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8, 1954
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In the Privy Council.

No. 23 of 1952.

ON APPEAL FROM THE SUPREME COURT
OF CANADA

UNIVERSITY OF LONDON
W.C.1.
24 FEB 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

THE ATTORNEY GENERAL FOR ONTARIO, THE ATTORNEY
GENERAL FOR ALBERTA and THE ATTORNEY GENERAL
FOR PRINCE EDWARD ISLAND ... (*Intervenants*) *Appellants*

AND

ISRAEL WINNER, doing business under the name and style of
MACKENZIE COACH LINES (*Defendant*) *Respondent*

37730

AND

THE ATTORNEY GENERAL FOR NEW BRUNSWICK *ex rel.*
S.M.T. (EASTERN) LTD., a duly incorporated Company
... .. (*Plaintiff*) *Respondent*

AND

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY
GENERAL FOR QUEBEC, THE ATTORNEY GENERAL
FOR NOVA SCOTIA, THE ATTORNEY GENERAL FOR
NEW BRUNSWICK, THE ATTORNEY GENERAL FOR
BRITISH COLUMBIA, CANADIAN NATIONAL RAILWAY
COMPANY, CANADIAN PACIFIC RAILWAY COMPANY,
MACCAM TRANSPORT COMPANY and CARWIL
TRANSPORT LIMITED (*Intervenants*) *Respondents*

— AND BETWEEN —

ISRAEL WINNER (doing business under the name and style of
MACKENZIE COACH LINES) *Defendant*, and CANADIAN
NATIONAL RAILWAY COMPANY and CANADIAN PACIFIC
RAILWAY COMPANY (*Intervenants*) *Appellants*

AND

S.M.T. (EASTERN) LIMITED (*Plaintiff*) and the ATTORNEYS
GENERAL OF CANADA, ONTARIO, QUEBEC, NOVA
SCOTIA, NEW BRUNSWICK, BRITISH COLUMBIA,
PRINCE EDWARD ISLAND and ALBERTA, MACCAM
TRANSPORT LIMITED and CARWIL TRANSPORT
LIMITED (*Intervenants*) *Respondents*.

(Consolidated Appeals)

CASE OF THE ATTORNEY GENERAL FOR QUEBEC

RECORD

1.—This is an Appeal by Special Leave from a Judgment of the
Supreme Court of Canada dated the 22nd October, 1951, reversing a
p. 41

Judgment of the Appellate Division of the Supreme Court of New Brunswick (on a question of law) dated the 1st May, 1950.

2.—The original Plaintiff, S.M.T. (Eastern) Limited, is a company holding licenses granted by The Motor Carrier Board of New Brunswick to operate public motor buses over certain highways of New Brunswick.

3.—The Defendant, Israel Winner, doing business under the name and style of Mackenzie Coach Lines, operates public motor buses for the carrying of passengers and goods for compensation, between the city of Boston in the State of Massachusetts, one of the United States of America, and the town of Glace Bay, in the Province of Nova Scotia. The Province of New Brunswick lies between these two termini of Winner's lines. 10

4.—Under The Motor Carrier Act (1937) of New Brunswick, as amended by the Act 13 Geo. VI, Chap. 47 (1949), it is provided *inter alia* :

“ 11. Except as provided by this Act, no person, firm or company shall operate a public motor bus or public motor truck within the Province without holding a license from the Board authorizing such operations and then only as specified in such license and subject to this Act and the Regulations.”

5.—On 17th June, 1949, Winner applied to and obtained from The Motor Carrier Board of New Brunswick, a license in the following terms : 20

“ Israel Winner doing business under the name and style of ‘ MacKenzie Coach Lines,’ at Lewiston in the State of Maine, is granted a license to operate public motor buses from Boston in the State of Massachusetts, through the Province of New Brunswick on Highways Nos. 1 and 2, to Halifax and Glace Bay in the Province of Nova Scotia and return, but not to embus or debus passengers in the said Province of New Brunswick after 1st August, 1949.”

6.—Notwithstanding the terms of the license, Winner continued after 1st August, 1949, as he had done before, to embus and debus passengers 30 within the Province of New Brunswick.

p. 2 7.—By Writ of Summons issued on the 17th September, 1949, the original Plaintiff, S.M.T. (Eastern) Limited, one of the Respondents in this Appeal, brought an action against Israel Winner for an injunction restraining him from picking up and setting down passengers within the Province of New Brunswick, and for damages.

p. 8 8.—By Order dated 17th January, 1950, the trial Judge submitted for the opinion of the Appellate Division of the Supreme Court of New Brunswick, the following questions :

“ 1. Are the operations or proposed operations of the Defendant within the Province of New Brunswick, or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of The Motor Carrier Act, 1937, and amendments thereto, or orders made by the said Motor Carrier Board ?

