

45, 1933

CANADIAN  
OFFICE  
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No. 61 of 1932.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

APPEAL No. 1.

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

BETWEEN—

THE BELL TELEPHONE COMPANY OF CANADA  
*Appellant*

— AND —

THE CANADIAN NATIONAL RAILWAYS  
*Respondent.*

APPEAL No. 2.

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

BETWEEN—

THE BELL TELEPHONE COMPANY OF CANADA  
*Appellant*

— AND —

30 THE CANADIAN NATIONAL RAILWAYS  
*Respondent.*

CASE FOR THE APPELLANTS.

APPEAL No. 3.

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

BETWEEN—

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

— AND —

THE CANADIAN NATIONAL RAILWAYS  
*Respondent.*

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APPEAL No. 4.

IN THE MATTER of the Application of the Canadian National Railways for an Order under Section 256 of the Railway Act. for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on General Plan YIA 31.10.4. 20 dated August 16th, 1930, and filed with the Board under File No. 9437.319.13.

BETWEEN—

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

— AND —

THE CANADIAN NATIONAL RAILWAYS  
*Respondent.*

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**APPEAL No. 5.**

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

**BETWEEN—**

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**THE MONTREAL TRAMWAYS COMPANY and  
THE MONTREAL TRAMWAYS COMMISSION**

*Appellants*

— AND —

**THE CANADIAN NATIONAL RAILWAYS**

*Respondent.*

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**APPEAL No. 6.**

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

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**BETWEEN—**

**THE MONTREAL TRAMWAYS COMPANY and  
THE MONTREAL TRAMWAYS COMMISSION**

*Appellants*

— AND —

**THE CANADIAN NATIONAL RAILWAYS**

*Respondent.*

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## APPEAL No. 7.

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

— AND —

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

BETWEEN—

THE BELL TELEPHONE COMPANY OF CANADA

*Appellant*

— AND —

THE CANADIAN NATIONAL RAILWAYS

*Respondent.*

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## APPEAL No. 8.

IN THE MATTER of the joint application of the Toronto, Hamilton and Buffalo Railway Company, hereinafter called the "Applicant Company", and the Corporation of the City of Hamilton, hereinafter called the "City", under Sections 162, 178, 188, 199, 201, 252, 255, 256 and 262, and other appropriate sections of the Railway Act, for an Order approving and sanctioning the plan, profile, and book of reference of the Applicant Company, No. 2BRC, dated October 15th, 1930, on file with the Board under file 30 No. 20161; authorizing a deviation, change, or alteration in the portion of the Applicant Company's railway between a point at or near the east side of Park Street on the west and a point just east of Victoria Avenue on the east, in the City of Hamilton, and authorizing the said deviation, change or alteration from the present location of the said portion of the Applicant Company's railway in accordance with the said plan, profile, and book of reference; authorizing the

Applicant Company to construct, maintain, and operate the said portion of its railway between the said points, in accordance with the change in grades as shown on the said plan and profile; authorizing the Applicant Company to carry its elevated tracks over the highways known as Hunter, McNab, James, John, Catharine, Ferguson, Young and Victoria by means of bridges and to carry each of the said streets beneath the said tracks by means of a subway; to take, without the consent of the owners, the lands not now owned by the Applicant Company or the City, shown bordered in red; directing the City to close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington, and to divert Hunter, Aurora and Liberty Streets; authorizing a relocation of the Port Dover line of the Canadian National Railways between Ferguson Avenue and Victoria Avenue, and the change in grade thereof; approving the new location of the Applicant Company's station and terminal buildings; directing the Hamilton Street Railway Company to reconstruct its tracks through and at each side of the subway at James Street,—all as shown on the said plan, profile and book of reference filed; and directing all public utility companies affected to reconstruct, alter or change the respective works of each to carry out the changes in the railway; File No. 20161.

— AND —

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

30 BETWEEN—

THE BELL TELEPHONE COMPANY OF CANADA

*Appellant*

— AND —

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

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

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## APPELLANTS' CASE.

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p. 404. 1. These are eight appeals brought by special leave and consolidated under Order of His Majesty in Council of the 21st July, 1932, from judgments of the Supreme Court of Canada dismissing appeals from Orders of the Board of Railway Commissioners of Canada. These Orders compel the respective Appellants which are public service corporations, to remove their installations in certain streets to permit altering the level of such streets and closing some of them in connection with certain railway works which are authorized by such orders, the question of cost being reserved. 10

pp. 10, 71, 273, 350. 2. An appeal lies from such orders of the Railway Board to the Supreme Court of Canada on any question of jurisdiction, upon leave being obtained from a Judge of such Court. Such leave was obtained; the appeal was argued and decided as above mentioned.

pp. 11, 72, 150, 187, 188, 231, 232, 274, 352. p. 404. 3. From the Supreme Court judgment special leave to appeal was obtained and by the order granting leave the eight appeals were consolidated.

