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Brompton Pulp and Paper Company Limited, Applicant, and Canadian National Railways (Canadian National Railway Company and Canadian Northern Ontario Railway Company), Respondents. Board's File No. 44168.

Mr. Glyn Osler, K.C., and Mr. J. T. Garrow appeared for the Applicant;

Mr. A. K. Dysart for the Respondent Railways.

Heard at Toronto, Ontario, on July 24th, 25th, and 26th, 1945.

JUDGMENT

Cross, *Chief Commissioner:*

Mr. C. R. Magone, K.C., attended at the hearing with a watching brief, so called, on behalf of the Attorney General of the Province of Ontario, not a party to these proceedings.

This is an application by Brompton Pulp & Paper Company Limited, a company incorporated under the laws of the Dominion of Canada, with head office in the City of Montreal, in the Province of Quebec, hereinafter referred to as the Applicant, for an Order pursuant to Section 33 of the Railway Act, R.S.C., 1927, and Amendments, directing the Canadian National Railway Company to reconstruct or alter or to remove altogether the bridges now used by it to cross the waters of the Blackwater River at mileages 25.2 and 24.9 Dorion Subdivision in the District of Thunder Bay, in the Province of Ontario, so that such bridges will not impede or obstruct the navigation and use of the said Blackwater River and so that the said Railway will cease to impede, obstruct or otherwise interfere with the Applicant's right to use the said river to run or drive its pulwood logs and timber therein in transporting the same to its pulpwood mills at Nipigon and Red Rock, Ontario.

The answer of Canadian National Railways to the application filed with the Board is made on behalf of Canadian National Railways (Canadian National Railway Company and Canadian Northern Ontario Railway Company). These companies are sometimes hereafter jointly referred to as the Railways.

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The applicant is engaged in the manufacture of pulp and paper and carries on business in the Provinces of Ontario and Quebec and elsewhere throughout Canada and in the United States of America. By the terms of an agreement, put in evidence, made between His Majesty the King in the right of the Province of Ontario and the applicant, dated the 18th day of February, 1942, the applicant was granted the right to cut and remove pulpwood logs and timber from several large timber areas in the District of Thunder Bay, in the Province of Ontario. One of the timber areas so granted comprises 1,183 square miles, more or less, situated on the east side of Lake Nipigon, and the said Blackwater River flows in a southwesterly direction through this area to empty into the said lake.

The applicant is now operating a pulpwood mill on the Nipigon River at Nipigon, Ontario, and is in the process of completing a substantially larger pulpwood mill at Red Rock, which is at the mouth of the Nipigon River where it empties into Nipigon Bay. The applicant proposes carrying on extensive cutting operations in the timber area drained by the Blackwater River, and alleges that the use of its waters is essential in order to enable the applicant economically to transport the pulpwood, logs and timber so cut to Lake Nipigon and thence to its mills at Nipigon and Red Rock.

The said two bridges constructed by the Railways, or one of the railways, at mileage 25.2 (in one or more of the maps or plans given as mileage 25.3), and at mileage 24.9, Dorion Subdivision, are pile trestle bridges. These two bridges, in respect to which the applicant complains, will be more fully described later.

The applicant contends that the said Blackwater River, particularly at high water, forms a public way or means of transportation which the public has a legal right to use; and alleges that the Railways by reason of the nature and construction of the said bridges have obstructed and are continuing to obstruct, without colour of right or authority, and contrary to Sections 245, 246, 247 and 248 of the Railway Act, the right of user which the public in general and the applicant in particular has to the waters of the said Blackwater River. The applicant further alleges that said Blackwater River is a navigable body of water and that the bridges in question constitute an obstruction in and impede the free navigation of the river.

It would seem desirable here to state the corporate history of the railway company whose line of railway is alleged to be causing the obstruction which gave rise to the present application and the authority under which such line of railway, including the two bridges in question were constructed.

In 1895, by 58-59 Victoria, Chapter 50 (Canada) The James Bay Railway Company was incorporated. It was empowered to build a line of railway from Parry Sound, in the Province of Ontario, to French River at or near Doke's Indian Reserve, thence in a northerly direction to the easterly side of Lake Wahnapital, and thence to a point at or near the mouth of Moose River on James Bay.

