St. Antoine Street 16th August 1930.

(Separate document.)

10

Schedule
No. 2.

Schedule No. 2.—Judgment of Board of Railway Commissioners for Canada directing investigation by Board's Engineer, 27th May 1927.

(Same as No. 3 in Appeal No. 1, at p. 418.)

Schedule
No. 3.

Schedule No. 3.—Order of Board of Railway Commissioners for Canada, No. 39079, directing investigation by Board's Engineer, 27th May 1927.

(Same as No. 4 in Appeal No. 1, at p. 425.)

Schedule
No. 4.

Schedule No. 4.—General Plan, No. D.C. 310.0.0.63.1, showing Montreal Terminals Scheme, 15th June 1929.

(Separate document.)

Schedule
No. 5.

Schedule No. 5.—Application of Respondent to Board of Railway Commissioners for Canada for approval of Plans Nos. WIA 19.14.1 and WIA 19.15.1, 28th January 1930. 20

(Same as No. 6 in Appeal No. 2, at p. 430.)

<p>Schedule No. 6.—Order of Board of Railway Commissioners for Canada, No. 44433, approving Plans Nos. WIA 19.14.1 and WIA 19.15.1, 13th March 1930. <i>(Same as No. 7 in Appeal No. 2, at p. 432.)</i></p> <hr/>	<p>Exhibits. <hr/> APPEAL No. 4. <hr/> Schedule No. 6.</p>
<p style="text-align: center;">APPEAL NO. 5.</p> <p>Schedule No. 1.—Plan for construction of Subway at d'Argenson Street, No. YIE 31.51.4, 15th April 1930. <i>(Separate document.)</i></p> <hr/>	<p>APPEAL No. 5. <hr/> Schedule No. 1.</p>
<p>Schedule No. 2.—Extracts from Special Acts of Incorporation of Appellant. <i>(Separate document.)</i></p> <hr/>	<p>Schedule No. 2.</p>
<p>10 Schedule No. 3.—Plan No. 2.G.716, showing Appellants' plant at d'Argenson Street, 19th May 1931. <i>(Separate document.)</i></p> <hr/>	<p>Schedule No. 3.</p>
<p>Schedule No. 4.—Judgment of Board of Railway Commissioners for Canada directing investigation by Board's Engineer, 27th May 1927. <i>(Same as No. 3 in Appeal No. 1, at p. 418.)</i></p> <hr/>	<p>Schedule No. 4.</p>
<p>Schedule No. 5.—Order of Board of Railway Commissioners for Canada directing Chief Engineer to make report, 27th May 1927. <i>(Same as No. 4 in Appeal No. 1, at p. 425.)</i></p> <hr/>	<p>Schedule No. 5.</p>
<p>20 Schedule No. 6.—General Plan, D.C. 310.0.0.63.1, showing Montreal Terminals Scheme, 15th June 1929. <i>(Separate document.)</i></p> <hr/>	<p>Schedule No. 6.</p>

Exhibits. **Schedule No. 7.—Application of Respondent to Board of Railway Commissioners for
Canada for approval of Plan No. WIE 19.4.2, 11th February 1930.**
 APPEAL
 No. 5.
(Same as No. 6 in Appeal No. 1, at p. 426.)

Schedule
 No. 7.

Schedule **Schedule No. 8.—Order of Board of Railway Commissioners for Canada, No. 44425,
 No. 8. approving Plan No. WIE 19.4.2, 10th March 1930.**
(Same as No. 7 in Appeal No. 1, at p. 428.)

APPEAL
 No. 6.

APPEAL No. 6.

Schedule **Schedule No. 1.—Plan for Construction of Subway at St. Antoine Street, No. YIA 31.10.4,
 No. 1. 16th August 1930.**

(Separate document.)

10

Schedule
 No. 2.

**Schedule No. 2.—Extracts from Special Acts of Incorporation of Appellants and Contract
 with City of Montreal.**

(Separate document.)

Schedule
 No. 3.

**Schedule No. 3.—Judgment of Board of Railway Commissioners for Canada directing
 investigation by Board's Chief Engineer, 27th May 1927.**

(Same as No. 3 in Appeal No. 1, at p. 418.)

Schedule
 No. 4.

**Schedule No. 4.—Order of Board of Railway Commissioners for Canada, No. 39079,
 directing Chief Engineer to make report, 27th May 1927.**

(Same as No. 4 in Appeal No. 1, at p. 425.)

Schedule
 No. 5.

**Schedule No. 5.—Plan No. D.C. 310.0.0.63.1, showing Montreal Terminals Scheme, 20
 15th June 1929.**

(Separate document.)

Schedule No. 6.—Application of Respondent to Board of Railway Commissioners for Canada for approval of Plans Nos. WIA 19.14.1 and WIA 19.15.1, 28th January 1930.

(Same as No. 6 in Appeal No. 2, at p. 430.)

Exhibits.

—
APPEAL
No. 6.

—
Schedule
No. 6.

Schedule No. 7.—Order of Board of Railway Commissioners for Canada, No. 44433, approving Plans WIA 19.14.1 and WIA 19.15.1, 13th March 1930.

(Same as No. 7 in Appeal No. 2, at p. 432.)

Schedule
No. 7.