4. The facts respecting six of these appeals may be conveniently stated together. By a special Act of the Canadian Parliament, chapter 12 of the Statutes of 1929, entitled the Canadian National Montreal Terminals Act, it is enacted by Section 2, that:— 20

“the Governor in Council may provide for the construction and completion  
 “by the Canadian National Railway Company (hereinafter called ‘the  
 “Company’) of terminal stations and offices, local stations, station grounds,  
 “yards, tracks, terminal facilities, power houses, pipes, wires and conduits for  
 “any purpose, bridges, viaducts, tunnels, subways, branch and connecting lines  
 “and tracks, buildings and structures of every description and for any purpose,  
 “and improvements, works, plant, apparatus and appliances for the movement,  
 “handling or convenient accommodation of every kind of traffic, also street and 30  
 “highway diversions and widenings, new streets and highways, subway and  
 “overhead streets, and also approaches, lanes, alleyways, and other means of  
 “passage, with the right to acquire or to take under the provisions of section  
 “nine of this Act or otherwise lands and interests in lands for all such purposes.  
 “all on the Island of Montreal in the Province of Quebec, or on the mainland  
 “adjacent thereto, as shown generally on the plan or plans thereof to be from  
 “time to time approved by the Governor in Council under the provisions of  
 “section seven of this Act; the whole being hereinafter referred to as the  
 “‘said works’, and a short description whereof for the information of Parlia-  
 “ment but not intended to be exhaustive, being set out in the schedule hereto.” 40

Section 7 provides as follows:—

“The general plan or plans of the said works and amendments or additions to such general plan at any time made, shall, on the recommendation of the Minister of Railways and Canals, be subject to the approval of the Governor in Council. Detail plans affecting any canal or other property controlled by the Department of Railways and Canals shall be subject to the approval of the Minister of Railways and Canals. Detail plans affecting the property of the Harbour Commissioners of Montreal shall be subject to the approval of the Minister of Marine and Fisheries.”

10 The schedule to the Act mentioned in Section 2 reads as follows:—

“SCHEDULE.

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

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

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

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

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

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

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

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

40 “(i) Railway from a point on the line between St. Henri and Point St. Charles near Atwater Avenue, along the River St. Pierre and the Aqueduct

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“Tail Race to the water-front, and construction of yard facilities on the  
 “Waterfront with connection to existing lines and Harbour Commission  
 “trackage ;

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

“(k) Connections and transfer facilities to the tracks of the Montreal  
 “Harbour Commission near Longue-Pointe, and/or at a point further East,  
 “and connections and transfer facilities to the C.P.R. East and South of the  
 “Lachine Canal, and at other points, except at Forsythe (now Rouen Street). 10  
 “The Company to pay part cost, to be determined, of facilities jointly owned  
 “or jointly used ;

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

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

5. The Order in Council providing for these works and approving the general plans thereof having been passed Respondent The Canadian National Railways applied to the Board of Railway Commissioners for authority to carry them out according to said 20 plans.

pp. 7, 70.

6. In these six appeals, two of these applications only are material, one in respect of St. Antoine Street and the other in respect of d'Argenson Street, both in the City of Montreal.

p. 70.

p. 7.

7. St. Antoine Street is a street which the railway did not cross at the time but, as shewn by Paragraphs (a) and (b) of the Schedule and by the plans approved by the Governor in Council, the station abutted on that street and from that point and therefore across that street and beyond there was to be built a viaduct and elevated railway. To comply with the Schedule and plan it was therefore 30 necessary that the street be depressed in order to pass under the viaduct. The Montreal Light, Heat & Power Consolidated is a public service corporation authorized by its Quebec Charter to supply and in fact supplying the city and the citizens with light, heat and power produced by gas or electricity. Under the authority of its charter and in order to fulfil its purposes and to carry out its contracts, the Company had placed on St. Antoine Street, pipes, conduits, underground and overhead wires and cables and by the depression of the street these had to be destroyed and rebuilt according to the new level. Appellant The Bell Telephone Company 40

p. 416.



of Canada, is authorized by its Dominion Charter to construct, maintain and operate throughout Canada a telephone system. The Company had its system installed in underground conduits on St. Antoine Street, and the depressing of that street will have, as to that plan, the same effect as above mentioned. Appellant The Montreal Tramways Company is a tramway company serving under Quebec legislative authority and by contract with the City of Montreal, the public of the said City and its suburbs. Its installation on St. Antoine Street will also have to be destroyed and rebuilt at the new level as a result of the depression.

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Separate document.

8. The same situation arises in respect of d'Argenson Street as regards the three Appellants except that there already exists a line of the Canadian National Railways crossing the street overhead by a viaduct. The approved plan and the Schedule, paragraph (e), involve however the addition of tracks to that overhead crossing widening the viaduct and lengthening the street depression so that the effect on the installations of the three Appellants at that point is the same as in the case of St. Antoine Street.

9. The seventh appeal is in respect of an Order of the Board which has no connection with the Statute above referred to. It is an Order which authorizes the Respondent, the Canadian National Railways, to elevate and divert an existing line of railway which crosses St. Clair Avenue, in Toronto, at grade and to carry its said diverted line across St. Clair Avenue by means of a viaduct at the new point of crossing. Otherwise, the facts are the same. The streets have to be depressed for the purpose. The underground service of Appellant The Bell Telephone Company will have to be destroyed and rebuilt.

10. The eighth appeal is against different Respondents, the Toronto, Hamilton & Buffalo Railway Company and the City of Hamilton. In this case the Respondents, the Toronto, Hamilton & Buffalo Railway Company and the City of Hamilton, entered into an agreement, bearing date the 20th October, 1930, providing for the elevation and diversion of the lines of the Respondent Railway between Park Street and a point just East of Victoria Avenue, in the City of Hamilton, and for other railway works in connection therewith, as generally described in the said agreement, of which the following are extracts :—

40 "1. The Plan and Profile lettered 2-B.R.C., dated the fifteenth day of October, one thousand nine hundred and thirty which shows the proposed railway tracks and subways, closed and diverted streets, re-arrangement of yards and facilities, new level of tracks, new Station and new Street,

p. 442, l. 14.

