

8, 1954

In the Privy Council.

No. 23 of 1952.

37726

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 —

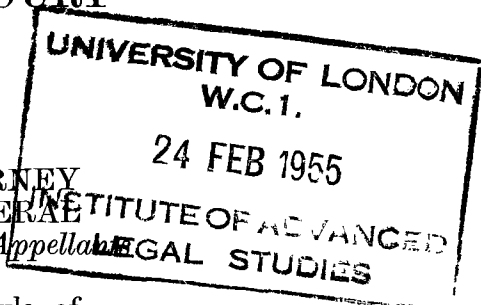
ISRAEL WINNER (doing business under the name and style of  
MACKENZIE COACH LINES) Defendant, and CANADIAN  
NATIONAL RAILWAY COMPANY and CANADIAN PACIFIC  
RAILWAY COMPANY ... (Intervenants) Appellants

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 ALBERTA

1.—The Attorney General of Alberta desires to adopt the facts and  
argument of the Attorney General for Ontario on this Appeal.



2.—Subhead 10 of Section 92 of The British North America Act, 1867 reads as follows :

“ 10. Local works and undertakings other than such as are of the following classes :

- (a) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with, any other or others of the provinces or 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 ; ”

3.—The Attorney General of Alberta will submit that the majority of the Judges of the Supreme Court of Canada erred in their interpretation of subhead 10 (a) of Section 92 of The British North America Act, 1867.

Kerwin, J., in his judgment said in part :

“ For the respondent and those supporting it, it was argued that if it cannot be said Winner had a work *and* undertaking connecting the province with any other or others of the provinces or extending beyond the limits of the province, he could not possibly come within the exception. This contention in my opinion is not sound and, where necessary, ‘ and ’ must be read ‘ or.’ That, I think, follows from the decision in the *Radio* case but, if not, it should now be so declared.”

“ Whether at some time in the future, under circumstances not now envisaged, ‘ undertaking ’ will be restricted to means of communication need not concern us at present since it is patent that the term includes the business or organisation of the appellant.”

“ 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.”

Taschereau, J., in his judgment said in part :

“ It is I think sufficient to bring the matter within federal jurisdiction, that the bus line operates as it does in the present

case, from the United States, through New Brunswick and Nova Scotia, whether the origin of the 'undertaking' be in New Brunswick or not. As long as such 'undertaking' connects the Province of New Brunswick with any other Province, or extends beyond the limits of the Province, 92 (10) (a) applies."

10 " But the embussing of passengers in a point within the Province to another point also within the Province, presents an entirely different situation. This is not 'inter-provincial 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."

" 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)."

Rand, J., in his judgment said in part :

20 " What is an 'undertaking' ? The early use of the word was in relation to services of various kinds of which that of the carrier was prominent. He would take into his custody or under his care either goods or persons, and he was said then to have 'assumed' or 'undertaken,' on terms, their carriage from one place to another ; to that might be added the obligation to accept and carry, drawn on himself by a public profession : and the service, together with the means and organization, constituted the undertaking. This is generalized for the purposes of head 10 by Lord Dunedin in the *Radio* case : " " undertaking " is not a physical thing but is an arrangement under which of course physical things  
30 are used,' language used by way of contrasting 'works' with 'undertakings.' But it is or can be of an elastic nature and the essential consideration in any case is its proper scope and dimensions."

40 " It was argued that the expression ' works and undertakings ' should be read conjunctively, and that whatever else might be said of an organized bus service, it could not be called a ' work.' But in the interpretive attitude of the Judicial Committee as expressed in *Edwards v. Attorney General of Canada* (1930), A.C. 124, and as exemplified in the *Radio* case (1932), A.C. 304, the modes of works and undertakings within head 10 (a) await the developments of the years ; and the specific enumerations, buttressed by the general considerations of provincial and dominion scope, are sufficient to warrant a disjunctive construction, although obviously in some cases both may be satisfied. Indeed the question would seem to be concluded by the language of Lord Dunedin in the *Radio* decision at p. 315."

