The Bell Telephone Company of Canada
(*Defendant*) *Appellant*;

and

Harding Communications Limited
(*Plaintiff*) *Respondent*;

and

The Attorney General of the Province of Quebec and the Attorney General of Canada
Mis en cause.

1978: October 25; 1978: November 21.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

Courts — Telecommunications — Jurisdiction of the Quebec Superior Court — Jurisdiction of the Canadian Transport Commission — Declinatory exception — An Act respecting The Bell Telephone Company of Canada, 1948 (Can.), c. 81, s. 5(4), (5), (6) as amended by 1967-68 (Can.), c. 48, s. 6 — National Transportation Act, R.S.C. 1970, c. N-17, s. 45(1) — Code of Civil Procedure, art. 31.

The respondent Harding developed a system involving use of a device, known as "divert-a-call", which the Bank of Montreal was prepared to use in connection with its credit card authorization centres. The system involved use of the appellant Bell's telephone lines but Bell refused to facilitate installation of Harding's equipment and threatened to disconnect the Bank's telephone lines if the equipment was installed. Alleging that its business was wrongly jeopardized by Bell, Harding brought an action against Bell in the Quebec Superior Court for an injunction to restrain Bell from interfering with its business and from threatening to disconnect customers' telephone lines. At the same time Harding moved for an interlocutory injunction to be effective pending judgment on the merits. Bell, by declinatory exception, challenged the jurisdiction of the Superior Court, claiming that exclusive jurisdiction in this matter resided in the Canadian Transport Commission. The declinatory exception was dismissed and the interlocutory injunction granted by the Superior Court. The Court of Appeal affirmed. Hence the appeal to this Court.

Held: The appeal should be dismissed.

This Court rarely interferes in proceedings which are not dispositive of the matters in issue and it will not interfere with the grant of the interlocutory injunction.

As to the declinatory exception, even if an issue in law might have been raised in proceedings before the Canadian Transport Commission, a provincial Superior Court is not precluded from entertaining it in the context of an action, such as the one in this case, which alleges fault or tortious liability. The legal isue here turns on s. 5(4) of the *Act respecting The Bell Telephone Company of Canada* which states that "... any equipment ... not provided by the company shall only be attached to ... the facilities of the Company in conformity with such reasonable requirements as may be prescribed by the Company". Bell contended, having regard to s. 5(5) and (6) of its constituent Act, to s. 45(1) of the *National Transportation Act* and to Rules 2, 7 and 9 of its General Regulations, that the jurisdiction of the Superior Court to decide whether s. 5(4) imposes an obligation on Bell to prescribe reasonable requirements is ousted. This Court, approaching this contention against the background of art. 31 of the *Code of Civil Procedure*, concludes that the Quebec Superior Court has jurisdiction to decide whether s. 5(4) imposes a legal obligation upon Bell when the question arises in the course of judicial proceedings that are properly taken, as in this case, in that Court.

Ottawa Cablevision Ltd. v. Bell Canada, [1973] C.T.C. 522, leave to appeal refused [1974] 1 F.C. 373; *In re Dr. Morton Shulman and Bell Canada*, [1975] C.T.C. 244; *Grand Trunk Railway Co. v. Perrault* (1905), 36 S.C.R. 671, distinguished.

APPEAL from a judgment of the Court of Appeal of Quebec[1] affirming a judgment of the Superior Court[2] granting an interlocutory injunction and dismissing a declinatory exception. Appeal dismissed.

Ernest E. Saunders, Q.C., and *Peter J. Knowlton*, for the appellant.

Henry R. Altschuler, for the respondent.

