

1911

JAMES M. JOHNSTON (SUPPLIANT) .. APPELLANT;

*March 6.

AND

*May 8.

HIS MAJESTY THE KING RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of right—Contract—Powers of Commissioners of the Transcontinental Railway—Liability of Crown—Construction of statute—3 Edw. VII. c. 71.

"The National Transcontinental Railway Act," 3 Edw. VII. ch. 71 (D.), does not confer powers upon the Commissioners of the Transcontinental Railway in respect to the inspection and valuation of lands required for the purposes of the "Eastern Division" of the railway; consequently, a petition of right will not lie for the recovery of remuneration for services of that nature.

Judgment appealed from (13 Ex. C.R. 155) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada (1) on the argument of points of law before trial by which the suppliant's petition of right was dismissed with costs.

The circumstances of the case are stated in the judgments now reported.

M. G. Macneil, for the appellant.

Newcombe K.C., Deputy Minister of Justice, for the respondent.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 13 Ex. C.R. 155.

The judgment of the court was delivered by

1911

JOHNSTON

v.

THE KING.

Davies J.

DAVIES J.—This is an appeal from the judgment of the Exchequer Court(1) giving effect to the Crown's demurrer to the suppliant's petition of right, and dismissing the petition.

The petition was brought by certain valutors employed by the Commissioners of the National Transcontinental Railway to inspect and value lands and properties which the located line of the eastern division of the National Transcontinental Railway would cross through the City of St. Boniface, Manitoba, and to report on the same giving a separate valuation for each piece of land so to be crossed.

The determination of the rights of the suppliant to maintain the petition depends upon the powers vested in the Railway Commissioners appointed to construct and operate such eastern division of the railway.

If these commissioners are vested with powers over the damages for the lands located for the railway or over their settlement or adjudication, then, I think it obvious that there would be implied a power on their part to appoint valutors to report upon the proper compensation to be paid for each piece of land taken by them. It is obvious the commissioners could not do such work themselves over the thousand and more miles covered by the eastern division they were appointed to construct and operate. They would necessarily have to employ others to do the work; and, having done so, the work being within their powers, such persons would be entitled to either the agreed compensation, or, in the absence of such agreement, what would be fair and reasonable.

1911
JOHNSTON
v.
THE KING.
—
Davies J.
—

As there is no allegation in the petition of any special authority having been given by the Government to the commissioners to do or have this work of valuation done, their powers to do so must be sought and found in the agreement for the construction of the eastern division, ratified and confirmed by 3 Edw. VII. ch. 71, or in that statute itself.

Turning first to the agreement we find the 5th and 8th paragraphs read as follows:

(5) The said eastern division shall be constructed by, and at the expense of, the Government, upon such location and according to such plans and specifications as it shall determine, having due regard to directness, easy gradients and favourable curves.

(8) The construction of the said eastern division shall be commenced *so soon as the Government has made the surveys and plans and determined upon the location thereof*, and shall be completed with all reasonable dispatch.

Then the 9th section of the Act reads:

The *construction* of the eastern division and the operation thereof, until completed and leased to the company pursuant to the provisions of the agreement, shall be under the charge and control of three commissioners, to be appointed by the Governor in Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of "The Commissioners of the Transcontinental Railway" and are hereinafter called "The Commissioners."

Section 13 relates to the *expropriation of lands* and reads as follows:

The commissioners may enter upon and take possession of any lands required for the purposes of the eastern division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

The scheme of the Act appears to be that construction shall be commenced so soon as the Government

has made the surveys and plans and determined upon the location of the line, and not before.

1911
JOHNSTON
v.
THE KING.
—
Davies J.
—

But section 13 gives the commissioners special powers with respect to entering upon and taking possession of "any lands required for the purposes of the eastern division" and laying them off by metes and bounds, and depositing plans which, when deposited, are to operate as a dedication of the lands to the public, and to vest the same in the Crown. All the powers necessary or reasonably incidental to the proper exercise of these statutory directions to the commissioners are within their jurisdiction. But it will be noticed the question of "the compensation" to which any one interested in the lands taken may claim or be entitled to is specially reserved. Nothing whatever is said as to the assessment or determination of the compensation by the commissioners or by any one appointed by them. The words used are

saving always the lawful claim to compensation of any person interested therein.

Now, of course, the Crown could authorize the commissioners, or any one else, to adjust or settle these damages with the parties interested. It is not alleged or suggested the Crown did so, and the only question which appears to me to be open in the case before us is whether or not the statutory powers given the commissioners necessarily involve a power to value the lands taken for the located road.

Section 18 clearly relates, in my judgment, only to the work of constructing the eastern division by tender and contract as provided for in the previous sections 16 and 17. The chief engineer would have nothing whatever to do with the certifying to any such work as that of valuing of lands taken.

1911

JOHNSTON

v.

THE KING.

Davies J.

The conclusion I have reached, however, is for the reasons stated, that the powers of the commissioners under the statute do not embrace the valuation of any lands within the located line of the eastern division of the Transcontinental Railway and that, consequently and unless and until special power for them to undertake such work was given to them by the Governor in Council, their action in respect to the same would be *ultra vires*.

This petition was one brought to recover the charges of the petitioner with respect to the valuation of the located line through the City of St. Boniface. That is the construction I put upon the language of the second paragraph of the petition, and it is the one adopted and put forward by the petitioner's counsel at bar.

The individuals damnified by their lands having been taken or injured have their lawful claims to compensation specially reserved to them, and they can either settle amicably with the Government or its authorized agent or enforce their rights in court.

No special authority having been given to the commissioners, the valuation of the lands taken is not covered by the power to construct and operate the road.

