

Ellen Boland - - - - - *Appellant*

v.

The Canadian National Railway Company - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 30TH JULY, 1926.

Present at the Hearing :

VISCOUNT HALDANE.

VISCOUNT DUNEDIN.

LORD ATKINSON.

LORD WRENBURY.

LORD JUSTICE WARRINGTON.

[*Delivered by* VISCOUNT DUNEDIN.]

A portion of the track of the Canadian National Railway Company, entitled its Newmarket Subdivision, running north and south crossed on the level Bloor Street running east and west in the City of Toronto.

In the spring of 1924, the Corporation of the City of Toronto made an application to the Board of the Railway Commissioners for Canada under Sections 257 and 259 of the Railways Act of 1919, for an order requiring the Canadian National Railway Company to collaborate with the applicant in the preparation of a joint plan for the separation of gradients on the crossing of Bloor Street, and as to certain other crossings which need no longer be referred to.

Following that application the Board, on the 5th June, 1924, pronounced the following order :—

1. That the Canadian Pacific and the Canadian National Railway Companies be, and they are hereby, directed to construct, jointly, two subways, one under the double tracks of the Galt Subdivision and the

Toronto, Grey and Bruce Subdivision of the Canadian Pacific Railway Company and the Brampton Subdivision of the Canadian National Railway Company on Bloor Street, and one under the said tracks on Royce Avenue, in the City of Toronto, Province of Ontario.

2. That the Canadian National Railway Company be, and it is hereby, directed to construct a subway under the tracks of its Newmarket Subdivision on Bloor Street, in the said City of Toronto.

3. That plans showing the two subways on Bloor Street be filed by the Railway Companies, for the approval of the Chief Engineer of the Board, within thirty days from the date of this Order; and that plans showing the Royce Avenue subway be filed, for the approval of the Chief Engineer of the Board, not later than January 1st, 1925; detail plans of the said work also to be filed for the approval of the Chief Engineer of the Board.

4. That the work on the two subways at Bloor Street be commenced not later than August 1st, 1924, and completed not later than July 1st, 1925.

5. That the work on the subway at Royce Avenue be commenced as early in the Spring of 1925 as convenient, and completed not later than January 1st, 1926.

6. That all questions of distribution of costs, interest, or other matters involved in the construction of the said work be reserved for further Order of the Board.

Pursuant to this order a plan was lodged within the prescribed date within 30 days of the advertisement, and was approved on July 10th, 1924. This plan consisted of a section showing the curve at which the subway dropped under the railway which was then to be carried over the subway by a bridge, and the position of the side walk which underneath the bridge did not extend to the lowest point of the curve. It also gave a plan which showed Bloor Street as it would then be, together with the existing buildings and properties, contiguous thereto. It did not show that any work was intended to be constructed other than the construction of the subway itself, *i.e.*, that the existing Bloor Street was to be excavated so as to form a curve on the roadway arriving at its lowest point under the railway which was there to be carried by a bridge, and regaining the level when going from east to west at a spot opposite the middle of Boland's Buildings. No details as to retaining walls, etc. were given.

To make the case intelligible it is now necessary to describe the *locus*. All that is relevant is the condition of affairs on the south side of Bloor Street. Previous to these operations the properties westward from the railway line were as follows:—The Fairbank property with a frontage of about 160 ft. to Bloor Street; the Loblaw property with a frontage of about 130 ft., and then the Boland property. The Fairbank property and the Loblaw property had direct access on the level to Bloor Street. At the extreme west of the Loblaw property there was a strip of ground 12 ft. wide which touched Boland's boundary on the west, and had its eastward boundary formed by Loblaw's warehouse. It became obvious from the plan and section that the subway being constructed, Loblaw's property and the Fairbank

