

G.C.I. G. 16.

8, 1954

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

37731

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*

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 INTERVENANT
THE ATTORNEY GENERAL FOR NOVA SCOTIA

RECORD

1.—This is an Appeal by special leave of Her Majesty in Council p. 89
granted the 29th day of July, 1952, from the Judgment of the Supreme p. 41

p. 18

Court of Canada dated the 22nd day of October, 1951, allowing the Appeal of the Defendant Israel Winner from the Judgment of the Supreme Court of New Brunswick, Appellate Division dated the 1st day of May, 1950, answering certain questions submitted to that Court.

2.—The questions which arise for determination on this Appeal are as to the constitutional validity of (i) the Motor Carrier Act, 1937 (N.B.) and amendments thereto, or orders made by the Motor Carrier Board; (ii) 13 George VI, Chapter 47 (1949) (N.B.); (iii) Sections 6 and 53 of the Motor Vehicle Act, Chapter 20 of the Acts of 1934 (N.B.); and (iv) Regulation 13 made under the provisions of the said Motor Vehicle Act; and (v) of acts done under the purported authority of the said Motor Carrier Act and Motor Vehicle Act and of the said Regulation 13. The relevant portions of the said Acts and of the said Regulation are set out in the Annexure hereto. 10

3.—The Defendant Israel Winner, an American citizen, operated a public bus service between Boston, U.S.A., and Halifax, Nova Scotia. He was granted a licence by the New Brunswick Motor Carrier Board to operate his buses over certain of the highways of New Brunswick but with a limitation that he was not to embus or debus passengers within that Province. In granting the licence and imposing the said limitation the Board purported to act under the Motor Carrier Act, 1937, as amended by *inter alia* 13 George VI, Chapter 47 (1949). 20

4.—The Defendant, Israel Winner, refused to be bound by the limitation imposed by the Motor Carrier Board and the Plaintiffs, S.M.T. (Eastern) Ltd., instituted

THE PRESENT SUIT

p. 2

by a Writ of Summons dated 17th September, 1949, in the Supreme Court of New Brunswick, Chancery Division, claiming an injunction to restrain the Defendant Winner from picking up and letting down passengers within New Brunswick in his motor buses running between points in the United States and the Province of Nova Scotia over routes in New Brunswick between St. Stephen and the Nova Scotia border, and other relief. 30

pp. 8-11

5.—By order of Hughes, J., dated 17th January, 1950, certain questions of law were raised for the opinion of the Supreme Court of New Brunswick, Appellate Division. The said questions (as subsequently amended by agreement on 21st March, 1950) were as follows:—

pp. 11, 18

1. " Are the operations or proposed operations of the Defendant within the Province of New Brunswick or any part of 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 ? "

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 ? " RECORD

And it was further ordered that after the said questions had been answered by the Appellate Division of the Supreme Court the matter should be referred back to the Supreme Court, Chancery Division, for further proceedings. The Appellate Division of the Supreme Court was requested to answer the said three questions on the basis of an agreed statement of facts contained in the said order of Hughes, J. p. 11
pp. 8-11

6.—By notice dated the 20th February, 1950, the Attorney General for New Brunswick intervened in the Suit. p. 17

7.—The Supreme Court of New Brunswick (Richards, C.J., Harrison and Hughes, J.J.) answered the three questions raised by the order of Hughes, J., in the affirmative in the following terms— p. 19

Answer to Question No. 1: " Yes, prohibited, until the Defendant complies with the provisions of the Act."

Answer to Question No. 2: " Yes, in respect of this Defendant." (Richards, C.J., and Hughes, J., answered simply " Yes "). p. 19

Answer to Question No. 3: " Yes, until the Defendant complies with the provisions of the Act, and the regulations made thereunder."

8.—Special Leave to appeal to the Supreme Court of Canada against the Judgment of the Supreme Court of New Brunswick, Appellate Division, was granted to the Defendant, Winner, by Order dated the 8th May, 1950. p. 38

9.—Pursuant to an Order of Taschereau J. in the Supreme Court of Canada dated the 15th of September, 1950, the Attorney General for the Province of Nova Scotia was granted leave to intervene in the Appeal before the Supreme Court of Canada. The Attorney General of Canada, the Attorneys General for Ontario, Quebec, British Columbia, Alberta and Prince Edward Island, the Canadian National Railway and the Canadian Pacific Railway, the Maccam Transport Company and Carwil Transport Limited were also granted leave to intervene and were represented on the argument before the Supreme Court of Canada. Not printed

10.—When the Appeal to the Supreme Court of Canada opened, it was arranged that an application should be made to the Supreme Court of New Brunswick to add the Attorney General for the Province of New Brunswick *ex rel.* S.M.T. (Eastern) Limited as party Plaintiff in the action. p. 38

11.—The relevant sections of The British North America Act for the purposes of this Appeal are set out in the Annexure hereto.

