THE CROW'S NEST PASS COAL COMPANY (LIMITED) ..... APPELLANT;

1963

*Jan. 29, 30
**April 1

AND

ALBERTA NATURAL GAS COMPANY ..RESPONDENT.

ON APPEAL FROM A DECISION OF THE NATIONAL ENERGY BOARD

Real property—Pipe line right of way—Compensation for mines and minerals—Jurisdiction of National Energy Board—National Energy Board Act, 1959 (Can.), c. 46—Railway Act, R.S.C. 1952, c. 234.

The respondent was granted a certificate of public convenience and necessity to construct a pipe line through certain lands owned by the appellant, whose ownership thereof included the mines and minerals, including coal, lying under the said lands. After unsuccessful negotiations between the parties a notice of expropriation, with a form of easement attached thereto, was served by the respondent on the appellant. Upon the matter being heard before the County Court judge, a warrant for immediate possession of the main line right of way was granted to the respondent, who then took possession and constructed the pipe line. At the compensation proceedings the appellant took the position that while the National Energy Board under s. 72 of the *National Energy Board Act* had jurisdiction to award compensation for mines and minerals lying within the respondent's right of way and for a distance of forty yards on either side of the limits of the right of way, the awarding of compensation for mines and minerals lying beyond the forty-yard limits was not within the competence of the Board but could be awarded only by the County Court judge in his capacity as arbitrator. The matter having been brought before the Board for determination, the latter found that under the *National Energy Board Act* it had sole jurisdiction to award compensation for mines and minerals, whether within or without the protected area. The appellant appealed to this Court.

Held: The appeal should be allowed.

The jurisdiction over mines and minerals vested in the National Energy Board pursuant to the *National Energy Board Act,* 1959 (Can.), c. 46, including its jurisdiction to award compensation to an owner, lessee or occupier of any mines or minerals, is restricted to those mines and minerals only, lying under a pipe line or any of the works connected therewith, or within forty yards therefrom. Any right which the owner of the right of way may have to prevent mining outside the protected area, arises and must be enforced under the general law.

APPEAL from a decision of the National Energy Board, granting certain declaratory orders sought by the respondent. Appeal allowed.

J. J. Robinette, Q.C., and *A. B. Ferris,* for the appellant.

John L. Farris, Q.C., and *J. M. Giles,* for the respondent.

*PRESENT: Kerwin C.J. and Abbott, Martland, Ritchie and Hall JJ.
**Kerwin C.J. died before the delivery of judgment.

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The judgment of Abbott, Ritchie and Hall JJ. was delivered by

ABBOTT J.:—This is an appeal pursuant to s. 18(1) of the *National Energy Board Act*, 1959 (Can.), c. 46, from a decision of the National Energy Board made on June 13, 1962, granting two declaratory orders sought by the respondent Alberta Natural Gas Company.

These two orders declared:

(a) That the National Energy Board Act gives the National Energy Board sole jurisdiction to determine the compensation payable in respect of any mines and minerals affected by a pipeline.

(b) that such compensation may only be awarded from time to time if the Board is satisfied the mine owner has a bona fide intention to commence mining operations which will be affected by the presence of a pipeline.

The main questions before the Board were (1) whether ss. 68 to 72 inclusive of the *Energy Board Act* gave to the Board sole jurisdiction to determine the compensation payable in respect of any mines and minerals adversely affected by the construction and operation of a pipe line no matter where such mines and minerals may be located, or (2) whether, as the appellant contended, the Board's jurisdiction is limited to awarding compensation, if any, for those mines and minerals lying under a pipe line and any works connected therewith or within forty yards therefrom.

The events which led up to the parties bringing the matter before the Board for determination, are admirably summarized in the Board's decision as follows:

The Applicant (the present respondent) having been granted a certificate of public convenience and necessity No. GC-12 to construct a pipe line, proceeded with the work. The Respondent (the present appellant) owns certain lands and the mines and minerals, including coal thereunder, if any, through which the Applicant's main line right-of-way passes. These lands, mines and minerals are situate in the Kootenay District of the Province of British Columbia. Columbia Iron Mining Company has options to purchase these mines and minerals, including the coal. After unsuccessful negotiations between the parties whereby the Applicant sought to obtain a grant of easement from the Respondent for the construction of the pipe line and other facilities, a notice of expropriation dated January 19, 1961, with a form of easement thereto attached, was served by the Applicant upon the Respondent. Upon the matter being heard before the County Court Judge of the County of East Kootenay, a warrant for immediate possession of the main line right-of-way was granted to the Applicant. The Applicant posted security in the sum of $100,000, took possession of the main line right-of-way and thereupon commenced construction of its pipe line, which was later completed.

