Case and Comment

CRIMINAL LAW — PREVENTIVE JUSTICE AND THE LIABILITY OF MAGISTRATES — BINDING OVER — In *MacKenzie* v. *Martin*[1] the Supreme Court of Canada held that the power of magistrates to bind over at common law survives in Canada unaffected by the Criminal Code. The question arose in an action for damages against a police magistrate in the province of Ontario who had bound the plaintiff over to be of good behaviour. The Supreme Court, in a judgment read by Kerwin J., dismissed the action, holding that the magistrate had acted within his jurisdiction.

In the proceedings before the magistrate, it appeared that the plaintiff was a blind man separated from his wife. He used to telephone her, her landlady and her employers between sixty and a hundred times (or even more) every day, his object being to get his wife to return to him. Evidence was given that sometimes in these telephone conversations the plaintiff would threaten to murder his wife, and that on other occasions he blackened her character. Nevertheless, the information by which the proceedings were commenced did not mention these matters, but merely charged that by making the telephone calls the plaintiff had caused "annoyance, loss of sleep, inconvenience and worry, said acts tending towards a breach of the public peace". The magistrate at the end of the case made no reference to breach of the peace, but said merely that the plaintiff had been guilty of annoying people by making telephone calls. It seems from this that the threat to murder and defamation of character were not treated seriously either by the wife or by the magistrate, and that the gravamen of the complaint was the annoyance caused by unreasonable telephoning.

The magistrate ordered the plaintiff to find two sureties in the sum of $1,000 each for three years, and thereupon signed a so-called "conviction" (the use of this term was plainly wrong) and a warrant of commitment. As Rand J. pointed out in his dissenting

[1] (1954), 108 C.C.C. 305.

judgment, the magistrate does not seem to have given any opportunity to the plaintiff to find sureties; nor was it explained to the plaintiff that this was what he had to do. The plaintiff successfully appealed to the Ontario Court of Appeal against his commitment, that court holding that the appeal was in a civil matter and that the commitment was invalid because it did not state that the plaintiff was in default in failing to find sureties. Thereupon the plaintiff launched this action against the magistrate for damages.

It was evident that the decision of the magistrate to bind the plaintiff over could not be justified under the Criminal Code. Section 748(2) of the 1927 Code[2] allowed binding over upon complaint of threats; but here no threats had been alleged in the information. Again, section 748(2) limited the recognizances thereunder to a period of twelve months, but here the magistrate had purported to bind over for three years. The Supreme Court held that the order for recognizances was valid at common law, notwithstanding that it fell outside the terms of the Code; and the English authorities giving a wide extension to the power were quoted with approval. Although no remark was made upon the period of the recognizances ordered, it seems to follow from the decision that the limitation of time in section 748 (section 717 of the 1954 Code) is ineffective. This is a somewhat remarkable result.

Rand J., in his dissenting judgment, took the view that there is no power to bind over at common law or under the statute 34 Edw. III, c. 1, for mere annoyance. He cited *R.* v. *Dunn*,[3] but that

[2] Section 717 of the 1954 Code (the Code has been passed but is not yet in force) corresponds roughly with section 748(2) to (5):

"SURETIES TO KEEP THE PEACE

"717. (1) Any person who fears that another person will cause personal injury to him or his wife or child or will damage his property may lay an information before a justice.

"(2) A justice who receives an information under subsection (1) shall cause the parties to appear before him or before a summary conviction court having jurisdiction in the same territorial division.

"(3) The justice or the summary conviction court before which the parties appear may, if satisfied by the evidence adduced that the informant has reasonable grounds for his fears,

(a) order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, or (b) commit the defendant to prison for a term not exceeding twelve months if he fails or refuses to enter into the recognizance.

"(4) A recognizance and committal to prison in default of recognizance under subsection (3) may be in Forms 28 and 20, respectively.

"(5) The provisions of this Part apply, *mutatis mutandis*, to proceedings under this section."

The old section 748(1) is to be found, with some changes, in the new 637.

[3] (1840), 12 A. & E. 599.

concerned binding over to keep the peace, and it must be confessed that the English courts have since given a much wider interpretation to the power to bind over to be of good behaviour. A limitation upon the former power is of little utility when resort can so easily be had to the latter. However, there was no previous Canadian authority for importing these English decisions into Canada; and the argument that the Criminal Code was intended to be exhaustive on this question appears to be a persuasive one.

It was not enough for the majority of the Supreme Court to hold that the magistrate acted within his jurisdiction in binding the plaintiff over. To defeat the plaintiff, the court had also to hold that the magistrate acted within his jurisdiction in committing the plaintiff to prison without giving him an opportunity to find sureties. On this point, strangely enough, the majority judgment is virtually silent. All that is said is that in view of the common law the magistrate "had jurisdiction over the subject-matter of the complaint, and did not exceed it". Hitherto it has been assumed that a magistrate is not protected merely because he has jurisdiction over the subject-matter of the complaint; he must also have jurisdiction to make the particular order which he does make. For instance, if he has power only to fine, but sends the defendant to prison, he is surely liable in damages for excess of jurisdiction. In the present instance the magistrate had no power to send the plaintiff in the action to prison except for failing to find sureties; and since the plaintiff was given no opportunity to find sureties he was never in default. In these circumstances, it is somewhat difficult to understand how it could be said that the magistrate acted within his jurisdiction in making the particular order. As it stands, the decision of the Supreme Court is authority for the proposition that a magistrate has jurisdiction to send a man to prison though he has committed no crime and is not in default under any order of the court.

Once it was decided that the magistrate had jurisdiction, and that he was not actuated by malice, the plaintiff's claim necessarily failed; and it was not relevant to consider whether the magistrate's determination to bind the plaintiff over was proper. Since the Supreme Court referred at some length to the evidence before the magistrate, including the evidence of threats and defamatory statements made by the plaintiff, it may perhaps be inferred that these circumstances were regarded as material, although they had not been specified in the information. Consequently, it may be going beyond the judgment to assert that magistrates can bind over for

mere annoyance where there are no threats of breach of the peace or defamatory words. Even the English cases, though they lay down the law in sweeping terms, do not specifically support a proposition of this width.

The indefinite nature of the power to bind over has given rise to some disquiet, especially when coupled with the power to require sureties of a man who has committed no crime. By fixing sureties beyond his ability to provide, magistrates may at their discretion (and in England without appeal) imprison for an act that is not the violation of any law. The law is also unsatisfactory in the doubt as to what constitutes a breach of the recognizance. Is it broken only by the commission of crime, or is it broken also by a repetition of the conduct complained of, though not a crime? If the latter, it follows that people who have been bound over become subject to legal restrictions from which their fellow-citizens are free.

GLANVILLE WILLIAMS*

* * *

RESPONSABILITÉ DES MAÎTRES ET COMMETTANTS — PERSONNE INVITÉE PAR UN PRÉPOSÉ À MONTER DANS L'AUTOMOBILE DU PATRON — DÉSOBÉISSANCE AUX ORDRES REÇUS — EXÉCUTION DES FONCTIONS — ART. 1054 C. CIV. — Dans le domaine de la responsabilité civile, un sujet épineux est celui de la responsabilité des maîtres et commettants et de son objet particulier. On sait qu'en vertu du dernier alinéa de l'article 1054 C. civ. le patron est responsable des actes fautifs dont ses employés se sont rendus coupables dans l'exécution des fonctions auxquelles ils sont employés. Dans quels cas le préposé a-t-il agi dans l'exécution de ses fonctions? Dans quels cas a-t-il agi en dehors de ses fonctions?

