1967

*Oct. 10, 11
Nov. 20

HER MAJESTY THE QUEEN in the Right of the Province of Ontario .... APPELLANT;

AND

BOARD OF TRANSPORT COMMISSIONERS ..... RESPONDENT.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS

Constitutional law—Jurisdiction—Railways—Commuter service operated by provincial government using own rolling stock—Tracks of Canadian National Railways used—Whether tolls charged by province subject to jurisdiction of Board of Transport Commissioners—Whether commuter service within legislative jurisdiction of Parliament of Canada—Desirable that Attorney General of Canada be represented whenever constitutional validity of federal legislation in issue—Commuter Services Act, 1965 (Ont.), c. 17—B.N.A. Act, 1867, s. 92(10)—Interpretation Act, R.S.C. 1952, c. 158, s. 16—Railway Act, R.S.C. 1952, c. 234.

The government of Ontario decided to operate a commuter train service, using its own rolling stock but utilizing the Canadian National Railways tracks. The train crews would be those of the Canadian

*PRESENT: Cartwright C.J. and Fauteux, Martland, Judson, Ritchie, Hall and Pigeon JJ.

National Railways performing services for the government of Ontario on an agency basis under terms and conditions to be provided for in a formal agreement to be entered into in the near future. The Board of Transport Commissioners, on an application by the Canadian National Railways to discontinue certain passenger trains on that line, declared that it had jurisdiction in respect of the tolls to be charged by the province in respect of the proposed services. On appeal to this Court by the province of Ontario against that declaration, two questions were raised: (1) Whether the Board of Transport Commissioners has jurisdiction to set the tolls, and (2) Whether the commuter service comes within the jurisdiction of the Parliament of Canada.

Held: The appeal should be dismissed.

As to the first question, the tolls to be charged by the province of Ontario are subject to the jurisdiction of the Board of Transport Commissioners.

The Board has jurisdiction over tolls within the meaning of the *Railway Act*, R.S.C. 1952, c. 234, and the question is whether the tolls to be charged by the province in this case are tolls within the definition of that word in the *Railway Act*. The answer to the contention that they will not be charged by the "company" but by Her Majesty is that the definition applies not only to tolls charged by the "company" but also to tolls charged "upon or in respect of a railway owned or operated by the company, or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers..." While it is true that the the rolling stock belongs to the province of Ontario, the railway on which this equipment runs is the "company's" railway. Therefore, the tolls cannot be said not to be "in respect of a railway owned" by the Canadian National Railways.

As to the second question, the commuter service comes within the legislative jurisdiction of the Parliament of Canada as being a local work or undertaking within the meaning of s. 92(10)(*a*) of the *B.N.A. Act, 1867*.

The Canadian National Railways, extending beyond the limits of the province of Ontario, is subject to the jurisdiction of the Parliament of Canada, and the question is whether the commuter service can be said not to form part of this railway. To come to this conclusion, it would be necessary to hold that federal jurisdiction over interprovincial railways extends only to interprovincial services provided on such railways. It is not possible to so hold. The constitutional jurisdiction depends on the character of the railway line and not on the character of a particular service provided on that railway line. The fact that for some purposes the commuter service should be considered as a distinct service does not make it a distinct line of railway. From a physical point of view, the commuter service trains are part of the overall operations of the line over which they run. Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction.

Droit constitutionnel—Juridiction—Chemins de fer—Service de trains de banlieue exploité par le gouvernement provincial en se servant de son matériel roulant—Utilisation de la voie des Chemins de Fer Natio-

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naux du Canada—Le tarif exigé par la province est-il sujet à la juridiction de la Commission des Transports du Canada—Le service de trains de banlieue tombe-t-il sous la juridiction législative du Parlement du Canada—Désirable que le procureur général du Canada soit représenté chaque fois qu'est soulevée la validité constitutionnelle d'une législation fédérale—Commuter Services Act, 1965 (Ont.), c. 17 —L'Acte de l'Amérique du Nord britannique, 1867, art. 92(10)—Loi d'interprétation, S.R.C. 1952, c. 158, art. 16—Loi sur les chemins de fer, S.R.C. 1952, c. 234.

