1955
June 27
Nov. 24

BETWEEN:

JOHN POLLOCK .....SUPPLIANT,

AND

HER MAJESTY THE QUEEN .....RESPONDENT,

AND

ATTORNEY-GENERAL OF NEW-FOUNDLAND ..... } INTERVENER.

Crown—Petition of right—Terms of Union of Newfoundland with Canada, 13 Geo. VI, c. 1, s. 39(1)(2)(3)—Civil Service Act, 1926, Newfoundland —Pension right assured by Terms of Union.

Suppliant an employee of the Newfoundland Railway, a public work of and owned by Newfoundland, prior to the union of Newfoundland with Canada, became an employe of the Canadian National Railways after the union. In 1953 he retired from the service of the Canadian

(1) [1950] Ex. C.R. 402.

National Railways on a life pension. He now asks a declaration of the Court that "the Government of Canada do provide a pension for the said suppliant without loss of pension rights acquired by reason of his service in Newfoundland" and that his pension be increased accordingly.

The Newfoundland Railway became the property of Canada on April 1, 1949 and clause 39(1) of the Terms of Union provide that "Employees of the Government of Newfoundland in the services taken over by Canada . . . will be offered employment in these services or in similar Canadian services . . . but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland".

Suppliant submits that he was entitled to exactly the same pension from the Canadian National Railways as he would have been entitled to receive from Newfoundland had the whole of his services up to retirement been with the Newfoundland Railway.

Held: That the only pension right acquired by suppliant by reason of his service in Newfoundland and which he was entitled to retain by reason of clause 39(1) of the Terms of Union was the right to a pension based on the provisions of the Civil Service Act, 1926, of Newfoundland, and computed on the basis of the last three years of his service in Newfoundland prior to union. That is the right which by clause 39(1) of the Terms of Union may not be lessened.

PETITION OF RIGHT asking for a declaration that suppliant's pension be increased.

The action was tried before the Honourable Mr. Justice Cameron at St. John's.

R. S. Furlong, Q.C. and *F. J. Ryan* for suppliant.

K. E. Eaton for respondent.

J. B. McEvoy, Q.C. and *W. R. Smallwood* for intervener.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (November 24, 1955) delivered the following judgment:

The nature of the relief sought in this Petition of Right is shown in the Prayer of the Petition as amended at the trial, which is as follows:

Your suppliant therefore humbly prays for a declaration that the Government of Canada do provide a pension for the said suppliant without loss of pension rights acquired by reason of his service in Newfoundland and that the amount of the said pension shall be $293 per month from the 30th day of April, 1953.

I am informed that this is a test case. The claim is based on clause 39(1) of the Terms of Union of Newfoundland with Canada, which terms form the schedule to chapter 1 of

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the Statutes of Canada (1949) 13 George VI, and by which Act the agreement set out in the schedule was approved. By order of the President of this Court dated September 2, 1954, the Attorney-General of Newfoundland was permitted to intervene in the proceedings.

The facts are not in dispute. On April 30, 1953, the suppliant retired from the service of the Canadian National Railways and was granted a life pension of $220.00 per month. On April 1, 1949, Newfoundland became a province of Canada. Immediately prior to that date the suppliant had been employed as Superintendent of Marine Engineers of the Newfoundland Railway, which railway was one of the public works of and was owned by Newfoundland; by clauses 31 and 33 of the Terms of Union, that railway and many other public works of Newfoundland became the property of Canada on April 1, 1949. Pursuant to the provisions of clause 39 (*infra*), the suppliant was offered employment in the services of the Canadian National Railways, which offer he accepted, remaining in its service from April 1, 1949, to the date of his retirement.

Clause 39 of the Terms of Union is as follows:

Public Servants

39. (1) Employees of the Government of Newfoundland in the services taken over by Canada pursuant to these Terms will be offered employment in these services or in similar Canadian services under the terms and conditions from time to time governing employment in those services, but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland.

(2) Canada will provide the pensions for such employees so that the employees will not be prejudiced, and the Government of the Province of Newfoundland will reimburse Canada for the pensions for, or at its option make to Canada contributions in respect of, the service of these employees with the Government of Newfoundland prior to the date of Union, but these payments or contributions will be such that the burden on the Government of the Province of Newfoundland in respect of pension rights acquired by reason of service in Newfoundland will not be increased by reason of the transfer.