La cour d'appel de la province de Québec a, une fois de plus, eu à répondre à cette question, dans une cause de *Duquette* v. *Pinard*.[1] Les faits de cette affaire étaient simples. Le demandeur Pinard, se trouvant à un carrefour, fut pris comme passager dans une voiture de la Pharmacie Montréal, propriété du défendeur Duquette, et alors conduite par son préposé et employé, le défendeur Emond. Conduisant à une vitesse dangereuse et du mauvais côté du chemin, le défendeur Emond fut cause d'un accident, dont

*Glanville L. Williams, Ph.D., LL.D., Quain Professor of Jurisprudence in the University of London (University College) and author, among other works, of *Criminal Law* (1953), which is reviewed at page 799 of this issue.

[1] [1953] B R. 705.

les deux cours le jugèrent personnellement responsable pour les dommages subis par le demandeur.

Mais là où la cour d'appel refusa de suivre le tribunal de première instance, c'est sur le terrain de l'interprétation à donner aux derniers mots de l'article 1054 C. civ. en regard des faits de la cause. L'honorable juge André Demers avait, en Cour supérieure, retenu la responsabilité du défendeur Duquette, pour l'actif fautif d'Emond, son livreur, qu'il jugea avoir été, lors de l'accident dommageable, dans l'exécution de ses fonctions.

Reprenons les faits de la cause appréciés sous ce seul aspect de l'exécution des fonctions. La preuve révèle que le défendeur Duquette avait défendu au chauffeur Emond de laisser monter des passagers dans l'automobile de livraison de la Pharmacie Montréal. Le contrat d'engagement comportait même une stipulation à cet effet, dont, cependant, le demandeur Pinard ignorait l'existence, comme on le conçoit aisément. On prouva aussi, de façon certaine, que dans la voiture conduite par Emond il n'y avait pas de décalque mentionnant qu'aucun passager n'était admis, bien qu'il ait pu y en avoir dans les autres voitures de livraison du défendeur Duquette.

Il est clair qu'Emond avait désobéi aux instructions de son maître en acceptant le demandeur comme passager bénévole. Si la preuve était contradictoire, c'était sur le seul point de savoir si c'était le demandeur Pinard qui avait demandé à monter dans l'automobile de livraison ou si s'était le défendeur Emond qui l'y avait invité. Quoi qu'il en soit, la cour d'appel admit, après la Cour supérieure, que celà ne changeait rien à la responsabilité, le défendeur Emond ayant consenti à prendre le demandeur comme passager.

Cette désobéissance aux instructions reçues était-elle de nature à faire sortir complètement le défendeur Emond du cadre de l'exécution de ses fonctions? Nous croyons, comme l'a jugé la Cour supérieure, que la réponse à cette question doit être négative.

Avant d'étudier les raisons données par la cour d'appel pour adopter une solution contraire, rappelons les principes admis en pareille matière pour ensuite voir l'application qu'il convient d'en faire aux faits exposés plus haut.

L'abus des fonctions engage la responsabilité du commettant. Ce point ne fait plus doute en jurisprudence en autant que le fait incriminé s'est produit dans l'exécution des fonctions.[2] La déso-

[2] *Curley* v. *Latreille* (1920), 60 S.C.R. 131, à la p. 176; *The Governor,*

béissance aux ordres reçus rentre dans la catégorie des abus de fonctions. Après avoir rappelé ces principes jurisprudentiels et cité un précédent bien au point,[3] l'honorable juge de première instance conclut comme suit:

> Il nous paraît donc que la jurisprudence est maintenant fixée sur ce point et qu'elle est à l'effet que lorsque l'employé est dans l'exercice de ses fonctions, même s'il abuse desdites fonctions, le commettant ne saurait être libéré vis-à-vis des tiers. Or, dans la présente cause, il n'y a aucun doute qu'Emond était dans l'exercice de ses fonctions. Il est également certain qu'il a abusé ou plutôt désobéi aux instructions recues, mais qu'étant dans l'accomplissement de ses fonctions, cette désobéissance ne dégage pas son employeur de la responsabilité de l'art. 1054 C civ.

A cette conclusion du juge de première instance, opposons immédiatement le sommaire de l'arrêt en Cour du Banc de la Reine:

> Ne saurait engager la responsabilité de son commettant le préposé, chauffeur d'un camion, qui en violation des termes du contrat permet à un piéton de prendre place dans le véhicule, conduit la voiture à une vitesse exagérée et heurte une voiture avec le résultat que le compagnon de route est blessé. Le chauffeur n'était pas dans l'exercice de ses fonctions en permettant au demandeur de monter dans le véhicule. Le lien juridique n'existe pas entre le demandeur et le propriétaire du camion.

Ce sommaire est inexact. L'arrêt de la cour parle d'une automobile servant à la livraison, et non d'un camion. Nous verrons qu'une distinction s'impose probablement, dans l'appréciation de la responsabilité, entre le transport gratuit dans un camion et celui qui s'effectue dans une voiture automobile.

Les motifs de l'arrêt sont les suivants:

> Considérant la défense faite à son employé de permettre à quiconque de monter dans la voiture de l'appelant;
>
> Considérant que ledit employé a signé l'engagement dans lequel il lui était défendu de prendre un passager bénévole;
>
> Considérant que les chauffeurs qui ont signé un contrat par lequel ils s'engagent à ne laisser monter aucun passager sur les voitures qu'ils conduisent, ne font pas cet acte d'obligeance vis-à-vis du tiers, dans l'exercice de leurs fonctions.

Ces motifs ont tous trait à la défense faite à Emond de prendre des passagers dans la voiture, défense renforcée par une clause du contrat d'engagement. Mais ne faut-il pas immédiatement faire remarquer qu'une telle prohibition devait être réputée à l'égard du demandeur Pinard comme une *res inter alios acta*? Un contrat

---

etc. v. *Vaillancourt*, [1923] S.C.R. 414; *Moreau* v. *Labelle*, [1933] S.C.R. 201; *T. Eaton Co. Ltd. of Canada* v. *Moore*, [1951] S.C.R. 470, à la p. 480.

[3] *McIsaac* v. *Hall* (1939), 77 C.S. 220 (Juge E. McDougall).

n'a d'effet qu'à l'endroit de ceux qui y sont parties et de leurs héritiers ou représentants légaux (article 1028 C. civ.). Cependant, il faut tenir compte du contenu du contrat, si le tiers en a eu connaissance ou est censé en avoir eu connaissance. C'est ainsi que si la preuve, dans la cause que nous commentons, avait établi que sur le pare-brise de la voiture de l'appelant, il y avait l'affiche "Pas de passagers, No riders", le demandeur aurait indéniablement été démuni de tout recours contre le propriétaire, pour avoir pris place dans le véhicule malgré cet avertissement portant à la connaissance du public la défense faite par le patron.

Mais la preuve était formelle à l'effet que, dans la voiture en question, il n'y avait pas de décalque sur le pare-brise, mentionnant qu'aucun passager n'était admis. Le demandeur et le défendeur Emond ont tous deux témoigné en ce sens, sans être contredits par personne. Alors, de quel poids peut être la constatation en cour d'appel, par un "attendu" exprès, que sur les autres automobiles du défendeur Duquette il y avait semblable mention, si on ne peut prouver que la victime avait remarqué ce fait? Nous ne croyons pas que l'on doive conclure du fait que le demandeur était un résidant de Montréal qu' "il n'est pas sans avoir vu dans la cité de ces automobiles de la Pharmacie Montréal sur le pare-brise desquelles les mots 'no riders, pas de passagers' sont écrits" (p. 708) et écarter le témoignage de la victime qui "admet avoir vu plusieurs de ces automobiles sans cependant dire si elle a remarqué l'avis écrit dans le pare-brise" (p. 708). Ce fait n'était pas d'une notoriété telle qu'une présomption de connaissance s'ensuivait pour tout le monde.