- RECORD
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- pp. 43
et seq.
- pp. 41-42
- pp. 42-43
- 12.—After the hearing of the Appeal before the Supreme Court of Canada, the Court reserved Judgment and subsequently the learned Judges who composed the Court each filed their respective opinions. The Court was of the unanimous opinion that the Appeal should be allowed. The operative portion of the formal Judgment of the Supreme Court of Canada is in the following terms :—
1. “ It is not within the legislative powers of the Province of New Brunswick by the statutes or regulations in question, or within the powers of the Motor Carrier Board by the terms of the licence granted by it, to prohibit the Appellant by his undertaking from bringing passengers into the Province of New Brunswick from outside said province and permitting them to alight, or from carrying passengers from any point in the province to a point outside the limits thereof, or from carrying passengers along the route traversed by its buses from place to place in New Brunswick, to which passengers stop-over privileges have been extended as an incident of the contract of carriage ; but except as to passengers to whom stop-over privileges have been extended as aforesaid it is within the legislative powers of the Province of New Brunswick by the Statutes and Regulations in question, and within the powers of the Motor Carrier Board by the terms of the licence granted by it, to prohibit the Appellant by his undertaking from carrying passengers from place to place within the said Province incidentally to his other operations.”
- pp. 42-55
p. 52
- p. 52
- pp. 55-59
p. 59
- The Chief Justice was of the opinion that the answer to the first question submitted by the learned trial Judge should be that the operations or proposed operations of the Defendant-Appellant within the Province of New Brunswick or any part or parts thereof are not prohibited or in any way affected by the provisions of The Motor Carrier Act, 1937, and amendments thereto and that such operations or proposed operations were specially provided for in Regulation 13 made under authority of The Motor Vehicle Act. His Lordship then went on to say that the attempt to restrict the operations or proposed operations of the Defendant Company in the Order made by the Motor Carrier Board was illegal and *ultra vires*. His Lordship declined to answer the second and third questions.
- Kerwin, J., held that the questions should be answered by stating that the New Brunswick Statutes and Regulations in question and the licence issued by the Motor Carrier Board to the Defendant-Appellant are legally ineffective to prohibit the Defendant-Appellant by his undertaking from bringing passengers into the province from outside the province and landing such passengers in the province, or from carrying passengers from any point in the province to a point outside the limits thereof. His Lordship also held that the Statutes, Regulations and licence were also ineffective to prohibit the transportation of passengers between points in the province, to which passengers stop-over privileges have been extended as an incident of a contract of carriage.

Locke, J. (with whom Mr. Justice Taschereau concurred), held that the particular questions to be determined in the present matter were as to whether by legislation of the province an undertaking such as that of the Defendant-Appellant may be prohibited 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. His Lordship was of the opinion that the answer to each of these questions should be in the negative.

pp. 78-82
pp. 59-62
pp. 62, 82

Rand, J., held that the real issue was whether the Defendant-Appellant could be restrained from taking up and setting down passengers in New Brunswick and he was of the opinion that the answer to that issue was: only when it was done in the course of carriages which in their entirety begin and end at points in New Brunswick.

pp. 62-69
p. 69

Kellock, J., held that it was the "connecting" undertaking which alone was committed to Dominion jurisdiction while the local undertaking was at the same time committed to that of the Provinces. His Lordship was of the opinion that the Defendant-Appellant though not subject to the provincial control asserted on the appeal insofar as his through operations were concerned could not claim the same exemption with respect to his purely local carriage.

pp. 70-74
p. 73

Estey, J., was of the opinion that it would be a sufficient answer to all the questions raised on the appeal to say that provincial legislation insofar as it prohibits the embussing or debussing of international or interprovincial passengers was *ultra vires* the province. His Lordship went on to say that in particular, the amendment of 1949 to the Motor Carrier Act insofar as it makes provision therefor, was *ultra vires* and the same might be said of Regulation 13 and Section 58 of The Motor Vehicle Act under which it was authorized.

pp. 74-78
p. 78

Cartwright, J., was in agreement with the other members of the Court who held that the New Brunswick Statutes and regulations in question and the licence issued by the Motor Carrier Board were legally ineffective to prevent the Defendant-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.

pp. 83-86
pp. 85-86

Fauteux, J., held that insofar as the operations or proposed operations were interprovincial, the public transportation service of the Defendant-Appellant undoubtedly constituted an undertaking coming within the

pp. 87-89
pp. 88-89

RECORD
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meaning of Section 92 (10) (a) and as such was within the classes of subjects transferred into Section 91 and for that reason the carrying of passengers by the Defendant-Appellant (a) from outside the Province of New Brunswick to points along his route in the province, and (b) from points within the province to points beyond the province, and (c) between points in the province as an incident to stop-over privileges related to the operations mentioned in (a) and (b), having this interprovincial character, came within dominion jurisdiction as such. His Lordship went on to say that the features of the actual and proposed operations of the Defendant-Appellant with respect to the transportation of passengers between intermediate points within the Province of New Brunswick were in essence exclusively local and were not a necessary incident to the interprovincial service of the Defendant-Appellant. 10

