

CASES
 DETERMINED BY THE
SUPREME COURT OF CANADA
ON APPEAL
 FROM
DOMINION AND PROVINCIAL COURTS

| | | |
|--|---|-------------|
| THE BELL TELEPHONE COMPANY } OF CANADA..... | } | APPELLANT; |
| AND | | |
| THE CORPORATION OF THE } COUNTY OF MIDDLESEX..... | } | RESPONDENT. |

1946
 {
 *Jun. 6
 *Oct. 1
 —

ON APPEAL FROM THE BOARD OF TRANSPORT
 COMMISSIONERS FOR CANADA

Statutory law—Telegraphs and telephones—Wire crossing—Future change of location—Highways located neither in cities or towns—Statutory powers of company—Jurisdiction of Board—Terms, conditions and limitations—Railway Act, R.S.C., 1927, c. 170, s. 373, ss. 2, 3, 4, 5, 6, 7.

The appellant company, by section 3 of its Incorporation Act, was given the power to “construct, erect and maintain its lines along the sides of and across or under any public highway * * *”—Subsection (2) of section 373 of *The Railway Act* enacts that “no telegraph or telephone line * * * shall * * * be constructed by any company upon, along or across any highway * * * without the legal consent of the municipality having jurisdiction over such highway * * *” and section (3) provides that, if such consent is not granted, the company may apply to the Board.

The Board of Transport Commissioners, by Order made in July, 1945, authorized the appellant company to construct its lines of telephone (buried cable) under certain highways in the respondent corporation; and the Board, at the same time, directed that questions relating to terms and conditions be reserved for further consideration. In October, 1945, the Board imposed certain terms and conditions as set out in the Order and, more particularly, directed that, in case of disagreement between the Company and the Municipality, following a request by the latter to change in the future the location of the works, the Board may order the company to make such change, each to pay such part of the costs as the Board may direct.

*PRESENT: Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.
 79544—1

1946 *Held*, Hudson J. dissenting, that the Board had no power to make the last mentioned order.

**THE BELL
TELEPHONE
COMPANY
OF CANADA**
v.
**THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX**

Held, also, that, upon the proper construction of the language of sub-section (2) of section 373, which refers to construction of telegraph or telephone lines "upon, along or across any highway * * *," the proposed construction of the lines of the Company under the County highways does not fall within that subsection, as the word "across" does not include "under". Hudson and Rand JJ. dissenting.

Per The Chief Justice and Kerwin and Taschereau JJ.:—"Across" means over from side to side; and it is made clearer by the context of sub-section (2) and by the history of the legislation. Parliament, in enacting that subsection, had in mind only above surface construction and was preoccupied with the right of travel particularly referred to in subsection (a) of section 373. The appellant company, under section 3 of its Incorporation Act, is specifically given the power to construct its lines under the highways in the respondent corporation; and, for such purpose, the appellant does not need the legal consent of the respondent, and not only does it not need the authorization of the Board but the latter has no jurisdiction to give such authorization.

Per Hudson J. dissenting:—Subsection (2) of section 373 deals with the construction of a telegraph or telephone line "across any highway". The word "across" means "from side to side" and, taken by itself, is wide enough to cover a crossing at any level. The "highway" to be crossed includes not merely the surface of the road but what has been called the "area of user", i.e. "all the stratum of soil below the surface * * * required for the purposes of the street as street".—The appellant company, in placing its line "across a highway" must "not interfere with the public right of travel (s. 373, ss. (1) (a)) and any alterations by the company in the sub-surface of a highway might affect the safety and convenience of the public using the surface.—Thus, the Board, having jurisdiction in the matter, had under subsections 4 and 5 power to make the Order appealed from.

Per Rand J.:—The provisions of sub-section 7 as a whole constitute a code regulating the construction of telephone lines in and on highways; and the statute is clear that, with the exception in sub-section 6 where changes may be ordered in cities and towns, once the installations have been made, they may thereafter be maintained and operated free from the Board's control.—The Order appealed from has in effect added the provisions of sub-section 6 to new constructions outside cities and towns, while these provisions have by implication the effect of denying the Board power to impose conditions as to future changes of location of newly constructed lines outside cities and towns.

APPEAL by the Bell Telephone Company of Canada (by leave of the Board and upon a settled statement of facts) from an Order (No. 66533) of the Board of Transport Commissioners for Canada (1) imposing certain terms, conditions and limitations in respect to works which the

appellant Company, by a previous order, had been authorized to construct across and under certain highways within the respondent County Corporation.

Leave to appeal to this court was given upon the question, which in the opinion of the Board was one of law and of jurisdiction, as to whether the Board had power to make Order No. 66533.

N. A. Munnoch K.C. and *F. A. Burgess* for the appellant.

No counsel for the respondent.

The judgment of The Chief Justice and of Kerwin and Taschereau JJ. was delivered by

THE CHIEF JUSTICE:—The parties hereto have agreed upon the following statement of facts:—

(1) The appellant is a company incorporated by Act of the Parliament of Canada, (1880, 43 Victoria, chapter 67). It carries on and provides a public telephone service within the Dominion of Canada and elsewhere. By section 3 of its Act of Incorporation, it is granted the right to: 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, etc., upon the terms and conditions therein set forth.

