

Supreme Court of Prince Edward Island

Date: 19861223
Docket: GDC-6349

PROVINCE OF PRINCE EDWARD ISLAND

IN THE SUPREME COURT - APPEAL DIVISION

IN THE MATTER of the Petroleum Products Act, R.S. P.E.I. 1974, Cap. P-4i

and

IN THE MATTER of the Public Utilities Act, R.S. P.E.I. 1974, Cap. P-31

and

IN THE MATTER of an Appeal by Irving Oil Ltd., from an Order of the Public Utilities Commission made the 23rd day of January, A.D. 1986

BEFORE:

The Honourable Chief Justice Carruthers

The Honourable Mr. Justice McQuaid

The Honourable Mr. Justice Mitchell

Date of Hearing - November 27, 1986

Date of Judgment - December 23, 1986

Eugene P. Rossiter - Solicitor for the appellant

John A. Carr - Solicitor for the respondent

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1986 CanLII 182 (PE SCAD)

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IN THE MATTER of an Appeal by Irving Oil Ltd., from an Order of the Public Utilities Commission made the 23rd day of January, A.D. 1986

Prince Edward Island Supreme Court – Appeal Division

Present: Carruthers, C.J. and McQuaid and Mitchell, JJ.

Heard – November 27, 1986

Judgment – December 23, 1986

APPEAL from decision of Public Utilities Commission dismissing application for initial Petroleum Products Dealer's License - s. 11 Petroleum Products Act - Meaning of "Public convenience and necessity" - APPEAL ALLOWED.

Statutes considered:

Public Utilities Commission Act Petroleum Products Act

Cases considered:

Re Allison McLeod Ltd., Re Imperial Oil Ltd. (1958), 14 D.L.R. (2d) 500

Union Gas Company of Canada Ltd. v. Sydenham Gas and Petroleum Co. Ltd., [1957] S.C.R. 185

Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co. et al., [1958] S.C.R. 353

Worldways Airline Ltd. v. Canadian Transport Commission (1975), 4 N.R. 579

Eugene P. Rossiter for the appellant, Irving Oil

John A. Carr for the respondent, Public Utilities Commission

McQUAID, J.

This is an appeal from the decision of the Public Utilities Commission, dated 23 January, 1986, wherein the Commission dismissed the application of Irving Oil Ltd. for an initial

Petroleum Products Dealer's license for a split serve gas bar operation to be established at a convenience store outlet proposed for 6S0 University Avenue in West Royalty.

After having heard all of the evidence and other matters brought before it, and having taken the matter under advisement, the Commission by unanimous decision, held that "the applicant has failed to demonstrate to the satisfaction of the Commission that public convenience and necessity require the licensing of an additional retail gasoline outlet in this area".

From this decision, Irving Oil now appeals.

The appeal is taken under s. 16 of the Public Utilities Commission Act, subsection (1) thereof reads as follows:

Except as otherwise provided in any statute or regulation, any public utility or any person aggrieved by any decision or order of the Commission may appeal from the decision or order to the Supreme Court in banc, and the Supreme Court may thereupon decide any question of jurisdiction or any question of law and examine the evidence taken before the Commission or may hear further

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evidence, and may confirm, modify, vary or reverse the decision or order, with or without costs to either party.

I would construe this section as not restricting the powers of review of the court merely to questions of jurisdiction or of law, but that it also possesses the powers of determining questions of fact, on the basis of evidence already heard by the Commission, supplemented, if it feels it appropriate, by such additional evidence as may be adduced before it. The court, in effect, possesses all those tribunal powers which might have been exercised by the Commission in the first instance.

The granting, or withholding of a license, by the Commission is determined by s. 11 of the Petroleum Products Act:

No retailer's license shall be issued with respect to any outlet that was not being operated on the 25th day of March, 1948, unless, in the judgment of the Commission, public convenience and necessity so require.

The outlet in question here is not one protected by the grandfather provisions of the section, so that the onus lay upon the applicant, Irving, to satisfy the Commission with respect to the "public convenience and necessity" test.

