Privy Council Appeal No. 26 *of* 1931.

O. Martineau and Sons, Limited - - - - - *Appellants*

v.

The City of Montreal and another - - - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD NOVEMBER, 1931.

Present at the Hearing:

LORD BLANESBURGH.
LORD MERRIVALE.
LORD WARRINGTON OF CLYFFE.
LORD TOMLIN.
LORD THANKERTON.

[*Delivered by* LORD BLANESBURGH.]

The action out of which this appeal arises was instituted by the appellant Company in the Superior Court, District of Montreal, on the 3rd September, 1927, in order to have declared unconstitutional and inoperative, so far as they affected its own proprietary interests, certain proceedings taken by the City of Montreal for the expropriation of the appellant Company and other contiguous owners from properties of theirs required by the Corporation for the extension of Rosemount Boulevard from Chambord Street to Papineau Street, all within the area of the city. Thirty-two properties were scheduled for this extension. Those in the plan of expropriation numbered 21, 22 and 23 belonged to the appellant Company, and it is with them that the present litigation has been concerned. They represent a strip of land 500 feet in length and 266 feet in breadth, constituting the centre of a quarry then in active operation by the Company.

On the 17th June, 1927, the Corporation, following, as it conceived, the procedure prescribed by the city's charter, presented to the Superior Court of the Province of Quebec a petition praying that the Court would fix the day for the Public Service Commission of Quebec, by its President, to proceed to inquire into and assess the compensation payable to the different expropriated proprietors, and the date also on or before which the Commission should report the result of its inquiry. By an order of Court on that petition made the same day the Commission was directed to commence its work by the beginning of the month of August following and to make its report by the end of the same month.

The *enquête* directed was held by the President of the Commission. It commenced on the 1st August, 1927. The appellant Company duly appeared and supported its claims for compensation both by argument and by evidence, not then taking any objection either to the regularity of the preliminary procedure or to the competence of the Commission or its President effectively to deal with the questions referred. The Commission's report was made on the 22nd August, 1927, the amount of indemnities thereby awarded in respect of the 32 properties amounting to an aggregate sum of $219,172·08. Of that sum the indemnities awarded to the appellant Company for its properties were fixed as follows :—

	$
No. 21	2,036·30
No. 22	114,917·90
No. 23	1,755·60
	$118,709·80

It was explained in the report that the sum of $114,917·90 awarded in respect of the property numbered 22 included the value of lands expropriated and exploited as a quarry, and also the damages suffered in respect of that exploitation as well by the taking of the property of the appellant Company numbered 22 as of its properties numbered 21 and 23.

To the report when published the appellant Company took the gravest exception and this action was, as already stated, commenced on the 3rd September, 1927, doubtless in order to forestall an application by the city to the Court to homologate the report, of which, for the 6th September, public notice had been duly given. On that application the report was homologated by a judgment of the Superior Court of that date save as to the properties of the appellant Company, with reference to which no order was made by reason of the pendency of these proceedings.

The action was tried in the Superior Court of Quebec by Mr. Justice Archer. On the 2nd January, 1930, he dismissed it. An appeal to the Court of King's Bench (Appeal Side) for Quebec was on the 12th December, 1930, likewise dismissed. The present is an appeal from the judgment of dismissal of that date.

In the Courts of Quebec the objections taken by the appellant Company to the report of the Commission were numerous and varied. There were objections to the regularity of the initial procedure adopted by the city: to the right of the city to expropriate the appellant Company from its scheduled lands having regard to their user extent and quality. But all other objections having in Canada been disposed of adversely to the appellants, those taken before the Board were confined to two.

The first, which may be described as the constitutional objection, was that the provisions of the charter of the City of Montreal, a Provincial statute, as well as those of the Public Service Commission Act, also a Provincial statute, in compliance with which the award was made, were unconstitutional in that they attributed to the President of the Public Service Commission, an official appointed by the Province, a judicial power and judicial functions which under the British North America Act, 1867, could be conferred only by the Governor-General of Canada.

