

5, 1934



No. 76 of 1933.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

BETWEEN

WESTERN POWER COMPANY OF CANADA
LIMITED (Defendant) - - - - - *Appellant*

and

10 THE CORPORATION OF THE DISTRICT OF
MATSQUI (Plaintiff) - - - - - *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from a Judgment of the Court of Appeal for British Columbia dated June 6th 1933 dismissing by a majority (J.A. Macdonald, C.J.B.C., and M. A. Macdonald, J.A.; McPhillips J.A. dissenting) the Appellant's appeal from a Judgment of the Supreme Court of British Columbia (Mr. Justice Murphy) dated January 5th 1933. The Appellant appeals only from that part of the said Judgments which declared that the Appellant had committed a breach of contract in making certain charges for electrical current supplied.

20 2. The action was brought by the Respondent Municipality against the Appellant Company to enforce alleged rights claimed by the Respondent in virtue of an agreement dated March 29th, 1913, made between the Respondent and The Western Canada Power Company Limited. The Appellant is successor in interest of the Western Canada Power Company Limited. pp. 85-91.

3. By this agreement the Municipality gave to the Power Company, rights, expressly declared not to be exclusive, to supply electric energy within the limits of the municipality together with the powers incidental to such supply, and the Company inter alia, agreed in clause 11 of the Agreement:— p. 91, ll. 1-7. p. 88.

30 "That the Company will not make any charge for the supplying of electric energy to the Corporation, or any of the

APPELLANTS CASE.

inhabitants of the Municipality greater than that paid for similar service by any municipality or the inhabitants thereof other than a city, and will not in any way discriminate against the Corporation or residents of the Municipality; And the Company will free of charge to the customer, make the necessary connections and instal electric service to anyone requiring service."

4. The questions for decision in this appeal are mainly of construction. The most important are:—

(A) Whether the agreement not to make a charge for the supply of electric energy greater "than that paid for similar services by any municipality" etc. and "not to discriminate against the Corporation and its inhabitants" should be construed as the Appellant contends as imposing a duty not to charge within the Respondent Municipality prices greater than those charged by the Appellant in other municipalities or, as the Respondent contends, as imposing a duty on the Appellant to regulate its prices according to those charged, with or without its knowledge, by other companies supplying other Municipalities outside the sphere of the Appellant's operations. 10

(B) Whether "similar service" in this agreement means as the Appellant contends, supplying under similar conditions or, as the Respondent contends, whether all considerations of density of population, load, locality, costs and difficulty of supply are to be ignored and the word "similar" to be deprived of any effective meaning. 20

(C) Whether the words "similar service" in a contract for the supply of electrical energy have the technical or customary meaning proved, it is submitted, to attach to them by the uncontradicted evidence given on behalf of the Appellant.

p. 2.

5. The Statement of Claim alleged inter alia a breach of the above clause of the agreement and asked for a declaration "that the Defendant (Appellant) is bound to supply electric energy to the Plaintiff (Respondent) and to the inhabitants of the Municipality of Matsqui at no greater charge than that paid by the inhabitants of the Municipality of Burnaby for similar service."

pp. 51-55.

p. 81.

p. 62.

6. Mr. Justice Murphy found for the Respondent and made a declaration accordingly and his judgment was upheld by the Court of Appeal, Mr. Justice McPhillips dissenting. The Court of Appeal also dismissed the Respondent's cross appeal or "contention" which asked for an account over a period of six years of alleged over payments and payment of the amount so ascertained. 40

7. The evidence at the trial showed that the Appellant had charged the Municipality of Matsqui and its inhabitants at the rate of six cents per kilowat hour, and the British Columbia Electric Railway Company Limited charged the Municipality of Burnaby and its inhabitants at the rate of five cents per kilowat hour for the supplying of electric energy for lighting purposes. No evidence was given as to the conditions of supply in Burnaby other than the mere statement of the price charged.

p. 16,
ll. 32-43.
p. 15,
ll. 17-18.

8. The defence of the Appellant, so far as now material was :—

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First : That the Appellant was not bound by the agreement not to make higher charges for its services in Matsqui than those charged by another company, e.g. the British Columbia Electric Railway Company, in Burnaby, for similar services.

