

GC. G. 16.

8,1954

No. 23 of 1952.

In the Privy Council

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

10

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

37729

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

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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

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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

40

(Consolidated Appeals)

Case

OF THE ATTORNEY-GENERAL OF CANADA.

pp. 89-91.

pp. 41-43.

pp. 18-19.

pp. 8-11.

1. These are consolidated appeals by special leave from the judgment of the Supreme Court of Canada pronounced on the 22nd day of October, 1951, reversing the judgment of the Supreme Court of New Brunswick, Appellate Division, pronounced on the 1st day of May, 1950, answering the questions raised for the opinion of that Court by Order of Mr. Justice Hughes in the Supreme Court of New Brunswick, Chancery Division, dated the 17th day of January, 1950.

pp. 2-3.

2. On the 17th day of September, 1949, S.M.T. (Eastern) Limited, as Plaintiff, commenced an action by Writ of Summons in the Supreme Court of New Brunswick, Chancery Division, against Israel Winner, doing 10 business under the name and style of Mackenzie Coach Lines, as Defendant.

pp. 3-4.

3. By its Statement of Claim dated the 18th day of October, 1949, the Plaintiff claimed an injunction against the Defendant, his servants or agents restraining him and them from enbussing and debussing passengers within the Province of New Brunswick in his public motor buses running between St. Stephen, New Brunswick, and the Nova Scotia Border; a declaration that the Defendant has no legal right to enbus or debus passengers within the Province of New Brunswick; an accounting of fares received for the carriage of passengers within the Province of New Brunswick; and damages. 20

pp. 5-6.

4. By his Statement of Defence and Counter-claim dated the 1st day of December, 1949, the Defendant claimed a declaration that his operations constituted an undertaking connecting the Province of New Brunswick with another province of Canada, namely 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; a declaration that his said operations are not prohibited by or subject in any way to the provisions of The Motor Carrier Act and amendments thereto, or by or to any other applicable statute or law; and a declaration that 13 George VI Chapter 47 30 (1949) is *ultra vires* the Legislature of the Province of New Brunswick.

p. 7.

5. The Plaintiff filed a Reply and Defence to Counter-claim dated the 8th day of December, 1949.

p. 8, ll. 14-17.

6. On the 17th day of January, 1950, Mr. Justice Hughes ordered that questions of law be raised for the opinion of the Supreme Court of New Brunswick, Appellate Division, and that in the meantime all further proceedings in the action be stayed. He also ordered that the facts relevant to the issue or issues to be determined be taken to be as follows:—

pp. 8-11.

“ 1.—The Plaintiff is a company incorporated under and by
 “ virtue of the New Brunswick Companies' Act and is in the business 40
 “ (*inter alia*) of operating motor buses for the carriage of passengers
 “ and goods for hire or compensation over the highways of the
 “ Province of New Brunswick.

“ 2.—The Plaintiff holds licenses granted by The Motor Carrier
 “ Board of the Province of New Brunswick to operate public motor
 “ buses between St. Stephen, New Brunswick, and the City of Saint

“ John, New Brunswick over Highway Route No. 1 and between
“ the said City of Saint John and the Nova Scotia border over
“ Highway Route No. 2, for the purpose of carrying passengers and
“ goods for hire or compensation.

“ 3.—The Plaintiff by its public motor buses maintains a daily
“ passenger service over the routes set out in paragraph 2 hereof.

10 “ 4.—The Defendant, who resides at Lewiston in the State of
“ Maine, one of the United States of America, is in the business
“ (*inter alia*) of operating motor buses for the carriage of passengers
“ and goods for hire or compensation under the name and style of
“ MacKenzie Coach Lines.

“ 5.—(A) On the 17th day of June, 1949, on the application
“ of the Defendant the said Motor Carrier Board granted a licence
“ to the Defendant, permitting him to operate public motor buses
“ from Boston in the Commonwealth 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 enbus or debus passengers in the said Province of New
“ Brunswick after August 1st, 1949.