Schedule No. 9.—Drawing No. 1262 P.F. showing changes in layout of Appellant's utilities necessitated by construction of proposed works, 5th May 1931.

(Separate document.)

Schedule
No. 9.

10

APPEAL No. 7.

APPEAL
No. 7.

Schedule No. 1.—Extracts from Special Act of Incorporation of Appellant.

(Same as No. 2 in Appeal No. 1, at p. 416.)

—
Schedule
No. 1.

Schedule No. 2.—Order of Board of Railway Commissioners for Canada, No. 35037, directing grade separation at crossing of Respondent's tracks at St. Clair Avenue, Toronto.

Order No. 35037.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

20 Friday, the 9th day of
May, A.D. 1924.

HON. F. B. CARVELL, K.C.
Chief Commissioner.

S. J. McLEAN,
Asst. Chief Commissioner.

A. C. BOYCE, K.C.,
Commissioner.

C. LAWRENCE,
Commissioner.

30 HON. FRANK OLIVER,
Commissioner.

IN THE MATTER OF the Application of the Corporation of the City of Toronto, in the Province of Ontario, hereinafter called the "Applicant," under Sections 257 and 259 of the Railway Act, 1919, for an Order requiring the Canadian Pacific and Canadian National Railway Companies to collaborate with the Applicant in the preparation of a joint plan for the separation of grades at the crossings of Bloor Street, Royce Avenue, Weston Road, and St. Clair Avenue by the said railways, and at the crossings of Wallace Avenue and Davenport Road by the Canadian National Railway; and that a time be fixed by the Board for the submissions to it of a plan dealing with grade separation at the said crossings; File Nos. 32453, 18759, 9437.149, 8673, 9437.94, 132.1 and Case No. 1353.

Schedule
No. 2.
Order of
Board of
Railway
Commis-
sioners for
Canada
No. 35037
directing
grade
separation
at crossing
of Respon-
dent's tracks
at St. Clair
Avenue,
Toronto,
9th May
1924.

Exhibits.

APPEAL
No. 7.Schedule
No. 2.Order of
Board of
Railway
Commis-
sioners for
Canada
No. 35037
directing
grade
separation
at crossing
of Respon-
dent's tracks
at St. Clair
Avenue,
Toronto,
9th May
1924—con-
tinued.

UPON hearing the application at the sittings of the Board held in Toronto, February 14th, 1923, in the presence of Counsel for the Applicant and the Railway Companies, and what was alleged; and upon a further hearing at the sittings of the Board held in Toronto, January 8th, 1924, in the presence of the said interested parties—

THE BOARD ORDERS as follows :

1. That no change in grade or interference with the width of right of way be made on the main double track lines of the Canadian Pacific Railway Company's Galt and Toronto, Grey and Bruce Subdivisions and of the Canadian National Railway Company's Brampton Subdivision; and that subways be constructed at Bloor Street, Royce Avenue, Junction Road, and St. Clair Avenue, Toronto; such subways to be the full width of the street, with fourteen-foot clearances—the Junction Road Subway to extend as far east as Miller Street; but the Applicant may, if it desires to do so, extend the same to Davenport Road; the present Weston Road Bridge to be eliminated; and the Royce Avenue Subway to involve the acquisition of additional land and the construction of a diversion of Dundas Street, as set forth on the plan filed by the Canadian Pacific Railway Company. 10

2. That track elevation and grade separations be carried out on the Canadian Pacific Railway Company's North Toronto Line, according to the plan filed by the said Railway Company, including the construction of subways at Osler Avenue, Symington Street, Lansdowne Avenue, Dufferin Street, and Bartlett Avenue; such subways to be the full width of the street, with fourteen-foot clearances. 20

3. That subways be constructed on the Newmarket Subdivision of the Canadian National Railway Company, at Bloor Street, Royce Avenue, Davenport Road, and St. Clair Avenue; such subways to be the full width of the street, with fourteen-foot clearances.

4. That if the Applicant should require greater clearances at any of the subways herein authorized, the same is hereby authorized; the additional expense, however, to be borne entirely by the Applicant. 30

(Sgd.) F. B. CARVELL,

Chief Commissioner,
Board of Railway Commissioners for Canada.

Schedule
No. 3.

Schedule No. 3.—Plan for Construction of Subway at St. Clair Avenue and for diversion of Respondent's line No. C.-6426, 20th November 1930.

(Separate document.)

APPEAL No. 8.

Schedule No. 1.—Extracts from Special Acts of Incorporation of Appellant.*(Same as No. 2 in Appeal No. 1 at p. 416.)*

Exhibits.

APPEAL
No. 8.Schedule
No. 1.**Schedule No. 2.—Order of Board of Railway Commissioners for Canada, No. 19238, directing Appellant to place certain of its lines underground.**Schedule
No. 2.

Order No. 19238.

Order of
Board of
Railway
Commis-
sioners for
Canada
No. 19238
directing
Appellant
to place
certain of
its lines
under-
ground,
10th May
1913.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Saturday, the 10th day of
May, A.D. 1913

10

H. L. DRAYTON, K.C.,
Chief Commissioner.S. J. McLEAN,
Commissioner.IN THE MATTER OF the applications of the City
of Hamilton, in the Province of Ontario, under
sections 247 and 248 of the Railway Act for an Order
directing the Great North Western Telegraph Company,
The Canadian Pacific Railway Company's Telegraph
and the Bell Telephone Company of Canada to remove
their poles, wires and cables from the portions of
certain specified streets, in the said City of Hamilton;
Files 19730, Part 2; 19723, 19724 and 19725.