C'est un fait admis que le défendeur Emond faisait ses livraisons dans l'automobile de la pharmacie, lorsqu'il a fait monter le demandeur. Mais, se demande la cour d'appel, le défendeur Emond agissait-il pour son patron ou pour son compte personnel, en faisant monter le demandeur dans l'automonile qu'il conduisait? Elle répond qu'en posant ce geste d'obligeance l'employé cessait d'être dans l'exécution de ses fonctions.

S'il s'agit d'une automobile affectée à la livraison, bien qu'elle portât l'indication d'être la propriété d'une pharmacie, qui peut dire au passager bénévole que règne l'interdiction de prendre des passagers? On n'a pas tenté de prouver que l'usage était dans le sens d'une telle interdiction pour ce genre de véhicules. Il n'était pas non plus question d'une rémunération quelconque, demandée par le préposé. Selon nous, si le préposé demandait une rémunération pour un transport effectué dans de pareilles circonstances, la

victime devrait alors y voir un agissement du préposé pour son compte personnel, et non pour celui du patron. Ça en serait l'indice assez clair. Nous admettons, en effet, que dans les cas où la victime a considéré le préposé comme agissant pour son compte, elle ne peut invoquer la responsabilité du commettant. C'est notamment le cas d'une victime qui se serait associée sciemment à un abus de fonctions. Il en serait ainsi si la victime monte pour son agrément, dans une automobile qu'elle sait détournée par le préposé, ou dans laquelle elle n'ignore pas que celui-ci a ordre de ne pas l'admettre.[4]

Rien de tel dans la cause actuelle. La victime était-elle obligée de considérer que le préposé n'agissait que pour son propre compte en la laissant monter? Ne pouvait-elle pas, au contraire, penser que le consentement donné par le chauffeur était le prolongement d'une consentement au moins tacite du propriétaire?

L'hon. juge McKinnon dans l'affaire de *Fink* v. *Hérér*[5] avait, pour décider dans le sens de la non-responsabilité du patron, cru devoir citer non seulement quelques données de la jurisprudence française, mais aussi un auteur américain, commentant la jurisprudence de son pays, et deux décisions de tribunaux anglo-canadiens. La cour d'appel invoque, à son tour, les mêmes précédents, bien qu'elle doive admettre, elle aussi, que la jurisprudence américaine n'est pas uniforme sur le point.

Signalons, en passant, le danger de s'appuyer sur des précédents américains ou anglais pour interpréter nos textes. Le droit anglo-saxon fait intervenir les notions de "trespasser" et de "mere licensee" à propos du passager bénévole. Ces notions, du moins la dernière, n'ont pas droit de cité chez-nous. S'il arrive que l'on invoque des textes du droit anglais, c'est à titre de *rationes scriptae*. La chose est légitime si c'est pour interpréter des textes identiques. Précisément, à propos de la responsabilité des maîtres et commettants, on cite souvent, dans les jugements de nos cours, ce texte de Lord Dunedin:[6]

> There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery and compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

[4] Savatier, Traité de la responsabilité civile en droit français (1951) t. 1, no 323, p. 418

[5] (1934), 72 C.S. 509.

[6] *Plump* v. *Cobden Flour Mills Company*, [1914] A.C. 62, à la p. 67 (Conseil privé).

Il nous semble qu'ici la violation des instructions reçues rentrait dans le cadre des probitions de la seconde catégorie, c'est-à-dire de celles qui avaient seulement trait à la conduite à suivre par l'employé dans l'exercice de ses fonctions. Le chauffeur Emond, en prenant un passager, a transgressé une défense qui se rapportait à l'accomplissement correct de son devoir, mais non pas une défense qui limitait l'étendue de son emploi. Son patron aurait, par contre, cessé d'être responsable des actes d'Emond si, disons, ce dernier, qui le jour de l'accident devait faire des livraisons pour la pharmacie, s'était servi de l'automobile du défendeur Duquette pour vaquer à ses affaires personnelles et, à ce moment, après avoir pris le demandeur Pinard comme passager, aurait eu un accident.

La preuve démontrait que le défendeur Emond, durant tout le temps où le demandeur Pinard a été passager dans l'automobile, a suivi exactement le même chemin qu'il aurait suivi s'il n'avait pas eu Pinard comme passager. Il avait même d'autres livraisons à faire à ce moment là. Bien que le défendeur Emond ait désobéi à son employeur, il est resté en tout temps son préposé dans l'exécution de ses fonctions. Nous croyons donc que le jugement de la Cour supérieure aurait dû être confirmé et que la cour d'appel aurait dû prononcer, elle aussi, dans le sens de la responsabilité du patron.

ANDRÉ NADEAU*

* * *

RESPONSIBILITY OF EMPLOYER — INDEPENDENT CONTRACTOR — WORK OF A DANGEROUS NATURE — PERSONAL FAULT — COMMON LAW — QUEBEC JURISPRUDENCE. — It has been a principle of Quebec civil law that a person who employs an independent contractor by "estimate and contract" is not responsible for damages which are caused by the fault of the contractor or his employees in the execution of the contract. The common law of the other Canadian provinces seems to be to the same effect. An apparent exception has recently been made to this principle by the Quebec Court of Queen's Bench (Appeal Side) in the case of *St-Louis* v. *Goulet*.[1] The court decided that a person who hires an independent contractor to do a piece of work of a dangerous nature and likely to

*De l'étude Blain, Nadeau & Nadeau, de Montréal, et auteur du tome 8 du *Traité de droit civil du Québec*, portant sur *La Responsabilité civile délictuelle et quasi-délictuelle* (1949).

[1] [1954] Q.B. 185.

cause damage to the property of another must personally take the necessary precautions to prevent the damage, and his failure to do so will incur his responsibility. It is not sufficient for the employer to stipulate that the contractor must take the necessary precautions; the employer has to make sure himself that they are taken.

The *St-Louis* judgment is without precedent in Quebec jurisprudence, but there are earlier common-law decisions to the same effect. In fact, this judgment of the Quebec Court of Queen's Bench illustrates the influence of common-law decisions on Quebec jurisprudence, and at the same time it illustrates the ability of the latter to develop new theories within the sphere of its own fundamental principles and traditions.

The facts in the *St-Louis* case are briefly as follows. The defendants, Napoléon and Marcel Goulet, were under contract to clear timber from a piece of land for the Shawinigan Engineering Company Limited, which intended to erect a power line. According to the contract, defendants were to burn tree trunks and branches under a certain size, adopt the proper measures to protect adjacent properties, supervise the work at all times, and indemnify the company from any loss resulting from damage to persons or property. Defendants made a sub-contract with Fortin to clear a portion of the land under similar conditions, and Fortin made a further sub-contract with Grandmont and Tremblay, who agreed to clear part of the land allotted to Fortin. As part of the clearing process, Grandmont and Tremblay set fire to a pile of branches. The fire spread to adjacent land and destroyed part of a forest belonging to the plaintiff St-Louis, who sued defendants for damages. The judgment of Savard J. in the Superior Court relieved defendants of all liability for damages caused by the fire.

The plaintiff, St-Louis, appealed from this judgment to the Court of Queen's Bench. Four of the five judges of the appeal court, Pratte, McDougall, Gagné and Bissonnette JJ., were satisfied that the evidence established fault on the part of Grandmont and Tremblay in lighting the fire in the manner and at the time they did. Their judgment establishing the responsibility of defendants for damage caused by the fire was based on two grounds.

First, it was held that Fortin was not an independent contractor in relation to defendants, nor were Grandmont and Tremblay independent contractors in relation to Fortin, because the evidence showed that in either case the employer exercised a control over the supposed independent contractor, and this created a

relationship of employer-employee and consequent responsibility of defendants for damages caused by their employees, or rather, by the employees of their employees. This part of the judgment is the application, to a finding of fact, of the accepted criterion of control and the power to give orders, in distinguishing an independent contractor from an employee.

