

In the Privy Council.

ON APPEAL

FROM THE EXCHEQUER COURT OF CANADA.

BETWEEN—

THE S.S. "EURANA" (Defendant) - - - *Appellant*

AND

BURRARD INLET TUNNEL AND BRIDGE
COMPANY (Plaintiff) - - - *Respondent.*

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Case

ON BEHALF OF THE APPELLANT.

1. This is an Appeal from the Judgment of Mr. Justice Maclean the President of the Exchequer Court of Canada, dated 8th December 1929, dismissing the defendant's appeal from the Judgment of Mr. Justice Martin, Local Judge in Admiralty, dated 22nd April 1929, whereby he dismissed the Counter-claim of Planet Line Inc., the owners of the s.s. "Eurana" against the plaintiff for damages sustained by that vessel on 10th March 1927, in a collision with the plaintiff's bridge spanning the Second Narrows of Burrard Inlet.

Record, p. 7.

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2. The facts with regard to the collision are not now in dispute and can be stated shortly. At about 6 p.m. on the 10th March 1927 the "Eurana" a steel screw steamship of 5,689 tons gross and 3,516 tons net register, 400 feet in length, 56 feet in beam, fitted with engines of 498 h.p. nominal and laden with a cargo of timber was approaching the Second Narrows Bridge from the eastward in the usual and proper manner. The tide at the time was about low water slack and the bascule of the bridge had been duly opened to allow the passage of the "Eurana." When the "Eurana" was about 600 feet distant from the open bascule span she

Record, p. 240.

Record, p. 77 et seq.

suddenly sheered to starboard. The helm was at once starboarded, the engines were put full astern and both anchors dropped, but before the vessel could be brought up she went under the centre fixed span, carrying away her upperworks as far as the funnel. The surface water at the material time was slack and the learned Trial Judge and the President of the Exchequer Court both found that the sheer was due to an undercurrent the strength of which could not have been foreseen or guarded against by those on board the "Eurana." They held that there was no negligence in the navigation of the ship and that the plaintiff's claim for damage done by the "Eurana" to the bridge failed. 10

3. The Appellant's case upon their Counter-claim was that the Respondent's bridge was erected without lawful authority and constituted an unlawful obstruction and a nuisance in a public navigable waterway.

4. A reference to the Chart (Exhibit 7) and to the plans (Exhibits 9, 15, 17, 23) will give a general idea of the nature and situation of the bridge. The Second Narrows is approximately half a mile long and the bridge is at the western end of the Narrows. The natural ship channel in the Second Narrows (between the 5-fathom lines) measured at the bridge site at low water is 550 feet wide. Further to the eastward the channel widens and at its eastern end is approximately 900 feet wide. The bottom is slightly irregular but in general is V-shaped and the deepest part (80 feet) is in the centre. The south shore for a distance of 1,700 feet eastward from the bridge is shoal and runs out approximately 300 feet and then drops off sharply into deep water. 20

Ex. 2 and 27.
Ex. 7,
Record,
p. 160.
Record,
pp. 498, 129,
130, 262, 326,
722.

5. The Second Narrows Bridge is a combined railway and traffic bridge, 22 feet in height above high water level. The northern end is built on piles driven into the bed of the Narrows. The southern part is composed of five steel spans laid on eight concrete piers numbered, from the north, 00, 0, 1, 2, 3, 4, 4A and 5. Of these 3, 4 and 4A are close together and constitute in effect one pier. Of the five spans only the two which occupy the natural channel are of importance. These are the centre span, which is a fixed span 300 feet wide, and the bascule span, which is 150 feet wide. The fixed centre span is now the prescribed waterway for log booms and such small steamers as can go under it. The bascule span, which lies to the south of the centre span, is the only waterway for ships of any size. It occupies the extreme southerly portion of the natural ship channel and the centre of this span is 175 feet south of the centre of the natural channel. 30

Ex. 23.
Record,
p. 127.
Record,
p. 128.

6. The only serious difficulty involved in designing and erecting the Second Narrows Bridge was the problem offered by the tidal conditions 40

in the Second Narrows. A large body of evidence was called at the trial dealing with the point and this evidence may be briefly summarised as follows :—

(A) The tides vary greatly both in length of run and in range ; the runs vary from 2 to 7 hours in length and the range varies from 1 foot to 15 feet.

