Supreme Court of Canada
Canadian Pacific Railway v. Province of Alberta, [1950] S.C.R. 25
Date: 1949-12-22

Canadian Pacific Railway *Appellant*;

and

The Province Of Alberta Et Al *Respondent.*

1949: December 5, 6, 7, 8; 1949: December 22.

Present: Rinfret C.J. and Kerwin, Taschereau, Rand and Kellock JJ.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Railways—Freight rates—Board of Transport Commissioners—Powers and duties—Postponement of final decision—Declining of jurisdiction —Railway Act, R.S.C. 1927, c. 170, ss. 33(1) (b), 45(2), 52(3).

The Board of Transport Commissioners, being a court of record, cannot postpone determination of an application for an increase in freight rates by reason of matters entirely irrelevant to the proper discharge of its duty to decide such question. To do so would amount, in effect, to a declining of jurisdiction.

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APPEAL, by leave of the Board of Transport Commissioners for Canada, from a decision of that Board authorizing, upon application, an interim increase in freight rates and postponing final determination of the said application pending the General Freight Rates Inquiry, the report of the Royal Commission on Transportation and its consideration by Parliament. The appeal is on the following questions which in the opinion of the Board involved questions of law:

1. Is it the duty of the Board of Transport Commissioners under the *Railway Act,* upon application by the railway companies subject to its jurisdiction, to determine whether and to what extent an increase in freight rates should be authorized because of changing conditions or cost of transportation?

2. If so, did the Board fail to perform that duty in respect of the application of the Railway Association of Canada dated July 27, 1948, for authority to make a general advance of 20 per cent in freight rates, when by its Judgment dated September 20, 1949, it postponed the final determination of the said application until the investigations, studies and determination of the several matters referred to in the said Judgment have been completed?

C. F. H. Carson, K.C., F. C. S. Evans, K.C. and *D. K. M. Spence* for the appellant.

J. C. Osborne for Alberta.

H. E. B. Coyne, K.C. for *Board of Transport.*

W. E. McLean, K.C. and *C. D. Shepard* for Manitoba and Saskatchewan.

F. D. Smith, K.C. for Maritime Board of Trade.

C. W. Brazier for British Columbia.

The judgment of the Court was delivered by

KELLOCK J.:—This appeal comes to this court pursuant to leave granted by the Board of Transport Commissioners under section 52(3) of the *Railway Act,* upon certain questions stated by the Board as follows:

> 1. Is it the duty of the Board of Transport Commissioners under the Railway Act, upon application by the railway companies subject

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> to its jurisdiction, to determine whether and to what extent an increase in freight rates should be authorized because of changing conditions or cost of transportation?
>
> 2. If so, did the Board fail to perform that duty in respect of the application of the Railway Association of Canada dated July 27, 1948, for authority to make a general advance of 20 per cent in freight rates, when by its Judgment dated September 20, 1949, it postponed the final determination of the said application until the investigations, studies and determinations of the several matters referred to in the said Judgment have been completed?

By a judgment of the 30th of March, 1948, made upon an application by the Railway Association of Canada on behalf of the railways subject to the jurisdiction of Parliament, the Board authorized a general increase in freight rates of 21 per cent, the majority judgment expressing the view that the increased rates would give the present appellant, at the end of the fiscal year, 1948, a small surplus on its transportation operations. This view was based upon the assumption that operating results in 1948 would be approximately the same as had been experienced in 1947.

On the 27th of July, 1948, the railways, having in the meantime been called upon to pay higher wages to their employees, filed with the Board an application for authority to make a further general advance of 20 per cent in the then existing freight rates and alleged that the increase in wage rates alone would effect an increase in the annual operating expenses of the appellant of some twenty-seven million dollars. The railways also asked for authority to make an interim increase of 15 per cent pending the final determination by the Board of the application for a permanent increase, but they consented to the deferring of the final determination on the condition that the application for this interim increase should be set down for summary hearing at a date agreeable to the Board during the month of September next and that "judgment thereon shall have been given by the Board." These terms not having been met, this consent was subsequently withdrawn and the application for an interim allowance pending disposition of the main application need not be further considered.

Meantime, on the 7th of April, 1948, P.C. 1487 had been passed, directing the Board to undertake a general freight rates investigation. Meantime also, the provinces, in September 1948, had launched an appeal to the Gover-

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nor-in-Council from the judgment of the 30th of March, 1948, and applied to the Board to stay its hearing of the new application of the railways, pending the disposition of this appeal. The appeal was disposed of by Order in Council P.C. 4678 of the 12th of October, 1948, by which the Board was directed to consider the complaints which were the subject matter of the appeal, concurrently with the application of the railways.