Le gouvernement de l'Ontario a décidé d'exploiter un service de trains de banlieue, tout en se servant de son matériel roulant mais en utilisant la voie des Chemins de Fer Nationaux du Canada. Le personnel du train devait être celui des Chemins de Fer Nationaux en service auprès du gouvernement de l'Ontario, sur une base d'agence en vertu des termes et conditions devant faire partie d'un contrat formel à être passé tout prochainement. La Commission des Transports du Canada, sur une demande des Chemins de Fer Nationaux de discontinuer certains trains de voyageurs sur la ligne en question, a déclaré qu'elle avait juridiction sur les tarifs devant être exigés par la province relativement au service proposé. Sur appel devant cette Cour par la province de l'Ontario à l'encontre de cette déclaration, deux questions ont été soulevées: (1) La Commission des Transports du Canada a-t-elle juridiction pour établir le tarif, et (2) Le service de trains de banlieue tombe-t-il sous la juridiction du Parlement du Canada.

Arrêt: L'appel doit être rejeté.

Quant à la première question, le tarif devant être exigé par la province de l'Ontario est sujet à la juridiction de la Commission des Transports du Canada.

La Commission a juridiction sur les tarifs dans le sens de la *Loi sur les chemins de fer*, S.R.C. 1952, c. 234, et le problème est de savoir si le tarif devant être exigé par la province dans le cas présent est un tarif selon la définition de ce mot dans la *Loi sur les chemins de fer*. La réponse à la prétention que le tarif ne sera pas exigé par la «compagnie» mais par Sa Majesté est que la définition s'applique non seulement au tarif exigé par la «compagnie» mais aussi au tarif exigé «sur un chemin de fer que la compagnie possède ou tient en service, ou relativement à ce chemin de fer, ou pour toute personne agissant au nom de la compagnie ou avec son autorisation ou son consentement, pour le transport des voyageurs...» Il est vrai que le matériel roulant appartient à la province de l'Ontario, mais la voie ferrée sur laquelle ce matériel roule est la voie ferrée de la «compagnie». En conséquence, on ne peut pas dire que le tarif n'est pas «relativement à un chemin de fer possédé» par les Chemins de Fer Nationaux du Canada.

Quant à la seconde question, le service d'un train de banlieue tombe sous la juridiction législative du Parlement du Canada comme étant un travail ou une entreprise d'une nature locale dans le sens de l'art. 92(10)(*a*) de *L'Acte de l'Amérique du Nord britannique*, 1867.

Les Chemins de Fer Nationaux du Canada, s'étendant au-delà des limites de la province de l'Ontario, sont sujets à la juridiction du Parlement

du Canada, et le problème est de savoir si on peut dire que le service de trains de banlieue ne fait pas partie de ce chemin de fer. Pour en venir à une telle conclusion, il serait nécessaire de décider que la juridiction fédérale sur les chemins de fer interprovinciaux s'étend seulement aux services interprovinciaux fournis sur ces chemins de fer. Il n'est pas possible de décider de cette façon. La juridiction constitutionnelle dépend du caractère de la ligne de chemin de fer et non pas du caractère des services particuliers fournis sur cette ligne de chemin de fer. Le fait que pour certaines fins le service de trains de banlieue doit être considéré comme un service distinct n'en fait pas une ligne distincte de chemin de fer. Du point de vue physique, le service de trains de banlieue fait partie de l'exploitation entière de la ligne sur laquelle ces trains roulent. Le Parlement du Canada a juridiction sur tout ce qui fait partie physiquement des chemins de fer sujets à sa juridiction.

APPEL d'une décision de la Commission des Transports du Canada. Appel rejeté.

APPEAL from a decision of the Board of Transport Commissioners. Appeal dismissed.

C. F. H. Carson, Q.C., J. R. Houston and *D. A. Crosbie,* for the appellant.

J. M. Fortier, Q.C., and *L. Salembier,* for the respondent.

The JOINT OPINION OF THE COURT:—This case arose in the following way.

Under the authority of the *Commuter Services Act,* 1965, Statutes of Ontario 1965, c. 17, the Minister of Highways for Ontario decided to operate a Government of Ontario Commuter Service from Toronto westerly to Hamilton and easterly to Pickering utilizing Canadian National Railways' trackage in the entire area of its operation. Although no contract for that purpose has yet been signed, the Canadian National Railways, on July 16, 1965, made an application to the Board of Transport Commissioners for authority to discontinue four passenger trains operating between Toronto and Hamilton. It was stated in the application that the train crews on the Commuter Service would be those of the Canadian National Railways performing services for the Ontario Government on an agency basis under terms and conditions to be provided for in a formal agreement to be entered into in the near

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future. By the order appealed from authority to discontinue the four trains was given and in addition the Board declared that:

It has jurisdiction in respect of the tolls to be charged by the Province of Ontario in respect of the proposed services.

The appeal by Ontario is against that declaration only and raises two points:

1. Whether the tolls to be charged by Ontario in respect of the Commuter Service are subject to the jurisdiction of the Board of Transport Commissioners;
2. Whether the Commuter Service comes within the legislative jurisdiction of the Parliament of Canada.