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“ 2. Is 13 George VI, Chapter 47 (1949) *intra vires* of the legislature of the Province of New Brunswick ? ”

9.—During the hearing, by agreement between Counsel, the questions of law were enlarged to include the following : p. 17

10 “ 3. Are the proposed operations prohibited or in any way affected by Regulation 13 of The Motor Vehicle Act, Chapter 20 of the Acts of 1934 and amendments, or under Sections 6 or 53 or any other sections of The Motor Vehicle Act ? ”

10.—The Attorney General for New Brunswick intervened in the action and was represented by Counsel before the Appellate Division. p. 17

11.—On 1st May, 1950, all the questions were answered in the affirmative. p. 19

12.—On May 8th, Special Leave to Appeal to the Supreme Court of Canada was granted to the Defendants in the action. p. 38

20 13.—The Supreme Court of Canada raised the preliminary question of the right of the Plaintiff to sue. Without deciding the question, it was arranged that an application would be made to the Supreme Court of New Brunswick to add the Attorney General for New Brunswick *ex rel.* the S.M.T. Company as Plaintiff. This was done and the proceedings were amended accordingly.

30 14.—The Attorney General of Canada, the Attorney General for Ontario, the Attorney General for Quebec, the Attorney General for Nova Scotia, the Attorney General for British Columbia, the Attorney General for Prince Edward Island, the Attorney General for Alberta, the Canadian National Railway Company, the Canadian Pacific Railway Company, the Maccam Transport Company and Carwil Transport Limited were added as intervenants in the Supreme Court of Canada, and were represented by Counsel at the hearing.

15.—On 22nd October, 1951, the Supreme Court of Canada allowed the Appeal. Separate opinions were delivered by each of the nine Judges. p. 41

16.—The Chief Justice of Canada was of the opinion that The Motor Carrier Board of New Brunswick had no power under The Motor Carrier Act, to grant a license imposing the condition that the licensee should not p. 43

RECORD — take up or set down passengers in New Brunswick. He further expressed the view that having obtained a permit under a regulation passed pursuant to The Motor Vehicle Act, which regulation applied specifically to a public carrier operating between termini outside the Province, no license from The Motor Carrier Board was required. The Chief Justice did not discuss the constitutional aspects.

17.—Mr. Justice Kerwin said in part :

p. 57, l. 6

“ Prior to 1904, the title to the soil and freehold of highways in New Brunswick was vested in the owners of lands abutting on the highways. That year, by 4 Ed. VII, c. 6, s. 4, the soil and freehold were vested in His Majesty. This enactment was repealed in 1908 and, by R.S.N.B. 1927, c. 25, s. 29, His Majesty released any right he might have under the 1904 Act, and the title to the soil and freehold was re-vested in the abutting owners. In my opinion the same ultimate result would follow in provinces where the title is in the Crown. In either case, I take it to be indisputable that highways, generally speaking, fall within ‘ Property and Civil Rights in the Province ’ under s. 92 head 13 of the British North America Act. The public right of passage over highways is in all the members of the public, whether residents of the particular province or any other, or of a foreign country, and subsists whether the fee is in the Crown or abutting owners. That right may be interfered with in some respects by provincial legislatures and no question is raised as to its power to require every public motor carrier to register provincially and carry provincial licence plates.”

And further :

p. 58, l. 46

“ However, it is sufficient to state that in my opinion the interprovincial and international undertaking of the Appellant falls clearly within section 92 (10) (a) of the British North America Act but that the carriage of passengers or goods between points (a) and (b) in New Brunswick is not necessarily incidental to the Appellant’s undertaking connecting New Brunswick with any other, or others, of the provinces or extending beyond the limits of the province, except as to such carriage in connection with stop-over privileges extended as an incident of the contract of through carriage.”

