

44, 1934

In the Privy Council.

No. 26 of 1933.

ON APPEAL FROM THE SUPREME COURT OF  
CANADA.

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IN THE MATTER of General Order No. 490 of the Board of Railway Commissioners for Canada dated 20th February, 1931, amending the rules for wires erected along or across Railways adopted by General Order No. 231 dated May 6th, 1918, as amended by General Order No. 291 dated April 7th, 1920 (case, No. 470), and the Appeal therefrom by THE CANADIAN ELECTRICAL ASSOCIATION AND THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO.

BETWEEN

THE CANADIAN ELECTRICAL ASSOCIATION AND  
THE HYDRO-ELECTRIC POWER COMMISSION  
OF ONTARIO - - - - - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS, THE  
CANADIAN PACIFIC RAILWAY COMPANY, THE  
MICHIGAN CENTRAL RAILROAD COMPANY AND  
THE RAILWAY ASSOCIATION OF CANADA - *Respondents.*

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RECORD OF PROCEEDINGS.

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In the Privy Council.

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IN THE MATTER of General Order No. 490 of the Board of Railway Commissioners for Canada dated 20th February, 1931, amending the rules for wires erected along or across Railways adopted by General Order No. 231 dated May 6th, 1918, as amended by General Order No. 291 dated April 7th, 1920 (case, No. 470), and the Appeal therefrom by THE CANADIAN ELECTRICAL ASSOCIATION AND THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO.

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*Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS, THE  
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THE RAILWAY ASSOCIATION OF CANADA -

*Respondents.*

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RECORD OF PROCEEDINGS.

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*Before  
the Board  
of Railway  
Commis-  
sioners for  
Canada.*

**No. 1.**

**General Order No. 231 of the Board of Railway Commissioners for Canada, as amended by General Order No. 291 of 7th April 1920, setting forth standard conditions and specifications for wire crossings.**

**PART I.—OVER-CROSSINGS.**

**CONDITIONS.**

No. 1.  
General  
Order No.  
231 of the  
Board of  
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sioners for  
Canada, as  
amended by  
General  
Order No.  
291 of  
7th April  
1920, setting  
forth  
standard  
conditions  
and specifi-  
cations for  
wire  
crossings,  
6th May  
1918.

1. The applicant shall, at its or his own expense, erect and place the lines, wires, cables, or conductors authorized to be placed along or across the said railway, and shall at all times, at its own expense, maintain the same in good order and condition and at the height shown on the drawing, and in accordance with the specifications hereinafter set forth, so that at no time shall any damage be caused to the company, owning, operating or using the said railway, or to any person lawfully upon or using the same, and shall use all necessary and proper care and means to prevent any such lines, wires, cables, or conductors from sagging below the said height. 10

2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from, and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables or any works or appliance herein provided for not being erected in all respects in compliance with the terms and provisions of this order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant. 20

3. No work shall at any time be done under the authority of this order in such a manner as to obstruct, delay or in any way interfere with the operation or safety of the trains or traffic of the said railway.

“4. (See General Order No. 291, April 7, 1920.) The applicant, before any work is begun, shall give the railway company owning, operating, or using the said railway at least seventy-two hours' prior notice thereof in writing, and the said railway company shall be entitled to appoint an inspector, under whose supervision such work shall be done, and whose wages, at a rate not to exceed eleven dollars per day, shall be paid by the applicant; such payment to cover both wages and expenses. When the applicant is a municipality and the work is on a highway under its jurisdiction, the wages of the inspector shall be paid by the railway company.” 30

4.—(a) It shall not, however, be necessary for the applicant to give prior notice in writing to the railway company as above provided in regard to necessary work to be done in connection with the repair or maintenance of the lines or wires when such work becomes necessary through an unforeseen emergency. 40

5. Where the wires or cables are to be erected at the railway and carried above, below, or parallel with existing wires, either within the

span or spans to be constructed at the railway or within the spans next thereto on either side, such additional precautions shall be taken by the applicant as the Engineer of the Board shall consider necessary.

6. Nothing in these conditions shall prejudice or detract from the right of the company owning, operating, or using the railway to adopt at any time the use of the electric or other motive power, and to place and maintain along, over, upon, or under its right of way, such poles, lines, wires, cables, pipes, conduits, and other fixtures and appliances as may be necessary or proper for such purpose. Liability for the cost of any removal, change in location or construction of the poles, lines, wires, cables or other fixtures or appliances erected by the applicant along, over or under the tracks of the said railway company, rendered necessary by any of the matters referred to in this paragraph, shall be fixed by the Board on the application of any party interested.

7. Any disputes arising between the applicant and the said railway company as to the manner in which the said wires or cables are to be erected, placed or maintained, used or repaired, shall be referred to the Engineer of the Board, whose decision shall be final.

8. The wires or cables of the applicant shall be erected, placed and maintained in accordance with the drawing approved by the Board and the specifications following. If the drawing and specifications differ the latter shall govern unless a specific statement to the contrary appears in the Order of the Board.

9. In every case in which the line of a railway company is to be constructed along or under the wires or cables of a telegraph or telephone company, the construction of the telegraph or telephone line or lines of the company shall be made to conform to the foregoing specifications, and any changes necessary to make it so conform shall be made by the telegraph or telephone company at the cost and expense of the railway company.

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forth  
standard  
conditions  
and speci-  
fications for  
wire  
crossings,  
6th May  
1918—con-  
tinued.

30

## SPECIFICATIONS.

A. *Labelling of poles.*—Poles, towers, or other wire-supporting structures on each side of and adjacent to railway crossings, to be equipped with durable labels showing (a) the name of the company or individual owning or maintaining them, and (b) the maximum voltage between conductors; the characters upon the labels to be easily distinguished and read from the ground.

B. *Separate lines.*—Two or more separate lines for the transmission of electrical energy shall not be erected or maintained in the same vertical plane. The word “lines,” as here used, to mean the combination of conductors and the latter’s supporting poles, or towers and fittings.

C. *Location of poles, etc.*—Poles, towers, or other wire-supporting structures to be located generally a distance from the rail not less than equal to the length of the poles or structures used. Poles, towers, or other

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wire-supporting structures must under no consideration be placed less than 12 feet from the rail of a main line, or less than 6 feet from the rail of a siding. At loading sidings sufficient space to be left for driveway.

D. *Setting and strength of poles.*—Poles less than 50 feet in length to be set not less than 6 feet and poles over 50 feet not less than 7 feet in solid ground. Poles with side strains to be reinforced with braces and guy wires. Poles to be at least 7 inches in diameter at the top—mountain cedar poles to be at least 8 inches at the top. In soft ground poles must be set so as to obtain the same amount of rigidity as would be obtained by the above specifications for setting poles in solid ground. When the line is located in a section of the country where grass or other fires might burn them, wooden poles to be covered with a layer of some satisfactory fire-resisting material, such as concrete at least two inches thick, extending from the butt of the pole for a distance of at least 5 feet above the level of the ground. Wooden structures to have a safety factor of five. 10

E. *Setting and strength of other structures.*—Towers or other structures to be firmly set upon stone, metal, concrete or pile footings or foundations. Metal and concrete structures to have a safety factor of 4.

F. *Length of span.*—Span must be as short as possible consistent with the rules of setting and locating of poles and towers. 20

G. *Fittings of wooden poles for telegraph, telephone, or similar low tension lines.*—The poles at each side of a railway must be fitted with double cross-arms, dimensions not less than 3 inches by 4 inches, each equipped with 1½-inch hardwood pins, nailed in arms, or some stronger support and with suitable insulators; cross-arms to be securely fastened to the pole in gain by not less than a ⅝-inch bolt through the pole; arms carrying more than two wires or carrying cable must be braced by the two stiff iron or substantial wood braces fastened to the arms by ⅝-inch or larger bolts, and to the pole by a ⅜-inch or larger bolt.

H. *Fitting of all poles, towers, or other structures.*—All wire-supporting structures to be equipped with fittings satisfactory to the Engineer of the Board. 30

I. *Guards.*—Where cross-arms are used, an iron hook guard to be placed on the ends of and securely bolted to each. The hooks shall be so placed as to engage the wire in the event of the latter's detachment from the insulators.

J. *Insulators.*—All wires or conductors for the transmission of electrical energy along or across a railway to be supported by and securely attached to suitable insulators.

Wires or conductors in 10,000-volt (or higher) circuits, to be supported by insulators capable of withstanding tests of two and one-half times the maximum voltage to be employed under operating conditions. An affidavit describing the tests to which the insulators have been subjected and the 40

apparatus employed in the tests shall be supplied by the applicant. The tests upon which reports are required are as follows :—

Ja. *Puncture or rupture tests.*—The insulators having been immersed in water for a period of seven days, immediately preceding and ending at the time of the test, to be subject for a period of five minutes to a potential of two and one-half (2·5) times the maximum potential of the line upon which they are to be installed.

10 Jb. *Flash-over test.*—State the potentials that were employed to cause arcing or flashing across the surface of the insulator between the conductor and the insulator's point of support when the surface was (1) dry, and (2) wet.

K. *Height of wires :—*

Ka. *Low tension conductors.*—The lowest conductor must not be less than 25 feet from top of rail for spans up to 145 feet;  $2\frac{1}{2}$  feet additional clearance of rails or other wires must be given for every 20 feet or fraction thereof additional length of span. The words "low tension" as here used, to mean conductors for telegraph, telephone, and kindred signal work, as well as conductors connected with grounded secondary circuits of transformers below 350 volts.

20 Kb. All primary conductors, ungrounded secondaries and railway feeders to be maintained at least 30 feet above the top of rail—except where special provisions are made for trolley wires.

Kc. High tension conductors, those between which a potential of 10,000 volts or over is employed, to be maintained at least 35 feet above the top of rail.

30 L. *Clearance.*—Safe clearances between all conductors to be maintained at all times. The following distance to be provided wherever possible; at least 3 feet clearance from low tension wires; at least 5 feet between low tension wires, primaries, ungrounded secondaries, and railway feeders employing less than 10,000 volts; at least 10 feet between high tension wires and all other lines.

M. *Guy wires.*—Guy wires at railway crossings to be at least as strong as 7-strand No. 16 Stub's or New British standard gauge galvanized steel wire, and to be clearly indicated as guy wire on the drawing accompanying the application. One or more strain insulators to be placed in all guy wires; the lowest strain insulator to be not less than 8 feet above the ground.

N. *Wires and other conductors :—*

40 Na. Where open telephone, telegraph, signal or kindred low tension wires are strung across a railway this stretch to consist of copper wire, or copper-clad steel wire, not less than No. 13 New British standard gauge, .092 inch in diameter. Wire is to be securely tied to insulators by a tie wire not less than 20 inches in length and of the same diameter as the line wire.

Nb. Where No. 9 B.W.G., or larger, galvanized iron or steel wire is employed in a circuit, and where there is no danger of deterioration from smoke or other gases, the use of this wire may be continued at the crossing.

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6th May  
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tinued.

Nc. Where a number of rubber-covered wires are strung across a railway they may be made up into a cable by being twisted on each other or otherwise held together and the whole securely fastened to the poles.

Nd. Wires or other conductors for the transmission of electrical energy for purposes other than telegraph, telephone, or kindred low tension signal work, to be composed of at least seven strands of material having a combined tensile strength equivalent to or greater than No. 4 Brown & Sharpe gauge hard-drawn copper wire. These conductors to be maintained above low tension wires at the crossing, to be free from joints or splices, and to extend at least one full span of line beyond the poles or towers at each side of the 10  
railway.

Ne. Wires or other conductors subject to potentials of 10,000 volts or over, to be reinforced by clamps, servings, wrappings, or other protection at the insulators to the satisfaction of the Engineer of the Board.

Nf. Conductors for other than low tension work to have a factor of safety of two when covered with ice or sleet to a depth of 1 inch and subjected to a wind pressure of 8 pounds per square foot on the ice-covered diameter.

Ng. All conductors to be dead ended or so fastened to their supporting insulators at each side of the crossing that they cannot slip through their 20  
fastenings.

O. *Positions of wires.*—Wires or conductors of low potential to be erected and maintained below those of higher potential which may be attached to the same poles or towers.

P. *Trolley wires.*—Trolley wires at railway crossings to be provided with a trolley guard so arranged as to keep the trolley wheel or other rolling, sliding or scraping device in electrical contact. The trolley wire, trolley guard and their supports to be maintained at least 22 feet 6 inches above the top of the rails.

Q. *Cable.*—Cable to be carried on a suspension wire at least equivalent to seven strands of No. 13 Stub's or New British standard gauge galvanized 30  
steel wire. When cross-arms are used, suspension wires to be attached to a  $\frac{3}{4}$ -inch iron or stronger hook, or when fastened to poles to a malleable iron or stronger messenger hanger bolted through the poles, the cable to be attached to the suspension wire by cable clips not more than 20 inches apart. Rubber insulated cables of less than  $\frac{3}{4}$ -inch in diameter may be carried on a suspension wire of not less than seven strands of No. 16 Stub's or New British standard gauge galvanized steel wire. The word "cable" as here used, to mean a number of insulated conductors bound together.

## PART II.—UNDERGROUND LINES.

### CONDITIONS.

40

1. The line or lines, wire or wires, shall be carried along or across the railway in accordance with the approved drawing, and a pipe or pipes, conduit or conduits, cable or cables shall, for the whole width of the right



of way adjoining the highway be laid at the depth called for by, and shall be constructed and maintained in accordance with the specifications hereinafter set forth.

2. All work in connection with the laying and maintaining of each pipe, conduit or cable and the continued supervision of the same shall be performed by, and all costs and expenses thereby incurred be borne and paid by the applicant; but no work shall at any time be done in such a manner as to obstruct, delay or in any way interfere with the operation or safety of the trains, traffic or other work on the said railway.

10 3. The applicant shall at all times maintain each pipe, conduit or cable in good order and condition, so that at no time shall any damage be caused to the property of the railway company or any of its tracks be obstructed, or the usefulness or safety of the same for railway purposes be impaired, or the full use and enjoyment thereof by the said railway company be in any way interfered with.

“ 4. (See General Order No. 291, April 7, 1920.) Before any work of laying, removing, or repairing any pipe, conduit, wire, or cable is begun, the applicant shall give to the railway company at least seventy-two hours prior notice thereof in writing, accompanied by a plan and profile of the  
20 part of the railway to be affected, showing the proposed location of such pipe, wire or cable, conduit, and works contemplated in connection therewith; and the said railway company shall be entitled to appoint an inspector to see that the applicant, in performing said work, complies in all respects with the terms and conditions of this order, and whose wages, at a rate not exceeding eleven dollars per day, shall be paid by the applicant, such payment to cover both wages and expenses. When the applicant is a municipality and the crossing is on a highway under its jurisdiction, the wages of the inspector shall be paid by the railway company.”

4a. It shall not, however, be necessary for the applicant to give prior  
30 notice in writing to the railway company, as above provided, in regard to necessary work to be done in connection with the repair or maintenance of the line when such work becomes necessary through an unforeseen emergency.

5. The applicant shall, at all times, wholly indemnify the company owning, operating, or using the said railway of, from and against all loss, costs, damage and expense to which the said railway company may be put by reason of any damage or injury to person or property caused by any pipe, conduit, or cable, any works or appliances herein, or in the order authorizing the work provided for, not being laid and constructed in all  
40 respects in compliance with the terms and provisions of these conditions, or if, when so constructed and laid, not being at all times maintained and kept in good order and condition and in accordance with the terms and provisions of said order, or any order or orders of the Board in relation thereto, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of any of the employees or agents of the applicant.

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No. 1—  
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6. Nothing in these conditions shall prejudice or detract from the right of any company owning or operating or using the said railway to adopt, at any time, the use of electric or other motive power, and to place and maintain upon, over, and under the said right of way such poles, wires, pipes and other fixtures and appliances as may be necessary or proper for such purposes. Liability of the costs of any removal, change in location or construction of the pipes, conduits, wires, or cables constructed or laid by the applicant rendered necessary by any of the matters referred to in this paragraph, shall be fixed by the Board on the application of the party interested.

10

7. Any dispute arising between the applicant and the company owning, using or operating said railway as to the manner in which any pipe or conduit, or any works or appliances herein provided for, are being laid, maintained, renewed, or repaired, shall be referred to the Engineer of the Board, whose decision shall be final and binding on all parties.

