# IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY AND EFFECT OF SECTION 189 OF THE RAILWAY ACT IN ITS APPLICATION TO PROVINCIAL CROWN LANDS.

1925
*Nov. 25, 26.
*Dec. 10.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL

*Railway—Crown Lands—Expropriation—B.N.A. Act, ss. 91, 92*

Section 189 of the Railway Act, 1919, c. 68, which enables railway companies with the consent of the Governor in Council to take possession of Crown Lands applies to Provincial Crown Lands and is within the competence of the Parliament of Canada to enact.

It is within the discretion of the Governor in Council to grant or refuse the consent required by said section. The condition which requires consent imports no more than an incidental power of regulation.

The Nipissing Central Railway Company was incorporated by a statute of Canada 6-7 Ed. VII, c. 112, and was authorized amongst other things to construct its railway from the town of Latchford in the province of Ontario northerly into and through part of the province of Quebec. The company obtained from the Board of Railway Commissioners of Canada as required by the Railway Act, an order approving of its general location plan, and a further order sanctioning the plan and profile, etc., of a portion of the line between Larder Lake in Ontario to Osisko Lake in the township of Rouyn, in the province of Quebec, a distance of 37 miles, and which passed through lands vested in the Crown in the right of the province of Quebec. The company thereupon applied to the Governor in Council for leave to take possession of the said Crown Lands pursuant to section 189 of the said Railway Act, which provides as follows:

(1) No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.

(2) Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway which have not been granted or sold, as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.

(3) The company may not alienate any such lands so taken, used or occupied.

---

*Present:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

(4) Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.

The Attorney General of the province of Quebec objected to the Governor in Council giving the leave asked for, and claimed that the expression "lands vested in the Crown" in said section 189 was limited to lands vested in the Crown in the right of the Dominion and not of any province. He further contended that if the said lands did include lands vested in the Crown in right of the province, the section in question was *ultra vires* of the Parliament of Canada. Thereupon pursuant to the provisions of section 60 of the Supreme Court Act, R.S.C. [1906], c. 139, the following questions were referred to the Supreme Court:

1. Is it within the competence of Parliament to enact the provisions of section 189 of the Railway Act, 1919, with regard to provincial Crown lands?

2. If the answer to question 1 be in the affirmative, is said section 189 as it now stands applicable to provincial Crown lands?

3. Is it obligatory upon the Governor in Council to give his consent under the provisions of subsection 2 of said section upon any proper application therefor, or has he discretion to grant or refuse such consent as he may see fit?

*Lafleur K.C.* for the Attorney General of Canada contended that by virtue of subsection 29 of section 91, and subsection 10 of section 92, B.N.A. Act, the railway in question was under the sole jurisdiction of the Parliament of Canada, and as a necessary consequence Parliament was vested with the necessary powers to enable the railway to be constructed and operated without assistance or hindrance from the provincial legislatures, and that the question was settled by the judgments of the Judicial Committee of the Privy Council. *Corporation of the City of Toronto* v. *Bell Telephone Co.* (1); *Attorney General for British Columbia* v. *Canadian Pacific Railway Company* (2).

*W. N. Tilley K.C.* and *Parmenter* for the Nipissing Central Railway Company relied on the same cases, and also emphasized the fact that section 189 had its origin before the passing of the B.N.A. Act. Substantially the same language is to be found in the Railway Act of 1868, 31 Vict. 68, s. 7.

(1) [1905] A.C. 52.

(2) [1906] A.C. 204.