(B) There is a north-easterly set at the beginning of the flood tide at the entrance of the Narrows on the south side. This set was felt both west and east of the bridge site in days before the bridge was built.

Record,
pp. 125, 211,
212, 604, 617,
191, 194, 175,
177, 334, 241,
243, 266, 267,
272, 285.

(C) Another northerly set existed at the eastern side of the bridge which was observable at the end of the ebb tide.

Record,
p. 197.

(D) The tide table for Vancouver Harbour is very inaccurate in so far as the Second Narrows is concerned. The time of actual slack water (both at high and low water) in the Second Narrows differs on occasion by as much as 30 minutes from that given in the tide book.

Record,
pp. 124, 137,
309, 263, 266,
72, 82, 190,
192, 193, 198,
210, 272, 278,
282, 183, 640,
285.

(E) The length of slack water is uncertain. Frequently the tide changes instantaneously ; on some occasions slack water lasts for a few minutes on other occasions there may be as much as half an hour of slack water.

Record,
pp. 301, 285,
124, 138,
140-1, 171,
210, 72, 248,
263, 277, 222,
232, 318.

(F) The velocity of the tide reaches as much as 6-7 knots but is very variable and uncertain. At certain stages the sub-surface velocity is greater than the surface, and at other stages of the same tide it is the reverse. The greatest velocity appears to be in the centre and approximately 20 feet below the surface.

Record,
pp. 190, 191.

Record,
p. 692.

Record,
pp. 121, 604,
508.

(G) The tidal flow starts below the surface and the tide sometimes ebbs on the surface and floods beneath, and sometimes vice versa.

Record,
pp. 508, 140,
141, 289, 291,
318.

(H) The tide floods on the south shore while still ebbing on the north shore and there are many confused eddies and currents both east and west of the bridge.

Record,
pp. 121, 190,
199, 200, 202,
263, 265, 285,
290, 291.

(I) Owing to the V-shape of the bed of the Narrows, the tide runs through it in two spirals turning outwards at the surface and inwards below.

Record,
p. 498.

(J) There is a regular drift of current from the sides towards the centre of the Narrows.

Record,
p. 616.

(K) Before the bridge was built the tide in the centre of the channel ran reasonably straight and the Second Narrows was

Record,
pp. 124, 273,
278, 286, 470,
233, 265, 279,
292, 298-300,
329, 350.

readily and safely navigated by vessels of all sizes. Small ships and log booms were able to navigate the Narrows at all stages of all tide. Big ships used it at all stages except during the full strength of big tides and the customary course for such vessels was in the centre of the channel.

Record,
pp. 276, 233,
310.

Record,
pp. 206, 221.

7. Faced with the difficult tidal problems referred to in the preceding paragraph the Respondent company had the following alternative types of bridge to choose from :—

Ex. 56.

(A) High-level or suspension bridges which were evidently not seriously considered. 10

Record,
pp. 505,
536-7, 728,
620.

(B) Lift bridges, such as were proposed by Dr. Waddell (Exhibit 36) and recommended by the Vancouver Board of Trade.

Record,
pp. 427-8,
611.

(C) Swing spans such as were proposed by Sir John Wolfe-Barry (Exhibit 32) supported by the Dominion Bridge Company (Exhibit 55) the Canadian Bridge Company (Exhibit 20) and the Northern Construction Company (Exhibit 36) and recommended by the Respondent's engineers, Swan and Cameron.

(D) Bascule lifts, of the type which was actually built.

It is significant that no one recommended this type of bridge and the Respondent was unable to call anyone who would take the responsibility for this design or who would even recommend a bascule bridge at all. Mr. Swan, the Respondent's Company's engineer, who superintended the construction of the bridge definitely declined to accept responsibility for the design and stated that he favoured the swing type (e.g., Exhibit 32). 20

Record,
pp. 443, 461.

Record,
pp. 443, 461.

In spite of the fact that it does not appear to have been recommended by any engineering expert the bascule type of bridge was eventually selected, apparently because it was insisted upon by some official in the Public Works Department. Bascule bridges are more expensive to build than swing bridges and as the Respondent Company had a cost limit of one million and a quarter dollars they had to reduce the width of the bascule opening to 150 feet and to put it near the shore instead of in the middle of the channel in order to keep within the cost limit. 30

8. A large body of evidence was called dealing with the effect of the bridge upon the navigation of the Narrows by large vessels. This evidence can be summarised as follows :—

(A) The available waterway is reduced from 550 to 150 feet and the bridge is set at an angle of 5 degrees to 10 degrees from a right angle with the main tidal current.

