1958
*Nov. 11, 12
Dec. 18

CALGARY POWER LTD. AND L. C. HALMRAST (*Defendants*) ..... APPELLANTS;

AND

CLARENCE COPITHORNE (*Plaintiff*) ...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Expropriation—Minister of the Crown—Minister empowered by statute to grant power of expropriation to public utility—Whether administrative or judicial decision—Whether obliged to grant hearing and act judicially—Whether right-of-way for power lines interest in land—The Water Resources Act, R.S.A. 1942, c. 65.

The defendant company, a licensee under *The Water Resources Act*, obtained the authorization of the Minister for the expropriation of a right-of-way on the plaintiff's property. The Minister's order was duly filed in the land titles office. The plaintiff received no notice of any of these proceedings, nor was he given any opportunity to be heard by the Minister. The plaintiff's action for a permanent injunction and for damages was dismissed by the trial judge. This judgment was reversed by the Court of Appeal on the ground that the Minister had failed to act judicially.

Held: The appeal should be allowed and the action dismissed.

In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not it imposes a duty to act judicially. Under the statute, there is no requirement to give notice or to hold an inquiry in relation to the expropriation itself, although there are specific provisions in relation to the com-

*PRESENT: Locke, Cartwright, Fauteux, Martland and Judson JJ.

pensation procedure. The Minister is given sole authority to decide whether or not lands or any interest therein are necessary for an authorized undertaking. There is no provision for an appeal from his decision. His decision is a policy decision as a Minister of the Crown. It is strictly an administrative act.

The Minister exercised his powers in accordance with the requirements of the statute.

The interest which the defendant company was authorized to expropriate by the ministerial order was an interest in land as defined for the purposes of *The Water Resources Act*.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of McBride J. Appeal allowed.

J. V. H. Milvain, Q.C., for the defendant Calgary Power Ltd., appellant.

H. J. Wilson, Q.C., for the defendant L. C. Halmrast, appellant.

D. C. Prowse, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1], dated July 18, 1957, which reversed the decision of the trial judge, dated June 12, 1956, in favour of the appellants.

The appellant company is a public utility engaged, in the Province of Alberta, in the generation and transmission of electrical energy. The respondent is a rancher and is the owner of six quarter sections of land west of the city of Calgary, hereinafter referred to as "the lands". In connection with its operations, the appellant company proposed to construct a transmission line from Ghost Park, west of Calgary, to the city of Calgary, following a route which traversed the lands. Negotiations for the acquisition of right-of-way over the lands for this transmission line were conducted between the appellant company and the respondent for some months commencing in February 1955. They failed because the appellant company and respondent were unable to reach agreement as to the consideration to be paid for such right-of-way.

[1] (1957), 22 W.W.R. 406.

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On June 14, 1955, the appellant company, without notice to the respondent, applied to the Minister of Agriculture of the Province of Alberta, Mr. L. C. Halmrast, who is an appellant in this appeal, pursuant to subs. (2) of s. 72 of *The Water Resources Act*, R.S.A. 1942, c. 65, for permission to expropriate "the right, license, liberty, privilege and easement for itself and its successors in ownership, to use" a portion of the lands, being a right-of-way fifty feet in width as shown upon a plan which accompanied the application.

On June 22, 1955, the Minister of Agriculture issued an order authorizing the appellant company to effect such expropriation. This order recited that "the Minister has deemed the said right, license, liberty, privilege and easement of the said right-of-way across such lands necessary for the authorized undertaking of the Company".

Conditions were attached to the order providing that the right-of-way should not be fenced, providing for right of access to and the use of the right-of-way by the respondent, except in so far as necessary for the purposes of the appellant company, providing for compensation to the respondent for damage to any building, crops, fences, timber and livestock on the right-of-way by reason of the appellant company's exercise of its rights, and for the restoration of the right-of-way and the removal of its works therefrom by the appellant company upon discontinuing its use of the right-of-way.

No hearing was held prior to the granting of this order and no opportunity was furnished to the respondent to object to its issuance.