UPON hearing the applications at joint sittings held by the Board
and the Hydro-Electric Power Commission of Ontario, in the Cities of
Hamilton and Toronto on the 28th day of May and the 26th day of
September, 1912, and the further hearing before the Board in Toronto
the 6th day of November, 1912, the City of Hamilton and the Companies
interested being represented by Counsel at the hearings, the evidence
offered, and what was alleged; and upon the report and recommendation
of the Electrical Engineer of the Board—

IT IS ORDERED

1. That when the City of Hamilton has provided underground
conduits in accordance with plans prepared by the City and approved
by the Electrical Engineer of the Board, the lines and wires of the
Great North Western Telegraph Company and the Canadian Pacific
Railway Company's Telegraph shall be placed and carried in the said
conduits, and the said Companies shall remove their poles, wires and
lines from the following portions of streets, in the said City of Hamilton,
namely:—

(a) The Great North Western Telegraph Company—King Street,
from Sophia to Wentworth Streets, Main Street, from McNab to
Catharine Street, James Street, from Main to Stuart Streets, Merrick
Street from James to York Streets.

(b) The Canadian Pacific Railway Company's Telegraphs—
From portions of King and James Streets.

30

Exhibits.
 —
 APPEAL
 No. 8.
 —
 Schedule
 No. 2.
 Order of
 Board of
 Railway
 Commis-
 sioners for
 Canada
 No. 19238
 directing
 Appellant
 to place
 certain of
 its lines
 under-
 ground,
 10th May
 1913—*con-
 tinued.*

2. That the Bell Telephone Company of Canada be, and it is hereby, required and directed to place and carry its lines or wires in underground conduits, supplied by the Company, on the following portions of streets in the said City, namely:—York, Market, King, Main, Jackson, Catharine, Bowen, John, Hughson, James, McNab and Bay Streets,—on the condition that the City supply sites, either in lanes or back yards, for poles to be connected with the underground systems, and from which poles the connections to subscribers' premises may be made; and the Telephone Company shall take its poles and wires off the streets in question at the expiration of three months after the necessary sites in lanes or back yards 10 have been supplied.

3. That the question of the apportionment of cost of the said work between the parties in interest be, and it is hereby reserved.

(Sgd.) H. L. DRAYTON,

Chief Commissioner,
 Board of Railway Commissioners for Canada.

BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Examined and certified as a true copy
 under Section 23 of "The Railway Act."

(Sgd.) A. D. CARTWRIGHT,
 Sec'y of Board of Railway
 Commissioners for Canada.
 Ottawa, May 15, 1913.

20

Schedule No. 3. **Schedule No. 3.—Plan and profile for construction of diversion of portion of Respondent Railway's line No. 2 B.R.C. (filed at hearing as Exhibit No. 2), 15th October 1930.**

(Separate document.)

Schedule No. 4.—Agreement between Toronto, Hamilton and Buffalo Railway Company and Corporation of City of Hamilton.

Exhibits.
 —
 APPEAL
 No. 8.
 —
 Schedule
 No. 4.
 Agreement
 between
 Toronto,
 Hamilton
 and Buffalo
 Railway
 Company
 and Cor-
 poration of
 City of
 Hamilton,
 20th Octo-
 ber 1930.

THIS AGREEMENT is made this 20th day of October, one thousand nine hundred and thirty.

BETWEEN :

THE TORONTO HAMILTON AND BUFFALO RAILWAY COMPANY (herein called the Railway Company), of the first part,

AND

10 THE CORPORATION OF THE CITY OF HAMILTON (herein called the City) of the second part.

WHEREAS pursuant to the Statutory powers vested in the Railway Company and pursuant to By-law of the City No. 755 passed on the 29th day of October, A.D. 1894, the Railway Company constructed its railway through the City of Hamilton on the conditions contained therein and in particular in accordance with the description and specification of the southerly route referred to in said By-law.

20 AND WHEREAS by an Act of the Legislature of the Province of Ontario, 58 Victoria Chapter 68 (1895) said By-law and all the conditions therein were declared to be binding on the Railway Company and the City.

AND WHEREAS by an Act of the Parliament of Canada 58-59 Victoria Chapter 66 (1895) said By-law was ratified and confirmed and declared to be binding upon the parties thereto so far as such confirmation was within the powers of the Parliament of Canada.

30 AND WHEREAS the City has requested the Railway Company to proceed with grade separation in the City of Hamilton which will necessitate a change in the route and grades of the railway as set forth in said description and specification from a point at or near where the tunnel mentioned in said By-law ends on the east side of Park Street to a point just east of Victoria Avenue which will necessitate the removal of certain of the Railway Company's tracks, structures, buildings, facilities and works from their present location as provided for in the said By-law and the replacement thereof as herein proposed.