In 1905, by 4-5 Edward VII, Chapter 110 (Canada) The James Bay Railway Company was authorized to do two things. First of all, with the consent of the Governor in Council, to change its name, and secondly to construct lines of railway from Toronto to Ottawa; from French River, via Ottawa and Hawkesbury, to Montreal; and from Sudbury to Port Arthur. It is the line from Sudbury to Port Arthur, in the Province of Ontario, with which we are here concerned. Section 5 of the last named statute provided that the construction of the lines of railway was to be commenced within two years, and completed and put into operation within five years.

In 1906 The James Bay Railway Company changed its name to the Canadian Northern Ontario Railway Company pursuant to the Act of 1905 referred to above. The change of name was approved by the Governor in Council by Order in Council P.C. 1193, dated June 25, 1906. The Order in Council was passed pursuant to Section 2 of the Act of 1905.

In 1907, by 6-7 Edward VII, chapter 72 (Canada), the time for construction of the Sudbury to Port Arthur line was extended for another two years and the time for completion of the line for another five years.

In 1912 another Act of the Parliament of Canada was passed, that is 2 George V, Chapter 75, and the Canadian Northern Ontario Railway Company (formerly the James Bay Railway Company), under that statute, was authorized to build and put into operation the line from Sudbury to Port Arthur. This power was stated to lapse if the line was not completed in five years.

In 1914 The Canadian Northern Ontario Railway Company, for the first time, was mentioned in one of the Dominion Statutes as forming part of the Canadian Northern System in Canada. This reference is found in 4-5 George V, Chapter 20.

In 1917, by 7-8 George V, Chapter 24, the Dominion Government was empowered to acquire capital stock of Canadian Northern Railway Company and the Canadian Northern System, including the Canadian Northern Ontario Railway Company.

Then by the Canadian National Railways Act, 1919, the Canadian Northern System, including the Canadian Northern Ontario Railway Company, became part of the Canadian National Railways.

The James Bay Railway Company, now the Canadian Northern Ontario Railway Company, as previously mentioned, was, by the Act of 1905, 4 and 5, Edward VII, Chapter 119, given power to construct a line of railway from Sudbury to Port Arthur, which includes the portion of the line here in question. By subsequent enactments the time for construction was extended and, ultimately the line was completed within the statutory limits as to time.

Our attention was directed by counsel for the Railways to the powers conferred upon a railway company, in respect to construction, by various sections of the Railway Act, but it would not seem necessary to refer to them all specifically here. I will, however, mention some of the steps taken by the Canadian Northern Ontario Railway Company in compliance with the requirements of certain provisions of the Act of 1906. The route map which was then designated as Plan No. 20 was, pursuant to Section 157 (now Sec. 167), approved by the Minister of Railways and Canals, on January 14, 1911. A plan, profile and book of reference were made by the company and submitted to the Board, then the Board of Railway Commissioners for Canada, pursuant to Sections 158 and 159 (now Secs. 168 and 170). The Board, by Order No. 14717, dated September 6, 1911, approved the location of the company's line of railway as shown on the plan and profile and described in the book of reference on file with the Board under File No. 9188.62. The map or plan and profile of the railway was filed with the Registrar of Deeds at Port Arthur, Ontario, on September 16, 1911.

By Section 257 of the Railway Act of 1906 (now Sec. 251) it is provided that the company shall not commence the construction, or reconstruction of or any material alteration in any bridge, tunnel, viaduct, trestle, or other structure, through, over, or under which the company's trains are to pass, the span, or proposed span or spans, or length of which exceeds eighteen feet, until leave therefor has been obtained from the Board, unless such construction, or alteration, is made in accordance with standard specifications and plans approved by the Board.

The bridges at Warneford, mileages 24.9 and 25.2, Dorion Subdivision, were constructed in 1913 in accordance with standard plans approved by the Board by Orders No. 15344, dated October 31, 1911, No. 16360, dated April 22, 1912, and No. 10096, dated April 7, 1910.

Section 261 of the Act of 1906 (now Sec. 276) precludes a railway company from opening its line for the carriage of traffic other than for the purposes of construction of the railway until leave has been obtained from the Board. The Board by its Order No. 24,319, dated October 15, 1915, authorized the Canadian Northern Ontario Railway Company to open for the carriage of traffic its said line of railway.

The said bridges were reconstructed in the years 1930 and 1931 respectively in accordance with standard plans approved by the Board by Order No. 35,888, dated the 12th day of December, 1924.