(3) Pensions of employees of the Government of Newfoundland who were retired on pension before the service concerned is taken over by Canada will remain the responsibility of the Province of Newfoundland.

The suppliant relies on the concluding phrase of subsection (1) of that clause. There is no dispute, however, as to salary matters. Just prior to the date of Union, he was in receipt of a monthly salary of $340.00 from the Newfoundland Railway; on April 1, 1949, when he entered the

services of the Canadian National Railways, his salary was immediately increased to $400.00; on December 1, 1950, it was increased to $440.00; and on September 1, 1952, to $484.00, remaining at that figure until his retirement. The complaint relates solely to matters of pension. It is said that the pension of $220.00 per month awarded him by the Canadian National Railways results in "a loss of pension rights acquired by reason of service in Newfoundland", contrary to the provisions of clause 39(1). It is submitted that the pension right which he had acquired by reason of service in Newfoundland was the right, upon retirement (and taking into consideration the total number of years of employment in railway service), to a pension of two-thirds of the average salary for the three years preceding retirement; that such average monthly salary was $440.00, and that therefore his monthly pension should have been $293.00 instead of $220.00 actually awarded to him. In effect, counsel for the suppliant submitted—and in this he was supported by counsel for the intervener—that the suppliant was entitled to exactly the same pension from the Canadian National Railways as he would have been entitled to receive from Newfoundland had the whole of his services up to retirement been with the Newfoundland Railway.

It should be stated here that I have not been furnished with any particulars as to the manner in which the pension of $220.00 awarded to the suppliant was made up. It is established, however, that pensions paid by the Canadian National Railways to its employees are to a substantial extent based on contributions made to the pension fund by the employees. It is also admitted that the suppliant, during his employment with that railway, did not make any contribution to its superannuation or pension fund.

Reserving all his rights to object to the admissibility thereof, counsel for the respondent at the request of counsel for the suppliant, permitted the filing of certain Orders in Council passed subsequent to the date of Union; these indicate that some efforts were made to bring about some adjustments in the rate of pensions payable to former employees of the Newfoundland Railway who entered the service of the Canadian National Railways. One of these seems to provide that for such employees who made no contribution to the Canadian National Railways Pension

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Fund, an allowance of $15 per year of service in such railway would be paid in addition to the pension which the employee would have been entitled to receive from Newfoundland had he retired on March 31, 1949. I do not think however, that these Orders in Council in this case can in any way affect the suppliant's claim as he does not rest his case on any of their provisions. The Petition of Right and the Particulars filed make it perfectly clear that the claim is for a pension of two-thirds of his average monthly salary during his last three years of employment and that the statutory authority under which he claims to have acquired pension rights prior to Union is the Civil Service Act, chapter 12, Statutes of Newfoundland, 1926, and Amendments, the pension provisions of which, he submits, were applied to employees of the Newfoundland Railway by Order-in-Commission.

It becomes necessary, therefore, to first ascertain what pension rights the suppliant had by reason of service in Newfoundland. He entered the service of the railway in 1909, the railway at that time being owned and operated by the Reid-Newfoundland Company. In 1923 the Government of Newfoundland took over all of the assets of that company, including the railway. There is no evidence to suggest that while the railway was operated by the Reid-Newfoundland Company, the suppliant was entitled to any superannuation or pension at the expense of that company. It is also shown that until January 1, 1935, there was no provision by Newfoundland for the payment of pensions to employees of its railway. On September 25, 1934, at a meeting of the Commission of Government, the following Minute (Exhibit 1) was passed:

> P.U.35—On recommendation of the Commissioner for Public Utilities it was agreed to apply from January 1st next, to employees of the Newfoundland Railway, pension and superannuation arrangements analogous to those applied to Civil Servants.

The reference therein to superannuation for civil servants related to the Civil Service Act of 1926. By section 15 thereof it was provided that the Act did not apply to certain groups, including employees of the Newfoundland Government Railway.

Again, on November 14, 1947, an Order of the Governor-in-Commission (Exhibit 2) provided:

It was agreed that the computation of pensions of employees of the Newfoundland Railway should continue to be on the basis under which civil servants received pensions in 1934.