No. 2.  
Notes of  
Judgment  
of the  
Board,  
5th Febru-  
ary 1931.

## No. 2.

### Notes of Judgment of the Board.

#### BY THE BOARD :

On the 6th day of May, 1918, a General Order of this Board, No. 231, was issued under the Provisions of section 246 of the Railway Act as it then stood, adopting and confirming the conditions and specifications applicable to the erection, placing and maintaining of electric lines, wires or cables, along or across all railways subject to the jurisdiction of the Board as set forth in the schedule annexed to the said Order.

20

The powers given to the Board under the section above referred to are now continued by section 372 of the Railway Act, 1919, and the conditions and specifications embodied in General Order No. 231, with certain amendments, are still in force.

Complaints have been made against clause 3 of the said General Order, as well as against certain of the conditions contained in the schedule to such Order being "The Standard Conditions and Specifications for Wire Crossings," part 1 of which deals with over-crossings.

30

In many instances in accordance with subsection 5 of section 372 of the Railway Act, mutual agreement between the railway company and the power company immediately involved, has rendered it unnecessary that application be made to the Board for permission to carry the transmission wires of light and power companies over the rights of way of railway companies, but it has frequently happened that under the provisions of section 372 above mentioned, such application has become necessary because no agreement could be arrived at under which such crossing could be made.

40

In view of certain objections made and terms insisted upon by the railway companies as a condition of such wire crossings, and erections in close proximity, it has been recognized by the Board that the subject-matter thereof must be given full consideration and a determination arrived at, and in the meantime for some years past, the Board's several orders allowing such crossings and erections have in all cases incorporated a clause therein making such permission subject to whatever conditions should be settled upon when decisions should be made by the Board in the general application now under consideration, in respect of construction, maintenance and  
 10 operation of power or electric lines or wires near, along or across railways.

The schedules attached to General Order No. 231 specify standard conditions and specifications for wire crossings, part 1 dealing with over-crossings, and part 2 thereof having to do with underground lines. This application has reference to the wording of clause (3) of the General Order, and to sections 1 and 2 of the conditions concerning over-crossings as set out in part 1 of the schedule, such conditions last above referred to being embodied in nine sections. It is suggested that No. 2 thereof is ineffective for proper protection of the railway company, whose right of way is sought to be crossed, and it is also contended that a further condition, to be known  
 20 as No. 10, should be added thereto.

For the purpose of reference necessary in the discussion of this application, conditions 1 and 2, as well as paragraph 3 of General Order No. (231), as they now stand, are set out immediately hereunder :—

“GENERAL ORDER NO. 231.”

“3. That any Order of the Board granting leave to erect, place or maintain any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board shall, unless otherwise expressed, be deemed to be an Order for leave to erect, place and maintain the same according to the conditions and specifications set out in that part of the said schedule applicable thereto, which conditions and specifications shall be considered as embodied in any such Order without specific reference thereto, subject, however, to such change or variation therein or thereof as shall be expressed in such Order.”  
 30

STANDARD CONDITIONS AND SPECIFICATIONS FOR WIRE CROSSINGS.

*Part 1.—Over-Crossings.*

CONDITIONS.

“1. The applicant shall, at its or his own expense, erect and place the lines, wires, cables, or conductors authorized to be placed along or across the said railway, and shall at all times, at its own expense, maintain the same in good order and condition and at the height shown on the drawing, and in accordance with the specifications hereinafter set forth, so that at no time shall any damage be  
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No. 2.  
Notes of  
Judgment  
of the  
Board,  
5th February 1931—  
*continued.*

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of Railway  
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No. 2.  
Notes of  
Judgment  
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*continued.*

caused to the company owning, operating or using the said railway, or to any person lawfully upon or using the same, and shall use all necessary and proper care and means to prevent any such lines, wires, cables or conductors from sagging below the said height.”

“ 2. The applicant shall at all times wholly indemnify the company owning, operating, or using the said railway, of, from, and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables or any works or appliances herein provided for not being erected in all respects in compliance with the terms and provisions of this Order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant.” 10

The railway companies complain that these conditions are not sufficiently protective. They say that while at present the power companies are required under condition No. 1 to maintain their lines, wires or cables in good order and condition, yet under the wording of No. 2 they are not compelled to indemnify the railway companies against loss occasioned them by failure of the power companies to maintain the same in such good order and condition; that the requirements of clause 2 are confined to the Power Company's works and appliances being erected in compliance with the terms and provisions of the Order, but indemnification is not provided for loss occasioned by a failure on the part of the power company to maintain the same in good order and condition. In addition to such ground of complaint the railways have persistently put forward as their view, that the conditions should provide for their indemnification, not only for the reasons enumerated above, but for loss or damage howsoever caused. 20

Various conferences have been held between the parties in interest from time to time and certain amendments to the conditions were put forward as a basis for discussion and consideration on the part of counsel for the railway companies and for the power companies. A proposed amendment to clause 2 of the conditions was submitted to the Board as follows :— 30

(The underlined portions in this and in other quoted paragraphs, show suggested changes.)

“ 2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from and against all loss, cost, damage and expense to which the said railway company may be put by reason of any damage or injury to person or property caused by any of the said wires or cables, or any works or appliances herein provided for, not being erected in all respects in compliance with the terms and provisions of his Order, (or if, when so erected, not being at all times maintained and kept in good order and condition and in accordance with the terms and provisions of this Order), as well as any damage or injury resulting from the 40

imprudence, neglect or want of skill of the employees or agents of the applicant. Provided however, that the applicant shall not be required to indemnify the railway company from and against any loss or damage directly attributable to any act, default or negligence on the part of the railway company, its agents or employees.

“ Nothing in this section shall deprive the railway company, or the applicant, of any remedy or right of action which either would otherwise have against the other for loss or damage resulting from the construction or maintenance of the said wires, cables or works.”

10 In lieu of paragraph 3 of General Order No. 231, as it now stands, the same was submitted as follows :—

“ 3. That any order of the Board granting leave to erect, place or maintain any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board, shall, unless otherwise expressed, be deemed to be an order for leave to erect, place and maintain the same according to the conditions and specifications set out in that part of the said schedule applicable thereto or as the same may be changed, varied or added to by future order of the Board, which conditions and specifications with such  
20 changes, variations and additions as may be ordered by the Board, shall be considered as embodied in any such order without specific reference thereto.”

In order to meet the conditions as at present existing an additional paragraph 10 was submitted as follows :—

30 “ 10. The applicant shall as soon as possible and immediately after its head office has received information of the occurrence upon railway lands, along or across which its wires are constructed and maintained, of any accident attended with personal injury to any person using the railway, or to any employee of the railway company, or which causes loss or damage to the railway company, give notice thereof by telegraph with full particulars, to the Board.”

The above amendments and addition were taken by counsel as a basis of argument before the Board, and the contentions of the railways and of the power companies in respect thereto are indicated by their request that the paragraph and section so submitted should be subjected to alterations as follows :—

40 Mr. Hanna, counsel for the Hydro-Electric Power Commission of Ontario, asked that clause 2 as last above written should be added to by inserting after the words “ employees ” where the same is first used, the words, “ or to any failure on its or their part to maintain or operate properly its systems,” and that the last five words of the clause be struck out and there be substituted therefor the words “ works of the other party,”

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so that as sought to be amended by the power companies, the new clause 2 of the conditions for over-crossings would read in its entirety as follows:—

“ 2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from and against all loss, cost, damage, and expense to which the said railway may be put by reason of any damage or injury to person or property caused by any of the said wires or cables, or any works or appliances herein provided for, not being erected in all respects in compliance with the terms and provisions of this Order (or if when so erected, not being at all times maintained and kept in good order and condition and in accordance with the terms and provisions of this Order), as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant. Provided, however, that the applicant shall not be required to indemnify the railway company from and against any loss or damage directly attributable to any act, default, or negligence on the part of the railway company, its agents or employees, or to any failure on its or their part to maintain or operate properly its system. 10

“ Nothing in this section shall deprive the railway company or the applicant, of any remedy or right of action which either would otherwise have against the other for loss or damage resulting from the construction or maintenance of the works of the other party.” 20

As regards paragraph 3 of the General Order No. 231 Mr. Hanna asked that a proviso be added thereto, so that the same would read thus:—

“ 3. That any order of the Board granting leave to erect, place or maintain any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board shall, unless otherwise expressed, be deemed to be an order for leave to erect, place and maintain the same according to the conditions and specifications set out in that part of the said schedule applicable thereto, which conditions and specifications shall be considered as embodied in any such order without specific reference thereto, subject, however, to such change or variation therein or thereof as shall be expressed in such order; subject always to the right of the Board, after notice to all parties and opportunity to be heard, to order at any time such changes or alterations to be made in connection with any such crossing as may to it seem advisable.” 30

To clause 10 as proposed to be added to the conditions of over-crossing, Mr. Hanna suggested that there be inserted after the word “ accident,” in the 4th line of the clause the following words “ connected with the works of the applicant,” so that his amended paragraph 10 would read thus:— 40

“ 10. The applicant shall as soon as possible and immediately after its head office has received information of the occurrence upon

railway lands, along or across which its wires are constructed and maintained, of any accident connected with the works of the applicant attended with personal injury to any person using the railway, or to any employee of the railway company, or which causes loss or damage to the railway company, give notice thereof by telegraph with full particulars to the Board."

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Mr. Fraser, counsel for the Canadian National Railways, took the position that the railway companies should be fully indemnified for damage or loss arising from the overhead wire crossing, however occasioned, except when caused by negligence on the part of servants or agents of the railway company. He was willing to accept the proviso to that effect as proposed to be added to condition 2, if the suggested amended clause contained the indemnification clause. But if the Board were not prepared to acquiesce in such contention on his part, he submitted that clause 2 should read as follows :—

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"2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from and against all loss, cost, damage and expense to which the said railway company may be put by reason of any damage or injury to person or property caused by any of the said wires or cables or any works or appliances herein provided for, not being erected and at all times maintained in all respects in compliance with the terms and provisions of this Order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant."

The wording contended for by each party, both in the conditions as existing and in the General Order, conforms to the respective contentions made, and they may be stated in the abstract very much more briefly than when set out in verbal alterations necessary to embody the contentions of each. The railway companies claim that being first upon the ground, they should be protected to the full against the new coming power companies which are carrying what is described as a dangerous load across their rights of way. They claim freedom of action within their own territory, that no obligation exists on their part to raise their standard of appliances to meet conditions brought about by high tension power wires crossing their land, that if damage should occur by accidental spilling of such power load the railway companies say such damage is caused by the presence of the power lines, and as the power lines are there by virtue of the Board's order, that such order should impose as a condition that the railway companies' existing rights be preserved, and that they be indemnified against any and all loss to which they may be subjected by the presence of such power lines.

On the other hand, the power companies say that the supply of electricity is just as important within its limits, as railway facilities, and that if their lines and works are constructed with due regard to safety and with modern appliances, they should not be called upon to contribute

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to, or to carry a loss occasioned to the railways by something for which they are not responsible, including perhaps carelessness or negligence on the part of the railway company in not constructing their works to meet the advanced necessities of the day in regard to transmission of power.

It was argued by Mr. Montgomery, counsel for the Canadian Electrical Association, that the Board is without power to impose conditions affecting liability between the railways and the power companies, inasmuch as such procedure might result in a declaration of liability at variance with the prevailing jurisprudence of the locality where an accident might occur. In the interest of public safety, the Board has not hesitated to exercise 10 the powers apparently bestowed upon it by Parliament in dealing with this matter, and the standard conditions and specifications for wire crossing in existence to-day exemplify this. His objection includes not only the enlarged conditions suggested by Mr. Fraser, but several which are now in force and which have been in existence for a long while. Mr. Montgomery took the position that in all instances in which the prescribed conditions of crossing have effected or determined liability between the respective companies, the Board has been acting *ultra vires*.

In view of the course pursued by this Board, unchallenged for many years, it would not appear seemly to hastily abandon this ground, or to 20 admit an improper exercise of power by the Board in this respect. The only authority for putting wires near, along or across railways takes its rise from section 372 of the Railway Act, and without leave of the Board such construction is forbidden. With certain exceptions, not here pertinent, such wires cannot be constructed or maintained near, along or across railways, or along or across other lines, wires, etc., without the Board's permission. On application by a power company for that purpose, subsection 3 of section 372 of the Railway Act provides :—

“(3) The Board may grant the application and may order the extent to which by whom, how, when, on what terms and conditions 30 and under what supervision, the proposed work may be executed.”

Mr. Montgomery's contention is, that the above subsection amounts to a direction for the power companies to come to the Board in order to see that ordinary protective measures are adopted concerning such crossing, and that it is presupposed that the right to cross will be granted, care being taken to see that the crossing be made as safe as possible.

Considering the specific provisions of the subsection above referred to, and the uniform procedure of the Board thereunder, it is not proposed here and now to negative the Board's jurisdiction, especially in view of the fact 40 that it is open to the power companies to correct the Board's procedure, if it has misdirected itself herein.

Mr. Montgomery further urged that, apart from the question of jurisdiction, the discretion of the Board should not be exercised to impose upon the power companies an excessive liability, and that they should not be answerable for any mishap except that which might arise from their own negligence.



The position taken at the hearing by the different parties has been fully detailed above. Subsequent to the argument, lengthy consultations have taken place between the parties immediately in interest and Mr. John Murphy, the Board's Electrical Engineer, dealing with the above and various other phases of the problem. It goes without saying that each is influenced by regard for its own interest. While it is a matter of great concern to the Board to deal fairly between the interested companies in apportioning responsibility and in setting up conditions under which their liability may be affected, there is a much more serious consideration overshadowing the whole question, for there emerges here a large issue which has to do with the safety of the public, to whom the dealings of the two companies are extraneous. I think we are to be guided in our determination rather by the safety of the public than by the incidence of pecuniary liability which may be occasioned by a failure or mishap in service. Whatever would seem to be the safest course to pursue in order to accomplish this end should be followed.

While not contesting liability for damages caused by their own negligence, the plea is put forward by the power companies that a mishap arising from vis major and not in any way attributable to their own negligence, should not involve liability on their part. As between the two companies this seems not unreasonable, although it furnishes no answer to Mr. Fraser's query as to why the railways should shoulder such responsibility. The Board must pursue the course which is most likely to protect the public. In this whole situation there is a feature very difficult to define, which carries with it a danger, almost, if not altogether, impossible to foresee. The Board's duty should be to establish such regulations as will keep everybody concerned most astute to foresee and prevent accidents. Mr. Fraser, for the railways, says in effect: "We are content to bear responsibility for our own negligence, but anything apart from that we should not be called upon to answer for whether the accident occurs through vis major or otherwise howsoever." His acceptance of such burden would involve liability arising from accidents which may occur through a fault or defect in the railway system. He would be compelled to keep continually alert to know what the power companies are doing in the premises—what voltage they are carrying, and under what circumstances they are crossing or paralleling the right of way at every point.