(2) The respondent is a municipal corporation within the province of Ontario, governed by the *Municipal Act* (R.S.O. 1937, chapter 226). It has municipal jurisdiction over the public county roads, highways and road allowances within its municipal boundaries.

(3) In the early part of the year 1945, the appellant proposed to construct an underground or buried cable system of long distance telephone lines from the city of London to the city of Windsor in the province of Ontario; and it was necessary for the cables to cross under the surfaces of certain public highways, roads and road allowances that intersected their courses. In the case of the county of Middlesex, it was necessary for the said cables to pass under the surfaces of ten different public highways or roads under the municipal jurisdiction of the respondent.

(4) The appellant applied to the respondent for the latter's legal consent to these ten highway crossings.

(5) On June 14, 1945, the council of the respondent passed and enacted by-law no. 2159, granting the requisite legal consent, but upon the following term and condition:

"Provided further that the County will assume no further costs in connection with lowering of the Company's cable which might be made necessary by the County road work or works".

(6) This was not acceptable to the appellant; and this feature of the by-law was discussed between the parties by correspondence.

1946
 THE BELL
 TELEPHONE
 COMPANY
 OF CANADA
 v.
 THE
 CORPORATION
 OF THE
 COUNTY OF
 MIDDLESEX
 —
 Rinfret C.J.

(7) The appellant thereupon filed an application to the Board of Transport Commissioners for Canada, dated July 19, 1945, for leave of the Board to construct the aforesaid ten underground cable crossings; and on July 20, 1945, moved the Board *ex parte* for the requisite order.

(8) By Order no. 66276, dated the 23rd day of July, 1945, the Board authorized the appellant to construct the aforesaid crossings, at the same time directing that:

"all questions relating to terms and conditions in respect of this application and the works hereby authorized be and they are hereby reserved for further consideration and order of the Board".

(9) Following the issue of this Order, the respondent wrote to the Secretary of the Board on July 26, 1945:—

"I have no objection whatever to the making of the Order and am perfectly willing to leave the terms on a statutory basis."

(10) By letter addressed to the Secretary of the Board on August 14, 1945, Mr. Moss, the solicitor for the respondent, stated that, in his opinion, no public hearing was necessary; that the sole question was as to who should bear the cost of any future alteration of the appellant's lines; and that the respondent had no objection to the appellant exercising its statutory powers as long as it did not exceed such powers.

(11) In turn, by letter addressed to the Secretary of the Board dated August 21, 1945, the appellant agreed that no public hearing was necessary, but expressed the view that the final paragraph of Order no. 66276 made it an interim Order only, and suggested that it should be made final by the issue of a supplementary Order to the effect that the works authorized be subject to the terms and conditions contained in the appellant's Act of Incorporation, 43 Victoria (1880) chapter 67, section 3, so far as such terms and conditions were applicable to works of the nature authorized.

(12) Subsequently, without any hearing of the parties in the present case, but after having heard a similar case, the Board issued a judgment on October 4, 1945, and the Order which gives rise to the present appeal, namely, Order no. 66533, by which the Board ordered that the authority granted to the appellant to construct, erect and maintain the works should be subject to the following term, condition or limitation:

"If, from time to time, in order to enable the municipality to construct, reconstruct, alter or repair a highway, waterpipe line, sewer or other work of the municipality, the municipality requests the company to change the location of any of the works authorized by Order no. 66276 and the company does not agree to make such change, or does not agree to make such change otherwise than upon terms and conditions unacceptable to the municipality, the municipality may apply to the Board for an order or orders directing the company to make such change; and if, upon such application or applications, the Board deems it expedient, having due regard to all proper interests, that the location of any of the works in question should be changed, the company shall make such changes in the location of the works in question as the Board may direct; and the municipality and the company shall each pay such part of the cost of changing the location of the works as the Board may direct."

(13) On November 30, 1945, the appellant moved the Board for leave to appeal to the Supreme Court of Canada under section 52 (3) of the *Railway Act*, from Orders nos. 66276 and 66533.

By Order no. 66893 dated the 14th day of December, 1945, the Board granted the appellant leave to appeal to the Supreme Court of Canada upon the following question, which the said Order declares to be, in the opinion of the Board, a question of law and jurisdiction:

Had the Board power to make Order no. 66533, dated the 4th day of October, 1945?

In its reasons for judgment on questions relating to terms and conditions reserved by paragraph 2 of Order no. 66276, the Board amongst other things states:

The letter of Mr. Moss raises a question of considerable importance. Order no. 66276 authorizes the company to construct its lines across and under certain highways in the municipality. What will be the position of the municipality if at some time in the future the municipality wishes the company to make some change in the location of any of the works authorized by Order no. 66276? In the absence of any condition imposed by the Board under subsection 4 of section 373 of the *Railway Act*, it appears that the municipality would have no remedy. Subsection 6 of section 373 confers power on the Board to order (*inter alia*) a change in the location of a telephone line, but subsection 6 applies only to lines in a city or town. The Board's view is that Parliament, in giving the Board power to impose "terms, conditions or limitations", intended the Board to accommodate the interests of the company and the municipality in a practical common sense way; and the Board deems it "expedient, having due regard to all proper interests", that in the present case the following term, condition and limitation be imposed by order.

