BOGOCH SEED COMPANY LIMITED ..APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY AND CANADIAN NATIONAL RAILWAYS ..... RESPONDENTS.

1962
*Nov. 27, 28

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ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Statute—Interpretation—Rapeseed—Whether "grain" under Crow's Nest Pass Agreement and Crow's Nest Pass Act, 1897 (Can.), c. 5—Railway Act, R.S.C. 1952, c. 234, s. 328 as amended, 1960-61 (Can.), c. 54.

The Board of Transport Commissioners dismissed the appellant's application for an order declaring that rapeseed was a "grain" within the meaning of the Crow's Nest Pass Agreement, and for an order directing the establishment by the respondents and the Board of rates on rapeseed from prairie points eastbound to Fort William and westbound to the Pacific coast on the basis of the rates charged for the transportation of grain. The Crow's Nest Pass Agreement was made between the Crown and the Canadian Pacific Railway Company in 1897 pursuant to the *Crow's Nest Pass Act*, 1897 (Can.), c. 5, and provided for certain rate reductions on grain and flour. The rates so fixed were later extended in application by provisions added to the *Railway Act* in 1925, which now appear as subs. (6) and (7) of s. 328 of the present Act, R.S.C. 1952, c. 234.

The issue for determination was as to whether the word "grain", as it is used in the Crow's Nest Pass Agreement and in the *Crow's Nest Pass Act*, was to be construed as meaning only those commodities which, at the time the statute and the agreement came into existence, were, in the ordinary sense, considered as grain, or whether it should be held to include a commodity which, at a later date, had come to be regarded as a grain in the ordinary sense. The Board, by a majority, decided that the word "grain" in the *Crow's Nest Pass Act* and the Crow's Nest Pass Agreement, and in s. 328 (6) and (7) of the *Railway Act*, did not include rapeseed. Subsequent to this decision and to the order giving the appellant leave to appeal, an amendment to s. 328 of the *Railway Act*, effective August 1, 1961, was passed which provided that the expression "grain" included rapeseed. Therefore the instant decision had relation only to the situation which existed prior to that date.

Held: The appeal should be dismissed.

The principle of construction that was stated, with reference to the *British North America Act*, in *British Coal Corporation v. The King*, [1935] A.C. 500, *i.e.*, in interpreting a constituent or organic statute that construction most beneficial to the widest possible amplitude of its powers must be adopted, could not properly be applied to the statute in question in this case because its purpose was entirely different. The *Crow's Nest Pass Act* was enacted so as to provide for the making of an agreement. The agreement that followed was dealing with a reduction in the existing rates on grain and flour and it seemed that the parties

*PRESENT: Taschereau, Fauteux, Martland, Judson and Ritchie JJ.

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contemplated, and only contemplated, the effecting of a reduction in rates then applicable on what both parties, at that time, regarded as being grain. *The Governments of Alberta, Saskatchewan and Manitoba v. The C.P.R.*, [1925] S.C.R. 155, applied.

The words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute. *Sharpe v. Wakefield* (1889), 22 Q.B.D. 239, affirmed, [1891] A.C. 173; *Simpson v. Teignmouth and Shaldon Bridge Co.*, [1903] 1 K.B. 405; *Kingston Wharves Ltd. v. Reynolds Jamaica Mines Ltd.*, [1959] 2 W.L.R. 40; *Attorney-General for the Isle of Man v. Moore*, [1938] 3 All E.R. 263, referred to.

APPEAL from an order of the Board of Transport Commissioners[1], dismissing the appellant's application for certain orders. Appeal dismissed.

George H. Steer, Q.C., and *G. A. C. Steer*, for the appellant.

W. R. Jackett, Q.C., and *K. D. M. Spence, Q.C.*, for the respondent: Canadian Pacific Railway Company.

Gordon W. Ford, Q.C., and *E. B. MacDonald*, for the respondent: Canadian National Railways.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from an order of the Board of Transport Commissioners[1], which dismissed the appellant's application for an order declaring that rapeseed is a "grain" within the meaning of the Crow's Nest Pass Agreement, and for an order directing the establishment by the respondents and the Board of rates on rapeseed from Prairie points eastbound to Fort William and westbound to the Pacific coast, on the basis of export rates applicable to grain from Prairie points to Fort William and the Pacific coast as the case may be, and declaring the rates being charged at the time of the application to be and to have been beyond the jurisdiction of the respondents and of the Board, void and of no effect.