Subsequently the Applicant applied to the said Judge as Arbitrator to determine the compensation payable to both the Respondent and Columbia Iron Mining Company by reason of the taking of the right-of-way. The

necessary hearing to set compensation commenced July 6, 1961, and has since, by consent of the parties, been adjourned from time to time.

At the compensation proceedings, prior to the last adjournment thereof, the Respondent took the position that, while the National Energy Board under Section 72 of the National Energy Board Act had jurisdiction to award compensation for mines and minerals lying within the Applicant's right-of-way and for a distance of forty yards on either side of the limits of the right-of-way, the awarding of compensation for mines and minerals lying beyond the forty-yard limits (hereinafter referred to as "outside minerals") was not within the competence of the National Energy Board but could be awarded only by the County Court Judge in his capacity as Arbitrator. The Applicant, Alberta Natural Gas Company, of course argued that the National Energy Board has jurisdiction under Section 72 of its Act to award compensation for mines and minerals both inside and outside the aforementioned forty-yard limits. The parties have agreed, without prejudice to the right, if any, of the Respondent and Columbia Iron Mining Company to continue the arbitration proceedings before the County Court Judge for the County of East Kootenay with respect to their claims for compensation for mines and minerals (including coal and the severance thereof) lying outside the right-of-way and more than forty yards therefrom, and without prejudice to the right, if any, of the Applicant to maintain and assert in any such proceedings that the said County Court Judge does not have jurisdiction to award such compensation, upon a form of easement which has been granted by the Respondent and Columbia Iron Mining Company to the Applicant and registered in the Land Registry Office at the City of Nelson, British Columbia. This easement grants Alberta Natural Gas Company a right-of-way upon and through which it may construct its pipe line and other facilities. By reason of the grant of the easement, the Respondent and Columbia Iron Mining Company are obliged not to withdraw support of the surface of the right-of-way. The easement does not make provision for payment to the Respondent or to Columbia Iron Mining Company of any compensation for mines or minerals (including coal or the severance thereof). The Compensation claims of the Respondent and of Columbia Iron Mining Company for mines and minerals (including coal and the severance thereof) are preserved to them as hereinbefore provided to be presented before or dealt with by such Board, Court or Arbitrator as may be found to have jurisdiction with respect thereto. Provision has, however, been made in the easement for the payment of compensation for minerals (including coal) that are necessary to be dug up, carried away or used on the right-of-way during the course of the construction or reconstruction of the pipe line and other facilities of the Applicant.

The Board found that under s. 72 of the *National Energy Board Act* it had sole jurisdiction to award compensation for mines and minerals whether within or without the protected area prescribed by s. 70 of the said Act, and on August 17, 1962, it made the declaratory orders above referred to.

The present appeal by leave is from that decision.

The *National Energy Board Act* is the successor to and repealed the *Pipe Lines Act*, R.S.C. 1952, c. 211. These two acts were the first federal statutes dealing with the regulation of pipe lines in Canada. Under the *Pipe Lines Act*

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regulatory duties were vested in the Board of Transport Commissioners for Canada. Under the *Energy Board Act* these duties were transferred to a new body, the National Energy Board.

Power to expropriate is granted under the *Energy Board Act* and s. 64 of that Act (which is identical to s. 166 of the *Railway Act*, R.S.C. 1952, c. 234) provides that a company exercising its powers under the act shall make full compensation to all persons interested for all damages sustained by them by reason of the exercise of such powers. The expropriation provisions of the *Railway Act*—ss. 218 to 246 inclusive—are incorporated by reference into the *Energy Board Act*. Generally speaking, these sections provide for such matters as the fixing of compensation, the appointment of an arbitrator, proceedings before the arbitrator and the like. It is common ground that the said sections govern the fixing of compensation payable for the surface rights of way for a pipe line.

The *Pipe Lines Act* and the *Energy Board Act* each contain five sections under the sub-heading "Mines and Minerals" which are in substantially the same terms. In the *Energy Board Act* these are ss. 68 to 72 inclusive. They were based upon five similar sections under the same sub-heading—ss. 197 to 201 inclusive—in the *Railway Act*. These sections in turn had their origin in an Imperial statute, the *Railway Clauses Consolidation Act, 1845*, c. 20. The effect of what are now ss. 197 and following of the *Railway Act* was considered by the Judicial Committee in *Davies v. James Bay Railway Company*[1], and after that decision was rendered Parliament amended the *Railway Act* by adding what are now ss. 200 and 201 of the said act.

With certain minor differences—which in my view have no relevance to the question at issue in this appeal—ss. 68 to 71 of the *Energy Board Act* are in the same terms as ss. 197 to 199 and s. 201 of the *Railway Act*. Section 72 of the *Energy Board Act* is in slightly different terms to the corresponding s. 200 in the *Railway Act*, and it is upon this difference that respondent mainly relies.