(then comes the term and condition already reproduced above).

And the reasons proceed:

In some other applications of a similar kind which have come before the Board recently, the company has contended that the Board has no power to make such a provision as is above set out, and this contention merits consideration. Subsection 4 is very wide. But the suggestion is that the provisions of subsection 6 by implication cut down or restrict the meaning of subsection 4 and have the effect of denying the Board the power to impose terms, conditions or limitations as to future changes of location of telephone lines in municipalities other than towns and cities. The Board does not agree that such is the effect of subsection 6. The subsection applies to (*inter alia*) lines which are already in existence, and applies whether they were constructed under the authority of the Board or not. In view of the broad terms of subsection 4, the Board is unable to see that any inference should be drawn from subsection 6 that the Board, in authorizing the construction of a new line in a rural municipality, has no power to safeguard its interests by such a provision as is above set out.

The appeal in this Court was argued *ex parte*, the respondent taking no part in the argument.

1946
THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX
Rinfret C.J.

1946

THE BELL
TELEPHONE
COMPANY
OF CANADA

v.

THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX

Rinfret C.J.

Here, the appellant raised a question which does not appear to have been submitted to the Board and of which, at all events, no trace can be found in the correspondence or the Orders of the Board, or the reasons therefore.

This new question is to the effect that the Board had no jurisdiction whatever to deal with the application because the latter is in respect of the construction of cables or lines "under highways" and that in such a case, neither the legal consent of the municipality having jurisdiction over such highways, nor the authorization of the Board of Transport Commissioners is required by the Bell Telephone Company, the appellant, to carry on such work.

It must be noted that we are dealing here with county highways, and that is to say with highways located neither in a city nor in a town; and also that the cables or lines of the appellant are to cross the highways in question entirely beneath the surface of the ground; in fact, they are to be buried in the ground itself.

Now, the Company invokes section 3 of its Incorporation Act authorizing it to construct and maintain its lines of telephone "along the sides of and across or under any public highway"; and provides that

in cities, towns and incorporated villages, the location of the line or lines and the opening up of the street for the erection of poles or for carrying the wires underground shall be done under the direction and supervision of the engineer or such other officer as the Council may appoint, and in such manner as the Council may direct, and that the surface of the street shall, in all cases, be restored to its former condition by and at the expense of the Company.

By section 4 of an amending Special Act (45 Victoria, 1882, chapter 95, section 2), the works of the company authorized by this Act of Incorporation "are hereby declared to be for the general advantage of Canada".

Of course, the situation in which the appellant finds itself is really of its own making, because its present contention is directly contrary to the position it took when it applied first for the legal consent of the county of Middlesex and afterwards for the authorization of the Board.

In effect, the action of the appellant assumed that the legal consent of the respondent was necessary, and implied that the Board had jurisdiction to make the Order applied for.

But, of course, jurisdiction can never be conferred by consent; and, if the Board has no jurisdiction as now contended, it does not matter that the appellant first elected to go before it; the absence of jurisdiction of the Board still remains.

The Board has no inherent jurisdiction. It has only the powers and authority given to it by the Statute. Its jurisdiction over telegraphs, telephones, power and electricity is governed by sections 367 to 378 inclusive of the *Railway Act* (R.S.C. 1927, c. 170). Of these, sections 367 to 371 deal with telegraphs and telephones on railway for railway purposes, or telephone connections with railway stations, or putting wires across railways or other wires.

In the premises, section 373, dealing with the putting of lines or wires across or along highways, is the section to be looked at for the purpose of answering the question submitted to this Court by the Board of Transport Commissioners. Section 374 deals with the price and supply of certain power. Section 375 contains special provisions governing telegraphs and telephones, and subsection 12 thereof states the limitations imposed by Parliament upon the jurisdiction and powers of the Board with regard to telegraph and telephone companies.

Moreover, we are not concerned here with sections 376, 377 and 378 which have reference to marine electric telegraphs or cables, and to Government use and construction of telegraphs and telephones.

Turning therefore to section 373, which is the section that has to be construed here, we find that:

subject to the provisions of this section, any company empowered by Special Act or other authority of the Parliament of Canada, to construct, operate and maintain telegraph or telephone lines, may, for the purpose of exercising the said powers, enter upon, and, as often as the company thinks proper, break up and open any highway, square, or other public place * * *

It is therein provided that the company shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building. Then follow certain provisions some of which specifically apply only in cities, towns and incorporated or

1946
THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX
Rinfret C.J.
—

1946
 THE BELL
 TELEPHONE
 COMPANY
 OF CANADA
 v.
 THE
 CORPORATION
 OF THE
 COUNTY OF
 MIDDLESEX
 Rinfret C.J.

police villages; others deal with poles, trees, supervision, restoration, the times when it is necessary to cut wires or remove poles, and there is a provision that the telegraph or telephone company

shall be responsible for all unnecessary damages which it causes in carrying out, maintaining or operating any of its said works.