The second objection, quite different in character, was directed to the report itself. The amount of compensation thereby awarded to the appellant Company was, it was objected, so small, in view of the evidence led at the inquiry, as to constitute by itself an injustice to the appellant Company amounting to actual illegality.

In view of the constitutional issue thus raised by the appellant Company the Attorney-General for Quebec has been throughout a party to the proceedings, and, while taking no part in the discussion of the appellant Company's second objection, he has actively contested the correctness of the Company's constitutional imputations upon the validity of the report.

Notwithstanding that the case of the appellant Company on what may be called the merits only arises, if and when it has failed on its first and main objection to the report it will be convenient to deal with that case at once.

It, of course, presupposes the formal validity of the award. It assumes that the President of the Commission was fully empowered to make a proper award, and that the award which he has made was, except as to the inadequacy of compensation allowed, unobjectionable.

But the appellant Company is on that footing at once confronted with a serious preliminary difficulty, in that Article 429 of the City's charter, which, as it now stands, provides for the ascertainment by the President of the Public Service Commission of the compensation to be paid to the proprietors of expropriated lands, says that there shall be no appeal from the President's decision, while, by the statute constituting the Commission (17 Geo. 5, c. 16) it is provided in effect that in expropriation matters the decision of the Commission even upon a question of law shall be final. It follows accordingly that the permissible interference by any Court with an award made in such an expropriation case as the present is confined within the narrowest

limits, the nature of which has been laid down in judgments both of this Board and of the Supreme Court of Canada. In *Fraser* v. *City of Fraserville* [1917], A.C. 187, their Lordships, dealing with a statute which made the award of arbitrators final and without appeal, observed " that, apart from evidence establishing that the arbitrators had exceeded their jurisdiction, their award could not be disputed. Their findings of fact and their findings of value, unless it be shown that the value is not that which they were appointed to determine, are free from challenge." And the Supreme Court of Canada, in the later case of *Royal Trust Company* v. *The City of Montreal* 1918], 57 S.C. 352, had to deal with just such an award as this. There Davies J. at p. 357 observed :—

> " The statute makes the award of the Commissioners, in such cases as the present, final and without appeal. In order to give ground for attacking it, either highly improper conduct on the Commissioners' part or fraud or the proceeding by the Commissioners in making the award upon an improper principle must be clearly shown."

And the present Chief Justice of Canada in the same case observes at p. 366 :—

> " There is no appeal from an award such as this. The statute expressly excludes it . . . without entertaining an appeal an award may not be set aside solely because the Court is of opinion that it is too high or too low —even very considerably so—unless the disparity is so great that it is clear that the award must have been fraudulently made or that the arbitrators must have been influenced by improper or illegal considerations. The Court of King's Bench has held that neither of these grounds of invalidity has been established, and the clear case necessary to justify a reversal of its judgment, in my opinion, has not been made out."

In the present case no impropriety of conduct on the part of the President of the Public Service Commission is even hinted at ; no suggestion is put forward that in making his report he has been influenced by improper or illegal considerations. Nor does error appear upon the face of the report. It is not possible from a perusal of it to deduce the principles on which the President acted, or to discover the method by which he reached the amount of compensation awarded. He does there refer to the fact that, as by law he was entitled to do, he had inspected the scheduled properties. It may therefore be reasonably inferred that his conclusions were not unaffected by what he then saw. But nothing more in this direction appears on the report, and the appellant Company did not think fit at the trial to call the President to explain its findings. The Company was content to rest its attack upon them merely by a reference to three separate sheets of notes or calculations in the handwriting of the President, found apparently amongst his papers produced to the Court and showing, as was suggested, with reference to the appellant Company's properties, the process of reasoning by which the President arrived at the sum which by way of compensation he awarded in respect of each. Then by a comparison of these

figures with the evidence led at the inquiry the appellant Company sought to show such things as that in one direction the President had fixed a figure of value lower than that placed upon the property in question by some witness for the city: that in relation to another figure he had erred in law: that in relation to a third he had erred in fact, and so on.