40 AND WHEREAS the changes and alterations from the present location of the railway of the Railway Company between said points involves a deviation slightly to the south of its present route and the elevation of its tracks, construction of underpasses at certain Streets and the closing and diversion of other Streets, the construction of a new Street, the construction of a new Station, and other buildings and facilities, the demolition of the present Station, the removal of and replacement

Exhibits.
 —
 APPEAL
 No. 8.
 —
 Schedule
 No. 4.
 Agreement
 between
 Toronto,
 Hamilton
 and Buffalo
 Railway
 Company
 and Cor-
 poration of
 City of
 Hamilton,
 20th Octo-
 ber 1930—
continued.

of tracks, structures and other facilities as aforesaid, and the Railway Company has agreed to such deviation, change and alteration only on the express understanding that in the new location it shall retain all its rights and privileges conferred by said By-law and the said Acts confirming the same to which the City has agreed.

AND WHEREAS the changes in the said location of the railway necessitates the consideration and settlement of grade separation problems in the said City.

AND WHEREAS the works hereinafter set forth comprised in and connected with grade separation are of mutual benefit to the City and the Railway Company. 10

NOW THEREFORE IT IS AGREED between the parties hereto as follows :

1. The Plan and Profile lettered 2-B.R.C., dated the fifteenth day of October, one thousand nine hundred and thirty which shows the proposed railway tracks and subways, closed and diverted streets, re-arrangement of yards and facilities, new level of tracks, new Station and new Street, together with other general features of the proposed construction work which Plan has been identified by the signatures of the parties hereto shall be considered forming part of this Agreement. Provided always, 20 subject to the approval of the Board, the Railway Company shall be at liberty to change or alter the track lay-out and work incidental thereto as indicated on said Plan during the progress of the work herein contemplated or subsequent thereto.

2. The parties will join in an application to the Board of Railway Commissioners for Canada (herein called the Board) for the approval of the said Plan and Profile of the said new level of tracks street grades and the works referred to in the next preceding paragraph and for an Order authorizing, directing and ordering the construction of the same in accordance therewith and for the taking of such additional lands without 30 the consent of the owners in accordance with the provisions of the Railway Act as may be required to carry out the works.

3. After the issue of the Order of the Board pursuant to said Application the Railway Company shall thereupon proceed with the clearing of the site, the letting of contracts and the carrying out of the work so approved by the Board in accordance with detailed plans of the subways and other works to be approved by the parties hereto and the Board or the Chief Engineer of the Board as the case may be the matter of the apportionment of the costs of the said works including the relocation of public facilities such as telephone poles, wires and conduits, sewers, water mains, 40 pavements and sidewalks, gas mains and all other works of whatsoever nature affected by the proposed works herein mentioned together with the cost of all lands used for such works and all compensation awards damages costs and expenses awarded to the owners of said lands and/or adjoining properties by reason of the construction of the works

herein provided for shall be assumed, borne and paid for in accordance with the Order of the Board following a hearing of the parties on a date to be fixed by the Board not later than sixty days from the issuance of the said Order referred to in paragraph 2 hereof and the parties hereby agree to be bound and abide by the Board's Order in respect of said apportionment.

4. It is agreed that the apportionment of the cost to be determined by the Board as provided for in the next preceding paragraph insofar as the City and the Railway Company are concerned, shall be limited to the cost of replacing all existing facilities of the Railway Company or the equivalent thereof and of all works incidental thereto. It is agreed, however, that any contribution the Board may order to be paid out of The Railway Grade Crossing Fund in respect of those additional facilities, the cost of which shall be paid for entirely by the Railway Company, be wholly payable to the Railway Company, but the provisions of this paragraph in respect of the division of cost shall be subject to the approval of the Board, to vary as it may deem fair and equitable.

5. The City shall pay to the Railway Company the proportion of the cost placed on the City by the Board pursuant to paragraphs 3 and 4 hereof, in monthly payments as the work proceeds, said monthly payments to be made in accordance with statements certified by the Chief Engineer of the Railway Company and rendered prior to the 15th day of the month following that in which said work was performed, and payments therefor to be made to the Railway Company prior to the last day of such month. Similarly, the Railway Company shall pay to the City its proportion of expenditures made by the City in connection with and properly chargeable to said works. The parties hereto will at all times allow proper inspection by the other of all books, accounts, returns and vouchers for the purpose of checking or verifying accounts which may be rendered for expenditures made in pursuance of this Agreement and each party shall have the right from time to time to employ an Auditor or Auditors to investigate the accuracy of any account and each party shall from time to time afford all proper facilities for such investigation. Neither the acceptance of any such account nor the payment thereof by either party shall prejudice its right to an audit or verification, and if upon such audit or verification it shall be found within one year after completion of said works that either party has paid to the other party any sum or sums of money which under the terms of this Agreement it was not liable to pay it shall be entitled to demand and collect the same from such other party which shall promptly refund the same. At the conclusion of the work an account, if desired by either of the parties shall be taken and adjusted by the Chief Engineer of the Board who may require from the City and the Railway Company all evidence necessary for his decision.

Exhibits.

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APPEAL
No. 8.—
Schedule
No. 4.Agreement
between
Toronto,
Hamilton
and Buffalo
Railway
Company
and Corporation of
City of
Hamilton,
20th October 1930—
continued.