20 “ (B) At the time of making the said application, the Defendant
“ challenged the validity of 13 George VI Chapter 47 (1949), and
“ the Motor Carrier Act, 1937, as affected thereby, as being *ultra*
“ *vires* of the Legislature of the Province of New Brunswick.

“ (C) That the said Motor Carrier Board made no specific ruling
“ on the Defendant’s challenge as set out in sub-paragraph (B),
“ but acted under the said 13 George VI Chapter 47 (1949).

“ 6.—The Defendant by his motor buses maintains a regular
“ passenger service over the routes set out in paragraph 5 (A)
“ hereof.

30 “ 7.—Since August 1st, 1949, the Defendant has continually
“ enbused and debused passengers within the Province of New
“ Brunswick and it is his intention to continue to do so unless and
“ until it shall have been declared by some court of competent
“ jurisdiction that such operations are prohibited by The Motor
“ Carrier Act, 1937, and amendments thereto, or by any other
“ applicable statute or law.

40 “ 8.—The Defendant intends to carry passengers not only from
“ points without the Province of New Brunswick to points within
“ the said Province and vice versa, but also, in connection with and
“ incidental to his operations as more particularly described in
“ paragraph 9 hereof, to carry passengers from points within the
“ said Province to destinations also within the said Province, unless
“ and until it shall have been declared by some court of competent
“ jurisdiction that such operations are prohibited by the Motor
“ Carrier Act, 1937, and amendments thereto, or by any other
“ applicable statute or law.

“ 9 —(A) The business and undertaking of the Defendant,
 “ generally referred to in paragraph 4 hereof consists of the
 “ operation of motor buses for the carriage of passengers and
 “ goods for hire or compensation between the City of Boston in the
 “ Commonwealth of Massachusetts and the Town of Glace Bay
 “ in the Province of Nova Scotia and between intermediate points.

“ (B) That the said business and undertaking is conducted
 “ by the Defendant over that portion of its route which lies between
 “ the said City of Boston and the Town of Calais, Maine, under a
 “ certificate granted by Interstate Commerce Commission (a Federal 10
 “ commission of the United States of America having jurisdiction
 “ inter alia, over inter-state transportation), permitting the
 “ defendant to carry passengers and their baggage, as a motor
 “ carrier, as follows :—

“ ‘ Passengers and their baggage, and express and mail in
 “ ‘ the same vehicle with passengers, in seasonal operations from
 “ ‘ the 1st day of May to the 15th day of December, both inclusive,
 “ ‘ over a regular route between Boston, Mass., and a point on the
 “ ‘ United States–Canada Boundary line north of Calais, Maine ;
 “ ‘ From Boston over U.S. Highway 1 to Portland, Maine, thence 20
 “ ‘ over Maine Highway 3 via Auburn, Augusta, and Belfast,
 “ ‘ Maine, to Ellsworth, Maine (also from Augusta, Maine over
 “ ‘ Maine Highway 100 to Newport, Maine, thence over U.S.
 “ ‘ Highway 2 to Bangor, Maine, thence over U.S. Highway 1
 “ ‘ to Ellsworth), thence over U.S. Highway 1 to Franklin Road,
 “ ‘ Maine, thence over Maine Highway 182 to Cherryfield, Maine
 “ ‘ (also from Franklin Road over U.S. Highway 1 to Cherryfield),
 “ ‘ thence over U.S. Highway 1 to Calais, Maine, and thence over
 “ ‘ bridge to the United States–Canada Boundary line and return
 “ ‘ over the same routes. 30

“ ‘ Service is authorised to and from all intermediate points.’

“ (c) Subsequently and in addition, Interstate Commerce
 “ Commission, has permitted the Defendant to carry passengers
 “ and their baggage as a motor carrier, as follows :—

“ ‘ Passengers and their baggage, and express, mail and
 “ ‘ newspapers in the same vehicle with passengers, in a seasonal
 “ ‘ operation extending from the first of May to the 15th of
 “ ‘ December, inclusive, of each year, over alternate regular routes
 “ ‘ for operating convenience only in connection with said carrier’s
 “ ‘ presently authorise regular route operations. 40

“ ‘ Between Portland, Maine, and Kittery, Maine : From
 “ ‘ Portland over Maine Turnpike to Kittery, and return over
 “ ‘ the same route.