The issue of law, on which leave to appeal was given in this case, is stated in the order which gave to the appellant leave to appeal, and is as follows:

Whether the majority of the Board, consisting of Chief Commissioner Rod Kerr and Assistant Chief Commissioner H. H. Griffin, and Commissioner W. R. Irwin, whose reasons for judgment were delivered by the said Chief Commissioner erred, having found that rapeseed was now

[1] 81 C.R.T.C. 79.

recognized as a grain, in not holding that rapeseed must be included within the meaning of the word "grain" as used in the Crowsnest Pass Act, being Chapter 5 Statutes of Canada, 1897, and the Railway Act of Canada, Section 328 (6) and (7)?

Commissioner Knowles and Commissioner Woodard, who dissented, were of the opinion that rapeseed is now a "grain" within the meaning of the Crow's Nest Pass Agreement.

The Crow's Nest Pass Agreement was made on September 6, 1897, between Her Majesty The Queen, acting in respect of the Dominion of Canada, and the Canadian Pacific Railway Company (which is hereinafter referred to as "C.P.R."). It was made pursuant to a statute commonly known as the *Crow's Nest Pass Act*, 1897 (Can.), c. 5, which authorized a grant of subsidy to the C.P.R. toward the cost of construction of a railway through the Crow's Nest Pass on condition that the C.P.R. first enter into an agreement with the Government containing certain stipulated covenants by the C.P.R., which included the following:

> (*a*) That the Company will construct or cause to be constructed, the said railway upon such route and according to such descriptions and specifications and within such time or times as are provided for in the said agreement, and, when completed, will operate the said railway for ever;
>
> * * *
>
> (*e*) That there shall be a reduction in the Company's present rates and tolls on grain and flour from all points on its main line, branches, or connections, west of Fort William to Fort William and Port Arthur and all points east, of three cents per one hundred pounds, to take effect in the following manner:— One and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-eight, and an additional one and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-nine; and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned on such merchandise from the points aforesaid.

The agreement, as executed, contained these covenants.

In the year 1924 the Board of Railway Commissioners had to consider the issue as to whether the rate reductions provided for in the agreement applied only to points which had been upon the railway's system in 1897, or whether they also applied to points to which the system had been extended subsequently. The Board ruled that the rates stipulated in the agreement were not binding upon the Board and, therefore, that it did not require to consider this issue.

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An appeal by leave of the Board was taken to this Court, which was argued in 1925 (*The Governments of Alberta, Saskatchewan and Manitoba v. The C.P.R.*[1]). It was decided on that appeal that the statute and the agreement were binding upon the Board, which had no power to change the rates thereby fixed, but that the rates so fixed applied only to the carriage of freight between the points which were on the C.P.R. system in 1897. Anglin C.J.C., at p. 171, said:

> We now pass to the consideration of the second question: Do the Crow's Nest Pass rates apply exclusively to the designated traffic between points which were on the Canadian Pacific Railway Company's lines in 1897? The terms in which the rate reduction clauses (*d*) and (*e*) were couched seem to afford a conclusive answer in the affirmative. Both clauses provide for a reduction in then existing rates and tolls—clause (*d*) by deducting certain specified percentages from rates and tolls in respect to the carriage of certain commodities as now charged or as contained in the present freight tariff of the company, whichever rates are the lowest; clause (*e*) by deducting from the present rates on eastbound grain and flour 3 cents per one hundred pounds. It is obvious that the rates and tolls to be reduced whether those actually charged, or those contained in the freight tariff, were rates and tolls between points actually on the Canadian Pacific Railway as then existing. There were—there could be—no rates or tolls in existence to or from points not then on the system; and there could be no reductions in non-existing rates and tolls.

Following that decision, Parliament promptly enacted c. 52, Statutes of Canada 1925, which added provisions to the *Railway Act* which now appear as subss. (5), (6) and (7) of s. 328 of the present Act, R.S.C. 1952, c. 234.