Under the Civil Service Act, 1926, it was provided that:

8. The superannuation allowance hereinbefore mentioned shall be calculated—

(a) Upon the average yearly salary, and emoluments legally enjoyed. *at the expense of the Colony,* during the last three years of the service in respect of which an allowance is permitted hereunder;

(b) At the rate of two and one-quarter per centum of such average salary and emoluments, for each year of service, for a period not longer than thirty years in any instance;

(c) In computing the number of years of service, if the actual period of service includes a fraction of a year, the fraction, if equal to or greater than one-half, shall be counted as a full year's service; if less than one-half it shall not be counted in the service;

The superannuation thereby provided was entirely non-contributory. By section 6(1) thereof, payment of superannuation was limited to those civil servants who had served for ten years or more.

The suppliant submits that these Orders-in-Commission make applicable to employees of the Newfoundland Railway the superannuation provisions of the Civil Service Act, 1926. It is in evidence that up to March 31, 1949, the provisions of that Act relating to pensions were applied to employees of the Newfoundland Railway.

In the Statement of Defence the respondent denied that the suppliant had acquired any pension rights by reason of service in Newfoundland. At the hearing, however, his counsel stated at p. 22:

In any event I think there is no room for argument about what the basis for the suppliant's pension was prior to union. Under the Newfoundland provisions this was a pension based on two-thirds of the average annual salary for the three years preceding entitlement.

And at p. 24:

I think we can state by agreement between counsel that had he retired on March 31, 1949, his pension would have been two-thirds of his average annual salary for the three years immediately preceding. It is alleged in the particulars what his salary was and we can agree on a figure of $320 a month as his average salary. That appeared in the first instance as paragraph 2 of the particulars. I assume two-thirds of that would be what he would have received.

For the purposes of this case I need not stop to consider the question as to whether the suppliant *as of right* was

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entitled to a pension from the Government of Newfoundland had he retired on March 31, 1949. In an unreported judgment of Mr. Justice Higgins of the Supreme Court of Newfoundland, dated November 6, 1939—a copy of which has been filed—it was held that a person to whom the Civil Service Act, 1926, applied, and who was otherwise qualified, had a right to a superannuation allowance of an amount computed in accordance with that Act. He held, however, that as the Act expressly excluded railway employees from its operation, a railwayman had no *right* to pension thereunder. It is sufficient to say that on the evidence and on the admissions made, the suppliant, had he retired on March 31, 1949, would have received a pension based on the provisions of the Civil Service Act, 1926.

If the agreement as to the basis on which the suppliant would have been entitled to pension had he retired on March 31, 1949, be correct, that pension would have amounted to two-thirds of $322 (that amount rather than $320 being stated in the Particulars), or $214.50. It seems to me, however, that if the pension were computed on the basis of the requirements of the Act of 1926 (*supra*)—and I was not referred to any change made in that Act which affected railwaymen—the suppliant would not have been entitled to take into consideration for purposes of pension those years of service with the Reid-Newfoundland Company, by reason of the provisions of section 8(1)(*a*) of that Act. If that be correct, then he would have been entitled to a pension computed at the rate of $2\frac{1}{4}$ per cent of his average salary for the last three years prior to March 31, 1949, multiplied by the number of years' service between 1923 (when the Government of Newfoundland acquired the railway) and 1949. On a monthly basis that would be approximately $58\frac{1}{2}$ per cent of $322, or $188.37.

The precise computation of the quantum of the pension which the suppliant would have been entitled to receive from Newfoundland, had he retired March 31, 1949, would doubtless be of great importance to the province of Newfoundland in computing the payments or contributions which it is required to make to Canada under clause 39(2) of the Terms of Union (*supra*), as well as to the Canadian National Railways in working out the suppliant's pension. But in the view that I have taken of the case, it is here of

relatively minor importance whether such pension be $214.50 or $188.37, since the pension of $220 actually awarded to the suppliant is greater than either of such amounts.

For the purposes of this case it may also be assumed, I think, that had Union not taken place and had the suppliant continued to serve in the Newfoundland Railway, enjoying the same increases in salary as were in fact granted by the Canadian National Railways, he would, upon retirement on April 30, 1953, have been entitled to receive from Newfoundland a pension of $290 per month. On that date he would have served approximately thirty years with the Newfoundland Railway while it was owned and operated by Newfoundland. The question is whether in view of the provisions of clause 39(1) he was entitled to a pension of the same kind upon retirement from the services of the Canadian National Railways under the circumstances above referred to.