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“together with other general features of the proposed construction work which  
“Plan has been identified by the signatures of the parties hereto shall be  
“considered forming part of this Agreement. Provided always, subject to the  
“approval of the Board, the Railway Company shall be at liberty to change  
“or alter the track lay-out and work incidental thereto as indicated on said  
“Plan during the progress of the work herein contemplated or subsequent  
“thereto.”

p. 442, l. 25.

“2. The parties will join in an application to the Board of Railway  
“Commissioners for Canada (herein called ‘the Board’) for the approval of  
“the said Plan and Profile of the said new level of tracks street grades and 10  
“the works referred to in the next preceding paragraph and for an Order  
“authorizing, directing and ordering the construction of the same in accordance  
“therewith and for the taking of such additional lands without the consent  
“of the owners in accordance with the provisions of the Railway Act as may  
“be required to carry out the works.”

p. 442, l. 33.

“3. After the issue of the Order of the Board pursuant to said Applica-  
“tion the Railway Company shall thereupon proceed with the clearing of the  
“site, the letting of contracts and the carrying out of the work so approved by  
“the Board in accordance with detailed plans of the subways and other works  
“to be approved by the parties hereto and the Board or the Chief Engineer 20  
“of the Board as the case may be the matter of the apportionment of the costs  
“of the said works including the relocation of public facilities such as telephone  
“poles, wires and conduits, sewers, water mains, pavements and sidewalks,  
“gas mains and all other works of whatsoever nature affected by the proposed  
“works herein mentioned together with the cost of all lands used for such  
“works and all compensation awards damages costs and expenses awarded  
“to the owners of said lands and/or adjoining properties by reason of the  
“construction of the works herein provided for shall be assumed, borne and  
“paid for in accordance with the Order of the Board following a hearing of  
“the parties on a date to be fixed by the Board not later than sixty days from 30  
“the issuance of the said Order referred to in paragraph 2 hereof and the  
“parties hereby agree to be bound and abide by the Board’s Order in respect  
“of said apportionment.”

\* \* \* \* \*

p. 444, l. 1.

“6. The City agrees to close those portions of Hunter, Charles, Hughson,  
“Baillie, Walnut, Augusta, and Wellington Streets, also lanes and alleys or  
“such portions thereof as are within the limits of the Railway Company’s  
“property, all as indicated on said plan, and to divert Hunter, Liberty and  
“Aurora Streets as shown on said plan. The City shall convey to the Railway  
“Company by a good and sufficient deed in fee simple the portions of said  
“streets, lanes and alleys so to be closed, together with the portion of Hunter 40  
“Street required for the construction of the new station and plaza, and that

10 "part of the Wood Market Square situated north of the new street. The  
 "Railway Company shall similarly convey to the City the portion of the station  
 "grounds between James and John Streets required for the diversion of  
 "Hunter Street and for the new street between James and Hughson Streets.  
 "all as shown on said plan. The City shall also take the necessary steps to  
 "open the new street between James and John Streets and shall prevent the  
 "parking of motor cars and vehicles on the south side of the new street, and  
 "permit the Railway Company to construct and at all times maintain a plat-  
 "form 3½ feet in width on the north side of the new street immediately  
 "adjacent to the Railway Company's buildings, together with a canopy 10 feet  
 "in width over said platform.

"It is the intent of this agreement that the exchange of lands referred to  
 "in this paragraph shall be without monetary consideration on either side."

\* \* \* \* \*

"12. The City further agrees to join with the Railway Company in any  
 "application for Parliamentary, Legislative or other sanction of any  
 "constituted authority that may be required from time to time to confirm,  
 "ratify and give legal effect to the provisions of this Agreement.

p. 445, l. 40.

20 "This Agreement shall enure to the benefit of and be binding upon the  
 "successors and assigns of the parties hereto."

30 **11.** The Board of Railway Commissioners by its Order  
 authorized the Railway Company to divert and elevate its line  
 accordingly and to carry its elevated tracks over certain highways  
 by means of bridges and the streets beneath the tracks by means of  
 subways; ordered the City to close certain streets, and approved the  
 location for the Railway Company's new station on the intersection  
 of Hunter and Hughson Streets, all as shown on the said plan, which  
 is Schedule 3 to the Record in this appeal. The Appellant the Bell  
 Telephone Company, had underground conduits installed in several  
 of those streets, some of which are depressed, others closed.

p. 350.

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**12.** In all these cases the Appellants were ordered to move  
 their installations, the cost of this work being reserved. One of the  
 five judges of the Supreme Court of Canada, Newcombe, J., having  
 died, the judgment was delivered by the four remaining Judges.  
 Rinfret, J., delivered the judgment of the Court; Duff and Lamont,  
 JJ., concurred. Anglin, J., concurred stating that the reasoning of  
 Rinfret, J., speaking generally, struck him as being forcible especially  
 in the earlier part of the judgment and that taking everything in  
 account he would dismiss the appeal.

p. 47.

pp. 48, 64.

p. 48.

40 **13.** Rinfret, J., at the outset, points out that there are two  
 questions, the question of the jurisdiction of the Board to make its

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p. 49, l. 1.