*Lanctot K.C.* and *Geoffrion K.C.* for the Attorney General of Quebec contended that the land in question was public property of the province of Quebec under the B.N.A. Act. *St. Catherine's Milling and Lumber Co.* v. *Queen* (1); *Attorney General for Canada* v. *Attorneys General for Ontario, Quebec and Nova Scotia (The Fisheries Case)* (2); *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours* (3); *Ontario Mining Co.* v. *Seybold* (4); *Corporation of the City of Toronto* v. *The Bell Telephone Co. of Canada* (5); *British Columbia* v. *Canadian Pacific Ry.* (6); *Burrard Power Co.* v. *The King* (7); *Attorney General for Ontario* v. *Attorney General for Canada* (8); *Attorney General for Canada* v. *Ritchie Contracting and Supply Co.* (9); *Attorney General for Quebec and others* v. *Attorney General for Canada and another (The Star Chrome Case)* (10); *Attorney General for Canada* v. *Attorney General for Quebec* (11); *Canadian Pacific Ry. Co.* and *Corporation of Toronto* (12); *Cushing* v. *Dupuy* (13); *City of Montreal* v. *Montreal Street Railway Co.* (14). They also distinguished the decision of *Attorney General of British Columbia* v. *Canadian Pacific Railway* (6), as in that case the harbour in question was the property of the Dominion under section 108 of the B.N.A. Act, and was subject also to the over-riding provisions of the Canadian Pacific Railway charter, 44 V.C. 1.

The judgment of the court was delivered by

NEWCOMBE J.—By order of the Governor General in Council of 11th June, 1925, the following questions were referred to this Court for hearing and consideration, under the authority of section 60 of the Supreme Court Act:

1. Is it within the competence of Parliament to enact the provisions of section 189 of the Railway Act, 1919, with regard to provincial Crown lands?

2. If the answer to question 1 be in the affirmative, is said section 189, as it now stands, applicable to provincial Crown lands?

3. Is it obligatory upon the Governor in Council to give his consent under the provisions of subsection 2 of said section upon any proper

(1) [1888] 14 A.C. 46.
(2) [1898] A.C. 700.
(3) [1899] A.C. 367.
(4) [1903] A.C. 73.
(5) [1905] A.C. 52.
(6) [1906] A.C. 204.
(7) [1911] A.C. 87.
(8) [1912] A.C. 571.
(9) [1919] A.C. 999.
(10) [1921] 1 A.C. 401.
(11) [1921] 1 A.C. 413.
(12) [1911] A.C. 461.
(13) [1880] 5 A.C. 409.
(14) [1912] A.C. 333.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

application therefor, or has he discretion to grant or refuse such consent as he may see fit?

The order proceeds upon a recital that there is pending an application of the Nipissing Central Railway for the consent of the Governor in Council, under the section mentioned, to take possession of, use and occupy Crown Lands of the province of Quebec for the purposes of a proposed extension of its Larder Lake branch into the Rouyn mining district, and that the Government of Quebec opposes such consent upon the grounds that the section applies only to Crown Lands of the Dominion, and that, if interpreted as applying to Provincial Crown Lands, it is *ultra vires* of Parliament, in so far as it is intended to affect them.

The Nipissing Central Railway Company was incorporated by Act of the Dominion, c. 112 of 1907. The lines of railway which it is authorized to construct and operate are particularly described, and include a line extending from Latchford in the province of Ontario, through certain named townships, and thence, in a northerly direction, to a point on the line of the Grand Trunk Pacific Railway in the province of Quebec, at or near the Matagami River. Thus the work authorized to be constructed is of the class described in the 10th enumeration of s. 92 of the British North America Act, 1867, as a line of railway connecting one province with another, or extending beyond the limits of a province, and therefore within the exclusive legislative authority of the Parliament of Canada under the 29th enumeration of s. 91 of the last mentioned Act.

Section 189, the enactment with regard to which the questions are propounded, is the first of a group of sections comprised in the Railway Act, 1919, under the general title or description, " The taking and using of lands"; it is introduced under the special caption, "Restrictions—Crown Lands," and is expressed in the following words:

189. (1) No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.

(2) Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway which have not been granted or sold, as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.

(3) The company may not alienate any such lands so taken, used or occupied.

(4) Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.

A few brief observations are necessary in order to bring out the setting or context. The Railway Act, 1919, is the general Railway Act of the Dominion, providing for the construction and working of railways, other than Government railways, and authorizing, subject to its provisions, the compulsory taking and using of lands for railway purposes; it provides for the powers and regulation of railway companies, subject to the special or particular legislation affecting them individually; it applies to Government railways only so far as specially provided; it provides also for a Board of Railway Commissioners for Canada, and this board exercises large powers and jurisdiction with relation to railways under the provisions of the Act.