“ ‘ Between Bangor, Maine, and Calais, Maine : From
 “ ‘ Bangor over Maine Highway 9 to Calais, and return over the
 “ ‘ same route.

“ ‘ Service is not authorised to or from intermediate points.’

“(D) The Motor Carrier Board of the Province of New Brunswick, on the 17th day of June, 1949, on the application of the Defendant as set forth in paragraph 5 hereof, purported to license the operation of the Defendant, in the Province of New Brunswick, as follows :—

10 “ ‘ 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 enbus or debus passengers in the said Province of New “ ‘ Brunswick after August 1, 1949.’ ”

“(E) The Board of Commissioners of Public Utilities for the Province of Nova Scotia has purported to approve the Defendant’s operations in the Province of Nova Scotia over the following routes :—

20 “ ‘ (a) New Brunswick Border to Glace Bay, via Route “ ‘ No. 4 Wentworth Valley and Truro—302 miles ; “ ‘ (b) New Brunswick Border to Glace Bay, via Route “ ‘ No. 2 Parrsboro and Truro—319 miles ; “ ‘ (c) New Brunswick Border to Glace Bay, via Route “ ‘ No. 6 Pugwash, Wallace, Pictou and New Glasgow—292 “ ‘ miles ; “ ‘ (d) Truro to Halifax—64 miles (3 miles of which is “ ‘ within the corporate limits of the Town of Truro and City of “ ‘ Halifax).’ ”

30 “ (F) Subsequently the said Board of Commissioners of Public Utilities for the Province of Nova Scotia amended the certificate granted to the Defendant as set out in sub-paragraph (E) hereof as follows :—

“ ‘ Operation of this route is permitted TO BE SUSPENDED “ ‘ from January 12th, 1949 until May 1st, 1949.’ ”

40 “ (G) The Defendant in fact, operates as a public motor carrier between the City of Boston aforesaid, the Town of Glace Bay aforesaid and intermediate points, in accordance with the timetable, a copy of which is hereunto (the order of Mr. Justice Hughes) annexed marked ‘ A,’ between the 1st day of May and the 15th day of December in each year, the period of time covered by the certificates granted by the Interstate Commerce Commission.

“(H) Between December 15th and May 1st of each year, the Defendant proposes to operate as a public motor carrier as aforesaid, between the Provinces of New Brunswick and Nova Scotia, connecting with New England Greyhound Lines, Inc., a company authorized by the Interstate Commerce Commission to operate as a public motor carrier between Calais, Maine and Boston, Massachusetts throughout the entire year.

“(J) Incidentally to its operations as aforesaid, the Defendant
“ proposes to pick up, within the Province of New Brunswick,
“ passengers and their baggage having a destination also within
“ the Province of New Brunswick.”

p. 11, ll. 21-28.

7. The order of Mr. Justice Hughes then went on to provide that the questions for the opinion of the Supreme Court of New Brunswick, Appellate Division, be 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 10
“ 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 ? ”

pp. 17-18.

8. It was subsequently formally agreed by counsel by Memorandum of Agreement dated the 21st day of March, 1950, that the first question raised by the Order of Mr. Justice Hughes be enlarged so as to read as follows :—

“ 1.—Are the operations or proposed operations of the Defendant
“ within the Province of New Brunswick or any part or parts 20
“ 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 or by
“ Sections 6, 53, or other provisions of The Motor Vehicle Act and
“ amendments thereto or by regulation No. 13 or by any other
“ regulation promulgated under the provisions of The Motor Vehicle
“ Act ? ”

p. 19.

The latter part of question numbered 1, as so enlarged, was subsequently treated in the Judgment of the Supreme Court of New Brunswick, Appellate Division, as a separate question numbered 3, reading as follows :— 30

“ 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 ? ”

9. The relevant provisions of The Motor Carrier Act would appear to be as follows :—

“ 2. (1) In this Act unless the context otherwise requires—

* * * * *

“ (f) ‘ Public Motor Bus ’ means a motor vehicle plying or
“ standing for hire by, or used to carry, passengers at 40
“ separate fares from any point within the Province to a
“ destination also within the Province.