A further unescapable duty rests upon the railways to maintain their own wires, telegraph and telephone signals and other electric systems in good order and condition, and in such a way as to co-ordinate them with those of the power companies which may cross the rights of way. Methods previously well adapted to carry electrical loads in safety have had to be abandoned before now, and in all probability, existing systems will go into the discard to be replaced by others more efficient. If nothing more were at issue than the immediate result to the companies themselves, the Board would not feel under the same degree of responsibility to the public which the potential danger from high-tension power wires gives rise to, and the conditions in regard to them must be set up in accordance with this

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responsibility. In the opinion of the Board, the liability of the power company should not be limited to mishaps concerning which it can be shown to be at fault; unusual or accidental breakdowns in electric power systems, in common with a variety of disastrous occurrences, sometimes completely destroy all evidence of their cause. Except where carelessness, negligence, or whatever the cause of the mishap may be, can be traced to the railway company, the interest of all parties, and particularly the interest of the public, would appear to be most certainly and justly safeguarded by holding the power company—the only party in possession of knowledge of what is going on in its own system, and the only one in position to control it—liable for damage or injury done by its system. And there is this further to be said, namely, that it is by the act of the power companies in crossing, or coming near, the rights of way that the danger of accidents, even of some of those which might arise from vis major, are called into existence. It might be impossible in the event of damage or injury to draw a clear distinction between what might be termed carelessness on the part of the power company and vis major, which latter, not infrequently, reduces itself into a question of what might be avoided by the use of what may be termed excessive care. It seems conclusive that public safety will be best ensured, if the power companies are held liable for any damage or injury their systems may cause, even if it be difficult or impossible to accurately locate the reason for the mishap. The power companies must set up the most complete barrier against a breakdown. They must cross the right of way without spilling their dangerous load and, if they do so, and damage results, they must be held liable therefor. 10

The conditions providing for the liability of the railway companies arising from their own negligence involves the obligation to provide themselves with a high standard of equipment and to maintain their whole operation at such a point that the consequence of a mishap on the part of the power company will be nullified if a high standard of efficiency on the part of the railway can produce that result. It should not be open to the railways to content themselves with equipment outworn or out of date, and therefore liable to destruction under conditions when danger and loss could be prevented by the adoption of more modern methods. It is always the duty of an employer to provide his workmen with a proper place to work and the proper materials for carrying on the operation, and such duty is not performed by putting into their hands inadequate machinery, or placing them in conditions which are fraught with danger avoidable by reasonable care, and, if this obligation runs from employer to workmen, still more strongly should it be invoked for the protection of those who are strangers to the business which is being carried on. The passenger upon a railway train which, under conceivable circumstances might be wrecked through an accident to the high power tension line, is rightly upon the company's premises; he has paid for his right to be there, and he is entitled to the highest degree of protection while in such position. If, therefore, an accident or disability occur in the power company's system, and damage or injury to the railway be consequently done, even though for any reason 30 40

the cause of the accident or disability cannot be definitely located, as between the railway and the power company, the latter should be held responsible, for the reason that the loss suffered will have been occasioned by the presence of the power companies' wires or cables near, over or along the right of way of the railway.

Regarding as vitally essential the safety of persons outside the circle of either company, and desiring to frame conditions most likely to ensure to them immunity from danger and loss, the Board is of opinion that this result can be best assured by placing upon the shoulders of the company  
 10 carrying a dangerous load across the right of way, a primary obligation to bear it safely across the railway property, unless the negligence of the latter company should operate to cause the power wires to spill their load.

If, therefore, an accident or disability occur, due to an escape of electric power and for any reason its cause cannot be definitely located as between the railway company and the power company, the latter should be held responsible, for the reason that the loss suffered will have been occasioned by the passage of the power company's wires over or along those of the railway company. If they had not been there the occurrence would not have taken place. The conditions of carrying the power companies' lines  
 20 across or along the railways should be framed in accordance with what is above stated, that is to say, except in cases where loss or damage to the railway company is directly attributable to any act, default or negligence on the part of such railway company, its agents or employees, the applicant shall at all times wholly indemnify the company owning, operating or using the railway, from and against all loss, cost, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this order as well as against any damage or injury resulting from the  
 30 imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.

In result, therefore, paragraph 2 of the

“STANDARD CONDITIONS AND SPECIFICATIONS FOR WIRE CROSSINGS.

*Part 1—Over-Crossings.*

“CONDITIONS.”

will be amended to read as follows :—

“2. The applicant shall, at all times, wholly indemnify the  
 40 company owning, operating or using the railway, from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence,

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neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.”

To the conditions as at present, there will be added two additional paragraphs to be numbered 10 and 11, reading as follows :—

“ 10. The applicant shall as soon as possible and immediately after its head office has received information of the occurrence upon railway lands, along or across which its wires are constructed and maintained, of any accident attended with personal injury to any person using the railway, or to any employee of the railway company, or which causes loss or damage to the railway company, give notice thereof by telegraph with full particulars, to the Board.” 10

“ 11. Nothing herein shall deprive the railway company, or the applicant, of any remedy or right of action either would otherwise have against the other, for loss or damage resulting from the construction or the maintenance of the said wires, cables or other works covered by the order.”

A. D. CARTWRIGHT,

Secretary.

OTTAWA, February 5, 1931.

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Under the Railway Act 1919 (R.S.C. 1927, c. 170), the following is provided :—

S. 372.—(1) Lines, wires, other conductors, structures or appliances for telegraphic or telephone purposes, for the conveyance of electricity for other purposes, shall not, without leave from the Board, be constructed or maintained :

(a) Along or across a railway, by any company other than the railway company owning or controlling the railway ; or 30

(b) Across or near other such lines, wires, conductors, structures or appliances which are within the legislative of the Parliament of Canada.

(3) The Board may grant the application and may order the extent to which, by whom, how, on what terms and conditions, and with what supervision the works may be executed.

(5) Leave of the Board under this section shall not be necessary . . . when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes. 40

## II.

By its General Order No. 231, of the 6th of May, 1918, and amendments thereto, the Board made Rules and Regulations and fixed standard conditions and specifications regarding the electric wires along and across railways, in part, as follows:—

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## GENERAL ORDER NO. 231.

10 “ 3. That any order of the Board granting leave to erect, place, or maintain any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board, shall, unless otherwise expressed, be deemed to be an order for leave to erect, place and maintain the same according to the condition and specifications set out in that part of the said schedule applicable thereto, which conditions and specifications shall be considered as embodied in any such order without specific reference thereto, subject, however, to such change or variation therein or thereof as shall be expressed in such order.”

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## STANDARD CONDITIONS AND SPECIFICATIONS FOR WIRE CROSSINGS.

## PART 1.—OVER-CROSSINGS.

*Conditions.*

20 1. The applicant shall, at its or his own expense, erect and place the lines, wires, cables, or conductors authorized to be placed along or across the said railway, and shall at all times, at its or his own expense, maintain the same in good order and condition and at the height shown on the drawing, and in accordance with the specifications hereinafter set forth, so that at no time shall any damage be caused to the company, owning, operating or using the said railway, or to any person lawfully upon or using the same, and shall use all necessary and proper care and means to prevent any such lines, wires, cables, or conductors from sagging below the said height.

30 2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from, and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables or any works or appliances herein provided for not being erected in all respects in compliance with the terms and provisions of this order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant.

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## III.

The Canadian National and the Canadian Pacific Railway Companies allege that these conditions are unsatisfactory and inadequate; that the

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construction, maintenance and operation of high potential wires across their right of way is a source of gravest danger to themselves and their patrons, even when such wires are erected in accordance with the orders and specifications of the Board, and properly protected so far as human foresight can provide; that, under sections 45, 372 and other relevant sections of the Railway Act, the Board, as a condition to the granting of such applications, should require the power companies to assume the risk of all resultant damage to the railway company's property, and to the persons and property of its patrons, due to any cause whatsoever, even exceptional and uncontrollable, as the act of God, a hurricane or lightning etc., and should keep the railway company absolutely indemnified and insured against everything but the negligence of its own servants and agents. 10

The applicants therefore request that clause 2 of the standard conditions hereinabove quoted be amended accordingly.

#### IV.

The Ontario Hydro-Electric Power Commission and several power companies oppose this application and submit that all Canadian legislatures, federal and provincial, and every Parliament in the civilized world, have now recognized as a well-defined principle of public policy, that when a 20 company is incorporated by competent authority to fulfil a public demand, it should not be submitted to any exceptional or extraordinary liability, but should be held to account only to use the greatest possible care consistent with the handling of the dangerous commodity with which it is duly authorized to supply the public; that the railway companies themselves, though they introduce by their construction and operation, many new elements of danger, receive exceptional powers which, if carried out in a proper and efficient manner, do not involve any liability except for the damages due to the negligence of their own employees or agents; that, 30 similarly, power companies are vested with statutory authority to transmit dangerous electric currents and, when properly exercising such authority, they are liable only when damages arise out of their negligence; that this general policy of law has been adopted to meet the requirements of our modern conditions of living, and it could not now be discarded without seriously retarding the advancement and development of science and industry, there being hardly a public utility which does not involve a new element of danger; that in fixing the terms and conditions on which leave can be granted to these companies to cross or parallel a railway right of way, this Board should refrain from interfering with or changing these funda- 40 mental principles of common law which are applicable to all public utilities, including power transmission lines.

#### V.

The question of the liability in damages, due to negligence or otherwise, is a matter which, under the provisions of the British North America Act,

falls within the jurisdiction of provincial legislatures, except when it is necessarily incidental to the proper carrying into effect of laws enacted by the Dominion Parliament. The functions of this Board are judicial and administrative; they are not legislative. Its powers to impose a liability in damages must be found within the four corners of the Railway Act.

This Board has uniformly held that the question of damages is a matter for the courts and not for the Board. As early as 1904, in the *York Street Bridge case*, the late Chief Commissioner Blair, who was Minister of Railways and Canals when this Board was created, made the following statement:

10 “We must again emphasize the opinion that it is not within our province, in administering the Act which constitutes this Board, to attempt to provide remedies or afford relief in cases in which said relief and said remedies can better be afforded by the ordinary tribunals of the country.” (4 C.R.C., pp. 62 & s., and especially at page 69.)

In *Duthie vs. The Grand Trunk Railway Co.*, (4 C.R.C., p. 304) late Chief Commissioner Killam reaffirmed the principle that this Board was created to enforce the provisions of the Railway Act, but not to supplant or supplement the provincial courts in the exercise of their ordinary jurisdiction; that the Board was not empowered to award damages or any other

20 relief for any injury caused by an infraction of the Act.

In 1912 the case of *The Grand Trunk Pacific Railway Company vs. The Land owners on Streets in Fort William*, came before the Judicial Committee of the Privy Council on an appeal from the Board's order on a question of the Board's power as regards compensation to be paid.

Under section 47 of the Railway Act then in force, the Board could direct that its orders should come into force, *inter alia*, upon the performance “of any terms which the Board may impose upon any party interested.”

This language was certainly general and comprehensive, but it did not appear to their lordships that it would be safe to infer from the generality and comprehensiveness of the powers of the Board, and apart from any

30 specific reference to the compensation itself and the parties entitled thereto, that the liability in damage could be altered, abrogated, or enlarged by the exercise of the Board's administrative powers. (1912 Appeal Cases, pp. 224 & s.) The same principle was adopted by the Board in the case of *The City of Windsor vs. The Bell Telephone Co.* (22, C.R.C. 416), and *The Bell Telephone Co. vs. The City of Ottawa* (22, C.R.C. 421).

In the first case, the Board decided that in approving the route of the Bell Telephone Company on a highway, the jurisdiction of the Board is confined to fixing such terms, conditions or limitations as refer to the

40 lines, wires or poles within the municipality, but that the Board had no jurisdiction to require, as a condition, the payment of any money or the granting of free telephones to the municipality. In the second case above quoted, the Board decided that it was given no jurisdiction under the Railway Act to make the payment of compensation a term of an order approving the location or construction of a telephone line, or to impose any condition for which a municipality may contend in bargaining with a telephone company as a term or condition of such order.

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The Board has held in *Robinson vs. C.N.R.* (11, C.R.C., p. 289) that it had no jurisdiction to award damages for improperly taking away spur track facilities; in *Rogers vs. Canadian Express* (9 C.R.C. 480), that it had no power to award damages for the negligence of express employees; in *Duthie vs. Grand Trunk* (4 C.R.C., p. 304, quoted above) that it could not award damages for infractions to the Railway Act; in *United Grain Growers vs. C.P.R.* (26 C.R.C., p. 26) wherein negligence on the part of the railway employees in wrongly routing a car was alleged, that it had no jurisdiction to deal with a claim for damages.

The Board is the guardian of the public safety; it is given administrative 10 powers to say how crossings shall be made; it may lay down reasonable conditions as to the engineering features and protective devices to insure public safety; but the Railway Act has always been construed by this Board, by all other tribunals of this land and, forsooth, by the Judicial Committee of the Privy Council itself, as leaving the question of liability in damages to be determined by the civil laws and to be administered by the civil courts of each province.

Under section 372, it is provided that lines, wires, etc., for the conveyance of power, or electricity, shall not be constructed or maintained across a railway without leave of the Board, and that the Board may grant 20 the application and may determine the terms and conditions under which the proposed works may be executed.

The expression "terms and conditions" used here obviously refers to devices for safety, and does not extend to the right to fix liability for what may happen, even if these terms and conditions are observed.

## VI.

One must also bear in mind that power companies have been created by Parliament because public necessities require the transmission and distribution of electric power, quite as much as they require railways.

When a railway company appropriates property for public purposes, 30 the right of way to the private property of the railway company remains subject to various provisions of the law. In 18 C.R.C., p. 442, reference is made to the decision of Mr. Justice Osler, wherein all the authorities on the subject were cited, and *inter alia*, the following is quoted: "After a full review of the authorities, English and American, the learned judge came to the conclusion (p. 430) that if power is granted for one public or quasi-public purpose, such as the construction of a railway, and cannot be exercised without acquiring lands already expropriated for another public purpose, and yet can be exercised consistently with the existence of the latter, and without substantial interference therewith, the right to 40 exercise such power exists by necessary implication."

Effect is given to this principle all through the Railway Act, where railway property is permitted to be used either for railway uses or for other public purposes like highway crossings, farm crossings and crossings of transmission and distribution wires.



The railway companies urged that the power company having brought a very dangerous thing upon its land, it is liable at common law for all damage caused by the escape of that thing, no matter how that escape is brought about. They based themselves on the old *Rylands vs. Fletcher* case, but this case has no application herein, and the doctrine of *Rylands and Fletcher* (L.R. 3 H.L. 330) was never extended to cover the act of God.

The facts were as follows: The Rylands were mill-owners, their being on a property near that under which Fletcher occupied and worked a mine. Desiring to construct a reservoir, F. employed admittedly competent persons to do this. In working his mine F. came upon the disused passages of a forgotten mine, and these passages were connected with the land above by certain vertical shafts imperfectly filled with marl and rubbish.

The engineer or contractor failed properly to block these shafts, and when the water was introduced into the reservoir, it broke through some of the shafts, and flooded F's mine.

In the House of Lords, Lord Cairns, in delivering judgment, adopted the language of Mr. Justice Blackburn of the court below, and it is quite evident from the very language used in this decision that the Rylands could have excused themselves by showing that the escape had been the consequence of "vis major" or the act of God.

Beven on Negligence, commenting on this at p. 474 of Vol. 1 of his third edition after stating the general rule as laid down in *Rylands & Fletcher*, and as applied to electricity in *National Telephones & Baker*, notes that there are four exceptions to its generality, viz. :—

"(1) Where the damage to the plaintiff arises from the natural user of land.

"(2) Where the damage to the plaintiff is caused by his own default.

"(3) Where the damage to the plaintiff is the consequence of vis major or the act of God, and

"(4) Where the damage is the consequence of accumulation for public purpose under the direct authority of a statute."

He goes on to cite cases in which these exceptions have been upheld; and at p. 480 cites the case of *Nichols v. Marsland* (L.R. 10 Ex. 255 & 2 Ex. Div. 1), where the judgment was delivered by Mellish, L.J., who had been counsel in *Rylands v. Fletcher*, and where the exception there suggested is definitely adopted, *i.e.*, that acts of God did not fall under the general rule.

Again, in *Eastern & S. African Telegraphs v. Capetown Tramways* (1902 A.C. 381) where part of the Tramways system was authorized by statute and part was not. Here the variations in current caused by the stopping and starting of the cars disrupted the cable company's service, and it was shown that such interruptions could be avoided by laying a duplicate cable for a distance out to sea. The Privy Council held, for the part operated without statutory authority, that the doctrine of *Rylands v. Fletcher* was not inconsistent with the Roman-Dutch law and would apply

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of Railway  
Commissioners for  
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Chief Com-  
missioner  
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30th Janu-  
ary 1931—  
*continued.*

to an escape of electricity injuring persons or the ordinary use of someone else's property, but would not apply to the case of injury to a peculiar trade apparatus, unnecessarily so constructed. For the part of the line operated under statute, they held that the "leak" was not a leak in the meaning of the statute for which damages would have had to be paid, but was the natural consequence of a business carried on under statutory authority.

The principle of *Rylands v. Fletcher* has been refused where the escape of electricity caused damage only by reason of the trespass of a third party in the case of *Goodbody v. Poplar Borough Council* (84 L.J. K.B. 1230), where the council was operating a power system under statutory authoriza- 10  
tion and gas, escaping from a nearby main not belonging to them, entered a transformer changer and was ignited by a spark from their automatic circuit breaker, exploding and causing injury to a passerby. They were held not liable because they were not in control of the gas in question.