Then comes a series of subsections and it is necessary to reproduce in full subsections 2, 3 and 4, because, if the Board of Transport Commissioners has jurisdiction in the matter, it is there that such jurisdiction must be found.

Subsection (2).

Notwithstanding anything in any Act of the Parliament of Canada or of the legislature of any province, or any power or authority heretofore or hereafter conferred thereby or derived therefrom, no telegraph or telephone line, within the legislative authority of the Parliament of Canada, shall except as hereinafter in this section provided, be constructed by any company upon, along or across any highway, square or other public place, without the legal consent of the municipality having jurisdiction over such highway, square or public place.

Subsection (3).

If any company cannot, in respect of any such line, obtain such consent from such municipality, or cannot obtain such consent otherwise than subject to terms and conditions not acceptable to the company, such company may apply to the Board for leave to exercise such powers and upon such application shall submit to the Board a plan of such highway, square or other public place showing the proposed location of such lines, wires and poles.

Subsection (4).

The Board may refuse or may grant such application in whole or in part, and may change or fix the route of such lines, wires or poles, and may by order impose any terms, conditions, or limitations, in respect of the application which it deems expedient, having due regard to all proper interests.

As will be seen, subsection (2) requires the legal consent of the municipality having jurisdiction over the highways, only when the telegraph or telephone line is to be constructed "upon, along or across any highway". No mention is made of a line to be constructed "under the highway".

And what is to be observed is that if any company cannot, in respect of any such line obtain such consent from such municipality, or cannot obtain such consent otherwise than subject to terms and conditions not acceptable to the company, such company may apply to the Board for leave to exercise such powers.

Then, the Board may refuse or grant such application in whole or in part, and may by order impose any terms, conditions or limitations in respect of the application which it deems expedient, having due regard to all proper interests.

1946
THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX
Rinfret C.J.

The repetition of the word "such" throughout subsections (3) and (4) makes it clear that both the consent from the municipality is required, and the jurisdiction of the Board exists only if the work is to be constructed "upon, along or across any highway", for such is the work for which, under subsections (3) and (4) the application may be made to the Board, if the company cannot "obtain such consent from such municipality". And it is only upon such application

that the Board is empowered to act in either refusing or granting same, and at the same time impose terms and conditions or limitations.

The answer to the question submitted to the Court must, therefore, depend upon the construction of the language of subsection (2) of section 373.

The lines to be constructed by the company and with which we are concerned are not to be upon or along the highways, and if the present construction of the lines falls at all within subsection (2), it is only if the word "across" includes "under". Otherwise, a construction "under" is not covered by subsection (2) and, therefore, no legal consent of the municipality is required, nor has the Board jurisdiction to deal with it. My view is that the word "across" does not include "under". "Across" means over from side to side. It is made clearer by the context of subsection (2) and by the history of the legislation. It is evident that in subsection (2) Parliament had in mind only above surface construction. It was preoccupied with the right of travel particularly referred to in subsection (a) in the first part of section 373.

Moreover, it must be noted that in the Special Act of the Bell Telephone Company of Canada (43 Victoria, 1880, chapter 67, section 3) the company is empowered to construct, erect and maintain its lines, along the sides of and across or under any public highways (and) across or under any navigable waters. It is a well known rule of construction that Parliament is not supposed to speak for nothing and that all the words it uses in its legislation must be given their application.

1946
 THE BELL
 TELEPHONE
 COMPANY
 OF CANADA
 v.
 THE
 CORPORATION
 OF THE
 COUNTY OF
 MIDDLESEX
 Rinfrét C.J.

The fact that the same Act contains both the words "across" and "under" shows that in using those words Parliament intended by the word "under" something more than and different from "across".

A comparison, in that respect, between the *Railway Act* (1906) and the *Railway Act* (1919) is also illuminating and instructive.

In the Act of 1906, the matters dealt with in sections 247 and 248 correspond to section 373 in the Act of 1919.

The 1906 Act provided (subsection 2 of section 248) that the telephone company

shall not, except as in the section provided, construct, maintain or operate its lines of telephone upon, along, across or under any highway * * * within the limits of any city, town or village, incorporated or otherwise, without the consent of the municipality;

and, if such consent of the municipality was not forthcoming, the telephone company could then apply to the Board for leave to exercise its powers upon the highways. The Board could then grant such application and, at the same time, by Order, "impose any terms, conditions or limitations in respect thereof".

Some exceptions were provided for in subsections 4 and 5 of section 248 with regard to long distance line or service or any trunk line or service connecting two or more exchanges in any city, town or village.

In section 373 of the *Railway Act* of 1919, we find several significant changes or modifications.

First, section 373 (2) does not contain the word "under" any highways. That word has been deleted and the section then reads "upon, along or across any highway", leaving out the word "under" which appeared in subsection (2) of section 248 of the 1906 Act.

On the other hand, while the same section of the 1906 Act provides for the necessity of the consent of the municipality only for highways "within the limits of any city, town or village", now, in section 373 (2) the necessity of the consent of the municipality is no longer limited to a city, town or village, but it is required in the case of all municipalities having jurisdiction over such highways.