The order was filed at the land titles office for the South Alberta Land Registration District by the appellant company on June 28, 1955, pursuant to the provisions of s. 27 of *The Water, Gas, Electric and Telephone Companies Act*, R.S.A. 1942, c. 260.

On or about July 21, 1955, employees of McGregor Construction Company, which was acting on instructions from the appellant company, entered on the lands. The foreman then handed to the respondent a letter from the appellant company, a copy of the ministerial order and a notice of compensation pursuant to s. 28 of *The Water, Gas, Electric*

and Telephone Companies Act, offering compensation for the right-of-way in the amount of $874.40. The area comprised in the right-of-way totalled 14.04 acres.

The respondent subsequently telephoned to the Honourable Mr. Taylor regarding the expropriation order. The matter was then referred to Mr. Halmrast, who, on August 5, 1955, wrote a leter to the respondent, which is as follows:

Dear Mr. Copithorne:

While I was away in the South attending meetings you 'phoned to the Honourable Mr. Taylor expressing to him your concern in that an Expropriation Order has been signed permitting Calgary Power to install their line across your property. As this did not come under Mr. Taylor's jurisdiction, he advised you that I would be back in the City soon and that I would look into this matter upon my return.

I wish to advise that I signed the Expropriation Order on advice given that no suitable settlement could be arranged and that an Arbitration Board would then decide what compensation should be paid to you and other property owners by Calgary Power.

Following my return to the office I dispatched one of my hydraulic engineers to your district to make a personal inspection of the route and to advise me whether or not some alternate route could be selected that would be more suitable for all concerned. The report I have received indicates that the route through your property is the most suitable in that area and, therefore, no change is contemplated there. Further on it may be possible to make one or two diversions that would appear to be satisfactory to both Calgary Power and some of the residents.

Yours very truly,
"L. C. Halmrast"
MINISTER OF AGRICULTURE

On August 17, 1955, the respondent issued a statement of claim against the appellant company and Mr. L. C. Halmrast, asking for an injunction to restrain the appellant company from entering upon the lands, for a declaration that the ministerial order was a nullity and claiming damages. The appellant Mr. Halmrast was made a party so as to be bound by any declaration made by the Court. Statements of defence were filed by both the appellants and the action proceeded to trial.

The learned trial judge decided that the order was properly granted and dismissed the action. On appeal, the Appellate Division of the Supreme Court of Alberta[1], by a majority of two to one, reversed this judgment, declared that the ministerial order was a nullity, granted an injunction restraining the appellant company, its servants, agents,

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employees and contractors from entering upon the lands, and gave judgment for damages to be assessed by a judge of the Trial Division.

It is from this judgment that the present appeal is brought.

The appellants contend that the order in question was properly made in accordance with the relevant provisions of *The Water Resources Act*. These provisions are subs. (1) of s. 63 and subs. (2) of s. 72 and read as follows:

63. (1) Any licensee for the purpose of the authorized undertaking may with the consent in writing of the Minister take and acquire by expropriation any lands other than Provincial lands or any interest therein which the Minister may deem necessary for the authorized undertaking.

* * *

72. (2) In any case in which a licensee desires or proposes to expropriate any land or any interest therein for the purpose of his undertaking, he shall first make application to the Minister for his permission or consent to expropriate the lands or interest therein specified in the application and the Minister may issue an order authorizing the licensee to expropriate such land or interest in land as the Minister by order may designate and may prescribe the terms and conditions of or to be applicable to any such interest in land.

It was admited that the appellant company is a licensee within the meaning of these subsections and was entitled to apply for the right to expropriate.

Reference should also be made to subss. (2a) and (2b) of s. 72 of *The Water Resources Act* and to ss. 27 to 29 of *The Water, Gas, Electric and Telephone Companies Act*, which, by virtue of subs. (2a) of s. 72 of *The Water Resources Act*, are made applicable to the appellant company. These provisions are as follows:

THE WATER RESOURCES ACT

72. (2*a*) Sections 4*a*, 10*a* and sections 27 to 30 of The Water, Gas, Electric and Telephone Companies Act, in so far as they are reasonably applicable and not inconsistent with this Act, apply mutatis mutandis to licensees and their works and undertaking.