(B) The open span is not in the middle but so dangerously close to the south shore that at low water inbound ships, if they continue for two ships' lengths (800 feet) at right angles to the bridge without altering course will be ashore on the south shore. Furthermore outbound ships in opening up the draw span are forced so close to the shoal east of the bridge that they are in imminent danger of going ashore.

10 (C) The natural northerly set of the young flood tide at the south end of the bridge has been increased in strength by the bridge and extends as far to the north as the north pier of the open span, and new and confusing eddies have been created by the bridge piers.

(D) The northerly set at the end of the ebb has been given an importance it did not have before. Outbound ships have to approach the south shore, to line up for the bridge opening, and when they arrive at or opposite the Knuckle during the last of the ebb they come under the influence of this northerly set which often sets them over bodily to the northward, and on other occasions sets the ship's head to the northward and creates a sheer very difficult to break.

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(E) In consequence of the above experience it has been found too dangerous to attempt the passage of the bridge except at slack water. Actual slack water is often momentary and never lasts for more than half an hour. As a result of the "Eurana's" collision and that of the "Norwich City" (hereinafter referred to), the passage of large vessels through the bridge at low water slacks has had to be abandoned. Furthermore many ships decline to make the passage on the night high water slack, leaving only one slack tide, a period of at most 30 minutes, in each 24 hours when the passage can be attempted.

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The witnesses called by the Appellant to speak to the above matters were fully representative of all interests in the shipping world and they were unanimous in the opinions which they expressed. The Respondent called only one navigational witness to controvert these propositions, namely, a retired Pilot called Batchelor. This witness had never himself piloted a ship through the bridge since it was completed, and it is submitted that his evidence should not be accepted.

Record,
p. 629.

Record,
p. 717.

9. The learned trial Judge and the President of the Exchequer Division were both of the opinion that the bridge as built interfered with navigation and constituted an obstruction in the Second Narrows. It is submitted that the evidence also established that the bridge as built, owing to its type and general design, interfered with and obstructed navigation more than was reasonable or necessary.

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Perhaps the best evidence of this is afforded by the following list of vessels which in the space of some four years have either collided or narrowly escaped collision with this bridge :—

Record, pp. 208-10, 213, 220.	“ Norwich City ”	24th April 1928.	
pp. 264, 268-9.	“ El Grillo ”	July 1928.	
pp. 275-6. pp. 223-232.	“ Senelesco ”	9th January and 26th February 1926.	
pp. 286, 288.	“ Chilkoot ”		
pp. 310, 322-3.	“ West Hemrod ”	June 1925.	10
p. 311.	“ Eldridge ”	July 1925.	
p. 312.	“ Montana ”	April 1926.	
pp. 312, 313.	“ Edmore ”		
	“ Stuart Dollar ”	April 1928.	

10. It is submitted that the learned trial Judge and the President of the Exchequer Court were wrong in law in holding that the Second Narrows Bridge had been lawfully erected by the Respondent Company (hereinafter called “ the Bridge Company ”) and it is submitted on the contrary that the said bridge is an obstruction unlawfully erected by the Respondent in navigable tidal waters and is a public nuisance, and that the Appellant is entitled to recover damages for injury sustained by the “ Eurana ” in properly attempting to pass through the said bridge. In support of this general proposition the Appellant makes three points. 20

11. First Point.—It is submitted that the Bridge Company had no power or capacity to build any bridge which interferes with or impedes navigation and as this bridge does interfere with and impede navigation it is illegal. If this contention is correct it is submitted that no approval of the Bridge Company’s plans by any public body will make legal a bridge which does interfere with or impede navigation.

12. The Bridge Company (which is primarily a Bridge Company with limited ancillary railway powers) derived its powers to build the bridge in question from two sources :— 30

App., p.

(A) Its Private Act of the Parliament of Canada, 9-10 Edward VII (1910), Ch. 74.

Ex. 6,
Record,
p. 816.

(B) Its Crown Grant dated 9th May 1924.