The law of the province of Quebec is somewhat different, though in the end it amounts to about the same thing. The pertinent article of the Civil Code is 1054 which says in part:—

"He is responsible not only for the damage caused by his own fault, but also for that caused . . . by things which he has under his care; . . ."

"The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which caused the damage."

The liability expressed here has been much debated in our courts. Until the *Doucet v. Shawinigan Carbide* case in 1910, the jurisprudence held firmly to the view that this article created a presumption of "faute," which was rebuttable. In and following that case arose a controversy over the interpretation of the article which came before the Privy Council in 1921.

In *Quebec Ry., L.H. & P. v. Vandry* [1920] A.C. 662 (52 D.L.R. 136) the Privy Council, disregarding the previous jurisprudence, applied to the article 30  
the rule of construction laid down by Lord Herschell in *Vagliano v. The Bank of England*. Under this they found that the sense of the article was plain, and that accordingly, without recourse being had to the sources of the article, the natural meaning should be given to its words. This natural meaning they found would make the "exculpatory" paragraph apply to the first paragraph of the article, so that what was created was not a rebuttable presumption of "faute," but a liability, which might be avoided by showing that the accident could not reasonably have been prevented.

Here the power wires of the defendant were brought down by a sleet-covered branch, causing damage to the plaintiffs. Their Lordships were 40  
not so sure that this constituted an act of God, but they in any event held the defendant liable because it had failed to show that it could not reasonably have prevented the damage (by grounding its transformers).

The above case, which is difficult to read, has been very clearly explained and approved in *City of Montreal v. Watt & Scott* [1922], 2 A.C. 555, 1922

(59 D.L.R. 1), which is the latest pronouncement of the Privy Council on the point. Here an exceptional rainfall found the city's sewer on Commissioners street inadequate to carry off the volume of water, with the result that it backed up into the respondents' cellar and caused them damage. The city was held liable on the ground that the storm had not been sufficiently intensive not to have been anticipated and so did not constitute an act of God, and the city could have prevented the damage by providing an adequate sewer or check-valves. In the words of the Court :—

10       “ The only addition to the views expressed in *Vandry's* case, which was not necessary there but is necessary here, is that in their Lordships' view 'unable to prevent the damage complained of' means unable by reasonable means. It does not denote an absolute inability. If therefore the storm in question could be described as a *cas fortuit* or *force majeure*, and if the appellants had shewn that they had constructed the sewer of a size sufficient to meet all reasonable expectations there would, in their Lordships' view, have been a case where the exculpatory paragraph would have applied.”

20       In the above two cases acts of God are considered as happenings which could not have reasonably been foreseen and against which, in consequence, the keeper of the thing could not reasonably be expected to guard. Thus the interpretation placed upon the common law (whether of England or of Quebec) by the railways is too broad. The liability which the power companies bring to the edge of their right of way, and, as a matter of fact carry over it, apart from all question of statutory authorization, does not include liability for acts of God—it is a liability to take reasonably extraordinary precautions in the handling of a dangerous thing. A liability, if you will, in which the conception of negligence is broadened to a degree commensurate with the danger in question.

30       The Board would in no way be justified in fixing the power companies with a liability which covered every accident, arising from no matter what cause, merely on the strength of the argument that it will only be giving effect to the common law in doing so.

40       Power companies are authorized by statute to serve the community, to erect poles, to carry power transmission lines, and hence, by implication, to cross railways where it is necessary to do so, subject to regulation by this Board, as hereinabove set out. Such statutory authority clearly modifies the common law liability, and under *C.P.R. vs. Roy* (1902 A.C. 220) a company so authorized is accountable only for damages arising out of its own negligence. In this case the railway was sued for damage caused by sparks from their locomotive, which they proved they had run after the most improved methods and without negligence. At page 231 of the report, the Lord Chancellor laid down the following principle :—

      “ The law of England, equally with the law of the province in question (Quebec) affirms the maxim *sic utere tuo ut alienum non*

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ary 1931—  
*continued.*

*laedas*, but the previous state of the law whether in Quebec, or in France, or England, cannot render inoperative the positive enactment of a statute, and the whole case turns, not upon what was the common law of either country, but what is the true construction of plain words authorizing the doing of the very thing complained of.”

This case is obviously applicable here. It is futile to say that the power companies have no statutory authorization except under order of the Board. They carry with them their common law liability as modified by their incorporating powers (in the light of *C.P.R. v. Roy*) wherever they go. An order of the Board to cross a railway right of way under the present regulations in no way relieves them from it on that right of way, nor could an order of the Board do so. 10

Statutory authorization as a defence to liability is fully discussed and a complete history of the jurisprudence given in *Beven on Negligence*, Vol. 1, pp. 286-293.

The Board is here concerned in reconciling the two services both authorized to operate for the benefit of the general public within their respective spheres, both legally causing damage without any fault on their part as a necessary incidental to the exercise of powers granted to them by the supreme authority, Parliament. When there is damage arising out of the proximity of the power lines to the telegraph lines, the Board's concern is, not who shall pay for that damage, but how shall that damage be prevented. Because the damage happens to be difficult to estimate and to trace, it is not for the Board to say who is to pay for it. The power companies are empowered to come anywhere with their lines, and when the Act says they shall not come near without the permission of the Board, it again only means: without complying with the conditions of the Board as to safe construction, etc. It does not imply a power to prevent them from coming “near.” 20

The American case of *Postal Telegraph Cable Co. v. Pacific Gas & Electric Co.*, cited by Mr. Lucas, at p. 2285 of the 1925 record, gives a good example of how they deal with the question of parallelism in the United States. 30

I adopt the reasoning of late Chief Commissioner Killam in *C.P.R. and C.N.R. vs. Kaministiquia Power Co.* (6 C.R.C. p. 160 and particularly at p. 170) where he used the following language: “The railway companies have since asked for the insertion of a condition throwing upon the power company the responsibility for any damage that may occur to the railway companies or those using the railways. I do not think that such a condition should be enforced between the railway companies and the power company. I think it best that we should simply refuse the applications of the railway companies, leaving the municipality and the public using the highways to such protection as is given by the provincial law.” 40

In my opinion, clause 2 of the “Conditions and Specifications” hereinabove referred to should remain as it is.

## VII

I agree with the learned Chief Commissioner as regards clauses 3 and 10. General Order No. 231 should be amended by striking out clause 3 as it now stands and inserting in lieu thereof the following :—

10 “ 3. That any order of the Board granting leave to erect, place or maintain any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board, shall, unless otherwise expressed, be deemed to be an order for leave to erect, place and maintain the same according to the conditions and specifications set out in that part of the said schedule applicable thereto, or as the same may be changed, varied or added to by future order of the Board which conditions and specifications with such change, variations and additions as may be ordered by the Board, shall be considered as embodied in any such order without specific reference thereto.”

A clause to be numbered 10 should be added to the conditions and specifications as now framed, to read as follows :—

20 “ 10. The applicant shall as soon as possible and immediately after its head office has received information of the occurrence upon railway lands, along or across which its wires are constructed and maintained, of any accident connected with the works of the applicant attended with personal injury to any person using the railway, or to any employee of the railway company, or which causes loss or damage to the railway company, give notice thereof by telegraph with full particulars to the Board.”

OTTAWA, January 30, 1931.

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 No. 4.

General Order No. 490 of the Board of Railway Commissioners for Canada.

Friday, the 20th Day of February, A.D. 1931.

30 Hon. H. A. McKEOWN, K.C., Chief Commissioner.  
S. J. McLEAN, Assistant Chief Commissioner.  
Hon. T. C. NORRIS, Commissioner.  
J. A. STONEMAN, Commissioner.

Upon hearing the matter at the sittings of the Board held in Ottawa, February 7, 1928, in the presence of counsel for and representatives of the Canadian National and the Canadian Pacific Railway Companies, the Michigan Central Railroad Company, Canadian Electric Railway Association, Toronto Transportation Commission, Ottawa Electric Company, Canadian Electrical Association, Montreal Light, Heat and Power Company,

*Before  
the Board  
of Railway  
Commissioners for  
Canada.*

—  
No. 3.  
Dissenting  
Judgment  
of Deputy  
Chief Com-  
missioner  
Vien,  
30th Janu-  
ary 1931—  
*continued.*

No. 4.  
General  
Order No.  
490 of the  
Board of  
Railway  
Commis-  
sioners for  
Canada,  
20th Febru-  
ary 1931.

Before  
the Board  
of Railway  
Commis-  
sioners for  
Canada.

Shawinigan Water Power Company, Gatineau Light and Power Company, Southern Canada Power Company, New Brunswick Electric Power Commission, Hydro-Electric Power Commission of Ontario, and the Bell Telephone Company of Canada, and what was alleged; and upon reading the written submissions filed on behalf of parties interested,—

No. 4.  
General  
Order No.  
490 of the  
Board of  
Railway  
Commis-  
sioners for  
Canada,  
20th Febru-  
ary 1931—  
*continued.*

*The Board Orders :* 1. That the “ Rules For Wires Erected Along or Across Railways,” adopted by the said General Order No. 231, dated May 6, 1918, as amended by General Order No. 291, dated April 7, 1920, be, and they are hereby, further amended by striking out paragraph 2 of “ PART I, OVERCROSSINGS,” and substituting in lieu thereof the following, 10  
namely :—

“ 2. The applicant shall at all times wholly indemnify the company owning, operating, or using the railway from and against all loss, damage, injury, and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the said applicant’s wires or cables, or any works herein provided for by the terms and provisions of this Order, as well as against any damage or injury resulting from the imprudence neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury, or expense can 20  
be traced elsewhere.”

2. That the said “ Rules for Wires Erected Along or Across Railways,” be further amended by adding after paragraph 9 of the said “ PART I, OVERCROSSINGS,” the following paragraphs, namely :—

“ 10. The applicant shall, as soon as possible, and immediately after its head office has received information of the occurrence upon railway lands along or across which its wires are constructed and maintained, of any accident attended with personal injury to any person using the railway, or to any employee of the railway company, or which causes loss or damage to the railway company, give notice 30  
thereof by telegraph, with full particulars, to the Board.

“ 11. Nothing herein shall deprive the railway company, or the applicant, of any remedy or right or action either would otherwise have against the other, for loss or damage resulting from the construction or the maintenance of the said wires, cables, or other works covered by the order.”

H. A. McKEOWN,  
Chief Commissioner.

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## No. 5.

Order No. 46762 of the Board of Railway Commissioners for Canada, granting leave to appeal to the Supreme Court of Canada from General Order No. 490.

*Before  
the Board  
of Railway  
Commis-  
sioners for  
Canada.*

FRIDAY, THE 5th DAY OF  
JUNE, A.D. 1931

S. J. McLEAN,  
10 Asst. Chief Commissioner.

HON. T. C. NORRIS,  
Commissioner.

J. A. STONEMAN,  
Commissioner.

IN THE MATTER OF the application of the Canadian Electrical Association for an extension of the delay for applying for and for leave to appeal to the Supreme Court of Canada from General Order of the Board No. 490, dated the 20th February, 1931, amending the Rules for Wires Erected Along or Across Railways, adopted by General Order No. 231, dated May 6th, 1918, as amended by General Order No. 291, dated April 7th, 1920 :

No. 5.  
Order No. 46762 of the Board of Railway Commissioners for Canada granting leave to appeal to the Supreme Court of Canada from General Order No. 490, 5th June 1931.

Case No. 470

UPON hearing the application at the sittings of the Board held in  
20 Ottawa, May 19th, 1931, in the presence of Counsel for the Applicant, the Hydro-Electric Power Commission of Ontario, the Toronto Hydro-Electric System, and the Railway Association of Canada, and what was alleged, all parties in interest having been served with notice stating the grounds of appeal—

THE BOARD ORDERS

1. That the time for applying for leave to appeal to the Supreme Court of Canada from the said General Order No. 490, dated February 20th, 1931, be, and it is hereby, extended to the date of this Order.

2. That leave be, and it is hereby, granted the Appellants to appeal  
30 to the Supreme Court of Canada upon the following question, which, in the opinion of the Board, is a question of law or a question of jurisdiction, or both, namely :

“As a matter of law, had the Board jurisdiction to make General Order No. 490, dated the 20th of February, 1931 ? ”

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

BOARD OF RAILWAY COMMISSIONERS  
FOR CANADA,

40 Examined and certified as a true copy  
under Section 23 of “The Railway Act.”

(Sgd.) A. D. CARTWRIGHT,  
Sec'y of Board of Railway Commissioners for Canada,  
OTTAWA, June 10th, 1931.

No. 6.

Notice of setting Appeal down for hearing.

IN THE SUPREME COURT OF CANADA

On Appeal from the Board of Railway Commissioners for Canada.

Before  
the Board  
of Railway  
Commissioners for  
Canada.

No. 6.  
Notice of  
setting Ap-  
peal down  
for hearing,  
16th June  
1931.

IN THE MATTER OF the application of the Canadian Electrical Association for an extension of the delay for applying for and for leave to appeal to the Supreme Court of Canada from General Order of the Board No. 490, dated the 20th February, 1931, amending the Rules for Wires Erected Along or Across Railways, adopted by General Order No. 231, dated May 6th, 1918, as amended by General Order No. 291, dated April 7th, 1920 : 10

Case No. 470

BETWEEN :

THE CANADIAN ELECTRICAL ASSOCIATION - *Appellants*

and

THE CANADIAN NATIONAL RAILWAYS, THE  
CANADIAN PACIFIC RAILWAY COMPANY  
AND MICHIGAN CENTRAL RAILROAD  
COMPANY - - - - - *Respondents.* 20

TAKE NOTICE that the above appeal from Order Number 490 of The Board of Railway Commissioners for Canada has been set down by the Registrar of this Court for hearing at the Session of this Court commencing on the Sixth October 1931.

DATED at Ottawa this 16th day of June, A.D. 1931.

POWELL & MATHESON,

Agents for Brown, Montgomery & McMichael,  
Appellants' Solicitors.

To the above named Respondents, and to ALISTAIR FRASER, K.C., Solicitor for The Canadian National Railways and to E. P. FLINTOFT, K.C., Solicitor for the Canadian Pacific Railway Company and to SAUNDERS, KINGSMILL, MILLS & PRICE, Solicitors for The Michigan Central Railroad Company, and to The Board of Railway Commissioners for Canada.

30



## No. 7.

**Certificate of Secretary of the Board of Railway Commissioners for Canada.**

I, the undersigned, Secretary of the Board of Railway Commissioners for Canada, do hereby certify that the foregoing printed document from page 1 to page 41 inclusive is the case settled by the said Board pursuant to Section 68 of the Supreme Court Act and the rules of the Supreme Court of Canada in Appeal to the Supreme Court of Canada in the matter of :— General Order # 490 of the Board of Railway Commissioners for Canada dated 20th February 1931 amending the rules for wires erected along or  
 10 across Railways adopted by General Order # 231 dated May 6th 1918 as amended by General Order # 291 dated April 7th 1920 (Case, # 470) and in the matter of the Appeal from the said Order # 490 by the Canadian Electrical Association between The Canadian Electrical Association, Appellant, and Michigan Central Railway Company, Respondent.

In testimony whereof I have hereto subscribed my name and affixed the seal of the said Board of Railway Commissioners for Canada this eighth day of January 1932.

(SEAL)

20

(Sgd.) A. D. CARTWRIGHT,  
 Secretary, Board of Railway  
 Commissioners for Canada.

*Before  
 the Board  
 of Railway  
 Commis-  
 sioners for  
 Canada.*

No. 7.  
 Certificate  
 of the Board  
 of Railway  
 Commis-  
 sioners for  
 Canada,  
 8th Janu-  
 ary 1932.

Before  
the Board  
of Railway  
Commissioners for  
Canada.

No. 8.  
Certificate  
of comparison by  
Counsel.

No. 8.

Certificate of comparison by Counsel.

DOMINION OF CANADA.

IN THE SUPREME COURT OF CANADA.  
OTTAWA.

ON APPEAL FROM THE BOARD OF RAILWAY  
COMMISSIONERS FOR CANADA.