On the first question it is not disputed that the Board of Transport Commissioners has jurisdiction over tolls within the meaning of the *Railway Act*, R.S.C. 1952, c. 234. The issue is whether the tolls to be charged by Ontario in respect of the Commuter Service are tolls within the definition of this word in the *Railway Act*. The material part of this definition is as follows:

> (32) 'toll,' or 'rate,' when used with reference to a railway, means any toll, rate, charge or allowance charged or made either by the company, or upon or in respect of a railway owned or operated by the company, or by any person on behalf of or under authority or consent of the company, in connection with the carriage and transportation of passengers, or the carriage, shipment, transportation, care, handling or delivery of goods, or for any service incidental to the business of a carrier; and includes any toll, rate, charge or allowance so charged or made in connection with rolling stock, or the use thereof, or any instrumentality or facility of carriage, shipment or transportation, irrespective of ownership or of any contract, expressed or implied, with respect to the use thereof;...

Appellant points out that the tolls in question will not be charged by the "company" within the meaning of the definition since they will be charged by Her Majesty in the right of the Province of Ontario. The answer to this contention is that the definition applies not only to tolls charged by the "company" but also to tolls charged "upon or in respect of a railway owned or operated by the company, or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers . . .". While it is true that the rolling stock used in operating the Commuter Service belongs to Ontario, the railway on which this equipment runs is the "company's" railway. Therefore, the tolls

cannot be said not to be "in respect of a railway owned" by the Canadian National Railways; they are obviously a charge for the transportation of passengers over this railway by means of such equipment.

It is worth noting that under the *Railway Act* the rolling stock, is not considered an essential part of the railway. Although it is included in the definition of "railway" it is also included in the definition of "traffic":

> (33) "traffic" means the traffic of passengers, goods and rolling stock;

It should be further noted that under s. 315 of the *Railway Act,* a railway company is obliged to furnish "suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway". Therefore it cannot be said that the operation of a commuter service by means of rolling stock owned by the Government of Ontario is not an operation of the "railway" within the meaning of the *Railway Act.* On the contrary, to the extent that the tolls charged to the passengers can be said to be charged in connection with the use of the rolling stock they are expressly covered by the last quoted part of the definition: "and includes any toll ... so charged in connection with rolling stock, or the use thereof ... irrespective of ownership".

It is argued that, although the provisions of the *Railway Act* respecting tolls might be applicable in such a situation if the rolling stock was owned by and operated on the account of any other person or corporation, they cannot be applied to Her Majesty in right of the Province of Ontario by reason of s. 16 of the *Interpretation Act* that was in force at the time the order was made, R.S.C. 1952, c. 158. This section is as follows:

> 16. No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

It should be pointed out that this section does not provide that no enactment applies to Her Majesty unless it is expressly stated therein that Her Majesty is bound thereby but only that no enactment affects the rights of Her Majesty unless it is so stated. Therefore, in order to rely on the rule to exclude Her Majesty from the application of an enactment, it must be shown that Her rights are affected thereby.

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It was held by the Privy Council in *Dominion Building Corporation, Limited v. The King*[1], with respect to a similar enactment of the Ontario Legislature that, at page 549:

> The expression "the rights of His Majesty" in this context means, in their Lordships' view, the accrued rights of His Majesty, and does not cover mere possibilities such as rights which, but for the alteration made in the general law by the enactment under consideration, might have thereafter accrued to His Majesty under some future contract.

This observation is applicable to the present case. Her Majesty in right of Ontario has, apart from an agreement in principle with the Canadian National Railways, no right to operate the Commuter Service and therefore no right to levy tolls for the carriage of passengers over part of the Canadian National Railways lines. Such rights as Ontario has are derived either from such agreement or from the *Railway Act* and therefore are subject to the conditions prescribed in that Act, one of these being that tolls are within the jurisdiction of the Board of Transport Commissioners.

It appears to us that Ontario can no more claim to be exempt in the operation of the Commuter Service from the application of the general provisions of the *Railway Act* respecting tolls than British Columbia could claim to be exempt from the general provisions of the *Customs and Excise Acts* in the operation of its Liquor Control Board, as was held in *Attorney-General of British Columbia v. Attorney-General of Canada*[2]. It is true that in that case, the claim to exemption was based on s. 125 of the *B.N.A. Act*, however, the decision also involves the application to a provincial government of the general provisions of the *Customs and Excise Acts*.

On the second question, it is urged that the Commuter Service is operated exclusively within the Province of Ontario and reference is made to the following sentence in the reasons for judgment of the Board:

> The service to be provided will be a service of the Government of Ontario and will not form part of the Canadian National Railway operations.