Under the general powers conferred, a railway company may, by s. 162, for the purposes of its undertaking and subject to the provisions of its special Act:

(*a*) enter into and upon any Crown lands without previous license therefor, or into or upon the lands of any person whomsoever, lying in the intended route or line of the railway, and make surveys, examinations or other necessary arrangements on such lands for fixing the site of the railway, and set out and ascertain such parts of the lands as are necessary and proper for the railway;

* * * * *

(*d*) make, carry or place the railway across or upon the lands of any person on the located line of the railway;

* * * * *

(*q*) do all other acts necessary for the construction, maintenance and operation of the railway.

It is provided by s. 166 that the company shall not commence the construction of its railway, or any section or portion thereof, until the general location shall have been approved by the Board of Railway Commissioners for Canada, nor until the plan, profile or book of reference of the railway shall have been sanctioned by the Board. Then by s. 167, it is enacted that the company shall prepare, and submit to the Board, a map showing the general location of the proposed line of the railway, the termini, and principal towns and places through which it is to pass, with some additional particulars which are specified, and such further or other information as the Board may require.

1925
REFERENCE IN RE S. 189, RAILWAY ACT.
Newcombe J.

This map may be approved by the Board, subject to such changes and alterations as may be deemed expedient, and, when so approved, the company is, by s. 168, required to prepare a plan, profile and book of reference of the railway with precise particulars, showing, among other requirements, the areas, length and width of the lands proposed to be taken, giving the numbers of lots, and defining the portion of each lot proposed to be taken, and stating the names of the owners and occupiers, so far as they can be ascertained. By s. 170, the plan, profile and book of reference are to be submitted to the Board, which, if satisfied therewith, may sanction them, and by such sanctioning, the Board shall be deemed to have approved the location, grades and curves as shown; and, by s. 172, the plan profile and book of reference, when sanctioned, are to be deposited with the Board, and copies thereof are also to be deposited in the office of the registrars of deeds for the districts or counties within which the lands lie. The company may then proceed, subject to the provisions of the Act, to take, for the purposes of its railway, the lands so defined or ascertained; but, so far as concerns lands vested in the Crown, the requirements of s. 189 are interposed. We are informed that the Board of Railway Commissioners has approved the location map of the Nipissing Central Railway, and sanctioned the plan, profile and book of reference of that portion of it which lies between Larder Lake, in the province of Ontario, and Osisko Lake, in the province of Quebec, a distance of about thirty-seven miles; but, as the railway so located necessarily traverses Crown Lands of Quebec, the work is stayed in the absence of the Governor General's consent to the taking of the lands required.

The course of the legislation is important, because, as I shall show, the section now in question was, in an earlier form, both as to its interpretation and enacting authority, the subject of conclusive determination by decision of the Judicial Committee of the Privy Council which is directly binding upon this court.

And, first, it is pertinent to observe that the Railway Act of 1919 is a consolidation, with some amendments, of preceding legislation; s. 189 finds its prototype in the preunion consolidation of the statutes of the province of Can-

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

ada in 1859, c. 66, s. 133, an Act which apparently has not been expressly repealed, either by the Parliament of Canada or by the legislature of Quebec, and which survived the union of the province, subject to the provisions of s. 129 of the British North America Act, 1867. A corresponding provision was enacted at the first session of Parliament after the Union by s. 7, ss. 3, of c. 68 of the Railway Act, 1868; it reads as follows:

3. No railway company shall take possession of, use or occupy any lands vested in Her Majesty, without the consent of the Governor in Council; but with such consent any such company may take and appropriate for the use of their railway and works, but not alienate, so much of the wild lands of the Crown lying on the route of the railway, as have not been granted or sold, and as may be necessary for such railway, as also so much of the public beach or of the land covered with the waters of any lake, river, stream or canal, or of their respective beds, as is necessary for making and completing and using their said railway and works, subject, however, to the exceptions contained in the next following subsection.