IN THE MATTER OF General Order No. 490 of the Board of Railway  
Commissioners for Canada dated 20th February, 1931, amending the  
rules for wires erected along or across Railways adopted by General 10  
Order No. 231 dated May 6th, 1918, as amended by General Order  
No. 291 dated April 7th, 1920 (Case, No. 470),

— and —

IN THE MATTER OF the Appeal from said Order No. 490 by the  
CANADIAN ELECTRICAL ASSOCIATION

BETWEEN :—

THE CANADIAN ELECTRICAL ASSOCIATION - *Appellant*

and

MICHIGAN CENTRAL RAILWAY COMPANY - *Respondent.*

I, Hazen Hansard, hereby certify that I have personally compared 20  
the annexed printed Case in Appeal to the Supreme Court with the originals  
and that the same is a true and correct reproduction of such originals

HAZEN HANSARD,  
Of Counsel for the Appellant.



## No. 9.

## Factum of the Canadian Electrical Association.

DOMINION OF CANADA.

IN THE SUPREME COURT OF CANADA,  
OTTAWA.ON APPEAL FROM THE BOARD OF RAILWAY  
COMMISSIONERS FOR CANADA.*In the  
Supreme  
Court of  
Canada.*No. 9.  
Factum  
of the  
Canadian  
Electrical  
Association.

IN THE MATTER OF General Order No. 490 of the Board of Railway  
Commissioners for Canada dated 20th February, 1931, amending  
10 the rules for wires erected along or across Railways adopted by General  
Order No. 231 dated May 6th, 1918, as amended by General Order  
No. 291 dated April 7th, 1920 (Case, No. 470),—

— and —

IN THE MATTER OF the Appeal from said Order No. 490 by the  
CANADIAN ELECTRICAL ASSOCIATION.

BETWEEN :

THE CANADIAN ELECTRICAL ASSOCIATION - *Appellant*

— and —

20 CANADIAN NATIONAL RAILWAYS, CANADIAN  
PACIFIC RAILWAY COMPANY AND MICHIGAN  
CENTRAL RAILROAD COMPANY - - - *Respondents.*

This is an appeal by leave of the Board of Railway Commissioners  
for Canada upon a question of law and of jurisdiction, under the provisions  
of Section 52 subsection (3) of the Railway Act, from the Board's General  
Order No. 490 made on February 20th, 1931, dealing with and amending  
the "Standard Conditions and Specifications for Wire Crossings" as  
adopted by the Board by its General Order No. 231 dated May 6th,  
1918, and amended by General Order No. 291 dated April 7th, 1920. The  
judgment granting the Order appealed from was rendered by Chief  
30 Commissioner McKeown, speaking for the majority of the Board. Deputy  
Chief Commissioner Vien dissented.

## PART I.—THE FACTS.

From the nature of the matter disputed, no evidence was made at the  
hearings held by the Board. Such facts as are necessary to raise the  
question for the decision of this Honourable Court may be found in the Order  
appealed from, the notes of Judgment of the learned Chief Commissioner  
for the Board and of Deputy Chief Commissioner Vien dissenting, and  
from the Order granting leave to appeal, all of which are to be found in

*In the  
Supreme  
Court of  
Canada.*

No. 9.

Factum  
of the  
Canadian  
Electrical  
Association  
—continued.

\* Record,  
pp. 29, 10,  
20, 31.

the Appeal Case at pp. 13, 15, 29 and \*10<sup>10</sup> respectively, and which may briefly be summarized as follows:—

At the instance of Respondents the Board submitted to the various Power Companies which Appellant represents and to the various Government Power Commissions who are also materially interested in this matter, proposed amendments to its General Order No. 231 as then amended by General Order No. 291. While the question will be fully dealt with hereinbelow, it is only necessary to state here that these proposed amendments had the general effect of placing upon the Power Companies the burden of insuring the Railroad Companies against all damages however arising (save through the negligence of the Railroads), by reason of the crossing of a line of Railway by a high tension power line, such burden being set up as a condition precedent to the granting by the Board of authority for the Power Companies to make such crossing. 10

With the amendments so submitted was a notice calling upon the Power Companies to appear before the Board on February 7th, 1928, to present any objections which they might have thereto. The Appellant and the Ontario Hydro Electric Commission accordingly appeared by Counsel before the Board on that date and a hearing took place at which the Power Companies generally outlined their objections to the proposed amendments. The Board took the matter under advisement, and some three years later in February, 1931, rendered its decision and made the Order No. 490 appealed from, by which the Board, Deputy Chief Commissioner Vien dissenting, substantially upheld the pretensions of the Railroads. 20

Appellant thereupon sought from the Board and obtained leave to bring the present Appeal.

## PART II.—THE ORDER APPEALED FROM.

Appellant respectfully submits that the Order appealed from is erroneous in that it purports to alter the respective rights and liabilities of the Railroads and the Power Companies under the law with respect to damages in force in the various Provinces and is accordingly *ultra vires* and beyond the purely statutory jurisdiction of the Board. 30

## PART III.—ARGUMENT.

The Board of Railway Commissioners for Canada is a Statutory Court, its jurisdiction and powers being not inherent, but limited by the terms of the Statute which creates it, namely, the Railway Act (R.S.C. 1927, ch. 170).

*G.T.R. v. Toronto* (1 C.R.C. 92); *Merritton Crossing case* (3 C.R.C. 263); *City of Victoria v. Esquimalt Ry. Co.* (24 C.R.C. 84); *Kelly v. G.T.R.* (24 C.R.C. 367); *Duthie v. G.T.R.* (4 C.R.C. 304). 40

The relevant portion of the Railway Act, dealing with the high tension wire crossings here in question, is to be found in section 372, which reads as follows :—

*In the  
Supreme  
Court of  
Canada.*

“ 372. Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for *other purposes*, shall not, without leave of the Board, except as provided in subsec. 5 of this section, be constructed or maintained

No. 9.  
Factum  
of the  
Canadian  
Electrical  
Association  
—continued.

10 “ (a) Along or across a railway, by any company other than the railway company owning or controlling the railway; .....

“ 2.—Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the Railway or other work proposed to be affected, showing the proposed location and the proposed works.

“ 3.—The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

20 “ 4.—Upon such Order being made the proposed works may be constructed and maintained subject to and in accordance with such Order.

“ 5.—Leave of the Board under this section shall not be necessary . . . for the maintenance of works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any General Orders, regulations, plans or specifications adopted or approved by the Board for such purposes.”

30 Appellant respectfully submits that nothing in section 372 of the Railway Act, and nothing which may be found elsewhere in the said Act or in any other statute, empowers or confers jurisdiction upon the Board to alter the law of any Province governing the right to claim and the duty to pay damages in any given set of circumstances. What the Board in effect has done by the Order appealed from is to create a statutory liability affecting all companies who seek the right to cross a railway with their high tension lines. In doing so the Board has usurped the function of the Legislature, which no Court is entitled to do, much less a statutory court with a defined and limited jurisdiction. If therefore no statutory delegation of authority to the Board to legislate can be found, the Order appealed from must be *ultra vires* and cannot stand.

40 The reasoning which the learned Chief Commissioner seems to have adopted, that because the language of Section 372 of the Act requires that the leave of the Board must be obtained before crossing, it is therefore open to the Board to prevent the power companies from crossing altogether, and as a corollary of this that it is open to it to attach any and all conditions it may see fit in granting such leave, is in Appellant's submission demonstrably unsound. The clear intention of the legislator, as at once appears

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when the statute is construed as a whole, was that leave should be granted by the Board when applied for. The reason for requiring the applicant to seek leave is obviously so that the Board, as the guardian of public safety and convenience, should be able to make sure that the "terms and conditions" prescribed by it in the public interest would be complied with. The use of the expression "on what terms and conditions" again obviously has reference to those material safeguards and practical considerations relating to the actual construction of the work and its maintenance which would naturally be left to the discretion of the Board. To contend that these words give the Board the right to legislate is surely specious.

10

In any event, no such proposition could be maintained in face of the doctrine of *C.P.R. v. Roy* (1920 A.C. 220). The power companies are expressly authorized by statute to build and operate their transmission lines in a given territory, and were it possible for the Board, by refusing them leave to cross, to prevent their exercising their statutory power, in the case of a Dominion power company there would be the absurdity of the same legislative body giving a power with one hand and taking it away with the other, while in the case of a Provincial power company there would be direct interference with Civil Rights in the Province. As is pointed out in *C.P.R. v. Roy*, the Courts will not construe statutory enactments so as to bring about this impossible position. See in this connection the note at 18 C.R.C. p. 442 with reference to the decision of Mr. Justice Osler in *In re Bronson* (1882) 1 O.R. 415 as follows:—

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"After full review of the authorities, English and American, the learned Judge came to the conclusion (p. 430), that 'if powers granted for one public or quasi-public purpose, such as the construction of a railway, cannot be exercised without acquiring lands already expropriated for another public purpose, and yet may be so exercised consistently with the existence of the latter and without substantial interference therewith, the right to exercise such power exists by necessary implication.'"

30

It should perhaps here be said that even if there were provisions in the Railway Act empowering the Board to alter Provincial law in this manner, such provisions would in Appellant's submission be *ultra vires* the Parliament of Canada, as being an interference with Property and Civil Rights and the Administration of Justice, both legislative fields reserved to the Provinces by the British North America Act. On the other hand it is of course an elementary rule of interpretation that a legislature will not be presumed to have exceeded its powers, where a statute can be construed in the contrary sense.

40

The functions of the Board of Railway Commissioners have always been held to be judicial and administrative, but certainly not legislative. Parliament clearly indicated that it was not its intention that the Board should have power to change the law at will (and particularly Provincial law) when it restricted the Board's power to make orders under Section 34 to matters relating to the Act and the carrying of it into effect. It has also

been repeatedly held that the Board was not created for the purpose of enforcing rights or duties imposed or created by Provincial laws.

*Duthie v. Grand Trunk* (4 C.R.C. 304). In this case Chief Commissioner Killam, in holding that the Board had no jurisdiction to award damages for infractions of the Act, said at p. 311 :—

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10 “ The Board is purely a creature of statute. The general principle applicable to such a body is that its jurisdiction is only such as the statute gives by its express terms or by necessary implication therefrom . . . Our constitution assigns to the Provincial Legislatures the subjects of ‘ property and civil rights in the Province ’ and ‘ the administration of justice in the Province ’ etc.”

p. 312 : “ In creating such companies . . . extensive executive control is necessary. Formerly assigned to the Railway Committee of the Privy Council . . . Railway Act 1903 substitutes Board of Railway Commissioners . . . One main object being the provision of a substitute for the Railway Committee.”

20 p. 314 : “ It is a statutory body created to carry out the legislation of Parliament dealing with railways and the companies operating them. It is not created for the purpose of enforcing the rights or duties which are imposed or created by provincial laws, etc.”

p. 315 : “ That is, the business of the Board is to enforce the railway legislation of the Dominion Parliament, and, for that purpose, to order the performance of some acts and to prohibit others. It was not created to supplant, or even to supplement, the Provincial Courts in the exercise of their ordinary jurisdiction, but to exercise an entirely different jurisdiction, though, perhaps, occasionally overlapping that of the Provincial Courts.”

30 *York Street Bridge Case* (4 C.R.C. 62 at p. 69) Chief Commissioner Blair says :—

“ . . . and we must again emphasize the opinion that it is not within our province in administering the Act which constitutes this Board, to attempt to provide remedies or afford relief in cases in which said relief and said remedies can better be afforded by the ordinary tribunals of the country.”

*G.T.P. v. Landowners of Fort William* (1912 A.C. 224)—  
where the Privy Council held that the Board had no power to award damages or compensation under the somewhat similar language of the then section 47 : viz.

40 “ . . . of any terms which the Board may impose upon any party interested.”

*Windsor v. Bell Telephone Co.* (22 C.R.C. 416).

*Bell Telephone Co. v. Ottawa* (22 C.R.C. 421).

The Board has held in a number of cases that it has no jurisdiction to award damages, e.g.,

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*Robinson v. C.N.R.* (11 C.R.C. 289).  
*Rogers v. Can. Express* (9 C.R.C. 480).  
*Duthie v. Grand Trunk* (4 C.R.C. 304 cited supra).  
*United Grain Growers v. C.P.R.* (26 C.R.C. 26).

Since it is clear from the above that the Board has no power or jurisdiction to alter the law of a Province, and particularly the law dealing with damages, it remains to consider whether or not the General Order No. 490 appealed from does in fact purport to alter the law with respect to Appellant and Respondents and so is *ultra vires* and beyond the jurisdictional competence of the Board. This involves a consideration of the so-called amendments imported into the original general order and an examination of the law relating to damages—

- (a) in the Common Law Provinces and Province, and  
(b) in the Province of Quebec. Quebec.

The paragraph about which the principal dispute centres is paragraph 2 of Part 1 of the Standard Conditions and Specifications for Wire Crossings dealing with "Over-Crossings." The original paragraph 2 under General Order No. 231 as amended by General Order No. 291 reads 20 as follows :—

" 2.—The applicant shall at all times wholly indemnify the  
" company owning, operating or using the said railway of, from  
" and against all loss, cost, damage, and expense to which the  
" said railway company may be put by reason of any damage or  
" injury to persons or property caused by any of the said wires  
" or cables or any works or appliance herein provided for not being  
" erected in all respects in compliance with the terms and provisions  
" of this order, as well as any damage or injury resulting from the  
" imprudence, neglect, or want of skill of the employees or agents 30  
" of the applicant."

Whether or not the foregoing is *ultra vires* the Board and its language constituting an infringement of the legislative rights of the Province is a matter for question. In effect however the additional burden placed by it on the applicant has apparently been considered so small that no one has thought fit to bring the matter before the Courts. It is certainly true, in any event, that the language above quoted represents the furthest that the Board could go under the language of the Act.

On the other hand when we turn to the paragraph 2 which the Order appealed from would substitute for that above, we find an entirely different state of affairs. The paragraph complained of reads as follows :—

" 2.—The applicant shall at all times wholly indemnify the  
" company owning, operating, or using the railway from and against  
" all loss, damage, injury, and expense to which the railway company  
" may be put by reason of any damage or injury to persons or



“ property caused by any of the said applicant’s wires or cables,  
 “ or any works herein provided for by the terms and provisions  
 “ of this Order, as well as against any damage or injury resulting  
 “ from the imprudence, neglect or want of skill of the employees or  
 “ agents of the applicant, unless the cause of such loss, cost, damage,  
 “ injury, or expense can be traced elsewhere.”

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Here the applicant is bound to indemnify against “ all loss, damage,  
 injury and expense ” to which the Railway may be put “ by reason of any  
 damage or injury to persons or property *caused by* the applicant’s wires,  
 10 etc., unless the cause of such loss . . . can be traced elsewhere.”

This, it is apparent, is a far more serious and burdensome liability  
 than is placed upon the Applicant by the general law either of the common  
 law Provinces or of the Province of Quebec.

So far as damages arising out of negligence are concerned, it is of  
 course elementary that the party negligent or at fault is liable. This holds  
 good in all Provinces. So too, with respect to damages which are necessarily  
 incidental to the normal operation of a work expressly authorized by statute,  
 as is the case with the transmission lines here, the doctrine of *C.P.R. vs.*  
*Roy* (1902 A.C. 220) applies to all the Provinces. Lord Halsbury in this case  
 20 says at p. 231 :—

“ The law of England, equally with the law of the province  
 “ in question (Quebec) affirms the maxim *sic utere tuo ut alienum*  
 “ *non laedas*, but the previous state of the law whether in Quebec,  
 “ or in France, or England, cannot render inoperative the positive  
 “ enactment of a statute, and the whole case turns, not upon what  
 “ was the common law of either country, but what is the true  
 “ construction of plain words authorizing the doing of the very  
 “ thing complained of.”

See also Beven on Negligence—4th Edition, Vol. 1, pp. 369 et seq.

30 Insofar therefore as the Order appealed from derogates from the  
 above firmly established rules of law, and it clearly does, it is in effect  
 legislative and so quite beyond the competence of the Board.

The rules of law with respect to damages resulting from the care of a  
 thing are slightly different in the common law Provinces and in Quebec.