Orders and the question if, in any event these Orders had not been made irregularly and not in accordance with the rules binding on the Board, this being a reference to the complaint of Appellants that they were not given an opportunity to be heard before the Orders were made, a point which will not be pressed here. The judgment then states that the applications of the Railway Companies and the Orders of the Board profess to be made under Sections 255, 256 and 257 of the Railway Act and that in those sections and the enabling enactment contained in Section 39 the authority of the Board to pronounce the Orders must be found, if at all, and that Respondents were not understood to contend otherwise nor that the Orders were to be supported by any other legislation. 10

14. The material parts of Sections 255, 256, 257 and 39 read as follows :—

“255. The railway of the company may, if leave therefor is first obtained from the Board as hereinafter authorized, but shall not without such leave, be carried upon, along or across any existing highway: Provided that the compensation, if any, payable by the company to adjacent or abutting land-owners shall be determined under the arbitration sections of this Act in so far as such sections are applicable, and provided that the Board shall not grant leave to any company to carry any street railway or tramway, or any railway operated or to be operated as a street railway or tramway, along any highway which is within the limits of any city or incorporated town, until the company has first obtained the consent therefor by a by-law of the municipal authority of such city or incorporated town; and provided that where leave is obtained to carry any railway along a highway the Board may require the company to make compensation to the municipality if the Board deems proper, said compensation to be determined under the arbitration sections of this Act, in so far as such sections are applicable.” (Amended by Statutes of 1930, ch. 36, s. 2). 20 30

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

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

“256. Upon any application for leave to construct a railway upon, along or across any highway, or to construct a highway along or across any railway, the applicant shall submit to the Board a plan and profile showing the portion of the railway and highway affected.” 40

10       “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.”

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

30       “6. The Board may make regulations respecting the plans, profiles,  
       “drawings and specifications required to be submitted under this section.  
       “1919, c. 68, s. 256.”

40       “257. Where a railway is already constructed upon, along or across any  
       “highway, the Board may, of its own motion, or upon complaint or applica-  
       “tion, 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

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“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. 1919, c. 68, s. 257.”

“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. 1919, c. 68, s. 39.”

**15.** It is then pointed out that the primary concern of Parliament in this legislation is public welfare, not the benefit of railways and that with that in view almost unlimited power is given to the Board to insure protection, safety and convenience to the public. Then follows the statement of the facts on the eight appeals. It is then stated that the whole works, or at least the construction 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 application in whole or in part in connection with the crossings applied for or arising or likely to arise . . . in connection with the existing crossings”

p. 50, l. 34.

pp. 50, 52.

p. 52, l. 16.

as stated in the above sections of the Railway Act. It is then stated that what Appellants dispute is the applicability of Sections 255, 256 and 257 to Canadian National Railways Company and the power to compel public utility companies to remove their facilities without previous compensation. p. 52, l. 25.

16. Dealing first with the last of these two objections, Section 39 of the Railway Act is relied on and it is said that under the judgments of this Board in *re : Toronto Railway Company vs. City of Toronto*, 1920, A.C., p.426 at p.435, and *Canadian Pacific Railway Company vs. Toronto Transportation Commission*, 1930, A.C., p.686 at p.695, it is 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. It is stated that the judgment of this Court, in *re : British Columbia Electric Railway Company vs. Vancouver & Victoria Railway Company*, 1914, A.C., p.1067, is inapplicable and that any distinction between permissive and mandatory Orders which may have once been material has ceased so to be since the statute has been amended to apply to Orders permitting as well as to Orders directing. It is further said that the Orders here are mandatory. It is further stated that there is no doubt that Appellants are companies or persons interested or affected by the Orders and therefore reached by Section 39. p. 52, l. 32.  
p. 53, l. 10.  
p. 53, l. 18.  
p. 53, l. 37.  
p. 54, l. 8.

17. The question is then taken up if within the meaning of Section 39, this is a case "otherwise expressly provided." Sections 162 and following of the Railway Act are discussed in this connection. The material parts of these sections are the following :— p. 56, l. 14.

"162. The Company may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained :

\* \* \* \* \*

30 "(k) make or construct, in, upon, across, under or over any railway, tramway, river, stream, watercourse, canal, or highway, which it intersects or touches temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences;

"(l) divert or alter, as well temporarily as permanently, the course of any such river, stream, watercourse or highway, or raise or sink the level thereof, in order the more conveniently to carry the same over, under or by the side of the railway ;

40 "(m) make drains or conduits into, through or under any lands adjoining the railway, for the purpose of conveying water from or to the railway ;

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

\* \* \* \* \*

“163. The company shall restore, as nearly as possible, to its former  
“state, any river, stream, watercourse, highway, water pipe, gas pipe, sewer  
“or drain, or any telegraph, telephone or electric line, wire, or pole, which  
“it diverts or alters, or it shall put the same in such a state as not materially  
“to impair the usefulness thereof. 1919 c.68, s.163.

“164. The Company shall, in the exercise of the powers by this or the  
“Special Act granted, do as little damage as possible, and shall make full 10  
“compensation, in the manner herein and in the Special Act provided, to all  
“persons interested, for all damage by them sustained by reason of the  
“exercise of such powers. 1919, c.68, s.164.”

p. 56, l. 18.

**18.** It is said that Section 162 is only permissive and that the  
following sections are only corollary thereto and all these apply only  
when the Railway for itself and of its volition does the work or  
exercises the powers granted therein, and further that the power  
under Section 162 may be exercised only subject to provisions in the  
general and the special Acts and that this brings one back to  
Section 39. 20

p. 56, l. 24.