“ (g) ‘ Public Motor Truck ’ means a motor vehicle, with or
“ without a trailer, carrying or used to carry goods or
“ chattels for hire from any point within the Province
“ to a destination also within the Province.

* * * * *

“ 4. The Board may grant to any person, firm or company a licence to operate or cause to be operated public motor buses or public motor trucks over specified routes and between specified points within the province.

* * * * *
“ 5. * * * * *

10 “ (3) In determining whether or not a licence 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.

“ (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 licence be granted to the applicant in accordance with its finding upon proper security being furnished.

20 “ (5) No licence shall be issued to a motor carrier unless there is filed with the Board—

30 “ (a) A liability insurance policy or bond satisfactory to the Board of some insurance company or association authorized to transact business in the Province in such sum as the Board may deem necessary to adequately protect passengers, shippers and the public, due regard being had to the number of persons and amount of property involved, which insurance or bond shall bind the obligors to make compensation for injuries to persons and loss of, or damage to, property resulting from the negligent operation of the public motor buses and public motor trucks of such motor carrier.

“ (b) A bond satisfactory to the Board and in such amount as the Board may determine conditioned for the payment by such motor carrier of all assessments, fees and charges under, and for the faithful performance by such motor carrier of all duties imposed by this Act and the regulations.”

40 “ 7. * * * * *

“ (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.”

* * * * *

“ 11. Except as provided by this Act, no person, firm or 10
 “ 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.”

* * * * *

“ 17. (1) The Board may from time to time make regulations
 “ fixing the schedules and service, 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 20
 “ 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 ’.”

* * * * *

“ 21. Every licensed motor carrier shall be deemed a public 30
 “ utility under the Public Utilities Act.”

10. 13 George VI Chapter 47 (1949), referred to in the second
 question raised, amended the above quoted provisions of the Motor
 Carrier Act as follows :—

- (A) by striking out everything in s. 2 (1) (f) after the word “ fares ” ;
- (B) by striking out everything in s. 2 (1) (g) after the word “ hire ” ;
 and
- (C) by striking out the word “ and ” in the fourth line of s. 4 and
 substituting the word “ or ” therefor and by striking out the
 words “ within the province,” being the last three words of the
 said section. 40

11. The provisions of The Motor Vehicle Act referred to in the third
 question are as follows :—

“ 6. (1) Except as provided in Sections 14, 16, 20 and 23 of
 “ this Act, and except in the case of any motor vehicle used

“ exclusively as an ambulance or by a fire department for protection
 “ against fires, every owner of a motor vehicle, trailer or semi-
 “ trailer intended to be operated upon any highway in New
 “ Brunswick shall, before the same is so operated, apply to the
 “ Department for and obtain the registration thereof.

10 “ (2) The Minister may make and enforce regulations providing
 “ that upon proper application for the registration of a vehicle,
 “ either new or after a transfer, such vehicle may be operated upon
 “ the highways under a temporary number issued by the Department
 “ or by a person so authorized by the Department.”

* * * * *

“ 53. No motor vehicle shall be used or operated upon a
 “ highway unless the owner shall have complied in all respects
 “ with the requirements of this Act, nor where such highway has
 “ been closed to motor traffic under the provisions of The Highway
 “ Act.”

12. Regulation No. 13, referred to in the third question, reads as follows :—

20 “ No person operating a motor vehicle as a public carrier
 “ between fixed termini outside the Province shall operate such
 “ motor vehicle on the highways of the Province unless the operator
 “ is in possession of a permit issued by the Department setting forth
 “ the conditions under which such motor vehicle may operate and
 “ after payment of such fees as the Minister may determine fair
 “ and equitable.”

13. The provisions of the British North America Act which require consideration are :—

30 “ 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 in 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 :—

* * * * *

40 “ 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.

“ 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.”