The exceptions are of no present consequence; they make special provision for lands reserved for naval or military purposes. This provision agrees precisely in effect with s. 133 of the Railway Act as found in the Consolidated Statutes of Canada, 1859, except that the public beach is not mentioned in the Act of 1859, and the exceptions include Indian as well as Military or Naval Reserves.

Eleven years later, Parliament enacted the Consolidated Railway Act, 1879, c. 9, and s. 7, ss. 3, of this Act reproduces in place and in terms the provision of 1868 last quoted.

Since the Act of 1879 there have been no less than five consolidations. When the Act of 1879 was consolidated in the general revision of the Public Statutes of 1886, c. 109, s. 7, ss. 3, was reproduced, without any material change, by paragraph 17 of s. 6; but when that section reappeared in the consolidation of 1888, c. 29, s. 99, some changes and an addition were introduced, making the section read as follows:—

99. No company shall take possession of, use or occupy any lands vested in Her Majesty, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway, as also so much of the public beach, or of the land covered with the waters of any lake, river, stream or canal,

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

or of their respective beds, as is necessary for making and completing and using its said railway and works; and whenever any such lands are vested in Her Majesty for any special purpose or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.

C. 29 of 1888 stood until the consolidation of 1903, c. 58, wherein it was reproduced as ss. 1 of s. 134, under the heading "Taking or Using Lands"; but, in the latter section, the words "the Crown" were substituted for "Her Majesty," where they occurred in the provision of 1886, and the word "canal" was omitted in the mention of the lands covered with water, which, by the Act of 1888, the company was empowered to take. In the general consolidation and revision of 1906, c. 37, the provision respecting the taking possession of, use or occupation of lands vested in the Crown appears as s. 172, and it differs in no respect from ss. 1 of s. 134 of 1903, except that it is divided into four subsections with a view, I suppose, to simplify and improve its structure.

Section 172 of c. 37 of the Revised Statutes, 1906, is reproduced without material change in s. 189 of the Consolidation of 1919, the enactment which is now submitted for hearing and consideration.

Argument seems unnecessary to show that s. 189 is intended to apply to Provincial Crown Lands, or that it is, in relation to those lands, within the enacting authority of Parliament, if the previous corresponding enactments to which I have referred, and from which it is mediately or immediately derived, had that application, and were competently sanctioned. Now s. 189 does not differ, as to its intention and legislative effect, from the original Dominion provision of 1868 in any particular material to the questions submitted. There can be no doubt of course that, in the Consolidated Act of 1859, the parent provision applied to all Crown Lands; the separate rights of the Crown in relation to the Dominion and the provinces had not then been created; neither can there be any doubt that in 1868, when the Parliament of Canada re-enacted the clause of 1859, that re-enactment was expressed in terms which, in one particular at least, did not fail to describe lands belonging to the provinces. It must be remembered that at that time the only provinces comprised in the union were the four original ones, Ontario and Quebec, previously

united as the provinces of Canada, Nova Scotia and New Brunswick; and, in these provinces, by s. 109 of the British North America Act, 1867, the public lands, including all which would be understood as comprised in the description "wild lands of the Crown," were to belong to the several provinces in which they were situated. It was not until 1888, after the North West Territories had been incorporated in the Union, and after the constitution of the province of Manitoba, and after the provinces of British Columbia and Prince Edward Island had joined the Union, that the expression, "wild lands of the Crown," gave way to the general and more comprehensive description, "lands of the Crown," as a more apt and enlarged definition of the lands to which the provision was to apply.

The legislative authority of Parliament to give effect to s. 189, in its application to Provincial Crown Lands, might, however, present some difficulties were it not already affirmed by ultimate authority; but, in view of the judgment of the Judicial Committee of the Privy Council in the *Vancouver Case, Attorney General for British Columbia* v. *Canadian Pacific Railway Co.* (1), neither the meaning of the section nor the power to enact it is questionable in this court. That case was tried in 1904; the action was by the Attorney General of the province for a declaration that the public had a right of access to the waters of Vancouver harbour through certain streets of the city of Vancouver. The main line of the defendant company's railway extends from Calendar Station, near lake Nipissing, to Port Moodie, in British Columbia, and the company had constructed, under its statutory powers, a branch or extension of its railway from Port Moodie to Vancouver, the line of which ran along the foreshore on the south side of the harbour, crossing the ends of these streets, where the company had constructed yards and wharves which obstructed them. It was found that these streets were at the time public highways, extending to low water mark, and that the public right of passage over them to the waters of the harbour existed at the date of the admission of British Columbia into the Union. At the trial the action was dismissed; and, upon appeal to the Supreme Court of the province, sitting *en banc,* the question as to the authority of the company