It is common ground, following Re Allison McLeod Ltd., Re Imperial Oil Ltd. (1958), 14 D.L.R. (2d) 500, that

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the word "public" in the expression "public convenience" is restricted to the patronizing, or potentially patronizing, public, and does not extend to the public at large.

The first issue to be faced, therefore, is to determine those characteristics or elements which constitute "public convenience and necessity".

The case of Union Gas Company of Canada Ltd. v. Sydenham Gas and Petroleum Co. Ltd., [1957] S.C.R. 185, appears to be the first reported decision in which that phrase was judicially considered. The decision, in fact, turned on another point. Locke, J. in his dissenting opinion, is the only one of the learned justices to advert to it. At p. 196, he writes:

If there were any doubt as to the meaning to be assigned to the expression "public convenience and necessity" in the statute, and I think there is none, the question as to its interpretation would be one of law which the legislation would also require the court to determine.

Unfortunately, the meaning so clearly ascribed to the expression by Locke, J. remained in pectore.

The following year, in 1958, the same question was again considered by the Supreme Court in Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co. et al., [1958] S.C.R. 353. Abbott, J. writing for the majority at p. 357:

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... it would, I think, be both impracticable and undesirable to attempt a precise definition of general application of what constitutes public convenience and necessity. As has been frequently pointed out in the American decisions, the meaning in a given case should be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.

As this court held in the Union Gas case, supra, the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formation of an opinion. Facts must, of course, be established to justify a decision by the Commission, but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

Finally, the court again considered the question in Worldways Airline Ltd. v. Canadian Transport Commission (1975), 4 N.R. 579. Laskin, C.J.C., speaking for the court, cited with approval the Union Gas case, supporting the view that the court should not substitute its opinion for that of the Commission. However, it would appear to me that these cases should be applied only cautiously, if at

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all, to the present case, inasmuch as the appeal provisions under s. 16(1) of the Public Utilities Commission Act, above cited, and the powers vested in the Court of Appeal therein, are rather wider and more extensive than those contained in the appeal legislation governing that trilogy of cases.

What can, I think, be extracted from these cases is that precisely what constitutes public convenience and necessity is essentially a subjective opinion to be arrived at by the Commission. But, as has been determined by this and other Courts, an "opinion" in this context can be the product only of an informed mind founded in established facts or sworn testimony, judicially weighed by the tribunal. A conclusion arrived at by selective use of facts or testimony cannot constitute a statutory opinion or a judgment of a judicial or quasi-judicial tribunal.

In the absence, then, of judicially determined objective criteria upon which a determination of the appropriate meaning to be ascribed to the expression "public convenience and necessity", it then becomes necessary to ascertain, if possible, what are the constituent elements which go to make up that condition as heretofore accepted by the Commission itself, and then to determine whether or not, on an examination of the evidence before the Commission, weighed against these accepted

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constituent elements, the opinion arrived at by the Commission, can be justified.

The process can be carried out only by examining the ratio employed by the Commission in other cases leading up to the disposition of the present application and ensuing order. It should be observed at the outset that the Commission consists of three members, a chairman and two commissioners, who are in the exercise of their quasi-judicial function, equal when all three constitute the panel, where only two, including the chairman, constitute the panel, the

chairman is, by statute, more equal than his confrere, and in the event of a division of opinion, that of the chairman constitutes the opinion of the Commission.

The first of these cases is the Consumer's Direct Charge Co-Op application. It would appear that the peculiar facts applicable in this case differentiate it so strongly that it is irrelevant to the issue under consideration in this appeal.

On 3 May, 1985, the Commission, comprising the chairman and one commissioner, considered the application of Regal Petroleum. The application was granted on the strength of the chairman's findings which were, essentially, that (a) a new outlet in the marketplace would increase the competitive environment and contribute to the

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public interest; (b) location on a major arterial highway, and on the opposite side of the road from existing outlets was a favourable factor. The commissioner would have denied the application on the ground of an adequate number of existing outlets, as well as of the traffic problems which might be created by an additional outlet.