property would have no longer access to Bloor Street on the level, but would find themselves a considerable number of feet above the track of the subway. This position of affairs gave food for thought on the part of the railway engineer in charge of the work, and he seems some time in the summer of 1925, to have held a colloquy with his colleague in the Land Department, the result of which was that they devised a scheme for securing a new entrance which should be available to Fairbank and Loblaw's to get access to Bloor Street. For that purpose a plan was constructed to that effect. It was proposed to take a strip of about 30 ft. wide at the extreme east of the Boland property. That added to the existing 12 ft. strip would make a strip of 42 ft. wide. On this strip it was proposed to construct a roadway leading down into the subway at a gradient of considerable steepness. The plan was communicated some time in October to Mr. Harris the City's Commissioner of Works. The City did not like the proposal because they thought that a steep roadway at right angles into the subway, and likely to be used by heavy motors with trailers from Loblaw's works, would be a source of danger to the traffic in Bloor Street. The railway people, however, took the matter into their own hands, and having made a larger and working plan, they had it signed by a Vice-President of the railway, and assuming that under the powers of the Expropriation Act that gave them power to take the strip of Boland's land they sent men to the land to take possession. Mrs. Boland, acting through her son, objected to her land being taken, and after some preliminary discussion as to procedure, Mrs. Boland raised the present action in the Supreme Court praying for an injunction restraining the railway company from taking her land. The action depended before Orde J. The railway authorities conceived at this time that they had ample power to take under the Expropriation Act. The plan showing the taking of lands had been submitted to the City, but they had refused to agree to it. Witnesses were examined, and the hearing of the case concluded, but after the hearing of the case and before judgment had been delivered, the railway company presented the new plan to the Chief Engineer of the Railway Board and obtained his approval to it, whereupon Orde J. ordered it so approved to be put in as an exhibit. He then delivered judgment dismissing the action. His judgment rested on the view that the taking of the land was permissible under the powers conferred on the railway company by the Expropriation Act. He did not rest his judgment on any authority conferred by the Railway Board. The plaintiff appealed and the Appellate Division of the Supreme Court dismissed the appeal. Riddell J. agreed with Orde J. The other learned judges of that Court while in no way expressing disapproval of the views of Orde J. did not rest their judgment on his grounds. They thought it sufficient to say that the authority of the Railway

Board had been given for the taking in question. Appeal against these judgments has been taken to His Majesty in Council.

The questions raised are difficult and complicated. It will be well first to set forth the various statutes which confer powers on the railway company in an action like the present. The first statute that falls to be considered is the special Act of the Railway Company, the National Railway Act of 1919. Section 13 of that Act runs thus :—

“(1) All the provisions of the Railway Act (excepting those provisions which are inconsistent with this Act, and excepting also the provisions of the Railway Act relating to the location of lines of railway, the making and filing of plans and profiles—other than highway and railway crossing plans—and the taking or using of land) shall apply to the Company and its undertaking, it being declared that all the provisions of the Expropriation Act except where inconsistent with this Act, apply *mutatis mutandis* to the Company and its undertaking, in lieu of the provisions of the Railway Act so excepted.

“(2) With respect to the undertaking of the Company :—

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

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

“(c) The compensation payable in respect of the taking of any lands so vested in the Company, or of interests therein, or injuriously affected by the construction of the undertaking or works shall be ascertained in accordance with the provisions of the Railway Act, beginning with notice of expropriation to the opposite party.”

Sec. (1) employs a very involved method of expression, but their Lordships do not think that there is any real difficulty in the meaning of it, and indeed there has not truly been any controversy so far between the parties to the suit. What is to be discussed is what Acts can be looked at for the power necessary for the construction of a subway under a railway where there is an existing highway crossed by an existing railway on the level. It does not seem to matter whether you read the expression “plans” and “railway crossing plans” as including the authorization of the construction of the crossing indicated by the plans, or if you confine the word plans to the meaning of a piece of paper with a drawing on it. In the latter view authorization of a railway crossing is not included in the enumerated exceptions. In the former it is included in the exception upon the exception, so that in either case the matter remains subject to the Railway Acts. Equally clearly, for the actual process of taking lands you must go to the Expropriation Act, but here it is necessary to accentuate a distinction which their Lordships think, in argument at least,

has occasionally been lost sight of. The Expropriation Act has a double function. It may, as will be seen from some of its provisions, actually give the power to take land. It may also only act as the machinery by which land authorised to be taken by some other authority is actually taken. It was in respect of its former function that the railway company in this case purported to act, and it was in that respect that they secured the judgment of the learned judge of first instance.

Pausing for a moment before coming to the actual terms of the Expropriation Act, let it be observed that it follows from what has been said that the initial movement as to dealing with the crossing was rightly taken under the Railway Act. Now the section of the Railway Act which deals with that is Section 257, which is as follows :—

(1) Where a Railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the Company to submit to the Board, within a specified time, a plan and profile of such portion of the Railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the Railway be carried over, under or along the highway, or that the highway be carried over, under or along the Railway, or that the Railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

(2) When the Board of its own motion, or upon complaint or application, makes any order that a Railway be carried across or along a highway, or that a Railway be diverted, all the provisions of law at such time applicable to the taking of land by the Company, to its valuation and sale and conveyance to the Company, and to the compensation therefor, shall apply to the land, exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

(3) The Board may exercise supervision in the construction of any work ordered by it under this section, or may give directions respecting such supervision.

