

IN THE MATTER OF A REFERENCE AS TO THE JURISDICTION OF THE EXCHEQUER COURT, OR A JUDGE THEREOF, AND THE APPLICATION OF THE RAILWAY ACT AND THE EXPROPRIATION ACT IN CONNECTION WITH LAND TAKEN BY THE CANADIAN NATIONAL RAILWAY COMPANY UNDER THE PROVISIONS OF CHAPTER 13 OF THE STATUTES OF CANADA, 1919.

1925
*Oct. 6.
*Nov. 2.

THE CANADIAN NATIONAL RAIL- }
WAY COMPANY (PETITIONER)..... } APPELLANT;

AND

ELLEN BOLAND (RESPONDENT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Canadian National Railways—Expropriation Act, R.S.C., c. 143, s. 21—Jurisdiction of the Exchequer Court—Railway Act, 1919, c. 68—Special Act incorporating Canadian National Railway Company (1919), c. 31, ss. 13, 15.

Expropriation proceedings by The Canadian National Railway Company to obtain possession of land are governed by the provisions of the *Expropriation Act* and not by those of the *Railway Act*.

A judge of the Exchequer Court of Canada has jurisdiction to issue a warrant for possession under s. 21 of the *Expropriation Act* and may exercise it before the commencement of proceedings to fix compensation.

Judgment of the Exchequer Court of Canada ([1925] Ex. C.R. 173) reversed.

APPEAL from a decision of the Exchequer Court of Canada (1) dismissing the appellant's petition.

By an order of the Board of Railway Commissioners for Canada dated June 5, 1924, the appellant company was directed *inter alia* to construct a subway on Bloor St., Toronto, after plans of work had been filed with and approved by the Board. Under provisions of the *Expropriation Act*, R.S.C., c. 143, the railway company took certain land owned by the respondent who resisted the expropriation proceedings contending that provisions for taking land in s. 257 (2) of the *Railway Act*, 1919, were applicable

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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to the case and not those of the *Expropriation Act*. The appellant's petition to the Exchequer Court of Canada under the provisions of s. 21 of the *Expropriation Act* for a warrant to put it in possession was dismissed for want of jurisdiction.

Pending an appeal by the railway company, the following questions were referred to this court by order in council of May 29, 1925, pursuant to the authority of s. 60 of the *Supreme Court Act*:

In the case of lands or interests therein taken by the Canadian National Railway Company under the provisions of chapter 13 of the statutes of Canada, 1919:

1. Are the provisions of the *Railway Act* or the *Expropriation Act* applicable to proceedings by the company to obtain possession of such lands?

2. Has the Exchequer Court of Canada, or a judge thereof, jurisdiction to entertain an application by the company for a warrant of possession under section 21 of the *Expropriation Act* as made applicable *mutatis mutandis* to the company by section 13 of the Canadian National Railways Act, 1919?

3. If question 2 be answered in the affirmative, has such court or judge power to issue such warrant prior to the commencement of proceedings by notice of expropriation or otherwise to ascertain the compensation payable in respect of the taking of such lands or of interests therein?

The appeal and the reference were heard together.

Lafleur K.C. for Attorney General of Canada, upholding the jurisdiction of the Exchequer Court.

Geoffrion K.C. for Attorney General of Canada, *contra*.

Geo. F. Macdonnell for the Canadian National Railway Company.

Smyth K.C. for respondent Boland.

The judgment of the court on the reference (and on the appeal), was delivered by

ANGLIN C.J.C.—In regard to “the taking or using of lands,” s. 13 of the statute 9-10 Geo. V, c. 13, enacts, by exception, that the provisions of the *Expropriation Act* (R.S.C., c. 143), shall apply to the Canadian National Railway Company in lieu (*inter alia*) of the sections of the *Railway Act* which deal with these subjects. The answers to the questions submitted by Order in Council for our consideration depend upon whether proceedings to obtain possession of lands to be acquired compulsorily for the purpose of the railway are to be regarded as included in the exception so made by s. 13 to the general application of

the Railway Act, or whether they should be regarded as incidental to proceedings for the ascertainment of compensation with which they are grouped in the Railway Act (ss. 215-243, 9-10 Geo. V, c. 68) under the heading EXPROPRIATION PROCEEDINGS, whereas a preceding fasciculus (ss. 189-214) carries the heading THE TAKING AND USING OF LANDS.

Apart from any inference to be drawn from collocation in the statute, the obtaining of possession would seem to fall naturally within "the taking of" lands rather than within "the ascertainment of the compensation" to be paid for them.

