

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

37727

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 FOR
PRINCE EDWARD ISLAND

RECORD

1.—This is an Appeal by special leave from a judgment of the Supreme Court of Canada dated 22nd October, 1951, which reversed a unanimous

RECORD

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judgment of the Appellate Division of the Supreme Court of New Brunswick on a question of law, delivered on May 1st, 1950. The writ of summons commencing the action was issued on the 17th September, 1949.

2.—The facts are not disputed and can be summarized as follows :

The original Plaintiff, S.M.T. (Eastern) Limited (S.M.T. stands for Scotia Motor Transport) is a company incorporated under the New Brunswick Companies' Act. It holds licenses granted by the Motor Carrier Board of New Brunswick to operate public motor buses over certain highways in New Brunswick, for the carriage of passengers and goods for compensation. 10

The defendant Winner, a resident of Lewiston, State of Maine, U.S.A., is in the business of operating motor buses for the carriage of passengers and goods for compensation, under the name and style of Mackenzie Coach Lines. He operates motor buses between the City of Boston, Massachusetts, and the Town of Glace Bay, Nova Scotia.

The Province of New Brunswick lies between Boston and Glace Bay, and on June 17th, 1949, Winner applied to the Motor Carrier Board of New Brunswick for a license permitting him to operate public motor buses through that Province. The Motor Carrier Board granted a license on such application, in the following terms : 20

“ Israel Winner doing business under the name and style of Mackenzie Coach Lines, 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 August 1st, 1949.”

Winner continually embussed and debussed passengers within the Province of New Brunswick, both before and after August 1st, 1949, and challenged the constitutionality of the Acts under which the license of the Motor Carrier Board was granted, as well as the legality of the restriction thereby imposed. 30

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3.—The Writ of Summons claimed an injunction restraining Winner from embussing and debussing passengers within New Brunswick, and damages. After issues were joined, the Trial Judge, by Order dated January 17th, 1950, 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 ? 40

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

Before the Appellate Division of the Supreme Court of New Brunswick, p. 18 pursuant to agreement between Counsel, the questions of law were enlarged.

4.—On May 1st, 1950, all the questions were answered in the affirmative and special leave to appeal to the Supreme Court of Canada was granted on May 8th, 1950. p. 18
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5.—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 Record amended accordingly. 10

6.—The Attorney-General of Canada, the Attorneys-General for Alberta, British Columbia, Nova Scotia, Ontario, Prince Edward Island and Quebec, the Canadian National and Canadian Pacific Railways, the Carwill Transport Limited and the Maccam Transport Limited were added as Intervants before the Supreme Court of Canada and were represented by Counsel on the hearing of the appeal.

7.—The Supreme Court of Canada allowed the appeal on October 22, 1951, and set aside the Order appealed from. Separate opinions were delivered by each of the Judges. p. 41
p. 43
et seq.

8.—The Chief Justice of Canada was of the opinion that the license issued by the Motor Carrier Board of New Brunswick was issued wholly without a shadow of authority, and that the attempt to restrict the operations of Winner in the Order made by the Motor Carrier Board is illegal and *ultra vires*. The Chief Justice did not discuss the constitutional aspect.

9.—Mr. Justice Kerwin found it to be “indisputable,” generally speaking, that highways fall within Property and Civil Rights in the Province, under S. 92, Head 13 of the B.N.A. Act. In his opinion, the interprovincial and international undertaking of the appellant falls clearly within Sec. 92 (10) (a), but the carriage of passengers or goods between points (a) and (b) in New Brunswick is not necessarily incidental to such undertaking. 30

10.—Mr. Justice Taschereau likewise held the undertaking to be severable, falling, in its interprovincial and international aspect, into Section 91, and in its intraprovincial aspect into Section 92. 40

11.—Mr. Justice Rand held the claim for provincial control excessive. In his opinion, “the first and fundamental accomplishment of the Constitutional Act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship,” and he held that “the Province is the quasi-trustee of its highways” for the public at large. He held further that the Province “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 10 travelling solely between points in the province.”

