



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *Dorman Roberts Ltd. v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2017 NLCA 42

Date: June 30, 2017

Docket: 201601H0030

BETWEEN:

DORMAN ROBERTS LTD.

APPELLANT

AND:

NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC
UTILITIES

FIRST RESPONDENT

AND:

HOWARD BOONE

SECOND RESPONDENT

Coram: White, Harrington and Hoegg JJ.A.

Appeal From: Order of the Newfoundland and Labrador Board of
Commissioners of Public Utilities dated March 1, 2016
(No. M.C. 1 (2016))

Appeal Heard: October 19, 2016

Judgment Rendered: June 30, 2017

Reasons for Judgment by White J.A.

Concurred in by Harrington and Hoegg JJ.A.

Counsel for the Appellant: David Eaton Q.C.

Counsel for the First Respondent: Jacqui Glynn

Counsel for the Second Respondent: No appearance

White J.A.:

[1] The Public Utilities Board (PUB) gave Howard Boone a motor carrier licence without holding a hearing, even though Dorman Roberts Limited (DRL) had objected to Mr. Boone's application.

[2] DRL applied for leave to appeal the PUB decision, and in May 2016 leave to appeal was granted. Now DRL appeals with the PUB as First Respondent. Mr. Boone did not participate in the appeal.

BACKGROUND

[3] A bus service that intends to pick up and drop off passengers within ten kilometers of the Trans-Canada Highway (TCH) must get a motor carrier licence. In late 2015 Howard Boone applied for a licence to provide the following bus service:

REGULAR PUBLIC PASSENGER BUS SERVICE for the transportation of passengers and their baggage as separate fares from Lewisporte to St. John's and the reverse thereof. This service is to be provided by a 20-passenger wheelchair accessible bus and will include pick up and drop off privileges in Gander.

[4] The PUB advised Mr. Boone that if Lewisporte is more than 10 km from the TCH, he would not need a licence to transport people between Lewisporte and Gander or between Lewisporte and St. John's. Mr. Boone then provided additional information confirming that Lewisporte is more than 10 km from the TCH. Thus Mr. Boone only needed a licence to transport passengers between Gander and St. John's.

[5] DRL filed a Notice of Objection, arguing that Mr. Boone's service would undermine the viability of its own bus service, which carries passengers along the whole TCH and not just between St. John's and Gander. The PUB decided that DRL's objection did not raise sufficient grounds to hold a hearing and approved Mr. Boone's application.

ISSUES

[6] DRL sets out a number of grounds of appeal, saying the PUB

1. Erred in failing to correctly interpret s. 9 of the *Motor Carrier Act* and failing to apply the correct standard of proof applicable to the determination of "presumptive case" or "sufficient grounds";

2. Erred in its interpretation of s. 16 of the *Motor Carrier Regulations* by (1) requesting [Mr. Boone] to provide reply evidence at the preliminary stage of determining whether sufficient grounds for a hearing existed, (2) failing to advise [DRL] of the request for reply evidence or that such evidence had been provided, and (3) relying on the reply evidence in making its decision, and in so doing exceeded its jurisdiction;
3. Erred in applying sections 23 to 27 of the *Motor Carrier Regulations* in determining whether sufficient grounds were established;
4. Erred in its interpretation of the process established by the *Motor Carrier Act* and *Motor Carrier Regulations* and the authority given to the PUB by dismissing DRL's objection on the merits without conducting a hearing and thereby denying DRL its right to be heard on the merits of the application, such error being a denial of fundamental fairness and an error of jurisdiction; and
5. Erred in law or committed an error of jurisdiction in denying DRL a full hearing.

[7] Ground 2 raises a discrete question: Was it unfair to accept information confirming that Lewisporte was more than 10 km from the TCH?

[8] The other grounds of appeal, though phrased differently, all challenge the merits of the PUB's decision to dismiss the objection without holding a full hearing. They should be treated as a single ground of appeal: Did the PUB err by declining to hold a hearing?

STANDARD OF REVIEW

[9] The reply-evidence issue is a challenge to a discretionary procedural decision. The questions are whether the process was authorized by the statute and fair. The standard of review is correctness, though parts of the analysis can be slightly more nuanced: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 43; *Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, at paragraphs 34–42.

[10] Both DRL and the PUB submitted that the merits of the PUB decision should be reviewed on a correctness standard. But the Court must

nevertheless determine the appropriate standard of review. As Abella J. wrote in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, “the parties should not be able, by agreement, to contract out of the appropriate standard of review”.

[11] The parties advance three reasons why the standard of review might be correctness. None is valid.

Is the Standard of Review Already Decided?