Exhibits.
 ———
 APPEAL
 No. 8.
 ———
 Schedule
 No. 4.
 Agreement
 between
 Toronto,
 Hamilton
 and Buffalo
 Railway
 Company
 and Cor-
 poration of
 City of
 Hamilton,
 20th Octo-
 ber 1930—
continued.

6. The City agrees to close those portions of Hunter, Charles, Hughson, Baillie, Walnut, Augusta, and Wellington Streets, also lanes and alleys or such portions thereof as are within the limits of the Railway Company's property, all as indicated on said plan, and to divert Hunter, Liberty and Aurora Streets as shown on said plan. The City shall convey to the Railway Company by a good and sufficient deed in fee simple the portions of said streets, lanes and alleys so to be closed, together with the portion of Hunter Street required for the construction of the new station and plaza, and that part of the Wood Market Square situated north of the new street. The Railway Company shall similarly convey to the City the portion of the station grounds between James and John Streets required for the diversion of Hunter Street and for the new street between James and Hughson Street, all as shown on said plan. The City shall also take the necessary steps to open the new street between James and John Streets and shall prevent the parking of motor cars and vehicles on the south side of the new street, and permit the Railway Company to construct and at all times maintain a platform $3\frac{1}{2}$ feet in width on the north side of the new street immediately adjacent to the Railway Company's buildings, together with a canopy 10 feet in width over said platform.

It is the intent of this agreement that the exchange of lands referred to in this paragraph shall be without monetary consideration on either side.

7. All matters concerning the works to be performed by the City and the Railway Company respectively, the maintenance and repairs thereof after construction, the liability of the parties as between themselves and to the public, taxes and other matters arising in the carrying out of the works shall be referred to the Board for settlement in case the parties hereto cannot agree.

8. In the event of any dispute or disputes in which the Board declines to act such dispute or disputes shall be submitted to arbitration in the following manner :

The party desiring such reference shall appoint an arbitrator who shall be a disinterested person and give notice thereof and of intention to refer to the other party, who shall within thirty days after receipt of such notice appoint on its behalf an arbitrator who shall be a disinterested person, in default of which such an arbitrator on behalf of such other party may be appointed by one of the Judges of the Supreme Court of Ontario on the application of the party desiring such reference after ten days' notice to the other party. The two arbitrators so appointed or selected shall select a third and the award of the said three arbitrators or a majority of them made after due notice to both parties of the time and place of hearing the matter referred and hearing the party or parties who may attend shall be final and binding on both parties hereto and they expressly agree to abide thereby. In case the two arbitrators first appointed fail to appoint a third within ten days after they have both been appointed then the third arbitrator may be appointed by one of the Judges of the Supreme Court of Ontario on the application of either party after ten days' notice to the

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30

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other. In case of death or the refusal or inability to act of any arbitrator or if for any cause the office of any arbitrator becomes vacant his successor shall be appointed in the same manner as is provided for his first appointment in the first instance unless the parties otherwise agree. The arbitrators appointed shall have all the powers given by The Arbitration Act (Revised Statutes of Ontario, 1927, Chapter 97) to arbitrators.

9. The work shall be commenced by the Railway Company within sixty days after the issuance of the Order of the Board referred to in paragraph 2 hereof, and the Railway Company shall insert in all contracts
10 a clause to the following effect :

“ In the performance of all the works covered by this Contract the contractors and sub-contractors shall employ workmen and labourers who have been bona fide residents of Hamilton for a minimum of one year prior to September 1st, 1930—provided that a sufficient supply of such labor is available. Preference shall be given to the employment of married men over single men. The contractors and sub-contractors shall keep a proper record of all employment, indicating the name, address, terms of residence, date employed, date of leaving or dismissal, which record shall be available
20 for inspection by or transmitted to the Chief Engineer as and when required.”

10. The City covenants and agrees with the Railway Company that the new location of the railway of the Railway Company and its Station, buildings, structures and works of whatsoever description constructed thereon shall be in substitution for the portion of the southerly route between Park Street and Victoria Avenue specified in said By-law No. 755 and in such substituted location the Railway Company shall have, enjoy and possess all the rights and privileges heretofore vested in the Railway Company as granted to and conferred on the Railway Company by said
30 By-law and confirming Acts, it being the express intention of this paragraph and Agreement that the Railway Company shall retain in the new location all of its existing rights and privileges and that nothing herein contained shall alter, interfere with or prejudice such existing rights or privileges and that the Railway Company shall not be moved from the new location without its consent.

11. The City agrees to and does hereby relieve the Railway Company from the provision of said By-law No. 755 requiring the Railway Company to always maintain a second passenger station within the limits of the City at some point on or near Lock Street south of Main Street.

40 12. The City further agrees to join with the Railway Company in any application for Parliamentary, Legislative or other sanction of any constituted authority that may be required from time to time to confirm, ratify and give legal effect to the provisions of this Agreement.

This Agreement shall enure to the benefit of and be binding upon the successors and assigns of the parties hereto.

Exhibits.

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APPEAL
No. 8.

—
Schedule
No. 4.

Agreement
between
Toronto,
Hamilton
and Buffalo
Railway
Company
and Cor-
poration of
City of
Hamilton,
20th Octo-
ber 1930—
continued.