12.—Mr. Justice Kellock held that “It is the connecting undertaking which alone is committed to Dominion jurisdiction, while the local undertaking is at the same time committed to that of the Provinces.”

13.—Mr. Justice Estey held that “provincial legislation, in so far as it prohibits the embussing or debussing of international and interprovincial passengers, is *ultra vires* the Province.”

14.—Mr. Justice Locke stated: “The particular questions to be determined in the present matter are as to whether by legislation of the Province an undertaking such as that of the appellant may be prohibited 20 from bringing passengers into the Province of New Brunswick from the United States and from Nova Scotia and permitting them to alight: from admitting passengers to its buses to be carried out of the Province, and to carry passengers along the route traversed by its buses from place to place in New Brunswick to whom stop-over privileges have been extended as an incident of the contract of carriage. The answer to each of these questions is, in my opinion, in the negative. This is sufficient, in my opinion, to dispose of the issues properly raised by the pleadings in this action. I think no further answer should be made.”

15.—Mr. Justice Cartwright said in part: “In the assumed 30 circumstances of this case, set out above, I am in agreement with those members of the Court who held 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 40 through carriage; because in so far as they purport so to do they are *ultra vires* of the Legislature of New Brunswick. I would so declare and would also declare that no further answer to the questions submitted is required.”

16.—Mr. Justice Fauteux held that, “In the measure in which it is interprovincial, the public transportation system of the appellant undoubtedly constitutes consequently an undertaking coming within the meaning of S.S. (10) (a) of S. 92.” And later, “local transportation is not a necessary incident to the interprovincial service of the appellant.”

17.—Section 3 of The Public Works and Highways Act, R.S.P.E.I., 1951, Chap. 135, reads as follows :

10 “ 3. Unless otherwise provided the soil and freehold of every common and public highways shall be vested in Her Majesty.”

18.—The Province has the control of its highways. It has to maintain them and to look after the safety and convenience of the public by regulating and controlling the traffic thereon.

19.—It might well lead to a state of chaos if a Dominion company had a right to operate motor vehicles on municipal and provincial highways according to its own ideas without reference to the provincial laws, rules and regulations governing the operation of other motor vehicles on the public highways in the province. For instance, you could not in any practical sense have a province requiring all motor vehicles to travel on
20 the right hand side of the road and a Dominion company denying any authority of the province over it because it was a Dominion company, and asserting the right to run its motor vehicles on the left hand side of the road.

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

Prov. Secy. of P.E.I. vs. Egan (1941) S.C.R. 396.

Lymburn vs. Mayland : (1932) A.C. 318.

Quebec Ry. Light & Power Co. vs. Beauport : (1945) S.C.R. 16.

Radio Reference : (1932) A.C. 304.

21.—The Attorney General for Prince Edward Island submits that
30 so much of the judgment of the Supreme Court of Canada which withholds from the provinces complete and exclusive control over public commercial vehicles and the conditions under which such vehicles may or may not embus or debus passengers is incorrect and should be reversed for the following, among other,

REASONS

- (1) BECAUSE control of highways, and regulation of traffic thereon, is within the exclusive jurisdiction of the provinces ;
- (2) BECAUSE motor buses proceeding along such highways are exclusively subject to provincial law ;

- (3) BECAUSE of the futility of trying to split what really is one undertaking into two ;
- (4) BECAUSE of the pre-eminent claims of Section 92 of the British North America Act ;
- (5) BECAUSE a divided control between provinces and Dominion could only lead to confusion and inefficiency.

W. E. DARBY.

J. O. C. CAMPBELL.

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

CASE OF THE ATTORNEY GENERAL
FOR PRINCE EDWARD ISLAND

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London, E.C.2,
*Solicitors to the Attorney General
for Prince Edward Island.*