[12] DRL and the PUB both suggest that this Court already decided that the standard of review for decisions of the PUB is correctness, citing *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38, 323 Nfld. & P.E.I.R. 127 (*Hydro 1*).

[13] A similar argument was rejected by Rowe J.A. (as he then was) in *The Consumer Advocate v. The Board of Commissioners of Public Utilities*, 2015 NLCA 24:

[31] The Court’s analysis made clear that the correctness standard should apply only to questions of jurisdiction, “general law” or “a constitutional issue” (para. 86). ... Thus, in this appeal for the issue of jurisdiction the standard of review is correctness and for other issues the standard of review is reasonableness.

Is This a Question of Procedural Fairness?

[14] DRL argues that the interpretation of “presumptive case” raises “an issue of procedural fairness or natural justice” that should be reviewed on a correctness standard.

[15] This appeal is not focused on the duty of fairness or on a breach of natural justice. Those issues arise when a statute confers a discretion on a tribunal. (See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 51-56). The *Motor Carrier Act*, RSNL 1990, c. M-19 (*Act*) conferred no discretion about whether to hold a hearing. This case is about the interpretation and application of imperative statutory procedures. DRL relies on Binnie J.’s concurring reasons in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. A tribunal had implicitly extended statutory timelines, and Binnie J. said that “courts should not defer to a

tribunal's view of the extent to which its 'home statute' permits it to proceed in what the courts conclude is an unfair manner" (paragraph 82).

[16] The majority rejected Binnie J.'s theory that statutory provisions with procedural ramifications should be reviewed on a correctness standard: see paragraphs 30–34 and 39. As *Consumer Advocate* held, the standard of review is reasonableness except for "questions of jurisdiction, 'general law' or 'a constitutional issue'".

Is This a Question of General Law?

[17] Both DRL and the PUB argue that the interpretation and application of s. 9(2) of the *Act* is a question of general law that is both of central importance to the legal system as a whole and outside the PUB's specialized area of expertise.

[18] Section 9(2) of the *Act* reads:

Where the board receives a notice of objection under subsection (1) and determines that the objection does not establish a presumptive case against granting the certificate, the board shall immediately notify in writing the person who filed the objection and the applicant ...

[19] The PUB gave this issue an illusion of generality by abstracting out all the particulars: "a decision to deny a hearing in accordance with a tribunal's governing legislation is a fundamental question of general law". But this appeal is not about tribunals in general or the basic principles of fairness. It is about s. 9(2) of the *Act*.

[20] The interpretation and application of s. 9(2) is a question of law. But it is not of central importance to the legal system as a whole; it is confined to motor-carrier licencing. And it is not outside the PUB's expertise. As the exclusive motor-carrier licensor, the PUB is uniquely familiar with the procedures for motor-carrier licencing. The standard of review is reasonableness. The applicable law was recently set out in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293:

[22] Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v. Saguenay (City)*,

2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

Was Accepting Additional Evidence Unfair?

[21] DRL has two arguments against the reply evidence. The first is that s. 16 of the *Motor Carrier Regulations (Regulations)* only authorizes reply evidence if a hearing is scheduled:

The board may require the applicant to file a reply to the evidence provided by the objector under section 14 or otherwise direct discovery of the applicant's case within a certain time before the date scheduled for hearing of the application.

[22] As the PUB points out, the additional evidence in this case was just the distance from Lewisporte to the TCH. It was not “a reply” to DRL’s objection, nor did it bear on any of the issues DRL raised. It clarified the scope of the application and nothing more.

[23] In other words, the additional information was received not under s. 16 of the *Regulations* but under s. 8:

On receiving an application, the board may refer it to its counsel for examination and if it is found to conform to these regulations and to all statutory provisions, the counsel shall report the facts to the board and if it does not so conform, counsel or the board shall advise the applicant of the defects which may then be corrected.

[24] The defect was that it was unclear which parts of the proposed service needed a motor carrier licence. The PUB advised Mr. Boone of the defect, and he corrected it.

[25] DRL’s second argument is that it was procedurally unfair to allow Mr. Boone to reply to DRL’s objection without allowing DRL to review Mr. Boone’s reply. That argument would be compelling if the additional evidence Mr. Boone supplied had any bearing on the issues raised in DRL’s reply. It did not.

Was There a Presumptive Case?

The Regulatory Scheme

[26] The *Act* creates a certification regime for any bus company that seeks to carry passengers along the TCH. Certificates will be granted unless “the detriments to the public interest outweigh the benefits” (*Regulations*, s. 23(2)).