Exhibits.
 —
 APPEAL
 No. 8.
 —
 Schedule
 No. 4.
 Agreement
 between
 Toronto,
 Hamilton
 and Buffalo
 Railway
 Company
 and Cor-
 poration of
 City of
 Hamilton,
 20th Octo-
 ber 1930—
continued.

IN WITNESS WHEREOF the Railway Company has hereunto caused to be affixed its Corporate Seal and the President and Secretary have set their hands and the City has hereunto caused to be affixed its Corporate Seal and the Mayor and Clerk have set their hands the day and year first above written.

THE TORONTO, HAMILTON AND BUFFALO
 RAILWAY COMPANY

(By) (Sgd.) J. N. BECKLEY,
 President.

Signed, Sealed and Delivered
 in the presence of :

Attest :

(Sgd.) E. F. STEPHENSON,
 Secretary.

(Seal)

THE CORPORATION OF THE CITY OF
 HAMILTON

(By) (Sgd.) JOHN PEEBLES,
 Mayor.

and by (Sgd.) S. H. KENT,
 City Clerk.

(Seal)

Approved :

(Sgd.) A. J. POLSON,
 Asst. City Solicitor.

T. H. & B. Approval Stamp.

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Schedule
 No. 5.
 Resolution
 of the
 Council of
 the City of
 Hamilton
 and Report
 of Board of
 Control,
 16th Octo-
 ber 1930.

Schedule No. 5.—Resolution of the Council of the City of Hamilton and Report of
 Board of Control.

City Hall, Hamilton, October 16th, 1930.

Special meeting of the City Council called by direction of His Worship the Mayor to consider a report from the Board of Control submitting for approval of the Council the application of the Toronto, Hamilton and Buffalo Railway Company and the City Corporation to the Board of Railway Commissioners for Canada, respecting railway grade separation, Hunter Street, and the proposed draft agreement between the City and the Company relating thereto.

Present : John Peebles, Esq., Mayor.

Controllers—McFarlane, Lawrence, Bell, Riselay.

Aldermen—McFarland, Flett, Wright, Hutton, Thompson, O'Heir, Sherring, Aitchison, Pollock, Clarke, Burton, Lewington.

The Clerk read the notice calling the meeting.

40

The Board of Control presented their report.

Moved by Controller McFarlane, seconded by Controller Lawrence :

Resolved—That the report of the Board of Control be now considered in Committee of the Whole.

The Council then went into Committee of the Whole on the report, Alderman O'Heir in the chair.

The Committee rose and reported the adoption of the report.

Moved by Controller McFarlane, seconded by Controller Lawrence :

Resolved—That the report of the Committee of the Whole on the report of the Board of Control be, and the same is, hereby adopted. Carried.

REPORT OF THE BOARD OF CONTROL.

To the Council of the Corporation of the City of Hamilton.

Gentlemen :

The Board of Control present their 25th Report :

1. The Board submit herewith for approval the application of the Toronto, Hamilton & Buffalo Railway Company and the City Corporation to the Board of Railway Commissioners for Canada, respecting Railway Grade Separation, Hunter Street, and the proposed draft agreement between the City and Company relating thereto.

Respectfully submitted,

JOHN PEEBLES, Mayor,
Chairman.

City Hall, October 16th, 1930.

Schedule No. 6.—By-law No. 4197 of the Corporation of the City of Hamilton.

BY-LAW NO. 4197.

To authorize the execution of an Agreement between the Corporation of the City of Hamilton and the Toronto, Hamilton & Buffalo Railway Company.

30 The Municipal Council of the Corporation of the City of Hamilton enacts as follows :

1. That the Mayor and the Clerk of the Corporation are hereby respectively authorized and directed to execute the said agreement approved by the Council, 16th October, 1930, and the Clerk shall fix the Corporate seal thereto.

PASSED this 14th day of April, 1931.

(Sgd.) JOHN PEEBLES,
Mayor.

(Sgd.) S. H. KENT,
City Clerk.

Exhibits:

APPEAL
No. 8.

Schedule
No. 5.

Resolution
of the
Council of
the City of
Hamilton
and Report
of Board of
Control,
16th Octo-
ber 1930—
continued.

Schedule
No. 6.

By-law
No. 4197 of
the Cor-
poration of
the City of
Hamilton,
14th April
1931.

Exhibits.

**Schedule No. 12.—Application of Respondents for approval of Plan and Profile
No. 2 B.R.C. (filed at hearing as Exhibit No. 1).**

APPEAL
No. 8.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Schedule
No. 12.

Application No.

Application
of Respon-
dents for
approval of
Plan and
Profile No.
2 B.R.C.
(filed at
hearing as
Exhibit
No. 1),
30th Octo-
ber 1930.

THE TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY, herein called the Applicant Company, and THE CORPORATION OF THE CITY OF HAMILTON, herein called the City, jointly apply to the Board :

1. For an Order under section 178 of the Railway Act approving and sanctioning the Plan, Profile and Book of Reference submitted herewith in triplicate showing a deviation, change or alteration in the portion of the Applicant Company's Railway between a point at or near the East side of Park Street on the West and a point just East of Victoria Avenue on the East in the City of Hamilton, in the County of Wentworth, in the Province of Ontario, and authorizing such deviation, change or alteration from the present location of said portion of the Applicant Company's Railway in accordance with said Plan, Profile and Book of Reference. 10

2. And also for an Order authorizing the Applicant Company to construct, maintain and operate said portion of its Railway between said points in accordance with the change in grades as shown on said Plan and Profile and including the reconstruction of the approaches to its tunnel on Hunter Street at the East portal thereof. 20

3. And also for an Order under Sections 255 and 256 of the Railway Act authorizing the Applicant Company to carry its elevated tracks over the highways known as MacNab Street, James Street, John Street, Catharine Street, Ferguson Avenue, Young Street and Victoria Avenue by means of bridges and to carry each of said streets beneath such tracks by means of a subway, all in accordance with said Plan and Profile and detailed Plans of said subways to be submitted to the Board.