(1) [1906] A.C. 204.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

under its statutory powers to take these lands for its railway purposes, seeing that they belonged to the Provincial Crown, was very fully discussed, both at the hearing and in the judgments of the learned judges who gave their reasons for dismissing the appeal. The authority of the company depended upon s. 7, ss. 3, of the Consolidated Railway Act, 1879, as modified or affected by the special legislation relating to the company, c. 1 of 1881. By ss. 17 and 18 (*a*) of the Company's Act of incorporation, which is embodied in a schedule to the Act last mentioned, it is provided that:—

> 17. "The Consolidated Railway Act, 1879," in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith.
>
> 18. As respects the said railway, the seventh section of "The Consolidated Railway Act, 1879," relating to powers, and the eighth section thereof relating to plans and surveys, shall be subject to the following provisions:—
>
> (*a*) The company shall have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways. But the provisions of this subsection shall not apply to any beach or land lying east of Lake Nipissing except with the approval of the Governor in Council.

The last four lines should not be overlooked; it is only with the approval of the Governor in Council that the provisions of the subsection apply to any beach or land lying east of Lake Nipissing, territory which could not be reached by the company save in the exercise of its very comprehensive powers to construct branches or extensions of its main line, as expressed in clause 14 of the contract, and in s. 15 of the Act of Incorporation, scheduled to c. 1 of 1881. Ordinarily, therefore, ss. 3 of s. 7 of the Railway Act, 1879, is left to its unqualified operation east of Lake Nipissing; beyond Lake Nipissing it applies subject to the special modification enacted by s. 18 (*a*), c. 1 of 1881. It must follow that when the Crown is spoken of, both in the main provision of 1879 and in s. 18 (*a*) of 1881, to which the main provision is made subject, it is the same Crown in both cases that Parliament had in mind; the rule and its exception must operate with relation to a com-

mon subject matter; east or west of Lake Nipissing, the Crown Lands which are provided for in subs. 3 of s. 7 of 1879, and in s. 18 (*a*) of 1881, include Crown Lands of the province.

It is noticeable in perusing the judgments of the learned judges of the provincial court upon the appeal that the arguments and the authorities which had been submitted to them, and to which they gave careful consideration, embrace all those, except the cases subsequently decided, which were so forcibly presented at the hearing of this reference in opposition to an affirmative answer to the first question submitted. From the judgment of the provincial court, sitting *en banc,* there was an appeal direct to His Majesty in Council, which was heard by Lord Macnaghten, Lord Davey, Sir Ford North and Sir Arthur Wilson, the latter pronouncing the judgment on 27th February, 1906. Their Lordships observe that the learned trial judge had found that the rights of way contended for existed when British Columbia entered the Union, and when the railway company, by the construction of its works, interrupted the free access to the sea, and that the learned judges of the full court did not dissent from this finding, " rightly addressing their minds to the more important general questions arising in the case". Their Lordships state that they propose to follow a similar course, and they proceed to consider the two distinct grounds upon which it was urged at the argument that the Dominion Parliament had the right to legislate; and, first, it was held that under s. 108 and the third schedule of the British North America Act, 1867, the harbour of Vancouver was a public harbour at the time of the Union, and therefore became the property of Canada. Then they consider the second ground which is thus described in the judgment:

> The second contention in support of the right of the Dominion Parliament to legislate for the foreshore in question is rested upon s. 91, read with s. 92 of the British North America Act, which secured to the Dominion Parliament exclusive legislative authority in respect of lines of steam or other ships, railways, canals, telegraphs, and other works, and undertakings connecting any province with any other or others of the provinces, or extending beyond the limits of the province, a description which clearly applies to the Canadian Pacific Railway.

