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*

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 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 OF ONTARIO

1.—This is an Appeal by special leave from the judgment of the Supreme Court of Canada announced on October 22, 1951 reversing a unanimous

judgment of the Supreme Court of New Brunswick, Appeal Division, which answered affirmatively three questions involving the validity of The Motor Carriers Act, 1937, Chapter 43 and amendments including 13 George VI, Chapter 47 and of The Motor Vehicle Act, 1934, Chapter 20 and amendments including in particular Sections 6 and 63 and Regulation 13 passed thereunder as applied to the operations carried on by the defendant in the action.

2.—By Writ of Summons dated 17th September, 1949 the respondent S.M.T. (Eastern) Limited and Others brought action against one Israel Winner doing business under the name and style of MacKenzie Coach Lines for an injunction restraining Winner from picking up and setting down passengers within the Province of New Brunswick in his public motor buses running between St. Stephen, New Brunswick and the Nova Scotia Border and for other relief.

3.—The Trial Judge by Order dated 17th January, 1950 submitted certain questions of law for the opinion of the Supreme Court of New Brunswick, Appeal Division, and ordered that in the meantime all further proceedings in the action be stayed. For the purposes of the said opinion the Trial Judge set out in his order the facts relevant to the issue or issues to be determined.

4.—The questions of law submitted for the opinion of the Supreme Court of New Brunswick, Appeal Division, were as follows :

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

During the hearing before the Appeal Division the questions of law were enlarged by consent to include the following :

> 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 Section 6 or 53 or any other sections of The Motor Vehicle Act ?

5.—The Attorney-General for New Brunswick intervened in the action and was represented by Counsel before the Appeal Division.

6.—The Supreme Court of New Brunswick, Appeal Division answered all the questions in the affirmative.

7.—Special leave to appeal from the judgment of the Appeal Division to the Supreme Court of Canada was granted to the defendants in the action on May 8, 1950.

8.—When the appeal opened in the Supreme Court of Canada the Court raised the question of the right of the plaintiff in the action 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 Company as plaintiff in the action. That was done and the proceedings were amended accordingly.

9.—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 Carwill Transport Limited were added as intervenants in the Supreme Court of Canada and were represented by Counsel at the hearing.

10.—All the Judges of the Supreme Court of Canada delivered opinions.

The Chief Justice of Canada did not deem it necessary to discuss the constitutional aspects. He was of the opinion that the Motor Carrier Board had no power under The Motor Carrier Act to attach as a condition to the licence granted by it that the licencee should not take up or set down passengers in New Brunswick. He was further of the opinion 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 fixed termini outside the Province, it did away with the obligation of getting a licence from the Motor Carrier Board.

11.—Mr. Justice Kerwin said in part:

> "In my view it is unnecessary to detail the provisions of The Motor Carrier Act or The Motor Vehicle Act since, if the relevant provisions of these Acts are validly enacted and are applicable to Winner, they authorize what has been done by the Board in affixing the condition to the licence granted him. The important matter is whether the Legislature of New Brunswick is competent so to authorize the Board so far as Winner is concerned.
>
> 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 on :

" 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."

12.—Mr. Justice Taschereau after holding that the bus line operated by Winner is an undertaking connecting the Province of New Brunswick with another Province within the meaning of the British North America Act, section 92 subsection (10) (a) said :

" If, as I think, the operations of the appellant are an ' undertaking ' which as such fall under federal control, it does not follow that the provinces may not enact legislation relating to all that is not interprovincial traffic, or ' incidental ' thereto. Interprovincial communications are not of provincial concern, and therefore the appellant may without the authorization of the Province of New Brunswick, debus a passenger coming from the United States, in the limits of the province, and embus a passenger in New Brunswick whose destination is outside the province and vice versa, and also extend stop-over privileges as an incident of the operations. 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."

And further on :

" 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* (1941) S.C.R. 396."