Each of the two bridges which cross the waters of the Blackwater River at mileages 25.2 and 24.9, Dorion Subdivision, as originally constructed and as reconstructed, cross the river not at right angles to the stream, but at a flat angle.

The country through which the railway is constructed is rough with high rock cliffs and the only practical location of the railway was to follow the course of the Blackwater River. The river is a tortuous river, with a very narrow valley, and the only means by which the railway company could avoid very heavy rock cuts and tunnels was to cross the river on whatever angles it could. While the crossings in question are flat crossings they were the most practical location for the railway at the time.

The bridge, as reconstructed, at mileage 24.9 Dorion Subdivision, is a pile trestle bridge about 348 feet in length. The distance between the trestles is 12 feet from centre to centre, thus leaving an opening between trestles of about ten to eleven feet. There are 29 trestles in the bridge; between the 20th trestle and the 21st trestle (counting from the east side) the opening is about 24 feet and the line is carried over the span on steel girders.

On the upper side of this bridge at the west end of the 24 foot opening, a rock-filled glance pier has been built apparently by the Railways and improved by the applicant to carry the current of the river into the opening. This pier is six feet high and fits at an angle inside the bridge opening, and about one-third the distance along the west wall. It thereby cuts off some of the width of the opening, and lessens the width of the approach to the opening. The river between the bank and the west side of the bridge is very narrow for about 60 feet. The pier helps to facilitate the passage of the pulpwood and logs of the applicant through the bridge.

The trestle bridge, as reconstructed, at mileage 25.3, Dorion Subdivision, is similar in design and construction to the bridge at mileage 24.9 described above. It is about 348 feet in length. There are 28 trestles and the openings between the trestles are from ten to eleven feet. From the 17th to the 19th trestle (counting from the east side) has been set aside for passing wood. This has been planked on the inside to carry the wood through without catching on the piling in the trestles.

The applicants have also put three cribs in the river at this last mentioned bridge for the purpose of assisting in directing the current of the water and the flow of the wood under the bridge. The bridges are wooden bridges and will require to be rebuilt again in about three years time.

The applicant company first became interested in the use of the Blackwater River in the year 1942, when it entered into the agreement previously mentioned, dated February 18th, 1942, made between His Majesty the King, represented therein by the Minister of Lands and Forests for the Province of Ontario. Under

this agreement the applicant obtained a grant for a period of twenty-one years giving it the right to cut timber in certain areas, including an area through which the said Blackwater River runs.

The applicant commenced to cut pulpwood and logs on its Blackwater River timber limits in 1942 and has carried on such operations since that time. The pulpwood, logs and timber are placed on the ice on the river, or near the river banks during the winter season. Then, when the river opens in the spring, or during the early summer, the pulpwood and logs are floated down the river loose by a process called "driving the river". A number of men are employed on the drive to assist the wood, logs and timber on their way downstream and to prevent them from becoming or remaining lodged on the shores of the river, or in shallow places, and to prevent, as far as possible, the forming of jams at falls or rapids or other difficult places in the river. If a jam does occur it is the purpose of the men to break up the jams and release the wood, logs and timber so that they may again be floated away.

The drive of the river starts in the Beardmore area or a little above. Beardmore is a railway station on the line about four miles upstream from Warneford another station near which the two bridges are located. The total length of the drive on the Blackwater River is about twelve miles, at the end of which Nipigon Lake is entered.

The applicants have driven the river during the seasons 1943, 1944 and 1945. The quantities floated or run down, which included the passage of the two bridges, are approximately as follows: In the spring of 1943, 800 cords of pulpwood and 10,000 logs; in the spring of 1944, 6,000 cords of pulpwood; and in the spring of 1945, 23,000 cords of pulpwood.

The quantity of pulpwood which the applicant company would like to cut and drive down the Blackwater River each season is approximately 40,000 cords.

The pulpwood brought down consists of logs about eight feet in length, and the saw-logs, generally speaking, sixteen feet in length. All of these are loose logs.

The applicant contends that the two bridges at mileages 24.9 and 25.2, Dorion Subdivision of the railway, provide a definite barrier to the normal passage of wood down the Blackwater River in the spring freshets.

The nature of the location and construction of the bridges, including the openings or passage-ways through the bridges has been already fully described.

The Blackwater is a river in which there is a good deal of variation in height according to rainfall. It sometimes changes in height, in spring flood, from four to eight feet in as little as a week's time. As the river rises its main current changes somewhat. These varying conditions of the current at the bridges increase the difficulty. Because of the nature of the bridges it is necessary to direct the wood, in some instances, almost at right angles across the stream for the purpose of passing it through the openings under the bridges.