Upon this question they conclude that:

> To construe the sections now in such a manner as to exclude the power of Parliament over provincial Crown lands would, in their Lordships' opinion, be inconsistent with the terms of the sections which they

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

have to construe, with the whole scope and purpose of the legislation, and with the principle acted upon in the previous decisions of this board. Their Lordships think, therefore, that the Dominion Parliament had full power, if it thought fit, to authorize the use of provincial Crown lands by the company for the purposes of this railway.

With regard to the suggestion that s. 18 (*a*) of the Canadian Pacific Railway's Act of incorporation did not authorize the closing of public highways, their Lordships observe that the latter Act incorporated the Consolidated Railway Act, 1879, in so far as its provisions were not inconsistent with or contrary to the provisions of the Incorporating Act; that there was a variety of inconsistent provisions in the general Act, but that it was unnecessary to enquire whether these would or would not apply to the rights of way in question, and they concluded that:

It is enough to say that the language of the Canadian Pacific Railway Act must prevail over that of the Consolidated Railway Act which applies only so far as it is not inconsistent with the special Act. And it is clear, in their Lordships' opinion, that the power given to the company to appropriate the foreshore for the purposes of their railway of necessity includes the right to obstruct any rights of passage previously existing across that foreshore.

It follows, I think, from the judgment of their Lordships that, in relation to railways, the authority given to Parliament by s. 91 of the British North America Act, 1867, necessarily involves the power to take provincial lands for railway purposes. That, I think, is the effect of the Vancouver decision. Their Lordships had before them the judgment of the provincial court in which the whole question of legislative power was elaborately considered; and, although the decision of either of the two more important general points before them might have been sufficient for the disposition of the case, these two questions were treated as of co-ordinate importance, and their Lordships emphasized the propriety of addressing their minds to the question of the legislative power, which they affirmed. It is impossible therefore to deny that the observations upon this branch of the case were strictly intended to form part of their judgment; *New South Wales Taxation Commissioners* v. *Palmer* (1); *Membery* v. *Great Western Railway Coy.* (2). I think that this court ought to follow the decision of their Lordships. It was given nearly twenty years ago,

(1) [1907] A.C. 179, at p. 184. (2) [1889] 14 A.C. 179, at p. 187.

and it has ever since been acted upon in practice. The provision which it upholds has, in the interval, been enacted and re-enacted by Parliament without any material change affecting the questions with which we are now concerned, and has thus become as firmly established in the legislation of the country as any statutory enactment, emanating from a legislature of limited powers, can possibly be.

It was said that s. 189 does not provide for adequate compensation, and is therefore *ultra vires* under the authority of the very recent decision of the Judicial Committee in the *Montreal Harbour Commissioners Case* (1). There are several answers. In the first place, it may be said that s. 189, at least, does not fail in the provision for indemnity more than did the legislation which was under review in the *Vancouver Case* (2); and, to the extent to which ss. 4 is intended to provide for compensation, that provision is additional to anything contained in the statutes which were considered in the latter case. We are not asked expressly to determine the effect of this subsection; but, whatever its interpretation may be, it must certainly be upheld along with the preceding subsections which accompany it. Then, if, as is suggested, the section do not provide for indemnity to the provinces for their Crown lands, the use of which may be taken under its provisions, it could therefore be considered *ultra vires* only if the powers conferred upon Parliament by ss. 91 and 92 (10) of the British North America Act with relation to railways are to be interpreted as subject to an implied condition or proviso to the effect that such lands are not to be taken or used thereunder without compensation; but there is not a word in the decision in the *Harbour Commissioners Case* to suggest that their Lordships were disposed to interpret the Dominion railway powers, which are expressed in the most general terms, as subject to any implied restriction, and such an implication would be inconsistent with the conclusion in the *Vancouver Case* (2), of which their Lordships have not intimated any disapproval. It is true that in considering the general power conferred by s. 91 (10), as to navigation and

(1) Reporter's Note:—This case is not yet reported.

