Montreal 1968 June 25 Ottawa July 2

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

ALEXIS NIHON .....DEFENDANT.

Expropriation—Deposit of plan—Statutory presumption that described land necessary for public work—Not reviewable by court—Expropriation Act, s. 12—Canadian National Montreal Terminals Act, S. of C. 1929, c. 12.

Section 12 of the *Expropriation Act* provides that the filing of a plan of land taken for a public work shall be deemed to indicate that in the expropriating Minister's judgment such land is necessary for that work.

Defendant landowner alleged in its statement of defence that not all of the land taken was necessary for the public work contemplated.

Held, the allegation should be struck out. The Minister's judgment that the land was necessary is not reviewable.

The King v. Toronto [1946] Ex. C.R. 424, followed; *Boland v. C.N.R.* [1927] A.C. 198, distinguished. *Canadian National Railways Act,* S. of C. 1919, c. 13, s. 13; R.S.C. 1927, c. 172, s. 17, am. 1929, c. 10, s. 2; *Canadian National Montreal Terminals Act* S. of C. 1929, c. 12, ss. 7, 9 considered.

APPLICATION.

André Perrault for plaintiff.

R. H. Walker, Q.C. and *John H. Gomery* for defendant.

JACKETT P.:—An application was made before me herein at Montreal on Tuesday, June 25, 1968, to strike out certain portions of the statement of defence (including certain paragraphs in the "particulars" of the defence).

The action was instituted by the Attorney General of Canada under the *Expropriation Act* to have the compensation for land taken under that Act determined and the portions of the defence that are the subject matter of the motion to strike out are the portions thereof whereby the defendant attacks the expropriation as having been invalid in whole or in part because the lands "alleged to have been taken" were not "to their full extent, necessary for the public work contemplated in the statement of claim". Apart from one respect to which I will refer hereafter, counsel for the defendant made it clear that the provisions in the defence that are attacked were not intended to raise

any attack on the validity of the expropriation except attacks based on the contention that some part or all of the lands that were the subject of the expropriation procedures were unnecessary for the public work for which they were said to have been taken. In other words, no question is raised as to the various steps contemplated by the *Expropriation Act* to take land having been duly taken. In these circumstances, the plaintiff's motion is based on section 12 of the *Expropriation Act*, which reads as follows:

> 12. 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 plaintiff says in effect, as I understand it, that, when a plan and description purporting to be signed by the deputy of the appropriate minister has been duly deposited of record under the *Expropriation Act*, section 12 operates, *inter alia*, as

(a) a statutory requirement that it shall be taken as indicating that "in his judgment" (i.e., the judgment of the minister) "the land therein described is necessary for the purpose of the public work", and

(b) a statutory prohibition against the plan and description being called in question by any person other than "the minister, or by some person acting for him or for the Crown".

Superficially, section 12 appears to be applicable here. The defendant admits that a plan and description signed by the deputy of the appropriate minister was duly deposited in the manner contemplated by the *Expropriation Act*, but nevertheless attacks the validity of the expropriation in whole or in part on the basis of an allegation that the lands described in the plan and description "were not, to their full extent, necessary" for the "work". Section 12, as it has been interpreted by this Court, would appear to prohibit any person other than the minister or some person

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acting for the Crown making any such attack. See *The King v. City of Toronto et al*[1] and *The King v. North York Township et al.*[2]

However, the matter cannot be disposed of so summarily because the decision of the Privy Council in *Boland v. Canadian National Railway Company*[3] indicates that there can be circumstances in which the Court must consider whether land described in a plan and description filed in the manner provided by the *Expropriation Act* was validly taken for a work for which it could be expropriated under that Act.