The second basis for the judgment, and the subject of this comment, is the personal obligation the court imposed on defendants to prevent any damage from ensuing from the dangerous work they had ordered done. It was held that, even if Grandmont and Tremblay, and in turn Fortin, were independent contractors, defendants were responsible for the damages because the contract had as its object an operation that by its very nature constituted "une menace sérieuse pour l'existence même des propriétés voisines". In the words of Pratte J.,

> En effet, dans ce cas, celui qui a donné à l'entreprise a voulu que s'accomplisse une chose dangereuse, et, par ce seul fait, il est devenu obligé, non seulement de stipuler que l'entrepreneur adopterait des mesures propres à prevenir tout dommage aux voisins, mais même de voir à ce que ces mesures soient adoptées.

St-Jacques J., of the Court of Queen's Bench, dissented from the majority judgment of the appeal court to agree with the judgment of Savard J. in the court below.

It is interesting to note that the main authorities the four judges cited to support defendants' liability are common-law decisions, in particular *Donald* v. *City of St. John*[2] and *Black* v. *Christchurch Finance Co. Ltd.*[3] The following passage of Anglin C. J. in *Donald* v. *City of St. John* illustrates the common law on the subject:

> . . . it is, no doubt, the general rule that the person who employs an independent contractor to do work in itself lawful and not of a nature likely to involve injurious consequences to others is not responsible for the results of negligence of the contractor or his servants in performing it. . . . His vicarious responsibility arises, however, where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable. That duty imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it.

[2] [1926] S C.R 371.

[3] [1894] A.C. 48.

Pratte J. finds this theory of the common law supported by one French author, Sourdat, who writes:

> . . la responsabilité du maître est engagée, lorsque l'objet même des travaux qu'il fait exécuter par entreprise est illicite, dangereux par sa nature et a causé effectivement un dommage.[1]

Gagné J., on the other hand, finds nothing contrary to the common-law theory in French jurisprudence or doctrine, and yet nothing that expressly states the principle. However, he says that it is so logical and reasonable that he does not see why it should not be applied in Quebec law.

These remarks of the judges might lead the unwary to believe that the court had adopted a common-law theory without attempting to justify it according to established civil-law principles. Such is not the case. The *St-Louis* judgment is based on the fundamental civil-law principle of responsibility for fault, namely the responsibility of a person for damages caused by his own negligence. To consider it a vicarious responsibility, a responsibility for damages caused by the fault of the contractor, would be to contradict the terms of article 1054 of the Civil Code, which lists the cases of vicarious responsibility, without mentioning the responsibility of an employer for damages caused by an independent contractor. This article, which is exceptional in character, must be interpreted restrictively. Both Pratte and Gagné JJ., with whom McDougall and Bissonnette JJ. concur, condemn the defendants, not because of the fault of the contractors who lit the fire, but because the defendants themselves failed to take precautions to prevent the fire spreading to adjacent property. The *St-Louis* judgment creates no exception therefore to the *general* rule that an employer is not responsible for damages caused by the fault of the independent contractor whom he employs. Instead the court has defined a *particular* kind of personal fault.

It is to be noted that nowhere does the Civil Code of Quebec define fault. Doctrine and jurisprudence have established that a person is at fault when his conduct is not that of a reasonable and prudent man, or "bon père de famille", who would have foreseen and prevented the damage. The determination of fault in a situation that has not been considered in a previous judgment is often left to the court's appreciation of what a reasonable and prudent man would have done in the circumstances. It is here, in the determination of what constitutes fault, and by the criterion of the

[1] Traité de la responsabilité (5th ed., 1902), vol. 2, no. 893, p. 142

reasonable and prudent man, that the common-law decisions have assisted the Quebec judges in arriving at their judgment. This is illustrated in the quoted statement of Anglin J. in *Donald* v. *City of St. John.*

The *St-Louis* judgment, in so far as it concerns the responsibility of an employer for damages caused by an independent contractor, is without precedent in the province of Quebec. There are, however, a few earlier Quebec cases dealing with the responsibility of lumber merchants who hired independent contractors to transport logs down waterways. The law then in force granted the right to use waterways for the transportation of logs on the express condition that an indemnity be paid to all owners of shore property whose land was damaged by the floating logs, and it was held in *Dickie* v. *Campbell*,[5] *Club de Chasse et de Pêche de Ouiatchouan* v. *Compagnie de Pulpe de Ouiatchouan*[6] and *Fraser* v. *Dumont*[7] that the lumber merchants could not be relieved of the liability imposed on them by statute by simply having the operation put into execution by a contractor. These decisions, however, do not constitute precedents for the *St-Louis* judgment, because they laid great stress on the fact that the liability was one imposed by statute. In fact, in the case of *Fraser* v. *Dumont*, when it was held in the Court of King's Bench that the applicable section of the statute conferred the right to use the waterways without expressly stipulating that an indemnity be paid to riparian landowners, it was further held that the right to use the waterways was absolute and the person who hired an independent contractor to transport the logs was relieved of any responsibility for damages to shore owners.[8] This decision was reversed in the Supreme Court, but on the basis that the article which was found to apply did impose a statutory liability. These early decisions do not cover the point in question in the *St-Louis* case. Even the judgment of the Court of King's Bench in *Fraser* v. *Dumont* is not relevant because it nowhere appears that the court considered transportation of logs by waterways a dangerous operation likely to cause damage to the riparian landowners.

In *St-Louis* v. *Goulet* the Quebec court of appeal has applied the common-law theory that a person who employs an independent contractor to do a dangerous piece of work likely to damage neighbouring property is responsible for the damages that result

---

[5] (1904), 34 S.C R. 265.
[6] (1907), 31 S.C 133.
[7] (1913), 48 S.C.R. 137
[8] (1912), 18 R.L. 317

from his failure to take, personally, the necessary precautions to prevent the damage.

JOAN CLARK*

* * *

EVIDENCE — CHEMICAL TESTS FOR ALCOHOLIC INTOXICATION — WEIGHT TO BE GIVEN — CONCLUSIVE OR CORROBORATIVE. — Several recent cases point to a reluctance on the part of Canadian courts to accept evidence of alcoholic content in the blood as any more than corroborative of other evidence of impairment of the mind or body by alcohol.

In *Kennedy* v. *Rowell*,[1] the Chief Justice of Manitoba's Court of Queen's Bench adds his authority to the proposition that, where the issue is whether or not a defendant's ability to drive or his judgment has been impaired by alcohol, the evidence of experts based on laboratory tests of the defendant's blood can, at the most, be corroborative of some other evidence and, in the absence of other evidence, must be disregarded. His reasoning has been followed by another Manitoba judge, Freedman J., in *Kowalyk* v. *Canadian Home Assurance Company*: "I agree entirely . . . that tests for blood alcohol are admissible as corroborative evidence only, and that the laboratory finding must be correlated with the findings of the clinical examination".[2] A magistrate in British Columbia, in the case of *Regina* v. *Donald*, has come to substantially the same conclusion after a thorough review of the Canadian authorities: "The effects of any given quantity of alcohol in blood in questions of intoxication are solely corroborative and not conclusive".[3] In Quebec, Mr. Justice Tellier has said much the same thing in *Marcoux* v. *Royal Insurance Company*.[4]

In two of these cases reference has been made to articles in the Canadian Bar Review by Dr. Charles U. Letourneau[5] and Dr. I. M. Rabinowitch,[6] who appear to have had some influence in developing Canadian jurisprudence on the subject of chemical tests for

*Joan Clark, LL.L. (Montréal); of the Bar of Montreal.

[1] (1954) 11 W.W.R. (N.S.) 177 (Williams C.J.).

[2] (1954) 12 W.W.R. (N.S.) 417, at p. 424.

[3] (1954) 11 W.W.R. (N.S.) 188 (Orr. P.M.).

[4] S C.M. 310885, June 3rd, 1954.

[5] Letourneau, Chemical Tests in Alcoholic Intoxication (1950), 28 Can. Bar Rev 858.