Kellock, J. in his judgment said in part :

“ With respect to the operation of a bus line of the nature of that here in question, I cannot accept the view of the statute taken in the court below. Such an undertaking is, in my opinion, one falling within the terms of s. 92 (10) (a) and therefore, a subject matter of legislation exclusively within the jurisdiction of Parliament. The very object of the provision, to employ the words of Lord Reid in the *Empress Hotel* case (1950), A.C. 122 at 142,

‘ is to deal with means of interprovincial communication. 10

Such communication can be provided by organizations or undertakings, but not by inanimate things alone.’

While this language was not there applied to circumstances similar to those in question in the case at bar, I would so apply it. The operation of an undertaking of the character contemplated by the section may not, therefore, be prevented by provincial legislation such as that in question. The question remains, however, as to whether the whole, and if not, what part, of the appellant’s operations may properly be regarded as falling within ‘ other Works and Undertakings *connecting* the Province with any 20 other or others of the Provinces or extending beyond the Limits of the Province,’ as those words are employed in s. 92 (10) (a). In my opinion, it is only the ‘ through ’ as distinct from the ‘ local ’ carriage which may be so regarded.”

“ Accordingly, in my opinion, the appellant, although not subject to the provincial control here asserted insofar as his through operations are concerned, cannot claim the same exemption with respect to his purely local carriage. There is no doubt an area in which provincial legislation may affect the operation of even a bus line confined to ‘ through ’ business ; *Provincial Secretary v. Egan* (1941), S.C.R. 396 at 415.” 30

Estey, J. in his judgment said in part :

“ As to the meaning of ‘ works and undertakings ’ under Section 92 (10) (a), Lord Reid, in *Canadian Pacific Railway Company v. Attorney-General for British Columbia (Empress Hotel case)*, 1950 A.C. 122 at 142, stated :

‘ The latter part of the paragraph makes it clear that the object of the paragraph is to deal with means of inter-provincial communication. Such communication can be provided by organizations or undertakings, but not by 40 inanimate things alone. For this object the phrase “ lines of ships ” is appropriate. That phrase is commonly used to denote not only the ships concerned but also the organization which makes them regularly available between certain points.’ ”

In the *Radio* case, 1932 A.C. 304 at 315 ; Plaxton 137 at 147, Viscount Dunedin, in referring to Section 92 (10) (a), stated :

“ ‘ Undertaking ’ is not a physical thing, but is an arrangement under which of course physical things are used.”

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

10 Locke, J. in his judgment said in part :

“ The word ‘ undertaking ’ is, in the absence of a statutory definition, and there is none, to be given its commonly accepted meaning as being a business undertaking or enterprise and, in my opinion, it is beyond doubt that the appellant’s business falls within this description. I think it equally clear that it connects the Province of New Brunswick with another of the provinces and extends beyond the limits of the province.”

Fauteux, J. in his judgment said in part :

20 “ In the light of what was said by Viscount Dunedin *In re Regulation and Control of Radio Communication in Canada* (1932 A.C. 304), the conclusion that the operation of the bus line of the appellant is an undertaking within the meaning of the word in the sub-section and that it is an undertaking which connects one province to another, is, with deference, inescapable.”

30 “ 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 ’.”

40 In the Province of Alberta the ownership of the land used for highway purposes is vested in the Province. The construction and maintenance of the highways are undertaken by the Province and it is submitted that the Province has complete control over the manner in which the highways shall be used.

The Public Works Act, being chapter 73 of the Revised Statutes of Alberta, 1942, contains the following provision :

“ 3. All lands, streams, watercourses and other property real or personal, heretofore or hereafter required for the use of public

works including all dams, hydraulic works and other works for improving the navigation of any water; all slides, dams, piers, booms, and other works for facilitating the transmission of logs or timber ; all dams erected for the storage of water ; all hydraulic powers created by the construction of any public work ; all roads and bridges ; all public buildings ; all vessels, dredges, scows, tools, implements, and machinery for the improvement of navigation ; all drains and drainage works ; all ferries ; all wells ; and generally all property heretofore or hereafter acquired, constructed, repaired, maintained or improved at the expense of the North-West Territories or of the Province and not under the control of the Government of the Dominion of Canada shall be and remain vested in His Majesty as public works and so far as they are not under the control of any other department shall be under the control of the Department of Public Works.”