Their Lordships do not consider themselves at liberty to follow the appellant Company on this expedition of inquiry into the origins of the President's figures. They have been unable to satisfy themselves that they are entitled even to look at these notes of his, for it has not been explained how, if at all, they became evidence in the action or admissible as such. It would in any case be, in their judgment, unjust to the President himself to rely upon the notes without any opportunity afforded him of explaining fully their meaning or their origin. It is perhaps, however, enough to say with reference to the use sought to be made of his notes by the appellant Company, that the President, who had, as already stated, himself inspected the properties, was not bound, on a question of value, to accept the evidence of any witness, and that his views of the law are not any more than his findings of fact open as such to review.

The conclusion on this matter of the learned trial Judge who very carefully investigated it was that the award could not, in respect of any of the matters complained of by the appellant Company, be questioned, and the Court of King's Bench agreed with him. Their Lordships must have been well satisfied that these concurrent findings were clearly wrong before they would have ventured to advise His Majesty to displace them. But they see no sufficient reason to doubt their correctness, and in their judgment this objection to the report cannot be sustained.

But it was the constitutional objection to its validity which formed the main subject of discussion before the Board. Once again, as so often before, is the question raised whether, in reference to the administration of justice, Provincial legislation has overrun the limits of Provincial competence. The case made by the appellant Company is that in the Statutes to which reference will be made in a moment, the Legislature of Quebec has trespassed upon the power given to the Governor-General in the matter of the appointment of Judges by Section 96 of the British North America Act. And a very serious question is thereby raised, for it cannot be doubted that the exclusive power by that section conferred upon the Governor-General to appoint the Superior, District and County Courts in each Province is a cardinal provision of the statute. Supplemented by Section 100, which lays upon the Parliament of Canada the duty of fixing and providing the salaries, allowances and pensions of these Judges, and also by Section 99, which provides that the Judges of the Superior Courts shall hold office during good behaviour, being removable only by the Governor-General on address of the Senate and House of Commons, the section is shown to lie

at the root of the means adopted by the framers of the statute to secure the impartiality and the independence of the Provincial Judiciary. A Court of construction would accordingly fail in its duty if it were to permit these provisions and the principle therein enshrined to be impinged upon in any way by Provincial legislation.

But by Subsection 13 of Section 92 of the Act, as is well remembered, there is conferred upon the Provincial Legislature the exclusive right of making laws in relation to property and civil rights in the Province and (by Subsection 14) in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts. These exclusive provincial powers have made it extremely difficult in many cases to draw the line between legislation which is within the competence of the Province under Section 92 of the Act, and legislation which is beyond its competence by reason of Section 96. This observation may be illustrated by two instances, neither of them remote from the present case, the first on the one side of the line and the second on the other. In *The Queen* v. *Coote* [1873], 4 P.C. 599, it was held by this Board, in an appeal upon which, it must be noticed, the respondent was not represented, that certain statutes of Quebec appointing officers named Fire Marshals, with power to examine witnesses under oath and to inquire into the cause and origin of fires and to arrest and commit for trial in the same manner as a justice of the peace, was within the competence of the Provincial Legislature. On the other hand, in a British Columbia case in 1890—*Burk* v. *Tunstall*, 2 B.C. 12—it was held by Drake J. that while it was within the competence of the Province to create Mining Courts and to fix their jurisdiction, it was not within its competence to appoint any officers thereof with other than ministerial powers. The learned Judge, in the course of his judgment, referring to Section 96 of the Act, observes, as their Lordships think with reason :—

> "It is true that the language used in that section is limited to the Judges of the Superior District and County Courts in each Province, and it might be contended that these Courts having been expressly named, all other Courts were excluded. If this were so the Provincial Legislature would only have to constitute a Court by a special name to enable them to avoid this clause. But in the section itself, after the special Courts thus named, the Courts of Probate in Nova Scotia and New Brunswick are excepted from the operation of the clause, thus showing that Section 96 was intended to be general in its operation."