[6] Rabinowitch, Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication (1948), 26 Can. Bar Rev. 1437. See also Rabinowitch, Correspondence (1953), 31 Can. Bar Rev. 1069, 1190; and Penner, Correspondence (1954), 32 Can. Bar Rev. 123, and Rabinowitch, Correspondence (1954), 32 Can. Bar Rev. 243.

alcoholic intoxication. Dr. Letourneau's conclusion is quoted in *Kennedy* v. *Rowell*[7] "as accurate":

> It would appear, therefore, that tests for blood alcohol are admissible in evidence, but Canadian courts are not yet convinced of their probative value. Up to now they seem to have been admitted as corroborative evidence only.[8]

And Dr. Rabinowitch[9] is quoted in the same case:

> In the case of the individual, there is no known concentration of alcohol in the blood which, *independent of all other evidence*, indicates, with certainty, the extent to which the person was under the influence of alcohol. For a correct conclusion, valuable as the laboratory test may be, the laboratory finding must be correlated with the findings of the clinical examination.

The trend of Canadian jurisprudence is opposed to accepting blood tests as conclusive of intoxication or of impairment by alcohol, and it is clear from the cases that the findings of laboratory tests may be negatived by clinical evidence of symptoms and conduct. Such "clinical evidence" has been preferred to blood tests in *Earnshaw* v. *Dominion of Canada General Insurance Co.* by the Ontario Court of Appeal,[10] in *Rex* v. *Cox* by the Alberta Court of Appeal,[11] and in *Weir* v. *Dickson* by McDougall J. of Quebec's Superior Court.[12]

There is, however, a great difference between saying that evidence is not conclusive and saying that it is only corroborative. The difference is illustrated by the Wisconsin case of *Kuroske* v. *Aetna Life Insurance Company of Hartford*,[13] where an attempt was made in 1940 to have the court accept evidence of blood tests as conclusive in a motor accident case. Nelson J. gave the opinion of the court:

> The defendant contends that the sample of blood . . . constituted physical or scientific facts which should be given the same controlling effect which has often been accorded to undisputed physical facts by this court. . . . In our opinion, the contention of the defendant is too broadly stated. The sample of blood was, of course, a physical fact. Its alcoholic content, if accurately shown, was a physical fact. The opinions of Dr. Heise and Dr. Thauringer were obviously expert testimony and its weight as such was clearly for the jury.
>
> Tests are not so certain and accurate to make such opinions or

---

[7] (1954) 11 W W.R. (N.S.) at p. 183.
[8] (1950), 28 Can. Bar Rev. at p. 873.
[9] (1948), 26 Can. Bar Rev. at p. 1438.
[10] [1943] O.R. 385; 80 C.C.C. 35.
[11] (1948), 93 C.C.C. 32.
[12] (1939), 6 I.L.R. 189; [1942] 4 D.L.R. 220 (K.B.).
[13] (1940), 291 N.W. 384.

> deductions at all conclusive, because of certain individuals' toleration of alcohol.
>
> The opinions of the experts were not conclusive and the weight to be given them was for the jury.

According to this judgment, the evidence of alcohol in the blood is not conclusive, but it is more than merely corroborative; it is admissible evidence, the weight of which is for the jury to determine in the light of all the other evidence.

Apart from the very recent Canadian cases that are the immediate occasion for this comment, there is actually very little authority for saying that evidence of laboratory tests of blood alcohol can be, at the most, corroborative. Certainly, McDougall J. in *Weir* v. *Dickson* did not go that far. He said that the blood tests were not conclusive, but he did not say that they were only corroborative:

> The court does not propose to follow the expert witnesses into the intricacies of the relative merits of blood, for testing purposes. . . . To do so would be long and could serve no useful purpose. It will be sufficient to say that while the alcohol content of the blood may usefully be referred to as constituting some proof of intoxication, in itself it is not conclusive of the fact.[14]

It is true that in the headnote to one of the reports of the Ontario case of *Earnshaw* v. *Dominion of Canada General Insurance Co.* it is said that "these tests may, however, be corroborative".[15] In the judgment of the majority, this is not made so clear and in one place Robertson C.J.O. refers to the opinion of an expert that no "test [is] infallible without corroboration by clinical symptoms".[16] It is submitted that evidence of the alcoholic content of the blood is just as relevant on the issue of intoxication or impairment by alcohol as evidence of the quantity of alcohol consumed.

It is no doubt true, as Campbell C.J. pointed out in the Prince Edward Island case of *Giddings* v. *The King*, that "consumption of even a considerable quantity of alcoholic liquor is not direct evidence of intoxication" and that "such consumption, followed by a negligent or even reckless act or omission which might be done or omitted by a sober driver, is not necessarily proof of intoxica-

---

[14] 6 I.L.R. at pp. 194-195; quoted by Dr. I. W. Rabinowitch in (1948), 26 Can. Bar Rev. 1437.

[15] (1943), 80 C.C.C. 35, at p. 36. It is this report which is referred to in the article by Dr. Letourneau in (1950), 28 Can. Bar Rev. 858, at p. 872. The headnote in [1943] O.R. 385 expresses more accurately the sense of the judgment.

[16] [1943] O.R. at p. 397

tion".[17] But intoxication, as Wigmore says,[18] may be evidenced circumstantially and therefore it may be evidenced by pre-disposing circumstances, such as by the drinking of intoxicating liquor. If blood tests of alcohol show approximately how much alcohol has been drunk by a man in a given period, then they should be admitted as evidence of the same weight as evidence of eye-witnesses who have watched the consumption of liquor. It appears that blood tests can never give an absolute measure of the quantity of liquor consumed, but authorities seem to be agreed that blood tests do show the approximate minimal amount of alcohol that must have been drunk to create the blood level shown by the tests.[19] This is, after all, exactly what an eye-witness is able to swear to after he sees a person drink a particular quantity of an alcoholic beverage at a particular time.

It seems only common sense to acknowledge that a large quantity of liquor will make a man drunk, even though, as Dr. Rabinowitch points out, this is merely a statistical conclusion which because of individual tolerances may not be true in all cases. But the objections to evidence of the quantity of alcohol in the blood can surely be answered in the same way as objections to evidence of quantity of liquor consumed. Long ago, in the old American case of *Tuttle* v. *Russell*,[20] the reasoning of which appeals to Wigmore,[21] the court affirmed counsel's argument:

> Can a Court say that evidence to show that a man has within an hour before drunk a quart of rum is not relevant to prove that the man is drunk? It is barely possible that the consequence of a man's drinking a quart of rum may not be drunkenness, but generally it is not only a highly probable but a certain consequence. Courts and juries in weighing evidence are to calculate on probabilities, not possibilities.

There may be room for doubt over the accuracy of particular blood tests,[22] but it is submitted that, if a proper blood test indi-

[17] (1947), 89 C.C.C 346, at p. 352; followed in *Grimsteit* v. *McDonald* (1950), 96 C.C.C 272.

[18] Wigmore on Evidence (3rd ed., 1940) Vol II, p. 31.

[19] According to a letter by Dr. Rabinowitch in (1954), 32 Can. Bar Rev. 243, a special committee of the Council of the British Medical Association has found that "chemical tests are valuable because the alcohol content of the tissues is an indication at least of the minimal quantity of alcohol which had been ingested". Dr. F. S. Hansman, writing in (1954), 27 Aust. L. J. 723, states: "Blood analysis is a valid method of determining the amount of alcohol present in the blood and tissues; the percentage of alcohol in the blood can be accurately determined; from the date the minimal amount of any given beverage that must have been drunk can be accurately calculated".

[20] (1805), 20 Day Conn. 202. [21] *Op.cit.*, p 31.