4. And also for an Order authorizing the Applicant Company to take without the consent of the owners the lands not now owned by the Applicant company or the City shown in red on the said Plan or Profile and mentioned in said Book of Reference. 30

5. And also for an Order directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington within the limits as indicated on said Plan, and to divert Hunter, Aurora and Liberty Streets as shown on said Plan.

6. And also for an Order directing and authorizing a relocation of the Port Dover Line of the Canadian National Railway between Ferguson Avenue and Victoria Avenue and the change in grade thereof as indicated on said Plan and Profile. 40

7. And also for an Order under Section 188 of the Railway Act approving of the new location of the Applicant Company's Station and other terminal buildings in connection therewith on the south side of Hunter Street as shown on said Plan.

8. And also for an Order directing the Hamilton Street Railway Company to reconstruct its tracks through and on each side of the subway on James Street as shown on said Plan and Profile.

9. And also for an Order directing United Gas and Fuel Company of Hamilton Limited, The Bell Telephone Company of Canada, The Hamilton Hydro-Electric Power Commission, The Dominion Power and Transmission Company Limited and any other public utility Company or Companies affected, to reconstruct, alter or change the respective works of each in order to carry out the changes in the Railway shown on said Plan and Profile.

10. And also for an Order under Section 262 of the Railway Act directing a contribution from "The Railway Grade Crossing Fund" towards the cost of the works.

AND STATES :

(1) The Applicant Company and the City have approved of the Plan accompanying this Application and the works covered by the Plan are necessary for the safety, convenience and protection of the public and for the efficient maintenance and operation of the Railway of the Applicant Company.

20 (2) The Applicant Company and the City have agreed that the Board shall apportion the cost of the works between the City, the Applicant Company and all other parties that may be benefited by or interested in the carrying out of the said works.

(3) The Applicant Company and the City desire that the Board shall order the maximum contribution out of The Railway Grade Crossing Fund; the amount or amounts to be fixed by the Board on the hearing of the evidence of all parties at a hearing on a date to be fixed by the Board.

30 (4) The City, the Applicant Company and Canadian National Railway Company have conferred and are in accord upon the proposed scheme of grade separation, and the Applicant Company and the City desire that the Board should issue an Order at once so that the work may be commenced as soon as possible in ease of the present serious unemployment situation at Hamilton which is one of the important considerations for the Applicants joining in this Application at this time.

DATED at Hamilton this 30th day of October, 1930.

THE TORONTO, HAMILTON AND BUFFALO
RAILWAY COMPANY

Per JOHN A. SOULE,
General Solicitor.

THE CORPORATION OF THE CITY OF
HAMILTON

Per A. J. POLSON,
Assistant City Solicitor.

Exhibits.

—
APPEAL
No. 8.

—
Schedule
No. 12.

Application
of Respon-
dents for
approval of
Plan and
Profile No.
2 B.R.C.
(filed at
hearing as
Exhibit
No. 1),
30th Octo-
ber 1930—
continued.

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Exhibits. **Schedule No. 15.—Draft Order prepared by Respondents and submitted to Board of Railway Commissioners for Canada at hearing.**

—
APPEAL
No. 8.
—

Order No.

Schedule
No. 15.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Draft Order prepared by Respondents and submitted to Board of Railway Commissioners for Canada at hearing, 1st November 1930.

IN THE MATTER OF the joint Application of The Toronto, Hamilton and Buffalo Railway Company (herein called the Applicant Company) and the Corporation of the City of Hamilton (herein called the City) for an Order under Sections 162, 178, 188, 199, 201, 255, 256 and 262 and other appropriate sections of the Railway Act approving and sanctioning the Plan, Profile and Book of Reference of the Applicant Company Number 2 BRC dated October 15, 1930, on file with the Board under File Number 20161 and authorizing a deviation change or alteration in the portion of the Applicant Company's Railway between a point at or near the east side of Park Street on the West and a point just east of Victoria Avenue on the East in the City of Hamilton and authorizing said deviation change or alteration from the present location of the said portion of the Applicant Company's Railway in accordance with said Plan, Profile and Book of Reference and authorizing the Applicant Company to construct, maintain and operate said portion of its Railway between said points in accordance with the change in grades as shown on said Plan and Profile and authorizing the Applicant Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John, Catharine, Ferguson, Young and Victoria by means of bridges and to carry each of said streets beneath said tracks by means of a subway and to take without the consent of the owners the lands not now owned by the Applicant Company or the City shown bordered in red and directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington and to divert Hunter, Aurora and Liberty Streets and to authorize a relocation of the Port Dover line of the Canadian National Railway between Ferguson Avenue and Victoria Avenue and the change in grade thereof and to approve of the new location of the Applicant Company's station and Terminal Buildings and to direct the Hamilton Street Railway to reconstruct its tracks through and at each side of the subway at James Street, all as shown on said Plan, Profile and Book of Reference and to direct all Public Utility Companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the Railway.

