

The Bell Telephone Company of Canada - - - - - *Appellant*

v.

La Ville St. Laurent - - - - - *Respondent*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF
QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 25TH JULY, 1935.

Present at the Hearing :

LORD ATKIN.

LORD TOMLIN.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

LORD ALNESS.

[*Delivered by LORD THANKERTON.*]

The present action was brought by the respondent on the 29th October, 1929, for the recovery of municipal and school taxes imposed upon the immoveables of the appellant situated within the municipality of the respondent for the years 1926, 1927 and 1928. The taxes imposed for the years 1926 and 1927 were levied upon an assessed value of \$25,000 placed upon " poteaux, fils, cables et tout le système "; for the year 1928 the assessed value was increased to \$45,000. It is agreed that the increase was due to the inclusion of the value placed upon a switchboard, with its associated plant, which the appellant had brought from another area, and had placed in premises of which the appellant was not the owner, but only a tenant under a lease, and which had been put into service on the 7th April, 1928.

While in the defence as filed the appellant disputed liability for any of the taxes claimed, the appellant subsequently filed a pleading, confessing to judgment for all the taxes claimed except those levied in 1928 upon the increased value of \$20,000 in respect of the switchboard. The confession of judgment was refused by the respondent. Accordingly the only question left in issue is in relation to the switchboard. On this point the appellant succeeded before the Circuit Court, but, on appeal to the Court of King's Bench (Appeal Side), the respondent was successful.

The power of the respondent to levy the municipal taxes is derived from section 521 of the Cities and Towns' Act (R.S.Q., 1925, c.102), which provides in part as follows:—

“ 521. The council may impose and levy, annually, on every immovable in the municipality, a tax of not more than two per cent. of the real value as shown on the valuation roll.”

The school taxes are levied, under the authority of section 249 of the Education Act (R.S.Q., 1925, c.133), upon “ all taxable property in the school municipality ”, which is identified with the subjects taxable in respect of the municipal taxes.

It has been decided by this Board in *Montreal Light, Heat and Power Consolidated v. Outremont City*, [1932] A.C. 423, at p. 435, that the word “ immovable ” in section 521 of the Cities and Towns' Act must bear the meaning given to it by the Quebec Civil Code, the material articles of which are as follows:—

“ 374. All property, incorporeal as well as corporeal, is moveable or immovable.

“ 375. Property is immovable either by its nature, or by its destination, or by reason of the object to which it is attached, or lastly by determination of law.

“ 376. Lands and buildings are immovable by their nature.

“ 377. Windmills and water-mills, built on piles and forming part of the buildings, are also immovable by their nature when they are constructed for a permanency.

“ 378. Crops uncut and fruits unplucked are also immovable.

“ According as grain is cut and as fruit is plucked, they become moveable in so far as regards the portion cut or plucked. The same rule applies to trees; they are immovable so long as they are attached to the ground by their roots and they become moveable as soon as they are felled.

“ 379. Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immovable by their destination so long as they remain there.

“ Thus, within these restrictions, the following and other like objects are immovable:

“ 1. Presses, boilers, stills, vats and tuns;

“ 2. All utensils necessary for working forges, paper-mills and other manufactories.

“ Manure, and the straw and other substances intended for manure, are likewise immovable by destination.

“ 380. Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, imbedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached.

“ Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect.

“ 381. Rights of emphyteusis, of usufruct of immovable things, of use and habitation, the right to cut timber perpetually or for a limited time, servitudes and rights of action which tend to obtain possession of an immovable, are immovable by reason of the objects to which they are attached.

" 332. All moveable property, of which the law ordains or authorizes the realization, becomes immoveable by determination of law, either absolutely or for certain purposes"

The switchboard in question is of the manual type known as No. 1-92 Jack. It is made up of seven sections, each of which consists of a cabinet containing an assembly of wires and electrical apparatus for connecting the telephone circuits of the subscribers either with one another or with trunk lines. It has certain ancillary equipment, such as a distributing frame, but this equipment affords no additional or separate argument. Apart from the actual physical connecting up of the cables and wires, which are led onto the premises, with the switchboard and its equipment, the latter are not in any way attached, but merely rest on the floor of the premises. On detachment of the physical connection with the cables and wires, the switchboard and its equipment are easily removable, without injury to the premises. As already stated, the appellant is only a tenant of the premises.