> (5) Notwithstanding the provisions of section 3 the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, are not limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company.
>
> (6) Notwithstanding anything in subsection (5), rates on grain and flour shall, on and from the 27th day of June, 1925, be governed by the provisions of the agreement made pursuant to chapter 5 of the statutes of Canada 1897, but such rates shall apply to all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

[1] [1925] S.C.R. 155, 2 D.L.R. 755, 30 C.R.C. 32.

(7) The Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities or of undue or unreasonable preference, respecting rates on grain and flour, governed by the provisions of chapter 5 of the statutes of Canada, 1897, and by the agreement made or entered into pursuant thereto within the territory referred to in subsection (6), on the ground that such discrimination or preference is justified or required by the said Act or by the agreement made or entered into pursuant thereto.

On August 26, 1927, by Order 448, the Board ordered that the rates on grain and flour from Prairie points to Vancouver and Prince Rupert for export (to which the 1925 statute had not applied the Crow's Nest Pass Agreement rates) be on the same basis as the rates to Port Arthur.

The application in the present case raised the issue as to whether or not rapeseed was a "grain" within the meaning of the Crow's Nest Pass Agreement and the *Crow's Nest Pass Act*. The application was heard on March 8 and 9, 1960. Subsequent to the decision of the Board and to the order giving to the appellant leave to appeal therefrom to this Court, there was enacted, on July 13, 1961, and taking effect on August 1, 1961, an amendment to s. 328 of the *Railway Act*, adding thereto subs. (8) as follows:

(8) For the purposes of subsections (6) and (7) and the Act and agreement therein referred to, the expression "grain" includes rapeseed, and the rates applicable to the movement of rapeseed from any point referred to in subsection (6) after the coming into force of this subsection shall not exceed the rates applicable to flaxseed.

As from August 1, 1961, therefore, the issue before this Court has been settled by the statute and the decision of the Court in this case can only have relation to the situation which existed prior to that date.

The evidence before the Board showed that the rape plant is a broad-leafed plant of the same genus as cabbage, brussels sprouts and turnips. There is an annual variety and a biennial type. The latter was grown in Canada as a forage crop as far back as the 1890's, but, as it could not survive the winter in most parts of Canada, it produced only forage and not seeds. The seed for it was imported into Canada.

The annual variety, which produces oil seed rapes, was not produced commercially in Canada until 1943, when it was first grown to provide a source of oil for certain naval requirements. It produces an edible oil, useful for margarine and other foods, and has continued to be produced commercially in Canada since 1943.

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The evidence indicated that this type of plant, for the purpose of providing seeds for the production of oils, had been grown in Europe for a hundred years or more. There was, however, no evidence as to whether it had been considered, in the countries in which it was produced, as being a grain crop.

There was evidence, which the Board accepted, that rapeseed would not have been generally regarded in Canada in 1897 as a grain. "Grain" is a term of general usage applied to certain agricultural commodities by the trade. In 1943, when rapeseed came to be grown commercially, with the seed sold as a commercial product for purposes other than the growing of new plants, it did become recognized by the trade as a grain. The Board made the following finding upon the evidence:

> I find that the word "grain", as used and understood today by farmers, agronomists, transportation people and what is generally called the "grain trade" in Canada, in respect of such undisputed grain as wheat, oats and barley also includes rapeseed, that rapeseed to them is grain in the same sense that wheat, oats and barley are grain, and that they include rapeseed in their common usage of the word grain—and that it was so included, used and understood by them since 1943, but not prior thereto.

Evidence was given regarding the tariffs immediately prior to and subsequent to the making of the Crow's Nest Pass Agreement. This evidence is summarized in the reasons of the Chief Commissioner as follows:

> When the Crow's Nest Pass Act was passed, Canadian Pacific's present rates and tolls on grain and flour were contained in its Tariff No. 236 which came into effect on September 5, 1893, and was in effect through 1897. The title page of that tariff had the following words:
>
> "Special Tariff
> on
> Grain, Flour, Oatmeal, Millstuffs
> Flaxseed, Oilcake, Potatoes and Hay,
> in Carloads,
> From Stations on the above Railways in Manitoba,
> Assiniboia, Saskatchewan and Alberta,
> Keewatin, Rat Portage,
> West Fort William, Fort William
> and
> Port Arthur."
>
> There was no specific reference to rapeseed in that tariff. To find the rate for rapeseed it would be necessary to go to "Canadian Joint Freight Classification No. 10(*a*)", which took effect on September 1, 1897, and use it in conjunction with C. P. Tariff No. 270, which provided for mileage

