

Privy Council Appeal No. 67 of 1930.

The Steamship "Eurana" - - - - - *Appellant*

v.

The Burrard Inlet Tunnel and Bridge Company - - - - - *Respondents*

FROM

THE EXCHEQUER COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 13TH JANUARY, 1931.

Present at the Hearing :

LORD MERRIVALE.

LORD ATKIN.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD ATKIN.]

This is an appeal from a judgment of the President of the Exchequer Court of Canada dismissing an appeal from the Trial Judge in Admiralty for the Admiralty district of British Columbia. The action was brought by the Burrard Inlet Tunnel and Bridge Company, the present respondents, hereafter called the Bridge Company, against the owners of the S.S. "Eurana" for damages sustained by the Bridge Company through the ship coming into collision with their bridge over the Second Narrows in the harbour of Vancouver. The shipowners counterclaimed against the Bridge Company in respect of the damage to their ship caused by the collision, alleging that the bridge was a wrongful obstruction to the navigation of the harbour. Both claim and counterclaim were dismissed by the Trial Judge, and on appeal by the shipowners the judgment dismissing their counterclaim was affirmed by the President of the Exchequer Court.

The harbour of Vancouver runs for some miles inland easterly from the sea. At two points known as the First and the Second

Narrows the waterway is contracted. The bridge in question is built over the Second Narrows. It carries both a railway track and a road track and appears to afford a valuable connection between N. and S. Vancouver and the railways on either side of the harbour. It consists of five spans built on piers, some of which are in the waterway. The height is 22 feet above high water level, but one of the spans, 150 feet in width, is raised by a bascule and thus affords means for the passage of vessels. The navigable channel taken from the five-fathom lines at low water is at the site of the bridge 500 feet. The adjacent land slopes more steeply to the water level on the south side than on the north. The ordinary course of navigation before there was a bridge was towards the southerly side of the waterway; the bascule span is the southernmost span of those covering the original navigable waterway. The tide runs both ways with considerable velocity, ranging from 4 to 7 knots at flood on different tides. Before the bridge was built the Narrows were navigable at all stages of the tides by smaller vessels; larger vessels avoided the full strength of the larger tides, but otherwise were not restricted. The effect of the construction of the bridge is that, owing to the proximity of the open span to the southern shore, the space available for outgoing vessels to line up for the span is inconveniently restricted, and that all vessels are exposed to cross-currents sometimes acting only beneath the surface, which set them either away from the opening or across the bridge. The result is that it is found undesirable to navigate through the bridge except at slack water, which lasts about half an hour. Navigable hours, therefore, are confined to about 2 hours in the 24. The difficulty of the navigation is illustrated by the collision in question. The "Eurana," a steamship of 5,689 tons gross, 400 feet in length, 56 feet beam, was proceeding outward under charge of a pilot in daylight at 6 p.m. in March, 1927. The tide was low water slack. She had straightened to pass the span, but when about 600 feet away and under slight starboard helm, her speed being about 4 knots, she took a sheer to starboard, and though engines were reversed and both anchors dropped, she collided with the central span of the bridge and suffered considerable damage to her top hamper. The Trial Judge found her not to blame, a decision affirmed by the President, from which there has been no appeal to this Board. The ship counterclaims against the Bridge Company on the ground that the damage was due to the bridge being an unlawful obstruction to navigation. The Trial Judge found that the bridge substantially increased the natural difficulties of navigation in three respects: in contracting the space in which it is necessary for ships to line up outwards, and to manœuvre after passing inwards; in adding to the uncertain conditions of tidal currents in the vicinity of the bridge, and in increasing the force of the current through the open span. The learned Judge, however, found that the bridge was authorised by statute to be there in its existing form

and that the shipowners had no cause of action. The learned President agreed with the Trial Judge as to statutory authority, and did not find it necessary to express an opinion as to the effect of the bridge on navigation, except for a statement that at the time and place in question conditions prevailed that undoubtedly made navigation through the bascule span extremely difficult. There was evidence that since the bridge was opened in November, 1925, and before the trial in November and December, 1928, several other vessels had either collided or narrowly avoided collision with the bridge.