“ 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 :—

“ (a) Lines of Steam or other Ships, Railways, Canals,
 “ Telegraphs, and other Works and Undertakings 10
 “ 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. 20

* * * * *

“ 13. Property and Civil Rights in the Province.

* * * * *

“ 16. Generally all Matters of a merely local or private Nature
 “ in the Province.”

p. 17.

14. On the 20th day of February, 1950, the Attorney General for
 New Brunswick gave notice of his intention to intervene.

p. 18, ll. 30-35.

15. The argument upon the questions raised was heard in the
 Supreme Court of New Brunswick, Appellate Division at its February
 session, 1950. Counsel appeared for the Plaintiff and the Defendant.

pp. 18-19.

16. On the 1st day of May, 1950, judgment was delivered by that
 Court that the several questions submitted be answered as follows :— 30

“ 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 ? ’ 40

“ 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.’ ”

17. Chief Justice Richards, while of the opinion that the operation of a bus line is an undertaking contemplated by s. 92 (10), decided that the “ Works and Undertakings ” referred to in paragraph (a) thereof are local works and undertakings and that the Defendant’s undertaking was not “ local ” because he had no office, place of business organisation or situs in the province. It was his view that the Motor Carrier Act was validly enacted under heads (9), (10) and (13) of s. 92, and that none of the legislation in question, in pith and substance, comes within s. 91 but is legislation entirely local in character, relating to traffic within the province and only incidentally affecting traffic passing through the province.

18. Mr. Justice Harrison held that the works and undertakings which are excepted from provincial jurisdiction by s. 92 (10) (a) are those which are “ local within the province of New Brunswick,” that the Defendant’s undertaking is not “ local in New Brunswick ” because he has no office or location of any kind there. It was also his opinion that the Motor Carrier Act and the Motor Vehicle Act, are authorized by heads (13) and (16) of s. 92. He concluded that, if the province has the right to regulate motor vehicle traffic within its own borders, that must include the right to prohibit such traffic. It was his view that while this legislation in pith and substance comes within provincial powers, it incidentally affects through traffic as an ancillary matter and that, until Parliament legislates regarding such traffic, the provincial legislation is valid. He also stated, in the penultimate paragraph of his Reasons, that, even if the legislation in question should be *ultra vires* in respect of a Canadian national carrying on an undertaking local in Canada, foreign nationals have no status to ask that such laws be declared *ultra vires*.

19. Mr. Justice Hughes, who had had the opportunity of reading the judgment of Mr. Justice Harrison, agreed in all respects with the reasons expressed therein with the exception of the penultimate paragraph upon which he expressed no opinion.

20. On the 8th day of May, 1950, the Supreme Court of New Brunswick, Appellate Division, granted leave to appeal from its judgment to the Supreme Court of Canada.

21. The argument on the appeal to the Supreme Court of Canada took place on the 6th, 7th, 8th and 9th days of February, 1951. Counsel appeared for the Appellant, the Respondent, 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 New Brunswick, the Attorney General for British Columbia, the Attorney General for Alberta, the Attorney General for Prince Edward Island, the Canadian National Railway Company and the Canadian Pacific Railway Company, The Maccam Transport Limited and The Carwil Transport Limited.

pp. 41-43.

22. On the 22nd day of October, 1951, judgment was delivered by the Supreme Court of Canada setting aside the judgment of the Supreme Court of New Brunswick, Appellate Division and ordering and adjudging that the answer to such parts of the questions submitted as it was considered necessary to answer for the disposition of the issues properly raised in the pleadings be as follows :— 10

“ 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 license 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 license 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. 50-51.