Up to this point, in considering what pension rights the suppliant had acquired by reason of service in Newfoundland, I have dealt mainly with the quantum thereof. It now becomes necessary to consider more closely the nature of such rights in the light of the submissions made on behalf of the suppliant on whom lies the onus of establishing his case.

That submission is to this effect. It is said that upon the suppliant entering railway enployment in 1909—or at least by 1935 when the provisions of the Civil Service Act, 1926, relating to pensions, were made applicable to employees of the Newfoundland Railway by Order-in-Commission—he acquired a certain right, namely, the right upon retirement to receive a pension based on the provisions of that Act. That right in its entirety, it is said, was reserved to him by the concluding phrase of clause 39(1) throughout his service with the Canadian National Railways, but with this latter submission I am quite unable to agree. The "pension rights acquired by reason of service in Newfoundland" are admittedly to be found only in the terms of the Civil Service Act, 1926, and it is those rights only which are not to be lessened. As one would expect, that Act said nothing whatever about superannuation for civil servants other than

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that relating to employment by the Government of Newfoundland; it does not purport to confer any superannuation rights in respect of services after the employee has left the service of that Government and has entered the service of some other organization such as in the instant case.

Section 6(1) of that Act authorizes the Governor in Council to "grant an annual superannuation allowance to any member of the Civil Service as defined herein"; that term is defined in section 1(1) and is limited to those "who are employed on full time and exclusively occupied in the service of the Colony". Then by section 8(9), the allowance is calculated "upon the average yearly salary, and emoluments legally enjoyed, at *the expense of the Colony,* during the last three years of the service in respect of which an allowance is permitted hereunder". This submission in substance means that the suppliant had acquired a right to the allowance provided in the Act upon retirement from *railway employment,* and whether or not at that time he was employed by a railway other than that owned by Newfoundland. I find nothing in that Act or elsewhere which confers any such right on the suppliant. In my view, his rights as to superannuation are limited entirely to such rights as he may have acquired while in the service of the Newfoundland Government.

Accordingly, I must reject the submission made on behalf of the suppliant that, upon entering the service of the Canadian National Railways, he was entitled to the same superannuation allowance upon retirement as he would have been entitled to had Union not taken place and had he received from Newfoundland the same advances in salary as were granted him by the Canadian National Railways.

This conclusion, it seems to me, is consistent with the main purpose of clause 39(1) of the Terms of Union which was to ensure that an opportunity would be given to employees of the Newfoundland Government to secure employment in the same or similar services in Canada and under the terms and conditions from time to time governing employment in such services. Other than the maintenance of salary and pension rights acquired while in the service of Newfoundland, there is nothing to suggest that upon entering the Canadian services, such employee would receive preferential treatment beyond that accorded to

other employees who had not previously been in the employment of the Government of Newfoundland. If it could be argued that the right to superannuation on the basis of two-thirds of the average annual salary during the last three years of employment, and after thirty years of service, was carried forward to the period of employment with the Canadian National Railways, it is obvious, I think, that it might also be argued that another "right" provided for in the Civil Service Act, 1926, should also be carried forward. I refer to the fact that the allowance under that Act was entirely non-contributory. Undoubtedly, if such were the case, other employees would be at a disadvantage since as I have stated, the superannuation provided by the Canadian National Railways is to a very substantial degree supported by contributions from its employees.

During the argument, I put a question to counsel for the suppliant. I asked him whether he would support a submission that an employee of the Newfoundland Railway who had served therein for two years prior to union, and had then entered the service of the Canadian National Railways, would be able to say: "Upon retirement at the age of sixty-five I am entitled to a pension based on the provisions of the Civil Service Act, 1926, without making any contribution to the superannuation fund of the Canadian National Railways, since, by reason of my service in the Newfoundland Railway, I have acquired a right to such a pension without contribution". He agreed that such a contention could not be supported, but added that in such a case the employee would be entitled to say: "I have been in that position in Newfoundland for two years and that must be counted. I am entitled to two years non-contributory to any scheme." The important part of that admission is that there is in effect a cut-off date as of the date of Union and that there was no right carried forward, when entering the service of the Canadian National Railways, to insist upon the "right" to a non-contributory pension thereafter. I can see no reason why any of the other provisions of the superannuation sections of the Civil Service Act, 1926, should be carried forward after the date of Union.