Accordingly, the order already quoted was a perfectly legal and proper order. Now as to the Expropriation Act, the relevant sections are as follows :—

In this Act, unless the context otherwise requires,

2.—(a) “minister” means the head of the department charged with the construction and maintenance of the public work ;

* * * * *

(d) “public work” or “public works” means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the

telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only ;

* * * * *

The minister may by himself, his engineers, superintendents, agents, workmen and servants—

* * * * *

3. (b) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto ;

* * * * *

“ 11. In all cases, when any such plan and description, purporting to be signed by the deputy of the minister, or by the secretary of the department, or by the superintendent of the public work, or by an engineer of the department or by a land surveyor duly licensed as aforesaid, is deposited of record as aforesaid, the same shall be deemed and taken to have been deposited by the direction and authority of the minister, and as indicating that in his judgment the land therein described is necessary for the purposes of the public work ; and the said plan and description shall not be called in question except by the minister, or by some person acting for him or for the Crown.”

The powers given by this enactment are very far-reaching, and the argument for the respondents which was practically given effect to by Orde, J., was that in this case the railway authorities were placed in the shoes of the Minister and, subject to possible control by him, could without question (Section 11) serve a plan and take any land they pleased. Their Lordships think that this is a complete misconception of the position. Turning again to Section 13 of the Special Act, it provides that for the provisions of the Railway Act as to taking of lands are to be substituted *mutatis mutandis* the provisions of the Expropriation Act. Now the provisions of the Railway Act as to taking lands were contained under the fasciculus of Sections 189-214, whereof the heading is “ Taking and Using of Lands,” together with the succeeding fasciculus, 215-243, under the heading “ Expropriation Proceedings.” These are all gone : the Expropriation Act is to come in instead *mutatis mutandis* ; and what *mutatis mutandis* means is clearly shown by subsection 2 of Section 13.

With regard to the undertaking of the Company any plan deposited may be signed by the Minister of Railways, or by the president or any vice-president of the Company, and by subsection 3, any land so shown becomes thereupon vested in the Company.

The effect of these sections is that the company authorities get the position of the Minister not absolutely, as the respondents argues, but solely for the purposes of the undertaking of the

railway. The undertaking is to the Railway Company what the public work is to the Minister. The Expropriation Act can only come in if the necessity for taking the land is such that had Section 13 not cut out the railway clauses, the land could have been taken under the clauses in the Railway Act. Now, so far as the railway proper is concerned, no one can pretend that the present proposed taking of lands is for the purpose of the railway proper. The question, therefore, resolves itself into this: Is the subway part of the undertaking of the railway? Their Lordships consider that it is not. The expression subway has been used, and it is convenient, but in fact, what has been done is merely a lowering of the road and the construction of a new railway bridge. Their Lordships do not doubt that the lowered road still remains, as it was part of the road belonging to the municipality. They might put sewers under it or gas pipes along it, and could not be restrained by the railway authorities—assuming, of course, that these things so done did not in any way interfere with the position of the railway proper.

Their Lordships are, therefore, of opinion that the ground of judgment of Orde J. fails. It is, of course, not open to any judicial tribunal to question the wisdom of the legislature when the terms of the legislation are explicit, but in order to aid construction it is legitimate to look at the opposing contentions. If Orde J.'s view were right the result would be very astounding. The railway authorities would have the right to take any land anywhere for any purpose whatever, and with the immunity from giving explanation afforded by Section 11 they could requisition lands which had no connection with the undertaking, and they might proceed to dispose of them or use them as they pleased. Even as it is, the powers are very wide, for they get rid of much procedure and some checks which would have affected them had the proceedings been under the Railway Act. It is not a conclusion to be easily reached that they should act in such a matter with all the powers of an autocratic despot.

