1931
*Oct. 26, 27.
1932
*Mar. 1.

THE BELL TELEPHONE COMPANY OF CANADA, IN RE D'ARGENSON STREET SUBWAY, MONTREAL ..... APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS ..... RESPONDENT.

THE BELL TELEPHONE COMPANY OF CANADA IN RE ST. ANTOINE STREET SUBWAY, MONTREAL ..... APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS ..... RESPONDENT.

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED, IN RE D'ARGENSON STREET SUBWAY, MONTREAL APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS ..... RESPONDENT.

---

*Present at hearing: Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.; Newcombe J. took no part in the judgment, having died before the delivery thereof.

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED IN RE ST. ANTOINE STREET SUBWAY, MONTREAL... } APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS ..... } RESPONDENT.

THE MONTREAL TRAMWAYS COMPANY AND THE MONTREAL TRAMWAYS COMMISSION IN RE D'ARGENSON STREET SUBWAY, MONTREAL..... } APPELLANTS;

AND

THE CANADIAN NATIONAL RAILWAYS ..... } RESPONDENT.

THE MONTREAL TRAMWAYS COMPANY AND THE MONTREAL TRAMWAYS COMMISSION IN RE ST. ANTOINE STREET SUBWAY, MONTREAL..... } APPELLANTS;

AND

THE CANADIAN NATIONAL RAILWAYS ..... } RESPONDENT;

THE BELL TELEPHONE COMPANY OF CANADA IN RE ST. CLAIR AVENUE SUBWAY, TORONTO ..... } APPELLANT;

AND

THE CANADIAN NATIONAL RAILWAYS ..... } RESPONDENT.

THE BELL TELEPHONE COMPANY OF CANADA IN RE SUBWAYS, ETC., IN THE CITY OF HAMILTON ..... } APPELLANT;

AND

THE TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY AND THE CORPORATION OF THE CITY OF HAMILTON ..... } RESPONDENTS.

1932

THE BELL TELEPHONE CO. OF CANADA
v.
THE CAN. NAT. RYS. (3 appeals)

—

THE MONTREAL L., H. & P. CON.
v.
THE CAN. NAT. RYS. (2 appeals)

—

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM.
v.
THE CAN. NAT. RYS. (2 appeals)

—

THE BELL TELEPHONE CO. OF CAN.
v.
THE T., H. & B. RY. CO.

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Orders of Board of Railway Commissioners—Authorizing construction of subways in connection with highway crossings—Directing appellants to move utilities—Railway Act, sections 39, 255, 256, 257—Jurisdiction of Board under the Act—Whether these sections apply to Canadian National Railways—Whether appellants "interested or affected by" the Orders—Railway Act, R.S.C., 1927, c. 170, ss. 33 (5), 39, 44 (3), 52 (2), 162, 252, 255, 256, 257, 259, 260—Expropriation Act, R.S.C., 1927, c. 64—Canadian National Railways Act, R.S.C., 1927, c. 172; 19-20 Geo. V, c. 10—Canadian National Montreal Terminals Act, (D) 19-20 Geo. V, c. 12.

The Canadian National Railways, 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. The Board, in final Orders granting the applications, authorized the construction of subways or other structures in connection with the highway crossings and, at the same time, directed the present appellants, amongst others, to move such of their utilities as may be affected by the construction or changes so authorized. The appellants urged that the Board was without jurisdiction to make the Orders in so far as it directed the appellants to move their utilities; that, in any event, the orders were made irregularly and not in accordance with the rules binding upon the Board; that sections 255, 256 and 257 of the *Railway Act* were not applicable to the Canadian National Railways and that the Board had not the power to compel public utilities companies to remove their facilities without previous compensation.

Held that these Orders were made within the exercise of the powers vested in the Board by the *Railway Act*, and more particularly by the provisions of sections 39, 255, 256 and 257 of that Act.

Per Duff, Rinfret and Lamont JJ.—The powers of the Board, under the sections above mentioned, are set in motion not alone at the request of the railway companies, but equally 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, and it may prescribe such terms and conditions as it deems expedient, its decisions being conclusive as to the expediency of the measures ordered to be taken.

Per Duff, Rinfret and Lamont JJ.—The appellants fall within the class of companies or persons "interested or affected" by the Orders, within the meaning of section 39 of the *Railway Act*, and, therefore, could competently be ordered to do the works in the manner specified in these Orders, unless it be "otherwise expressly provided" in some other part of the Act. But there is no other section of the Act 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.