23. The Chief Justice of Canada, after referring to the relevant statutory provisions, concluded that the license issued by the Motor Carrier Board was issued without authority because :—

(A) as a matter of interpretation, Regulation 13 made under The Motor Vehicle Act, dealing specially with non-residents, must prevail over the general provision in section 4 of the Motor Carrier Act with the result that the Defendant required only a permit under that Regulation ; and

(B) the restriction inserted in the license issued by the Board had nothing to do with highway legislation proper, but sections 5 (3), 5 (4) and 11 of The Motor Carrier Act should be read as being restricted to the subject of highway circulation and cannot be extended to commercial competition. His answer to the first question was, therefore, that the operations or proposed operations of the Defendant are not prohibited or in any way affected by the provisions of The Motor Carrier Act. He declined to answer the second and third questions on the ground that it was sufficient for 40

p. 52.

the purpose of disposing of the action to decide that The Motor Carrier Board license can in no way support the conclusions of the Statement of Claim.

24. The Honourable Mr. Justice Kerwin, after referring to the decision in *Re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304 and the conclusion by the Supreme Court of New Brunswick, Appellate Division, that the connecting or extending works or undertakings mentioned in paragraph (a) of section 92 (10) must have their "genesis" in the province, decided that "there is nothing to indicate that
10 "the primary location must be so situate." He went on to decide that the interprovincial and international undertaking of the Appellant falls clearly within section 92 (10) (a), but that the carriage of passengers or goods between points in New Brunswick is not necessarily incidental to the Defendant'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. pp. 58-59.
25. The Honourable Mr. Justice Taschereau, after referring to the description of an "undertaking" as "an arrangement under which
20 "physical things were used," given by Lord Dunedin in the *Radio Reference* [1932] A.C. 304 at 315, also held that the operations of the Defendant are an "undertaking" within s. 92 (10) (a), it being sufficient that the bus line operates through New Brunswick and so *connects* that province with any other or extends beyond the limits of the province, whether the origin of the undertaking be in New Brunswick or not. However, he decided that the transportation of passengers from one point to another within the province is severable from and not incidental to the undertaking but is traffic of a local nature falling under provincial jurisdiction. He pointed out that his conclusion did not mean that the control of the
30 roads and highways and the regulation of traffic is not within provincial jurisdiction as indicated by the decision in *Provincial Secretary of P.E.I. v. Egan* [1941] S.C.R. 396. He agreed with the reasons of the Honourable Mr. Justice Rand with respect to ownership of the highways and the status of the Defendant as a foreign national. p. 61, ll. 15-38.
p. 61, l. 42—
p. 62, l. 29.
p. 62, ll. 30-34.
p. 61, ll. 39-41.
26. The Honourable Mr. Justice Rand decided that the province was without power to prevent the Defendant's buses from setting down or taking up international or inter-provincial traffic, but that the province could forbid such operations in respect of passengers travelling solely between points in the province. His view was that, if "the international
40 "and inter-provincial components of Winner's service are such an undertaking as head 10 envisages," Winner could not "by piecemeal accumulation, bring within paragraph 10 (a) a day-to-day fluctuating totality of operations of the class of those here in question" since "there is no necessary entirety, to such an aggregate"; but, if in relation to the "primary components," the service is not an undertaking within s. 92 (10), it comes within federal jurisdiction as the regulation of Trade and Commerce, or, in any case, under the residual power. With respect to railways and telegraphs, he said that "these works are specifically
"named and it is the clear implication that their total functioning was to p. 69, ll. 12-18.
p. 68, l. 41—
p. 69, l. 11.
p. 68, ll. 10-12.

p. 67, ll. 18-34.

p. 66, ll. 14-37.

"be under a single legislature." He considered that the question whether "works and undertakings" can be read conjunctively is concluded by the language of Lord Dunedin in the *Radio Reference* [1932] A.C. 304 at 315. He considered that the province is "the quasi-trustee of its highways to enable the life of the country as a whole to be carried on" and can directly curtail the use of such highways either by Canadian citizens or subjects of a friendly foreign country, who for practical purposes enjoy all the rights of the citizen, "only within the legislative and administrative field of highways as such or in relation to other subject-matter within its exclusive field."

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p. 72, ll. 7-37.