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[1] [1933] A.C. 533, 2 W.W.R. 417, 3 D.L.R. 577, 41 C.R.C. 117.

[2] [1922], 64 S.C.R. 377, 38 C.C.C. 283, [1923] 1 W.W.R. 241, 1 D.L.R. 223; [1924] A.C. 222, 42 C.C.C. 398, [1923] 3 W.W.R. 1249, 4 D.L.R. 669.

It must first be pointed out that this sentence comes immediately after the following: "It will use existing C.N.R. trackage". It is therefore apparent that, when the service is said not to "form part of the Canadian National Railways operations" this must be taken in a special sense in considering the operations from an accounting or financial point of view. It cannot be taken as meaning that the Commuter Service will not form part of the physical operations of the railway seeing that the equipment runs on the railway tracks. That this is of substantial importance in the physical operation of the railway appears in the record from uncontradicted evidence. John Howard Spicer, Manager of the Toronto area said:

> We are presently expanding the capacity of our plant to ensure that we can handle this new traffic adequately and also protect the existing traffic that moves on the line. This is one of our more important lines in Ontario and we must ensure that we can handle the traffic well. The new design for facilities will permit this.

How important "the trackage" is in the operation of the Commuter Service appears from what the same witness also said respecting the limited service provided to Hamilton.

> Q. Now, if this facility was constructed at Bayview, Mr. Spicer, would it in any way enable the Ontario Government utilizing C.N. facilities to operate more frequent commuter trains into Hamilton?
>
> A. Not without the expansion of the physical plant between Bayview and Burlington. The main problem we have at the present time is that the stretch of track between Burlington and Bayview is our highest traffic density portion of the entire line. Over that stretch of track we have all the traffic coming out of our hump yard, down the Halton Subdivision connecting into the Oakville Subdivision at Burlington. And of course we have all the trains going to London and Chicago and also down to Niagara Falls. So that over that short stretch of line we have an extreme density of trains. We don't feel that our existing plant has sufficient capacity to handle anything like the proposed commuter service. This is why we were forced to restrict our operations to two trains in each direction, the equivalent of our present commuter service to this area. To handle more trains than this or any significant more larger number of trains than this we would have to add lines, new rail lines, and of course they would have to be fully signalled, crossover networks would have to be put in to tie into the existing main lines that we have through here. So this would be a very expensive part of the entire project and I believe we made an estimate on it that the cost of extending the commuter service through this approximately three-mile stretch would equal the entire capital cost of installing the commuter service on the rest of the area,...

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On the basis of what has just been said as to the nature of the Commuter Service it remains to be seen whether it can be said to be a local work or undertaking within the meaning of head 10 of s. 92 of *The British North America Act:*

> 10. Local Works and Undertakings other than such as are of the following Classes:—
>
> (*a*) Lines or Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> (*b*) Lines of Steam Ships between the Province and any British or Foreign Country:
>
> (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

It is, of course, admitted that the Canadian National Railways extends beyond the limits of the Province of Ontario. Therefore it is clear that this railway is subject to the jurisdiction of the Parliament of Canada. The only question is whether the Commuter Service can be said not to form part of this railway. To come to this conclusion, it would be necessary to hold that federal jurisdiction over interprovincial railways extends only to interprovincial services provided on such railways. This is clearly not possible. In *Winner v. S.M.T. (Eastern) Ltd.*[3], Rand J. said at p. 923:

> The analogy of railways and telegraphs was pressed upon us. These works are specifically named, and it is the clear implication that their total functioning was to be under a single legislature. But even they are limited to essential objects: *Attorney General for British Columbia v. C.P.R.* (1950 A.C. 122), in which a hotel operated by the company was held not to be part of the railway...

Kellock J. said at p. 929:

> The words, 'Lines of ships' and 'railways,' as used in the section, no doubt include all traffic carried by such means, but that is because these undertakings are specifically mentioned and, being mentioned, include everything normally understood by those words...

In the Privy Council the judgment of this Court was varied by taking a wider view of the operations included in an international or interprovincial bus service. No doubt

[3] [1951] S.C.R. 887, 4 D.L.R. 529, 68 C.R.T.C. 41.

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was cast on the correctness of the views expressed in the passages just quoted *(Attorney-General for Ontario v. Winner*[4]):

> Their Lordships might, however, accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises, one within the province and the other of a connecting nature. Their Lordships, however, cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities.

