

1963

\*Nov. 26  
Dec. 16

METCALFE TELEPHONES LIMITED . . APPELLANT;

AND

WALTER J. McKENNA AND THE BELL TELEPHONE COMPANY OF CANADA . . . . .	}	RESPONDENTS.
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ON APPEAL FROM THE BOARD OF TRANSPORT  
COMMISSIONERS FOR CANADA

*Public utilities—Telephone company—Order by Transport Board to provide service—Area not served by Bell Telephone Company—Absence of jurisdiction—An act respecting the Bell Telephone Company of Canada, 1902 (Can.), c. 41, s. 2—The Railway Act, R.S.C. 1952, c. 234, s. 33.*

The respondent lived on the south side of a road served by the appellant company. The Bell Telephone Company served the north side of that road. The respondent was granted an order by the Transport Board directing the Bell Telephone Company to provide him with telephone service. The appellant was granted leave to appeal to this Court.

*Held:* The appeal should be allowed and the order of the Board set aside.

Under s. 2 of *An Act respecting the Bell Telephone Company of Canada, 1902 (Can.), c. 41*, the Transport Board could require the Bell Telephone Company to serve all persons within a territory "within which it gave a general service". It was not intended that it could impose a requirement upon the Bell Telephone Company to extend its services into new areas or to enter a territory already served by another telephone company. The evidence in this case disclosed that the general service provided in that territory in which the respondent lived, was provided by the appellant. Consequently, the respondent did not come within the section of the Act and the Transport Board was without jurisdiction to make the order.

APPEAL by leave from an order of the Transport Board. Appeal allowed.

*J. P. Nelligan*, for the appellant.

No one appearing for the respondents.

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\*PRESENT: Taschereau C.J. and Abbott, Judson, Ritchie and Spence JJ.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from an Order of the Board of Transport Commissioners for Canada made under s. 33 of the *Railway Act*, the Assistant Chief Commissioner dissenting, which ordered the Bell Telephone Company of Canada to give telephone service to the respondent Walter J. McKenna.

Before the Transport Board the Bell company denied that it was obliged to give service to Mr. McKenna, the reasons given being the same as those relied upon by the appellant in this appeal. Although entered as a respondent, the Bell company takes the position that it has no reason to oppose the appeal but on the contrary that it is in agreement with the position taken by the appellant Metcalfe Telephones Limited (formerly The Metcalfe Rural Telephone Company Limited), a rural telephone company incorporated under the laws of Ontario.

The facts are not in dispute. The respondent McKenna resides on the south side of Edwards Road which at that point is the dividing line between the townships of Gloucester and Osgoode in the County of Carleton. Mr. McKenna's residence is in the Township of Osgoode. The Metcalfe company has a telephone line running along the south side of Edwards Road in the township of Osgoode which passes the McKenna residence. The Bell company has a line on the opposite (the north) side of Edwards Road in Gloucester Township. The respondent McKenna can be served by the Metcalfe company and it is ready to serve him. An agreement exists between the Bell company and the Metcalfe company dated December 21, 1951, which was approved by the Transport Board on February 26, 1952, providing for an interchange of services and which contains the following clause:

Neither company shall enter into competition with the other, except as may be agreed upon in writing, but nothing in this agreement shall be deemed or construed to prevent the Bell Company from accepting application for direct connection from any other system already connected with and forming part of the system of the Connecting Company, and entering into an agreement for such purpose.

On August 8, 1962, the respondent McKenna applied to the Transport Board for an Order directing the Bell company to provide him with telephone service. After

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correspondence with the parties (an oral hearing having been waived) the Board on May 1, 1963, issued the Order requested. The present appeal, by leave, is from that decision.

The jurisdiction of the Board to make the Order complained of, depends upon the interpretation and effect of s. 2 of c. 41 of the Statutes of Canada 1902, entitled "*An Act respecting the Bell Telephone Company of Canada*". It reads as follows:

Upon the application of any person, firm or corporation within the city, town or village or other territory within which a general service is given and where a telephone is required for any lawful purpose, the Company shall, with all reasonable despatch, furnish telephones, of the latest improved design then in use by the Company in the locality, and telephone service for premises fronting upon any highway, street, lane, or other place along, over, under or upon which the Company has constructed, or may hereafter construct, a main or branch telephone service or system, upon tender or payment of the lawful rates semi-annually in advance, provided that the instrument be not situate further than two hundred feet from such highway, street, lane or other place.

In my opinion the purpose of this section is clear. That purpose is to require the Bell company to serve all persons within a territory "within which a general service is given" by Bell, who comply with the other requirements of the section. It is not intended to impose a requirement upon the Bell company to extend its services into new areas or to enter a territory already served by another telephone company. On this point I adopt the following statement of the Assistant Chief Commissioner in his written reasons:

By its nature a public utility usually operates in an area or territory in which it alone provides the service. This is the area or territory in which its general service is given. The boundaries may be clearly defined but usually they are not.

A customer, consumer or subscriber in such an area (with very few exceptions) cannot elect by which utility he will be served. He has available to him only the services provided by the utility giving general service in the area. Hence the reason for much legislation to protect him.

Instances have occurred in the past where rivalries have arisen between utilities to serve certain areas with resulting intrusion by one utility into the territory served by another.

At the time of the passage of the amendment of 1902 (with which we are concerned), the pattern of utilities providing a general service in a particular territory was well established. At that time there were in the Provinces of Quebec and Ontario many private and municipal telephone systems.

In my opinion, the wording of the 1902 amendment recognized the necessity of one telephone system only providing a general service in any one city, town or village, or in any one territory or service area.

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The material in the record shows that general telephone service in Osgoode Township is provided by the Metcalfe company although, about its perimeter, portions of the township are served by Bell. Nevertheless the general service that is provided in the major portion of the said township—and more particularly in that portion in which Mr. McKenna resides—is provided by appellant.

In my opinion, therefore, the respondent McKenna does not come within s. 2 of the statute II Ed. VII, c. 41, as being a person within a territory in which general telephone service is furnished by the Bell company. It follows that the Transport Board was without jurisdiction to make the Order which it did.

The appeal should be allowed and the Order of the Board of Transport Commissioners for Canada dated May 1, 1963, set aside. Counsel for appellant agreed that there should be no order as to costs.

*Appeal allowed; no order as to costs.*

*Solicitor for the appellant: J. P. Nelligan, Ottawa.*

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