The widespread modern legislative tendency to create what may be termed administrative tribunals to determine specific matters of controversy has undoubtedly in many cases accentuated the difficulty of defining in this matter the frontier between Provincial and Dominion territory. Nor does the difficulty arise only in Canada. In Australia also under the Commonwealth Constitution it appears in another form. This is well illustrated

in the recent case before this Board of *The Shell Company of Australia* v. *Federal Commissioner of Australia* [1931], A.C. 275. In that case it will be found that a " Board of Appeal " to hear income-tax appeals, created by the Australian Income Tax Assessment Act, 1922, had been held to be invalidly created as exercising part of the judicial power of the Commonwealth with Judges appointed for a term of years and not for life, as required by Sections 71 and 72 of the Constitution of Australia ; while a substituted statute constituting in similar matters a " Board of Review," with modified powers, was by the decision of the Board treated as an administrative body, not exercising the judicial power of the Commonwealth, and as a result constitutional, although its members were appointed only for a term of years. The judgment of the Board (in that case delivered by the Lord Chancellor) shows the narrowness of the line of division between judicial and administrative activity.

In the present case, however, it will be found, as their Lordships think, that difficulties serious in other cases are resolved by reason of its special circumstances which are found latent in the statutory procedure regulating, at confederation, the compulsory acquisition of property by the City of Montreal. That procedure, it is suggested, as the result of bringing to bear upon it the relevant provisions of the British North America Act, thereby became and, with the modifications that have later been introduced, thenceforth remained a matter of Provincial concern alone.

In tracing the development of the procedure in question a beginning may, for present purposes, be made with the Act of the Province of Canada of 1851, 14 & 15 Vict., c. 128, consolidating the provisions of the statutes incorporating the City. By Section 68 of that Act the compensation payable on expropriation was to be fixed by the verdict of a special jury summoned, on petition of the corporation by the Justices of the Peace of the City in special session. On payment or deposit by the Corporation in manner prescribed of the compensation fixed by the jury the title to the expropriated property passed to the Corporation.

No Court apparently under the procedure of this Act had any part or lot in the matter.

The Act of 1851 was superseded by a statute of 1864, 27 & 28 Vict., c. 60, intituled An Act to Amend the Acts relating to the Corporation of the City of Montreal. This was the Act on the subject in force at Confederation. By Section 13 (1) the Council of the City in cases of expropriation was required to apply by petition to the Superior Court, calling upon it to nominate three competent and disinterested persons to act as Commissioners to fix and determine the amount to be paid in respect of any expropriated property. The Court on that petition and on being satisfied that all preliminary statutory requirements as to notice and the like had been observed, was required to appoint three

such Commissioners and to fix the day on which they should begin their operations and also the day on which they should make their report. By Subsection 7 of the same Section 13 it became the duty of the Commissioners diligently to proceed to appraise the prescribed compensation. They were authorised and required to hear the parties, to examine and interrogate their witnesses and those also of the City, but to make such examination *viva voce* and not in writing, so that it might form no part of their report, any law, usage or custom to the contrary notwithstanding. The report of the Commissioners upon its becoming final in manner prescribed in intervening subsections was (Subsection 12) to be submitted by the Corporation to the Superior Court or a Judge thereof " for the purpose of being confirmed and homologated to all intents and purposes ; and the said Court or Judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have been observed, shall pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested and consequently not open to any appeal."

It will be observed in relation to this procedure that while the Commissioners were appointed by the Superior Court, that Court, all formalities observed, was required, exercising no further judgment, to confirm and homologate their report, which was itself final and not open to appeal.

The first substantial modification of this procedure made after confederation is to be found in the Statute of Quebec of 1899, 62 Vict., c. 59, an Act to revise and consolidate the charter of the City.

Article 429 of the charter as then consolidated ran, so far as is now material, thus :—

" For the purpose of ascertaining the compensation to be paid to the proprietor whose building may be affected by . . . expropriation . . . a board of expropriation commissioners shall be appointed.