The appeal should be dismissed.

IDINGTON J. (dissenting).—If we interpret this petition as the Judicial Committee of the Privy Council directed that in the case of *McLean v. The King* (1) should be, a trial must be had of the facts.

Instead of construing, as of old, the pleading most strongly against the pleader, that court, on appeal,

directed, though the case is unreported, that, if upon any reasonable construction of the petition, a cause of action could be proved, then the suppliant would be entitled to succeed on the demurrer. This petition alleges, if so treated, enough to induce a trial of the facts.

1911
JOHNSTON
v.
THE KING.
Idington J.

It is not necessary for the suppliant or plaintiff in any case to set up more than to shew a cause of action.

If there happens to be, as it is said exists here, a condition that liability to pay, for that sued for, must be measured by what someone else says, certified in a particular manner, then that is matter of defence of which the defendant may or may not avail himself.

In this case it may be a matter of inference from the nature of the services performed and the nature of the statutory powers by virtue of which the work in respect of which recovery is sought was directed, that the certificate of the commission, or some officer connected therewith, necessarily must be produced as evidence before the suppliant can succeed.

It does not occur to me that such a question necessarily arises upon demurrer. And it does not occur to me so absolutely clear as suggested, that the statute permits no payment for such a claim as sued for herein unless certified. Clearly contractors are, by section 18 of the Act, so tied down, but—Is the appellant a contractor within the meaning of that section ?

As the learned judge of the Exchequer Court says, in his opinion judgment, and the parties admit here, the argument below travelled beyond what strictly was raised by the demurrer and the appellant seems desirous of a decision as if this point relative to a

1911
JOHNSTON
v.
THE KING.
Idington J.

certificate of the commission being needed had been raised on the demurrer, perhaps, in view of the peculiar nature of the case and the course it has run, it may be thought no great harm could arise by expressing an opinion.

It would be, I submit, a bad precedent and an unsatisfactory way of disposing of a point in the case, when its whole story having been unrolled, it might appear in quite a different light.

On the question raised by the learned judge as to his jurisdiction, I cannot agree in his conclusion; and an order dismissing the petition on that ground is, I submit, not well founded.

No one ventured to suggest this commission was, in law, less representative of the Crown, as a statutory agent or governmental device for constructing a railway, than was that under and by means of which the Intercolonial Railway was constructed.

Such cases as arose in the course of the existence of the Intercolonial Railway Commission raising analogous points, or giving opportunity therefor, in this court, do not seem to have suggested the difficulty found herein.

It seems to me this court, in disposing of such cases assumed, as of course, that a petition of right founded on some obligation arising in the execution of said work would, as a matter of course, be triable in the Exchequer Court.

Indeed, I should not be at all surprised if it could be demonstrated, as a matter of fact, that the experience derived from the execution of that work was a factor in leading to the founding of the court.

So far as I can see the purposes of each commission are of an identical character. They differ in

details of machinery furnished in the creating statute for the execution of the work. They differ also in this, that the ultimate destiny of that constructed under and by virtue of such respective bodies is somewhat different.

1911
JOHNSTON
v.
THE KING.
Idington J.

But in the chief feature of each the purpose to be attained and mode of its attainment are almost identical.

Each was designed for the construction of a work to become a property of the Crown. In the early case the property was to be operated by the Crown. In this latter case it is to be leased by the Crown to a railway corporation. The basis for rental is to be the cost of construction. In that cost such items as that here in question are included. To preserve evidence of and determine disputes relative thereto is part of the commission's duty. Their duty in the first place is to pass upon the expenditure for certain parts of the work — but not all.

The members of the commission are in this case, as were those in that other, removable by the Crown.

There does not seem to me to be in the statute aught that necessarily constitutes this commission the proper body to sue.

Indeed, such restrictions as appear upon the right to receive payment on contracts, without being certified to or approved of by this body, seem repugnant to the conception of the commission ever having been intended to be subject to action for aught done in the discharge of its duty.

It seems almost inconceivable that these functions of defendant, of superintendent or of judge, and of owner and paymaster, should be all intentionally vested in the same body. So far as the statute clearly

1911
JOHNSTON v. THE KING. expresses the extent of duty relative to passing upon the execution of work, it seems confined to the claim of the contractors with the Government.

Idington J. I say nothing of the liability of the commission for a departure from its duty. That might give rise to questions of another nature relative to which I refrain from passing opinion.

It seems to me we must observe the rule laid down by Lord Campbell and later adopted by Lord Blackburn in the *Mersey Docks Trustees v. Gibbs*(1), at page 118, and applied since in reaching a conclusion upon questions of a cognate character relative to the liability of corporate bodies created in like cases.

The expression of that learned judge, speaking, of course, relatively to liability in only one phase of such subject, was that it must be determined upon a true interpretation of the statute under which the body is created.

I cannot feel much doubt in regard to the liability of this commission.

It was not empowered to own, to control or lease this road. It was not even empowered to let the contracts for its construction.

It was created to meet the exigencies of a particular enterprise, of a vast and complicated character, for and in respect of specific purposes, relative thereto, and when its functions in these regards had been fulfilled its operative existence is to cease.

Its general character is that of being for these limited purposes the agent of the Crown.

Since I hold these views, it seems I must conclude

(1) L.R. 1 H.L. 93.

that this appeal must be allowed with costs, and appellant be given a chance to have his case tried.

1911
JOHNSTON
v.
THE KING.
Idington J.

Appeal dismissed with costs.

Solicitors for the appellant: *Elliott, Macneil & Deacon.*

Solicitor for the respondent: *J. B. Coyne.*