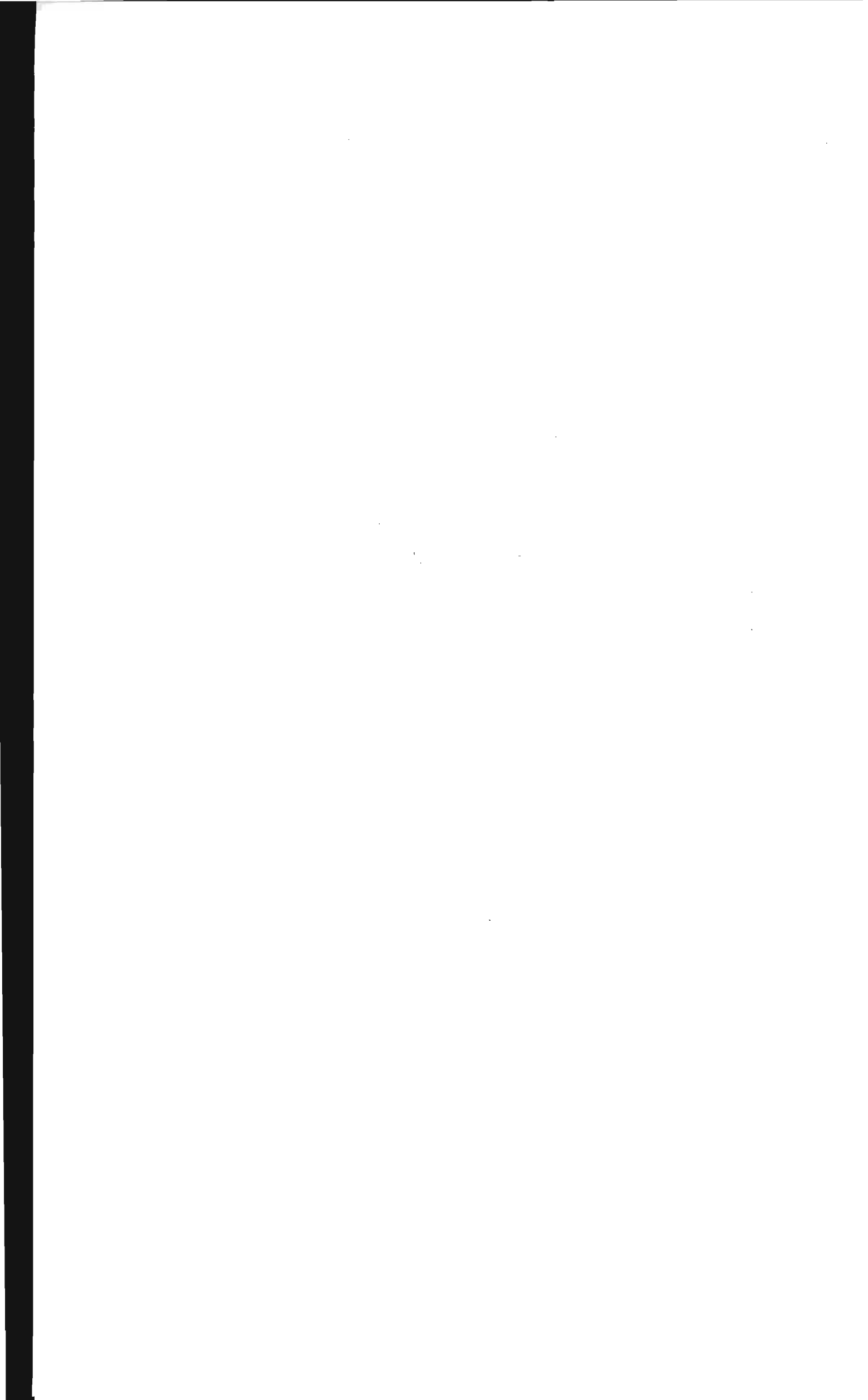
There remain, however, the grounds of judgment of the learned judges of the Court of Appeal, and here the question becomes a very narrow one. Whether the Railway Board could give directions in ordering the subway, to effect such other changes in respect to access as to necessitate the taking of land, need not be, for the moment, considered. The point is whether the direction was given. The learned judges of the Court of Appeal thought that the order of the 5th June, of the Board, gave that direction. Their Lordships do not arrive at that conclusion. The plan of the subway was to be lodged by July 5th, 1924, and the plan so lodged confessedly showed no indication of any road of approach or taking of land. The respondents argued that inasmuch as detailed plans were also ordered to be subsequently put in, the plan showing the construction of the access, was really

a detailed plan, and as such obtained the sanction of the engineer. Their Lordships think that detailed plans must be detailed plans of what was actually lodged as the general plan, and that it was not within the liberty given by the Board that the Railway Company should, by means of a so-called detailed plan, enlarge the scope of the original plan which had been lodged by July, 1924. That plan was the measure of their rights to construct. Detailed plans are only to show the precise way in which the construction was to be made. Their Lordships therefore think that the learned judges of the Court of Appeal are really wrong in fact, when they say that the plans showing the access and the taking of lands received the sanction of the Board.

Their Lordships wish emphatically to state that in coming to this opinion they are not for a moment influenced by proceedings which subsequent to judgment were taken before the Railway Board to elicit from the Board their view of the true meaning of the order of June 5th, 1924. These proceedings were improper and irregular, and the petition to have these proceedings admitted in evidence before their Lordships will fall to be dismissed with costs.

On the main case their Lordships think that the appeal should be allowed, and an injunction granted against the respondents interfering with the appellant's land. There is a prayer for damages. Their Lordships do not know whether this will be insisted in, or whether there is any real substance in it, but the Appeal Court will deal with that. The appellant will have costs before this Board and in the Courts below.

Their Lordships will humbly advise His Majesty in accordance with the views above stated.



Privy Council.

ELLEN BOLAND

v.

THE CANADIAN NATIONAL RAILWAY COMPANY

DELIVERED BY VISCOUNT DUNEDIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1926.