The applicant has found it necessary at certain periods during the drive to employ as many as sixteen men at one time at and in the vicinity of the bridges to assist in the direction and movement of the wood through the bridges and down the river. This, of course, occasions considerable additional expense to the applicant. The wood can only be passed through in limited quantities and, as a consequence, the amount that can be floated or run down in a given time is considerably decreased. One of the witnesses called by the applicant placed the amount at about fifty per cent of the amount they should be able to drive down the river. In this respect the lower bridge at mileage 25.2 presents the greatest problem. When a flow of wood is allowed down at the capacity for the bridge above, this lower bridge will not take it, and the result is the creation of a jam at the lower bridge.

It is clear that the bridges, and particularly the lower bridge at mileage 25.2, act as an obstruction to the normal passage of the pulpwood, logs and timber of the applicant down the river.

It should be mentioned that the water transportation method used by the applicant of running or driving its wood, logs and timber down the Blackwater River is the most economical, and the usual method of transporting wood cut on timber limits, generally speaking, in the Lake Superior District, and elsewhere in the Province of Ontario and in the Province of Quebec.

The use which has been made of the Blackwater River by the applicant since the year 1942, as a means of transportation of its pulpwood and other logs, in connection with its timber operations has already been fully stated. But the river is not capable of use for the purpose of running down or driving loose logs during the whole of the open water season. Such operations can only be successfully carried out when the water is fairly high such as during the spring run off or after periods of heavy rain. There are periods when the water is too low even for such a purpose. There is, however, no evidence to show what use, if any, the waters of the Blackwater River have been put to as a means of navigation, transportation or communication prior to the time mentioned.

The Blackwater River flows in a southwesterly direction and empties into Lake Nipigon. The portion of the river here considered extends from a point opposite mileage 16.4 on the Dorion Subdivision of the railway right-of-way four miles east of Beardmore station to below the last rapids above Lake Nipigon. Beardmore is a little more than four miles above Warneford station near which the two bridges in question are located.

In addition to the oral evidence given on the point, by witnesses called by the parties, there was put in evidence a number of maps showing the portion of the Blackwater River with which we are here more particularly interested and, also, a large number of photographs of various places on the river.

One of the witnesses called for the Railways was Mr. Westcote D. Cassels, a consulting civil engineer, of Ottawa, Canada, a man of long and wide experience in connection with matters pertaining to his profession. Mr. Cassels made an examination of the river at the request of the Railways, and his report was, at the hearing, filed as an exhibit. On this report Mr. Cassels was also fully examined and cross-examined. The examination of the portion of the river mentioned was made by Mr. Cassels in five days from June 12th to June 16th, 1945, both days inclusive, spent on the ground. At this time this witness found the water in the Blackwater River a little lower than he had expected to find it at that season of the year, and his evidence relates to conditions on the river as he found them at the time.

The Lower Blackwater (the portion in question) is a small sinuous river running through a comparatively narrow valley in forest country. The hills bordering the river are of moderate height rising in places almost from the water's edge, while elsewhere they are farther back from the stream.

The narrowest part of the river-bed is about 40 feet wide and there are occasional expanses of a few hundred feet, but, in general, it may be described as being from 60 to 100 feet in width.

The river falls rapidly on its way to Lake Nipigon. The drop is more pronounced west of Warneford station than it is east of that point, that is upstream from the bridges. The total fall of the river between Warneford and Lake Nipigon is 112 feet in approximately 9.7 miles.

There are many rapids and a number of stretches of shallow water on the section under consideration. They vary in length from under 100 feet to almost half a mile.

From mileage 16.4, about four miles above Beardmore, to mileage 26.00 the tracks of the railway follow the river closely, crossing it in four places. From mileage 26.00 (just below Warneford) to mileage 29.00 the track is within half a mile of the river. The railway then leaves the course of the river.

The immediate banks of the river are, in general, somewhat lower east of Warneford station (upstream) than they are west of that point, and there is also more low lying land adjacent to the stream.