" Such board shall consist of one of the recorders of the City (who shall be the president and convener of the said board), two of the assessors of the City to be named by the Council, and two other commissioners who shall be named by the Superior Court or a Judge thereof upon a petition to that effect to be made by or on behalf of the City after continuous notice in two daily papers . . . during a period of at least two weeks. The two latter commissioners shall be appointed upon the exclusive suggestion of the party to be expropriated.

" There shall be no appeal from the decision of such commissioners."

Matters so remained from 1899 to 1925. In that year was passed an Act further amending the charter of the City, and, incidentally, revising the procedure in expropriations, by the

substitution of a system to which constitutional objection is now taken by the appellant Company.

It will not be inconvenient to set forth from the terms of the charter so confirmed so much of the new procedure as is material to the present discussion :—

" 429. The President or the Acting President of the Quebec Public Service Commission shall ascertain the compensation to be paid to the proprietor whose building or land is to be expropriated and determine, if need be, the rights of the City mentioned in the foregoing articles for the acquisition of the whole or part of the said buildings. There shall be no appeal from the decision of the President or Acting President of the Public Service Commission."

" 430. . . . The Court or Judge shall fix a day on which the President or Acting President of the Quebec Public Service Commission shall proceed with his work and also the day upon which he shall make his report. . . ."

" 434. In order to come to a decision respecting such expropriation the President or Acting President . . . shall proceed with all due diligence to establish the value of the land and buildings to be expropriated. . . . He shall have power to call, summon and examine witnesses under oath as well as all parties interested and to require the production of titles and documents : he shall inspect the properties to be expropriated and take all other measures which he may deem necessary to establish the fair and exact amount of the compensation to be paid for the land, buildings and servitudes to be expropriated. . . . [His] report . . . shall be signed and shall establish the amount for which the city shall have the right to acquire the immovables for the purpose of such expropriation."

" 438. So soon as the President . . . has completed and signed his report in accordance with the foregoing provisions he shall deposit the same in the office of the city clerk, who shall forthwith give public notice thereof and of the day on which such report will be submitted to the Superior Court or to one of the Judges thereof as the case may be for confirmation or homologation. . . ."

" 439. On the day specified in the notice the City shall submit to the Superior Court or to one of the Judges thereof the report . . . for confirmation and homologation and such Court or Judge as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided have been observed, shall confirm and homologate the said report and the decision of the Court or Judge shall be final as regards all interested parties and shall not be subject to appeal."

As to the Quebec Public Service Commission to whose President or Vice-President the above duty is entrusted, it was created by a Provincial Act—the Quebec Public Service Commission Act of 1925, as amended by later Acts of 1926 and 1927.

The Commission consists of three members appointed by the Lieutenant-Governor in Council for a term of ten years (1925, Section 4). One of the Commissioners is to be appointed President of the Commission and another of them Vice-President (1925, Section 6). The President or the Vice-President may sit alone to hear and decide any expropriation matter within the jurisdiction of the Commission (1897, Section 1). The opinion of the President upon any question which, in the opinion of the Commissioners is a question of law is to prevail. There are provisions, securing the disinterestedness of every Commissioner (1925, Sections 12 and 13), fixing the duties of the secretary (1925, Section 19), providing for the payment by the Government of the Province of the salaries of the Commissioners and staff (1925, Section 22), and of the pension of the President (1925, Section 26), while by Section 28 (*h*), as settled by Section 6 of the Act of 1926, there is conferred upon the Commission jurisdiction over a wide range of subjects, including by Subsection 9 jurisdiction " notwithstanding any provision in the charter of such cities respectively . . . on any question arising respecting expropriation by the City of Quebec or by the City of Montreal for any municipal purpose (including the fixing of the compensation) which under the said charters is within the jurisdiction of any board of commissioners, assessor, arbitrator or other functionary or officer, provided that every provision relating to expropriation in either of the said charters shall continue to govern expropriation by each of such cities respectively with the exception of the modification introduced by this paragraph." The decision of the Commission on any question of fact within its jurisdiction is final (1925, Section 49), and by Section 58 an appeal is to lie to the Court of King's Bench (Appeal Side) from the final decision of the Commission upon any question as to its jurisdiction or upon any question of law, except in expropriation matters.