18.—After quoting sub-section 10 of Section 92 of the British North America Act, Mr. Justice Taschereau said :

p. 61, l. 15

“ It is beyond dispute, that the operations of the Appellant are an ‘ undertaking ’ within the meaning of the section. As Lord Dunedin expressed it in the *Radio Reference*, they constituted ‘ an arrangement under which physical things were used.’ ”

And further on :

“ As long as such ‘ undertaking ’ connects the Province of New Brunswick with any other province, or extends beyond the limits of the province, 92 (10) (a) applies. As it has been said by Lord Reid in the *Empress Hotel*, the purpose of the section, is to deal with means of interprovincial communication. Such communication can be provided by organizations or undertakings, but not by inanimate things alone.” p. 61, l. 33

And again :

10 “ But the embussing of passengers at a point within the province to another point also within the province, presents an entirely different situation. This is not ‘ interprovincial communication,’ and I cannot see how it can be said that it is ‘ incidental ’ to the undertaking from which it is severable. It is traffic of a local nature, which falls under provincial jurisdiction. p. 62, l. 6

20 “ It is probable, that conflicts will arise between both, federal and provincial jurisdictions, but the courts are not legislative bodies. Their duty is to apply the law as they believe it has been enacted. The co-operation of the Central Government and the provinces, is therefore essential, in order to arrive at a satisfactory result. As it has been said by Lord Atkin, in *A.G. for British Columbia v. A.G. for Canada*,

30 “ It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

“ This conclusion which I have reached does not mean, that even if federal control may be exercised over interprovincial operations as indicated, the control of the roads and highways and the regulation of traffic, does not remain within the jurisdiction of the provinces. *Provincial Secretary of P.E.I. v. Egan.*”

40 19.—Mr. Justice Rand said in part :

“ Highways are a condition of the existence of an organized state : without them its life could not be carried on. To deny their use is to destroy the fundamental liberty of action of the individual, to proscribe his participation in that life : under such a p. 66, l. 14

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ban, the exercise of citizenship would be at an end. A narrower constitutional consideration arises. Civil life in this country consists of inextricably intermingled activities and relations within the legislative jurisdiction of both Parliament and Legislature; and deprivation of the use of highways would confound matters appertaining to both. To prevent a person from engaging in business at a post office or a customs house or a bank by forbidding him the use of highways is, so far, to frustrate a privilege imbedded in Dominion Law. These considerations are, I think, sufficient to demonstrate that the privilege of using highways is likewise an essential attribute of Canadian citizenship status. 10

“The province is thus seen to be the quasi-trustee of its highways to enable the life of the country as a whole to be carried on; they are furnished for the Canadian public and not only or primarily that of New Brunswick. Upon the province is cast the duty of providing and administering them, for which ample powers are granted; and the privilege of user can be curtailed directly by the province only within the legislative and administrative field of highways as such or in relation to other subject-matter within its exclusive field.” 20

He further held that Winner’s business was an undertaking within the meaning of sub-section 10 of Section 92 of the British North America Act; that the Province was without power, having admitted Winner’s buses to the highways of the Province, to prevent them from picking up or setting down, either interprovincial or international traffic; but that it was within the provincial authority to forbid the picking up or setting down of passengers travelling solely between points in the Province.

20.—Mr. Justice Kellock found it impossible to agree with the contention that “control of the use of provincial highways is a matter of civil rights within the Province,” and said: 30

p. 71, l. 38

“In the words of Lord Coleridge in *Bailey v. Jamieson*, ‘The common definition of a highway that is given in all the text-books of authority is, that it is a way leading from one market-town or inhabited place to another inhabited place which is common to all the Queen’s subjects.’ It therefore appears at once that the right to the use of a highway is a right vested in the ‘subject’ who is entitled to the exercise of that right throughout the kingdom.”

And further:

p. 72, l. 28

“It is with means of ‘interprovincial’ communication only, that the section deals, and therefore it is only the carriage of passengers or goods from a point outside the province to points within the province or beyond the province, and from a point within the province to points beyond the province, which may 40

properly be regarded as 'interprovincial' or 'connecting,' to use the statutory language." RECORD
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And again :

10 " As pointed out by the Respondents, local carriage of traffic by bus has become, over wide areas, an essential public service, and, unless regulated to prevent excessive competition, the section of the public dependant upon such service will often suffer. Such regulation would be impossible if any person, merely because he operates across a provincial boundary, perhaps at no great distance away, could compete with a purely local undertaking, free from any local control. It is past question, in my opinion, that a local legislature may, as a purely local matter, authorize the granting of exclusive transport franchises within the province in the interests of the inhabitants intended to be served. Just as an interprovincial or international bus line is withdrawn from provincial control, an intraprovincial bus line is, by the same statutory provision, placed within the exclusive jurisdiction of the provincial legislatures." p. 72, l. 45

21.—Mr. Justice Estey said :

20 " As to the meaning of 'works and undertakings' under s. 92 (10) (a), Lord Reid, in *C.P.R. v. A.G. for British Columbia (Empress Hotel case)* 1950 A.C. 122 at 142, stated :

30 " The latter part of the paragraph makes it clear that the object of the paragraph is to deal with means of interprovincial communication. Such communication can be provided by organizations or undertakings, but not by inanimate things alone. For this object the phrase 'lines of steamship' is appropriate. That phrase is commonly used to denote not only the ships concerned but also the organization which makes them regularly available between certain points. "

" In the *Radio* case, 1932, A.C. 304 at 315, Viscount Dunedin, in referring to s. 92 (10) (a), stated :

" 'Undertaking' is not a physical thing, but it is an arrangement under which of course physical things are used.