Saturday, the 1st day of
November, A.D. 1930

HON. H. A. McKEOWN, K.C.,
Chief Commissioner.

S. J. McLEAN,
Assistant Commissioner.

1. UPON the joint Application of the Applicant Company and the City and upon hearing the interested parties, further notice to and service on the interested parties being hereby dispensed with, and upon the Report and recommendation of the Chief Engineer of the Board,

2. IT IS ORDERED that the said Plan, Profile and Book of Reference of the Applicant Company Number 2BRC, dated October 15, 1930, on file with the Board under File Number 20161, showing a deviation, change or alteration in the portion of the Applicant Company's Railway between a point at or near the East side of Park Street on the West and a point just east of Victoria Avenue on the East in the City of Hamilton, in the County of Wentworth, in the Province of Ontario, be and the same is hereby approved and sanctioned and the Applicant Company is hereby authorized to make such deviation, change or alteration from the present
 10 location of said portion of the Applicant Company's Railway in accordance with said Plan, Profile and Book of Reference.

3. AND IT IS FURTHER ORDERED that the Applicant Company be and it is hereby authorized to construct, maintain and operate said portion of its railway between said points in accordance with said Plan and Profile.

4. AND IT IS FURTHER ORDERED that the Applicant Company be and it is hereby authorized to carry its elevated tracks over the highways known as Hunter Street, McNab Street, James Street, John Street, Catharine Street, Ferguson Avenue, Young Street and Victoria
 20 Avenue by means of bridges and to carry such of said streets beneath said tracks by means of a subway and in accordance with said Plan and Profile and detailed plans to be submitted to the Chief Engineer of the Board for approval.

5. AND IT IS FURTHER ORDERED that the Applicant Company be and it is hereby authorized to take without the consent of the owners the lands not now owned by the Applicant Company or the City shown bordered in red on said Plan and Profile and mentioned in said Book of Reference.

6. AND IT IS FURTHER ORDERED that the City do close the
 30 streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington within the limits as indicated on said Plan and divert Hunter, Aurora and Liberty Streets as shown on said Plan.

7. AND IT IS FURTHER ORDERED that Canadian National Railway Company relocate the portion of its Port Dover Line between Ferguson Avenue and Victoria Avenue in accordance with said Plan and Profile.

8. AND IT IS FURTHER ORDERED that the Applicant Company be and it is hereby authorized to construct, maintain and operate its new station and other terminal buildings in connection therewith in the location
 40 as shown on said Plan.

9. AND IT IS FURTHER ORDERED that The Hamilton Street Railway Company do reconstruct its railway through and on each side of the subway on James Street as shown on said Plan and Profile.

Exhibits.
 —
 APPEAL
 No. 8.
 —
 Schedule
 No. 15.
 Draft Order
 prepared by
 Respon-
 dents and
 submitted
 to Board of
 Railway
 Commis-
 sioners for
 Canada at
 hearing,
 1st Nov-
 ember 1930
 —continued.

Exhibits.
—
APPEAL
No. 8.
—
Schedule
No. 15.
Draft Order
prepared by
Respon-
dents and
submitted
to Board of
Railway
Commis-
sioners for
Canada at
hearing,
1st Nov-
ember 1930
—continued.

10. AND IT IS FURTHER ORDERED that United Gas and Fuel Company of Hamilton Limited, The Bell Telephone Company of Canada, Hamilton Hydro-Electric Power Commission and Dominion Power and Transmission Company Limited and any other Public Utility Company or Companies affected do reconstruct, alter or change the respective works of each in order to carry out the change in the Railway shown on said Plan and Profile.

11. AND IT IS FURTHER ORDERED that the Applicant Company be and it is hereby authorized to enter upon and occupy any lands so long as is necessary for the purpose of temporarily shifting its tracks or carrying out the works hereby authorized. 10

12. AND IT IS FURTHER ORDERED that the apportionment of the cost of the works between the Applicant Company, the City and all other parties that may be benefited by or interested in the carrying out of the said works and the contribution to be made out of the Railway Grade Crossing Fund be reserved for further consideration on a date to be fixed by the Board.

.....

Chief Commissioner,
Board of Railway Commissioners for Canada. 20



In the Privy Council.

No. 61 of 1932.

On Appeal from the Supreme Court of Canada.

IN THE MATTER OF the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act for authority to construct a Subway at d'Argenson Street, in the City of Montreal, between Point St. Charles and St. Henri, as shown on General Plan No. YIE 31.51.4 dated April 15th, 1930, on file with the Board under File No. 9437.319.7.

BETWEEN

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

AND

THE CANADIAN NATIONAL RAILWAYS
Respondent.

And Seven Connected Appeals (Consolidated by His Majesty's Order in Council dated 21st July 1932).

RECORD OF PROCEEDINGS.

LAWRENCE JONES & CO.,
Lloyd's Building,
Leadenhall Street, E.C.3.

For the Appellants.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.

For the Respondents.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C.4.