10

This Act was repealed by chapter 88 of the Statutes of Alberta, 1951, and The Surveys and Expropriation Act passed in lieu thereof. The same principle is continued in the new Act. By Section 2 (e) of this Act “ highway ” is defined as follows :

“ 2. In this Act, unless the context otherwise requires,— 20

\* \* \* \* \*

(e) ‘ highway ’ includes every common or public highway, road allowance, thoroughfare, public travelled road, trail road or way vested in the Province or overlands vested in the Province by any Act or otherwise, or overlands reserved for public purposes and every bridge, culvert, drain or other accessory to a highway erected thereon, thereunder or adjacent thereto or used and enjoyed therewith, and any part of a highway as herein defined ; ”

By Section 2 (k) of this Act, “ public work ” is defined as follows :

“ (k) ‘ public work ’ includes,— 30

- (i) public buildings ;
- (ii) public highways ;

\* \* \* \* \*

Section 10 of this Act provides in part as follows :

“ 10. The Minister, by his surveyors, engineers, foremen, agents, workmen and servants may,—

- (a) enter upon and take possession of any lands required for any public work ;

\* \* \* \* \*

Under the provisions of The Public Highways Act, being chapter 74 of the Revised Statutes of Alberta, 1942, “ highway ” or “ road ” is defined as follows :

40

“ 2. In this Act, unless the context otherwise requires,—

\* \* \* \* \*

(h) ‘ Highway ’ or ‘ road ’ includes every common or public highway, road allowance, thoroughfare, public travelled road, trail and any road or way vested in the Province or over lands vested in the Province by any Act or otherwise, or over lands reserved for public purposes and every bridge, culvert, drain or other accessory to a highway erected thereon, thereunder or adjacent thereto, or used and enjoyed therewith, and any part of any highway as herein defined ; ”

10 Sections 7, 8 and 9 of the Act provide as follows :

“ 7. ‘ Main highways ’ shall be such highways as in the opinion of the Minister are of prime importance either by reason of being trunk channels of communication throughout the Province, or by reason of being connected with the main travelled roads situated outside and adjoining the Province, and are established as such by the Lieutenant Governor in Council.

8. Upon the Minister giving a direction to that effect, the Department shall proceed with the construction of any portion of a main highway, and shall maintain the same after it has been  
20 constructed, and the entire cost of the construction and maintenance shall be defrayed by the Department.

9. ‘ Secondary highways ’ shall be such highways as in the opinion of the Minister are of secondary importance to main highways, and are established as such by the Lieutenant Governor in Council.”

In addition to the reasons given in the Case filed on behalf of the Attorney General of Ontario, the Attorney General of Alberta will contend that the portion of the judgment of the Supreme Court of Canada which holds that a province has no jurisdiction to prohibit a bus company from  
30 picking up passengers within the province whose destination is outside the province and setting down passengers within the province who have come from any point outside the province, is wrong and should be reversed for the following additional

### REASONS

- (1) BECAUSE the words “ other works and undertakings ” occurring in subhead 10 (a) of Section 92 of The British North America Act, 1867, should be construed conjunctively and not disjunctively.
- (2) BECAUSE in order to remove local works and undertakings from provincial jurisdiction, it must be shown that both the  
40 works and undertakings connect the province with any other

or others of the provinces or extend beyond the limits of a province.

- (3) BECAUSE it is not sufficient if it is merely the undertaking of the Company that connects one province with another or extends beyond the limits of a province in order to oust provincial jurisdiction.
- (4) BECAUSE alternatively the undertaking of the Defendant cannot be said to include the use of highways the ownership and control of which is exclusively under provincial jurisdiction. 10
- (5) BECAUSE alternatively the property of the highways belongs to the province and the province constructed the highways thereon, thus the province has the right to determine the user of its own property in any manner it sees fit under subheads 13 and 16 of Section 92 of The British North America Act, 1867.
- (6) BECAUSE the ownership and control of highways constructed by the province are within the exclusive jurisdiction of the province and any user of such highways must be subject to conditions fixed by the province and subject to provincial control in every respect. 20

L. MAYNARD.  
H. J. WILSON.



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

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CASE OF THE ATTORNEY  
GENERAL OF ALBERTA

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