Both s. 70 of the *Energy Board Act* and the corresponding s. 199 of the *Railway Act*, provide that no person shall work mines or minerals lying under a pipe line or railway or

[1] [1914] A.C. 1043.

any of the works connected therewith or within forty yards therefrom until leave therefor has been obtained from the Energy Board or the Board of Transport Commissioners as the case may be. This area—some three hundred feet wide—was appropriately described by Mr. Robinette in his argument as "the protected area".

As Locke J. pointed out in *Attorney General of Canada v. C.P.R.* and *C.N.R.*[1], the effect of ss. 197 to 201 of the *Railway Act* is to ensure that when a railway is carried over lands which contain mines or minerals the interests of (1) the owner of such minerals (2) the public and (3) the railway company, are adequately protected. In my opinion ss. 68 to 72 inclusive of the *Energy Act* have precisely the same purpose and effect.

In my view it is also clear, that neither the Board of Transport Commissioners nor the Energy Board has been given any jurisdiction to interfere with mining operations outside the protected area. Any right which the owner of the right of way may have to prevent mining outside the protected area, arises and must be enforced under the general law.

It is common ground that in the case of a railway right of way, jurisdiction to fix the compensation, if any, for minerals lying under the right of way, is vested by s. 200 of the *Railway Act* in the Board of Transport Commissioners, but that compensation for minerals outside the protected area, which must be left in place to afford support to the surface of the right of way, is to be determined by an arbitrator in accordance with ss. 222 and following, in the same way as compensation for the surface right of way.

Respondent's contention is that by virtue of s. 72 of the *Energy Board Act,* the Energy Board has sole jurisdiction to determine the compensation payable in respect of any mines and minerals affected by a pipe line. That contention is based upon what respondent submits is the plain and literal meaning of the said section which reads:

72. A company shall, from time to time, pay to the owner, lessee or occupier of any mines such compensation as the Board shall fix and order to be paid for or by reason of any severance by a pipe line of the land lying over such mines, or because of the working of the mines being prevented, stopped or interrupted, or because of the mines having to be worked in such manner and under such restrictions as not to injure or be

[1] [1958] S.C.R. 285 at 304, 12 D.L.R. (2d) 625.

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detrimental to the pipe line, and also for any minerals not purchased by the company that cannot be obtained by reason of the construction and operation of its line.

The corresponding s. 200 in the *Railway Act* reads:

200. *The* company shall, from time to time, pay to the owner, lessee, or occupier of any *such* mines such compensation as the Board shall fix and order to be paid, for or by reason of any severance by the *railway* of the land lying over such mines, or because of the working of *such* mines being prevented, stopped or interrupted, or of *the same* having to be worked in such manner and under such restrictions as not to injure or be detrimental to the railway, and also for any minerals not purchased by the company that cannot be obtained by reason of the construction and operation of *the railway*.

The italics are mine.

It will be seen that the only differences between the two sections are the substitution of the word "a" for the word "the" in the first line [in s. 200 as in R.S.C. 1952], the elimination of the word "such" between the words "any" and "mines" in the second line, the substitution of the words "pipe line" for "railway" in the fourth line, the substitution of the word "the" for the word "such" in the sixth line, the substitution of the words "the mines" for the words "the same" in the seventh line, and the substitution of the words "its line" for the words "the railway" in the last line.

Section 72 must be read in the context in which it is found. It forms part of a group of five sections which provide for the control of mining operations under and within a prescribed distance from a pipe line. No power is given to control mining operations outside that protected area. The purpose of these five sections (and of the corresponding sections in the *Railway Act*) is to ensure that the interests of the public, the pipe line company and the mine owner are protected.

I agree with Mr. Robinette's submission that the differences between s. 72 of the *Energy Board Act* and s. 200 of the *Railway Act* are merely drafting changes and do not justify any inference that Parliament intended in the case of a pipe line, to alter the law with respect to the fixing of compensation for minerals lying outside the protected area. That law is to be found in ss. 218 and following of the *Railway Act* which have been incorporated by reference into the *National Energy Board Act*.

Under the *Railway Act* if the removal of minerals lying under a railway is proposed, the owner must apply to the Transport Board for leave to do so and that Board under

the powers given to it by s. 199 may prescribe the measures to be taken for the protection of the public. The same powers are given to the Energy Board under s. 70 of the *Energy Board Act*. Section 200 gives the Transport Board power to direct a railway company to pay to such owner compensation by reason of the severance by the railway of the lands lying over the mines because working them is prevented or interrupted. It is conceded that the Transport Board's jurisdiction to award such compensation is limited to compensation for minerals lying within the protected area.

Similar powers are given to the Energy Board under s. 72 of the *Energy Board Act* and, in my opinion, the jurisdiction of the Energy Board under s. 72 to award compensation, is subject to the same limitation as that imposed upon the Transport Board under the s. 200 of the *Railway Act*.

