

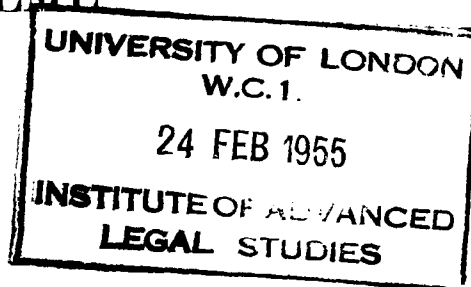
~~G.C. G. 16.~~

8, 1954

In the Privy Council.

No. 23 of 1952.

ON APPEAL FROM THE SUPREME
COURT OF CANADA



BETWEEN
THE ATTORNEY GENERAL FOR ONTARIO, THE
ATTORNEY GENERAL FOR ALBERTA and THE
ATTORNEY GENERAL FOR PRINCE EDWARD
ISLAND (Intervenants) APPELLANTS

37728

AND
ISRAEL WINNER, doing business under the name and
style of MACKENZIE COACH LINES ... (Defendant) RESPONDENT

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 COM-
PANY, 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 ISRAEL WINNER, CANADIAN NATIONAL
RAILWAY COMPANY AND CANADIAN
PACIFIC RAILWAY COMPANY

pp. 89-91
pp. 41-43

pp. 18-19

pp. 8-11

1.—These are consolidated appeals by special leave from a judgment of the Supreme Court of Canada pronounced on October 22, 1951, allowing in part an appeal by Israel Winner from a judgment of the Appeal Division of the Supreme Court of New Brunswick pronounced on May 1, 1950, answering certain questions of law raised for the opinion of that Court by Order of Mr. Justice Hughes in the Supreme Court of New Brunswick, Chancery Division, dated January 17, 1950.

2.—An action was commenced on September 17, 1949, by S.M.T. (Eastern) Limited against Israel Winner, doing business under the name and style of MacKenzie Coach Lines. 10

S.M.T. (Eastern) Limited is a New Brunswick Company operating motor buses for the carriage of passengers and goods for hire over the highways of New Brunswick. Winner, a resident in the United States, operates a line of motor buses for the carriage of passengers and goods for hire from Boston, Massachusetts, through New Brunswick to Glace Bay in Nova Scotia and return.

pp. 3-4

3.—In its Statement of Claim, the Plaintiff claimed an injunction restraining Winner from embussing and debussing passengers within New Brunswick in the course of his bus operation between St. Stephen, New Brunswick, and the Nova Scotia border; a declaration that Winner had no legal right to embus or debus passengers within New Brunswick; and accounting of fares received by Winner for the carriage of passengers within New Brunswick; and damages and incidental relief. 20

pp. 5-6

4.—In his Statement of Defence, Winner alleged that his operation of public motor buses is primarily international and interprovincial, but that incidentally to such international and interprovincial operation he also operates intra-provincially. He claimed a declaration that his operations constitute an undertaking connecting the Province of New Brunswick with another province of Canada, the Province of Nova Scotia, and extending into states of the United States of America, beyond the limits of the Province of New Brunswick, within the meaning of head 10(a) of section 92 of The British North America Act. He also claimed a declaration that his operations were not prohibited by the provisions of The Motor Carrier Act of New Brunswick and a declaration that the 1949 amendments to that Act were ultra vires. 30

pp. 8-11

5.—By an Order dated January 17, 1950, Mr. Justice Hughes raised for the opinion of the Appeal Division of the Supreme Court of New Brunswick two questions of law relating to The Motor Carrier Act of New Brunswick and

the 1949 amendments to that Act. By that order he directed that for the purpose of the said opinion, the facts relevant to the issues to be determined were to be taken to be as set out in the order.

He also ordered that in the meantime all further proceedings in the action be stayed and that after the questions have been answered by the Appeal Division, the matter be referred back to the Supreme Court of New Brunswick, Chancery Division, for further proceedings.

6.—On February 20, 1950, the Attorney General for New Brunswick p. 17 gave notice of his intention to intervene in the action.

10 7.—By an agreement dated March 21, 1950, it was agreed between p. 17-18 counsel that the first of the two questions of law raised for the opinion of the Appeal Division by the Order of Mr. Justice Hughes be enlarged so as to refer also to certain provisions of The Motor Vehicle Act of New Brunswick and a regulation passed thereunder.

The part added by agreement of counsel to the first of the two questions p. 28, l. 27 in the Order of Mr. Justice Hughes was treated by the Appeal Division as constituting a third question.

8.—The questions considered by the Appeal Division and the answers of p. 19 that Court were as follows :

20 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 ?

Answer : Yes, prohibited, until the Defendant complies with the provisions of the Act.

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

30 Answer : Yes, in respect of this Defendant. (Richards, C. J., and Hughes, J. answering simply " Yes ".)

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 ?