Before proceeding to consider the matter in detail, I should say that, after hearing counsel on the question whether the question should be dealt with at this stage or left for consideration by the trial judge, I came to the conclusion, and I think counsel for both parties were in agreement, that it was a question that should be decided before the parties should proceed to discovery or trial. This is a very substantial expropriation case. The Crown is willing to pay $60,636.20 and the defendant claims over $2,000,000. The expropriation took place over seventeen years ago. The claim of the defence involves the Court in an investigation of "a large real estate development plan" upon which the defendant says that it had embarked before the expropriation. The case is related to another case (No. 141672) between the same parties in which the amounts involved are even larger and in which the same general problems arise. In my view, it will be difficult enough, for the Court and for counsel, to conduct a trial or trials of these two cases on the compensation questions without it being necessary to try at the same time the very intricate and difficult question of fact as to what lands are or were "necessary" for the Canadian National Montreal Terminal. In my view, the question of law as to whether section 12 operates to prohibit the Court from embarking on any such inquiry should be determined in advance of discovery and trial so that the trial or trials of the compensation questions will not become involved with a substantial inquiry concerning facts that are otherwise irrelevant unless the Court is properly concerned with them.

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[1] [1946] Ex. C.R. 424.
[2] [1948] 2 D.L.R. 381.
[3] [1927] A.C. 198.

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Before examining the pleadings in this action, it may be helpful to refer to legislation some knowledge of which is necessary to understand the background.

The *Expropriation Act*[4] has remained unchanged, with one irrelevant exception, since the Revised Statutes of 1906 (chapter 143). The courts have uniformly proceeded on the view that this statute authorizes the Crown to expropriate land by the filing of a plan and description of the land to be taken in the appropriate registry office, although the statute is not as appropriately worded to achieve that end as it might be. Section 3(*b*) authorizes the Minister (who, by definition, is the head of a department charged with the construction and maintenance of a public work) to "enter upon and take possession of any land...the appropriation of which is, in his judgment, necessary for...the public work". Section 9(1) then contains two apparently separate provisions, although they are linked together by cross references in one to the other. They are

(a) "Land taken for the use of Her Majesty shall be laid off by metes and bounds"; and

(b) "when no proper deed or conveyance thereof to Her Majesty is made...or when, for any other reason, the Minister deems it advisable so to do, a plan and description of such land signed by the Minister ...shall be deposited of record in the office of the registrar of deeds for the county...in which the land is situate, *and such land, by such deposit, shall thereupon become and remain vested in Her Majesty.*

(The italics are mine.)

It is in relation to these provisions in section 9 that section 12, which I have already quoted, must be read. For convenience, I repeat that section here.

> 12. 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

[4] R S C. 1952, chapter 106.

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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.

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While the opening words of section 9 seem to contemplate that land will already have been "taken for the use of Her Majesty" before the necessity of filing a plan and description arises, section 12 seems to provide that it is unnecessary to inquire whether any such prior taking has occurred once a "plan and description", duly signed, has been deposited.

The next statute to which reference should be made is the *Canadian National Railways Act*.[5] That statute recited that it was expedient to provide for the incorporation of a company under which the railways of the Canadian Northern system might be consolidated, and together with the Canadian Government railways operated as a national railway system. After providing for the constitution of the Canadian National Railway Company, the statute provided (section 11) for entrusting to that company by order in council the management and operation of any railways or other properties owned, controlled or occupied by Her Majesty, for the transfer to that company of the stocks in railway companies which the Crown had previously acquired, or might thereafter acquire (section 12), and for the construction and operation by that company of new railways (section 23). Section 13 of the 1919 Act[6] provided *inter alia* for using the *Expropriation Act* for acquiring land for the Company's undertaking. Section 13 read as follows:

> 13. (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 lands) 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.
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> (2) With respect to the undertaking of the Company,—
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> (*a*) Any plan deposited under the provisions of the *Expropriation Act* may be signed by the Minister of Railways and

[5] S. of C. 1919, c. 13; R.S.C. 1927, c. 172.

[6] Sec. 17 of R.S.C. 1927, c. 172.

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.

Section 13[7] was repealed by chapter 10 of the Statutes of 1929 and the following was substituted therefor:

17. (1) All the provisions of the *Railway Act* shall apply to the Company, except as follows:—

(*a*) such provisions as are inconsistent with the provisions of this Act;

(*b*) the provisions relating to the location of lines of railway and the making and filing of plans and profiles, other than highway and railway crossing plans;

(*c*) such provisions as are inconsistent with the provisions of the *Expropriation Act* as made applicable to the Company by this Act.