[22] Dr. D. W. Penner, a leading pathologist in Winnipeg, thinks that "a properly performed blood alcohol determination is reliable evidence of

cated that a man had consumed at least one quart of rum in a short period, such evidence should have the same effect as evidence of an eye-witness that he had seen the man drink the quart of rum. Such evidence might not be conclusive, but it would, it is submitted, be sufficient to carry conviction in the absence of other clear evidence of sobriety.

J. F. O'SULLIVAN*

* * *

CONSTITUTIONAL LAW—INTERPROVINCIAL TRADE OVER PROVINCIAL HIGHWAYS—DELEGATION BY THE DOMINION PARLIAMENT TO A PROVINCIAL BOARD.—In the past it has been the fashion among writers on Canadian constitutional law to castigate the Judicial Committee of the Privy Council for rewriting the British North America Act in favour of the provinces.[1] It must be admitted that the recorded opinions of the Judicial Committee have provided abundant justification for this criticism. In what will be its last pronouncement on the Canadian constitution, however, the Judicial Committee abruptly reversed its field and bestowed upon the Dominion Parliament what may prove to be an embarrassment of riches. In rendering its opinion in *Attorney-General for Ontario and Others* v. *Israel Winner*[2] the Judicial Committee erected a few helpful sign posts in some of the most difficult terrain in the entire area of Canadian constitutional law.

The defendant, Winner, a resident of the United States of America, operated a fleet of motor buses for the carriage of passengers and goods from Boston through the state of Maine and the province of New Brunswick to Glace Bay in the province of Nova Scotia. The operations of the bus system were not confined to the carriage of through passengers from Boston to Glace Bay but also

intoxication, and moreover that it is the most reliable practical evidence we have available", Blood Alcohol as a Legal Test for Intoxication (1953), 25 Manitoba Bar News 69, and (1954), 70 Canadian Medical Association Journal 18, at p. 22 See also Penner, Correspondence (1954), 32 Can. Bar Rev. 123, at p 124.

*Of McMurray, Walsh, Micay, Molloy, Henteleff & O'Sullivan, Winnipeg

[1] See, among many others, MacDonald, The Constitution in a Changing World (1948), 26 Can. Bar Rev. 21; Judicial Interpretation of the Canadian Constitution (1936), 1 U. of Tor. L.J. 260; Constitutional Interpretation and Extrinsic Evidence (1939), 17 Can Bar Rev. 77; Kennedy, The British North America Act: Past and Future (1937), 15 Can. Bar Rev. 393; Essays in Constitutional Law (Oxford, 1934); Laskin, "Peace, Order and Good Government" Re-Examined (1947), 25 Can. Bar Rev. 1054; Tuck, Canada and the Judicial Committee of the Privy Council (1941), 4 U. of Tor. L.J. 33.

[2] [1954] 2 W.L.R. 418.

included the transportation of passengers between intermediate points. From our point of view the traffic carried on by the bus system may be divided into three categories: (a) carriage of through passengers and goods from Boston to Glace Bay, (b) carriage of passengers and goods between intermediate points separated by an international or interprovincial border, (c) carriage of passengers and goods between two points in the same province. The traffic described in (b) and (c) gave rise to the present litigation.

On June 17th, 1949, the New Brunswick Motor Carrier Board granted a licence to Winner permitting him to operate motor buses from Boston through the province of New Brunswick on specified highways to Halifax and Glace Bay in Nova Scotia and return, but not to embus or debus passengers in the province of New Brunswick. The effect of the licence would have been to restrict the defendant's operations to through traffic and to prohibit (b) and (c) type traffic in so far as New Brunswick was concerned. In the event, Winner elected to defy the limitations imposed by the Motor Carrier Board and continued not only to embus and debus interprovincial and international passengers in New Brunswick, but also to transport passengers between points entirely within the bounds of New Brunswick.

The plaintiff in the original action was a company incorporated under the laws of New Brunswick and holding a licence from the Motor Carrier Board authorizing the transportation of passengers between points in New Brunswick over the same highways travelled by the defendant's system. The plaintiff company sought an injunction restraining the defendant from embussing and debussing passengers within New Brunswick in violation of the licence granted by the Motor Carrier Board. The defence was that the New Brunswick Motor Carrier Act[3] was *ultra vires* in so far as it affected the operations of the defendant and that consequently the Motor Carrier Board acted beyond its jurisdiction by including limitations in the licence. At this stage of the proceedings, the learned trial judge referred certain questions, raising the constitutional issues, to the New Brunswick Court of Appeal.[4]

The provincial Court of Appeal, the Supreme Court of Canada and the Judicial Committee all fashioned their judgments from interpretations of section 92(10) of the British North America Act. The wording of section 92(10) is vital to a proper understanding of the *Winner* case and, for this reason, is reproduced here:

[3] 1937 (N.B.), c. 43, as amended.
[4] *S.M.T. (Eastern) Ltd.* v. *Winner*, [1950] 3 D.L.R. 207.

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, . . .

(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.

The effect of section 92(10) is to remove those subject matters enumerated in sub-clauses (a), (b) and (c) from provincial jurisdiction. At this stage, section 91(29) comes into operation and transfers the matters so excepted to the legislative jurisdiction of the Dominion.[5]

Before the defence raised by Winner could prevail it was necessary to establish that his motor-bus system came within the exceptions to section 92, clause 10, of which only those set forth in (a) were applicable to the physical characteristics of the undertaking. In this he failed before the New Brunswick Court of Appeal which, while conceding that the bus system was an "undertaking" within the meaning of section 92, clause 10, interpreted that clause as though the words "local works and undertakings" followed the word "such" in the opening line. As a result of this remarkable interpretation it was not sufficient for Winner to establish that his system was an "undertaking" connecting one or more provinces, or extending beyond the limits of a province (both of which it clearly did); he must now go farther and prove that his undertaking was "local". Since the bus line had been organized under the laws of Maine and had its headquarters in the city of Lewiston in the same state, it was relatively easy for the court to hold that Winner had not satisfied the newly constructed requirement that his undertaking be "local" and, as a consequence, section 92, clause 10(a), did not operate to exclude provincial jurisdiction.

The interpretation imposed upon section 92(10) by the New Brunswick Court of Appeal was unhesitatingly repudiated by the Supreme Court of Canada,[6] which demonstrated that such an in-

[5] *C P.R.* v. *A-G. B.C.*, [1950] A.C. 122, [1950] 1 D L.R. 721.

[6] [1951] S.C.R 887 This decision was commented on by McWhinney (1952), 30 Can Bar Rev 832, the author confining himself to following,

terpretation would nullify the very purpose the provision was designed to accomplish. If the New Brunswick interpretation had been upheld, provincial legislation affecting interprovincial transportation systems would be *ultra vires* in only that province in which the particular system had its situs and would be enforceable in every other jurisdiction traversed by the system. To state the proposition is to destroy it.

The majority of the Supreme Court split the defendant's undertaking neatly in two and held that the New Brunswick legislation was *ultra vires* with respect to the carriage of passengers over the entire route or from points outside the province to and from points within its bounds. With respect to that portion of the defendant's business that consisted of the carriage of passengers between points within the province, the legislation was declared *intra vires*. In the result, Winner was at liberty to continue (a) and (b) types of traffic and prohibited from carrying on (c) type.

In the early stages of its opinion the Judicial Committee travelled over familiar country, striking down well-worn arguments against Dominion jurisdiction over a transportation system such as that owned by the defendant. The first attack on the Dominion's jurisdiction was based on the presence of the word "and" between "Works" and "Undertakings" in section 92(10)(a), which, it was argued, meant that before a matter came within the scope of the exceptions it must be both a work and an undertaking. The word "work" connotes the existence of a physical thing, such as the trackage of a railway, and a bus system that involves only the periodic crossing of provincial borders by individual units does not constitute a "work". The Judicial Committee blunted this attack by turning it upon provincial jurisdiction as derived from the opening words of section 92(10), where the phrase "Works and Undertakings" also occurs, and indicating that, if the argument were to prevail, provincial jurisdiction would be confined to those local matters that were both "works" and "undertakings"—a result that, as their lordships pointed out, had never been contemplated in the past.