" The Appellant's organization under which he operates his bus service is, within the foregoing, an arrangement connecting New Brunswick and Nova Scotia. This arrangement, together with his equipment, constitutes a works and undertaking within the meaning of s. 92 (10) (a).

40 " There is no question but that the highways are subject to the exclusive legislative jurisdiction of the provinces. *Provincial Secretary of Prince Edward Island v. Egan*, 1941, S.C.R. 306 at 310.

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p. 77, l. 5

And further :

“ In respect of the embussing and debussing of international and interprovincial passengers within the province, while the contracts for their transportation are made both within and without the province, in every case such contracts are performed in part within and in part without the province. They constitute an inherent and important part of the Appellant’s works and undertaking and give to it that essential characteristic that, in the scheme of the British North America Act, places the Appellant’s service, by virtue of s. 92 (10) (a), under the legislative jurisdiction of the Dominion. While it was contended by certain of the Attorneys-General that the province possesses the power to prohibit an international and interprovincial bus to pass and repass upon its highways, no authority was cited to that effect. The Dominion of Canada was created by the British North America Act as ‘ one Dominion under the name of Canada ’ (s. 3) ; and there shall be ‘ one Parliament for Canada ’ (s. 17). Moreover, there is but one Canadian citizenship and, throughout, the British North America Act contemplates that citizens, and all others who may be for the time being in Canada, shall enjoy freedom of passage throughout the Dominion, subject to compliance with competent provincial legislation. 10 20

“ There remains for consideration the embussing and debussing by the Appellant of intraprovincial passengers. Immediately the 1949 license was issued he contended the prohibition was *ultra vires* of the province and has since carried on his business in complete disregard thereof. His position was that he had a right to carry on his international and interprovincial bus service and, as ‘ incidental ’ thereto, to embus and debus, including intraprovincial, passengers. He did not intimate what he included in the word ‘ incidental, ’ but it would appear that he at least meant the embussing and debussing of intraprovincial passengers along his route in New Brunswick.” 30

22.—Mr. Justice Locks held that the international and interprovincial operation of Winner was within the jurisdiction of Parliament, and said :

p. 80, l. 45

“ There remains the question as to the right of the Appellant to engage in what may properly, in my opinion, be described as the local business of carrying passengers other than those entering the province upon his buses, or leaving it in that manner, from place to place within the province. Whether these operations also fall within the exclusive jurisdiction of Parliament must be decided by determining the exact nature of the undertakings excepted from provincial jurisdiction by subheading 10 (a). These are undertakings connecting the province with another province or extending beyond the provincial limits. The 40

Appellant's enterprise is, I think, correctly described in the statement of defence as an international and interprovincial operation. It is properly a part of such an operation to afford to passengers brought into the province, or those who embark upon the buses to be carried out of the province, what are commonly called stop-over privileges of the nature above referred to as an incident of the contract of carriage." RECORD
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23.—Mr. Justice Cartwright said in part :

10 " I agree with my brother Rand that the relevant statutory provisions, if valid, are broad enough to empower the Board to restrict the license as it did, and the answer to the question must therefore turn on whether it was within the powers of the legislature of New Brunswick to so provide. p. 85, l. 33

20 " In the assumed circumstances of this case, set out above, I am in agreement with those members of the Court who hold that the New Brunswick Statutes and Regulations in question and the license issued by The Motor Carrier Board, referred to above, are legally ineffective to prevent the Appellant by his undertaking from bringing passengers into the Province of New Brunswick from the United States of America or from another province of Canada and permitting such passengers to alight in New Brunswick, or from picking up passengers in New Brunswick to be carried out of the province or from transporting between points in the province passengers to whom stop-over privileges have been extended as an incident of a contract of through carriage ; because in so far as they purport so to do they are *ultra vires* of the legislature of New Brunswick."