(a) *In the Common Law Provinces* the doctrine of *Rylands vs. Fletcher*  
 (L.R. 3 H.L. 330) as modified and explained by *Nichols vs. Marsland*  
 (L.R. 10 Ex. 255 and 2 Ex. Div. 1) applies where a proprietor brings a  
 dangerous thing on his land. Here the proprietor is answerable for damages  
 caused by the escape of the dangerous thing save in the exceptional cases  
 40 enumerated by Beven (Vol. 1, p. 605) as follows :—

(1) Where the damage to the plaintiff arises from the natural  
 user of the land ;

(2) Where the damage to the plaintiff is caused by his own  
 default ;

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(3) Where the damage to the plaintiff is in consequence of *vis major* or the act of God;

(4) Where the damage is the consequence of accumulation for public purposes under the express authority of a statute.

(Vide cases cited by Beven in support of the above).

It will immediately be observed that paragraph 2 of the conditions as amended by General Order No. 490 does not even allow for the operation of these exceptions.

(b) *In the Province of Quebec* the rule of law on this point is laid down by Article 1054 of the Civil Code :—

“ 1054 :—He is responsible not only for the damage caused by his own fault, but also for that caused . . . by things which he has under his care;

“ The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.”

The interpretation of this Article was finally settled by the Privy Council in *Quebec Ry. L.H. & P. Co. vs. Vandry* (52 D.L.R. 136) as being that a liability (not a rebuttable presumption of fault) was created, which might be avoided by showing that the accident could not reasonably have been prevented.

See also *City of Montreal vs. Watt & Scott* (59 D.L.R. 1). Here the Privy Council said :—

“ The only addition to the views expressed in Vandry’s case, which was not necessary there but is necessary here, is that in their Lordship’s view ‘unable to prevent the damage complained of’ means unable by reasonable means. It does not denote an absolute inability. If therefore the storm in question could be described as a *cas fortuit* or force majeure, and if the appellants had shown that they had constructed the sewer of a size sufficient to meet all reasonable expectations there would, in their Lordships’ view, have been a case where the exculpatory paragraph would have applied.”

*City of Montreal v. Lesage* (1923 S.C.R. 355), Mignault J., speaking of the Watt & Scott case, says :—

“ While the reference to the storm there in question might appear to give some support to the opinion expressed in the court below that the defendant cannot claim the benefit of the exculpatory paragraph of art. 1054 c.c. unless he shows that the act which caused the damage can be described as a *cas fortuit* or *force majeure*, it seems to me that the language of their Lordships should not be so construed. For were the defendant constrained to go the length of proving that the accident which caused the damage was a *cas fortuit* or the result of *force majeure*,

“ he would be obliged to establish ‘ an absolute inability ’ to prevent  
 “ the damage complained of, and their Lordships are very careful  
 “ to state that ‘ unable to prevent the damage ’ does not denote  
 “ such an inability, but means ‘ unable by reasonable means,’ which  
 “ of course excludes the idea of irresistible force as a necessary  
 “ element of exculpation. It follows that I cannot agree with  
 “ the view expressed by the majority of the learned judges of the  
 “ Court of K.B. that the defendant here was obliged to show that the  
 “ damage was caused by a *cas fortuit* or resulted from *force majeure*.”

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10 Once again Appellant would respectfully refer the Court to the paragraph 2 as amended, which as will be seen is clearly far more burdensome than the rule of law in Quebec.

It is submitted that the foregoing clearly demonstrates that the Order appealed from, if effective would derogate from the rights at law of the Appellants; would in fact alter the general law of the Provinces with regard to the rights and liabilities of all Power Companies and all Railroads in Canada; that in the absence of statutory power conferring jurisdiction on it to alter the provincial law with respect to damages, the Board of Railway Commissioners for Canada was without jurisdiction to make  
 20 the Order appealed from; and that accordingly the General Order No. 490 appealed from should be declared irregular, illegal, null and void and should be set aside.

The whole respectfully submitted.

MONTREAL, January 12th, 1932.

BROWN, MONTGOMERY & McMICHAEL,  
 Solicitors for Appellant.

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No. 10.

Factum of The Hydro-Electric Power Commission of Ontario.

PART I.

30 This is an appeal by leave of the Board of Railway Commissioners for Canada under the provisions of Section 52 subsection 3 of The Railway Act on a question which in the opinion of the Board is a question of law or a question of jurisdiction, namely :—

“ As a matter of law had the Board the jurisdiction to make General Order 490 dated 20th February, 1931 ? ”

General Order No. 490 is an amendment of “ The Rules for Wires erected along or across Railways ” adopted by General Order No. 231 of the Board dated May 6th, 1918, as amended by General Order 291 dated April 7th, 1920, which rule establishes certain terms and conditions under

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which the Board would grant leave for crossings of railways by power transmission lines. Paragraph 2 of Part One of these Rules, as they were before General Order No. 490, read as follows:—

“ The applicant shall at all times wholly indemnify the Company owning, operating or using the said railway of, from and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables or any works or appliance herein provided for not being erected in all respects in compliance with the terms and provisions of this order, as well as any damage or 10 injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant.”

General Order 490 re-enacted this clause as follows:—

“ 2. The applicant shall at all times wholly indemnify the Company owning, operating, or using the railway from and against all loss, damage, injury and expense to which the Railway Company may be put by reason of any damage or injury to persons or property caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this Order as well as against any damage or injury resulting from the imprudence, 20 neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury, or expense can be traced elsewhere.”

In effect the changes made by General Order 490 are shown by the underlined portions of the above quoted paragraphs, the words underlined in the previous Order being omitted in Order 490 and the words underlined in the latter being added as new. While the new wording is somewhat ambiguous, the intended effect, as appears from the Reasons of the Board supporting Order 490, is to impose upon the Appellant Commission or any other person applying for and obtaining leave from the Board to construct 30 and maintain power lines along or across a railway, the burden of wholly indemnifying the Railway Company against all damages to persons or property resulting from the applicant's wires or cables unless the cause of the damage can be traced elsewhere. General Order 490 also added two additional paragraphs relating to notice of accidents preserving all rights as between themselves and the Railway Company and the applicant for crossing privileges. These added paragraphs are not in question under this appeal.

This matter originated in an application made by the Respondents to the Board as a result of which the Appellant Commission and others 40 who were deemed to be interested were notified that certain amendments to General Order No. 231 were proposed by the Respondents and to appear before the Board on February 27th, 1928, to present any objections thereto. The Appellant Commission and others accordingly appeared by Counsel before the Board on that date and presented their objections to the proposed

amendments, following which the Board took the matter under advisement and in February 1931 rendered its decision and made the Order No. 490 appealed from.

No evidence was submitted on the hearing before the Board but the history of the matter and the considerations actuating the Board are set out in the Reasons for Judgment of the Board and in the dissenting Judgment of Deputy Chief Commissioner Vien.

The Reasons for Judgment of the majority of the Board may be summarized as follows:—

10 1. That the only authority for putting wires along or across railways is under section 372 of The Railway Act requiring the leave of the Board and that considering the specific provisions of subsection 3 of this section and the uniform procedure of the Board thereunder, it was not proposed to negative the Board's jurisdiction to make the Order in the terms proposed.

2. That while it is a matter of great concern to the Board to deal fairly between the interested parties, the Board should be actuated rather by consideration for the safety of the public and the safest course to pursue in order to accomplish this end should be followed.

20 3. That the liability of the Power Companies should not be limited to mishaps concerning which they can be shown to be at fault because unusual or accidental breakdowns in electric power systems sometimes completely destroy all evidence of their cause, and that except where the cause of the mishap can be traced to the Railway Company the interest of all parties and particularly the interest of the public would appear to be most certainly safeguarded by holding the Power Companies liable for damage or injury done by their systems.

30 4. Therefore if an accident or disability occur in the Power Company's system and damage to the Railway result, then even if the cause of the accident cannot be definitely located as between the Railway Company and the Power Company, the latter should be held responsible.

Deputy Chief Commissioner Vien delivered a dissenting judgment and his reasons may be summarized as follows:—

(1) That the question of liability in damages due to negligence or otherwise is a matter which under the provisions of the British North America Act falls within the jurisdiction of provincial legislatures, except when it is necessarily incidental to the proper carrying into effect of laws enacted by the Dominion Parliament.

40 (2) That the functions of the Railway Board are judicial and administrative and not legislative and that without specific provision in The Railway Act authorizing the Board to impose liability in damages as the term of condition of the performance of this Order, the ordinary liability of the parties at law cannot be altered, abrogated or enlarged by the exercise of the Board's administrative powers.

(3) That the Board is the guardian of public safety, it is given administrative powers to say how crossings shall be made, and it may lay

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down reasonable conditions as to the engineering features and protective devices to insure public safety but the Railway Act leaves to the provincial laws and courts the question of liability in damages.

(4) The expression " terms and conditions " in sub-section 3 of section 372 of the Railway Act obviously refers to devices for safety and does not extend to the right to fix liability for what may happen even if these terms and conditions are observed.

(5) That when a Railway Company appropriates property for public purposes its right of way remains subject to provisions of law, and if the powers granted to another body for another public or quasi-public purpose cannot be exercised without acquiring rights over the lands already appropriated by the railway and yet can be exercised consistently with the existence of the railway and without substantial interference with it, the right to exercise such powers exists by necessary implication, and the Board is not empowered to refuse it. 10

(6) That the principle of *Rylands v. Fletcher* has no application to the question at issue as damage resulting from vis major, or the act of God, or from the exercise without negligence of powers conferred by Statute, are exceptions to that doctrine.

(7) That in the case of two services both authorized to operate for the public benefit within their respective spheres and both legally causing damage without any fault on their part, the Board's concern should be not who is to pay for that damage, but how shall that damage be prevented, and that because the damage happens to be difficult to estimate or to trace, it is not for the Board to say who shall pay for it. 20

## PART II.

The appellant, Hydro-Electric Power Commission of Ontario, submits that General Order 490 is beyond the powers and jurisdiction of the Board and that the judgment of the majority of the Board is erroneous :—

1. Because upon the proper construction of the Railway Act, the powers of the Board to impose terms and conditions upon a grant of leave to cross railways with power lines, is limited to imposing terms and conditions as to the manner and means of construction of the works having regard to protection and safety; 30

2. Because under the guise of imposing terms and conditions the Board is in effect legislating as to the respective liabilities in damages of the Railway Company and the Power Commissions or Companies and purporting to alter in this connection the law in force in the various Provinces relating to such liability.

## PART III.

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1. The Railway Board is a creature of statute and its jurisdiction and powers are only such as are by express or necessary implication given it by the Railway Act.

The Board in making General Order 490 has assumed that it is proceeding under section 372 of the Railway Act, which reads as follows:—

“ 372. Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in subsection five of this section, be constructed or maintained—

(a) along or across a railway, by any company other than the railway company owning or controlling the railway;

10 or

(b) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

2. Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works.

3. The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

20

4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

5. Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under section three hundred and sixty-seven of this Act, nor for the maintenance of works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes.”

30

Under subsections 3 and 4 above quoted, it is submitted that the powers of the Board are limited to imposing by its order terms and conditions as to how the proposed works may be executed, and that thereafter a statutory obligation is imposed by subsection 4 upon the Power Commissions or Companies concerned, if they proceed with the works, to maintain the same in accordance with these terms and conditions. In other words, the Board is not empowered, either expressly or by necessary implication, to impose terms as to the maintenance of the works after their construction, and any such power is negated by the specific provision as to maintenance found in subsection 4 of the Statute itself. The Board, of course, in the exercise of its general jurisdiction under section 33 to enforce the Act, may hear and deal with any complaints as to the works not being properly maintained, but its powers in this connection are limited to enforcing subsection 4 of the Act which goes no further than to say that the works shall be maintained in accordance with the terms and conditions laid down for their “execution.”

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In other words, the only terms and conditions which may be imposed by the Board are terms and conditions as to construction of the works, and can have no relation whatsoever to any consequences which may result from the maintenance of the works.

Having regard to other sections of the Railway Act regarding crossings of railways, and particularly sections 256 and 271 relating to highway crossings and crossings for power, mining and irrigation works, it is obvious that these terms and conditions are limited to prescribing manner, means and supervision of construction having regard to protection, safety and convenience of the public and possibly payment of compensation to the railway. (Section 256 subsection 2—Section 271 subsection 3.) 10

Section 271 in so far as power line crossings are concerned is limited to crossings by persons having authority to develop hydro-electric power, while section 372 would include not only such persons but also any other persons operating power transmission lines. It is submitted that Parliament could not have intended different interpretations to be placed on these two sections so that the Board should have power under section 372 to impose upon a transmission company, terms and conditions which it could not impose under section 271 upon a hydro-electric development company. In considering the Board's powers to make such a General Order as No. 490, these sections 271 and 372 obviously must be read together when, it is submitted, the meaning of the legislature is clear that the terms and conditions which may be imposed by the Board are strictly limited and that the Board's powers thereunder cannot be stretched to include the imposition upon the Power Commissions or Companies of an onerous liability in respect of damages however resulting, over and above what they would ordinarily be subject to under the laws of the Province where the works are situate. 20

2. It is submitted that because the leave of the Board must be first obtained, it is not in the power of the Board to prevent wire crossings or to attach any and all conditions it may see fit in granting such leave. Properly construed, the intention of Parliament as appears from the Railway Act is that leave for such crossings should be granted by the Board when the terms they are empowered to impose have been complied with. And in the absence of any specific provisions in the Railway Act, Parliament should not be assumed to have given the Board power in imposing conditions to legislate as to liability in damages. 30

This submission is supported by the judgment of the Judicial Committee of the Privy Council in the case of *Grand Trunk Pacific Railway v. Landowners in Fort William* (1912 Appeal Cases, p. 224 et seq). Section 47 of the Railway Act then in force provided that—"the Board may direct in any Order that such Order or any portion or provision thereof shall come into force . . . upon the performance to the satisfaction of the Board . . . of any terms which the Board may impose upon any party interested." Their Lordships considered that notwithstanding the general nature of this language it would not be safe to infer from the comprehensiveness of the 40



powers given to the Board and apart from any specific reference to compensation and the parties entitled thereto, that the ordinary legal liability in damage could be altered, abrogated or enlarged by the exercise of the Board's powers.

It is also submitted that as the Appellant Commission and the Power Companies are themselves authorized by Dominion or Provincial Statutes to construct and maintain their respective transmission lines in a given territory, the principle laid down in the case of *Canadian Pacific Railway v. Roy* (1920 Appeal Cases, p. 220) should be applied, namely, that the Courts, unless otherwise compelled, should so construe these Statutes and the Railway Act as to avoid conflict. General Order 490 is clearly at conflict with the Statutes and the provincial laws as to liability for damages under which the Appellant Commission and Power Companies operate their systems. Under these statutes and laws they are accountable only for damage arising out of their own negligence (*C.P.R. v. Roy supra*). Full effect can be given to the Railway Act without implying the grant of the extraordinary powers claimed by the Board. The whole scheme of the Railway Act, including the carefully specific authorities given the Board and the limitation in section 34 restricting its power to make Orders to matters covered by the Act negatives the grant to the Board of any implied power to legislate or make Orders affecting the ordinary legal liabilities of parties applying to it for the exercise of its administrative functions.

It is further submitted that for Parliament to legislate on liability for negligence would be ultra vires as an interference with Property and Civil Rights and with the Administration of Justice, both these legislative subjects being reserved to the Provinces by the British North America Act. It will not, of course, be presumed that Parliament has exceeded its powers if the Railway Act can, as here, be given full effect when construed in a contrary sense.

The Appellant Commission respectfully submits that the dissenting judgment of Deputy Chief Commissioner Vien is correct for the reasons and upon the authorities therein given. This Appellant also adopts the argument of its co-Appellant, the Canadian Electrical Association, as set out in its factum.

The Appellant Commission accordingly respectfully submits that the Board of Railway Commissioners was without jurisdiction to make General Order 490 and that it should be so declared.

JAMES W. BAIN,

of Counsel for the Appellant,  
Hydro-Electric Power Commission  
of Ontario.

*In the  
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Court of  
Canada.*

No. 10.  
Factum of  
The Hydro-  
Electric  
Power Com-  
mission of  
Ontario—  
*continued.*

**Factum of The Canadian National Railways and others.**

**PART I.**

No. 11.  
Factum  
of the  
Canadian  
National  
Railways  
and others.