This historical survey brings into prominent relief one or two facts of suggestive importance. Since 1851 no Court of the Province has ever had the right either to make or to enquire into the merits of any compensation award in expropriation proceedings originated by the City: the duty of the Superior Court to direct that the compensation be assessed and to homologate the report of its amount when made was substantially the same at Confederation as it remains to-day under the later Provincial legislation now impugned; the procedure of the Commissioners at Confederation was not to be in strict accord with legal practice, and the only difference in substance, so far as the intervention of the Superior or any other Court is concerned between the procedure at Confederation and the procedure now is that by the Act of 1864 the Commissioners to hold the inquiry and make the compensation award were appointed by the Superior Court, whereas the President or Vice-President of the Quebec Public Service Commission to whom that duty is now assigned

is a Provincial Officer appointed by the Lieutenant-Governor in Council. Under the Act of 1899 two only out of the members of the board of five expropriation Commissioners fell to be appointed by the Superior Court, and that Act was in force and operative for 26 years. Neither before Confederation nor since has the duty of assessing compensation been discharged by any Judge of the Province, whether of a Superior, District or County Court. That is not one of his judicial duties. It is observable also that the validity of the Provincial legislation upon this subject since Confederation has never until now been called in question. Very many titles to property must depend upon its constitutional validity. It would be a serious matter indeed if that were now to be doubted.

It is accordingly with some sense of relief that their Lordships, in agreement with the Courts of Quebec, are of opinion that the assignment to the Quebec Public Service Commission of the duty of assessing compensation in expropriation proceedings by the City of Montreal was within the competence of Provincial legislation. They express no opinion—they have not directed their attention to the question—whether the statutes constituting the Commission are in relation to other matters within the Provincial field of legislation. Without going into the more general question they reach the conclusion they have expressed with reference to the matter now in hand by a consideration of the terms of Section 129 of the British North America Act.

That section, it will be recalled, is in the following terms :—

" Except as otherwise provided by this Act all Laws in force in Canada, Nova Scotia and New Brunswick at the Union and al Courts of Civil and Criminal Jurisdiction and all legal Commissions, Powers and Authorities and all Officers, Judicial, Administrative and Ministerial existing therein at the Union shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made : subject nevertheless . . . to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the respective Province according to the authority of the Parliament or of that Legislature under this Act."

In their Lordships' judgment the Commissioners whose appointment was authorised by the Act of 1864 in force at Confederation were " legal Commissioners " or " authorities " within the meaning of that section, dealing with Property and Civil Rights in the Province of Quebec within the meaning of Section 92 (13) of the statute, so that the repeal of the Act of 1864 constituting these Commissioners with the alteration of the procedure in expropriation, as it has now been altered is as a result of Section 129 and by reference to the other provisions of the statute within the sphere of Provincial legislation exclusively.

The Commissioners at Confederation were not Judges either of Superior, District or County Courts of the Province. The

jurisdiction to award compensation was not vested in any of these Judges. The fact that the Commissioners were appointed by the Superior Court was a procedure provision the continuance or alteration of which became under the British North America Act a question of Provincial concern. To their Lordships it appears clear that on the true construction of that Act the Quebec Public Service Commission when now assessing compensation in expropriation cases from the City of Montreal is not acting as a Judge either of a Superior District or Circuit Court, so that the appointment of its members must under the Act be made by the Governor-General of Canada.

Accordingly their Lordships are of opinion that the constitutional objection taken by the appellant Company to the competence of that Commission on the present occasion cannot be sustained.

For all these reasons they are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

O. MARTINEAU AND SONS, LIMITED,

v.

THE CITY OF MONTREAL AND ANOTHER.

DELIVERED BY LORD BLANESBURGH.

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