Having regard to the facts stated above and in particular to the important circumstance not mentioned by the Trial Judge that owing to the construction of the bridge navigation is now confined to the periods of slack water amounting in all to only about 2 hours of the 24, their Lordships have no doubt that it was proved that the bridge in its present form substantially interferes with navigation. Unless, therefore, the Bridge Company can establish statutory authority for erecting such a bridge, they have caused a public nuisance by obstructing the navigable highway; and the shipowners who have suffered special damage in the damage caused to their ship by the nuisance will have a cause of action against them for damages.

It is necessary, therefore, to consider the statutes and the executive orders thereunder upon which the plaintiffs rely. The Bridge Company was incorporated by a Dominion statute, 9 & 10 Ed. VII, c. 74, an Act to incorporate the Burrard Inlet Tunnel and Bridge Company. By Section 8 "The Company may lay out, construct, operate, maintain and use a tunnel under the First Narrows of Burrard Inlet and a bridge over the Second Narrows of Burrard Inlet for foot passengers, carriages, street, railway and railway purposes with the necessary approaches from some convenient points on the south shore in or near the city of Vancouver to points on the opposite shore of Burrard Inlet so as not to interfere with navigation." The section proceeds to give powers to construct and operate lines of railway to connect with the lines of certain scheduled companies. By Section 16 "The Railway Act shall apply to the Company and its undertaking." It is to be observed that the authority given by the special Act is to construct and maintain a bridge "so as not to interfere with navigation." Relying on the special Act alone, the Bridge Company obtain no protection for a bridge which does interfere with navigation. But the plaintiffs found themselves on the provisions of the incorporated Railway Act. Under that Act they say they have to submit their plans to the Governor in Council and to the Railway Board, who are specially charged to consider matters of navigation, and without whose authority they may not construct the bridge. The Governor in Council and the Railway Board are, it is said, the bodies designated to decide whether the bridge interferes with navigation or not, and, if they are satisfied, no further question arises. Their Lordships

cannot accept this contention. The Railway Act, a general Act, contains a fasciculus of clauses under a heading "Respecting Navigable Waters," which contains provisions for the protection of rights of navigation. Section 245 contains a general prohibition against causing obstruction in or impeding free navigation of any river, water, stream or canal over which the railway is carried. By Section 47, whenever the railway is proposed to be carried over any navigable water by means of a bridge, the Board may direct with what spans or headway or opening spans the bridge shall be constructed, "as to the Board may seem expedient for the proper protection of navigation." By Section 248, when the company desires to construct a bridge over navigable waters, the company, before commencing the work, shall submit to the Minister of Public Works for approval by the Governor in Council a general plan of the site and of the works to be constructed, and after approval apply to the Board for an order authorising the construction of the work, transmitting the approved plans and also detail plans. No deviation from the site or plans approved by the Governor in Council is to be made without the consent of the Governor in Council. The Board may alter the detail plans, and make an order for the construction of the work (Subsection 4), and upon such order being granted the company shall be authorised to construct such work in accordance therewith; on completion the Board may grant an order authorising the use or operation of the work. The Bridge Company from time to time made various applications for approval of their plans and for authority to construct and use the work, and obtained various orders upon which they rely. The Shipping Company contest the validity of these orders, alleging that the statutory requirements were not observed.

That the strict provisions of the statute were departed from is beyond question. In 1913 the Company submitted to the Governor in Council a plan for a swing bridge. This was approved, but nothing further was done. In April, 1923, the company submitted to the Governor in Council the plan of a bascule bridge and obtained approval. They then submitted this plan for approval, with detail drawings, to the Railway Board. They obtained a construction order from the Railway Board in July, 1923, but the plans of the bridge approved by such order differed from the general plan approved by the Governor in Council. The latter provided for two spans and four piers; the new plans for three spans and five piers; the length of the bridge was altered, and the position of some of the piers was substantially changed. In 1924, when a considerable part of the work was done, fears were entertained as to the effect on navigation. A board of consulting engineers was set up, and in accordance with their recommendations plans were prepared showing alterations by raising the bridge 5 feet, constructing two additional spans, making alteration in the structure of the piers, and dismantling and reconstructing part of the trestle superstructure. These plans were submitted direct to the Railway