On 30 April, 1985, the full Commission considered the application of Ellis-Birt Ltd. for a gas bar in conjunction with a convenience store. The two commissioners found that public convenience and necessity had not been established, and denied the application. The dissenting chairman was more specific in his findings. These were that:

- (a) distance between existing and proposed outlets, as well as volume of sales at existing outlets are irrelevant criteria;
- (b) location on major traffic arteries is significant

On the same date, the Commission, again consisting of the full panel, the chairman dissenting, rendered its decision in Regal Petroleum. The majority was of the opinion that there were sufficient outlets in the immediate area, with the result that public convenience and necessity had not been established.

The chairman again reiterated his view that distance between existing outlets was not a factor in the

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case of strip development in major arterial highways, nor was volume of sales. Nor was the point that existing outlets should be protected from further completion and consequent loss of sales volume.

On 9 July, 1985, the application of Joseph W. Casey was before the Commission. The application concerned the installation of a pump at an existing garage location in a rural area. Again the Commission divided, with the chairman dissenting. The majority declined the application on the ground that the travelling public was adequately served. The rationale of the dissenting opinion is somewhat novel, that by reason of the closure of a pre-existing outlet, other establishments in the area captured additional trade, but that these establishments should not be encouraged to believe that the business could not be re-captured by new competition.

This was followed by the decision of 20 November, 1985, in the Faye McInnis application for a license to operate an outlet in conjunction with a convenience store. All the commissioners were unanimous in their finding that the evidence established to their satisfaction that an additional outlet was required to serve adequately the travelling public in the area.

On 23 January, 1986, the Commission dealt unanimously with the application of Irving Oil for an

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outlet in conjunction with a convenience store. The application was rejected. The reasons given would appear to be inconsistent with earlier rulings:

The proposed site is located on a heavily travelled arterial on which several thousand vehicles travel daily. Every type of service to be supplied through the proposed new outlet is already available within a short distance from the intended site. [vide: Regal Petroleum and Ellis-Birt]

It is not sufficient to prove that it is convenient to the motoring public to have a convenience store and gas bar to serve northbound traffic on the University Avenue traffic arterial. It must also be necessary and the necessity must relate to the sale of gasoline. [vide: Ellis-Birt; Casey] (emphasis added).

This was followed by the Regal Petroleum application of 27 March, 1986. The majority refused the application on the ground that the local public was being adequately served. In what appears to be a well reasoned decision, the dissenting chairman sets out certain criteria

or guidelines, which he considers to be predominant factors, albeit in conflict with his recent decision in Irving Oil. These reasons merit consideration:

In particular, the use of a distance test between outlets is incorrect. In an urban
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area, distance between outlets is largely irrelevant. By necessity and design, outlets will cluster close together. This clustering may be a function of zoning regulations, traffic flows or because there are complementary effects possible by having outlets near to each other. There is ample evidence that grouping similar operations along major traffic arterials is a recognized marketing strategy among such diverse operations as fast-food outlets, car repair services, and retail gasoline outlets. All of these depend critically on traffic flows for their continuing viability, and it would be incorrect for the Commission to ignore these trends.

As well, the factor of competition should have been given more weight in arriving at a decision in this matter. Ultimately, public convenience and necessity is meant to serve the public interest and the public interest can best be served by ensuring that competition promotes fair pricing and reasonable service offerings.

The following month, on 24 April, 1986, the Commission dealt unanimously with the application of Peter MacDougall. This is the first decision in which the Commission appears to have attempted to identify and isolate those elements which it considered constituted public convenience and necessity. It found that these including the following:

- (a) competition;
- (b) proximity to other retail gasoline outlets;

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- (c) service proposed vis-a-vis service offerings at existing outlets; volume trends over time; traffic flows.

As to the competition aspect, the Commission expressed the opinion that the competition factor supported the application in that a competitive environment would, in all likelihood, contribute to the public interest. Proximity was not deemed to be a detrimental factor. The added convenience of a gas bar at a convenience store was given favourable consideration. The Commission felt that it would be convenient for some motorists to have a gas bar in relatively close proximity to a convenience store, providing a choice of products and services. The license was granted.