**19.** The reference in sub-section 3 of Section 256 and sub-  
section 2 of Section 257 to provisions respecting the taking of land  
is dealt with by stating that these Orders do not call for the taking  
of land. They merely provide for works to be executed partly by  
the Railway Company and partly by the utility companies since  
removing utilities is just as much part of the works as removing  
earth from the subways. It is further stated in answer to this  
objection that these orders are not made for the purpose of the  
railway proper, the reason or the purpose being the protection,  
safety and convenience of the public, that the lowering of the high- 30  
way will not make it part of the railway undertaking and the  
judgment of this Court in *re : Boland vs. Canadian National Railways*,  
1927, A.C., p.198 at p.209, is referred to.

p. 57, l. 20.

p 58.

**20.** Sections 259 and 260 of the Railway Act are then referred  
to. They read as follows :

“259. Notwithstanding anything in this Act, or in any other Act, the  
“Board may, subject to the provisions of the next following section of this Act,  
“order what portion, if any, of cost is to be borne respectively by the  
“company, municipal or other corporation, or person in respect of any Order  
“made by the Board, under any of the last three preceding sections, and such 40  
“Order shall be binding on and enforceable against any railway company.



“municipal or other corporation or person named in such Order. 1919, c.68, s.259.

“260. In any case where a railway is constructed after the nineteenth day of May, one thousand nine hundred and nine, the company shall, at its own cost and expense, unless and except as otherwise provided by agreement, approved by the Board, between the company and a municipal or other corporation or person, provide, subject to the Order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway. 1919, c.68, s.260.”

10 Section 259 is stated, under the authority of this Board’s judgment in *re: Toronto Railway Company vs. City of Toronto*, not to exclude Section 39 in respect to the costs and expenses of providing the works. Some questions are raised but not decided as to these two sections, but it is said that both deal with quite different things from that with which the Court was concerned on this appeal, namely with the question of the apportionment of cost, a question which is reserved for further consideration. p. 58. l. 11. p. 58. l. 25.

20 **21.** The second point is then dealt with, namely: the complaint about the regularity of the proceedings which will not be stressed upon this appeal. p. 58. l. 36.

**22.** An objection of the Appellant, The Bell Telephone Company, based on sub-section 12 of Section 375 of the Railway Act is then dealt with. The sub-section reads as follows: p. 60. l. 8.

30 “375. 12. Without limitation of the generality of this sub-section by anything contained in the preceding sub-sections, the jurisdiction and powers of the Board, and, in so far as reasonably applicable and not inconsistent with this section or the Special Act, the provisions of this Act respecting such jurisdiction and powers, and respecting proceedings before the Board and appeals to the Supreme Court or Governor in Council from the Board, and respecting offences and penalties, and the other provisions of this Act, except sections seventy-two to two hundred and seventy, two hundred and seventy-two to two hundred and eighty-two, two hundred and eighty-seven to three hundred and thirteen, three hundred and twenty-three, three hundred and forty-nine to three hundred and fifty-four, three hundred and sixty to three hundred and sixty-six, three hundred and ninety-four to four hundred and twenty-four, and four hundred and forty-nine to four hundred and fifty-seven, both inclusive in each case, shall extend and apply to all companies as in this section defined, and to all telegraph and telephone systems, lines and business of such companies within the legislative authority of the Parliament of Canada; and in and for the purposes of such application: 40

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

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

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

“(d) ‘toll’ or ‘rate’ shall mean telegraph or telephone toll;

“(e) ‘traffic’ shall mean the transmission of and other dealings ‘with telegraphic and telephonic messages. 1919, c.68, s.375.”

10

p. 60, l. 13.

The answer made is that this sub-section deals with telegraph and telephone companies as such but that 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.

p. 60, l. 20.

**23.** The peculiar feature of the Hamilton City case on account of the closing of certain streets is then dealt with. The Court says that there is much to be said in favour of the proposition that the Board can order part of a highway to be closed or can require the proper municipal authority to close it, but the point is not decided. The objection is met by stating that the city agreed to close the streets and all the Board did was confined to the extinguishment of the public right to cross the highway; that the Order came as the result of an agreement between the railway company and the city.

20

p. 60, l. 33.

p. 60, l. 41.

p. 61, l. 1.

**24.** The Court further draws attention to a statement made in the factum of the Bell Telephone Company to the effect that 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, stating that so far as they could remember no particular argument was addressed to them on that special point and that were it not that the appeal was on a question of jurisdiction the point should be dismissed on the simple ground that it was not taken at bar, but that if the situation was as represented in the factum the powers of the Board to make the direction complained of, so far at least as it concerns the rights of the Bell Telephone Company in respect of that particular work, might have to be inquired into, and that the result might not be the same as in the case of works ordered in connection with crossings. The Court

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p. 61, l. 5.

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concluded that they had no facts or admissions upon which to decide that issue, and that if the parties wished their rights to be reserved for that purpose the point might be spoken to.

p. 61, l. 13.

25. An application was subsequently made by motion by the Bell Telephone Company to re-open the appeal for re-argument on this question upon the ground that in point of fact it had been fully argued before the Court on the hearing of the appeal both in chief and in reply, and in view of the assumption that the argument had been overlooked it should be re-argued, but the motion was refused and a subsequent motion to vary the minutes of judgment by including a reservation to your Petitioner of the right to question the jurisdiction of the Board to order the closing of Hughson Street was also dismissed.

Supplemental  
Record p. 3.

p. 5.

p. 7.

pp. 8, 9.

26. The objection based on the special legislation affecting the Canadian National Railways is then dealt with. Section 17 of the Canadian National Railways Act (Statutes of Canada 1929 cap. 10 s. 2) is referred to. It reads as follows :

Record p. 61.

p. 61.