**STATEMENT OF FACTS.**

1. This is an appeal by leave of the Board of Railway Commissioners for Canada, hereinafter referred to as "the Board," from General Order of the Board No. 490, dated February 20th, 1931, amending the rules for wires erected along or across railways adopted by General Order No. 231, dated May 6th, 1918, as amended by General Order No. 291, dated April 7th, 1920.

2. The question in controversy is whether the Board had jurisdiction under the Railway Act (R.S.C. 1927, C. 170) to issue said General Order No. 490. 10

3. No oral evidence was adduced before the Board, the facts not being in dispute, but the summary of facts contained herein is drawn from the judgments and addresses of counsel. The Board did not consider that it was necessary to have a formal statement of facts included in the Appeal Case.

4. In the generation and distribution of electrical energy it is frequently necessary for the Electric Power Companies to construct and maintain lines, wires and other conductors and structures or appliances for the conveyance of power or electricity— 20

(a) along or across a railway;

(b) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

5. In crossing the tracks of railway companies or the lines of telephone or telegraph companies, two methods may be employed:—

(1) The power lines may cross over the railway or telegraph or telephone lines, or

(2) They may cross under such railway or other wires. 30

6. If the under-crossing method be adopted, the power lines would have to be placed in a duct underground beneath the rails of the Railway Company.

7. If the power wires cross over the railway or other wires and for any reason such power wires or the structures supporting them break or fall, resulting in contact between the power wires and such other wires, or the rails, or cars on such rails, or persons on the right of way of the railway, there would be great danger of a serious accident resulting in death of or injury to persons or damage to property, or both.

8. If the power lines cross under the tracks of the railway, the chances of injury or damage are very much reduced, if not entirely eliminated. 40

9. Although the crossings underground are safer than those overhead, the cost of making the former is considerably more than the cost of making the latter.

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10. Section 372 of the Railway Act provides :—

“ 372 (1) Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in subsection (5) of this section, be constructed or maintained—

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Factum  
of the  
Canadian  
National  
Railways  
and others  
—continued.

- (a) along or across a railway, by any company other than the railway company owning or controlling the railway; or  
(b) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

(2) Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works.

(3) The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

(4) Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

(5) Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under Section three hundred and sixty-seven of this Act, nor for the maintenance of works now authorized nor when works have been made or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes.”

11. When a power company is desirous of constructing or maintaining its lines along or across the lines or wires, or rails of any other Company, it must, under Section 372, either—

- (a) obtain the permission of the Board, or  
(b) obtain the consent of the other company, in which case it must erect its wires or structures, and thereafter maintain them “ in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes.”

12. In any case in which an order is issued by the Board, a provision is inserted in such order that the crossing so made shall be constructed and maintained in accordance with such general orders, plans or specifications.

13. For the purpose of insuring the safety of persons and property, the Board, on May 6th, 1918, issued General Order No. 231 pursuant to the

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of the  
Canadian  
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Railways  
and others  
—continued.

\* Record,  
pp. 4-10.

† Record,  
pp. 29 and  
30.

provisions of Section 246 of the Railway Act (R.S.C. 1906, C. 37). This order is set out in the Appendix hereto.

14. The provisions of Section 246 of the Railway Act (R.S.C. 1906, C. 37) correspond generally with those of Section 372 of the Railway Act (R.S.C. 1927, C. 170).

15. General Order No. 231 was amended by General Order No. 291, dated April 7th, 1920. The schedule referred to in General Order No. 231 as amended by General Order No. 291, will be found in Pages 1\* to 10 of the Appeal Case.

16. General Order No. 231 was further amended by the Board by 10 General Order No. 490, dated February 5th, 1931, which is now the subject of this Appeal. General Order No. 490 is set out on Pages 13† and 14 of the Appeal Case.

17. The schedule hereinabove referred to is headed "Standard Conditions and Specifications for Wire Crossings," and is divided into two parts—Part 1 thereof dealing with Over-Crossings, and Part 2 dealing with Underground Crossings.

18. Paragraph 2 of "Part 1, Over-Crossings," as adopted by General Order No. 490, reads as follows:—

"2. The applicant shall, at all times, wholly indemnify the 20 company owning, operating or using the railway, from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property, caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere."

19. The adoption of the above quoted clause by the Board is the reason 30 for this Appeal.

## PART II.

### QUESTION FOR DECISION.

The question submitted by the Board for decision is as follows:—

"As a matter of law, had the Board jurisdiction to make General Order No. 490, dated the 20th February, 1931?"

## PART III.

### ARGUMENT.

1. It is within the competence of the Dominion Parliament to deal with matters which, though otherwise within the legislative competence 40

of the Provincial Legislatures, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in Section 91 of the British North America Act;

*Attorney General for Canada vs. Attorney General for British Columbia* [1930], A.C. 111;

*Attorney General for Ontario vs. Attorney General for Canada* [1896], A.C. 348;

*Attorney General for Ontario vs. Attorney General for Canada* [1894], A.C. 189;

10 *City of Toronto vs. Bell Telephone Company* [1905], A.C. 52;

*City of Toronto vs. Canadian Pacific Railway Company* [1908], A.C. 54;

*City of Montreal vs. Montreal Street Railway* [1912], A.C. 333;

*Toronto & Niagara Power Company vs. Town of North Toronto* [1912], A.C. 834;

*British Columbia Electric Railway Company vs. Vancouver, Victoria & Eastern Railway Company* [1914], A.C. 1067.

2. Parliament in enacting the Railway Act has conferred upon the Board very wide powers to deal with matters affecting railways which are subject to Dominion jurisdiction.

20 3. Upon an application to the Board for leave to construct lines, wires or other conductors across a railway under Section 372 of the Railway Act, the Board has power to refuse the application, and it has power to grant the application and order upon what terms and conditions the proposed works may be executed.

4. The ample powers conferred upon the Board by Section 372 invest the Board with absolute discretion as to the terms and conditions which may be imposed on any person or company so seeking to carry its wires across a Dominion railway.

30 5. When authorizing a power company to take possession of a railway company's lands or invade its rights therein or bring dangerous objects and conductors thereon, it is the bounden duty of the Board under the Act to see that the exercise of such authority shall be so guarded that injustice shall not be done.

6. Under Section 372, the Board has power to refuse the application unless the power company is willing to accept the terms which the Board thinks fit and proper to impose in the interests of public safety, or as a matter of equity.

40 7. The regulations issued by the Board in General Order No. 490 are within the scope of the wide discretionary powers conferred upon the Board by Section 372 of the Railway Act.

8. In the said General Order, the Board deals with matters which are necessarily incidental to the exercise of its said powers, and, therefore, the Board had full jurisdiction to make the said order.

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Factum  
of the  
Canadian  
National  
Railways  
and others  
—continued.

9. There are numerous instances in the Railway Act where, for the proper carrying out of its functions, the Board has to deal incidentally with questions of property and civil rights.

10. The authority of the Parliament of Canada to confer upon the Board jurisdiction under the Railway Act to deal with questions of civil liability has been recognized :

*Grand Trunk Railway Company vs. Robinson* [1915], A.C. 740 ;  
*Canadian Pacific Railway Company vs. Parent* [1917], A.C. 195.

11. The exercise of such power by the Board in the present instance is expedient in order to give effect to the intention of the Dominion Legislature 10 in enacting the above mentioned provisions of the Railway Act.

12. The Respondents rely on the reasons given by the Board in issuing said General Order No. 490 and submit that the Board's power to issue the said Order should be upheld by this Court, and that this Appeal should be dismissed.

13. Pamphlet copies of the Railway Act will be furnished for the use of the Court at the hearing.

W. N. TILLEY,  
ALISTAIR FRASER,  
E. P. FLINTOFT,  
W. B. KINGSMILL,

20

Of Counsel for the Respondents.

#### APPENDIX.

##### GENERAL ORDER NO. 231.

IN THE MATTER of section 246 of the Railway Act, as amended by chapter 37 of the Acts 7-8 George V, section 4, for the carrying of wires and cables along or across the tracks of railway companies under the jurisdiction of the Board.

Case No. 4704.

Monday, the 6th day of May, A.D. 1918. 30

Sir HENRY L. DRAYTON, K.C., Chief Commissioner,  
S. J. McLEAN, Commissioner.  
A. S. GOODEVE, Commissioner,  
A. C. BOYCE, K.C., Commissioner.

Upon the report and recommendation of the Electrical Engineer of the Board—It is ordered :

1. That the conditions and specifications set forth in the schedule hereto annexed, under the heading "Rules for Wires erected along or across Railways," be, and the same are hereby, adopted and confirmed as the conditions and specifications applicable to the erection, placing, or 40

maintaining of electric lines, wires, or cables along or across all railways subject to the jurisdiction of the Board, part 1 being applicable where the line or lines, wire or wires, cable or cables, is or are carried along or over the railway; part 2 being applicable where the line or lines, wire or wires, cable or cables, is or are carried under the railway.

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2. That any order of the Board granting leave to erect, place or maintain any line or lines, wire or wires, cable or cables, along or across the railway and referring to "Rules for Wires erected along or across Railways," shall be deemed as intended to be a reference to the conditions and specifications set out in that part of the said schedule which is applicable to the mode of crossing authorized.

Factum  
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and others  
—*continued.*

3. That any order of the Board granting leave to erect, place, or maintain, any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board, shall, unless otherwise expressed, be deemed to be an order for leave to erect, place and maintain the same according to the conditions and specifications set out in that part of the said schedule applicable thereto, which conditions and specifications shall be considered as embodied in any such order without specific reference thereto, subject, however, to such change or variation therein or thereof as shall be expressed in such order.

4. That the general order of the Board No. 113, dated November 5, 1913, approving of "Rules for Wires crossing Railways," and the conditions and specifications adopted thereby, be, and the same is hereby, rescinded.

H. L. DRAYTON,  
Chief Commissioner.

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*In the  
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**No. 12.**

**Formal Judgment.**

No. 12.  
Formal  
Judgment,  
31st March  
1932.

**IN THE SUPREME COURT OF CANADA.**

Thursday the 31st day of March, A.D. 1932.

Present : The Right Honourable Mr. Justice DUFF, P.C.  
The Honourable Mr. Justice RINFRET.  
The Honourable Mr. Justice LAMONT.  
The Honourable Mr. Justice CANNON.

The Honourable Mr. Justice SMITH being absent, his judgment was announced by the Right Honourable Mr. Justice DUFF, P.C., pursuant to the Statute in that behalf. 10

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

IN THE MATTER OF General Order No. 490 of the Board of Railway Commissioners for Canada dated 20th February, 1931, amending the rules for wires erected along or across Railways adopted by General Order No. 231, dated May 6th, 1918, as amended by General Order No. 291, dated April 7th, 1920 (case No. 4704); and

IN THE MATTER OF the Appeal from said Order No. 490 by THE CANADIAN ELECTRICAL ASSOCIATION and THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO. 20

**BETWEEN**

**THE CANADIAN ELECTRICAL ASSOCIATION AND  
THE HYDRO-ELECTRIC POWER COMMISSION  
OF ONTARIO - - - - - Appellants**

and

**CANADIAN NATIONAL RAILWAYS, CANADIAN  
PACIFIC RAILWAY COMPANY, MICHIGAN  
CENTRAL RAILROAD COMPANY, and THE  
RAILWAY ASSOCIATION OF CANADA - - Respondents.**

The appeal of the above named appellants from the General Order of the Board of Railway Commissioners for Canada Numbered 490 and pronounced in the above cause on the 20th day of February, in the year of our Lord 1931, upon the following question of law or of jurisdiction or both namely : " As a matter of law, had the Board jurisdiction to make General Order No. 490, dated the 20th of February 1931 ?" having come on to be heard before this Court on the 22nd day of February, in the year of our Lord 1932, in the presence of Counsel as well for the appellants as for the respondents, whereupon and upon hearing what was alleged by Counsel 30



aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment,

THIS COURT DID ORDER AND ADJUDGE that the said order of the Board of Railway Commissioners for Canada should be and the same was affirmed, and that the said appeal should be and the same was dismissed with costs to be paid by the said appellants to the said respondents.

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

*In the  
Supreme  
Court of  
Canada.*

No. 12.  
Formal  
Judgment,  
31st March  
1932—*con-  
tinued.*

No. 13.

Reasons for Judgment.

10

(A) DUFF J. (concurrent in by LAMONT and SMITH JJ.)—Section 372 was not attacked as ultra vires, and reading the term “along” as stretching “longitudinally” upon the right of way, it is not seriously open to objection. Otherwise the phrase “for other purposes” in the principal clause might be obnoxious to the British North America Act and the section might then have to be read as if those words were eliminated.

The substantive question is whether section 2 of the order in its amended form, has been validly promulgated. That section is as follows:—

20

The applicant shall, at all times, wholly indemnify the company, owning, operating or using the railway, from and against all loss, damage, injury, and expense to which the railway company may be put by reason of any damage or injury to persons or property, caused by any of the said applicant’s wires or cables, or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.

30 The controversy is, I think, susceptible of a brief solution. The Dominion Parliament has power to prohibit all such works as those comprised in the order under discussion. The language of subsection 3 is comprehensive enough to embrace any “term or condition”; and unless there is something in the order in question which is in itself absurd, or something in the statute which is repugnant to the order, then the order is valid. Lord Macnaghten’s judgment in *Vacher v. London Society of Compositors* (1913) A.C. 107. The statute does not elsewhere deal with the subject matter of the order and there is nothing to which our attention has been called that is inconsistent with it. I can perceive no absurdity in the sense in which the word is used in the canon of construction laid down by Lord Macnaghten.

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Reasons for  
Judgment.

(A) Duff J.  
(concurrent  
in by  
Lamont and  
Smith JJ.)

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Reasons for  
Judgment.

(A) Duff J.  
(concurrent  
in by  
Lamont and  
Smith JJ.)  
—*continued.*

I find it impossible to affirm that the condition required by section 2 is one which it would be unreasonable for an administrative body such as the Board of Railway Commissioners to enact as the price of such privileges as those with which the order deals.

As to the contention that the matter of the condition is in its nature a matter exclusively for the provincial legislatures, I can only say that I do not understand the point.

The appeal should be dismissed with costs.

(B) Rinfret  
J., dis-  
senting  
(concurrent  
in by  
Cannon J.)

(B) RINFRET J. dissenting (concurrent in by CANNON J.).—In the generation and distribution of electrical energy, it is frequently necessary 10 for the electric power companies to construct and maintain lines, wires and other conductors and structures or appliances for the conveyance of power or electricity along or across a railway; or across or near other such lines, wires, conductors, structures or appliances which are within the legislative authority of the Parliament of Canada.

When a power company is desirous of constructing or maintaining its lines or wires along or across the lines or wires, etc., of any other Dominion company, it must either obtain the consent of the other company, or obtain the permission of the Board of Railway Commissioners of Canada, under section 372 of the Railway Act (c. 170 of R.S.C., 1927) which reads as 20 follows :—

372. Lines, wires, other conductors or other structures or appliances for telegraphic or telephonic purposes, or for conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in subsection five of this section, be constructed or maintained.

(a) along or across a railway, by any company other than the railway company owning or controlling the railway; or

(b) across or near other such lines, wires, conductors, structures, or appliances which are within the legislative authority of the 30 Parliament of Canada.

2. Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected showing the proposed location and the proposed works.

3. The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such 40 order.

5. Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under section three hundred and sixty-seven of this Act, nor for the maintenance of

works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes.

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Pursuant to the provisions of that section, which was then section 246 of chapter 37 of the Revised Statutes of 1906, the Board issued General Order No. 231 adopting "rules for wires erected along or across railways," to which was annexed a schedule setting forth "standard conditions and specifications for wire crossings" and providing for two methods of crossing: Part I, Over-crossings; and Part II, Underground lines. General Order No. 231 was later amended by General Order No. 291.

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Reasons for  
Judgment.  
(B) Rinfret  
J., dis-  
senting  
(concurring  
in by  
Cannon J.)  
—continued.

In view of certain objections made or terms insisted upon by the railway companies, the General Order was again amended on the 20th February 1931, and paragraph 2 of the Standard Conditions relating to over-crossings was made to read as follows:—

2. The applicant shall, at all times, wholly indemnify the company owning, operating or using the railway, from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property, caused by any of the said applicant's wires or cables, or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury, or expense can be traced elsewhere.