Having thus separated "works" and "undertakings", so that either one could activate section 92(10)(a), the Judicial Committee went on to hold that the defendant's system constituted an "undertaking", by re-affirming the proposition that the word envisages not a physical thing but an arrangement or system under which

with considerable misgivings, Mr. Justice Rand's excursion into the twilight zone of "fundamental and inherent rights".

physical things are used.[7] An organization under which buses cross and re-cross provincial boundaries according to a definite schedule obviously qualifies under this definition.

The argument that the word "local" must be inserted in section 92(10)(a), which had been adopted by the New Brunswick Court of Appeal, was rejected on grounds similar to those set forth by the Supreme Court of Canada.

At this juncture, the defendant's system, or at least a part of it, had been established as being within Dominion legislative jurisdiction. The buses operated by the system, however, travelled over roads that had been constructed by the province and were within its undoubted legislative competence. The existence of this concurrent jurisdiction demanded an answer to a further question: To what extent, if at all, could a province legislating with respect to its roads interfere with or limit the operations of an undertaking that, although under Dominion jurisdiction, utilized the roads in carrying on its business?

Their lordships now faced a situation endemic to the federal structure under which Canada is governed: the affairs of men do not always arrange themselves to fit into the categories of legislative authority apportioned between the federal and provincial governments by the British North America Act. On the contrary, an ever-increasing number of subjects overflow their basic categorization and spill over into one or more additional compartments of legislative jurisdiction. It is then necessary to determine which head of legislative jurisdiction is the controlling one, and to what extent the scope of the other relevant categories may be limited and modified to permit the controlling one to operate with full force and effect.

At the outset, it may be observed that there is no universal yardstick with which to determine how much the scope of a "relevant" jurisdictional head will be limited in favour of the "controlling" head. In each case the problem must be faced anew. In the present instance, the province's power to legislate with respect to its roads (the "relevant" head) is affected by the Dominion's jurisdiction over the defendant's system (the "controlling" head). The Judicial Committee referred to three of its previous opinions, all of which dealt with the power of a province to regulate companies incorporated by the Dominion and carrying on business in the

---

[7] *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, [1932] 2 D.L.R. 81.

province.[8] Their lordships emerged from a consideration of these authorities with two principles: (1) provincial legislation cannot sterilize a Dominion undertaking or impair its status and essential capacities in any essential degree, and (2) if the provincial enactment is not general in its application, but is directed with some particularity against the Dominion undertaking, it will probably be invalid.

It must be conceded that the first test does not lend itself to a precise application to the facts of any given case; but there is no difficulty in finding that a provision which severely restricts the right of a Dominion undertaking to load and unload passengers within a province seriously impairs its operations. Similarly, the New Brunswick Act and licence combined had no general application, but were directed specifically to the defendant. Accordingly, the New Brunswick legislation, in so far as it purported to affect the interprovincial bus line, and the licence, were held *ultra vires* the province.

The two principles enumerated by the Judicial Committee and used by it to determine the constitutionality of the provincial enactments are, in fact, nothing more than means of determining the quantum of *interference* that provincial legislation may impose on Dominion undertakings. Any interference that falls short of these standards is presumably valid; indeed, it was expressly stated that provincial legislation of the traffic-regulation type would be maintained. The province (validly) may legislate with respect to such items as speed, the side of the road upon which to drive, the weight and lights of vehicles, although these matters undoubtedly will interfere with the interprovincial traffic. On the other hand, if, for example, provincial speed regulations were so unreasonable as to seriously hamper the movement of interprovincial traffic, the validity of the provincial regulations would be open to serious objections. Carrying the example one step farther, if these regulations

---

[8] *Colonial Building & Investment Association* v. *Attorney-General of Quebec* (1883-84), 9 App. Cas. 157; *Great West Saddlery Co. Ltd.* v. *The King*, [1921] 2 A.C. 91; *Lymburn* v. *Mayland*, [1932] A.C. 318. See also, *Campbell-Bennett Ltd.* v. *Comstock Mid-Western Ltd. and Trans Mountain Oil Pipe Line Co.*, [1954] S.C.R. 207, [1953] 3 D.L.R. 594, in which the B.C. Court of Appeal held that mechanics-lien proceedings under provincial legislation cannot be enforced against an oil pipe line that operates interprovincially and consequently is under Dominion jurisdiction by virtue of section 92 (10)(a). The main ground of the decision was that the mechanics-lien proceedings could culminate in the sale of a portion of the pipe line that would either destroy or seriously disrupt the Dominion undertaking. This decision was affirmed on appeal to the Supreme Court of Canada.

were so framed as to affect only interprovincial traffic, they inevitably would be declared invalid. Although the Judicial Committee placed great reliance on the fact that the licence had no general application, but was confined to the defendant, as an indication of the intent or "pith and substance" of the provincial enactment, it hastened to destroy the converse proposition that a provincial enactment. general in its terms, would be safe from attack:[9]

> It does not indeed follow that a regulation of universal application is necessarily unobjectionable—each case must depend upon its own facts—but such a regulation is less likely to offend against the limitation imposed on the jurisdiction of the province inasmuch as it will deal with all traffic and not with that connecting province and province

It is now time to examine the opposite side of the coin. We have seen the manner in which otherwise valid provincial legislation is circumscribed to permit the effective operation of a Dominion head of jurisdiction. There remains the further question: Does the fact that a subject matter belongs predominantly within Dominion jurisdiction operate to remove from provincial jurisdiction other portions of that subject-matter that, normally, would be within provincial jurisdiction? Expressed in terms of the *Winner* case, the problem is reduced to this query: the defendant system being under Dominion jurisdiction, but a part of that system being devoted to traffic that begins and ends within one province, which portion would normally be under the sole competence of the province, is this provincial jurisdiction ousted by the Dominion jurisdiction over the other parts of the undertaking?

The only way in which Dominion jurisdiction over the totality of the defendant's system can be justified conformably to current constitutional jurisprudence is a finding that the intra-provincial aspect is so integrated with the other aspects of the business that the two should be treated as one. The Supreme Court of Canada

---

[9] *Supra*, footnote 2, at p. 435. In this connection, see *Regina* v. *Arrow Transit Lines Limited*, [1954] O.W.N. 538, where the Ontario Court of Appeal upheld a conviction against an interprovincial trucking firm under Ontario legislation that required *every* public commercial vehicle to take out a licence and to display it on the vehicle. The court, very properly, held that this was not a degree of interference with an interprovincial undertaking that would invalidate a provincial enactment and also pointed out that the provisions applied to *all* public vehicles. The court mentioned, but was not called upon to decide, the situation that might arise under a section of the provincial act requiring public commercial vehicles to take out an operating licence that had as a prerequisite a certificate of public necessity and convenience. In the light of the *Winner* case it seems probable that such a section would be declared invalid, in so far as it related to interprovincial traffic.

had found that the necessary degree of integration did not exist, arriving at this conclusion through a surgical test that involved the amputation of the intra-provincial aspect to determine whether or not the remainder of the undertaking could survive by itself. If the patient, no matter how crippled or emasculated, survived this rather heroic surgery, the separation was perpetuated and the two parts placed under different jurisdictions.

The Judicial Committee expressly rejected the literalistic approach of the Supreme Court and substituted a refreshingly realistic criterion: [10]

> The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?

The test now would appear to be: Can the undertaking as a whole be regarded as one which, while mainly devoted to interprovincial traffic, also engages in intra-provincial commerce as an incident of its operations? The ability to sever one part from the other or the degree of essentialness existing between the major and minor parts, used by the Supreme Court in both the present case and the *Empress Hotel* case,[11] are regarded as immaterial. On the facts of the *Winner* case the Judicial Committee decided that the defendant's operations were, in truth, one and indivisible and hence within the exclusive jurisdiction of the Dominion.