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

20 “(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 ;

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

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

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“(d) The compensation payable in respect of any lands or interests therein taken by the Company under the provisions of the *Expropriation Act* as made applicable to the Company by this Act shall be ascertained in accordance with the provisions of the *Expropriation Act*, and for that purpose the Exchequer Court shall have jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the Company, of judicial proceedings and the conduct thereof: Provided that such compensation may, in any case where the offer of the Company does not exceed two thousand five hundred dollars, be ascertained under the provisions of the *Railway Act*, beginning with notice of expropriation to the opposite party. The amount of any judgment shall be payable by the Company. 10

“(3) Lands or interests in lands required by any company comprised in the Canadian National Railways may be acquired for such company by the Company under the provisions of this Act.”

pp. 61-63.

27. After a detailed analysis of the Sections of the Railway Act and of the wording of this Section of the Special Act, which it is impossible to summarize in this case, the Court comes to the conclusion that the provisions of the Railway Act relied on by Respondent the Canadian National Railways applied to it. The judgment in the Boland case above is referred to. 20

p. 63, l. 1.

p. 63, l. 36.

28. It is then held that the Terminals Act quoted above does not give a complete rule on the subject of the present appeal and therefore the Railway Act is still applicable. Section 8 of the Terminals Act is quoted as supporting that view. It reads as follows :

“8. Where streets or highways are affected by the said works but are not crossed by the Company's tracks or diverted incidental to any such crossing and by reason thereof the Board of Railway Commissioners of Canada has no jurisdiction under the *Railway Act* with respect thereto, the Company may with the approval of the Governor in Council enter into agreements, where it may be desirable, with the City of Montreal or with any other municipality with respect to such streets or highways or with respect to the opening of new streets, the closing of existing streets and ways, the making of diversions or widenings of such streets or highways, and the making of substreets, subways or overhead facilities in connection with such streets or highways, and the apportionment of the cost thereof.” 30

p. 64, l. 32.

29. Finally, as respects the appeal of the Montreal Tramways Company, Section 252 of the Railway Act is relied on as supporting the Order. The Section reads as follows : 40

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

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

“3. The Board may, by order,

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

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

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

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

“(e) determine the amount of damage and compensation, if any,  
 “to be paid for any property or land taken or injuriously affected by reason  
 “of the construction of such works ;

“(f) give directions as to supervision of the construction of the  
 “works ; and

30 “(g) require that detail plans, drawings and specifications of any  
 “works, structures, equipment or appliances required, shall, before con-  
 “struction or installation, be submitted to and approved by the Board.

“4. No trains shall be operated on the lines or tracks of the applicant  
 “over, upon or through such crossing or junction until the Board grants an  
 “Order authorizing such operation.

“5. The Board shall not grant such last mentioned Order until satisfied  
 “that its Orders and directions have been carried out, and that the provisions  
 “of this section have been complied with. 1919, c. 68, s. 252.”

40 30. In respect of the six appeals concerned with St. Antoine  
 and d'Argenson Streets, Montreal, Appellants will submit in the  
 first place that Sections 255, 256 and 257 of the Railway Act which  
 alone are relied on as the basis for the Board's jurisdiction are

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inapplicable to these particular works because everything that these Sections deferred to the Board has been dealt with by Parliament and by the Governor in Council, under the special authority of Parliament and thus withdrawn from the jurisdiction of the Board. The necessary consequence is that Section 39 is also inapplicable. It is submitted that the question is not whether these Sections are or not entirely inapplicable to the Montreal Terminals undertaking. There are many works called for by that undertaking to which these Sections may apply subject to the other points to be mentioned. The point is that they cannot apply to these two cases as everything 10 on which the Board is authorized to pass has been taken away from it and passed upon by higher authority.

**31.** Section 8 of the Terminals Act, it is submitted, is not an answer as there are streets and highways to be crossed in the carrying out of the general work where the jurisdiction of the Board may exist subject as above stated. Appellants submit that Section 257 of the Railway Act would not, in any way, apply. There is no doubt as to St. Antoine Street, but it is submitted that even as to d'Argenson Street, the fact that there was, as previously stated, an overhead railway crossing the street which has to be widened to 20 permit the carrying out of the works according to the plan, would not render that section applicable. At all events, the same answer would apply to that section as has been made in respect of Sections 255 and 256.

**32.** The Montreal Terminals Act, Section 2, states that the Governor in Council may provide for the construction and completion by the Railway Company of . . . pipes, wires and conduits for any purposes, bridges, viaducts, tunnels, subways, tracks, buildings and structures of every description and for any purpose . . . also street and highway diversions and widen- 30 ings, new streets and highways, subways and overhead streets and also approaches, lanes, alley-ways and other means of passage . . .

It is submitted that these are to be constructed by the Railway Company and not by any one else, and therefore the Order of the Board that the work be done by Appellants is illegal.

**33.** It is further submitted that the depressing of the streets and consequent destruction and rebuilding of Appellant's plant is not ordered by the Railway Board out of consideration for the safety and convenience of the public, Sections 255, 256 and 257 do not there- 40 fore apply. The Railway Board merely purports to permit and order

something that had already been ordered by higher authority and had to be done as ordered by that authority and could not be done otherwise. For that additional reason, it is submitted that Section 39 is inapplicable as it applies only when the Board, under a power vested in it, directs or permits a work to be done, and this is not such a case.