(A) Section 8 of the Private Act gives the Bridge Company power to “ construct . . . a bridge over the Second Narrows of Burrard Inlet for foot passengers, carriages, street railway and railway purposes . . . so as not to interfere with navigation.”

Section 16 of the Private Act directs that the Railway Act shall apply to the Bridge Company and its undertaking. The Railway Act is a Statute of great length and deals with the whole subject of railways and railway companies. Section 3 of the Railway Act provides that "where the provisions of this Act and of any Special Act . . . relate to the same subject-matter the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to over-ride the provisions of this Act." Sections 245-248 of the Railway Act deal with the crossing of navigable waters by railway companies.

10 (B) The Grant from the Crown conveys to the Bridge Company in fee simple a portion of the bed of the Narrows, subject to the following reservation and the following condition: ". . . saving, excepting and reserving unto Us and Our Successors the free uses, passage and enjoyment of, in, over and above all navigable waters that shall or may be found on, or under, or be flowing through or upon any part of the lands hereby granted or intended so to be"

"Provided that nothing in these presents shall be held to absolve the grantee its successors and assigns or any of them, from fulfilling in all respects the requirements of Part I of the Navigable Waters' Protection
20 Act, Chapter 115, Revised Statutes, 1906; and it is an express condition of this grant that no 'work' within the meaning of said Part I shall be undertaken or constructed on the said lands by the grantee, its successors or assigns, or any of them, or shall be suffered or allowed by them or any of them, to be constructed thereon until as regards such work the provisions of said Part I shall have been fully complied with."

13. It is submitted that the controlling provision in the above sections is the clause in the Private Act which expressly prohibits any interference with navigation and that Sections 247 and 248 of the Railway Act are subordinate to this over-riding provision. The Appellant submits
30 that the Bridge Company is a statutory corporation confined strictly to its enumerated powers, that it has no capacity to build any bridge which interferes with navigation and that it has no status to apply to the Governor-General-in-Council or any other body for any permission or approval which would involve its doing anything which its Private Act did not empower it to do.

14. The above argument is founded firstly on Section 3 of the Railway Act, and secondly on the general rule of construction of statutes that where the provisions of a Special Act and a General Act are inconsistent the provisions of the Special Act shall prevail. Section 3 of the Railway
40 Act provides in terms that where the Special Act and the Railway Act "relate to the same subject-matter," the Special Act shall "over-ride"

the Railway Act so far as is necessary to give effect to the Special Act. Here there is a Special Act which deals with one "subject-matter," namely, the interference with navigation, by categorically directing that there shall be no interference. It is submitted that this provision in the Special Act over-rides the provisions of Sections 247 and 248 of the Railway Act if those sections do in fact (which is not admitted) allow the approval of plans of bridges which will interfere with navigation.

The interpretation of Sections 247 and 248 of the Railway Act contended for by the Appellant does not render these sections either inapplicable or meaningless. It is submitted that the Governor-General-in-Council and the Railway Board still have the duty to scrutinise all bridge plans, but in the case of a company in the position of this Bridge Company their duty was not to approve plans which involved interference with navigation. Subject to this duty they had full jurisdiction over the shape, size and character of the bridge in its railway or road-carrying capacity. The approval of plans by these bodies frees the Railway Company from penalties which would otherwise be incurred under Section 402 of the Railway Act by crossing navigable waters without authority, and from the risk of having the bridge removed by the Minister of Public Works under Section 5 of the Navigable Waters Act of Canada. This was the view taken by Sir Charles Fitzpatrick in the Supreme Court of Canada in *Champion v. City of Vancouver* (1918), 1 Western Weekly Reports, 216. 10 20

15. If, however, the Appellant is wrong in the contention set out above and the words in the Bridge Company's Special Act are not to be read as prohibiting all interference with navigation, it is submitted that such words must at the least be taken to prohibit any interference with navigation over and above what is reasonable and necessary. It is submitted that the evidence in the case clearly established that the bridge as built did in fact interfere with navigation more than was reasonable or necessary and that such interference was therefore unlawful. 30