Accordingly, the respondent's claim is rested solely on article 376 of the Code, and on the view that the switchboard is an integral part of that which is admittedly immovable, namely, the poles, wires and cables of the respondent.

The learned Trial Judge, on a review of the authorities, held that the only test was incorporation in the soil, and that the fact that the switchboard formed part of the telephone system of the respondent was not sufficient to make it become immovable by nature under article 376 of the Code.

In the Court of King's Bench, the following paragraphs of the judgment express succinctly the reasons for the contrary view taken by that Court:—

" Considérant que dans l'espèce, le tableau téléphonique susdit ne fait pas partie de la bâtisse dans laquelle il est érigé, et qu'il n'est pas placé là pour la compléter, mais qu'il est pour compléter le système téléphonique, lequel est immeuble; qu'il est nécessaire pour les opérations du système, étant relié aux cables placés dans le sol, lesquels cables sont la propriété de la compagnie de Téléphone;

" Considérant que le dit tableau est une partie intégrante et essentielle du système de la Compagnie défenderesse, que sans lui, il n'existerait que des poteaux et des cables sans utilité, et que pour constituer le système, il faut nécessairement et essentiellement le dit tableau les poteaux et les cables."

The basis of this conclusion is expressed in the leading opinion, which was delivered by Bernier J., who states that it must now be taken as settled that the whole system—telephonic, telegraphic or similar systems of power transmission—constitutes an immoveable. The learned Judge cites, as authority for that proposition, three decisions to which their Lordships will shortly refer.

It appears to their Lordships that the above proposition clearly involves, as distinct from consideration of the physical nature of the attachment and whether it amounts to incorporation in the soil, consideration of the purpose which the attachment serves. It is agreed, and indeed it is stated

in the first paragraph above quoted, that the physical attachment of the switchboard to the premises is insufficient to make it immovable by nature.

The earliest of the three decisions is *Montreal Light, Heat and Power Consolidated v. City of Westmount*, (1926) S.C.R. 515. The only property owned by the appellant in that case within the municipality consisted of gas mains, located in the public streets, a system of electric poles, wires and transformers, almost entirely upon the public streets, and meters placed in the houses of the consumers in the municipality. The Supreme Court of Canada held that the gas mains, poles, wires and transformers were immovable, but that the gas meters were not. In delivering the leading judgment, Anglin C.J. stated :

“ The sole question with regard to the statutory power to impose the taxes sued for—municipal and school alike—is whether the subjects of taxation in this instance are immovables within the meaning of that term as used in article 5730 of the R.S.Q., 1909. That question formed the principal matter of discussion at bar; but, while not free from difficulty, it would seem to be concluded adversely to the appellant by the decision of this court in *Bélair v. Ste. Rose* ((1922 63 Can. S.C.R. 526) as to the gas mains and electric poles and wires, which, for the reasons there stated, must be regarded as ‘buildings’ (bâtiments) within the meaning of article 376 C.C. and, therefore, ‘immovable by their nature.’ In that case three things were distinctly held: (a) that the scope of the word ‘immovable’ in article 5730 (R.S.Q., 1909) is to be ascertained by reference to the provisions of the Civil Code, article 376 *et seq.*; (b) that the word ‘buildings’ (bâtiments) in article 376 C.C. is used in the sense of ‘constructions’; (c) that it is immaterial to its taxability under article 5730 that a construction is erected on land which does not belong to the person who owns the construction. There is no distinction in principle which would justify the taxation of the bridge in that case under article 5730 as an immovable and warrant the exemption of the appellant’s gas mains, and electric poles and wires in the present case as moveables. The materials of which the structures—bridge and distribution systems alike—were comprised were all moveables before being placed *in situ* and made part of such structures. Once incorporated in the structures, however, the materials lost that character; the structures themselves took on the character of immovables.

“ Nor does it appear to matter for the present purpose whether the immobilisation of the pipes, poles and wires be attributed to their physical connection with the land in or upon which they are placed, or with the buildings from which they radiate as parts of a distribution system. In either view they are immovables actually (in the sense of physically) situated in the municipality and thus ‘come within the letter of the law’ which confers the power to tax. *Partington’s Case* (4 E. & I. App. 100). The immobilisation of the transformers may not be so clear. But they are usually attached to the company’s poles and form an integral part of the system quite as much as the wires strung on the poles to carry the current ”

It may be noted that the transformers so referred to were firmly tied by wires and metal braces to the posts supporting the electric wires.