The question in controversy is whether the Board had jurisdiction to issue that Order (No. 490). It comes before this court, pursuant to leave granted under subsection 3 of section 52 of the Railway Act, upon the following question submitted by the Board:

30 As a matter of law, had the Board jurisdiction to make General Order No. 490 dated 20th February, 1931?

The appellants are The Canadian Electrical Association and The Hydro-Electric Power Commission of Ontario. They submit that, upon an application for leave to cross railways with power lines, the authority of the Board is "limited to imposing terms and conditions as to the manner and means of construction of the works;" and that, in this connection, the Board is without jurisdiction to alter the law in force in the various provinces relating to the respective liabilities in damages of the railway company and the power companies.

40 The respondents are The Canadian National Railways, The Canadian Pacific Railway Company, The Michigan Central Railroad Company, and The Railway Association of Canada. They uphold the Order, and they contend that it is well within the competence of the Board of Railway Commissioners.

The Hydro-Electric Power Commission of Ontario is a provincial institution. The Canadian Electrical Association includes several companies

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(B) Rinfret  
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in by  
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—continued.

provincially incorporated. This should be borne in mind when dealing with the matter now before the court.

The appellants were authorized, by Dominion or provincial statutes, to construct or maintain their respective transmission lines in a given territory. They were incorporated to render a public service; and the legislature which called them into existence may be assumed to have regarded the services of these electrical and power companies as being in the public interest in no lesser degree than the services of the railway. The Dominion companies—railway or power—derive their authority from the same legislature. In the absence of a specific provision, section 372 should not be so construed as to give the Board the right to prevent the electrical companies from crossing altogether, or to attach to the permission granted by it such conditions as would practically defeat their statutory rights, or as would give to the railway companies a preferential position in respect of liability in damages. The enactment should, we think, be interpreted to mean that the Board ought to grant leave subject to certain terms and conditions. See *Attorney General for Canada v. Attorney General for British Columbia* (1930) A.C. 111, at 123. When Parliament intended, in the Railway Act, to delegate to the Board the power to refuse leave, it said so in express words. An instance of this may be found in the very next section 20 of the Act, subsection 4 of section 373 :—

The Board may refuse or may grant such application in whole or in part, etc.

The real question is what “terms and conditions” the Board may prescribe upon granting the application; and that question turns upon the interpretation of subsections 3 and 4 of section 372. So far as material, the language is :—

3. The Board . . . may order . . . on what terms and conditions . . . the proposed works may be executed.

4. Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order. 30

The expressions are very wide; and, to borrow the language of Lord Macmillan, delivering the judgment of the Judicial Committee in *Canadian Pacific Railway Company v. Toronto Transportation Commission* (1930), A.C. 686, at 697—

Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.

Liability in damages is fundamentally a matter of property and civil 40 rights. While the competence of the Dominion Parliament to provide for matters which, though affecting civil rights, are necessarily incidental to effective legislation in respect of Dominion railways, may not be doubted (1894), A.C. 189; (1896) A.C. 348; (1930) A.C. 111, at 118, Parliament should not be assumed to have legislated so as to appropriate the provincial field, except if the intention so to do is clearly indicated. And if that be true of

Parliament, *a fortiori* must it be so of a subordinate body, like the Board of Railway Commissioners, whose duties, when acting under section 372, are essentially administrative.

The power to create civil liability is not easily understood to have been delegated. In order to conclude that Parliament intended to delegate it in the premises, we should require more explicit language than that found in subsections 3 and 4 of section 372.

10 Full effect can be given to the language of those subsections without implying the grant of the power claimed by the Board when framing General Order No. 490. Having regard to the ordinary functions of the Board and to the general scheme of the Railway Act, the safe course is to interpret the expression "terms and conditions" as having reference to the engineering features and protective devices relating to the actual construction of the works and their maintenance, and to decide that they are limited to prescribing the manner and the means of construction, that is: the material safeguards, with a view to protection and safety.

20 It was suggested that the Order might be supported on the ground of compensation, and that a provision for indemnifying the railway companies in all cases of accidents might be considered as a means—even if unusual—of ordering payment of compensation.

But the answer to that suggestion would be:—

1. That, under the Railway Act (except in cases specially provided for), the Board has nothing to do with the proceedings whereby compensation is to be ascertained; and

2. That wherever it was intended to empower the Board to make directions as to compensation, a special authorization to that effect is contained in the section of the Act under which action is to be taken.

30 In that respect, reference may be made to sections 39, subs. 1; 215 to 243, dealing with expropriations; 252, subs. 3 (e); 255, 256, sub. 3; 257, subs. 2; etc., of the Railway Act. Under each of these sections, although the Board is given the power to grant applications upon such "terms and conditions" as it deems expedient, yet where it was intended that compensation may be made a term of the order, it was deemed necessary to insert in the enactment a special provision to that effect. On the contrary, when the expression "terms and conditions" is used alone, without reference to compensation, it is to be found in sections where, on account of the nature of the enactment, it does not appear to have been the intention of Parliament that compensation should be paid.

40 Let us illustrate the point by a reference to sections 272 and 273 of the Act, dealing with farm crossings. The Board may, upon the application of any landowner, order the company to provide and construct a suitable farm crossing across the railway wherever, in any case, the Board deems it necessary for the proper enjoyment of his land; and the Board may order and direct how, when, where, by whom and upon what "terms and conditions" such farm crossing shall be constructed and maintained. One would

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Judgment.  
(B) Rinfret  
J., dis-  
senting  
(concurrent  
in by  
Cannon J.)  
—continued.

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Court of  
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Reasons for  
Judgment.  
(B) Rinfret  
J., dis-  
senting  
(concurrent  
in by  
Cannon J.)  
—continued.

hardly suggest that, by these expressions, Parliament intended to empower the Board to impose conditions of civil liability upon the farmer as a result of using the farm crossing. In that respect, Parliament did impose civil responsibility upon its creature, the railway company; but it did so in specific terms, and not by way of delegation. (Railway Act, sects. 385 and following.) Under section 372 the power is not given to the Board, either in express terms or by necessary implication therefrom.

That the Board itself up to the time the present orders were issued, understood its powers and the policy of the Railway Act to be in accordance with the views we are now expressing may be gathered from the judgment of Chief Commissioners Blair, Killam and Mabee respectively in the *York Street Bridge case* (1904) 4 Can. Ry. Cas. 62; *Duthie v. Grand Trunk Railway Co.* (1905) 4 Can. Ry. Cas. 304; and *Bell Telephone Co. v. Nipissing Power Co.* (1909) 9 Can. Ry. Cas. 473, at 477; also from comparatively recent pronouncements of the Board: *City of Windsor v. Bell Telephone Co.*; and *Bell Telephone Company v. City of Ottawa* (1917) 22 Can. Ry. Cas. 416 and 421. 10

We think our conclusion is also supported by the decision of the Judicial Committee in *Grand Trunk Pacific Railway Company v. The Landowners on streets in Fort William* (1912) A.C. 224.

In that case, the Board of Railway Commissioners ordered that the railway company might construct its line of railway along certain streets through the city of Fort William. The order was made subject to the express condition that the railway should 20

make full compensation to all persons interested for all damage sustained by reason of the location of the said railway.

On behalf of the landowners (respondents) it was contended that section 47 of the Railway Act, on its true construction, authorized the Board to impose the condition contained in its order, or that otherwise, it had implied authority to frame its order as it thought right. It was urged that the Board, in considering whether a proper location of the railway should or should not be approved, must, in the proper exercise of its discretion and taking into account all the circumstances, judicially determine whether it should impose any and what condition on which its approval should be granted. The language of section 47 of the Railway Act, as it then was, related to the conditions which the Board may impose, and stated, in part, as follows:— 30

The Board may direct in any order that such order or any portion or provision thereof shall come into force . . . upon the performance, to the satisfaction of the Board or persons named by it, of any terms which the Board may impose upon any party interested. 40

Lord Shaw, delivering the judgment of the Judicial Committee, said:—

This language is certainly general and comprehensive; but, in their Lordships' view, it cannot be interpreted as being designed

to alter the other and specific provisions of the statute as to the compensation payable by the railway company. The particular application now being dealt with falls within the scope of s. 237, which applies to "any application for leave to construct the railway upon, along, or across an existing highway." By subs. 3 of that section it is provided that when the application is of that character "all the provisions of law at that 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." It does not appear to their Lordships that it would be safe to infer from the generality and comprehensiveness of the powers of the Board, and apart from any specific reference to the compensation itself and the parties entitled thereto, that these provisions of s. 237 were liable to be altered, abrogated or enlarged by the exercise of the Board's administrative power under s. 47.

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(concurring  
in by  
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—*continued.*

The reasons above referred to, which might induce administrative action so as to make the compensation properly equate with the injury to all interests, are reasons which might or might not appear sufficient for direct legislative interposition, but, as already mentioned, their Lordships, apart from that, cannot interpose by the inference argued for. On the contrary it appears to them that the administrative action taken was beyond the powers of the Board of Railway Commissioners for Canada, under the law as it stood at the date of the order.

An additional argument in favour of the appellant's contention may be found in the wording of subsection 3 of section 372 which is to the effect that the Board—

may order . . . on what terms and conditions . . . the proposed work may be executed,

the more natural meaning of that language being that the terms and conditions which the Board is empowered to order have reference to the actual execution of the work. After the work has been executed in accordance with the terms and conditions of the order, by force of subsection 4, there exists a statutory obligation to maintain the works in accordance with the terms and conditions laid down for its execution.

General Order No. 490, as already stated, amended General Order No. 231 (as amended by General Order No. 291) by striking out paragraph 2 of part 1, Over-crossings, and substituting in lieu thereof the new paragraph 2 quoted at the beginning of this judgment. It also added two additional paragraphs relating to notice of accidents, and preserving all rights as between power companies and railway companies for crossing privileges. These added paragraphs are not in question under this appeal.

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Canada.*

For the reasons stated, so far as concerns the substituted paragraph 2, we would answer the question submitted in the negative.

The respondents should pay to the appellants the costs of this appeal.

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—continued.

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No. 14.

**Order in Council granting special leave to appeal to His Majesty in Council.**

No. 14.  
Order in  
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His Majesty  
in Council,  
19th April  
1933.

AT THE COURT AT WINDSOR CASTLE

The 19th day of April, 1933.

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY  
LORD PRESIDENT      SECRETARY SIR JOHN SIMON      10  
LORD COLEBROOKE      SIR FREDERICK PONSONBY.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 4th day of April 1933 in the words following viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Canadian Electrical Association and the Hydro-Electric Power Commission of Ontario in the matter of an Appeal from the Supreme Court of Canada in the matter of General Order No. 490 of the Board of 20  
Railway Commissioners for Canada dated the 20th February 1931 amending the rules for wires erected along or across railways adopted by General Order No. 231 dated May 6th 1918 as amended by General Order No. 291 dated April 7th 1920 (Case No. 470) and of the Appeal therefrom by the Canadian Electrical Association and the Hydro-Electric Power Commission of Ontario between the Petitioners Appellants and the Canadian National Railways the Canadian Pacific Railway Company the Michigan Central Railroad Company and the Railway Association of Canada Respondents setting forth (amongst 30  
other matters) that the Petitioners desire to obtain special leave to appeal from a Judgment of the Supreme Court dated the 31st March 1932 dismissing an Appeal by the Petitioners from General Order No. 490 of the Board of Railway Commissioners for Canada dated the 20th February 1931 which Order was an amendment of the “ Regulations Regarding Wires Erected Along and Across Railways ” adopted by General Order No. 231 dated the 6th May 1918 as amended by General Order No. 291 dated the 7th April 1920 that the



Petitioners appealed from General Order No. 490 only insofar as it purported to amend Section 2 of Part I of the Regulations : that the Petitioners the Canadian Electrical Association is a body corporate and is an association having for its principal object the advancement of the common interests of its members : that the membership in this Association comprises a large number of Public Utility Companies engaged in the production and transmission of electric power for commercial and private consumption throughout the Dominion of Canada some being incorporated under Dominion legislation and some under Provincial and all having full charter or statutory powers to erect and maintain the overhead transmission lines necessary to the distribution of their power : that the Petitioners the Hydro-Electric Power Commission of Ontario are a Governmental Commission created a body corporate by statute of the Legislature of the Province of Ontario (R.S.O.-1927, cap. 57) and is also similarly engaged in the production and transmission of electric power and has similar statutory powers : that in connection with their operations the member companies of the Petitioners the Canadian Electrical Association and the Petitioners the Hydro-Electric Power Commission of Ontario are obliged in a very large number of instances to carry their overhead transmission lines across the lines of railway and lines of telegraphs of the Respondents who are creatures of the Dominion and/or subject to its legislative control being in particular subject to the application of the Dominion Railway Act (R.S.C.-1927, Ch. 170) : and reciting the facts out of which the Petition arose : that the majority of the Board gave judgment in support of the Order No. 490 of the 20th February 1931 (Deputy Chief Commissioner Vien dissenting) : that the Petitioners obtained leave from the Board of Railway Commissioners to appeal to the Supreme Court upon the question :—“ As a matter of law had the Board jurisdiction to make general order No. 490 dated the 20th February 1931 ” ? : that the Appeal of the Petitioners to the Supreme Court was dismissed by a majority of the Court the Judgment of the Court (Duff Lamont and Smith JJ.) being delivered by Duff J. and the dissenting judgment of Rinfret and Cannon JJ. being delivered by Rinfret J. : that the Petitioners submit that the questions to be raised on this Appeal involve important questions of law concerning the jurisdiction of the Board of Railway Commissioners for Canada : that the questions are the following : (a) can the Board of Railway Commissioners under the provisions of Section 372 of the Railway Act and particularly under subsection 3 thereof alter the law respecting the liability of telegraph and telephone companies or companies conveying power or electricity by wires that cross railways or similar companies and make it a condition of their right to cross that they shall be liable for damages not only in the case of negligence but in any case where they cannot trace elsewhere the cause of the damage ? : (b) if the Railway Act purports to confer such power on the Board of Railway Commissioners

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was it within the jurisdiction of the Dominion Parliament to do so? :  
And humbly praying Your Majesty in Council to grant to the  
Petitioners special leave to appeal from the Judgment of the Supreme  
Court dated the 31st March 1932 or that Your Majesty may be  
pleased to make such further or other Order as to Your Majesty in  
Council may appear fit :

“ THE LORDS OF THE COMMITTEE in obedience to His late  
Majesty’s said Order in Council have taken the humble Petition into  
consideration and having heard Counsel in support thereof and in  
opposition thereto Their Lordships do this day agree humbly to 10  
report to Your Majesty as their opinion that leave ought to be  
granted to the Petitioners to enter and prosecute their Appeal  
against the Judgment of the Supreme Court of Canada dated the  
31st day of March 1932 upon depositing in the Registry of the Privy  
Council the sum of £400 as security for costs :

“ And Their Lordships do further report to Your Majesty that  
the authenticated copy under seal of the Record produced by the  
Petitioners upon the hearing of the Petition ought to be accepted  
(subject to any objection that may be taken thereto by the  
Respondents) as the Record proper to be laid before Your Majesty 20  
on the hearing of the Appeal.”

HIS MAJESTY having taken the said Report into consideration was  
pleased by and with the advice of His Privy Council to approve thereof and  
to order as it is hereby ordered that the same be punctually observed  
obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government  
of the Dominion of Canada for the time being and all other persons whom it  
may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

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In the Privy Council.

No. 26 of 1933.

*On Appeal from the Supreme Court of Canada.*

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IN THE MATTER of General Order No. 490 of the Board of Railway Commissioners for Canada dated 20th February, 1931, amending the rules for wires erected along or across Railways adopted by General Order No. 231 dated May 6th, 1918, as amended by General Order No. 291 dated April 7th, 1920 (case, No. 470), and the Appeal therefrom by THE CANADIAN ELECTRICAL ASSOCIATION and THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO.

BETWEEN

THE CANADIAN ELECTRICAL ASSOCIATION AND THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO - *Appellants*

AND

THE CANADIAN NATIONAL RAILWAYS, THE CANADIAN PACIFIC RAILWAY COMPANY, THE MICHIGAN CENTRAL RAILROAD COMPANY, AND THE RAILWAY ASSOCIATION OF CANADA *Respondents.*

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RECORD OF PROCEEDINGS.

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*For the Appellants.*

BLAKE & REDDEN,

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*For the Respondents.*