13.—Mr. Justice Rand said in part :

" Assuming then that the international and interprovincial components of Winner's service are such an undertaking as head 10 envisages, the question is whether, by his own act, for the purposes of the statute, he can annex to it the local services. Under the theory advanced by Mr. Tennant, given an automobile, an individual can, by piecemeal accumulation, bring within paragraph 10 (a) a day-to-day fluctuating totality of operations of the class of those here in question. The result of being able to do so could undoubtedly introduce a destructive interference with the balanced and co-ordinated administration by the province of what is primarily a local matter ; and the public interest would suffer accordingly. There is no necessary entirety to such an aggregate and I cannot think it a sound construction of the section to permit the attraction, by such mode, to dominion jurisdiction of severable matter that otherwise would belong to the province.

But if, in relation to those primary components, the service is not such an undertaking, then, for the reasons given, it comes under the Dominion regulation of Trade and Commerce. In any case it would fall within the residual powers.

It follows that the province, in the absence of any justifying consideration relating to highway administration or other sufficient exclusive provincial matter, was without power, having admitted these buses to the highways, to prevent them from setting down or taking up either international or interprovincial traffic. On the other hand, it could forbid the taking up or setting down of passengers travelling solely between points in the province."

14.—Mr. Justice Kellock after holding that the operation came within section 92 (10) (a) said :

" 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 properly be regarded as ' interprovincial,' or ' connecting ' to use the statutory language. Unlike aerial navigation, or radio, which, from their very nature, are not divisible from the local or interprovincial or international standpoints, local carriage by bus is severable and forms no necessary part of the interprovincial

or international undertaking with which s. 92 (10) (a) is concerned. The words, ' Lines of ships ' and ' railways ', as used in the section, no doubt include all traffic carried by such means, but that is because these undertakings are specifically mentioned and, being mentioned, include everything normally understood by those words. I do not think, however, that there is any compelling reason for regarding such an undertaking as is here in question as including the purely local carriage of traffic, and, in the absence of such reason, I think there are considerations which dictate the contrary view."

15.—Mr. Justice Estey held that the appellant's organization under which he operates his bus service is a works and undertaking within the meaning of s. 92 (10) (a). He continued :

" 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. 396.

At the hearing there was some discussion as to the ownership of the highways in New Brunswick. Whatever the precise position may be in regard to their ownership, whether the province holds them as trustee for the public or whether the right of passage is in the nature of a public easement, for the purpose of this litigation it is sufficient that the province possesses, within the meaning of the British North America Act, complete legislative jurisdiction over its highways.

The appellant, once within the province, has a right to pass and repass his buses over the provincial highways, without regard to his citizenship or residence, upon his compliance with competently enacted provincial legislation. The province has not, at any time, disputed his right in this connection and he, on his part, has, by the purchase of the necessary licences, indicated a clear intention to comply with such legislation. In fact, he has and his right to do so is not here in question, carried passengers, from points outside, through the province to points beyond it."

16.—Mr. Justice Locke after stating that the international and interprovincial operation of Winner was within the jurisdiction of Parliament said :

" 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 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. I consider, however, that the carrying on of a purely local passenger business of the nature above referred to is not a part of, or reasonably incidental to, the operation of an undertaking of this nature. It is not every activity that the person engaged in the undertaking may decide to carry on in connection with its operation that falls within the exception. The establishment of restaurants at various places in New Brunswick through which the buses of the appellant pass might be an aid to the financial success of the undertaking, but such operations would not, in my view, be part of the undertaking excepted from the provincial jurisdiction. I think a purely local passenger business of the above mentioned nature is in no different position. The distinction between an undertaking such as this and that of the railway companies is that in the case of the latter it is an essential of the operation that there should be railway stations established at regular intervals along the line and large expenditures incurred for that purpose, and that there be facilities afforded for the carriage of both passengers and freight between these stations as a necessary part of an effective railway operation. These considerations do not, in my opinion, apply to an undertaking such as that of the appellant."