(2) (*a*) All the provisions of the *Expropriation Act*, except where inconsistent with the provisions of this Act, shall apply *mutatis mutandis* to the Company;

(*b*) 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;

(*c*) 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;

(*d*) The compensation payable in respect of any lands or interests therein taken by the Company under the provisions of the *Expropriation Act* as made applicable to the Company by this Act shall be ascertained in accordance with the provisions of the *Expropriation Act*, and for that purpose the Exchequer Court shall have jurisdiction in all cases relating to or arising out of any such expropriation or taking and

[7] S. of C. 1919, c. 10; R.S.C. 1927, c. 172, s. 17.

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may make rules and regulations governing the institution, by or against the Company, of judicial proceedings and the conduct thereof: Provided that such compensation may, in any case where the offer of the Company does not exceed two thousand five hundred dollars, be ascertained under the provisions of the *Railway Act,* beginning with notice of expropriation to the opposite party. The amount of any judgment shall be payable by the Company.

(3) Lands or interests in lands required by any company comprised in the Canadian National Railways may be acquired for such company by the Company under the provisions of this Act.

The next statute is the one which provides for the works giving rise to the necessity for the lands for which the expropriations in question were effected. It is the *Canadian National Montreal Terminals Act,* 1929.[8] Section 2 of this Act authorizes the Governor in Council to provide for the construction and completion by the Canadian National Railway Company of terminal stations, buildings, tracks, and other works specified in great detail, with "the right to acquire or to take under the provisions of section nine of this Act or otherwise lands and interests in lands for all such purposes, all on the Island of Montreal...or on the mainland adjacent thereto". Section 3 provides for the company raising money by the issuance of securities in respect of the construction and completion of such works, such securities to be guaranteed by the Crown. Section 6 provides for the proceeds of the sale of the securities being held in trust by the Minister of Finance for the company to be released to the company to meet expenditures in connection with the said works, and it also provides that "The said works may be constructed upon property from time to time owned, acquired or taken by the Company", as well as upon property of other companies comprised in the Canadian National Railways such as the Canadian Northern Railway Company and, with the approval of the Governor in Council, "upon property belonging to the Crown". Section 7 provides *inter alia* for the "general plan or plans of the said works" being approved by the Governor in Council. Section 9, which contains the authority for the expropriation in question, then reads as follows:

9. Certain expropriation plans and descriptions heretofore deposited, under the *Expropriation Act,* by or on behalf of the Minister of Railways and Canals for the purposes of the Government Railways having vested in His Majesty lands now required for part of the said works, other plans and descriptions showing lands or interests in lands

[8] Chapter 12 of the Statutes of 1929.

> required or taken from time to time in connection with the said works may be deposited by or on behalf of the said Minister under the *Expropriation Act*. The compensation to be paid in respect of any such taking, subject to the usual right of abandonment as provided in the *Expropriation Act*, may be paid out of the trust funds deposited to the credit of the Minister of Finance under section six of this Act, and upon such payment the lands or interests in lands thereby taken or vested in His Majesty shall upon request be transferred by His Majesty to the Company.

While the provisions prior to section 9 seem to contemplate the works authorized by this Act as being Canadian National Railway Company works, as opposed to Government Railways works, it is to be noted that section 9 refers to certain properties having been expropriated under the *Expropriation Act* "for the purposes of the Government Railways" and now being required for part of the said works, and then provides, and these are the significant words:

> ...other plans and descriptions showing lands or interests in lands required or taken from time to time in connection with the said works may be deposited by or on behalf of the said Minister under the *Expropriation Act*.

Nevertheless, we find that the compensation to be paid in respect of such taking under the *Expropriation Act* is to be paid out of the trust funds raised by securities issued by the Canadian National Railway Company and that, upon such payment, the title in the land is to be transferred by the Crown to the company. It is also of interest to note that section 11 provides that the Minister shall present to Parliament at the beginning of each session "held prior to the completion of the said works" a statement showing the nature and extent of the work done under the authority of the Act, and also provides that the Canadian National Railways shall keep separate accounts of all credits to the trust fund and expenditures made in connection with the said works.

Having reviewed these statutory provisions, I can now turn to the pleadings.