Second : That the two services—the supplying of electric energy in Matsqui, and the supplying of such energy in Burnaby, were not similar services.

9. It is submitted that on both grounds the Appellant is entitled to have the Judgment set aside.

FIRST : AS TO CHARGES BY A DIFFERENT COMPANY IN ANOTHER MUNICIPALITY.

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10. (1) The Appellant has no customers in Burnaby. That Municipality is served by the British Columbia Electric Railway Company Limited.

p. 42, l. 25,
ll. 37-44.

(2) It is submitted that the Appellant was only bound by the agreement not to charge its customers in Matsqui more than was paid by *its customers* in any other municipality. It did not undertake to regulate its charges by relation to those of any other company operating under different conditions elsewhere.

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(3) The Respondent has contended that the language of the agreement is complete and its meaning clear so that no words can be added.

It is submitted, however, that some words must be read into the paragraph. It must read either “than that paid to *the Company* for similar service,” or “than that paid to *any company or individual* for similar service.”

If the latter meaning is given, a further limitation must be considered. The Courts in British Columbia have added this further limitation—“to any company in British Columbia.” Why should it be limited to British Columbia ? The reasons given by their Lordships in the courts below are

Murphy, J.,
p. 52,
ll. 38-43.
Macdonald,
J.A., p. 79,
l. 45, p. 80,
ll. 1, 2.

that the contract is to be performed in British Columbia and that the Courts have jurisdiction in British Columbia. It is submitted that these reasons are fallacious. The contract was to be performed in a limited area of British Columbia. If extended to all British Columbia, why not to all Canada? If to Canada, why not elsewhere? As to the Courts, the contracting parties were not thinking in terms of the territorial jurisdiction of the Courts; indeed, as an action might have been begun in a County Court upon this contract, this reason would equally support a limitation to the statutory district of the particular County Court.

Mr. Justice Murphy gives the added reason that the scope of the agreement is confined to district and city municipalities and that the Court, while taking judicial notice of the existence of such in British Columbia cannot extend that notice outside the Province. There are several answers to this:—

p. 52,
ll. 38-43.

One: Other places might have such municipalities and so the Appellant always would be open to the menace of this possibility;

Two: The Courts of British Columbia shall take judicial notice of the laws of any part of Canada and of the Imperial Parliament.

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See Evidence Act 1924 R.S.B.C. Ch. 82, Sec. 27.

There are city and district municipalities in various parts of Canada.

Three: There is nothing said in the agreement about district municipalities. As city municipalities are excluded, their existence is not necessary for the application of the agreement.

(4) It is submitted that any territorial limitation of the agreement must be made only on the ground of *reasonableness*. It would be unreasonable to interpret the agreement that the Power Company undertook to meet the rates paid by the inhabitants of a municipality in any part of the world to any company.

Once it is conceded that limitations are to be imposed in the agreement on the ground of reasonableness, it follows that all reasonable limitations are to be so imposed.

It is submitted that it is unreasonable to infer that the Power Company bound itself not only to meet competition but also to meet any prices paid in any part of British Columbia to any company or individual by any company operating under wholly different conditions.

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(5) It is submitted that the purpose and intent of the agreement is two-fold :

(A) To prevent the Power Company having a monopoly in the municipality—to make it subject to competition.

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This was provided for by the stipulation that the franchise was not exclusive. Any other company is free to enter the field in competition with the Appellant and therefore to compete in the matter of price with the Appellant. To go farther and require the Appellant to meet other companies' prices in other districts to other customers under different conditions is not requiring it to meet competition. It is asking it to imperil its existence.

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Mr. Justice Macdonald in his Judgment in the Court of Appeal suggests the Appellant in making the agreement was looking forward to a time when Matsqui would be a populous municipality. With this clause meaning what the Respondent contends, the more customers, the greater the peril. A small company operating with cheap water power in some small district in British Columbia might, under special conditions, supply electric energy below the cost of production by the Appellant. Some large company might be supplying several municipalities and wishing to eliminate the Appellant, or acquire its business, might decide to supply to one group of its customers electric energy at cost, or even below cost. The other business of such company would enable it to do this without a net loss, but the effect on the Appellant would be disastrous.