The rainfall in the area would appear to have some bearing and I, therefore, give the following as supplied by Mr. Cassels. These figures for rainfall taken at MacDiarmid, some ten miles south and four miles west of Warneford, and which I think would be representative of the area in question, show an average of 27.4 inches over a period of ten years. In 1942, 26.1 inches fell, in 1943, 28.2 inches and in 1944 there was a record peak of 38.6 inches. This peak condition was general in the whole Nipigon Lake watershed. For example at Fort William the fall in 1944 was 37.7 inches. The average at Port Arthur and Fort William over a somewhat earlier period of 30 years was 23.32 inches.

The river above Warneford, near which the two bridges are located, has a drainage area of 275 square miles according to figures given by the Dominion Water and Power Bureau.

No periodic measurements of the flow of the Blackwater River appear to have ever been made. As this has a direct bearing on some aspects of floatability and navigability, Mr. Cassels endeavoured to secure some idea of the average monthly flow of the stream. This he did comparatively by studying the figures of the Matawin near Port Arthur, Ontario. He took that river because it, like the Blackwater, is an uncontrolled stream for which record for the year 1923 to 1944 inclusive was available.

The Matawin has a drainage basin of 990 square miles.

During the 21 years covered by the record the average monthly flow of the Matawin was, in second feet, as follows:—

Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.
480	434	337	278	266	312	887	1822	1486	895	536	479

The mean average annual flow being 684 second feet.

Taking the ratio between the drainage basins of the two rivers, and applying it to the above figures gives an indicated monthly flow for the Blackwater as follows:

Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.
133	120	93	77	74	87	246	504	411	248	148	133

The mean average annual flow being 189.4 second feet.

These figures for the Blackwater, of course, are not actual figures. But I think that the comparison used does give a fair estimate of the flow of the river.

In view of the nature of the watershed, I think that it can be expected that the Blackwater River rises rapidly after heavy rains and would fall in the same manner, and that the spring freshet would reach a considerable height, particularly when rain increased the run off from the melting snow.

The rapids in the Blackwater River, given by Mr. Cassels and which I accept, as shown in the river at the height of water existing at June 12th to June 16th, 1945, are as follows:—

1. At a point on the river directly north of mileage 16.4 there is a considerable rapid. The lower end of this rapid is a series of falls or chutes having a drop of 12 feet in 200 feet.

2. North of mileage 16.6 the river falls $2\frac{1}{2}$ feet in 20 feet over a series of stone steps.

3. There is a rapid 450 feet long near the westerly end of the Village of Beardmore. It has a fall of 5½ feet.

4. Opposite a point on the railway 165 feet west of Mile 22 there is a short rapid with a drop of somewhat more than a foot in the main section.

5. A few hundred yards further downstream there is another short rapid, over rock ledges, with a drop of some 3 feet.

6. One mile above Warneford there is a small rapid with a drop of 1½ in 100 feet.

7. A few hundred feet below Warneford there is a rapid in which the fall is 14 feet in 1600 feet. The tail end of the sweep was still in this rapid on June 12th, 1945.

8. Commencing approximately half a mile west of Mile 26 on the railway there is a series of rapids and falls some 2,000 feet long. The drop is very pronounced and levels showed that it measured 53 feet. One of the falls had a height of 8 feet or thereabouts.

9. Somewhat further downstream opposite a point between Mile 27 and 28, there is a small rapid. No estimate of the fall could be made but it is not great.

10. Below this rapid there are some miles of more quiet water broken some 3½ miles above the mouth of the river by a rapid which drops 5 feet in a distance of 700 feet. There are three separate chutes at intervals in this rapid.

11. A mile further downstream there is a total drop of 9 feet in 600 feet. This rapid is not only rough but there was a pronounced turn in it.

12. The last rapid before the lake is a small one. It is shallow and the bed is boulder strewn with transverse rock ledges.

In addition to the rapids there are some shallow stretches of fast water. One of these is in the vicinity of the trestles at Mile 24.9 and Mile 25.2.

Like most rivers the height of the immediate banks of the stream varies and the river in periods of high water flow spreads in places over the adjoining land. There is more low lying land above Warneford than below that point.

The bed of the Blackwater River varies markedly in nature at frequent intervals and any stretches of calm water are short above, below and at Warneford. The volume of flow would be irregular; being high during the spring freshets and after protracted heavy rains and low during the major part of the year. There are no expansions of any considerable length in the section under consideration.