Raynold Langlois, for the Attorney General of Quebec, mis en cause.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The respondent Harding is a distributor and manufacturer of telecommunication equipment. One of its products is a telecommunication device known as "divert-a-call", which the Bank of Montreal was prepared to use in

[1] [1977] C.A. 54.
[2] [1975] C.S. 1116.

connection with its master charge credit card authorization centres. Harding developed a system involving use of the device which was acceptable to the Bank of Montreal. The system involved use of the appellant Bell's telephone lines and the Bank asked Bell for couplers to facilitate installation of Harding's equipment. Bell refused, and threatened to disconnect the Bank's telephone lines if Harding's equipment was installed. It offered, however, to provide the Bank with the same equipment on lease. The Bank refused Bell's offer but at the same time decided it could not proceed with its dealings with Harding. Alleging that its business with the Bank and with others was wrongly jeopardized by Bell, Harding brought an action against Bell in the Quebec Superior Court for an injunction to restrain Bell from interfering with Harding's business and from threatening to disconnect customers' telephone lines. At the same time Harding moved for an interlocutory injunction to be effective pending judgment on the merits.

Bell, by declinatory exception, challenged the jurisdiction of the Quebec Superior Court, claiming that exclusive jurisdiction in respect of its obligations, if any, arising out of the dealings between Harding and the Bank resided in the Canadian Transport Commission. The declinatory exception was dismissed by Vallerand J. and he granted the request for an interlocutory injunction. The Court of Appeal affirmed. The case is now here by leave of this Court.

I can say at once that this Court will not interfere with the grant of the interlocutory injunction. It is rare for it to interfere in proceedings which are not dispositive of the matters in issue and hence, in this case it is the declinatory exception which is the only matter that needs consideration. The broad regulatory powers of the Canadian Transport Commission over Bell and over its operations are conceded. The issue of law presented here, to which I will come shortly, is one that might have been raised in proceedings before the Commission and it might have come here in the ordinary course of appellate proceedings after

passing through the Federal Court of Appeal: see for example, *Ottawa Cablevision Ltd. v. Bell Canada*[3], a case to which I will refer later in these reasons. It does not follow, however, that a provincial Superior Court is precluded from entertaining it in the context of an action, such as the one in this case, which alleges fault or tortious liability which is outside the purview of the Canadian Transport Commission.

Twenty-two years after its incorporation in 1880, Bell became a public utility by the obligation imposed upon it by 1902 (Can.), c. 41 to supply telephone service within its area of operations, upon request being made for such service. Section 2 of that Act reads as follows:

> 2. 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.

Bell's constituent Act has been frequently amended, mainly to authorize it to increase its capital stock but also with additions to its powers as well, as, for example, by 1948 (Can.), c. 81, s. 5. This section was repealed by s. 6 of 1967-68 (Can.), c. 48 and a new section 5 substituted. Subsection (4) of this new section is central to the legal issue here, and I reproduce it, along with subss. (5) and (6) which are relevant to its operation. These provisions read as follows:

> 5. . . .
>
> (4) For the protection of the subscribers of the Company and of the public, any equipment, apparatus, line, circuit or device not provided by the company shall only be attached to, connected or interconnected with, or used in connection with the facilities of the Company in

[3] [1974] 1 F.C. 373.

conformity with such reasonable requirements as may be prescribed by the Company.

(5) The Canadian Transport Commission may determine, as questions of fact, whether or not any requirements prescribed by the Company under subsection (4) are reasonable and may disallow any such requirements as it considers unreasonable or contrary to the public interest and may require the company to substitute requirements satisfactory to the Canadian Transport Commission in lieu thereof or prescribe other requirements in lieu of any requirements so disallowed.

(6) Any person who is affected by any requirements prescribed by the Company under subsection (4) of this section may apply to the Canadian Transport Commission to determine the reasonableness of such requirement having regard to the public interest and the effect such attachment, connection or interconnection is likely to have on the cost and value of the service to the subscribers.

The decision of the Commission is subject to review and appeal pursuant to the *Railway Act*.