(2*b*) The order of the Minister may prescribe the terms and conditions of, or to pertain to, any interest in land to be so expropriated and the order shall be filed in the proper Land Titles Office along with the description or plan referred to in section 27 of The Water, Gas, Electric and Telephone Companies Act and shall be deemed to be and constitute a part of the said description or plan, as the case may be, for all the purposes of the said Act and of this Act.

THE WATER, GAS, ELECTRIC AND TELEPHONE COMPANIES ACT

27. If after receiving authorization to expropriate, the company files in the Land Titles Office for the Land Registration District within which the land is situate,—

(*a*) a description of the land by metes and bounds or by reference to existing registered plans or both; or

(*b*) a new plan of survey of the land prepared by a land surveyor, duly licensed for the Province of Alberta;

which description or plan is signed by the president or general manager of the company and countersigned by the Minister of Highways, the land or interest therein shall vest in the company.

28. (1) Upon the filing in the Land Titles Office of the description or plan of land taken pursuant to section 27, the company shall serve or cause to be served by registered mail upon,—

(*a*) the owner of the land or the interest in land taken;

(*b*) all persons shown by the records of the Land Titles Office to be interested in the land taken;

a notice setting forth the compensation which the company is prepared to pay for the lands, or the interest therein, so taken.

(2) If a person entitled to compensation for land or the interest taken is dissatisfied with the amount of compensation offered, he shall notify the company in writing of his dissatisfaction within thirty days from the date of the mailing of the notice by the company and shall set out,—

(*a*) the amount that he claims as compensation for the land or the interest taken;

(*b*) a full statement of the facts in support of his claim.

(3) In the event of no claim for increased compensation being received by the company within the thirty days, the person entitled to compensation shall be deemed to be satisfied with and shall be bound to accept the amount of compensation offered by the company.

29. (1) When the company and the claimant for increased compensation are unable to agree on the compensation to be paid, the company shall proceed to arbitration under the provisions of The Arbitration Act.

(2) The arbitration shall be by two arbitrators one to be appointed by the company and one by the claimant for increased compensation.

(3) The arbitrators shall consider each case where the amount of compensation is disputed and shall fix the amount of compensation which in their opinion is fair and reasonable.

(4) The company shall pay forthwith to the claimant the compensation fixed by the arbitrators.

There are three issues which arise in these proceedings:

1. The respondent contends that the powers granted to the Minister of Agriculture, under the relevant sections of *The Water Resources Act,* are quasi-judicial in character, that consequently the Minister was bound to give notice to the respondent before exercising them and that the respondent was entitled to an opportunity to be heard before an order was made. The appellants argue that the

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powers of the Minister are administrative in character and that no provision is made in the Act for any such notice or hearing.

2. The respondent submits that, even if the Minister's powers are administrative, he failed to exercise them in accordance with the requirements of the statute. In this connection he relies upon the contents of Mr. Halmrast's letter to him quoted above. The appellants contend that the powers were properly exercised.

3. The respondent argues that, under subs. (1) of s. 63 of *The Water Resources Act,* the Minister can only give his consent to the expropriation of lands or any interest therein and that the order did not relate to lands or to any interest therein. The appellants submit that the expropriation for which the Minister gave his consent did relate to an interest in land.

With respect to the first point, the respondent submitted that a function is of a judicial or quasi-judicial character when the exercise of it effects the extinguishment or modification of private rights or interests in favour of another person, unless a contrary intent clearly appears from the statute. This proposition, it appears to me, goes too far in seeking to define functions of a judicial or quasi-judicial character. In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially. As was said by Hewart L.C.J., in *Rex v. Legislative Committee of the Church Assembly*[1]:

> In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially.

This passage was cited with approval by the Judicial Committee of the Privy Council in *Nakkuda Ali v. M. F. DeS. Jayaratne*[2]. In that case the question was whether a writ of *certiorari* should issue to the Controller of Textiles in Ceylon. The appellant had held a textile licence authorizing him to deal in textiles, which licence

[1] [1928] 1 K.B. 411 at 415.