Some object must be ascribed to the fact that Parliament, when enacting the *Railway Act* of 1919, left out the word "under". That object might be that while heretofore between 1906 and 1919, a telephone company had to obtain the legal consent of a city, town or police village even to construct "under" the highways over which such municipality had jurisdiction, after the adoption of the Act of 1919, consent was necessary from all municipalities to construct upon, along or across any highways; but the consent was no longer required from any municipality to construct "under".

1946
THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX
Rinfret C.J.

The above view is in accordance with the definition given in Standard dictionaries: Webster's New International Dictionary; the New English Dictionary (Oxford); The Imperial Encyclopedic Dictionary; Century Dictionary & Cyclopaedia; Funk & Wagnall's New Standard Dictionary; Ordways Dictionary of Synonyms and Antonyms (published by Harrap & Co., London). From all of these, whether we refer to the words "upon", "along" or "across", it appears that these words as used in section 373 (2) can not apply to the lines in question, because such lines are constructed beneath the surface of the highways and, as so constructed, merely cross under said highways from one side to the other, while the word "across" used alone, means from side to side of and over or above.

In the *South Eastern Railway Company v. the European and American Electric Printing Telegraph Company and Frend* (1), it was held that the word "across" does not include "under".

Many examples of cases where above-ground construction only is intended can be found in the *Railway Act*:

Sections: 162 (d) 173

" 162 (e)

" 193; 295 (1)

" 246; 247

" 255; 256; 257

" 373 (2); 403

" 256; 257 (2)

" 372 (a)

" 281 (3)

| | |
|--------------|---|
| 1946 | But where, in the <i>Railway Act</i> , Parliament intended that |
| THE BELL | underground construction be authorized or included, it |
| TELEPHONE | expressly said so by the use of the word "under". |
| COMPANY | |
| OF CANADA | Sections: 162 (k) |
| v. | " 162 (l) |
| THE | " 162 (m) |
| CORPORATION | " 245 |
| OF THE | " 246 |
| COUNTY OF | " 258 |
| MIDDLESEX | " 250 |
| — | " 251 |
| Rinfret C.J. | " 252 (3) (c), 256 (5), 264, 266 |
| — | " 256 (5), 257 |
| | " 264, 401 (a) |
| | " 268 |
| | " 269 (a), (b), (c), 270 (2), (4) |
| | " 269 (3) |
| | " 271 |

Section (3) of the appellant's Special Act draws a clear distinction between overhead and underground lines. Under it, the appellant is specifically given the power to construct, erect and maintain its lines along the sides of and across or under any public highways, and there is no doubt about the right of the company to construct its lines under the ten highways in question in the county of Middlesex; but, in my view, there is also no doubt that, for such purpose, the appellant does not need the legal consent of the respondent, and not only does it not need the authorization of the Board of Transport Commissioners, but the Board has no jurisdiction to give such authorization.

In *Toronto, Corporation of the City of, v. Bell Telephone Company of Canada* (1), the Judicial Committee dealt with, among other things, the argument that the 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, and at page 59 appears the following:

No trace is to be found of any such bargain and * * * nothing has occurred to prevent the Company from insisting on the powers which the Dominion Act purports to confer upon it.

Similarly here the application by the Company for the consent of the County and its subsequent application to the Board do not prevent the Company from relying upon the powers conferred upon it by its special Act.

I need only add that we should not refer to subsection (6) or subsection (7) of section 373 because they do not apply here. Subsection (6) comes into play only "upon the application of the municipality" and is restricted to a "city or town". Subsection (7) applies only to telephone lines "heretofore constructed". As for subsection (8) of section 373, it deals solely with cases where the Special Acts applying to the telephone companies specifically require the consent of the municipality, which is not the case for the Bell Telephone Co. of Canada. *Toronto, Corporation of the city of v. The Bell Telephone Co. of Canada* (1).

For these reasons, I would answer in the negative the question submitted.

HUDSON J.:—This is an appeal by leave from the Board of Transport Commissioners. The terms of this order and the circumstances under which it was made are fully set forth in the judgment of my Lord the Chief Justice. The appeal was heard *ex-parte* but the Court had the benefit of a very fair and exhaustive argument by counsel for the appellant.

The grounds of appeal are first: that the Board had no jurisdiction to make any order in the matter, and secondly: that even if it had such power it had no power to impose the conditions which were included therein.

The jurisdiction of the Board in the matter is set forth in section 373 of the *Railway Act*, R.S.C. 1927, chap. 107. By this section it is provided:

373. Subject to the provisions of this section, any company empowered by Special Act or other authority of the Parliament of Canada to construct, operate and maintain telegraph or telephone lines, may, for the purpose of exercising the said powers, enter upon, and, as often as the company thinks proper, break up and open any highway, square or other public place, provided always that

(a) such company shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building:

1946
THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX
Rinfret C.J.

1946
 THE BELL
 TELEPHONE
 COMPANY
 OF CANADA
 v.
 THE
 CORPORATION
 OF THE
 COUNTY OF
 MIDDLESEX
 ———
 Hudson J.

- (e) the opening of any street, square, or other public place for the erection of poles, or for the carrying of wires under ground, shall be subject to the supervision of such persons as the municipal council may appoint, and such street, square or other public place shall, without any unnecessary delay, be restored, as far as possible, to its former condition;

* * *

2. Notwithstanding anything in any Act of the Parliament of Canada or of the legislature of any province, or any power or authority heretofore or hereafter conferred thereby or derived therefrom, no telegraph or telephone line, within the legislative authority of the Parliament of Canada, shall except as hereinafter in this section provided, be constructed by any company upon, along or across any highway, square, or other public place, without the legal consent of the municipality having jurisdiction over such highway, square or public place.