Board and a construction order obtained in March, 1925. The bridge was constructed in accordance with these plans, and it was not till August, 1925, when the work was practically complete, that the new plans were submitted for the approval of the Governor in Council. They were on this occasion not submitted by the Bridge Company on the recommendation of the Minister of Public Works under the Railway Act, but were submitted by the Vancouver Harbour Commissioners on the recommendation of the Minister of Marine and Fisheries under the Vancouver Harbour Commissioners' Act for the purpose of obtaining permission to assist the Bridge Company financially to meet the expenses of altering the bridge. In October, 1925, the Railway Board made an order authorising the use of the bridge. The learned President was of opinion that though there might have been laxity in observing the precise directions of the statute, yet the precise order in which the Governor in Council and the Railway Board approved the plans was not of importance and the procedural defaults were waived in the final sanction of the plans of the bridge as completed. He came to the conclusion that the statutory conditions were complied with within the spirit and intent of the Railway Act. In the view their Lordships take of the case it is not necessary to express a final opinion upon this part of the case. They content themselves with saying that there is excellent authority for requiring statutory conditions to be strictly fulfilled if interference with public rights is to be justified. They must not be taken to assent to the view expressed on this part of the case in the Courts below.

But even if it be assumed that the provisions of the Railway Act were strictly observed in every particular, will the Bridge Company be protected if in fact the bridge when constructed does interfere with navigation? In their Lordships' opinion there can be only one answer. The special Act which constitutes the Bridge Company and confers upon them the power to construct and maintain the bridge limits the power by the express condition that the bridge is not to interfere with navigation. This stipulation in favour of public rights controls the whole activities of the Company. It is absolute and it cannot be supposed that the incorporation of provisions of a general Act implied the intention of the legislature that nevertheless the bridge might interfere with navigation if the Railway Board so permitted. Their Lordships would have no difficulty in arriving at this conclusion apart from the express provisions of the Railway Act itself regulating the consequences of its incorporation with the special Act. But when those provisions are examined the conclusion is confirmed. By section 3 except as in this Act otherwise provided :—

(a) This Act shall be construed as incorporate with the special Act.

(b) Where the provisions of this Act and of any special Act passed by the Parliament of Canada relate to the same subject matter the provisions of the special Act shall in so far as is necessary to give effect to such special Act be taken to override the provisions of this Act.

The provisions of the special Act with which this case is concerned deal with the same subject matter as the general Act, viz., the protection of public rights of navigation. Even if, therefore, the protection of navigation in the Railway Act is qualified by the discretion of the Railway Board, as to which their Lordships express no opinion, that qualified protection would be overridden by the absolute protection which in their Lordships' opinion was given by the special Act. It is quite a different matter when the powers of the general Act to protect the public are invoked so as to interfere with the plans of the undertaking under the special Act having no special reference to public protection. There, as has been decided by the Board, in *Can. Pac. Ry. v. City of Toronto* [1911] A.C. 461, the subject matter is not the same.

Their Lordships, therefore, are of opinion that the defendants have suffered damage by reason of the construction and maintenance by the Bridge Company of a substantial interference with navigation amounting to a public nuisance for which the defendants have no statutory authority. They are of opinion that the appeal should be allowed, and that so much of the order of Maclean J. as dismissed the defendants' appeal with costs be set aside, and that so much of the judgment of Martin J., dated April 22, 1929, as dismissed the counter-claim with costs and directed that the costs of the counter-claim be set off against the costs of the action be set aside, and that in lieu thereof judgment be entered for the defendants on the counter-claim for damages to be assessed, and that the counter-claim should be remitted to the Judge of the British Columbia Admiralty District. They will humbly advise His Majesty accordingly. The plaintiffs must pay the costs of the counter-claim and of the defendants' appeal to the Exchequer Court and of this appeal.

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In the Privy Council.

THE STEAMSHIP "EURANA"

2.

THE BURRARD INLET TUNNEL AND BRIDGE
COMPANY.

DELIVERED BY LORD ATKIN.

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