13.—On behalf of the Attorney General for Nova Scotia, it will be contended that the formal Judgment of the Supreme Court of Canada was correct and that the appeal and cross-appeal should both be dismissed for the following amongst other

REASONS

- (1) BECAUSE insofar as the Motor Carrier Act (New Brunswick) and the Motor Vehicle Act (New Brunswick) and amendments thereto and the orders and regulations made thereunder relate to highways and highway traffic within New Brunswick, they are valid provincial legislation under the enumerated heads (2), (9), (13) and (16) of Section 92 of the British North America Act ; 20
- (2) BECAUSE insofar as the above mentioned Acts, orders and regulations relate to the transportation of passengers and goods between points wholly within the Province of New Brunswick, they are valid provincial legislation under the enumerated heads (2), (9), (13) and (16) of Section 92 of the British North America Act ; 30
- (3) BECAUSE insofar as the above mentioned Acts, orders and regulations relate to inter-provincial, international or trans-provincial transportation of passengers and goods as such, they are *ultra vires* the legislature of New Brunswick because they relate to a Subject matter with respect to which power to legislate has not been conferred upon the legislature of New Brunswick by Section 92 or any other Section of the British North America Act ;
- (4) BECAUSE, in the alternative, the grounds stated in the reasons for judgment of the several Judges of the Supreme Court of Canada are correct. 40

JOHN A. Y. MACDONALD.
RALPH MILLNER.

ANNEXURE.

BRITISH NORTH AMERICA ACT.

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
 10 Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated ; that is to say :—

2. The Regulation of Trade and Commerce.

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
 20 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 :—

2. Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes.

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

30 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 :

40 (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.

13. Property and Civil Rights in the Province.

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

MOTOR CARRIER ACT (1937) (N.B.) as amended.

- “ 2. (1) (e) ‘ Motor Carrier ’ means a person, firm or company that operates or causes to be operated in the province a public motor bus or a public motor truck.
- (f) ‘ Public Motor Bus ’ means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares.
- “ 4. The Board may grant to any person, firm or company a license to operate or cause to be operated public motor buses or public motor trucks over specified routes or between specified points.” 10
- “ 5. (3) In determining whether or not a license shall be granted, the Board shall give consideration to the transportation service being furnished by any railroad, street railway or licensed motor carrier, the likelihood of proposed service being permanent and continuous throughout the period of the year that the highways are open to travel and the effect that such proposed service may have upon other transportation services. 20
- (4) If the Board finds from the evidence submitted that public convenience will be promoted by the establishment of the proposed service, or any part thereof, and is satisfied that the applicant will provide a proper service, an order may be made by the Board that a license be granted to the applicant in accordance with its finding upon proper security being furnished.
- (5) No license shall be issued to a motor carrier unless there is filed with the Board—
- (a) A liability insurance policy or bond satisfactory to the Board” 30
- “ 11. Except as provided by this Act, no person, firm or company shall operate a public motor bus or public motor truck within the Province without holding a license from the Board authorising such operations and then only as specified in such license and subject to this Act and the Regulations.”
- “ 12. (3) Upon the recommendation of the Board, the Governor in Council may order that the provisions of this Act shall not apply to a motor vehicle used, or being used, as a public motor bus or a public motor truck for a specified purpose not otherwise exempt from such provisions.” 40
- “ 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, fixing the fees payable to the Province, requiring the filing of returns, reports and other data and generally make regulations concerning motor carriers and public motor buses and public motor trucks as the Board may deem necessary or expedient for carrying out the purposes of this Act and for the safety and convenience of the public”

Section 19 provides penalties for violation of the Act by fine and imprisonment.

10 13 GEORGE VI CHAPTER 47 (1949) (N.B.)

1. Clause (f) of Sub-section (1) of Section 2 of Chapter 43 of 1 George VI, (1937) The Motor Carrier Act, 1937, as amended by Chapter 37 of 3 George VI (1939) is hereby further amended by striking out everything in the said clause after the word “fares” in the third line thereof.

2. Clause (g) of Sub-section (1) of Section 2 of the said Chapter, as amended by Chapter 37 of 3 George VI, (1939) is hereby further amended by striking out everything in the said clause after the word “hire” in the third line thereof.

20 3. Section 4 of the said Chapter, as amended by Chapter 37 of 3 George VI, (1939) is hereby further amended by striking out the word “and” in the fourth line thereof and substituting therefor the word “or,” and by striking out the words “within the province” being the last three words of the said section.

MOTOR VEHICLE ACT (1934) (N.B.)

30 “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.”

“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.”

REGULATION 13 made under THE MOTOR VEHICLE ACT (1934).

40 Regulation 13: “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.”

In the Privy Council

No. 23 of 1952.

ON APPEAL FROM THE SUPREME COURT OF
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ONTARIO, THE ATTORNEY GENERAL
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(Consolidated Appeals)

CASE OF THE INTERVENANT
THE ATTORNEY GENERAL FOR
NOVA SCOTIA

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