3. If any company cannot, in respect of any such line obtain such consent from such municipality, or cannot obtain such consent otherwise than subject to terms and conditions not acceptable to the company, such company may apply to the Board for leave to exercise such powers, and upon such application shall submit to the Board a plan of such highway, square or other public place showing the proposed location of such lines, wires and poles.

4. The Board may refuse or may grant such application in whole or in part, and may change or fix the route of such lines, wires or poles, and may by order impose any terms, conditions or limitations in respect of the application which it deems expedient, having due regard to all proper interests.

5. Upon such order being made, and subject to any terms imposed by the Board, such company may exercise such powers in accordance with such order, and shall in the performance and execution thereof, or in the repairing, renewing or maintaining of such lines, wires or poles conform to and be subject to the provisions of subsection one of this section, except in so far as the said provisions are expressly varied by order of the Board.

There are also two additional subsections, 6 and 7, which will be hereafter referred to.

The appellant company was incorporated by a statute of Canada, 43 Vict. Chap. 67, and by section 3 thereof was granted the right to

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, or across or under any navigable waters, either wholly in Canada or dividing Canada from any other country.

The argument on the first point is that by this Special Act the Company was given power to construct lines "under" any public highway, and this without consent of the municipality; that by subsection 2 of section 373 the Board was not given power to act where the Company proposed to place its lines *under* a highway, that is, that

the words in subsection 2 "upon, along or across any highway" were not sufficiently broad to cover a case as here where the Company had authority to lay wires or cables *underneath* the ground.

It must be kept in mind that what we are called on to construe here is the provision in the *Railway Act*, and not the Special Act. The significant words are "across" and "highway".

The word "across", as most commonly used, means "from side to side". It is clear that under paragraph (a) of section 1, in placing its line across a highway the telephone company must not interfere with the public right of travel. The word taken by itself is wide enough to cover a crossing at any level. Obviously, in this instance Parliament did not contemplate a permanent crossing at the surface level. Such a crossing would in all reasonable probability constitute an interference with the use of the highway in the first place, and in the second place it would not be of any value to the telephone company. The crossing contemplated must be either above or below the surface. The "highway" to be crossed includes not merely the surface of the road but what has been called the "area of user", that is:

all the stratum of air above the surface, and all the stratum of soil below the surface which in any reasonable sense can be required for the purposes of the street as street.

This quotation is from a judgment of Collins, M. R. in the case of *Finchley Electric Light Company v. Finchley Urban District Council* (1). Under various statutes in England dealing with main roads, etc. all streets being highways reparable by the inhabitants at large were vested in and under the control of urban authority. Collins, M. R. was dealing with a case arising under one of these statutes, and other cases of the same kind are *Mayor etc. of Tunbridge Wells v. Baird* (1), Lord Halsbury at p. 437 and Lord Herschell p. 442; *Wandsworth Board of Works v. United Telephone Co.* (2), Lord Bowen.

In Ontario the freehold in the soil of the highways is vested in the municipal bodies under section 454 of the *Municipal Act*, R. S. O. 1937, chap. 266. Even before this provision was enacted the municipalities were vested with

1946
THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX
Hudson J.

(1) [1903] 1 Ch. 437, at 441.

(3) (1884) 13 Q.B.D. 904.

(2) [1896] A.C. 434.

1946

THE BELL
TELEPHONE
COMPANY
OF CANADA

v.

THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX

Hudson J.

powers similar to the Boards referred to in England and their duty was and still is to provide for the maintenance of highways and the safety and convenience of the public who desire to use them. In order to do this, the highways must be of such a character as to bear the traffic which would normally flow thereon. Any alterations in the sub-surface of that portion of the highway being used for traffic might affect the safety and convenience of the public using the surface. Any interference with what is called the "area of user" would be a trespass on the highway. For these reasons, it would appear that the word "across" here must mean at least any such crossing as lies within the area of user. It would seem inconceivable that Parliament had anything else in mind.

The extent of the area of user might of course vary depending on the facts in each particular case, but here the application to the Board was made by the telephone company itself, and this might be taken as an acknowledgment that the crossing they had in mind was probably within this area. In any event, it is a matter for consideration of the facts by the Board in order to protect the interests of the public and it might well be in the interest of the telephone company itself.

Many authorities were cited in regard to the meaning of the word "across" in other statutes of Canada and elsewhere. With respect, it does not seem to me that in this case they are sufficient to justify any departure from the cardinal rule of construction, namely:

The object of all interpretation of a statute is to determine what intention is conveyed, either expressly or impliedly, by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it.