class rates effective on October 1, 1894. There was no specific reference to rapeseed in Classification No. 10(*a*) and one would have to use the item "Seed, Field, not otherwise specified". The classification contained the item "Grain" and under it are specified only "Barley, Beans, Buckwheat, Corn, Malt, Oats, Peas, Rye, Wheat", and the statement "The general term 'Grain' will not apply on Pot and Pearl Barley, Beans, Buckwheat or Split Peas on special 'grain' Tariffs, unless these articles are enumerated thereon as included in the Special Grain Rates." The carload ratings in the classification on seed, including rapeseed, were fifth class, and the fifth class rates to Fort William were considerably higher than the rates on grain to Fort William in Tariff No. 236 above referred to.

The first reduction on grain and flour made by Canadian Pacific under the Crow's Nest Pass Agreement was by its Tariff No. 494, effective August 1, 1898, and its title page was similar to the title page of Tariff 236 above described.

The second reduction under the Agreement was made by C.P. Tariff No. 543, effective September 1, 1899, and it was entitled as follows:

"Special Tariff
on
Grain, Flour, Oatmeal, Mill Stuffs."

and did not include flax, oilcakes, potatoes and hay which were put in another tariff without the second reduction in rates.

Rapeseed was first listed specifically when it appeared in Supplement No. 1 to Canadian Freight Classification No. 15, effective August 15, 1911, where it appeared under the item "Seeds" as "Rape, in barrels . . .", taking fifth class carload rating.

In 1925, the position was that rapeseed was listed in Canadian Freight Classification No. 16, under the item "Seed" among such other seeds as clover, mustard, timothy, sugar beet, etc., with fifth class carload rating.

Supplement No. 39 to C.P.'s Tariff No. W-4933, C.R.C. W-2641, effective June 18, 1925, and Supplement No. 36 to C.N.'s Tariff W-1-183-B, C.R.C. W-251, effective June 18, 1925, each of them on grain and grain products, were in effect when the 1925 amendment to the Railway Act was passed. Neither the supplements nor the original tariffs which they supplemented provided rates on rapeseed.

In 1927, pursuant to Board's General Order No. 448, rates were published on the Crow's Nest Pass basis on grain and grain products but they did not apply on rapeseed, the rates on rapeseed being the fifth class rates as provided in the Canadian Freight Classification under the heading "Seed".

Rapeseed has never taken the Crow's Nest Pass rates on grain, instead it has taken substantially higher rates.

The legal issue which has to be determined is as to whether the word "grain", as it is used in the Crow's Nest Pass Agreement and in the *Crow's Nest Pass Act,* is to be construed as meaning only those commodities which, as at the time the statute and the agreement came into existence, were, in the ordinary sense, considered as grain, or whether

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it should be held to include a commodity which, at a later date, has come to be regarded as a grain in the ordinary sense.

The appellant, in supporting the latter view, relies upon s. 10 of the *Interpretation Act*:

> 10. The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning.

Reliance was placed upon the decision of the Privy Council in *Attorney-General for Alberta v. Attorney-General for Canada*[1], in which there was considered the meaning of the word "banking" in s. 91 of the *British North America Act* and the question as to whether that term was confined to the activities of banks as conducted in 1867. Viscount Simon, at p. 516, said:

> The question is not what was the extent and kind of business carried on by banks in Canada in 1867 but what is the meaning of the term itself in the Act.