As is seen from what has been stated, the rapids are distributed with fair regularity along the length of the stream. Nine of the twelve would seem to form definite obstacles to both navigation and the passage of cribs, rafts, or sacs of logs, as they are shallow, have considerable fall, are crossed by ledges of rock and are frequently crooked. In addition, the Blackwater River itself is so small that it offers quite inadequate space for the assembly and handling of rafts except at the outlet into Lake Nipigon and near Beardmore. On this point Mr. David W. Christie, one of the witnesses called by the applicant, stated,—"Rafting wood on a river like the Blackwater is out of the question. It is not a big enough river to raft on." There are also shallow stretches of fast water on the river, for example the one between and through the railway trestle bridges immediately above Warneford.

When the water is much higher in the river, as it is on occasions, than at the time of the examination made by the witness, Mr. Cassels, in June, 1945, the rapids, and the rough and shallow water, stand out with less prominence. And, of course, the use that can be made of the river for driving wood and logs or other purposes is always dependent on the height of the water.

We have evidence of some recent limited use of the waters of the river for canoes and some sort of small boat called a pointer, by the applicant in connection with its river driving operations. The pointer is used by the men engaged on the drive, as a means of assisting them in the process of what is described as "sweeping the river". As to use of the river by canoes, we were given two specific instances: In about the first week of August, 1944, when the river was very high due to most heavy rains in the latter part of July, Mr. David William Christie, one of the witnesses for the applicant, took a canoe down the river from the bottom of the rapids at Beardmore to the point where the river empties into Lake Nipigon and found it necessary, on only three occasions, to take the canoe out of the water. During his examination of the river in June 1945, Mr. Cassels used a canoe down the stream starting at Beardmore, but the canoe had to be taken out of the water and carried over a number of difficult points.

The use to which the Blackwater River has been put by the applicant, in recent years, for floating down loose logs has been earlier fully stated. It is amply clear from the evidence that the river is a good river for this purpose.

It is now necessary to consider what jurisdiction, if any, the Board has to deal with the matters of which the applicant complains. The Board has only such powers as are given to it by the express terms of a statute, or by necessary implication therefrom. The Railway Act of 1906 was in force at the time the railways constructed the two bridges. When hereafter I refer to a section, I shall give the number of the section as it appears in the Act of 1906 and indicate in brackets the number of the corresponding section in the present Act.

Section 26 (33) of the Railway Act gives the Board jurisdiction where the railway company has violated, or has failed to comply with, the Railway Act or the Special Act. The applicant alleges that the respondent has violated, or failed to comply with sections 154 (163), 230 (245), 233 (248) and 235 (255) of the Railway Act.

I shall deal first with Section 233 (248), which requires the railway company, before commencing the construction of a bridge across a navigable water, to submit to the Minister of Public Works, for approval by the Governor in Council, a plan and description of the proposed site of the work and a general plan of the work to be constructed; and, further, requires the railway company to apply to the Board for an order authorizing construction of the work. Admittedly these things were not done by the railway company. The question of the applicability of Section 233 (248) depends upon whether the Blackwater River at the points where the two bridges are constructed, is a navigable water. Many authorities were cited to the Board. I have read the judgments in the cases referred to and have been unable to find any principle enunciated therein which would justify me in finding that the Blackwater River is a navigable water at the points in question. I find on the evidence presented that the Blackwater River at these points is not a navigable water within the meaning of Section 233 (248), and hold that this section does not apply to the construction or reconstruction of the bridges in question.

Section 230 (245) prohibits a railway company from causing any obstruction in, or impeding the free navigation of any river over which its railway is carried. The applicant contends that this section applies not only to a river which is navigable in a legal sense, but to any river over which there is a right of way for boats of any description. On the facts as I see them, I do not think it necessary to decide this point. My finding is that the railways have not, by the construction or reconstruction of the bridges in question, caused any obstruction in, or impeded the use of the canoes and other small boats which are the only craft which have used, or could use, the Blackwater River. I am therefore of the opinion that the applicant has not shown any violation of Section 230 (245).

Section 235 (255) of the Railway Act by implication prohibits the railway from being carried upon, along or across any existing highway without leave of the Board. The applicant contends that the Blackwater River is a highway, and it is admitted that leave of the Board was not obtained for the construction of the bridges. I suppose there is no doubt that "highway", used in a wide sense, includes a way over water as well as a way over land. But it is to be noted that the crossing of navigable waters is dealt with specifically by the Railway Act in Sections 230 to 233 (245 to 248), and after considering the provisions of the sections which are included in the heading "Highway Crossings," and the definition of "highway" as given in subsection (11) of Section 2, I am clearly of the opinion that "highway" as used in Section 235 (255) means only a highway over land and does not include a water highway. I therefore hold that Section 235 (255) has not been violated.