See Maxwell on Statutes, p. 1.

For these reasons, I am of opinion that the Board had jurisdiction.

The second point made is that the condition imposed in the order as follows:

If, from time to time, in order to enable the municipality to construct, reconstruct, alter or repair a highway, waterpipe line, sewer or other work of the municipality, the municipality requests the company to change the location of any of the works authorized by Order no. 66276,

and the company does not agree to make such change, or does not agree to make such change otherwise than upon terms or conditions unacceptable to the municipality, the municipality may apply to the Board for an order or orders directing the company to make such change; and if upon such application or applications the Board deems it expedient, having due regard to all proper interests, that the location of any of the works in question should be changed, the company shall make such changes in the location of the works in question as the Board may direct; and the municipality and the company shall each pay such part of the cost of changing the location of the works as the Board may direct.

1946
THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX
Hudson J.

cannot be exercised because of the provisions of subsections 6 and 7. Subsection 6 provides:

6. Notwithstanding any power or authority heretofore or hereafter conferred upon any company by or under any Act of the Parliament of Canada, or of the legislature of any province, or any other authority, the Board, upon the application of the municipality, and upon such terms and conditions as the Board may prescribe, may order any telegraph or telephone line, within the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company to construct or maintain, or to operate, or continue, any such line, or any pole or other works belonging thereto, except as directed by the Board; and where such a line or lines within the legislative authority of the Parliament of Canada and such a line or lines within the legislative authority of a province, run through or into the same city or town, and such municipality is desirous of having any such lines placed underground, and there exists in such province a provincial commission, public utilities or other board or body having power to order such a line within the legislative authority of such province to be placed underground, the Board and such provincial commission, or public utilities board or body, may by joint session of conference, or by joint board, order any such lines within such city or town, or any portion thereof, to be placed underground, and abrogate any right to carry the same on poles, and the provisions of subsection three of section two hundred and fifty-three of this Act, with the necessary adaptation, shall apply to every such case.

Subsection 6 applies only to cities and towns and only to cases where the municipality is the applicant and seeks to compel the telephone company to lay its lines beneath the surface. This is an altogether different case from the present where the application is made by the company itself to the Board under subsection 2; to authorize the underground crossing without the consent of the municipality.

Subsection 7 applies only to lines "heretofore constructed", that is, prior to the passing of this particular provision and many years before the present application.

1946
 THE BELL
 TELEPHONE
 COMPANY
 OF CANADA
 v.
 THE
 CORPORATION
 OF THE
 COUNTY OF
 MIDDLESEX
 Hudson J.

The particular condition attacked did not appear in the original order permitting the laying of the underground lines, but such original order contained an express reservation to the effect that the Board might make any amendments which it thought necessary in the future. This, I think, is quite in accord with the final phrase of subsection 5 above quoted:
 except in so far as the said provisions are expressly varied by order of the Board,

which clearly gives the Board the power to make or amend the previous order.

The application on which the Board acted was made by the telephone company itself and it requested action by the Board under section 373, subsection 3, as well as other relevant sections of the Act.

Under the provisions of subsection 4, there is no limitation on the conditions which the Board may impose when granting an order. The Board may well find on the facts that the conditions with which it has to deal, when considering the order, are in the case of particular municipalities substantially the same as conditions which exist in cities and towns. If so, there would appear to be no reason why they should not be permitted to exercise the same powers.

I think that the legal advisers of the company were right in their first thought and that the Board had jurisdiction and, once this is admitted, the Board had under subsections 4 and 5 jurisdiction to make the order.

For these reasons, I am of opinion that the answer to the question submitted by the Board in this appeal should be in the affirmative, namely, that the Board had power to make Order no. 66533. There should be no costs.

RAND J.:—The Bell Telephone Company, being unable to obtain from the Corporation an unqualified consent to carry a telephone line across certain highways by underground construction, applied for leave to do so to the Board of Transport Commissioners under the provisions of subsections 2 and 3 of section 373 of *The Railway Act* which are in these words:

2. Notwithstanding anything in any Act of the Parliament of Canada or of the legislature of any province, or any power or authority heretofore or hereafter conferred thereby or derived therefrom, no

telegraph or telephone line, within the legislative authority of the Parliament of Canada, shall except as hereinafter in this section provided, be constructed by any company upon, along or across any highway, square or other public place, without the legal consent of the municipality having jurisdiction over such highway, square or public place.

3. If any company cannot, in respect of any such line, obtain such consent from such municipality, or cannot obtain such consent otherwise than subject to terms and conditions not acceptable to the company, such Company may apply to the Board for leave to exercise such powers, and upon such application shall submit to the Board a plan of such highway, square, or other public place showing the proposed location of such lines, wires and poles.

1946
THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX
Rand J.

The powers of the Board on such an application are set forth in subsection 4 of the same section:

4. The Board may refuse or may grant such application in whole or in part, and may change or fix the route of such lines, wires or poles, and may by order impose any terms, conditions or limitations in respect of the application which it deems expedient, having due regard to all proper interests.