Per Duff, Rinfret and Lamont JJ.—Sections 39, 252, 255, 256 and 257 of the *Railway Act* apply to the Canadian National Railways, as there

are no other provisions, either in the *Special Act* or *Terminals Act* of the Canadian National Railways which are inconsistent with these sections of the Railway Act. Moreover, that being so, it is unnecessary to inquire whether they are inconsistent with the *Expropriation Act*, as that Act cannot prevail against the provisions of the *Railway Act* relating to highway and railway crossing plans.

Per Duff, Rinfret and Lamont JJ.—Applications under sections 252, 255, 256 or 257 of the *Railway Act* are not complaints within the meaning of subs. (*a*) of section 33 and the Board may conduct its proceedings in these matters in such manner as may seem to it most convenient. The Board itself is the proper judge of the circumstances under which section 59 of the Act and Rule 6 of its Regulations should be acted upon.

Per Duff, Rinfret and Lamont JJ.—Sections 367 to 378 of the *Railway Act* deal with telephones or telephone companies *qua* telephones or telephone companies; but there is nothing in them to detract from the authority of the Board to exercise its powers over telephone companies *qua* companies or persons, in the same manner and with the same effect as against any other company or person.

APPEALS by The Bell Telephone Company of Canada, The Montreal Light, Heat & Power Consolidated, The Montreal Tramways Company and The Montreal Tramways Commission, by leave of a judge of this court, from Orders of the Board of Railway Commissioners for Canada.

The Canadian National Railways, 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 Orders 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.

The Canadian National Railways, acting in pursuance of the provisions of the *Canadian National Terminals Act*, was constructing a line of railway from Victoria Bridge, in Montreal, to its new Terminal Station on Lagauchetière street. That line of railway was crossing St. Antoine street and d'Argenson street at a point where was located the underground conduit system of The Bell Telephone Company of Canada and of The Montreal Light, Heat & Power Consolidated. The railway line would be carried over St. Antoine street on a bridge and St. Antoine street would be

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

carried under the tracks by means of a subway, the construction of which would involve the lowering of the grade of the street. Also, the elevation of the railway line running from St. Henri to Point St. Charles, crossing d'Argenson street, necessitated the reconstruction of the existing subway at that place.

In 1913, The Bell Telephone Company of Canada constructed an underground conduit system under the surface and within the limits of St. Clair Avenue, in Toronto and placed its telephone lines and cables therein; and, in 1930, the Canadian National Railways applied to the Board of Railway Commissioners for authority to divert its Newmarket Subdivision line to the west and to construct a subway under the diverted line where it crosses St. Clair Avenue, and for an order directing the Bell Telephone Company to make such changes in its facilities as may be necessary.

The Bell Telephone Company of Canada owns and maintains telephone lines constructed upon and under certain streets in the city of Hamilton. The Canadian National Railways, for the purpose of elevating and diverting its line of railway running through that city, made an application to the Board of Railway Commissioners, in which the city of Hamilton joined as an applicant, for, *inter alia,* the approval of the plans, for the diversion and other works incidental thereto, and for an order directing the Bell Telephone Company to reconstruct, alter or change its works in order to carry out the changes planned by the railway company.

Pierre Beullac K.C. and *N. A. Munnoch* for the appellant The Bell Telephone Company of Canada.

Geo. H. Montgomery K.C. for the appellant The Montreal Light, Heat & Power Consolidated.

Thomas Vien K.C. for the appellant The Montreal Tramways Company.

F. Béique K.C. for the appellant The Montreal Tramways Commission.

W. N. Tilley K.C. and *Geo. F. Macdonnell K.C.* for the respondent The Canadian National Railways.

G. W. Mason K.C. and *A. J. Polson* for the respondent The City of Hamilton.

W. N. Tilley K.C. and *J. A. Soule* for the respondent The Toronto, Hamilton and Buffalo Railway Company.

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.

The judgment of Duff, Rinfret and Lamont JJ. was delivered by

RINFRET J.—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.

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.

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

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

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.

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 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.

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.

3. When the application is for the construction of the railway, upon, along or across a highway, all the provisions of law at such times applicable to the taking of land by the company, to its valuation and sale and con-

veyance 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.

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

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

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, or 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.

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

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

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.

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 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.

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

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.

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 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 * * * 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 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 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:

> 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 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

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 (3), 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 a certain extent in the *Toronto* case (4)), 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

(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.
(3) [1914] A.C. 1067.
(4) [1920] A.C. 426, at 436 to 443.

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

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* (1), that there can be no question here that the orders appealed from are mandatory.

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* 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 words 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.

But it seems evident that the appellants are companies "affected" as contemplated by the section. In *Canadian Pacific Ry. Co.* v. *Toronto Transportation Commission* (2), Lord Macmillan, delivering the judgment of the Judicial Committee, made the following observation at page 697:

> Sect. 89 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 so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.