It is common ground that no such requirements as are mentioned in s. 5(4) aforesaid have been prescribed by Bell. Although not a relevant consideration here in that respect, it is also common ground that there is no technological fault or impediment that would militate against interconnection of Harding's equipment with Bell's telephone facilities. What arises out of Harding's action and what was challenged by the declinatory exception taken by Bell is not whether s. 5(4) imposes an obligation upon Bell to prescribe reasonable requirements but whether it is open to the Quebec Superior Court to decide that question as it may arise in Harding's action.

Counsel for Bell contended, having regard to s. 5(5) and s. 5(6) above, and having regard also to s. 45(1) of the *National Transportation Act*, R.S.C. 1970, c. N-17 and to Rules 2, 7 and 9 of the General Regulations of Bell, which have the force of law, that the jurisdiction of the Quebec Superior Court to decide whether s. 5(4) imposes an obligation on Bell to prescribe reasonable requirements is ousted. I approach this contention against the background of art. 31 of the Quebec *Code of Civil Procedure* which declares that

The Superior Court is the Court of original general jurisdiction; it hears in first instance every suit not assigned exclusively to another court by a specific provision of law.

Rules 2, 7 and 9 above-recited were passed in 1953, with Rule 7 being amended in 1958. They read as follows:

Rule 2.—(a) Telephone service and equipment offered by the Company's Tariffs, when provided by the Company, shall be furnished upon and subject to the terms and conditions contained in

(i) these Regulations,

(ii) all the applicable Tariffs of the Company, and

(iii) the written application (if any) to the extent that it is not inconsistent with these Regulations or said Tariffs,

all of which shall be binding on the Company and its customers.

. . .

Rule 7.—Except where otherwise stipulated in its Tariffs or by special agreement, the Company shall provide and install all poles, conduits, plant, wiring, circuits, instruments, equipment, fixtures and facilities required to furnish service and shall be and remain the owner thereof, and shall bear the expense of ordinary maintenance and repairs.

. . .

Rule 9.—The Company's equipment and wiring shall not be rearranged, disconnected, removed or otherwise interfered with, nor shall any equipment, apparatus, circuit or device which is not provided by the Company be connected with, physically associated with, attached to or used so as to operate in conjunction with the Company's equipment or wiring in any way, whether physically, by induction or otherwise, except where specified in the Tariffs of the Company or by special agreement. In the event of a breach of this Rule, the Company may rectify any prohibited arrangement or suspend and/or terminate the service as provided in Rule 35.

Bell relies on the provisions of Rules 7 and 9, in their references to the Tariffs of Bell and to special agreement, as indicating the modes, the only modes according to Bell, by which equipment other than that provided by Bell may be used or connected with the Bell system. However, these provisions do not subordinate s. 5(4), later enacted by 1967-68 (Can.), c. 48; and whatever possible conflict they raise as against s. 5(4) does not, by

that fact, oust the jurisdiction of the Quebec Superior Court to determine whether there is a legal obligation cast upon Bell under s. 5(4), if the Court decides that it must face that question in dealing with Harding's cause of action and claim to an injunction against Bell.

Nor do I see the relevance of s. 45(1) of the *National Transportation Act* to the question under discussion here. That provision is in these terms:

> **45.** (1) The Commission has full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested,
>
> (a) complaining that any company, or person, has failed to do any act, matter or thing required to be done by the *Railway Act*, or the Special Act, or by any regulation, order or direction made thereunder by the Governor in Council, the Minister, the Commission, or any inspecting engineer or other lawful authority, or that any company or person has done or is doing any act, matter or thing contrary to or in violation of the *Railway Act*, or the Special Act, or any such regulation, order, or direction, or
>
> (b) requesting the Commission to make any order, or give any direction, leave, sanction or approval, that by law it is authorized to make or give, or with respect to any matter, act or thing, that by the *Railway Act* or the Special Act, is prohibited, sanctioned or required to be done.