Further, while the application of the railways was still pending, the Board, having fixed January 11, 1949, to hear it, the Governor-in-Council by P.C. 6033 of December 29, 1948, appointed a Royal Commission to inquire into and report upon all questions of economic policy within the jurisdiction of Parliament arising out of the operation and maintenance of national transportation, including such matters as guidance to the Board in general freight rates revision, competitive rates, international rates, etc., review of the Railway Act and recommendation of amendments; review of the capital structure of the Canadian National Railway Company; review of present day accounting methods and statistical procedure of railways in Canada; and review of the results achieved under the Canadian National-Canadian Pacific Act, 1933, and amendments. It was however, expressly provided:

> That the scope of this Commission shall not extend to the performance of functions which, under the Railway Act, are within the exclusive jurisdiction of the Board of Transport Commissioners.

Hearing of the review directed by P.C. 4678 and the application of the railways was concluded by the Board on the 5th of April, 1949, and judgment was delivered on the 20th of September following. The judgment of the majority delivered by the Chief Commissioner, and concurred in by Mr. Commissioner Chase, granted a general *interim* increase in freight rates of 8 per cent and increases in rates on coal and coke of 8 cents per ton. The judgment concluded as follows:

> When the investigations, studies and determinations of the several matters hereinbefore referred to have been completed the Board will notify the applicants and respondents of the date and place of hearing to consider further evidence and representations respecting this application.

As will subsequently be shown, the above paragraph amounted to a declaration that the Board declined to pass upon the application for increased rates until after the

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Royal Commission had concluded its hearings and made its report and, "possibly", until any amendments to existing legislation which might be recommended had been dealt with by Parliament, and also until the general freight rates investigation, which the Board itself was directed to undertake by P.C. 1487, had been concluded. These matters might very well occupy a considerable period of time and, apart from the general freight rates investigation to be conducted by the Board itself, these matters involved investigations by bodies in no way related to the Board. Appellant contends that, while no one would argue that the Board could not properly adjourn proceedings pending before it from time to time as might be necessary in order to dispose of them properly, as indeed the Board is expressly authorized to do by section 45 (2) of the statute, it may not make an order such as that here in question amounting to a refusal to function altogether, pending the occurrence of matters which are entirely irrelevant to the discharge by the Board itself of the duty incumbent upon it under the provisions of the *Railway Act.*

On the part of the respondents, it is conceded that the first question should be answered in the affirmative and also that in so far as the postponement is conditioned upon amendment by Parliament to existing law, the judgment is in error. It is contended, however, that apart from this consideration the Board was entitled to take the other matters into consideration and base its decision to postpone thereon.

We proceed to deal with the meaning and effect of

> When the investigations, studies and determinations of the several matters hereinbefore referred to have been completed

in the concluding paragraph of the judgment.

It was made to appear before the Board that there had been an advance in wages paid by the railways since March, 1948, of 17 cents per hour. The learned Chief Commissioner said that evidence had not been furnished to show what portion, if any, of this increase in labour costs was proper and necessary. In his opinion the question of increased labour costs had been most inadequately dealt with, both in the evidence and in argument,

> and therefore before any final decision is given on this application the applicants will be afforded an opportunity to supplement the evidence and argument already before us in this regard.

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By itself this is no doubt unobjectionable. It is merely to say that when the parties are ready to deal with the point the Board would hear them. However, this does not stand by itself but must be taken with the other "matters" to which we shall refer, all of which are governed by the final paragraph of the judgment, under which, when all such matters are "completed" the Board will then proceed. In the meantime the Board will not deal with the application before it.

Another "matter" was the contention put forward on behalf of the Canadian National Railways that any increase in freight rates should substantially meet the requirements, not only of the Canadian Pacific Railway, which had been taken somewhat as the yardstick heretofore, but also of the National Railways. With respect to this the Chief Commissioner says:

> … I am of opinion that the final determination respecting this application *must* (the italics are mine) await the findings of the Royal Commission on Transportation, and possibly the implementation of certain of those recommendations.

With reference to the evidence directed toward establishing a rate base, the judgment says, *inter alia,*

> It may very well be that the proper basis for establishing freight rates in this country should follow a revision of the capital structure of the Canadian National Railways and the appropriate statutory direction to this Board as to freight rates based on that valuation. It is not open to the Board at present to adopt such a course. Therefore it is all the more important that no final determination be made respecting this application at the present time.