The proposition expressed by Bernier J. in the present case appears to have been derived from the second paragraph above quoted, but, in their Lordships' opinion, the language of Anglin C.J. does not warrant such inference. He clearly predicates that the materials must be physically incorporated as part of the structure which is itself incorporated in the soil. He clearly held that the wires and transformers were physically incorporated with the poles. The poles were in fact embedded in the soil, but the learned Chief Justice was also ready to regard the whole physical system of pipes, poles and wires as one incorporated physical structure. The element of commercial usefulness of that structure with or without any of its component parts is not referred to by him at all. In their Lordships' opinion, that case gives no warrant for the proposition laid down by the King's Bench Court in the present case.

The second decision is *Lower St. Lawrence Power Co. v. L'Immeuble Landry Ltée.*, (1926) S.C.R. 655, in which, following the above decision, it was held that the pipes, poles, wires and transformers of an electric lighting system, erected in, and on, the public streets of a municipality were immovables; it was further held that the fact that they had been sold separately from the original generators, for the purpose of being later connected to generators belonging to the buyer did not cause them to lose the character of immovables. The opinion of the majority of the Court, which included Anglin C.J., was delivered in a very able judgment by Rinfret J., in which he reviews at length the judicial decisions and also the opinions of well-known jurists, from which he derives the following propositions (at pp. 668, 670) :—

“ La très grande majorité des commentateurs enseigne qu'il n'est pas nécessaire que la construction, pour être considérée comme immeuble par nature, soit fixée au sol à perpétuelle demeure. Il suffit que l'incorporation ne soit pas purement passagère et accidentelle. C'est le fait de l'attachement au sol que la loi considère. La condition de rigueur est que ' la construction, quelle qu'elle soit, fasse corps avec le sol ' ; qu'elle y soit ' cohérente ' , suivant l'expression de Pothier, ou ' adhérente ' , suivant celle de Laurent. C'est toujours la règle : *Quod solo inaedificatur, solo cedit* De même, les bâtiments ou autres ouvrages unis au sol sont immeubles par leur nature, qu'ils aient été construits par le propriétaire du fonds ou par un tiers possesseur ; et ce, dans le cas même où le tiers constructeur se serait réservé la faculté de les démolir lors de la cessation de sa jouissance Ce réseau, d'après l'opinion la plus générale, est un immeuble par lui-même, en tant que construction adhérente au sol, et non pas seulement comme faisant partie intégrante de l'usine génératrice de l'électricité.”