[2] [1951] A.C. 66, [1950] 2 W.W.R. 927.

the Controller had revoked. The Controller, under reg. 62 of the Defence (Control of Textiles) Regulations, 1945, was empowered to revoke a textile licence "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer".

Lord Radcliffe, who delivered the judgment, after referring to the requirement in reg. 62 as to reasonable grounds of belief, says at p. 77:

> But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially? It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari.
>
> Their Lordships have come to the conclusion that certiorari does not lie in this case. It would not be helpful to reconsider the immense range of reported cases in which certiorari has been granted by the English courts: or the reported cases, themselves numerous, in which it has been held to be unavailable as a remedy. It is, of course, a commonplace that its subjects are not confined to established courts of justice, and instances may be found of the quashing of orders or decisions in which the occasion of their making seems only distantly related to a judicial act. It is probably true to say that the courts have been readier to issue the writ of certiorari to established bodies whose function is primarily judicial, even in respect of acts that approximate to what is purely administrative, than to ministers or officials whose function is primarily administrative even in respect of acts that have some analogy to the judicial. But the basis of the jurisdiction of the courts by way of certiorari has been so exhaustively analysed in recent years that individual instances are now only of importance as illustrating a general principle that is beyond dispute. That principle is most precisely stated in the words of Atkin L J. (as he then was) in *Rex v. Electricity Commissioners,* 1924—1 K.B. 171, 205: ". . . the operation of the writs has extended to control the proceedings of bodies who do not claim to be, and would not be recognised as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." As was said by Lord Hewart C.J., in *Rex v. Legislative Committee of the Church Assembly,* 1928—1 K.B. 411, 415, when quoting this passage, "In order that a body may satisfy the required test it is not enough that is should have legal authority to determine questions affecting the rights of subjects; there must be super-added to

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that characteristic the further characteristic that the body has the duty to act judicially." It is that characteristic that the Controller lacks in acting under reg. 62. In truth, when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it. But, that apart, no procedure is laid down by the regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private, before the Controller acts. The licence holder has no right to appeal to the Controller or from the Controller. In brief, the power conferred on the Controller by reg. 62 stands by itself on the bare words of the regulation and, if the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules.

There have been several cases in England relating to the scope of powers conferred on a minister of the Crown affecting property rights under statutes relating to housing and planning. In *Robinson v. Minister of Town and Country Planning*[1], the Court had to consider the extent of such powers in the Minister of Town and Country Planning under the *Town and Country Planning Act*, 1944, regarding the compulsory purchase of land. In the statute in question in that case, unlike the relevant statute in the present case, provision was specifically made for notice by newspaper advertising and for a public inquiry under certain conditions. One of the questions in issue in that case was as to whether the Minister had to act only on the basis of the evidence obtained at such an inquiry. The Court ruled that he was free to have regard to his own views as to general policy and to consider material acquired in his executive capacity. Lord Greene M.R. has this to say at p. 716:

A number of authorities were referred to in which the powers and duties of ministers under statutes dealing in different language with different classes of subject-matter were discussed and observations were made as to their powers and duties when acting in a quasi-judicial capacity. I am basing this judgment on the particular provisions of this statute in their application to this particular subject-matter; and I do not find anything in the decisions cited which either assists or impedes me to such an extent as to make it necessary for me to examine them. As an example of the difference to be found in the subject-matter dealt with in different statutes, I may point out that this case is different from a case where a minister is given the duty of hearing an appeal from an order such as a closing order made by a local authority. This is not the case of an appeal. It is the case of an original order to be made by the

[1] [1947] 1 K.B. 702.

Minister as an executive authority who is at liberty to base his opinion on whatever material he thinks fit, whether obtained in the ordinary course of his executive functions or derived from what is brought out at a public inquiry if there is one. To say that in coming to his decision he is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the inquiry itself must be conducted on what may be described as quasi-judicial principles. But this is quite a different thing from saying that any such principles are applicable to the doing of the executive act itself, that is, the making of the order. The inquiry is only a step in the process which leads to that result and there is, in my opinion, no justification for saying that the executive decision to make the order can be controlled by the courts by reference to the evidence or lack of evidence at the inquiry which is here relied on. Such a theory treats the executive act as though it were a judicial decision (or if the phrase is preferred, a quasi-judicial decision) which it most emphatically is not. . . .

