

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
The Corporation of the City of Toronto v.
The Bell Telephone Company of Canada,
from the Court of Appeal for Ontario; de-
livered the 11th November 1904.*

Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is an Appeal from a Judgment of the Court of Appeal for Ontario on a special case stated by agreement in two separate actions, in each of which the Appellants, the Corporation of the City of Toronto, claimed an injunction against the Bell Telephone Company of Canada.

The claim was founded upon the contention that the Telephone Company was not entitled to enter upon the streets and highways of the city and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways without the consent of the Corporation.

The Company had been incorporated by a Dominion Statute of the 29th of April 1880 (43 Vict. c. 67) for the purpose of carrying on the business of a Telephone Company. The scope of its business was not confined within the limits of any one Province. It was authorised to acquire any lines for the transmission of

telephone messages "in Canada or elsewhere," and to construct and maintain its lines along, across, or under any public highways, streets, bridges, watercourses, or other such places, or across or under any navigable waters, "either wholly in Canada or dividing Canada from any other country," subject to certain conditions and restrictions mentioned in the Act, which are not material for the present purpose.

The British North America Act 1867, in the distribution of legislative powers between the Dominion Parliament and Provincial Legislatures, expressly excepts from the class of "local works and undertakings" assigned to Provincial Legislatures "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." (Section 92, Sub-section 10 (a).) Section 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company the objects of which as defined by its Act of Incorporation contemplate extension beyond the limits of one Province is just as much within the express exception as a telegraph company with like powers of extension. It would seem to follow that the Bell Telephone Company acquired from the Legislature of Canada all that was necessary to enable it to carry on its business in every Province of the Dominion, and that no Provincial Legislature was or is competent to interfere with its operations, as authorised by the Parliament of Canada. It appears, however, that shortly after the incorporation of the Company doubts arose as to its right to carry on local business. The question was raised in the Province of Quebec and decided adversely to the Company in the case of *Regina v. Mohr*,

7 Quebec L.R. 183; 2 Cartwright 257 (1881). In consequence of this decision, with which their Lordships are unable to agree, the Company applied for and obtained from the Legislature of Ontario an Act of 10th March 1882 (45 Vict. c. 71, Ontario) authorising it to exercise within that Province the powers which the Dominion Act had purported to confer upon it. This Act, however, according to the construction placed upon it by the Corporation (which, for the present purpose, their Lordships assume to be correct), makes the consent of the Municipal Council a condition precedent to the exercise of the Company's powers in cities, towns, and incorporated villages.

The Company was proceeding to construct its lines in the City of Toronto without having obtained the consent of Corporation, when the Corporation brought the two actions which resulted in the special case the subject of the present Appeal.

The case was heard in the first instance by Street J. who decided in favour of the Corporation, but his decision was reversed by the Court of Appeal for Ontario, MacLennan J.A. dissenting.

The view of Street J. apparently was that inasmuch as the Act of Incorporation did not expressly require a connection between the different Provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done under the Dominion Act without the authority of the Legislature of the Province. This view however did not find favour with any of the learned Judges of Appeal. In the words of Moss C.J.O. "the question of the legislative " jurisdiction must be judged of by the terms of

“ the enactment and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction.” If authority be wanted in support of this proposition it will be found in the case of *The Colonial Building and Investment Association v. Attorney-General of Quebec*, 9 A.C. 157, at p. 165, to which the learned Judges of Appeal refer.

MacLennan J.A. differed from the rest of the Court on one point only. He agreed in thinking that it would not be competent for a Provincial Legislature of itself to limit or interfere with powers conferred by the Parliament of Canada, but he seems to have thought that the Bell Telephone Company by reason of its application to the Ontario Legislature was precluded or estopped from disputing the competency of that Legislature, and that the enactment making the consent of the Corporation a condition precedent amounted to a legislative bargain between the Company and the Corporation to the effect that the Company would not use the powers conferred upon it by the Dominion Parliament without the consent of the Corporation. Their Lordships, however, cannot accept this view. They agree with the Chief Justice in thinking that no trace is to be found of any such bargain and that nothing has occurred to prevent the Company from insisting on the powers which the Dominion Act purports to confer upon it.

Their Lordships therefore are of opinion that the Appeal must fail.

There are two minor points which ought perhaps to be noticed.

(1) It was argued that the Company was formed to carry on and was carrying on, two separate and distinct businesses—a local business and a long distance business. And it was contended that the local business and

the undertaking of the Company so far as it dealt with local business fell within the jurisdiction of of the Provincial Legislature. But there, again, the facts do not support the contention of the Appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places. The special case contains a description of the Company's business which seems to be a complete answer to the ingenious suggestion put forward on behalf of the Appellants.

“The Company” it says “carries on a long
 “ distance telephone business and a local telephone
 “ business in various places in the Dominion,
 “ including the City of Toronto, operated by
 “ means of lines of telephone as hereinafter
 “ defined. The local business consists of fur-
 “ nishing communication between persons using
 “ telephones in a city, town, or other place
 “ where a central exchange exists. There are
 “ central exchanges to which run both the local
 “ and long distance lines. Any person in
 “ Toronto may use the long distance lines for the
 “ purpose of speaking to a person outside of
 “ Toronto by going to a central exchange and
 “ paying the usual charge therefor, and any
 “ telephone subscriber in Toronto desiring to
 “ speak to a person outside of Toronto may use
 “ the long distance lines for the purpose of
 “ having connection made with them through
 “ the central exchange and paying such usual

“ charge. In doing this he would use his own
 “ instrument and line to the central exchange and
 “ the long distance line from there. The long
 “ distance lines are not used in the local
 “ business.

“ A line or lines of telephone consist of poles
 “ with wires affixed thereto or of conduits with
 “ wires carried through the same.”

(2) An Act of 17th May 1882 (45 Vict. c. 95) amending the Company's Act of Incorporation and passed by the Dominion Legislature immediately after the passing of the Ontario Act was referred to in the course of the argument. This Act seems to have been intended, partly at any rate, to neutralise the effect of the Ontario Act. It declares the Act of Incorporation as thereby amended and the works thereunder authorized “ to be for the general advantage of Canada.” It is not very easy to see what the part of the section declaring the Act of Incorporation to be for the general advantage of Canada means. As regards the works therein referred to, if they had been “ wholly situate within the Province,” the effect would have been to give exclusive jurisdiction over them to the Parliament of Canada, but inasmuch as the works and undertaking of the Company as authorized by the Act of Incorporation were not confined within the limits of the Province, this part of the declaration seems to be unmeaning. Then the Act of Incorporation was amended by the introduction of words giving the engineer or other officer appointed by the Municipal Council a voice in “ the location of the line ” as well as in “ the opening up of the street.” It was contended that this amendment enabled the Council to select the course of the line and to determine the streets through which it might be taken. Their Lordships however do not think the words introduced by the

amendment can have the effect of enabling the Council to refuse the Company access to streets through which it may propose to carry its line or lines. They may give the Council a voice in determining the position of the poles in streets selected by the Company and possibly in determining whether the line in any particular street is to be carried overhead or underground.

In the result, their Lordships will humbly advise His Majesty that the Appeal ought to be dismissed. The Appellants will pay the costs of the Appeal.