16. In conclusion, the Appellant submits that if it had been the intention of Parliament that the Bridge Company were to be allowed to interfere with navigation so far as the Railway Board should think proper, there was no object in including an express prohibition in the Private Act. Since, however, Parliament has thought fit to do so, some meaning must be given to the words "so as not to interfere with navigation." The inference is irresistible that Parliament in reference to this bridge did deliberately intend to prohibit any interference with navigation or alternatively to prohibit any interference with navigation over and above what was in fact reasonable and necessary. 40

17. The Bridge Company's second source of power is its Crown Grant. The Appellant submits that so far from being a source of power to build this bridge this Grant merely emphasises the prohibition against interference with navigation. This Grant reserves to the Crown "the free use passage and enjoyment of in over and upon all navigable waters which shall or may be found in or under or be flowing through or upon any part of the said parcel or tract of land hereby granted." It is submitted that these words mean that the Bridge Company are to have and hold the parcel of land over which they are to build this bridge subject to the condition

10 that no navigable waters flowing over this site are to be interfered with. It is submitted that this reservation does not enure to the Crown alone but to all the King's subjects, and that any person who sustains damage by reason of any works built in defiance of this clause can recover such damage by the appropriate action.

18. Second Point.—It is submitted that the bridge is an illegal construction because the site and plans were not approved by the Governor-General-in-Council under the provisions of the Navigable Waters Protection Act, Ch. 115 of the Revised Statutes of Canada 1906 (as amended in 1918, Ch. 33).

20 19. It is clear that the provisions of the Navigable Waters Protection Act apply to this bridge from the express words of the Bridge Company's Crown Grant, quoted in full in paragraph 12 hereof. The Crown gave this parcel of land to the Bridge Company on the express condition that in erecting any work to which the Act applied they would comply with this Act and the Bridge Company accepted that condition. The matter is of the utmost importance because the Navigable Waters Protection Act (differing in this respect from the Railway Act) requires public advertisement of applications for approval of plans. If the Bridge Company had complied with the provisions of the Navigable Waters Protection Act and had

30 inserted in the public press advertisements of their applications for the approval of the bridge plans the shipping interests would have been afforded an opportunity of filing objections to the applications. The procedure in fact adopted by the Bridge Company has had the effect of denying to the shipping interests all opportunity of criticising or opposing the plans of the bridge as actually constructed. It is submitted that the condition in the Crown Grant that the bridge shall be constructed subject to the provisions of the Navigable Waters Protection Act, enures to the benefit of any member of the public, and that any work to which the Act applies is an unlawful obstruction to navigation if built otherwise than in

40 accordance with the provisions of the Act (*King v. Woldingham* (1925), Ex 85).

In addition to the express words of the Crown Grant the Department of Public Works at Ottawa called the Bridge Company's attention to its

Record,
p. 576.

Inter-
rogatories
15-18,
Record,
p. 18.

obligation to comply with the Act, and the Bridge Company evidently were advised that the Act must be complied with because it filed two of the bridge plans (Exhibits 36 and 2) with the Registrar of Titles at Vancouver under this Act in January and April 1923.

20. Apart, however, from the Crown Grant, it is submitted that the Navigable Waters Protection Act applies *proprio vigore* to this bridge. This is conceded unless it is excluded from the Act by Section 3 thereof. This section provides that the Act shall not apply to works of three classes, to wit:—

(A) Any work constructed under the authority of any Act of 10
the Parliament of Canada ;

(B) Any work constructed under the authority of any Act of
the Legislature of the late Province of Canada ; or

(C) Any work constructed under the authority of any Act of
the Legislature of any Province now forming part of Canada passed
before such Province became a part thereof.

The learned trial Judge and the President of the Exchequer Court have held that this bridge is a “work constructed under the authority of an Act of the Parliament of Canada” and therefore not within the Navigable Waters Protection Act. It is submitted on the contrary that the purpose and the 20
sole purpose of Section 3 was to protect existing works (i.e. works existing when this Act was first passed in its present form in 1882) from becoming illegal works. It is obvious that Parliament, in excluding from the purview of the Act works constructed under Acts of the Legislature of the “late Province of Canada” (which had ceased to exist in 1867), could not be referring to future works, but must be referring to existing works, and if the word “constructed” must mean “already or heretofore constructed” when dealing with Acts of the late Province of Canada, it must mean the same when speaking of works constructed under Acts of the Parliament of Canada. Moreover it is not reasonable to suppose that Parliament 30
intended to make the Act apply to the repairing of a bridge built under a Dominion Statute and yet that it should not be applicable to its original construction.