34. Dealing now with all the appeals except the Hamilton appeal, Appellants will submit that in view of the terms of Section 17 of the Canadian National Railways Act, such railway is governed  
10 by the Expropriation Act in respect of the matters herein and that Sections 255, 256, 257 and 39 of the Railway Act are inapplicable. The material sections of the Expropriation Act (R.S.C. 1927 cap. 64) are the following :

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

\* \* \* \* \*

20

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

30

“(g) divert or alter the position of any water-pipe, gas-pipe, sewer,  
“drain, or any telegraph, telephone or electric light wire pole. R.S.,  
“c. 143, s. 3.”

40

“9. Land taken for the use of His Majesty shall be laid off by metes  
“and bounds; and when no proper deed or conveyance thereof to His Majesty  
“is made and executed by the person having the power to make such deed  
“or conveyance, or when a person interested in such land is incapable of  
“making such deed or conveyance, or when, for any other reason, the  
“minister deems it advisable so to do, a plan and description of such land  
“signed by the minister, the deputy of the minister or the secretary of the  
“department, or by the superintendent of the public work, or by an engineer  
“of the department, or by a land surveyor duly licensed and sworn in and for  
“the province in which the land is situate, shall be deposited of record in the

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“office of the registrar of deeds for the county or registration division in  
 “which the land is situate, and such land, by such deposit, shall thereupon  
 “become and remain vested in His Majesty. . . .”

“27. In any case in which land or property is acquired or taken for, or  
 “injuriously affected by, the construction of any public work, the Attorney  
 “General of Canada may cause to be exhibited in the Court an information  
 “in which shall be set forth

“(a) the date on which and the manner in which such land or  
 “property was so acquired, taken or injuriously affected ;

“(b) the persons who, at such date, had any estate or interest in 10  
 “such land or property, and the particulars of such estate or interest  
 “and of any charge, lien or encumbrance to which the same was subject,  
 “so far as the same can be ascertained ;

“(c) the sums of money which the Crown is ready to pay to such  
 “persons respectively, in respect of any such estate, interest, charge, lien  
 “or encumbrance ; and

“(d) any other facts material to the consideration and determina-  
 “tion of the questions involved in such proceedings. R.S. c. 143, s. 26.

“28. Such information shall be deemed and taken to be the institution 20  
 “of a suit against the persons named therein, and shall conclude with a claim  
 “for such a judgment or declaration as, in the opinion of the Attorney General,  
 “the facts warrant. . . .”

**35.** In respect of all the Appeals, Appellants will submit that  
 under Sections 256, Paragraph 3, and 257, Paragraph 2 of the Railway  
 Act, the installations of Appellants are land exclusive of the  
 highway crossing required for the proper carrying out of the Order  
 of the Board and therefore the provisions of law applicable to the  
 taking of land by the company apply and an Order of the Board  
 which is not entrusted with the administration of the law respecting 30  
 the taking of land on such companies to destroy and rebuild these  
 installations with a chance of being offered full or part compensa-  
 tion later, should the Board so deem fit is an Order made in violation  
 of such provisions. The Appellants submit that the definition of  
 the word “land” should be that of the Expropriation Act, in view of  
 the Section 17 of the Canadian National Railways Act and not that  
 of the Railway Act but the next preceding argument is based on  
 either alternative. The Expropriation Act’s definition of “land” is  
 as follows :

“2. (d) ‘land’ includes all granted or ungranted, wild or cleared,  
 “public or private lands, and all real property, messuages, lands, tenements 40



“and hereditaments of any tenure, and all real rights, easements, servitudes  
 “and damages, and all other things done in pursuance of this Act, for which  
 “compensation is to be paid by His Majesty under this Act;”

The Railway Act's definition of “land” is as follows :

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

10 **36.** Appellants will submit on all the appeals that Sections  
 162, 163 and 164 apply in all cases of railways crossing highways  
 and not only when that is done by the mere volition of the Railway  
 Company as it can never be done thus, and therefore Section 39 is  
 inapplicable.

**37.** Appellants will alternatively submit that Section 260 of  
 the Railway Act applies to this case and that if the railway company  
 must provide for the protection, safety and convenience of the  
 public in respect of the crossings, an Order compelling the public  
 utility companies to destroy their installations and rebuild them  
 20 at another level leaving them with the chance of being compensated  
 as above mentioned, does not comply with that Section.

**38.** Appellant The Bell Telephone Company of Canada will  
 also submit that under Section 375, Paragraph 12, of the Railway  
 Act, it is exempted from the provisions of Sections 255, 256 and 257  
 of such Act.

**39.** Appellant The Bell Telephone Company, will submit in  
 respect of the Toronto appeal that the Order of the Railway Board  
 purports to have been made under the authority of Sections 178 and  
 257 of the Railway Act. It cannot be justified under Section 257  
 30 and must be supported, if at all, under Section 178, and is therefore  
 an Order made on the initiative of the Railway Company and in its  
 interest and not for the safety and convenience of the public.  
 Section 178 reads as follows :

“178. If any deviation, change or alteration is required by the Company  
 “to be made in the railway, or any portion thereof, as already constructed, or  
 “as merely located and sanctioned, a plan, profile and book of reference of the  
 “portion of such railway proposed to be changed, showing the deviation,  
 “change or alteration proposed to be made, shall, in like manner as herein-  
 “before provided with respect to the original plan, profile and book of refer-  
 40 “ence be submitted for the approval of the Board, and may be sanctioned by  
 “the Board.”