Answer : Yes, until the Defendant complies with the provisions of the Act, and the Regulations made thereunder.

9.—By an Order dated May 8, 1950, leave to appeal to the Supreme p. 38 Court of Canada was granted to Winner by the Appeal Division of the Supreme Court of New Brunswick.

40 10.—Pursuant to Orders made by the Supreme Court of Canada, the p. 55, l. 32 Attorney General of Canada, the Attorneys General for the Provinces of p. 41, l. 35 Ontario, Quebec, Nova Scotia, British Columbia, Alberta and Prince Edward Island, Canadian National Railway Company, Canadian Pacific Railway

Company, Maccam Transport Limited and Carwil Transport Limited intervened and were represented by counsel on the argument.

Speaking generally, the provincial Attorneys General and the two transport companies supported the position of the Plaintiff S.M.T. (Eastern) Limited, whereas the Attorney General of Canada and the two railway companies supported the position of the Defendant Winner.

p. 55, l. 32
p. 70, l. 1

11.—When the appeal was opened, the Supreme Court of Canada raised the question as to the right of the Plaintiff to sue. Without deciding that question, it was arranged for the Attorney General for New Brunswick, who had intervened in the proceedings before the Appeal Division of the Supreme Court of New Brunswick, to apply to the Supreme Court of New Brunswick to have the Attorney General for New Brunswick ex rel. S.M.T. (Eastern) Limited added as a Plaintiff in the action nunc pro tunc. This was done and the proceedings in the Supreme Court of Canada were amended accordingly. 10

p. 47, l. 32
p. 59, l. 7
p. 62, l. 35
p. 69, l. 34
p. 74, l. 1
p. 78, l. 32
p. 82, l. 29
p. 85, l. 18
p. 89, l. 11

12.—All nine judges of the Supreme Court of Canada were of the view that the three questions of law raised for the opinion of the Court involved matters which it was not necessary for the Court to decide in order to determine the issues raised in the action. Accordingly, the Supreme Court of Canada declined to answer the three questions to which the Appeal Division of the Supreme Court of New Brunswick had given answers, but instead gave a general answer in the following terms: 20

p. 42, l. 39

“ 1. It is not within the legislative powers of the Province of New Brunswick by the statutes or regulations in question, or within the powers of The Motor Carrier Board by the terms of the licence granted by it, to prohibit the Appellant by his undertaking from bringing passengers into the Province of New Brunswick from outside said province and permitting them to alight, or from carrying passengers from any point in the province to a point outside the limits thereof, or from carrying passengers along the route traversed by its buses from place to place in New Brunswick, to which passengers stop-over privileges have been extended as an incident of the contract of carriage; but except as to passengers to whom stop-over privileges have been extended as aforesaid it is within the legislative powers of the Province of New Brunswick by the Statutes and Regulations in question, and within the powers of the Motor Carrier Board by the terms of the licence granted by it, to prohibit the Appellant by his undertaking from carrying passengers from place to place within the said Province incidentally to his other operations.” 30

pp. 89-91

13.—By an Order of Her Majesty in Council dated July 29, 1952, leave to appeal from the judgment of the Supreme Court of Canada was granted to the Attorneys General for the Provinces of Ontario, Alberta and Prince Edward Island. By that Order, leave was also granted to Israel Winner, Canadian National Railway Company and Canadian Pacific Railway Company to appeal from so much of the judgment of the Supreme Court of Canada as holds that the Legislature of New Brunswick and the Motor Carrier Board may lawfully prohibit intra-provincial operations which are incidental to 40

interprovincial and international bus undertakings. It was further ordered that the appeals be consolidated and heard together.

14.—The issue in the appeal by the provinces is whether it was within the legislative powers of the Province of New Brunswick to prohibit or to authorize the provincial Motor Carrier Board to prohibit Winner from carrying on in New Brunswick his interprovincial and international motor bus operations.

The issue in the appeal by Winner and the railway companies is whether it was within the legislative powers of the Province of New Brunswick to
10 prohibit or to authorize the provincial Motor Carrier Board to prohibit Winner from carrying on in New Brunswick his intra-provincial bus operations.

15. The business and undertaking of Winner consists of the operation of motor buses for the carriage of passengers and goods for hire or compensation p. 9, l. 30 between the City of Boston, in the United States of America, through the Province of New Brunswick to the Town of Glace Bay, in the Province of Nova Scotia and between intermediate points. Winner's operation between p. 11, l. 6 Boston and Glace Bay and intermediate points is in accordance with the time-table which appears on pages 13 and 15 of the Record.

According to the time-table, the total time taken to travel from Boston
20 to Glace Bay is approximately 29 hours. Of this time, approximately 7 hours is required to travel through New Brunswick.