27. The Honourable Mr. Justice Kellock, applying the words of Lord Reid in the *Empress Hotel case* [1950] A.C. 122 at 142, decided that the operation of a bus line of the nature of that in question is an undertaking falling within s. 92 (10) (a), but that it is only the "through" as distinct from the "local" carriage which may be so regarded. He distinguished aerial navigation and radio as being "not divisible from the local or inter-provincial or international standpoints," whereas he regarded local carriage by bus as severable and forming no necessary part of undertakings with which s. 92 (10) (a) is concerned. He distinguished "Lines of ships" and "railways" on the ground that they are specifically mentioned and therefore "include everything normally understood by those words." He also pointed out that, "unlike a railway which has its own right of way, buses operate on public highways and must share the way thereby furnished with others." It was his opinion that the fact that the Defendant is an alien does not affect his right to challenge the legislation in question.

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p. 72, l. 37—

p. 73, l. 26.

p. 73, ll. 27-44.

p. 71, ll. 23-30.

p. 76, ll. 29-32.

28. The Honourable Mr. Justice Estey, after quoting passages from the judgments in the *Empress Hotel case* [1950] A.C. 122 at 142 and the *Radio case* [1932] A.C. 304 at 315 as to the meaning of "works and undertakings," decided that Winner's organisation and arrangement together with his equipment "constitutes a works and undertaking within the meaning of Section 92 (10) (a)." He considered that "local works and undertakings" include activities other than those initiated or having their head offices in the province, and he rejected the contention that the words "or extending beyond the limits of the province" must be restricted to an extension into some portion of what is now the Dominion of Canada. He further decided that, while the enbussing and debussing of international and inter-provincial passengers within the province constituted an inherent part of Winner's works and undertaking, whenever he uses the highways for the purpose of the carriage of intra-provincial passengers he is outside the scope of his works and undertakings under s. 92 (10) (a). In this respect, he drew a distinction between the operation of Winner and railways and telegraphs on the ground that they operate upon their own property whereas Winner operates his bus service upon highways maintained and controlled by the province.

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p. 75, l. 34—

p. 76, l. 13.

p. 77, l. 5—

p. 78, l. 18.

p. 77, l. 34—

p. 78, l. 2.

p. 79, ll. 36-43.

29. The Honourable Mr. Justice Locke considered that the word "undertaking" is to be given its commonly accepted meaning as being a business undertaking or enterprise, and that it is beyond doubt that Winner's business falls within this description. With respect to the view

p. 79, l. 43—

p. 80, l. 25.

of Chief Justice Richards and Mr. Justice Harrison, he felt that it must be taken either that paragraph (a) of s. 92 (10) refers to undertakings other than such as are merely local in their nature and extent, or that a local undertaking includes one which carries on its enterprise in whole or in part within the province. He decided that the carrying on of "a purely local passenger business," involving the transportation of passengers other than those entering or leaving the province by Winner's buses, "is not a part of, or reasonably incidental to, the operation of an undertaking" excepted from provincial jurisdiction. His distinction between such an undertaking and that of a railway company was that, in the case of the latter, it is an essential of the operation that there should be railway stations established at regular intervals and that there be facilities afforded for the carriage of both passengers and freight between these stations.

p. 80, l. 45—
p. 81, l. 31.

30. The Honourable Mr. Justice Cartwright stated that he was in agreement with those members of the Court who held that the New Brunswick statutes and regulations in question and the license issued by the Motor Carrier Board are legally ineffectual to prevent the Appellant by his undertaking from bringing passengers into the province from the United States or from another province 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 such statutes purport to do so they are *ultra vires* the legislature of New Brunswick.

pp. 85-86.

31. The Honourable Mr. Justice Fauteux decided that, in the measure in which it is inter-provincial, the public transportation service of Winner constitutes an undertaking coming within s. 92 (10) (a), which is not related to the situs of management of the undertaking but to the field in which the undertaking is actually operated. He also held that the transportation of passengers between intermediate points within the province is not a necessary incident to the inter-provincial service but is in itself a complete undertaking which remains under provincial control. He also expressed the opinion that The Motor Carrier Act is related to the public service of transportation while The Motor Vehicle Act deals with vehicles and their operations and that the principle laid down in *Provincial Secretary of P.E.I. v. Egan* [1941] S.C.R. 396 remains unaffected.

p. 88, ll. 30-39.

p. 88, l. 40—
p. 89, l. 10.

p. 89, ll. 12-19.