The question is primarily one of fact and the decisions herein carry the full weight that attaches to the finding of

(1) [1920] A.C. 427, at 436. (2) [1930] A.C. 686.

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 (1). In the *Toronto Transportation* case (2), the test was laid down in this way:

> 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* (3), the class of persons who may be ordered to contribute towards the cost and expenses under subs. 2 of section 39 is the same exactly as the class of persons who may be ordered to do the works under subs. 1. So far as we know, the question as to what constitutes a person "interested or affected" under subs. 1 comes before the courts for the first time, but it has been discussed in a number of cases under subs. 2; and, although fully 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 (4), 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.

(1) [1930] A.C. 686, at 696.
(2) [1930] A.C. 686, at 702-703.
(3) [1920] A.C. 426, at 435.
(4) [1920] A.C. 426, and [1930] A.C. 686.

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

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 (1), 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 (2).

It remains to consider whether, as the appellants contend, these are cases where the *Railway Act* "otherwise ex-

(1) See [1920] A.C. 431. (2) [1930] A.C. 703.

pressly provided" so as to take them outside the application of section 39.

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: 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 own 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.

Then, there are in subs. 3 of section 256 and in subs. 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 com-

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

panies; and the conclusion follows that the orders to remove the facilities are therefore invalid.

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 appellant's 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.

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. Subs. 3 of 256 and subs. 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 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 subs. 3 of 256 and in subs. 2 of 257 plainly mean the provisions applicable to the taking of land for the purposes of the rail-

way or for the undertaking of the railway. It may be said generally 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 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 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 subsections 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 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 subs. 3 of 256 or subs. 2 of 257; and those subsections do not, in these instances at least, preclude the application of section 39.

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

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

Incidentally it may be added that the provisions in subs. 4 of 256 and subs. 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."

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 subs. 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).

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, it expressly reserved for future 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 subs. 2 of section 39, it has none on subs. 1. In our view, there is nothing in sections 259 and 260 to put an end to the application of section 39 subs. 1 (3).

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

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

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

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

absence or sufficiency of notice to the appellants, who urge that they were not accorded the hearing to which they were entitled.

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 which they availed themselves—of filing their submissions in writing, although there was afterwards an 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 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 subparagraph (*a*) of that section. The applications leading to the orders we are now discussing were not complaints. They were requests of the kind described in subparagraph (*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

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

the Act (sections 20, 50 and 53). One of those rules reads in part as follows:—

> 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, as may seem to it just and right.

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, 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 subs. 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.

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

> 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.

(*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.* 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 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.

(1) (1916) 36 Ont. L.R. 619, at 628.

(2) 15 Can. Ry. Cases, 305.

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

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 the direction complained of, so far at least as 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 subs. 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 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 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 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.

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 subs. (*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 subs. (*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 subheading "Crossings and Junctions with other railways," are

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

sections 252 to 254 inclusive, and, under the sub-heading "Highway crossings," are sections 255 to 267 inclusive. It seems obvious that what subs. (*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 argued 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

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

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*.

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 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* (1); *London, Chatham & Dover Ry.* v. *Board of Works for the Wandswork District* (2).

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 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

(1) (1864) 33 L.J. Ch. 372. (2) (1873) L.R. 8 C.P. 185 at 189.

1932

THE BELL TELEPHONE CO. OF CANADA v. THE CAN. NAT. RYS. (3 appeals)

THE MONTREAL L., H. & P. CON. v. THE CAN. NAT. RYS. (2 appeals)

THE MONTREAL TRAM. CO. AND THE MONTREAL TRAM. COM. v. THE CAN. NAT. RYS. (2 appeals)

THE BELL TELEPHONE CO. OF CAN. v. THE T., H. & B. RY. CO.

Rinfret J.

the Board of Railway Commissioners under sections 252, 255, 256 and 257, the 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.

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 subs. 3 of 256 and subs. 2 of 257. But we have already indicated that the occasion does not arise here.

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.

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 Cor-*

poration 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.

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.

The appeals are dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellant, The Bell Telephone Company of Canada: *Pierre Beullac.*

Solicitors for the appellant The Montreal Light, Heat & Power Consolidated: *Brown, Montgomery & McMichael.*

Solicitors for the appellant The Montreal Tramways Company: *Vallée, Vien, Beaudry, Fortier & Mathieu.*

Solicitors for the appellant The Montreal Tramways Commission: *Béique & Béique.*

Solicitor for the respondent The Canadian National Railways: *Alistair Fraser.*

Solicitors for the respondent The Toronto, Hamilton and Buffalo Railway Company: *J. A. Soule.*

Solicitor for the respondent The City of Hamilton: *A. J. Polson.*

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