There was also cited the decision of the Court of Appeal of Ontario in *Re McIntyre Porcupine Mines Limited and Morgan*[2], in which the Court had to consider the meaning of the word "concentrators" for the purposes of the *Assessment Act*. In that case Hodgins J.A., at p. 219, said:

> The rule laid down in the Interpretation Act, R.S.O. 1914, ch. 1, sec. 10, is that statutes shall "receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof." It is therefore open to the Court to adopt the larger or later meaning of the word in question, if it be true, as I think it is, that the Assessment Act in this particular aims at exempting such means as may be adopted in the mining location to aid in the concentration of the ore-mass, even if that progresses to the point of using chemical means as well as those mechanical, and in so doing draws within its scope some part of what may be alternatively described as amalgamation or reduction:

Section 10 of the *Interpretation Act* refers to the "spirit, true intent and meaning" of an Act and, in construing the meaning of the *Assessment Act,* Hodgins J.A., in the passage just quoted, gave effect to the purpose which he found for the section in question in the *Assessment Act.*

In *The Attorney-General for Alberta v. The Attorney-General for Canada* the Court was considering the meaning of a term in the *British North America Act,* which the

[1] [1947] A.C. 503. [2] (1921), 49 O.L.R. 214.

learned Chief Commissioner, in his reasons, has described as "an organic statute conferring legislative powers". In his reasons the Chief Commissioner went on to refer to *British Coal Corporation v. The King*[1], in which, at p. 518, Viscount Sankey said:

> Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted.

I do not think that the same principle of construction can properly be applied to the statute in question in the present case because its purpose was entirely different. The *Crow's Nest Pass Act* was enacted so as to provide for the making of an agreement. It is true that the rates established by that agreement had statutory effect, as was pointed out by this Court in 1925 in the case of *The Governments of Alberta, Saskatchewan and Manitoba v. The C.P.R.*, previously mentioned. But, none the less, it was an agreement which was being made in 1897 between two parties, the Crown and the C.P.R., and under its terms, in consideration of a grant from the Crown to the C.P.R., the latter agreed to reduce its rates on certain commodities. That was the essence of the agreement, which provided that "there shall be a reduction in the Company's *present rates and tolls* on grain and flour". It then went on, after providing how and when such reductions should be effected, to provide: "and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned." In other words, the reduction in rates was not temporary in nature, but would continue. The agreement was dealing with a reduction in the existing rates on grain and flour and it seems to me that the parties contemplated, and only contemplated, the effecting of a reduction in rates then applicable on what both parties, at that time, regarded as being grain.

I am reinforced in this opinion by the reasons of Anglin C.J.C., already cited, in the case of *The Governments of Alberta, Saskatchewan and Manitoba v. The C.P.R.* The reasoning which he applied, in deciding that the agreement related only to points existing on the C.P.R. lines as at the date of the agreement, applies, by analogy, in considering what was meant by the word "grain", and, just as the agreement did not cover points subsequently added to the system, so it did not cover commodities which were not considered

[1] [1935] A.C. 500.

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as grain at the time of the making of the agreement, even though they subsequently came to be considered as grain in the trade.

In my opinion, the rule which is applicable in this case is that which was stated by Lord Esher in his judgment in *Sharpe v. Wakefield*[1]:

> Now what is the rule of construction to be applied? It is that the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute.

The judgment of the Court of Appeal in that case was affirmed by the House of Lords[2].

In *Simpson v. Teignmouth and Shaldon Bridge Company*[3], the issue was as to whether a bicycle was a "carriage" within the meaning of a statute of George IV which imposed certain bridge tolls. The Earl of Halsbury L.C. said at p. 413:

> The broad principle of construction put shortly must be this: What would, in an ordinary sense, be considered to be a carriage (by whatever specific name it might be called) in the contemplation of the Legislature at the time the Act was passed?

This passage was cited in the Privy Council decision in *Kingston Wharves Ltd. v. Reynolds Jamaica Mines Ltd.*[4] The same principle was applied by the Privy Council in *Attorney-General for the Isle of Man v. Moore*[5].

Applying that rule in the present case, it is my opinion that the Board, having found that the word "grain" did not include rapeseed prior to 1943, properly decided that the word "grain" in the *Crow's Nest Pass Act* and the Crow's Nest Pass Agreement, and in s. 328(6) and (7) of the *Railway Act*, did not include rapeseed.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.

Solicitor for the respondent, Canadian Pacific Railway Co.: K. D. M. Spence, Montreal.

Solicitor for the respondent, Canadian National Railways: W. G. Boyd, Montreal.

[1] (1889), 22 Q.B.D. 239 at 242.
[2] [1891] A.C. 173.
[3] [1903] 1 K.B. 405.
[4] [1959] 2 W.L.R. 40.
[5] [1938] 3 All E.R. 263.