Upon careful examination the entire set of provisions embraced in ss. 189-243 of the Railway Act are seen to relate to the acquiring of lands for the purposes of the railway and it seems clear that, notwithstanding the fact that the heading EXPROPRIATION PROCEEDINGS is in the same type as the earlier heading THE TAKING AND USING OF LANDS, namely small capitals, whereas sub-headings in the same statute are printed in *italics*, the sections dealing with proceedings for acquisition by expropriation, commencing with no. 215, must be regarded for present purposes as relating to, and a sub-division of, what is comprised under THE TAKING AND USING OF LANDS. S. 214, which is found under that heading and immediately precedes the heading EXPROPRIATION PROCEEDINGS makes this abundantly clear. It reads as follows:

214. In cases of disagreement between the parties or any of them, all questions which arise between them shall be settled as hereinafter provided.

Sections 215 *et seq.* proceed to provide for the mode of acquisition where transfer of the lands and settlement of matters incidental thereto by agreement under s. 213 is not feasible.

In this view of the matter ss. 239 *et seq.* which deal with the obtaining of possession in cases of resistance, must be regarded as having to do with "the taking or using of lands" and therefore within the purview of the exception to the application of the Railway Act made by s. 13 of the Canadian National Railway Company Act.

In conformity with this view we find a specific provision made by clause (c) of subs. 2 of s. 13 for the application to

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expropriations by the Canadian National Railway Company of the provisions of the Railway Act respecting the ascertainment of compensation, which might otherwise be deemed to have been excluded under the general exception made in regard to "the taking or using of lands."

While, therefore, the subsequent proceedings in regard to the ascertainment and payment of compensation for lands to be acquired by the Canadian National Railway Company are to be taken under the sections of the Railway Act commencing with s. 215, which provides for the notice of expropriation, it is the jurisdiction for the acquisition of possession conferred by s. 21 of the Expropriation Act (R.S.C., c. 143) which the company must invoke in order to obtain possession compulsorily.

Although the Canadian National Railway Company is admittedly a corporation entirely distinct from the Crown and is not to be regarded as a department of the Government of Canada, its national character and the fact that it is an instrument created by statute for the management, operation and control of the Canadian National Railway System must not be ignored. Lands to be acquired compulsorily by it being vested in the company (s. 13 (2) (b), 9-10 Geo. V, c. 13), by and upon the deposit of plans under the Expropriation Act, no good reason has been suggested why immediate possession of such lands should not be available to the company as provided for by s. 21 of the Expropriation Act. The provisions of ss. 239-240 of the Railway Act as to payment into court of compensation money or the giving of security therefor would seem to be unnecessary and inappropriate.

By subs. 1 of s. 13 of the Canadian National Railway Company Act the provisions of the Expropriation Act are made to apply only when not "inconsistent with this Act" and *mutatis mutandis*. But we are unable to discern anything in s. 15 of the Canadian National Railway Company Act which excludes, as inconsistent, the exercise by the Exchequer Court of the jurisdiction conferred on it by s. 21 of the Expropriation Act where lands are acquired by the Canadian National Railway Company. The jurisdiction of the judge of the Exchequer Court under s. 21 of the Expropriation Act is concurrent with that of "any judge of

any superior court." S. 15 of the Canadian National Railway Company Act is permissive; it is declaratory of the powers of a judge of any court of competent jurisdiction in Canada; the definition in subs. 2 of a court of competent jurisdiction is not framed as exclusive; the entire section is consistent with the existence of jurisdiction in the judge of the Exchequer Court concurrent with that of the judges of the provincial superior courts. The apparent office of s. 15 is to dispense with the necessity of a *fiat* which might otherwise have been deemed a prerequisite to proceedings against the company in view of its national character, and to provide for the right of appeal, notwithstanding that the judge acting under s. 15 might be regarded as *persona designata*. Unusual as it undoubtedly is that the Exchequer Court should entertain proceedings as between subject and subject, except in matters concerning patents, copyrights and trade-marks, having regard to the national character of the Canadian National Railway Company and its relation to the Government of Canada, it seems not inappropriate that that court should be vested with the jurisdiction here in question.

To the questions submitted we, therefore, make the following answers:

Question No. 1: The provisions of the Expropriation Act apply.

Question No. 2: Yes.

Question No. 3: Yes.

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ANGLIN C.J.C.—For the reasons stated above we are, with respect, of the opinion that the judgment of the learned judge of the Exchequer Court declining jurisdiction in this case was erroneous.

For the reasons stated by Mr. Justice Middleton in delivering the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of Orde J., in *Boland v. Canadian National Railway Co.* (2), we agree with the conclusions of that court that the impugned expropriation falls within the provisions of the Railway Act, 1919, and that the order

(1) 56 Ont. L.R. 653.

(2) 29 Ont. W.N. 41.

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of the Board of Railway Commissioners of Canada was sufficient to justify all that has been done by the railway company.

The appeal will accordingly be allowed with costs and the proceedings will be remitted to the learned judge of the Exchequer Court to be pursued under s. 21 of the Expropriation Act.

Appeal allowed with costs.

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*

Solicitor for the Canadian National Railway Co.: *George F. Macdonnell.*

Solicitors for the respondent Boland: *Macdonnell & Boland.*