That the words “work constructed” in Section 3 of the Act have the meaning contended for above is made abundantly clear by a reference to the proviso at the end of Section 5 (1) of the Act where the same words appear in a context which is only susceptible of one meaning, namely, “works already constructed.” In the same proviso works not yet in existence are referred to as “works to be constructed.”

21. Third Point.—Even if it be established that approval of plans 40
under the Railway Act would have justified an interference with

navigation, it is submitted that the Bridge Company did not in fact obtain approval of the plans of the bridge which it actually built, in accordance with the provisions of the Railway Act.

22. Section 248 of the Railway Act requires :—

(A) Approval of the “general plan of the work” by the Governor-General-in-Council ;

(B) A “construction order” of the Railway Board.

It is submitted that the Governor-General-in-Council never did approve of a “general plan” of the bridge as built and that the Railway Board never
10 authorised the construction of the bridge as built.

23. The facts with regard to the approval of the “general plan of the work” are as follows :—

The “general plan of the work” filed by the Respondent for approval, and the only “general plan of the work” filed for that purpose, was Sir John Wolfe-Barry’s plan for a swing bridge. This was approved of by the Governor-General-in-Council by Order-in-Council No. 1395 of 10th June 1913. This bridge was never in fact built.

Ex. 32.
Ex. 1,
Record,
p. 804.

In 1923 the Bridge Company filed Exhibit 2 (the Northern Construction Company’s plan of a bascule bridge) with the Clerk of the
20 Privy Council and applied for its approval by the Governor-General-in-Council as a “deviation plan” (under Section 248 (2)). Exhibit 2 was approved by Order-in-Council No. 718 of 25th April 1923 and the Appellant contends that this was the only approval by the Governor-General-in-Council on which the Bridge Company can rely and that the Bridge Company can only take advantage of this approval by showing that it built a bridge in accordance with this approved plan.

Ex. 2.

Ex. 37,
Record,
p. 576.
Ex. 1,
Record,
p. 803.

24. It is, however, submitted that the Bridge Company did not build a bridge in accordance with this approved plan (Exhibit 2), as their main engineering witness in effect admits, but instead of building a bridge
30 according to Exhibit 2, they built a bridge according to Exhibits 27 and 30-C. The building of the bridge was begun in September 1923 and the piers were all in place and the interference with navigation was complete by February 1925, although the bridge was not opened for traffic until some months later.

Inter-
rogatory 19,
Record,
p. 18.
Inter-
rogatories
20, 21, 22,
Record,
p. 18.
Exs. 51, 52,
Record,
pp. 822 and
827.

The bridge as built differs from the approved plan (Exhibit 2) in the following respects :—

(1) It is 7 feet higher (22 feet instead of 15).

(2) It has eight piers instead of five.

Ex. 63,
Record,
pp. 118, 489,
506, 221, 323,
718, 655.
Record,
pp. 513,
514, 532.
pp. 462, 500,
532.

Record,
pp. 462, 466,
573, 500, 128.

(3) Three of its piers (Nos. 2, 3 and 4) are of the solid (Gassoon) type, whereas the approved plan (Exhibit 2) calls for piers formed of clusters of independent cylinders, which are essentially different.

Ex. 47,
Record,
pp. 500,
502-4, 532-3,
534, 536, 539,
542, 544, 545.

(4) It has a rock fill at the south end which is not shown on the approved plan (Exhibit 2) or alternatively a rock fill greater than that shown on the approved plan.

Inter-
rogatory 38,
Record,
pp. 19, 462,
464.

It is submitted that these are not merely changes in detail but are changes in the "general plan of the work."

Record,
pp. 500, 532,
539, 545.

Inter-
rogatory 37,
Record,
p. 18.
Record,
pp. 461-2.
Record,
p. 462.

The Bridge Company admits that, as to Nos. 1, 2 and 3 above, the 10
bridge, as built, is not in accordance with the approved plan but makes a strenuous attempt to show that the approved plan contemplated a fill at the south end. Whilst the Appellant denies this, it is sufficient for this appeal to establish that the fill, as built, greatly exceeds in size anything shown on the approved plan.

Record,
p. 65.