24.—Mr. Justice Fauteux said in part :

30 " In the measure in which it is interprovincial, the public transportation service of the Appellant undoubtedly constitutes consequently an undertaking coming within the meaning of ss. 10 (a) of s. 92 and, as such, is within the classes of subjects transferred into s. 91. Thus, the carrying of passengers by the Appellant (a) from outside the Province of New Brunswick to points along his route in the province, and (b) from points within the province to points beyond the province, and (c) between points in the province as an incident to stop-over privileges related to the operations mentioned in (a) and (b), having this interprovincial character, comes therefore within dominion jurisdiction as such. p. 88, l. 30

40 " However, and as described at the very beginning of these reasons, the actual and proposed operations of the Appellant include, in addition to this interprovincial service,

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the transportation of passengers between intermediate points within the Province of New Brunswick. And the question arises whether this latter traffic, in essence exclusively local, should be dealt with in this case as necessarily incidental to what constitutes the interprovincial undertaking of the Appellant, and be thus equally declared to come under the exclusive control of Parliament. I see no reason why it should. In law, it has by itself none of the features which, considered alone, would bring it within the meaning of ss. 10 (a) of s. 92. In fact, such local transportation is not a necessary incident to the interprovincial service of the Appellant. 10 The operations carried on by S.M.T. (Eastern) Limited, the Respondent, sufficiently indicate that such local service is in itself a complete undertaking. It is true that both the interprovincial and local services may merge in one undertaking. This, however, is no reason to ignore the legal premises on which the issue must be determined and, further, to conclude that either the local or the interprovincial part of the whole service must be considered as a necessary incident of the other. These local operations remain within provincial control."

25.—Under Section 92 of the British North America Act in each 20 province, the Legislature may exclusively make laws in relation to :

8. Municipal Institutions in the Province ;

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a Revenue for Provincial, Local or Municipal purposes.

10. Local Works and Undertakings other than such as are of the following classes :

A. Lines of steam or other ships, railways, canals, telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or 30 extending beyond the limits of the Province.

B. Lines of steamships between the Province and any British or foreign country.

C. Such Works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

13. Property and Civil Rights in the Province.

16. Generally all matters of a merely local or private nature in the Province. 40

26.—The Provincial Legislatures have always controlled traffic on the highways of the Province.

27.—In Quebec, the ownership of the land used for highway purposes, is vested in the Province or in its creatures, the municipal corporations, and highways are constructed and maintained by the Province or by the municipal corporations.

28.—At the coming into force of the British North America Act, military roads and no others, were transferred to the Dominion under Sections 108 and 109 of the B.N.A. Act and the Third Schedule attached thereto.

29.—“ Roads and bridges ” were struck out of what is now
 10 Section 92 (10) (a) of the B.N.A. Act at the Quebec Conference. (See Pope’s Confederation documents (1895) p. 22.)

30.—The Attorney General for Quebec contends that so much of the judgment of the Supreme Court of Canada which denies to the Province complete and exclusive control over public commercial vehicles, and the conditions under which such vehicles may use the roads of the Province, is wrong and should be reversed for, among other, the following

REASONS

- 20 1. BECAUSE legislation in relation to highways and regulation of traffic thereon is within the exclusive jurisdiction of the Provincial Legislatures.
2. BECAUSE motor buses proceeding along such highways are exclusively subject to Provincial laws.
3. BECAUSE the ownership of the land used for highway purposes in Quebec is vested in either the Province or the municipal corporations in the Province.
4. BECAUSE there is no common law right to carry on the business of operating motor buses for gain on a highway.
- 30 5. BECAUSE the condition under which a licence was granted to the Defendant pursuant to provincial legislation was valid and *intra vires*.
6. BECAUSE the business of the Defendant is not an undertaking within the meaning of the B.N.A. Act, Section 92 (10) (a)
7. BECAUSE the Dominion Parliament has no authority to grant to an undertaking the right to use the highways of the Province for the purpose of carrying on its operations.

8. BECAUSE there is no legislative authority purporting to give the Defendant the right to carry on an undertaking within the meaning of the B.N.A. Act, Section 92 (10) (a).
9. BECAUSE dual control in relation to highway traffic would create chaos.
10. BECAUSE the right to determine the use of highways belonging to the Province or to municipal corporations in the Province is a matter falling under head 13 of Section 92 of the B.N.A. Act.
11. BECAUSE the Provincial legislation under which the 10 Defendant received a conditional licence to carry on business is legislation of general application.

L. EMERY BEAULIEU.

In the Privy Council.

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AND OTHERS ... (*Intervenants*) *Respondents.*

CASE OF THE ATTORNEY
GENERAL FOR QUEBEC

LAWRENCE JONES & CO.,
Winchester House,
Old Broad Street,
London, E.C.2,
*Solicitors to the Attorney General
for Quebec.*