17.—Mr. Justice Cartwright said in part :

" I am in agreement with those members of the Court who hold that the New Brunswick statutes and regulations in question and the licence 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."

18.—Mr. Justice Fauteux was also of the opinion that the appellant's bus line is an undertaking within section 92 (10) (a) and continued :

> " The fact that the highways, over which the motor buses of the appellant must travel, are not part of his undertaking is not more material in the present case than the fact that the space, in which the material transmitted by radio has to travel, was not part of the undertaking, was material in the *Radio* case. In the judgment of the Judicial Committee rendered in the latter, it was stated, at page 315, that " ' undertaking ' is not a physical thing, but is an arrangement under which of course physical things are used." And it was also declared that " the undertaking of broadcasting is an undertaking connecting the province with other provinces and extending beyond the limits of the province."

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

20.—In Ontario the soil and freehold of every highway is vested in the corporation of the municipality except that Provincial highways are vested in, constructed and maintained by the Province.

21.—According to the Public Accounts, Ontario spent over fifty-six million dollars in the fiscal year ending March 31, 1951 on highway construction and repairs.

22.—The annual cost to the Province for snow ploughing and sanding the highways is approximately seven million dollars.

23.—" Roads and Bridges " were struck out of what is now Section 92 (10) (a) of the B.N.A. Act at the Quebec conference. (See Pope's Confederation Documents (1895) page 22).

24.—Under Section 92 of the British North America Act in each Province the Legislature may exclusively make laws in relation to :

(9) Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

(13) Property and Civil Rights in the Province.

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

25.—The following cases will be referred to in argument :

Attorney-General for Ontario v. *Attorney-General of Canada* (1896) A.C. 348.
C.P.R. v. *Bonsecours* (1899) A.C. 367 at 372.
O'Brien v. *Allen* (1900) 30 S.C.R. 340 at 342.
Toronto v. *Bell Telephone Co.* (1905) A.C. 52.
Montreal v. *Montreal Street Railway* (1912) A.C. 333 at 338.
John Deere Plow Co. v. *Wharton* (1915) A.C. 330 at 339-40.
Re Water Powers Reference (1929) S.C.R. 200 at 220.
Aeronautics Case (1932) A.C. 54 at 73–74 and 77.
Radio Case (1932) A.C. 304.
Lymburn v. *Mayland* (1932) A.C. 318.
Ottawa Valley Power Co. v. *Hydro Electric Power Commission* (1937) O.R. 265 at 318.
Labour Convention Case (1937) A.C. 326 at 350–1.
Quebec Railway Light & Power Co. v. *Town of Beauport* (1945) S.C.R. 16 at 23.
C.P.R. v. *Attorney-General for British Columbia* (1950) A.C. 122.

26.—The Attorney-General for Ontario contends that so much of the judgment of the Supreme Court of Canada which says that the laws of the Province which authorize a Board, in licensing a public commercial vehicle to use the roads of the Province, to insert a condition that the Company shall not pick up or set down passengers within the Province has no application to the defendant in this action is wrong and should be reversed for the following among other

REASONS

1. BECAUSE the business of the defendant is not an undertaking within the meaning of the B.N.A. Act section 92 (10) (a).
2. BECAUSE legislation in relation to highways is within the exclusive jurisdiction of the Provincial Legislatures.
3. BECAUSE the soil and freehold in highways in Ontario is in either the Province or the municipality.
4. BECAUSE there is no common law right to carry on the business of operating motor buses for gain on a highway.
5. BECAUSE the right of the defendant to carry on a business on the highway of the Province was subject to a valid condition in a licence granted to him pursuant to Provincial legislation.

6. 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).

7. BECAUSE dual control in relation to highway traffic would create chaos.

8. BECAUSE the Provincial legislation under which the defendant received a conditional licence to carry on business is legislation of general application.

DANA PORTER.

C. R. MAGONE. 10

In the Privy Council

No. 23 of 1952.

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

CASE OF THE ATTORNEY GENERAL OF ONTARIO

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