32. On the 29th day of July, 1952, by Order in Council, leave was granted to the Attorney General for Ontario, the Attorney General for Alberta and the Attorney General for Prince Edward Island to appeal against the judgment of the Supreme Court of Canada; and leave was granted to Israel Winner and Canadian National Railway Company and Canadian Pacific Railway Company to appeal from so much of the said judgment as holds that the Legislature of New Brunswick and the Motor Carrier Board may lawfully prohibit intra-provincial bus operations which are incidental to inter-provincial or international bus undertakings. It was further provided by the said Order in Council that the appeals be consolidated and heard together.

p. 91.

33. The Attorney General of Canada submits that it should be held that 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 Respondent Israel Winner by his undertaking from carrying passengers from or to any place in the Province of New Brunswick for the following among other

REASONS

- (1) BECAUSE the Respondent Winner's undertaking (which consists of an arrangement for the picking up of passengers at any points on the route and putting them down at any other points on the route) is within the exclusive jurisdiction of Parliament as being an undertaking connecting the Province with another Province and extending beyond the limits of the Province within the meaning of the exception contained in paragraph (a) of Head (10) of Section 92 of the British North America Act, and therefore a matter within Head (29) of Section 91 of the British North America Act. 10
- (2) BECAUSE the prohibition against the carrying of passengers by the Respondent Winner's transportation undertaking from one place to another is in relation to the undertaking itself and is therefore within the exclusive legislative jurisdiction of Parliament and is *ultra vires* a provincial legislature. 20
- (3) BECAUSE that prohibition is in relation to the management of the undertaking and is therefore within the exclusive legislative jurisdiction of Parliament and is *ultra vires* a provincial legislature.
- (4) BECAUSE Parliament has, by virtue of Head (29) of Section 91 of the British North America Act, read with Head (10) of Section 92 thereof, exclusive jurisdiction to make laws in relation to undertakings other than local undertakings and the Motor Carrier Act of New Brunswick must therefore be construed as applying only to local undertakings in the province. 30
- (5) BECAUSE the Motor Carrier Act of New Brunswick is a law in relation to transportation undertakings and cannot therefore confer any power on the Motor Carrier Board except in relation to local undertaking in the province. 40
- (6) BECAUSE the Motor Carrier Act is a law in relation to transportation undertakings and is not a law in relation to the regulation of highway traffic as such.

- (7) BECAUSE a law in relation to an undertaking connecting one province with another or extending beyond the limits of a province is, by virtue of Head (29) of Section 91 of the British North America Act, within the exclusive legislative jurisdiction of Parliament and such a law is *ultra vires* a provincial legislature whether or not Parliament has "occupied the field."
- (8) BECAUSE in holding that legislative power in respect of the Respondent Winner's undertaking is divided between Parliament and the provincial legislature in the manner stated in its judgment, the Supreme Court has construed Sections 91 and 92 of the British North America Act as providing for an impractical and illogical distribution of power, and such construction does violence to the language of the sections.

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F. P. VARCOE.

FRANK GAHAN.

In the Privy Council.

ON APPEAL

from the Supreme Court of Canada.

BETWEEN

**THE ATTORNEY-GENERAL FOR
ONTARIO and Others** (Intervenants) *Appellants*

AND

ISRAEL WINNER (Defendant) *Respondent*

AND

**THE ATTORNEY-GENERAL FOR
NEW BRUNSWICK** *ex rel.*
(Plaintiff) *Respondent*

AND

**THE ATTORNEY-GENERAL OF
CANADA and Others** (Intervenants) *Respondents*

AND BETWEEN

ISRAEL WINNER and Others
(Intervenants) *Appellants*

AND

S.M.T. (EASTERN) LIMITED
(Plaintiff) and **THE ATTORNEY-
GENERAL OF CANADA and
Others** (Intervenants) *Respondents.*

(Consolidated Appeals.)

Case

FOR THE ATTORNEY-GENERAL OF CANADA.

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