The Information herein, which was filed on November 18, 1957, alleges (paragraph 1) that lands were taken under the *Expropriation Act* by the Crown "for the purposes of a public work of Canada, being the Government Railways" pursuant to the provisions of the *Canadian National Montreal Terminals Act*, 1929, by the deposit of a plan and description with the Registrar of Land in

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Montreal on June 11, 1951, and that such plan and description was signed by the Deputy Minister of Transport. Paragraph 2 alleges that, by virtue of deposit of the said plan and description, the lands in question were vested in the Crown. The Information then goes on to describe a portion of the lands so alleged to have been taken and to say that the defendant claims to have been the owner of the lands so described at the time of the taking by the Crown of such lands. The remainder of the provisions in the Information are irrelevant for the present purposes.

The portions of the statement of defence to which objections are taken read as follows:

> 1. They admit the deposit of the Plan and Description with the Registrar of Land for the Registration Division of Montreal under the No. 898618 on June 11, 1951, referred to in Paragraph 1 of the Information and the said Paragraph 1 is otherwise denied;
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> 2. Paragraph 2 of the Information filed herein is denied;
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> * * *
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> 4. They deny that the lands referred to in Paragraph 4 were taken by the Crown but the Paragraph is otherwise admitted;
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> * * *
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> 31. That the lands described in the Statement of Claim, and alleged to have been taken by Her Majesty were not, to their full extent, necessary for the public work contemplated in the Statement of Claim, and Her Majesty has disposed of or shall dispose of at least a portion of the said lands at times when the values of such lands were, or shall be, considerably higher than their value as on June 11th, 1951, the date of the filing of the plan and description in relation to the said lands;
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> 32. That where lands alleged to have been taken, have been or shall be found to be in excess of the actual requirements of the public work contemplated in the Information, Defendant has a right to the return of such excess of land, or to be compensated therefor in relation to its value at the time of disposal by Her Majesty to other parties, should such value exceed the value of such lands to Defendant on June 11th, 1951, and Defendant estimates the value of such lands over and above the amount claimed in Paragraph 23 of this Defence, on the dates of their subsequent disposal by Her Majesty to be the sum of $1,397,856.83;

Pursuant to order of the Court, on March 13, 1962, the defendant gave "particulars of the defence", and the relevant portions thereof read as follows:

> (A) With respect to paragraphs 1, 2 & 4 of the Defence the Defendant and the Mis-en-Cause state that the basis and the reasons invoked by them for denying in said paragraphs the validity of the expropriation referred to in the present action are that the lands purported to have been taken thereby, or in any event their full extent, were not necessary for the use, construction, maintenance or

repair of a public work of Canada or for obtaining better access thereto, have not been put to such uses nor are they intended to be put to such uses;

* * *

(K) With respect to paragraph 31 of the Defence the Defendant and the Mis-en-Cause state that they are unable to indicate in detail which lands described in the Information and to what extent they are unnecessary for the public work contemplated in the Information nor which lands the Plaintiff will dispose of or when such disposition has been or will be made, since neither the Defendant nor the Mis-en-Cause are privy to the plans of Plaintiff in this regard. However, the Defendant and the Mis-en-Cause rest their contentions with respect to such allegations contained in paragraph 31 upon the fact that no commencement has been made by the Plaintiff or those for whom it acts upon the public work alleged to have necessitated the expropriation within the lengthy period which has intervened between the date of the expropriation and the present, nor has there been any indication that such works are to be commenced, and the Defendant and the Mis-en-Cause can only conclude that the vast expense (*sic*) of land area expropriated will be devoted to purposes other than those for which the expropriation is alleged to have been necessary;

* * *

(L) With respect to paragraph 32 of the Defence the Defendant and the Mis-en-Cause state that they are unable to know which of such lands will be found to be in excess of actual requirements nor when such determination shall be made since these are matters solely within the knowledge of the Plaintiff or those for whom she acts and such knowledge has not been imparted by the Plaintiff to Defendant and the Mis-en-Cause. Defendant and the Mis-en-Cause have, therefore, no choice but to assume that all lands purported to have been taken shall be found to be not required for the purpose stated in the Information and to claim an additional sum equal to an estimated increase in value in the said lands between the date of the expropriation and the date of the disposal of such lands by the Plaintiff to persons other than Defendant or the Mis-en-Cause. The Defendant and the Mis-en-Cause have, therefore, estimated such increase of value at a uniform rate of .50 per square foot for all lands purported to have been taken and have calculated the said sum of $1,397,856.83 on such basis.