(B) To prevent any form of discrimination.

This was met, so far as rates were concerned, by the agreement of the Power Company to treat all its customers alike.

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(6) It is submitted that it is unreasonable and contrary to the intention of the parties to give a wider interpretation to the agreement one which would leave the Appellant at the mercy, not of competitors in Matsqui or within the area of its operations, but of any possible operating company existing anywhere or hereafter to spring up.

(7) The fact that the British Columbia Power Company owns the shares of the British Columbia Electric Railway Company Limited and also the shares of a company which in turn owns the shares of a Company which owns the shares of the Appellant Company, though insisted upon by the Respondent cannot it is submitted, affect this question.

p. 45,
li. 18-31.

Salomon v. Salomon 1897 A.C. 22 66 L.J. Ch. 35.

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SECOND: ARE THE SERVICES IN THE TWO MUNICIPALITIES SIMILAR ?

p. 30,
ll. 22-26.
pp. 26-28.
p. 30.
p. 74,
ll. 33-39.

11. (1) The Appellant's submission is that the services in Matsqui and in Burnaby are not similar. Matsqui is a scattered rural municipality. Burnaby is a compact urban district. The conditions in the two municipalities are not comparable. It would be impossible for any company to supply electric energy as cheaply in Matsqui as could be done in Burnaby. The distribution cost in Matsqui was two and one half times as much per customer as in Burnaby. The evidence as to the difference between the two is conclusive, as indeed Mr. Justice M. A. Macdonald one of the majority Judges found in the Court of Appeal.

A comparison of the respective densities of population, a matter 10 intimately bound up with the conditions of electric supply, may be here given—

p. 15, l. 40
to p. 16, l. 1.
p. 17,
ll. 31-33.

	Area. Acres.	Population.	Approximate Density per acre.
Burnaby ..	24,320	26,000	1.07
Matsqui ..	54,542	7,200	.18

Moreover, in Matsqui the Appellant undertook, free of charge, to make all necessary connections and instal electric service to any one requiring service and it does not appear that such a condition existed in Burnaby.

(2) It is submitted that in determining the similarity of service in the two Municipalities it is necessary to compare not merely the product 20 received, but the efforts necessary for its manufacture and delivery. The service in supplying a Kilowat Hour of light to a resident of Matsqui is not similar to the service in supplying an equivalent measurement of light to a resident in Burnaby. To supply both at the same rate would be discrimination in favour of Matsqui.

(3) To constitute similarity of service there must, of course, be corresponding amounts and quality of electric energy supplied in each case, but this alone is not the measure of the similarity. That would look at the service only from one side. Service involves the effort put forth as well as the product of the effort. 30

(4) The meaning of the word "service" may be ascertained in three different ways :—

- (A) The dictionary meaning ;
- (B) The meaning indicated by the agreement itself ;
- (C) The use of the word as a technical term.

(5) Consideration of these headings indicates that each supports the submission of the Appellant :—

(A) The dictionary meaning :—

MURRAY'S DICTIONARY.

- I. The condition of being a servant.
- II. The work or duty of a servant.
Performance of the duties of a servant ;
Work done in obedience to and for the benefit of a master ;
And act of serving ; a duty or piece of work done for a master.
- III. In religious uses : The serving God by obedience piety and good works.
- 10 IV. Help, benefit, advantage, use.
The action of serving, helping, or benefiting ; conduct, tending to the welfare or advantage of another.
- V. Waiting at table, supply of food ;
Hence supply of commodities, etc.
The act of waiting at table or dishing up food ; the manner in which this is done.
That which is served up or placed on the table for a meal, the food set before a person ;
20 ~~An allowance or portion of food—(now rare.)~~
The supply or laying on of gas, water etc. through pipes from a reservoir ; the apparatus of pipes, etc., by which this is done.
Provision (of labour, material, appliances etc.) for the carrying out of some work for which there is a constant public demand.

It will be seen that in each sense in which the word service is used the underlying meaning is the act of doing something—the effort put forth.

30 In Clause 11 of the agreement the concluding part of the paragraph now under consideration uses the word “ service ” in a sense which clearly relates to the apparatus and equipment by which electric energy is supplied. This is one of the meanings given the word in the dictionary above quoted. It is unlikely that the word would be used previously in the same paragraph in a conflicting sense.