In the present case, the constitutional jurisdiction depends on the character of the railway line not on the character of a particular service provided on that railway line. The fact that for some purposes the Commuter Service should be considered as a distinct service does not make it a distinct line of railway. From a physical point of view the Commuter Service trains are part of the overall operations of the line over which they run. It is clearly established that the Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction. In *Canadian Pacific Railway v. Notre-Dame de Bonsecours*[5], Lord Watson said at p. 372:

> ...the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management,...

In *Attorney General for Alberta v. Attorney-General for Canada*[6], Lord Moulton said at p. 370:

> By s. 8 of the Dominion Railway Act Parliament treats in a special manner the crossing of Dominion railways by provincial railways. These portions of the provincial railways are made subject to the clauses of the Dominion railway legislation, which deal also with the crossings of two Dominion railways, so that the provincial railways are in such matters treated administratively in precisely the same way as Dominion railways themselves. The Parliament of the Dominion is entitled to legislate as to these crossings because they are upon the right of way and track of the Dominion railway as to which the Dominion Parliament has exclusive rights of legislation, and moreover, as the provincial railways are there by permission and not of right, they can fairly be put under terms and regulations.

Hotels operated by railways were held to be separate undertakings only because they are not "a part of, or used

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[4] [1954] A.C. 541 at 580, 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225.
[5] [1899] A.C. 367.
[6] [1915] A.C. 363, 19 C.R.C. 153, 22 D.L.R. 501.

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in connexion with the operation of a railway system". *Canadian Pacific Railway v. Attorney-General for British Columbia*[7].

Counsel for appellant did not contend that the Commuter Service wholly escaped federal legislative jurisdiction, he conceded that for such matters as signals and safety, the commuter trains would be subject to the same rules as other trains. It is, of course, obvious that no railway could be operated with trains on the same line not governed by the same set of rules; as Davies J. said in *City of Toronto v. Grand Trunk Railway Company*[8]:

> There cannot be two conflicting tribunals legislating at the same time upon such a vital subject as the public safety at railway crossings.

Counsel for appellant also felt obliged to concede that the train crews would be subject to federal labour laws not provincial. This cannot be true on any other basis than that the commuter service is not a distinct undertaking but part of the railway operations from the physical point of view. The criterion for the application of the labour laws as well as for the application of the safety rules is the same: whether the undertaking connects the province with any other.

The decision in *Luscar Collieries, Limited v. McDonald et al.*[9], shows that even a work which is of itself local, such as a provincial railway, may become a part of a federal undertaking by being put under the same management through an agreement with the latter. It thereby becomes part of a railway connecting the province with other provinces. There again the criterion of the jurisdiction is the fact that the operations are a part of the interprovincial system.

It must also be noted that in this last mentioned case, the order of the Railway Board which was affirmed on appeal to this Court was, as in the present case, an order declaring only that the Board had jurisdiction.

Before concluding, two observations should be made.

In his reasons for judgment, the dissenting Commissioner said: "I am of the opinion the requirements of the

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[7] [1950] A.C. 122 at 147, 1 W.W.R. 220, 64 C.R.T.C. 266, 1 D.L.R. 721.
[8] (1906), 37 S.C.R. 232 at 243.
[9] [1925] S.C.R. 460, 31 C.R.C. 267, 3 D.L.R. 225; [1927] A.C. 925, 3 W.W.R. 454, 4 D.L.R. 85.

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Railway Act can be adequately and properly met by the simple process of the railway filing with the Board, as a tariff, the agreement which it has or will have with the Province and which must contain a full disclosure of the remuneration the railway will receive for the carriage and services it performs". It may well be that after considering all relevant circumstances the Board will come to the conclusion that it need not exercise its jurisdiction over the tolls charged to passengers and will find it sufficient to consider the adequacy of the charges made by the railway company to Ontario under the terms of the contemplated agreement. However, the question on this appeal is not whether the Board should in fact exercise its jurisdiction but whether it does have jurisdiction.

In the second place, it must be said that while at the hearing of this appeal the Court had the benefit of a thorough argument from both sides on the first question, no one appeared to oppose appellant on the constitutional issue. Counsel for the Board of Transport Commissioners declined to offer argument on that point in view of the Board's practice to refrain from dealing with such issues and the Attorney-General of Canada was not represented at the hearing. It is undesirable that this Court should be obliged to rule upon constitutional issues without the benefit of argument for both sides and the hope is expressed that, in the future, whenever the constitutional validity or application of federal legislation is in issue, this Court will always have the benefit of argument by counsel on behalf of the Attorney-General of Canada.

On the whole, we are of opinion that the appeal should be dismissed. There should be no order as to costs.

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Tilley, Carson, Findlay & Wedd, Toronto.

Solicitor for the respondent: J. M. Fortier, Ottawa.