16.—The said business and undertaking is conducted over that portion of its route which lies in the United States of America under a certificate p. 9, l. 35 granted by the Interstate Commerce Commission of the United States of America.

It is conducted over that portion of its route which lies in the Province p. 10, l. 37 of Nova Scotia with the approval of the Board of Commissioners of Public Utilities for the Province of Nova Scotia.

17.—The Motor Carrier Board of the Province of New Brunswick on p. 10, l. 27
30 June 17, 1949, purported to grant a licence to Winner to operate public motor buses from Boston, through the Province of New Brunswick, to Halifax and Glace Bay in the Province of Nova Scotia, " but not to embus or debus passengers in the said Province of New Brunswick after August 1, 1949 "

18.—The Motor Carrier Board was created by and derives its authority from The Motor Carrier Act of New Brunswick (S.N.B. 1937 c. 43 as amended by S.N.B. 1939 c. 37 ; by S.N.B. 1940 c. 11 ; and by S.N.B. 1949 c. 47). The relevant provisions of that Act, as amended to the date on which the Board purported to grant the said licence to Winner are as follows :

2. (1) In this Act unless the context otherwise requires :—
40 * * * * *
(f) " Public Motor Bus " means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares.

(g) " Public Motor Truck " means a motor vehicle, with or without a trailer, carrying or used to carry goods or chattels for hire.

* * * * *

4. The Board may grant to any person, firm or company a license to operate or cause to be operated public motor buses or public motor trucks over specified routes or between specified points.
5. (3) In determining whether or not a license shall be granted, the Board shall give consideration to the transportation service being furnished by any railroad, street railway, or licensed motor carrier, the likelihood of proposed service being permanent and continuous throughout the period of the year that the highways are open to travel and the effect that such proposed service may have upon other transportation services. 10
- (4) If the Board finds from the evidence submitted that public convenience will be promoted by the establishment of the proposed service, or any part thereof, and is satisfied that the applicant will provide a proper service, an order may be made by the Board that a license be granted to the applicant in accordance with its finding upon proper security being furnished.
7. (2) The Board may for good cause suspend any license ; and, after giving no less than ten days notice to the holder and allowing him an opportunity to be heard, may revoke, alter or amend any license. 20
- (3) On the finding of the Board that a licensed motor carrier is not furnishing proper service over any route covered by its license, such motor carrier shall be given a reasonable time, not less than twenty days, to furnish such service before its license is cancelled or revoked or a license granted to some other motor carrier for such route.
8. Except as provided in the next succeeding section no licensed motor carrier shall abandon or discontinue any service comprised within its license without an order of the Board which shall be granted only after a hearing upon such notice as the Board may direct. 30
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 its regulations.
17. (1) The Board may from time to time make regulations fixing the schedules and services, rates, fares and charges of licensed motor carriers, prescribing forms, requiring the filing of returns, reports and other data and generally make regulations concerning motor carriers and public motor buses and public motor trucks as the Board may deem necessary or expedient for carrying out the purposes of this Act and for the safety and convenience of the public ; and may from time to time repeal, alter and amend any such orders, rules and regulations. All general regulations shall be subject to the approval of the Governor in Council and on being approved shall be published in The Royal Gazette. 40

19.—The relevant provisions of the British North America Act are as follows :

10 Sec. 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces ; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated ; that is to say,—

* * * * *

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

20 And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Sec. 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated ; that is to say,—

* * * * *

(9) Shop, Saloon, Tavern, Auctioneer, and other Licences 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 :—

30 (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 extending beyond the Limits of the Province :

(b) Lines of Steam Ships 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.

* * * * *

40 (13) Property and Civil Rights in the Province.

* * * * *

(16) Generally all Matters of a merely local or private Nature in the Province.

20.—The motor bus business of Winner is an undertaking connecting the Province of New Brunswick with another province, Nova Scotia, and extending beyond the limits of the Province of New Brunswick into the United States. It is, therefore, it is submitted, an “undertaking” within the meaning of head 10 (a) of Section 92 of the British North America Act. As such, it is excepted from the “Local Works and Undertakings” which are within the exclusive legislative jurisdiction of the Provinces and, by virtue of head 29 of section 91, is a matter within the exclusive legislative jurisdiction of the Parliament of Canada.

21.—Since the undertaking is within the exclusive jurisdiction of the 10 Parliament of Canada, the legislature of the Province of New Brunswick has no jurisdiction to pass laws in relation to the undertaking or its management. It follows, therefore, that the legislature of New Brunswick had no power to authorize The Motor Carrier Board to prohibit Winner in the operation of his bus undertaking from picking up or setting down passengers in New Brunswick. The provisions of The Motor Carrier Act which confer authority on the Motor Carrier Board must, therefore, be construed as conferring authority only in respect of local undertakings in the province and not as conferring authority on the Board with respect to an undertaking such as that of Winner.

p. 9, l. 30
p. 11, l. 6

22.—According to the facts set out in the Order of Mr. Justice Hughes, 20 Winner’s bus undertaking operates between Boston and Glace Bay and between intermediate points in accordance with the time-table.