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**40.** Appellant The Bell Telephone Company will further submit in respect of the Hamilton case that the entire project was one of railway terminal development in that the Railway Company's application was primarily based upon Section 178 and not Sections 255, 256 and 257 of the Railway Act; and its plans provided for a new station and terminal buildings and that the works in this case, including the depressing and closing of the streets, was not ordered by the Board out of consideration for the safety and convenience of the public but rather because the Respondent Railway and City applied therefor.

10

**41.** Appellant The Bell Telephone Company will also submit in respect of the Hamilton case that the Railway Board had no power to order or permit the closing of streets and particularly when such closing is for the purpose of enabling a railway station and terminal buildings to be built thereon, or for a purpose incidental thereto and that by purporting to act in pursuance of an agreement between the Railway Company and the City providing for the closing of such streets cannot bring into operation Section 39 of the Act and compel the public utility company to destroy and rebuild its installation subject to its chance to be later compensated as above mentioned.

20

**42.** The Appellant also submits that there were sufficient facts before the Supreme Court of Canada to have enabled it to have dealt with the question relating to the closing of Hughson Street, as the location of the new station and the extent to which the street was to be closed and the use of the closed portion for the construction of the station were shown on the Railway's plan and were covered by the agreement. There was no finding on the part of the Railway Board that the street was closed for any other purpose and the plan speaks for itself, and further that under Sub-section 6 of Section 52 of the Railway Act the Supreme Court of Canada was entitled to draw all such inferences as were not inconsistent with the facts expressly found by the Board and necessary in determining the question of jurisdiction or law, as the case may be.

30

**43.** Appellants finally submit that Section 252 does not apply as respects the Tramways Company to the closing of highways on which there is a tramway and that the Order has not been made and does not purport to be made under that Section. Alternatively the objections based on the special provisions of the Canadian National Montreal Terminals Act and the Canadian National Railways Special Act and 164 of the Railway Act would equally apply to that Section.

40

**44.** Appellants therefore submit that the judgment of the Supreme Court should be reversed and the Orders of the Board of

Railway Commissioners of Canada set aside as being beyond its jurisdiction :—

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(A) In respect of the six Montreal appeals

- 10
- (1) BECAUSE in view of the terms of the Canadian National Montreal Terminals Act, 1929, and of the Order-in-Council passed, and the plan approved under the authority thereof, such Board had no jurisdiction to make, in the interest of the safety and convenience of the public or otherwise, the Orders that it has made, and Sections 255, 256, 257 and 39 of the Railway Act do not apply to such a case;
  - (2) BECAUSE Section 257 would, independently of the above considerations, be inapplicable, under the circumstances, to these works;
  - (3) BECAUSE the Canadian National Railway Montreal Terminals Act, 1929, provides that the Governor-in-Council may provide for the construction by Canadian National Railways of the Works in respect of which the present Order is made and the latter provides that others than such Railway Company will have to do the work;
- 20

(B) In respect also of the Toronto appeal

- (1) BECAUSE, in view of the provisions of the Canadian National Railway Act, especially Section 17, the above-mentioned Sections 255, 256, 257 and 39 of the Railway Act are inapplicable to the present case;
  - (2) BECAUSE the Order purports to be made partly under Section 178 of the Railway Act and could only be justified if at all under that Section and Sections 255, 256, 257 and 39 of the said Act are therefore inapplicable;
- 30

(C) In respect of all the appeals

- (1) BECAUSE the plant of Appellants is land within the meaning of the Expropriation Act which is applicable, or alternatively within the meaning of the Railway Act, and it is land exclusive of the highway crossing required for the proper carrying out of the Orders of the Board, if Sections 255, 256 and 257 of the Railway Act apply, and therefore, the
- 40

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- provisions of law applicable to the taking of land by the Company apply, and not Section 39;
- (2) BECAUSE, in view of Sections 163 and 164 of the Railway Act, Section 39 of the said Act would be inapplicable under the present circumstances;
  - (3) BECAUSE Section 259 is, for the same reasons, inapplicable to the present case;
  - (4) BECAUSE, alternatively, Section 260 applies to the present cases and therefore Sections 39 and 259 are inapplicable; 10
  - (5) BECAUSE in respect of The Bell Telephone Company's appeals, Sections 255, 256 and 257 of the Railway Act are inapplicable in view of the terms of Sub-section 12 of Section 375 of the same Act;
  - (6) BECAUSE in respect of the Hamilton case the Board had no jurisdiction to order the closing by a municipality of streets within the jurisdiction of the municipality and to order the removal of public utilities from such streets;
  - (7) BECAUSE the Board had no jurisdiction to order the 20 closing of streets, and particularly so when such closing is for the purpose of enabling a railway station to be built thereon, or for a purpose incidental thereto, nor was there permission required or necessary for the purpose, and, therefore, Section 39 is inapplicable;
  - (8) BECAUSE the Board had no jurisdiction to order the removal and destruction of public utilities in and about a street agreed to be closed by a municipality by virtue of an agreement between the municipality 30 and a railway company;
  - (9) BECAUSE in respect of the Montreal Tramways Company appeals, Section 252 does not apply to a tramway which has to be demolished and rebuilt because a street is depressed to pass under an elevated railway;
  - (10) BECAUSE alternatively, Section 252 would be inapplicable for the same reasons as above given in respect of Sections 255, 256, 257 and 39.

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**IN THE PRIVY COUNCIL.**

**ON APPEAL**

FROM THE SUPREME COURT OF CANADA.

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

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BETWEEN :—

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

— AND —

**THE CANADIAN NATIONAL RAILWAYS**  
*Respondent.*

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

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**APPELLANTS' CASE.**

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