

In the Privy Council.

No. 23 of 1904.

44589

UNIVERSITY OF LONDON
W.C.1.
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INSTITUTE OF ADVANCED
LEGAL STUDIES

APPELLANT'S CASE.

ON APPEAL FROM THE COURT OF APPEAL
FOR ONTARIO.

BETWEEN THE CORPORATION OF THE CITY OF TORONTO

(Plaintiffs) - *Appellants*

AND

THE BELL TELEPHONE COMPANY OF CANADA

(Defendants) - *Respondents*

CASE FOR THE APPELLANTS.

1. This is an appeal from the judgment of the Court of Appeal for Ontario allowing the appeal of the Respondents from the judgment of the Honourable Mr. Justice Street at the hearing.

Record, p. 30.

Record, p. 12.

2. The Appellants under the provisions of the Municipal Act of the Province of Ontario are the owners of the public streets and highways in the City of Toronto and have the care and control thereof vested in them.

3. The Respondents claim the right under their Incorporating Acts to enter upon the streets and highways of the Appellants and to construct conduits or cables thereunder or to erect poles and affix wires thereto upon or along such streets or highways without the consent of the Appellants. On the 8th day of March 1901 the Appellants forbade the Respondents to perform such work without such consent. On the 5th day of June 1901 the Respondents notified the Appellants of their intention of placing underground cables on Bloor Street and on June 6th they were notified not to do so by the Appellants. Notwithstanding such notice the Respondents forthwith thereafter began such work.

- Record, p. 1. 4. The Appellants thereupon began an action for an injunction and for a declaration of the rights of the parties and shortly thereafter upon the Respondents beginning work of a like character upon another street a second writ similar in effect was issued by the Appellants.
- Record, p. 4. 5. Thereupon the Appellants and Respondents stated a Special Case and asked the Court to declare their respective rights in regard to the various contentions set out therein.
- Record, p. 6. 6. The said Case was heard before the Honourable Mr. Justice Street on the 26th day of February 1902 who found in favour of the Appellants and thereupon the Respondents appealed to the Court of Appeal which Court on the 14th day of 10 September 1903 reversed said judgment Maclellan J.A. dissenting.
- Record, p. 12
Record, p. 20.
Record, p. 25,
l. 27, *et seq.* 7. The questions involved in this appeal are: Have the Respondents the right in any case to enter upon and use the streets and highways of the Appellants without their consent? and if so in what cases?
- Record, p. 5,
l. 6. 8. The Respondents as set out in the Special Case carry on two separate and distinct classes of business namely (1) a long distance telephone business and (2) a local telephone business.
9. The Respondent Company was incorporated by the Dominion Statute 43 Victoria chapter 67. This Act did not declare the works of the Company "to be for the general advantage of Canada or for the advantage of two or more of the Provinces" as provided in sub-Section 10 (c) of Section 92 of the British North America Act. Such works would therefore come within the exclusive powers assigned to Provincial legislatures by said Section 92 except in so far as they might be "works or undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Provinces" within sub-Section 10 (a) of said Section 92.
10. When the Respondents began business questions as to their right to carry on a local business were raised in the Province of Quebec (*Regina v. Mohr*, 7 Quebec L.R. 183; 2 Cartwright 257 (1881) and decided adversely to them whereupon at their instance on the 10th day of March 1882 the Statute 45 Victoria Chapter 71 intituled "An Act to confer certain powers upon the Bell Telephone Company of Canada" was enacted by the Legislature of Ontario. This Act recites among other things "that doubts have arisen as to the powers of the said Company under the said Act" (43 Victoria Chapter 67D) "in regard to those portions of its work and undertaking which are local and do not extend beyond the limits of this Province" and by Section 2 enacts "The Bell Telephone Company of Canada may construct erect and maintain its line or lines of telephone along the sides of and across or under any public highways streets bridges water-courses or other such places: Provided the said Company shall not interfere with the public right of travelling on and using such highways streets bridges or water-courses and provided that in cities towns and incorporated villages the Company shall

not erect any pole higher than forty feet above the surface of the street nor affix any wire less than twenty-two feet above the surface of the street nor carry any such poles or wires along any street without the consent of the Municipal Council having jurisdiction over the streets of the said City, town or incorporated village."

11. By this Act as the Appellants contend the Respondents require the assent of the Appellants to authorise them to carry their lines of telephone (at least for local business) under or along the streets of the City.

12. On the 17th of May, 1882, the Respondents' Dominion Incorporating Act was amended by the Dominion Statute 45 Victoria, Chapter 95, by inserting the words "the location of the line or lines, and" in the 28th line of Section 3 thereof after the word "villages" and by the 4th section of the said Amending Act it is provided that "the said Act of Incorporation as hereby amended and the works thereunder authorised are hereby declared to be for the general advantage of Canada."

13. As to the second of the above amendments the Respondents contend that it applies to their local business and lines and removes them from the effect and control of the said Ontario legislation. The Appellants contend:—

(a) That it applies only to the long distance business and lines of the Respondents; and

20 (b) That in any case it does not abrogate the Ontario legislation or otherwise prevent its application to the local business or lines of the Respondents.

14. The Appellants contend as regards the first amendment that upon the proper construction of the said Act the Appellants have the right to determine upon what street or streets within the municipality the lines of the Respondents may be carried.

15. The Appellants further contend that the Respondents having applied for and obtained legislation from the Ontario Legislature are subject to the conditions and restrictions therein contained.

30 For this contention the Appellants rely upon the reasons advanced in the Judgment of the Honourable Mr. Justice Maclellan.

Record, p. 23,
l. 39, et seq.

16. The Appellants further contend that the works of the Respondents not being public works are not within the provisions of sub-Section 10 of Section 92 of The British North America Act; and in any event, as Mr. Justice Street has held in this case, the Respondents would only come under that sub-Section within the exclusive powers of the Parliament of Canada in the conduct of their business as and when the works and undertakings of the Respondents actually connect the Province with any other or others of the Provinces or extend beyond the limits of the Provinces and on the completion of said works.

Record, p. 7,
l. 3, et seq.

17. The British North America Act exempts from the jurisdiction of the Provincial Legislature works and undertakings connecting the Province with any other of the Provinces or extending beyond the limits of the Province—not works which are authorized so to connect or extend.

18. The Appellants submit that the Judgment of the Court of Appeal is wrong and ought to be reversed for the following amongst other

REASONS.

(1) Because the local business of the Respondents was not at the time of the passing of their original Act of Incorporation within the exclusive powers of the Parliament of Canada or brought therein by the declaration 10 required by the British North America Act, Section 92, sub-Section 10 (c).

(2) Because the Respondents are not authorised without the permission of the Appellants to carry their lines of telephone upon or along the streets or highways of the Appellants.

(3) Because such Ontario legislation when passed applied to the Respondents works for local business and has not since been abrogated or affected by legislation of the Parliament of Canada inconsistent therewith.

(4) Because the Respondents cannot under the amended legislation of the Parliament of Canada carry any line or lines under or along the streets or highways of the Appellants without such streets or highways being first 20 determined by the Appellants.

(5) Because the Ontario legislation obtained by the Respondents was in effect a legislative Agreement which they are bound to carry out.

(6) Because the Respondents' works or undertakings do not come within the exclusive powers of the Parliament of Canada unless and until such works or undertakings actually connect Provinces or extend beyond Provinces and then only as to works or undertakings so actually connecting or extending.

C. ROBINSON.

JAMES S. FULLERTON.

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CASE FOR THE APPELLANTS.

FRESHFIELDS.