The federal government, however, hastened to divest itself of its newly-acquired jurisdiction. On April 26th, 1954, representatives of the federal government and nine of the provinces (Newfoundland, for obvious geographical reasons, did not participate) met to consider the implications of the *Winner* case. As a result of this conference, Bill 474 was placed before the House of Commons and duly enacted as the Motor Vehicle Transport Act. The act prohibits extra-provincial undertakings from operating without a licence in any province that requires local undertakings to take out a licence, and gives to the individual provincial boards complete discretion in the granting of licences and the imposition of terms and conditions upon any licences they may issue to extra-provincial undertakings. Similar powers with respect to the regulation of tariffs and tolls to be charged by an extra-provincial

[10] *Supra*, footnote 2, at p. 437.
[11] *C.P.R.* v. *A.-G. B.C.*, [1950] A.C. 122.

undertaking within a province are conferred upon the provincial boards. The act also contains a saving clause in that the Governor in Council may exempt any person, or the whole or any part of an extra-provincial undertaking, from its provisions, thus preventing any provincial board from totally destroying an extra-provincial undertaking by an over-zealous exercise of its powers. The act is to come into force in each province only upon a proclamation to that effect by the Governor in Council. Of the nine provinces represented at the conference, only Quebec declared that it would not participate in the scheme and held out for the more drastic measure of constitutional amendment, which would have conferred these powers on the provinces in a much more permanent form. Presumably, this act will not be declared in force in Quebec and extra-provincial undertakings can operate in that province under the protection of the *Winner* case.

For all practical purposes, the Motor Vehicle Transport Act completely reverses the findings of the Judicial Committee and returns to the provinces all that they had lost in the *Winner* case, a state of affairs that prompted the Leader of the Opposition to remark:[12] "It certainly seems a strange thing that large sums of public money would be spent to establish this position, and then once the position is established the authority for licensing and generally supervising this type of transportation should be placed right in the hands of boards appointed by the provinces under the provincial governments".

The manner in which the Motor Vehicle Transport Act accomplished this purpose was by the utilization of a device that had previously found favour with the Supreme Court of Canada, that of delegation of legislative jurisdiction by the Dominion to provincially appointed and controlled boards.[13] In the light of the *P.E.I. Marketing Board* case the federal enactment is unquestionably valid, subject to one point that may yet be a temporary setback to a prompt implementation of the scheme. In the *P.E.I. Marketing Board* situation the provincial board had received the capacity from the

---

[12] House of Commons Debates, Vol. 96, No. 128, at p. 5939.

[13] *P.E.I. Potato Marketing Board* v. *Willis and A.G. of Can*, [1952] 4 D.L.R. 146; see also, Ballem, comment (1952), 30 Can. Bar Rev. 1050. Compare with *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*, [1951] S C.R. 31, [1950] 4 D.L.R. 369, in which the Supreme Court of Canada unanimously rejected delegation of legislative power by a province to the Dominion. I commented on this decision in Ballem, comment (1951), 29 Can. Bar Rev. 79. The earlier judgment of the Supreme Court of Nova Scotia was criticized by Scott (1948), 26 Can. Bar Rev. 984.

province to exercise any powers that may be conferred upon it by the Dominion. Will similar legislation authorizing the individual boards to accept the powers conferred by the Motor Vehicle Transport Act have to be passed by each participating province before the scheme can function legally?[14] On the basis of the reasoning in the *P.E.I.Marketing Board* case it would seem that there are two possible answers to this query. The majority of the Supreme Court, impelled by the necessity of distinguishing *A.-G. N.S.* v. *A.-G. Can.*, held that the P.E.I. Marketing Board was a "legal entity" separate and distinct from its creator, the P.E.I. legislature; if we adopt this approach it follows that a provincial board, being an entity created by statute, has no existence apart from the statute and can only receive the capacity by a special statutory enactment. On the other hand, Mr. Justice Rand, in the course of his judgment in the *P.E.I. Marketing Board* case, worked a refinement on the "legal entity" theory by finding that it was a mere coincidence that the Dominion had appointed the same individuals who were already holding office as members of the provincial board. According to this line of reasoning, the capacity of the provincial board is irrelevant, as it is not the board that purports to exercise the powers conferred by the Dominion but the individual members of the board who, as natural persons, have undoubted and full capacity.

The scheme envisioned by the Motor Vehicle Transport Act is admittedly a makeshift device, designed, according to those who piloted it through Parliament, to handle the situation until a more workable and permanent solution can be found. There are, undoubtedly, a number of good reasons why the federal government is unwilling to assume this jurisdiction at the present time, the ones officially advanced were, firstly, a lack of federal machinery to handle the administration and regulation of the traffic, surely a strange but welcome excuse in these days of proliferating civil-service departments, and, secondly, the fact that the highways used by the extra-provincial undertakings were constructed and administered by the individual provinces. Notwithstanding these justifications for the return to the *status quo* as it existed before the *Winner* case, there are defects in the present scheme so glaring that

[14] This point was raised by Messrs. Fleming and Fulton during the debate on Bill 474, and was rather unconvincingly answered by the Ministers of Transportation and Justice, House of Commons Debates, *supra*, footnote 12, at pp. 5954, 5957-5962. The general conclusion seemed to be that if such provincial legislation were, in fact, necessary, it would be enacted by the participating provinces. As the various provincial legislatures, normally, will not meet until early next year, it would seem that there may be a certain hiatus in putting the scheme into effect.

they cause grave disquiet as to its future operations. In the first place, the abstention of Quebec seriously undermines the whole structure. In this central province extra-provincial undertakings, presumably, may ignore local licensing and similar legislation, but are forced to comply with identical legislation in all other provinces in which they may operate. Further, the only protection against abuses by the individual provincial boards and the resultant harm to extra-provincial traffic lies in the exemptive power of the Governor in Council, a procedure notoriously difficult to activate and cumbersome in its operation. It is safe to predict that many an abuse will be permitted before this power is brought into play and, in addition, a declaration under it will only have the result of placing the particular undertaking in the same limbo as that now occupied by extra-provincial traffic in the province of Quebec. More serious than any of these, however, is the fact that the extra-provincial carriage of goods and passengers by highway, alone among all the media of interprovincial and international trade, is not within Dominion jurisdiction. Shipping, both foreign and domestic, international and interprovincial railways, aviation, telegraphic and radio communication, all of which are essential in the day to day commerce of the nation, have historically been under the aegis of the Dominion. The deliberate abandonment by the federal government of its power over extra-provincial highway traffic, an ever-growing factor in the economy of the country as a whole, may yet prove to be a move conceived in haste and repented at leisure.

JOHN B. BALLEM*

Valeur du solide

Ainsi une solide instruction, une culture générale et plus spécialement une connaissance approfondie du droit sont indispensables à l'orateur judiciaire avant qu'il puisse envisager l'apprentissage plus direct de sa profession. L'ignorant, le faux savant, l'inculte, pourront, à raison d'une certaine facilité, faire quelque temps illusion, mais leur éloquence ne sera jamais solide. Elle pourra être clinquante, mais on ne se trompera pas longtemps sur sa valeur. Rapidement on en mesurera le vide et l'on remettra à sa juste place celui qui ne doit sa réputation qu'à un bavardage stérile et à une faconde sans portée. (Maurice Garçon, Essai sur l'Éloquence judiciaire. 1941)

---

*John B. Ballem, M.A., LL.B (Dal.), LL.M. (Harv.). Member of the Ontario and Nova Scotia bars Assistant Professor, Faculty of Law, University of British Columbia (1950-52). Now a member of the Law Department, Imperial Oil Limited, Calgary