The Board granted leave, but subject to this condition:

If, from time to time in order to enable the municipality to construct, reconstruct, alter or repair a highway, waterpipe line, sewer or other work of the municipality, the municipality request the company to change the location of any of the works authorized by Order no. 66276 and the company does not agree to make such change, or does not agree to make such change otherwise than upon terms and conditions unacceptable to the municipality, the municipality may apply to the Board for an order or orders directing the company to make such change; and if, upon such application or applications, the Board deems it expedient, having due regard to all proper interests, that the location of any of the works in question should be changed, the company shall make such changes in the location of the works in question as the Board may direct; and the municipality and the company shall each pay such part of the cost of changing the location of the works as the Board may direct.

Against the inclusion in the leave of that condition the Company appeals. Mr. Munnock, in an able argument, places his case on three grounds: that, as the works are underground, they are not within subsection 2 as being constructed "across" a highway; that the Board, under subsection 4, may impose conditions relating only to construction and not as to maintenance as here; and that the condition in question is in conflict with the implication of subsections 6 and 7 of the same section.

The purpose of Parliament in enacting section 373 was to place within the discretion of an important administrative body the adjustment of conflicts between the exercise

1946

THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX

Rand J.

of various public rights and services in highways. As these become more complex, the need becomes greater that their accommodation be made with efficiency and fairness, having regard to all interests involved. The object sought is a flexibility in functioning and an incidence of work and cost which, in the judgment of an experienced tribunal, best accord with the harmonious working of the services and uses as a whole.

The interpretation of such legislation as *The Railway Act* must have regard to those administrative purposes; and ever since the enactment of that statute the Judicial Committee has consistently adopted constructions of its provisions that have ensured a wide discretion to the Board. I must then approach the language vesting these powers in the Board so as to give it that plain and practical meaning which the nature of the subject matter and the character of the Board's function unite in requiring.

In that interpretive attitude, I reject the first ground raised against the order: but as I have come to the conclusion that the last is well founded, I do not deal with the former in detail. Nor do I find it necessary to examine the second beyond observing that in one aspect it is involved with the third.

Subsections 6 and 7 are as follows:

6. Notwithstanding any power or authority heretofore or hereafter conferred upon any company by or under any Act of the Parliament of Canada, or of the legislature of any province, or any other authority, the Board, upon the application of the municipality, and upon such terms and conditions as the Board may prescribe, may order any telegraph or telephone line, within the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company to construct or maintain, or to operate, or continue, any such line, or any pole or other works belonging hereto, except as directed by the Board; and where such a line or lines within the legislative authority of the Parliament of Canada and such a line or lines within the legislative authority of a province, run through or into the same city or town, and such municipality is desirous of having any such lines placed underground, and there exists in such province a provincial commission, public utilities or other board or body having power to order such a line within the legislative authority of such province to be placed underground, the Board and such provincial commission, or public utilities board or body, may by joint session or conference, or by joint board, order any such lines

within such city or town, or any portion thereof, to be placed underground, and abrogate any right to carry the same on poles, and the provisions of subsection three of section two hundred and fifty-three of this Act, with the necessary adaptation, shall apply to every such case.

7. Except as provided in the last preceding subsection, nothing in this section shall affect the right of any telegraph or telephone company to operate, maintain, renew or reconstruct underground or overhead systems or lines, heretofore constructed.

The section as a whole furnishes a code regulating the construction of telephone lines in and on highways and other public places; and the statute is clear that, except in one respect and except when the Company is exercising powers granted under subsection 1, once the installations have been made, whether that has taken place before the Board's jurisdiction was created, or thereafter with the consent of the Municipality or with an order under subsection 3, they may thereafter be maintained and operated free from the Board's control. The exception is in subsection 6 where changes may be ordered in cities and towns.

Now what the order challenged does is in effect to add the provisions of subsection 6 to new constructions outside of cities and towns. The implication of that subsection is perfectly clear that outside of cities and towns no such changes can be ordered. Can that implication be nullified by the condition of an order under subsection 3? I do not think so. Parliament no doubt had in mind the necessities of public services in the streets of cities and towns, as contrasted with country highways, as they become more numerous and congested and in subsection 6 it has dealt inclusively with the alterations of constructed works; if, under subsection 4 such a general condition could be annexed to an order, there would have been no need of limiting the power to order changes to cities and towns, certainly for subsequent construction. Under that condition, such works could exist side by side with others, belonging to the same or any other company, free from any administrative control whatever. That anomaly has been avoided in subsection 6 by placing all lines, whenever constructed, under the authority of the Board. Whether such a condition, specifically related to existing works, could in any circumstances be justified, I do not enquire; its generality here

1946

THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX

Rand J.

1946
THE BELL
TELEPHONE
COMPANY
OF CANADA
v.
THE
CORPORATION
OF THE
COUNTY OF
MIDDLESEX

in effect removes the limitation to cities and towns in subsection 6 in relation to new construction and cannot be held to be within the scope of subsection 4.

The appeal should be allowed and Order no. 66533 set aside. The original Order no. 66276, including section 2, remains in force. There should be no costs.

Question answered in the negative.

Rand J.

Solicitors for the appellant: *Munnock & Venne.*

Solicitor for the respondent: *W. D. J. Moss.*