I may add that the only evidence of user of the Blackwater River is as to its use by servants of the applicant since 1942, and that notwithstanding the rights conferred by the Lakes and Rivers Improvement Act, R.S.O. 1937, Chapter 45, and preceding legislation, I do not think that the Blackwater River is now or ever has been a highway in any sense of the word.

Section 154 (163) is as follows:—

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

In my opinion the section applies not only where a railway company diverts the course of a river, but also where, by the construction of its works, it changes or alters a river in any way so as materially to impair its usefulness. Under Section 24 of the Lakes and Rivers Improvement Act, R.S.O. 1937, Chapter 45, and preceding legislation, all persons have, and have had since the early days of the province, the right to float logs down all rivers, creeks and streams during the spring and autumn freshets. It is true that at the time the bridges were constructed there were no lumbering operations on the river. But my view is that the word "usefulness" as used in the section includes potential usefulness. I therefore find that the railway has violated the provisions of the section.

To what extent have the railways by their works impaired the usefulness of the Blackwater River for the floating of loose logs? As earlier stated, it is clear that the bridges act as an obstruction to the passage of pulpwood, logs and timber of the applicant down the river. The effect of the lower bridge at mileage 25.2, in this respect, is more serious than in the case of the upper bridge at mileage 24.9.

In my view there is an obligation on the part of the applicant to take reasonable measures by means of booms or other works to control the flow of the logs. The applicant has not, of course, a paramount or exclusive right to the use of the river for the passage of its logs. There must be some accommodation of interests, and it seems to me that it is an abnormal and unreasonable use of the river to run great masses of logs without some degree of control.

I find, however, that the construction and reconstruction of the bridges materially impaired the usefulness of the river. There remains for consideration what action the Board should take under the circumstances.

The applicant was not prepared to suggest what size of an opening under either of the bridges would be necessary, or what other or additional remedy might be applied to reasonably satisfy its complaint.

On the evidence before us I find it impossible to say, in precise terms, what alterations in the bridges the railways should be required to make.

My understanding is that the primary interest of the parties to this application is to obtain the Board's decision as to whether the railway company has violated the provisions of the Railway Act. That decision has been given. I hope that the parties can now come to an agreement as to what changes the railway company should make in the bridges. If they reach an agreement, and it is approved by the Board, the Board will incorporate the terms of the agreement in an order. If they fail to reach an agreement, the Board will, on the application of either party, direct its Chief Engineer to inspect the bridges and make a report, and will then make an order specifying the changes to be made.

One point which I have not dealt with relates to a question of title. The applicant contends that the railway has no title to the bed of those parts of the Blackwater River over which the bridges are constructed. Generally speaking, it is not the function of the Board to decide questions of title; such matters are for the provincial courts. In the present case the applicant bases its claim for relief on the allegation that the railway has violated or not complied with the sections of the Railway Act above referred to. In the case of none of these sections does the answer to the question whether it has been violated, or not complied with depend, in my opinion, on whether the railway company owns the bed of the river. For these reasons I do not think it necessary or proper to decide the question of title above referred to.

Dated Ottawa, October 3rd, 1945. J. A. CROSS

I concur

HUGH WARDROPE

J. A. STONEMAN.

Application of The Bell Telephone Company of Canada for an Order, under Section 373 (3) and all other relevant sections of the Railway Act, for authority to construct, erect and maintain its line or lines of telephone (buried cable) across and under certain public highways or road allowances within the corporate limits and under the municipal jurisdiction of the County of Middlesex, as set forth and described in the application; and questions relating to terms and conditions as reserved by paragraph 2 of Order No. 66276, dated the 23rd day of July, 1945.

File No. 44484

JUDGMENT

BY THE BOARD:

By Order No. 66276, dated July 23, 1945, the Board authorized The Bell Telephone Company of Canada (hereinafter referred to as "the company") to construct, erect and maintain its line or lines of telephone (buried cable) across and under certain highways or road allowances in the County of Middlesex, as in the said Order set out. Paragraph 2 of the Order provides that "all questions relating to terms and conditions in respect of this application and the works hereby authorized be, and they are hereby, reserved for further consideration and order of the Board."