(2) [1906] A.C. 204.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

shipping, in regard to legislation which, in the execution of that power, authorized the construction of an embankment and railway on the bank of the river, quays, a drydock and ship repairing plant, works the construction and use of which, could not, as their Lordships observe, be effected without an exclusive occupation of the soil equivalent to possession, it did not appear to their Lordships that the right of the Dominion extends so as to authorize them to vest in a body like the Commissioners an exclusive right to occupy property of the province without compensation, and to erect upon it permanent works, such as quays, docks and railways.

One must take it from this decision that, in the execution of the ancillary or incidental powers which are attendant upon the power of navigation and shipping, the Dominion may not authorize the taking of provincial property for the construction of railways without compensation; but different considerations arise when one is concerned with the powers derived from ss. 91 (29) and 92 (10). Their Lordships particularly point out that the railway in question, which was a mere harbour adjunct or facility, was not governed by s. 92 (10), because it had not been declared by the Parliament to be a work for the general advantage of Canada. The powers which the Dominion may exercise with relation to works so declared, or with regard to railways, such as the Nipissing Central Railway, which connect one province with another or extend beyond the limits of a province, are not considered or expounded in the *Harbour Commissioners Case*. It is, of course, requisite to the effective working of the latter section that the Parliament of Canada, to which the exclusive power is committed in regard to that which is essentially the construction and working of a railway, and nothing else, shall have the power to bring about that construction. It was in that view I apprehend that the Judicial Committee considered in the *Vancouver Case* (1) that the power would be inadequate and incapable of execution in cases calling for its exercise, if it were held not to embrace authority for the taking of the land required for the use of the railway; and, whatever may be the view upon which their Lordships suggest a power in the Dominion to take lands for purposes incidental to a harbour which cannot

(1) [1906] A.C. 204.

be exercised without compensation for the taking, I do not find anything in the decision which conflicts with the judgment in the *Vancouver Case* (1). That case I am sure did not excepe consideration, and it is an authority which, I should think, would stand perfectly well along side of what is held in the *Harbour Commissioners Case.*

There remains the third question of the reference with regard to the obligation of the Governor in Council to give his consent. It is too well established to require argument or the citation of authority that there is nothing obligatory upon the Governor General in Council, giving rise co-relatively to a right on the part of the railway to require his consent upon any application which may be submitted. It was contended for the Nipissing Central Railway Company that it was nevertheless the duty of the Governor in Council to give his consent in what, for lack of more exact definition, was described as a proper case; but I think it became apparent in the course of the discussion that the question submitted was strictly a question of law, as distinguished from any question which sought to ascertain the limits within which, as a matter of just or fair and reasonable decision, the Governor in Council might be justified to withhold his consent, and that he had a discretion to refuse. The company is constituted and its powers are conferred by Parliament which, as a condition to the taking of Crown Lands, has required the consent of the Governor in Council, who thus, as the donee of Parliament, is entrusted with the power of consent, to be exercised as an incident of the good government of the country; there is a duty to consider and to exercise sound discretion, but it is a duty involving political rather than legal responsibility, and in respect to the execution of which the Governor in Council is not answerable to the judicial tribunals. It was said that the construction of the railway upon the statutory route makes necessary the occupation of provincial Crown Lands, and that therefore refusal of consent to the taking of any such lands would in effect defeat the intention of Parliament in authorizing the construction of the railway. No statement of the facts in this particular is submitted with the case; but the condition which requires consent imports

(1) [1906] A.C. 204.

1925

REFERENCE IN RE S. 189, RAILWAY ACT.

Newcombe J.

no more than an incidental power of regulation, and it cannot be assumed that the Government would exercise this power in a manner to frustrate the execution of the statutory project. The question appears to be governed in this court by the case of *Lake Champlain and St. Lawrence Ship and Canal Co.* v. *The King* (1).

For these reasons I would answer the first and second questions in the affirmative, and to the third question, subject to what I have said, I would answer that it is not obligatory upon the Governor in Council to give his consent, and that he has, in point of law, discretion to grant or refuse such consent, as he may see fit.

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney General of Quebec: *Charles Lanctot.*

Solicitors for the Nipissing Central Ry. Co.: *Tilley, Johnston, Thomson & Parmenter.*