This was followed by a further application of Ellis-Birt on 29 July, 1986. The majority considered the same factors which it earlier enumerated in Peter MacDougall, and was of the view that the facts of the instant case did not warrant the issue of a license.

The chairman, in his dissenting opinion, expressed the view that:

... the greatest weight should be placed on the test of competition when evaluating applications for initial outlets to dispense gasoline. Any other tests, such as the nearness of other outlets to the proposed

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location or the potential sales at the new outlet are judgmental at best and their relevance to an application is open to question.

Population shifts, the increasing urbanization of the Province, and the increasing mobility of its residents, all suggest a trend toward the establishment of retail gasoline outlets along major arterials and at specific sites in order to capture sufficient business to warrant the initial investment. The Commission must be aware of these trends and be prepared to recognize them in its decisions.

Clearly, the effect of these several inconsistent decisions has been to send out mixed signals to potential applicants. If the Commission is to apply the test of public convenience and necessity, as by statute it is required to do, the first requisite is that the Commission itself have a clear understanding of the elements which constitute public convenience and necessity, and, second, that it apply the test, so constituted, on a consistent basis. Otherwise, it is not acting judicially, and hence without jurisdiction.

Every applicant which appears before the Commission is entitled to know, when the application is filed, precisely what criteria must be met, in order that the presentation to be made before the Commission, by way of viva voce and documentary evidence, might be prepared.

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The applicant is entitled to the assurance that if these criteria have been fully addressed and satisfactorily complied with, a decision of the Commission consistent with its own criteria, might be expected.

If there is anything to be extracted from the several more recent decisions of the Commission touching those elements or factors which go to constitute public convenience and necessity as the same relate to the petroleum product outlets, certain criteria appear to be evident. There will, of necessity, be required to be made certain distinctions between those areas which are more highly urbanized, and those areas which are essentially rural in nature, and the Commission will, perforce, weigh them accordingly.

These may be generally enumerated as including the following, which list should not, however, be looked upon as being all inclusive:

- arterial strip development consequent upon population developments;
- resultant traffic flows and patterns with particular regard to traffic volume;
- physical accessibility to the proposed site;
- nature and availability of existing and proposed services;
- hours of operation;

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population of the proposed service area.

Turning now to the application in question, the matter came before the Commission on 10 December, 1985, and the decision was rendered 23 January, 1986, denying the application.

The power of the court in an appeal such as this is outlined in s. 16 of the Public Utilities Commission Act:

The Supreme Court may thereupon decide any question of jurisdiction or any question of law and examine the evidence taken before the Commission or may hear further evidence, and may confirm, modify, vary or reverse the decision or order with or without costs to either party.

That section authorizes the court, on appeal, to examine the full record of the proceedings as they were before the Commission and thereupon to exercise all of the powers which the Commission might or should have exercised in the first instance, and to arrive at its own conclusion as to the proper disposition of the issue, and to confirm the decision of the Commission, or to override the decision of the Commission, if the court's conclusion is inconsistent with that of the Commission.

The court, in addition to hearing the able arguments of counsel, has examined the record. Nowhere in

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its decision does the Commission appear to have put its mind to those elements which it, collectively, or the individual members thereof, have identified as constituting the essential characteristics of public convenience and necessity. Most assuredly, the Commission applied the wrong test if one is to judge from the final sentence of the decision.

We do not believe that any motorist will be inconvenienced by the absence of a further outlet in the area at this time.

The test is not whether the absence of an additional outlet would cause inconvenience, but rather would the addition of another outlet meet public convenience and necessity.

This Court is of the opinion that the extensive evidence adduced by the applicant fairly and reasonably establishes that it has met all of those criteria which the Commission should have applied in its consideration of this application, and that, on the strength of that evidence the Commission should have granted the license applied for.

This Court therefore reverses the decision of the Commission, dated 23 January, 1986, and orders that the

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license be issued.

The Honourable Mr. Justice McQuaid, J.

CONCURRED IN BY:

The Honourable Chief Justice Carruthers, C.J.

The Honourable Mr. Justice Mitchell, J.

December 23, 1986

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