What then is the true meaning to be given the words "pension rights acquired by reason of service in Newfoundland"? In the first place I think "Newfoundland" is used

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as the name of one of the contracting parties to the Terms of Union, that is, in contradistinction to the province of Newfoundland which it became on April 1, 1949, after Union. It seems to me, therefore, that it was the intention of the contracting parties, in ensuring that the employees of Newfoundland who accepted employment in Canada would not be prejudiced, to provide a "cut-off" date—namely, the date of Union—at which time the salary of such employees and the quantum of pension rights acquired by reason of service to that date would be determined. If salaries were not to be reduced it would be necessary, of course, to establish what salaries were referred to, and the salaries paid at the date of Union were chosen as the salaries to be maintained. Similarly, as pension rights varied according to the length of service, it was necessary to fix with certainty what pension rights were to be maintained and they were fixed as being those "acquired by reason of service in Newfoundland", that is, as of the date of Union. As I have stated above, none of the provisions of the Civil Service Act, 1926, could be carried forward to the period of employment with the Canadian National Railways after Union. The quantum of superannuation thereunder to which an employee might have been entitled or might have acquired by reason of service up to April 1, 1949 (and based on length of service and on such matters as his average salary during the last three years of employment with the Government of Newfoundland), could be determined with accuracy as of the date of Union; that, in my view, is what was intended to be determined and when so determined was not to be lost to the employee. That precise computation based on a cut-off date as of April 1, 1949, was required to be made in order to carry out the terms of clause 39(2) (*supra*). Under that clause, Canada was to pay all pensions to employees who so entered its services. But the province of Newfoundland was to reimburse Canada for the pensions for (or at its option to make contributions in respect of) the service of such employees with the Government of Newfoundland prior to the date of Union.

I am therefore fully in agreement with the submission of counsel for the respondent that in the case of this suppliant, who undoubtedly had acquired pension rights by reason of having served over ten years as an employee of the Government of Newfoundland, the only pension right acquired by

him by reason of service in Newfoundland and which he was entitled to retain by reason of clause 39(1) of the Terms of Union, was the right to a pension based on the provisions of the Civil Service Act, 1926, and computed on the basis of the last three years of his service in Newfoundland prior to union. That is the "right" which by clause 39(1) may not be lessened.

As I have stated above, the pension actually awarded was $220 per month, which amount is in excess of the figure seemingly agreed upon by counsel for both parties as that which the suppliant would have been entitled to had he retired on March 31, 1949, and of the lower figure as I have computed it to be in accordance with the strict terms of the Civil Service Act, 1926. There is therefore no *loss* of that right which I have referred to above. No attempt was made by the suppliant to establish that the difference between either of the latter two amounts and the amount of $220 actually awarded was less than the amount of any additional pension to which the suppliant may have become entitled by reason of his four years' service with the Canadian National Railways on a non-contributory basis. I am unable to find, therefore, that the amount actually awarded is any less than that to which the suppliant is entitled.

The fact is that he was entitled to make contributions to the Canadian National Railways Pension Fund had he so desired, and had he done so his pension would undoubtedly have been larger. If by reason of the provisions of any Order in Council passed subsequent to the date of Union he is entitled to any supplementary payments by reason of service with the Canadian National Railways, I am confident that they will be provided if, in fact, they have not already been included in the pension awarded.

I desire to state that the conclusions at which I have arrived are based entirely on the facts of this case. In particular, I make no finding as to whether an employee who had served less than ten years with the Government of Newfoundland prior to Union has or has not acquired any pension rights by reason of that service, as it is unnecessary to consider that point.

In view of my conclusions, it is unnecessary to consider the other defences raised by the respondent. Included therein was the submission that the suppliant had no status to bring this action as only the contracting parties to the

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Terms of Union could insist on its terms being carried out; another submission was that this Court had no jurisdiction under the Exchequer Court Act, or otherwise, to entertain Petition of Right of this character. I felt it desirable to determine the issue on the merits and for that reason have assumed, but without deciding, that the Court had jurisdiction and that the suppliant was entitled to invoke on his own behalf the provisions of the Terms of Union.

There will therefore be a declaration that the suppliant is not entitled to any of the relief sought in the Petition of Right which will, accordingly, be dismissed. The respondent is entitled to taxed costs. There will be no order as to the costs of the intervener.

Judgment accordingly.