[27] Sections 24–26 explain various benefits or detriments that must or cannot be considered as part of “the public interest”. Two provisions are particularly significant for this appeal:

1. The PUB may consider “the operations of persons who object to the issue of the certificate sought, except that the mere diversion of revenue or traffic shall not be considered to be in and of itself detrimental to the public interest” (s. 24(b)(ii)).
2. The PUB “shall not consider the cumulative effect of pending applications but shall consider each application on its own merits” (s. 27).

Because of these provisions, an incumbent bus service cannot object to a competitor’s licence without showing that the competition would, on its own, reduce service levels. Short of that, loss of revenue or passengers cannot support a complaint based on reduced service levels.

[28] Once a threat to viability is shown, the PUB can weigh the benefits and demerits of the competing services to ascertain the public interest. That analysis cannot begin until a threat to viability is shown.

DRL’s Theory and Its Weaknesses

[29] The theory of DRL’s objection appears in paragraph 2 of its Notice of Objection:

DRL is the sole operator of the Trans-Island bus service along the Trans Canada Highway (“TCH”) corridor. ... [A] loss of passengers to operators who choose limited and profitable routes threatens the viability of the existing Trans-Island service.

[30] DRL argues that many sections of the Trans-Island service are unprofitable and DRL can only afford to service them because they are

subsidized by the profitable routes between Grand Falls–Windsor and St. John’s (see paragraph 11). Similarly, DRL’s large fleet allows it to add capacity during peak periods such as Christmas, and even pays for taxis for passengers who cannot be seated (paragraph 13).

[31] DRL adds that operating costs have risen (paragraph 4), and since 2013 revenues and passenger counts have fallen by about 10% (paragraph 8). When passengers leave the Trans-Island service the revenue is difficult to replace. New passengers are difficult to attract, partly because of population shift towards major centres (paragraph 7, 9, and 10). And price increases accelerate passenger erosion (paragraph 4).

[32] DRL’s objection shows that it faces some business challenges. It also shows that the cherry-picking of profitable routes by competing bus services could, in principle, threaten the Trans-Island service to the detriment of the public. But it does not outline a threat to the viability of the Trans-Island service. There are several missing links:

1. How profitable is the Trans-Island service? What is the cost of operating the service?
2. How many passengers would have to defect to threaten its viability?
3. Why only two years’ traffic and revenue figures? DRL has many years of data. Does the 10% decline represent reversion to the mean or business-cycle adjustment?
4. The most profitable routes run between Gander and St. John’s, but Mr. Boone is only asking for pick up–drop off privileges in Gander itself. How many passengers does that threaten?
5. DRL refers repeatedly to the threat that “operators” might pose rather than the threat that Mr. Boone’s service poses on its own. Does Mr. Boone’s service alone threaten the viability of DRL’s Trans-Island service?

[33] Because of these missing links, the objection does not say whether the Trans-Island route is highly profitable or on the brink; in other words, is the proposed service a real threat to its viability or a nuisance that will decrease margins?

[34] While DRL's objection provides some details and evidence that are illustrative and consistent with its theory, these details and evidence do not unambiguously support its theory.

[35] Many of the missing links could have been filled with information that is readily available to DRL. The corporation knows its own operating costs, profitability, and long-term revenue, and it knows they are material parts of its case. These omissions are difficult to attribute to a mere oversight or time pressure. DRL has been over this ground many times before. As it explains in its objection,

Like CN Roadcruiser ('CN') before it, DRL has always expressed its concern with the permitting of an operator to commence a bus service which would operate along the TCH corridor with pick up and drop off privileges at points along the corridor. ...

The Decision Under Review

[36] The PUB decided that the missing links meant that DRL had not established a presumptive case:

... There is no relevant documentary evidence provided by the Objector to support its position that the granting of this Motor Carrier Certificate will have a negative impact on the services currently provided by the Objector or that the viability of the Objector's service will be jeopardized. In addition, the Objector has not provided supporting information to demonstrate that the Applicant's services will not satisfy a need that is currently unsatisfied.

The Board notes that the Applicant's service is offered at times not coincident with those of the Objector and the Objector has not provided any relevant documentary evidence that approval of the application will be to the detriment of the existing services and users of those services.

[37] This decision appears to set a high threshold for a presumptive case. DRL's objection articulated arguable issues; the PUB wanted more. DRL suggests the decision required proof on a balance of probabilities, but the reasons do not complain about a lack of proof but a lack of evidence. The PUB's reasons appear to require something like a *prima facie* case.

[38] A *prima facie* case means that the objection must contain details and evidence that do not merely illustrate its theory, as DRL's did. The details and evidence must *support* the theory. They do not need to prove it, but they must tend to prove it. Where the gravamen of the objection is a threat to

viability, the supporting material must point unequivocally, though not conclusively, towards a threat to viability.