Similar views were expressed by Lord Greene in *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*[1].

Turning to the statutes in question here, it is significant that there is no requirement as to the giving of notice or the holding of any inquiry in relation to the expropriation itself, although there are specific provisions as to notice and as to arbitration proceedings in relation to the determination of the compensation to be paid in respect of the lands or interest in land expropriated. The Minister is given sole authority to decide whether or not lands or any interest therein are necessary for an authorized undertaking. There is no provision for an appeal from his decision. His decision is as a Minister of the Crown and, therefore, a policy decision, taking into account the public interest, and for which he would be answerable only to the Legislature. As the learned trial judge has said, in dealing with this point:

In the case at bar, as I have already pointed out, it was not incumbent on the Minister to hold a formal or informal hearing, or to furnish an opportunity to be heard either to the applicant or to the owner. Nor do we have here a delegation of authority by the Legislature to the Minister requiring by statute any public inquiry or hearing, or the exercise on his part of any other functions which might indicate judicial or quasi-judicial proceedings. Furthermore, there is here no true contest between Calgary Power and plaintiff to be decided by the Minister. Nor has the Legislature required the Minister after consideration to make any decision between them. Nor does the application raise any specific issue as between them which the Minister is required to settle. In brief, none of the hallmarks of judicial or quasi-judicial proceedings are present, and in addition, there is no *lis inter partes*. There is a vast

[1] [1947] 2 All E.R. 395.

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difference between the position of a Minister of the Crown exercising an authority vested in him by a Legislature to which he is answerable, and the position of some administrative Board (with which so many of the cases cited to me deal) called upon to decide a dispute between parties in particular circumstances, as a result of which the Board concerned is for the time being fulfilling a judicial or quasi-judicial function.

In my view the powers of the Minister, under the statute in question here, were to make an executive order. His functions were not judicial or quasi-judicial. His decision was an administrative decision to be made in accordance with the statutory requirements and to be guided by his own views as to the policy which, in the circumstances, he ought to pursue.

I turn now to the second point, as to whether the Minister failed to exercise his powers in accordance with the requirements of the statute.

On this matter the respondent's position, briefly, is that, whereas the provisions of subs. (1) of s. 63 of *The Water Resources Act* use the words "which the Minister may deem necessary", there was no evidence of any material before the Minister on which he could decide that the land in question here was necessary for the appellant company's undertaking. The respondent contends that the letter written by the Minister to him establishes that the question of necessity was not considered by the Minister.

The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary. In the order which he made he specifically states that he did deem them necessary for the authorized undertaking of the appellant company. There is here no suggestion of bad faith on his part. As Lord Greene M.R. said, immediately following the passage in his judgment already quoted:

> How can this Minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment and acts *bona fide* (as he must be assumed to do in the absence of evidence to the contrary), be called upon to justify his decision by proving that he had before him materials sufficient to support it? Such justification, if it is to be called for, must be called for by Parliament and not by the courts and I can see no ground in the language of the Act, in principle, or in authority for thinking otherwise.

I do not construe the letter of August 5, 1955, from the Minister to the respondent as stating the only grounds on which the Minister's decision was reached, or as demonstrating that he had not, prior to the inspection referred to in the last paragraph of it, deemed the lands necessary for the appellant company's undertaking. Rather it indicates that, out of courtesy to the respondent's objections, the Minister had taken additional steps which confirmed his prior decision.

I, therefore, conclude that the Minister's powers were exercised in accordance with the statutory requirements.

Finally there is the question as to whether that which was authorized to be expropriated constituted an interest in land.

By an amendment to the definition section of *The Water Resources Act* enacted in 1956 (S.A. 1956, c. 61), "lands" means lands within the meaning of *The Land Titles Act*. This provision, although enacted in 1956, is deemed to have been in force at all times on and after April 1, 1931.

The Land Titles Act, R.S.A. 1942, c. 205, defined "lands" as follows:

> "Land" or "Lands" means lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether such estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted.