If this means (and it is open to such a construction) that in the view of the majority no decision on the pending application could, nor would, be given until Parliament should have acted with respect to these matters, this would be, in our opinion, a ground of decision entirely irrelevant. If this is not the meaning of the language, then this particular matter has no bearing on the present appeal.

The learned Chief Commissioner refers to a number of other matters as reasons why his decision "should authorize an interim increase only." In the context of the judgment this language can only mean that by reason of these considerations the majority decline to pass on the main application. The first of these matters is the ques-

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tion of economy in carrying out the Canadian National-Canadian Pacific Act of 1933. As to this the judgment says:

> At the present time it is beyond the Board's jurisdiction to inquire into that question but I find again that one of the matters referred to the Royal Commission on Transportation in P.C. 6033 is that it "Review and report on the results achieved under '(the above statute)' making such recommendations as the present situation warrants."

Another matter under this head was the objection of the respondents to the principle of horizontal increases. The judgment states that the Board is not in a position to "give a final determination" with respect to the question because of the fact that it was a matter to be dealt with by the Board in conducting the general freight rates investigation directed by P.C. 1487.

The third matter under this head was the question of maintenance costs and "deferred maintenance." As to these the judgment says that—

> the question of proper maintenance costs as well as that of deferred maintenance will require further study by the Board in the light of additional information and accounting procedure which may flow from the recommendations of the Royal Commission …

From these references it is apparent that the postponement is until the General Freight Rates Inquiry (to be conducted by the Board itself), the report of the Royal Commission on Transportation, and probably (but perhaps not so clearly), the consideration by Parliament of that report, have all come to pass.

In our opinion if anything involved in these matters was relevant to a determination of the application of the railways and the review of the 21 per cent judgment ordered by P.C. 4678, it was for the Board itself to make its own determination and it was not competent to the Board to await the investigation of such matters by some other body or the passing by Parliament of some future legislation with respect to them. Such a decision involves, in our opinion, a declining of jurisdiction.

The Board of Transport Commissioners is not only an administrative body but a court of record and it has, in addition to any other power or authority, "full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested,

> (*b*) requesting the Board to make any order, or give any direction, leave, sanction or approval, which by law it is authorized to make

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> or give, or with respect to any matter, act or thing, which by this Act, or the Special Act, is prohibited, sanctioned or required to be done. Sec. 33(1) (*b*).

This jurisdiction the Board is bound to exercise.

In *Julius* v. *Lord Bishop of Oxford* [1], a case dealing with the nature and extent of duty imposed upon The Lord Bishop under an English statute couched in permissive terms, the Lord Chancellor, Earl Cairns, had occasion to review a number of pertinent authorities, among which was *The King* v. *Havering-atte-Bower* [2]. In that case a power granted by royal charter to the steward and suitors of a manor giving them authority to hear and determine civil suits was under consideration. It was held that this was in effect the establishment of a court for the public benefit and that the stewards and suitors of the manor had no discretion but were bound to hold the court. Lord Cairns at page 225 of the Julius case expressed himself as to the principle involved as follows:

> … where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.

In the same case Lord Penzance said:

> In all these instances the Courts decided that the power conferred was one which, was intended by the Legislature to be exercised; and that although the statute in terms had only conferred a power, the circumstances were such as to create a duty. In other words, the conclusion arrived at by the Courts in these cases was this—that regard being had to the subject-matter—to the position and character of the person empowered—to the general objects of the statute—and, above all, to the position and rights of the person, or class of persons, for whose benefit the power was conferred, the exercise of any discretion by the person empowered could not have been intended.

It was the view of all the members of the House in that case that while words which are permissive do not of themselves do more than confer a faculty or power, nevertheless, to quote The Lord Chancellor at page 222:

> … there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which

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> may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

In our opinion to postpone passing upon a matter by-reason of matters which are entirely irrelevant to the proper discharge of the duty placed upon the Board under the statute to decide these matters for itself amounts in effect to a refusal to function. It is no answer to

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1 (1879-80) 5 A.C. 214.
2 5 B. & Ald. 691.

say, as the respondents did, that it was always open to the railways to make a further application. In the face of the present judgment no one can doubt what would be the answer to such an application.