[39] The nub of this case, and the focus of counsel's argument, is whether it was reasonable for the Board to set such a high bar.

Was the PUB's Threshold Unreasonable?

[40] The requirement of a "presumptive case" is not a discretionary creation of the Board that can be reviewed through the prism of natural justice or procedural fairness. It is a statutory requirement and must be considered within its statutory context.

[41] When someone applies for a certificate under the *Act*, any other interested person can file a notice of objection under s. 9(1). If the notice of objection does not raise a "presumptive case", the PUB must grant the certificate (s. 9(3)); if it raises "sufficient grounds for holding a hearing", the PUB must hold a hearing (s. 9(4)).

[42] Every notice either raises sufficient grounds to hold a hearing or it does not raise a presumptive case. The expressions "presumptive case" and "raises sufficient grounds for holding a hearing" must be synonymous.

[43] The phrase "sufficient grounds for holding a hearing" suggests a fairly low bar. The courts, for instance, have traditionally allowed claims to proceed to trial unless it is plain and obvious that they cannot succeed: see e.g. *Andrews v. Canada (Attorney General)*, 2014 NLCA 32, but see *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

[44] By contrast, the phrase "presumptive case" is often used to suggest a high bar, analogous to a *prima facie* case: *Club 7 Ltd. v. E.P.K. Holdings Ltd.* (1993), 115 Nfld. & P.E.I.R. 271 (Nfld. T.D.); *Aronovitch & Leipsic Ltd. (c.o.b. J.J. Barnicke Winnipeg) v. Berney*, 2005 MBQB 180, [2006] 7 W.W.R. 720 at 63; *Murphy v. Szulinszky*, 2016 YKSC 18 at 70-72.

[45] By implicitly equating these two quite different phrases, the *Act* gives the PUB space in which to craft an approach to presumptive cases. A low threshold would be consistent with "sufficient grounds to hold a hearing"; a high threshold, with "presumptive case"; anything between would represent a compromise approach.

[46] There are good reasons to allow the PUB room to manoeuvre within the bounds of basic fairness. Whether to hold a hearing is a question of policy as well as principle. As Karakatsanis J. explained at paragraph 73 of *Hryniak*, the fundamental question is whether a hearing is the “most proportionate way to dispose of” the issue.

[47] In this context, the choice of threshold is properly affected by many factors:

1. The means of the parties: this case involves a small applicant and an objector with significant resources; the PUB would know whether that is typical.
2. The stakes at issue (often quite significant).
3. The consequences of delay. The applicant could not begin service until the hearing is complete, with consequences for both the applicant and consumers. The significance of that depends on how long it typically takes to proceed to a hearing.
4. The costs of a full hearing.
5. Any unfairness associated with dismissing an objection without a hearing. Do objectors have enough time to document their objections adequately? Do they need the opportunity to cross-examine or make oral submissions?
6. Conversely, there are forensic advantages of a full hearing - most essential when credibility is at issue. That is unlikely in the motor-carrier context; but the PUB would have a sense of how much additional evidence can be expected or of the value of oral submissions or discussion.

[48] As *Hryniak* explains, courts must weigh those factors in each case in deciding whether to issue summary judgment. In the motor carrier context, the statutory threshold for a presumptive case is more static. The PUB must, to a greater extent, crystallize its sense of proportionality in a single threshold, relying on its experience with the cases that typically come before it.

[49] A high threshold for “presumptive case” is not unfair. Objectors are participating in a commercial licensing process, not an adjudication of

rights. They are not defending their ability to participate in the industry but objecting to someone else's. They cannot expect the most generous set of procedures.

[50] The *Act* does not invite objectors to file vague or unsupported notices of objection in the hope of presenting their full case at an inevitable hearing. Objectors must put their best foot forward. They are required to file “relevant documentary evidence” and a “written statement setting out in full the reasons why the application should be denied” (emphasis added): see s. 9(1) of the *Act*.

[51] The choice of a high threshold for “presumptive case” is compatible with the text and scheme of the *Act*. To find it unreasonable, the Court would have to second-guess the PUB’s proportionality analysis. But the PUB is uniquely familiar with its docket and with the costs and benefits of ordering a full hearing. There is no evidence that allows the Court to find that it would be proportionate to delay the issuance of a certificate to allow a full hearing into an objection that fails to articulate a *prima facie* case.

CONCLUSION

[52] I would dismiss the appeal with no order as to costs. I would not award costs to Mr. Boone as he did not file any written materials or otherwise participate in the appeal. I would not award costs to the PUB as there were novel issues considered.

C. W. White J.A.

I Concur: _____

M. F. Harrington J.A.

I Concur: _____

L. R. Hoegg J.A.