23.—It is clear from this that Winner has a single bus undertaking which comprises international, interprovincial and intra-provincial operations. It is likewise clear that the incidental intra-provincial operation is not in any sense a separate undertaking. That being so, the intra-provincial operation does not, it is submitted, constitute a local work and undertaking within the legislative jurisdiction of the province.

24.—There is no material difference, it is submitted, between inter-provincial and international transportation by public motor buses on the one 30 hand and interprovincial and international means of communication by railways, by steamships, by aeroplanes, by telegraphs, by telephones or by radio, on the other hand. In the case of railways and telephones within the exclusive jurisdiction of the Dominion, intra-provincial operations which do not constitute a separate undertaking are within its exclusive legislative jurisdiction (*Luscar Collieries Limited v McDonald* 1927 A.C. 925; *City of Toronto v. Bell Telephone Company* 1905 A.C. 52). Likewise, in the case of a bus line, it is submitted that the intra-provincial operations which do not form a separate undertaking come within the exclusive legislative jurisdiction of the Dominion. 40

pp. 19–24 ;
pp. 30–36 ;
p. 37, ll. 21–
26

25.—In the Appeal Division of New Brunswick the learned judges were of the view that the works and undertakings excepted from provincial jurisdiction by head 10 (a) were those which are local within the Province of New Brunswick, that Winner’s undertaking is not local in New Brunswick

because he has no office or location of any kind there and that therefore Winner's undertaking is not within the legislative jurisdiction of Parliament.

26.—In the Supreme Court of Canada, the learned Chief Justice of Canada did not find it necessary to deal with the constitutional question because in his view the Motor Carrier Board was not authorized by the terms of the Act to prohibit Winner from embussing and debussing passengers in New Brunswick. pp. 43-55

27.—The other learned judges in the Supreme Court were of the view that Winner's international and interprovincial operations constituted an undertaking within the meaning of head 10 (a) and that accordingly it was within the exclusive legislative jurisdiction of Parliament. The view of six of the learned judges was that the intra-provincial operations of Winner did not come within the exclusive legislative jurisdiction of Parliament. They appeared to regard those operations as constituting a separate local undertaking within the exclusive legislative jurisdiction of the Province. Mr. Justice Locke and Mr. Justice Cartwright on their interpretation of the issue to be determined did not consider it necessary to deal with the intra-provincial operations. pp. 55-89
p. 82, ll. 35-45; p. 85, l. 37-p. 86, l. 4

28.—It is respectfully submitted that the appeal of the Attorneys General for Ontario, Alberta and Prince Edward Island should be dismissed and that the appeal of Israel Winner, Canadian National Railway Company and Canadian Pacific Railway Company should be allowed for the following amongst other

REASONS

1. BECAUSE the undertaking of Winner comprising his international, interprovincial and intra-provincial operations is an undertaking within the meaning of head 10 (a) of section 92 of the British North America Act and is within the exclusive jurisdiction of Parliament by virtue of head (29) of Section 91.
- 30 2. BECAUSE such undertaking is within the exclusive jurisdiction of Parliament by virtue of the general provisions of Section 91 of the British North America Act.
3. BECAUSE the prohibition against the picking up and setting down of passengers by Winner was in relation to the undertaking itself and therefore within the exclusive jurisdiction of Parliament and accordingly the Provincial Legislature had no power to authorize the Motor Carrier Board to make such prohibition.
- 40 4. BECAUSE such prohibition was in relation to the management of the undertaking and therefore within the exclusive jurisdiction of Parliament and accordingly the Provincial Legislature had no power to authorize the Motor Carrier Board to make such prohibition.

5. BECAUSE such prohibition was a law in relation to the undertaking itself and was not a law in relation to the regulation of highway traffic or any other matter within the competence of the Provincial Legislature.
6. BECAUSE the authority conferred by the Motor Carrier Act on the Motor Carrier Board to make such a prohibition could only be validly operative in respect of local undertakings in the Province and accordingly the prohibition made by the Board against the picking up and setting down of passengers by Winner was ultra vires the Board. 10
7. BECAUSE the intra-provincial operation of Winner does not constitute a separate undertaking so as to be a local undertaking within the jurisdiction of the provincial legislature.

C. F. H. CARSON.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA

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

AND

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BRUNSWICK ex. rel. S.M.T. (EASTERN)
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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 ISRAEL WINNER,
CANADIAN NATIONAL RAILWAY
COMPANY AND CANADIAN PACIFIC
RAILWAY COMPANY

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*Solicitors for Israel Winner, Canadian National
Railway Company and Canadian Pacific Railway
Company.*