I would allow the appeal with costs and declare that the jurisdiction over mines and minerals vested in the National Energy Board pursuant to the *National Energy Board Act*, 1959 (Can.), c. 46, including its jurisdiction to award compensation to an owner, lessee or occupier of any mines or minerals, is restricted to those mines and minerals only, lying under a pipe line or any of the works connected therewith, or within forty yards therefrom.

MARTLAND J.:—I am in agreement with the reasons delivered by my brother Abbott and merely wish to add the following additional comments.

Section 72 of the *National Energy Board Act*, which is cited in his judgment, relates only to compensation by a pipe line company to the owner, lessee or occupier of any *mines*. He is to receive compensation from the pipe line company, fixed by the National Energy Board,

(*a*) for severance of his land lying over the mines;

(*b*) because the working of his mines is prevented, stopped or obstructed;

(*c*) because his mines have to be worked in such manner and under such restrictions as not to injure or be detrimental to the pipe line;

(*d*) for minerals not purchased by the pipe line company that he cannot obtain by reason of the construction and operation of the pipe line.

The severance of lands above the mines referred to in (*a*) occurs by reason of the acquisition of its right of way by the pipe line company.

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The matters referred to in paras. (*b*) and (*c*) obviously relate to the limitations imposed on his right to work his mines created by s. 70 of the Act, the relevant portions of which provide:

70. (1) No person shall work or prospect for mines or minerals lying under a pipe line or any of the works connected therewith, or within forty yards therefrom, until leave therefor has been obtained from the Board.

* * *

(3) Upon an application to the Board for leave to work or prospect for mines or minerals, the applicant shall submit a plan and profile of the portion of the pipe line to be affected thereby, giving all reasonable and necessary information and details as to the proposed operations.

(4) The Board may grant the application upon such terms and conditions for the protection and safety of the public as to the Board seem expedient, and may order that such things be done as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from the proposed operations.

In my opinion the minerals mentioned in para. (*d*) to which s. 72 refers, which the mine owner cannot obtain by reason of the construction and operation of the pipe line, are only those minerals which, because of the restrictions imposed by the Board under s. 70, he cannot obtain.

Any minerals lying beyond the protected area provided for in s. 70(1) are not prevented from being obtained by reason of the construction and operation of the pipe line. If they are prevented from being obtained at all, it is only because their owner is compelled to provide that support to which the pipe line owner becomes entitled at common law as an incident of his ownership of the pipe line right of way. The obligation to support resting upon the owner of the lands adjoining the pipe line right of way arises as soon as the pipe line company acquires its right of way, and not because of the construction and operation of its line. The restrictions on the obtaining of minerals, which arise by reason of the construction and operation of the line, are only those which are imposed under s. 70.

The words "not purchased by the company" are also of some significance. Obviously, if the pipe line company has purchased minerals, then the mine owner would not be in a position to claim compensation because he was unable to obtain them. In my opinion, these words must be related back to s. 69, which reads:

69. A company is not entitled to mines, ores, metals, coal, slate, oil, gas or other minerals in or under lands purchased by it, or taken by it under compulsory powers given to it by this Act, except only the parts

thereof that are necessary to be dug, carried away or used in the construction of the works, and except as provided in this section, all such mines and minerals shall be deemed to be excepted from the conveyance of such lands.

I think that the reason the words appear in s. 72 is that they had appeared in the equivalent section of the *Railway Act*, s. 200. They were included in that section because in s. 198(1) of the *Railway Act*, which is the equivalent of s. 69 of the *National Energy Board Act*, but different in its terms, the wording was as follows:

> The company is not, *unless the same have been expressly purchased*, entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, . . .

When s. 200 of the *Railway Act* referred to "minerals not purchased by the company that cannot be obtained by reason of the construction and operation of the railway", it meant minerals underlying the railway which the railway company had not expressly purchased and also those underlying the forty-yard strip on each side of the railway right of way.

The reference in s. 72 of the *National Energy Board Act* was, I think, incorporated directly from the *Railway Act*, even though s. 69 of the *National Energy Board Act* makes no reference to an express purchase of minerals. The significance of these words is, however, to direct attention to those minerals which underlie the pipe line right of way itself. Their inclusion in s. 72 tends to emphasize that when that section speaks of "any minerals not purchased by the company that cannot be obtained by reason of the construction and operation of its line" it is not referring to minerals in general, but is doing no more than to refer to those minerals which underlie the pipe line right of way and those which adjoin the pipe line right of way underlying the forty-yard strip on each side of it which the mine owner is precluded from working, without the leave of the Board, by virtue of s. 70.

I agree with the disposition of this appeal proposed by my brother Abbott.

Appeal allowed with costs.

Solicitors for the appellant: Messrs. Davis & Company, Vancouver.

Solicitors for the respondent: Messrs. Farris & Company, Vancouver.