25. It is submitted that these radical differences between the bridge as approved and the bridge as built are fatal to the Bridge Company's case. The Bridge Company's advisers were evidently of this opinion because at the close of the plaintiff's case in the Court of first instance, their counsel 20
asked for and obtained leave to supplement this approval by other Orders-in-Council, if any could be discovered before the end of the trial. It is clear that neither the Bridge Company nor its advisers were at this date aware of any other Order-in-Council which could assist them. The trial, however, stood over for a month and when it was resumed the Bridge Company tendered an Order-in-Council of 20th August 1925 (Exhibit 26) and the plan thereto annexed (Exhibit 27). It is however submitted that these documents do not assist the Bridge Company for the following reasons :—

Record,
p. 828.

Record,
pp. 392, 395.

(A) This Order-in-Council to be effective must be brought within Section 248 of the Railway Act, and can only be deemed to be so if it can be held to be an approval of or a consent to "devia- 30
tions" from the original "general plan of the work" within Sub-section (2). But Section 248 (1) specifically provides that "approval" shall be obtained "before the commencement of the work" and it is submitted that no valid approval could be given after the work had been done as was the case here.

Record,
p. 395.

(B) It is admitted by Respondent that this Order-in-Council does not purport to confer any rights upon or to give any permission to the Bridge Company. It is submitted that it is clear on the face of the Order that His Excellency-in-Council never intended by this Order-in-Council to exercise any power under Section 248 40

of the Railway Act but that this Order-in-Council was passed to authorise a loan to the Vancouver Harbour Commissioners and for no other purpose.

10 (c) The Order-in-Council is not followed by any subsequent "construction order" of the Railway Board under Section 248 (3) of the Railway Act, which, it is submitted, is made essential by Section 248 (4). The learned Trial Judge holds that no "construction order" under Section 248 (3) is required for "deviations," but it is submitted that there is no ground for this distinction. The object of giving the Railway Board the power of saying when works shall be constructed and the terms on which they shall be constructed is as applicable to be altered as it is to original plans. The Bridge Company's own conduct in getting a construction order dated the 31st July 1923 (Exhibit 5) in respect of a deviation plan (Exhibit 34) shows that they agree upon this point.

Record,
pp. 393, 397.

(d) Finally this Order-in-Council does not even purport to approve of the following four changes which were actually made :—

Record,
pp. 813 &
826.

- 20 (A) The south span.
(B) The fill.
(C) The change in the character of Piers 2, 3 and 4.
(D) The raising of the bridge 7 feet instead of 5.

26. It is further submitted that no valid "construction order" under Section 248 of the Railway Act was ever made authorising the construction of the bridge as actually built.

The Bridge Company relies on four Orders :—

- (A) 24th July 1923, Exhibit 3 and Plan 3A.
(B) 30th July 1923, Exhibit 4 and Plan 4A.
(C) 31st July 1923, Exhibit 5 and Plan 34.
(D) 5th March 1925, Exhibit 30 and Plan 30c.

Record,
p. 806.
p. 812.
p. 813.
p. 826.

30 It is submitted that none of these Orders authorise the construction of this bridge. Of the four Orders set out above, only one, namely, the Order of the 31st July 1923 (Exhibit 5) is a "construction Order" made under Section 248 of the Railway Act. The remaining three Orders do not authorise the construction of anything and are not made under Section 248 or indeed under any section in that part of the Railway Act which deals with navigable waters.

(i) The Order of the 24th July 1923 (Exhibit 3) is made under Section 167 of the Railway Act and only purports to be

an approval by the Board of the general location and approaches of the proposed bridge as shown in Exhibit 3A.

(II) The Order of the 30th July 1923 (Exhibit 4) is made under Section 168 of the Railway Act and only purports to approve of a plan and profile (Exhibit 4A) and a book of reference.

(III) The Order of the 5th March 1925 (Exhibit 30) is made under Section 251 of the Railway Act and only purports to approve of certain plans (Exhibit 30c).