As I read these various provisions in the statement of defence, and the particulars that are under attack, they are based exclusively on the view that it can be established that the lands that are the subject matter of the expropriation, or at least some part of such lands, were "unnecessary" for the "public work contemplated in the Information". They do not allege that the lands were taken for some work other than one falling within the relevant expropriating authority.

I turn now to consider what was decided in *Boland v. Canadian National Railway Co.*, the decision of the Privy Council to which I have already referred. In that case the

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Canadian National Railway Company had filed a plan and description under the *Expropriation Act* pursuant to section 13 of the *Canadian National Railway Act* of 1919 for a parcel of land that was required to construct a roadway to give certain premises access to a subway under the railway that was being constructed pursuant to an order of the Railway Board of Canada, and the validity of the expropriation was attacked by the owner of the land in question. The Privy Council held that the proposed roadway for which the lands were taken was no part of the railway undertaking but was part of the municipal road system, and that the expropriation was not, therefore, authorized by the *Canadian National Railway Act* of 1919. In disposing of this branch of the case, Viscount Dunedin makes a reference to section 11 of the then *Expropriation Act* which is the same as section 12 of the present *Expropriation Act,* in a passage that reads as follows:

> 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 views 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 s. 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.

As I understand this decision, it means that the Court must consider an attack on an expropriation based upon an allegation that the work for which the land was taken is not a work for which the expropriating authority was authorized to take land. It does not say that section 12 must not be given full force where the work does fall within the expropriating authority, but there is an attack based on an allegation that the land taken or some part of it is not necessary for that work. In any event O'Connor J., giving the judgment of this Court in *The King v. City of Toronto,*[9] held, after considering the Privy Council decision, that section 12 operated to require that "the filing of the plan shall be deemed to indicate that in the Minister's judgment the land is necessary for the purpose of a public work", and that "his judgment is not open to review by the Court by reason of section 12", and I adopt his view of

[9] [1946] Ex. C.R. 424.

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the effect of that section. Even apart from his decision, I should have thought I would reach the same conclusion. Compare *Calgary Power Ltd. v. Copithorne*[10].

I am therefore of the view that the defences to which objection have been taken are not open to the defendant and that the offending provisions of the statement of defence and of the Particulars should be struck out.

There is, however, a matter to which I referred earlier with which I must deal. Counsel for the defendant indicated that it had been the intention in making the pleas that I have decided to strike out, to raise, not only the attack based on the necessity of the land taken for the works in question, but also to raise a contention that the lands in question were not for works included in a "general plan or plans of the said works" that had been approved by the Governor in Council as was required by section 7 of the *Canadian National Railway Montreal Terminals Act*. The order will be, therefore, that the portions of the statement of defence and the particulars in question are struck out and that the defendant has leave to substitute therefor an appropriate pleading, which must be satisfactory to the Court, raising the defence under section 7.

Finally, I should say that counsel for the defendant also urged that, even if my decision is against him on the main question, the latter part of paragraph 31 of the statement of defence should be allowed to stand. That part reads as follows:

> ...Her Majesty has disposed of or shall dispose of at least a portion of the said lands at times when the values of such lands were, or shall be, considerably higher than their value as on June 11th, 1951, the date of the filing of the plan and description in relation to the said lands;

Counsel was not able to suggest to me any view upon which this allegation would be an allegation of a material fact even if it is a fact that might be admissible as evidence. (Compare Rule 88 of the Exchequer Court Rules.) I must, therefore, refuse to accede to this submission.

When counsel have had an opportunity to consider the terms of an order to implement these conclusions, I will pronounce my order after hearing what they have to say. Costs of the application will be to the plaintiff in any event of the cause.

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[10] [1959] S.C.R. 24.