The injustice to the appellants by reason of the judgment here in question can best be illustrated by a reference to the earlier judgment delivered by the learned Chief Commissioner on April 23, 1949, in *Province of British Columbia* v. *C.P.R., C.N.R., et al* [3]. That was an application by the province of British Columbia for an order directing the railways to remove from the freight tolls the so-called "mountain differential." In the course of his judgment the learned Chief Commissioner, with whom Mr. Commissioner MacPherson agreed, said at 225:

> On behalf of the Provinces of Alberta, Saskatchewan and Manitoba, and on behalf of the City of Winnipeg and the Winnipeg Board of Trade it was urged that the removal of the mountain differential should not be made prior to a, general freight rate inquiry and study in Canada. Such an inquiry and study is now in progress. It will take much time to complete. As a result of that inquiry and study, and that being made by the Royal Commission on Transportation, it is possible that amendments to the Railway Act will have to be considered by Parliament before results of that study and the recommendations of the Royal Commission can be made effective. I see no reason why the Province of British Columbia before receiving the relief it seeks in this application should have to await the results of the study made by this Board and the Royal Commission.
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> * * * *
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> For the reasons already given I cannot, and do not subscribe to the doctrine which would involve perpetuating an injustice clearly established, until some date in the future when the General Freight Rates Inquiry will be concluded.

With respect, there can be no difference in principle between a refusal to postpone consideration of an application on behalf of a province to reduce railway rates and a refusal to deal with an application by the railways for increased rates, the ground of decision being in each case

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the same. If there is injustice in the one case (and we respectfully agree with the learned Chief Commissioner that there would have been) there is the same injustice in the other. In granting a measure of relief, as it did by its interim order of 8 per cent, the Board concedes that the railways had made out a case for relief. The error lies in failing to proceed to determine the extent to which the interim relief granted was adequate or inadequate on the basis of the case made.

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[3] 63 C.R.T.C. 214.

We think therefore the principle of the decision in *Maxwell* v. *Keun* [4], applies and that the majority judgment was such that injustice would be done by the order here in question were it to stand. To adopt the language of Cozens-Hardy M.R., in *Sackville West* v. *Attorney-General* [5], followed in Maxwell's case, the learned Chief Commissioner "failed to see that such would be the effect of his decision."

No doubt in deciding on "adjournments" the Board may and must exercise its discretion having regard to circumstances, but the general language of section 45(2) does not permit of that discretion being exercised with regard to irrelevant matters such as formed the grounds of postponement in the case at bar. As was said by Lord Esher M.R., in the *Queen* v. *Vestry of St. Pancras* [6]:

> If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, than in the eye of the law they have not exercised their discretion.

The decision in *Canadian National Railways* v. *Canada Steamship Lines Ltd.* [7], contrasted with that in *Great Western Railway* v. *Chamber of Shipping* [8], illustrates the point.

While the question before this Court is not the soundness or otherwise of any view expressed in the judgment as to the manner in which any of those matters should finally be dealt with by the Board, but merely whether the Board erred in refusing to determine those matters on the present application, counsel for the respondent asked that the court should deal with these matters, if it saw fit, to "prevent further wrangling before the Board." It may therefore

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not be irrelevant to refer to one matter, namely, the view expressed by the learned Chief Commissioner with respect to increased labour costs. This increase in wages on the part of the appellant followed upon an advance of this amount made by Canadian National Railways. The learned Chief Commissioner in his judgment does not say what further could or should have been done by the railways to establish the "propriety and necessity" of the increase, nor can we. Although the respondent provinces on the appeal before us attempted to support the view expressed of the majority, they did not take that point before the Board and were equally at a loss to suggest before us what further could have been

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4 [1928] 1 K.B. 645.
5 128 L.T. Jour. 265.
6 24 Q.B.D. 371 at 375.
7 [1945] A.C. 204.
8 [1937] 2 *KB.* 30.

done by the railways. Such a stand is therefore difficult to understand. We desire to add, however, that nothing in the above must be taken as indicating that in our view, any more than in that of the learned Chief Commissioner, proof of increased wages even though "fair, reasonable and necessary" must, without more, necessarily or automatically result in the authorization of increased freight rates. While a very important element, it is only one of the relevant circumstances which would have to be considered.

We therefore certify our opinion to the Board in the affirmative in answer to each of the questions asked. While there is jurisdiction under section 52(8) to award costs, it was agreed there should be no costs of this appeal.
Questions answered in the affirmative; no costs.

Solicitor for the appellant: *K. D. M. Spence.*
Solicitor for Province of Alberta: *J. J. Frawley.*
Solicitor for Province of British Columbia: *C. W. Brazier.*
Solicitors for Province of Manitoba: *W. E. McLean and C. D. Shepard.*
Solicitor for Province of Saskatchewan: *M. A. Mac-Pherson.*
Solicitor for Maritime Board of Trade: *F. D. Smith.*