(B) The meaning as indicated by the agreement itself :—

Section 11 furnishes its own definition of service.

The service is “ the supplying of electric energy,” and the comparison as to similar services is as to the two acts of supplying this energy. The paragraph is elliptical. Written in full with the added words in italics, it would read, it is submitted :—

40 “ The company will not make any charge for the *service of* supplying of electric energy to the Corporation . . . greater than paid for similar service *in the supplying of electric energy* by any municipality . . . ”

The Act of supplying electric energy involves several obvious factors—generation, transmission, distribution.

When it is said that it costs more to supply energy in a country district than in an urban district, what is meant is that more effort is required. Cost is merely the measurement of the effort.

The evidence indicates that electric energy which could be supplied at a profit in Burnaby for a given price could be supplied in Matsqui for the same price only at a substantial loss.

pp. 26 to 28,
p. 30.

It is submitted that the services are not similar unless the conditions in the two districts to be compared are such that in each case the costs of generation, transmission and distribution are practically similar.

(c) The technical meaning :—

In considering this question the Appellant is assisted by the evidence of the electrical engineer witnesses, who testified as to the technical meaning of “service” in the electrical industry. They said: In public utilities circles, *electric service has always meant the act of providing facilities and supplying electric energy.*

p. 25,
ll. 33-37.
p. 29, l. 31,
to p. 30, l. 2.

These engineers also stated that the services were not similar in the two Municipalities.

p. 26,
ll. 18-41.
p. 30,
ll. 6-41.

It is submitted that the learned Judge of the Supreme Court, and the majority of the Judges of the Court of Appeal, were in error in their conclusions that the evidence was not adequate to establish that the word “service” had a technical meaning which determined its use in the agreement.

pp. 24 to 26.
pp. 28 to 30.

An examination of the evidence of the two experienced engineers, Gray and Walker, shows that in the public utilities business the word ~~service universally and always has had the meaning assigned to it by the Appellant.~~ This evidence is uncontradicted and the witnesses were not cross-examined.

p. 87,
ll. 28-43.

It is also to be noted that the agreement makes repeated reference to the “Board of Works” of the Municipality, so that it is fair to assume that the Municipality was acting under the technical advice of this Department at the time the agreement was made.

(7) Reviewing generally the reasons of the Courts below it is submitted their Lordships erred :—

p. 54, ll. 5-23.
p. 77,
ll. 13-35.

(A) In thinking that a determination of the differences in the services as contended for by the Appellant would involve such complicated investigations as to make the construction unreasonable. Mr. Justice Macdonald thought it would be inserting a “joker” into the contract.

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It is submitted that this viewpoint exaggerates the difficulties. The pleadings set forth in detail what differences may be involved

in service. For practical purposes these fall into different groupings of Municipalities without difficulty. The only real matters needing to be considered are those detailed by the engineers, Gray and Walker, in their evidence. These matters are obvious and easily determined.

See *Metropolitan Electric Supply Co. v. Ginder* 1901 2 Ch. 799.

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In the English Statute, in this case considered, provision was made against undue preference in supplying customers with electric energy and it was provided that every customer in a given area was entitled to a supply on the same terms on which any other person in the area "is entitled under *similar circumstances* to a corresponding supply." The construction there put on the words "Similar circumstances" is, it is contended, equally applicable to the words "Similar Service" in the present case. Mr. Justice Buckley pointed out that the differences which made the circumstances different were a matter of degree, but found no difficulty in ascertaining when the circumstances became dissimilar.

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(B) Their Lordships were in error in thinking that the service was to be looked at only from the standpoint of the consumer: That in the words of Mr. Justice Murphy: "It is what the Plaintiff Corporation and its inhabitants *are to get*."

p. 54,
ll. 30-43.

They are particularly in error in thinking that the purposes for which they use the electric energy whether for light or heat or power determines the nature of the service. As already stated, the agreement defines the service. It is the supplying of electric energy. Their Lordships have the Appellant submits confused services with purposes.

Murphy, J.,
p. 54, l. 37.