I do not doubt, as I have already indicated, that the meaning of s. 5(4) may arise in the course of a complaint against Bell to the Canadian Transport Commission. Two cases of complaints against Bell's refusal to permit the attachment to Bell's facilities of certain equipment other than that of Bell were urged upon this Court by counsel for Bell. *In re Ottawa Cablevision Ltd. et al. and Bell Canada*[4], is not as directly relevant here as is the second case, *In re Dr. Morton Shulman and Bell Canada*[5]. Although in both cases the Canadian Transport Commission concluded that it had no jurisdiction to hear the complaints, the *Ottawa*

[4] [1973] C.T.C. 522, leave to appeal refused [1974] 1 F.C. 373.

[5] [1975] C.T.C. 244.

Cablevision case turned largely on the issue of whether the Commission could require Bell under s. 5(4), to enter into a so-called individual pole attachment agreement which would permit the applicant cablevision firms, subject to reasonable rental charges, to attach their own transmission cables to poles or conduits owned by Bell. An agreement already in effect between Bell and the cablevision firms provided, *inter alia*, for the lease to the latter of coaxial cables owned by Bell, and the firms wished to have this agreement revised. Leave to appeal was sought from the Federal Court of Appeal from the Commission's ruling that s. 5 did not give it jurisdiction to grant the relief sought by the cablevision firms. Leave was refused in a majority decision, the Court being of the opinion, in the words of Jackett C.J., that (see [1974] 1 F.C. 373, at p. 378):

> ... there is no possible basis for reading section 5, or any part of it, as conferring on the Commission a jurisdiction to compel Bell to provide facilities that it refuses to provide or a jurisdiction to remake contracts between Bell and its customers under which Bell is to provide facilities.

The *Shulman* case was brought to the Commission by a complaint of Dr. Shulman that Bell had disconnected his office telephone because he had refused to remove an automatic dialing device which he had purchased and attached to that telephone. It was contended that this was unreasonable conduct by Bell, and an order was sought to permit the continued use of the device. The Commission concluded, however, that it had no jurisdiction in the absence of any prescription by Bell of requirements for the attachment to its facilities of equipment not provided by Bell. It said this (at p. 251 of [1975] C.T.C.):

> ... the Company has not published any requirement for the connection to its facilities of a customer-owned "Magicall" dialer. There is, therefore, no such requirement before the Commission which the Commission could judge to be reasonable or otherwise. The Company's decision not to establish such requirement is, in our

view, completely within the discretion of the Company under subsection (4) of Section 5 of its Special Act.

The conclusion of the Commission is not one that binds the Courts in the absence of a clear indication that it was for the Commission alone to determine the meaning of s. 5(4), not only for its purposes but also in respect of any other proceedings in which the meaning of s. 5(4) arises. There is no such indication. Indeed, the Commission is not itself the final authority on questions of law or jurisdiction arising out of proceedings taken before it. There is provision in the *National Transportation Act* for an appeal to the Federal Court of Appeal, with leave, on questions of law or of jurisdiction (see s. 64(2), as amended by R.S.C. 1970 (2nd Supp.), c. 10, item 32), with the possibility of a further appeal here. It is this Court which would finally settle any question of law raised by s. 5(4), whether it came through a Superior Court route or through a route leading from the Commission's decision.

I conclude, therefore, that the Quebec Superior Court has jurisdiction to decide whether s. 5(4) imposes a legal obligation upon Bell when the question arises in the course of judicial proceedings that are properly taken in that Court. That is this case.

Counsel for Bell urged upon us the statements of Davies J., as he then was, speaking for the majority in *Grand Trunk Railway v. Perrault*[6]. The case arose out of an action to compel the railway to establish a farm crossing for the benefit of the plaintiff. This Court held that exclusive jurisdiction to grant such relief lay with the Board of Railway Commissioners. That case does not touch the point in issue here.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Houle, Hurtubise & April, Montreal.

[6] (1905), 36 S.C.R. 671.

Solicitors for the respondent: Lazarre & Altschuler, Montreal.

Solicitors for the Attorney General of Quebec: Langlois, Drouin & Laflamme, Montreal.