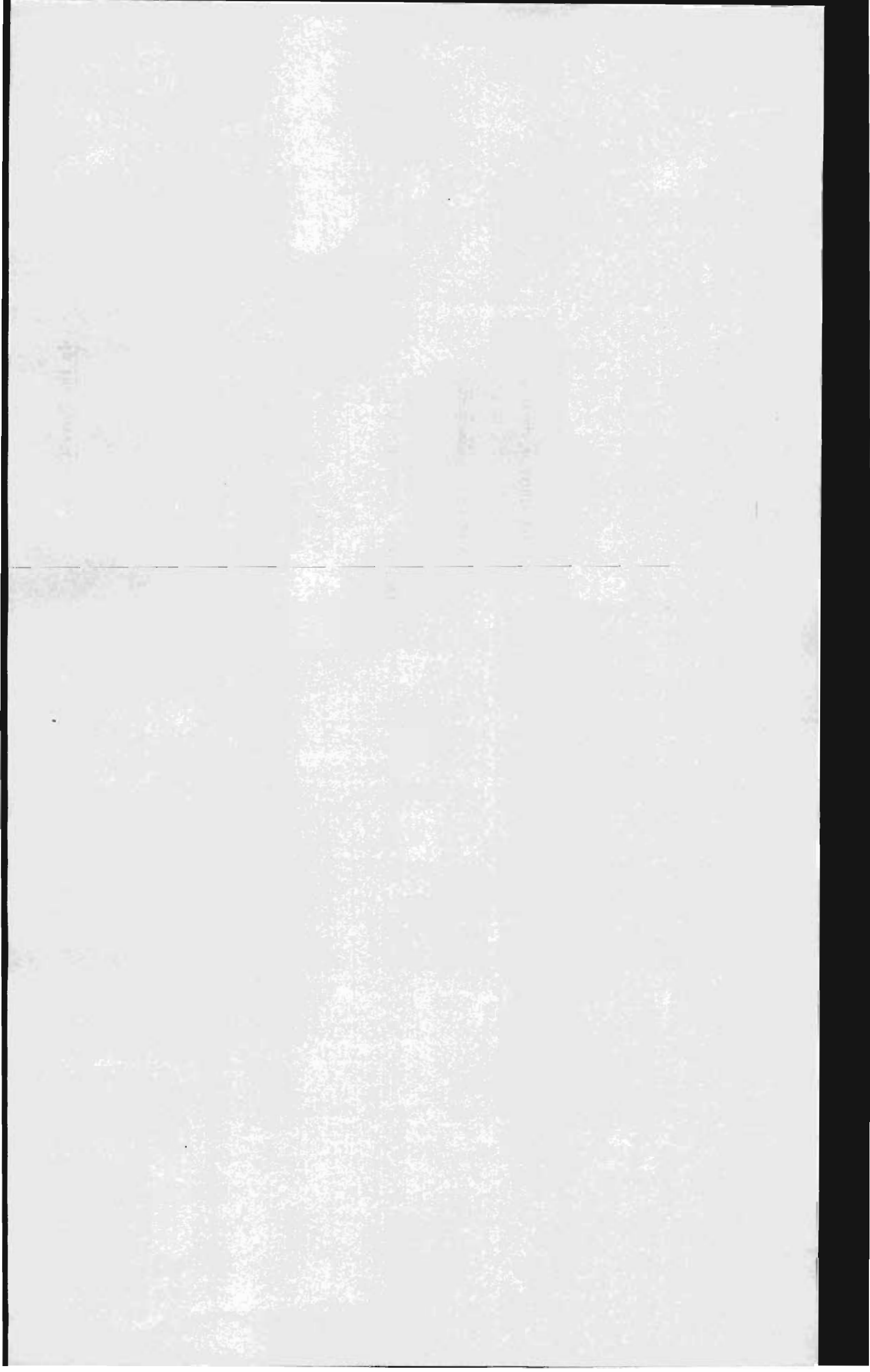
These passages, with which their Lordships are in accord, do not support the proposition of the Court of King's Bench.

The third decision referred to by Bernier J. is the decision of this Board in *Montreal Light, Heat and Power Consolidated v. Outremont City*, already cited, in which the decision of the Supreme Court in the *City of Westmount*

case, so far as relating to gas mains laid in the public streets, was challenged, but was approved of by this Board. The reasoning of the majority of the Supreme Court contained in the judgment of Anglin C.J. was held to be well founded, and Lord Tomlin, in delivering the judgment of the Board, says (at p. 436) "What then is an 'immoveable' under the Civil Code? A gas main laid in the earth is an 'immoveable' in the sense that it is physically a construction fixed in the earth, though the individual pipes of which it is made up were moveable before they came to form part of the construction The gas mains were never moveables, though constructed out of things which were moveables." This case likewise affords no support to the proposition of the Court of King's Bench.

In their Lordships' opinion, the existence of a building which is immoveable by its nature under article 376 involves two things, namely, that you have a structure and that such structure is incorporated with, or adherent to, the soil. In the present case, the switchboard with its equipment, admittedly, is not itself incorporated with, or adherent to, the soil. Is it then part of a structure which is so incorporated or adherent? As shown by the cases cited, it must be physically incorporated as part of the structure. The question whether the structure of which it is claimed to be part, is commercially able to operate without its assistance is irrelevant, in the opinion of their Lordships, and, apart from that suggestion, it is clearly incorrect to say that the switchboard is physically incorporated in the structure composed of poles, wires and cables belonging to the appellant's undertaking.

Their Lordships agree with the reasoning of the Trial Judge, and they are of opinion that the judgment of the Court of King's Bench should be reversed and that of the Trial Judge restored, the appeal being allowed with costs to the appellant throughout. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

THE BELL TELEPHONE COMPANY
OF CANADA

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LA VILLE ST. LAURENT.

DELIVERED BY LORD THANKERTON.

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