Macdonald,
J.A., p. 74
et seq.

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They refer to the language "*lighting and power service*" as indicative that each is a separate service and from this conclude that these are the only differences in service contemplated by the agreement. The language quoted, however, supports neither conclusion. A lighting and power service—the word service being in the singular—groups the two as a single service. It may be conceded that supplying electric energy to be used for lighting purposes may be a different service than supplying energy for heat or power purposes. The difference, however, does not arise because of the language in the agreement or because of any difference in the product received by the consumer. The services are not similar only because of the difference in the effort in supplying the energy. The difference is in the *quantity supplied*, and is merely an instance of the fact that mass production reduces the cost. Wholesale prices either to the individual

Murphy, J.,
p. 55, l. 27.

p. 54,
ll. 23-30.

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or to the community are less than retail prices, not because the product is different, but because the effort is different.

A service of electric energy for the purpose of light and power may be abbreviated into the expression "a light and power service." In the same way a light in the room may be referred to as a light service and a heater in the room as a heat service. In fact the service is the same in each case. It is the incandescent lamp supplied by the customer which makes the light, and the electric stove the heat. *The energy which the customer gets from the Power Company is the same in each case:* it is his use of it after he has taken delivery from the company which makes the difference. A difference after delivery is not in the service. If the light and the heater were in the same class in the amount of energy they consume, the rate would be the same. If, however, electric energy were used for heating a large building, a lesser rate would be charged—not because the energy supplied was different, but because the greater consumption reduced the cost of supplying. The unit to the customer—"what he is to get"—is not different. The difference is in the unit of effort in supplying. This distinction in services is therefore based on the difference in the efforts in generation, transmission and distribution, and is determined by the quantity supplied in each case, it is a question of mass production and is an illustration of the principle for which the Appellant contends. Light is charged a higher rate than power because the individual customer takes less electrical energy and the unit cost is higher. On the same principle the unit cost of light in Matsqui is higher than in Burnaby. The services are dissimilar. 10

Services may be different either to the individual or to the group of individuals comprising a Municipality. As in each case the commodity received is the same—"electric energy"—the difference must be in the conditions under which it is supplied, or the effort required to perform the service. The quantity supplied affects the cost which is the measure of the effort in the case of either the individual or the group. The principle is the same in both cases. If one individual takes a small amount of energy for a few lights in a house, he is requiring a different service from one who requires sufficient lights to illuminate a landing field for aviation—not because of the difference in what he gets (both get electric energy)—or how he uses it—(both are for lights)—but because of the quantities which change the unit of effort. What applies as between individuals applies in a greater degree as between the Municipalities which differ as do Matsqui and Burnaby. 30 40

12. The Appellant therefore submits that the part of the Judgment appealed from should be reversed for the following, among other

REASONS.

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- (1) BECAUSE the agreement, upon a proper construction, does not bind the Appellant to supply the Municipality of Matsqui and its customers in such municipality with electrical energy at the same rate as that charged by another undertaker, namely the British Columbia Electric Railway Company Ltd. to customers of that company in Burnaby.
- (2) BECAUSE upon a proper construction of the Agreement, the Appellant is only bound not to charge the said Municipality and inhabitants rates greater than those charged by the Appellant for similar services to other Municipalities and their inhabitants.
- (3) BECAUSE " Similar Services " in the said agreement means and includes services rendered by the Appellant.
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- (4) BECAUSE the services in the two Municipalities Matsqui and Burnaby are not similar but are dissimilar: and because there was no evidence or no sufficient evidence of similarity.
- (5) BECAUSE the comparison of services in the two municipalities involves a consideration of the whole circumstances of supply in each.
- (6) BECAUSE the use made of electrical energy supplied has no bearing upon the question of similarity of service.
- (7) BECAUSE the words " similar services " should be construed in the technical or customary sense proved to attach to them by the Appellant's evidence.
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- (8) BECAUSE the judgments of the learned trial Judge and of the majority of the Court of Appeal are wrong and should be reversed and because the judgment of Mr. Justice McPhillips in the Court of Appeal is right for the reason therein given.

J. W. DE B. FARRIS.

WILFRID BARTON.

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Case for the Appellant.

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