The interest which the appellant company was permitted to expropriate was the right, license, liberty, privilege and easement to use those portions of the defined areas of the respondent's land being a right-of-way fifty feet in width shown upon the plan. This interest was in favour of the appellant company and its successors in ownership of the undertaking for so long as the company and its successors desired to exercise the same. The interest included the right to construct, operate, maintain, inspect, alter, remove, replace, reconstruct and repair an electrical pole transmission line. There was reserved to the respondent a conditional right of access to and use of the defined right-of-way.

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The respondent contends that the rights which the appellant company was authorized by the ministerial order to expropriate did not constitute an interest in land. Both the learned trial judge and O'Connor C.J.A., who dissented in the Appellate Division, have held that these rights fell within the definition of land contained in *The Land Titles Act*. No opinion was expressed on this point in the majority decision of the Appellate Division.

The respondent argues that the use of the word "easements" in *The Land Titles Act* definition does not assist the appellant's cause. He says that under that definition easements only assume the character of land if they are held together with land as defined in the earlier portion of the relevant section.

It is, however, to be noted that s. 68(1) of *The Land Titles Act* permitted the registration of a grant to a public utility of a right to carry pipes, wires, conductors or transmission lines upon, over or under a parcel of land and that such a right could, by virtue of subs. (2*a*) of that section, be subjected to a registrable mortgage under *The Land Titles Act*.

It should also be noted, as was pointed out by the learned trial judge, that s. 61 of *The Land Titles Act*, in listing those rights to which land in a certificate of title is, by implication, subject, refers, in subs. (g), to "any right-of-way or other easement granted or acquired under any Act or law in force in the Province".

The Saskatchewan Court of Appeal, in *In re Interprovincial Pipe Line Company*[1], in relation to *The Land Titles Act* of Saskatchewan, which contains the same definition of "land" as that found in the Alberta Act, has held that a grant of rights for the construction of a pipe line, in wording very similar to that used in the ministerial order here, entitled the grantee to obtain a certificate of title in accordance with the estate transferred to the grantee.

Gas pipes and electrical poles, wires and transformers were held by this Court to constitute real property in the case of *Montreal Light, Heat & Power Consolidated v. The City of Westmount*[2], where the question in issue was as

[1] [1951] 1 W.W.R. (N.S.) 479, 2 D.L.R. 187, 67 C.R.T.C. 128.
[2] [1926] S.C.R. 515, 3 D.L.R. 466.

to whether gas mains or pipes and a system of electrical poles and wires located on public streets were taxable as "taxable real estate" and "taxable real property". Anglin C.J.C., who delivered the judgment of the majority of the Court, said at p. 523:

> Real estate comprises all hereditaments. That the pipes, poles, wires and transformers here in question would be hereditaments in English law seems clear. Metropolitan Ry. v. Fowler, 1893 A.C. 416 at 427.

The New Zealand Court of Appeal has held that poles, cross-arms, insulators and wires used by an electric-power board for the transmission of electricity constituted "lands, tenements and hereditaments" because the board's interest in the soil occupied by its lines and that portion above ground so occupied and its right thereto is a corporeal hereditament. *Hutt Valley Electric-power Board v. Lower Hutt City Corporation*[1].

I am of the opinion that the interest which the appellant company was authorized to expropriate by the ministerial order was an interest in land as defined for the purposes of *The Water Resources Act*.

For the foregoing reasons I have concluded that this appeal should be allowed. In accordance with the terms of the order of this Court which granted leave to appeal, the appellants shall pay to the respondent his party and party costs in this Court, including the costs of the application for leave to appeal. The appellants are entitled as against the respondent to costs in the Appellate Division of the Supreme Court of Alberta.

Appeal allowed.

Solicitors for the defendant Calgary Power Ltd., appellant: Chambers, Might, Saucier, Milvain, Peacock, Jones & Black, Calgary.

Solicitor for the defendant Halmrast, appellant: L. A. Justason, Calgary.

Solicitors for the plaintiff, respondent: Fenerty, Fenerty, McGillivray, Robertson, Prowse & Brennan, Calgary.

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[1] [1949] N.Z.L.R. 611.