It is submitted that the Order of the 31st July 1923 (Exhibit 5), which is the only "construction Order" which the Respondents were able to produce, does not authorise the construction of the bridge as built. This Order purports to authorise the construction of a bridge essentially different from the one shown in the plan (Exhibit 2) of which the Governor-General-in-Council had approved, whereas the Railway Act specifically provides that no deviation shall be made from the approved plans without the consent of the Governor-General-in-Council. No such consent was ever sought or obtained by the Bridge Company under Section 248 of the Railway Act. The plans of the bridge which were approved by the Governor-General-in-Council (Exhibit 2) differ in five important respects from the plans of the bridge of which the Railway Board purported to authorise the construction (Exhibit 34) :—

(1) Exhibit 34 has one more pier than Exhibit 2.

(2) Pier 2 in Exhibit 34 is founded on a rock fill which is absent in Exhibit 2.

(3) In Exhibit 2, Pier 4 has two members, and in Exhibit 34 it has three members.

(4) Exhibit 2 shows a length of 675 feet from the centre of Pier 3 to the south side of the C.P.R. right-of-way, whereas Exhibit 34 shows 850 feet.

(5) The grade at the south end is different.

27. There was abundant and uncontradicted evidence that these changes were not matters of detail, but were "deviations" from the "general plan of the work" and the learned President of the Exchequer Court stated in terms that these changes were "doubtless of a very substantial character."

For the above reasons it is submitted that the Railway Board had no power to make the construction Order of the 31st July 1923 and that the Bridge Company have built their bridge without obtaining any valid construction Order under Section 248 of the Railway Act.

28. In conclusion, it is submitted that if any one of the Appellant's three points set out above is held good, it follows that the Second Narrows Bridge was constructed by the Bridge Company in navigable waters without authority, and that such bridge is an illegal obstruction to navigation and a nuisance. It is further submitted that the "Eurana," having collided with this illegal obstruction without negligence on her part, her owners are entitled to recover from the Respondent the damage which they have sustained by reason of such collision.

29. The Appellant therefore submits that the Judgments of the learned Trial Judge and of the President of the Exchequer Court, should be set aside and Judgment given for the Appellant against the Bridge Company for the damages sustained by the Appellant for the following amongst other

REASONS.

- (1) BECAUSE the Second Narrows Bridge interferes with the navigation of the Second Narrows and the Bridge Company had no power or right to build a bridge which interfered with such navigation.
- 20 (2) BECAUSE the said bridge causes an obstruction in and/or impedes the free navigation of the Second Narrows and the Bridge Company had no power or right to build a bridge which so causes an obstruction and/or which so impedes free navigation.
- 30 (3) BECAUSE the said bridge interferes with navigation and/or obstructs and impedes free navigation more than is reasonable or necessary and the Bridge Company had no right or power to build a bridge which caused more interference with, and/or obstruction and/or impediment to navigation than was reasonable or necessary.
- (4) BECAUSE the said bridge constitutes an illegal obstruction and a nuisance in public navigable waters.
- (5) BECAUSE the said bridge was a work to which the Navigable Waters Protection Act of Canada applied and the Bridge Company failed to comply with the provisions of such Act.
- (6) BECAUSE the Bridge Company had no right or power to apply to the Governor-General-in-Council or to the

Railway Board for approval of the plans of a bridge which interfered with the navigation of the Second Narrows and/or which caused an obstruction in or impeded the free navigation of the Second Narrows.

- (7) BECAUSE the Bridge Company failed to build the said bridge in accordance with any duly approved plan.
- (8) BECAUSE the Bridge Company failed to comply with the provisions of the Railway Act in that it :—
- (i) Failed to obtain the approval of the Governor-General-in-Council of the general plan of the work as ultimately executed and/or failed to obtain such approval in due time. 10
 - (ii) Failed to obtain the consent of the Governor-General-in-Council to deviations from the general plan of the work and/or failed to obtain such consent in due time.
 - (iii) Failed to obtain an order from the Railway Board authorising the construction of the said bridge as ultimately executed and/or failed to obtain such order in due time. 20
- (9) BECAUSE the judgments of the learned Trial Judge and of the President of the Exchequer Court are wrong and should be reversed.

MARTIN GRIFFIN.

G. ST. C. PILCHER.

In the Privy Council.

ON APPEAL

From the Exchequer Court of Canada.

BETWEEN

THE S.S. "EURANA"

(Defendant) - - - *Appellant*

AND

**BURRARD INLET TUNNEL
AND BRIDGE COMPANY**

(Plaintiff) - - - *Respondent.*

Case

On behalf of the APPELLANT.

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Solicitors for the (Defendant) Appellant.
