

5, 1934

No. 76 of 1933.

# In the Privy Council.

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## ON APPEAL

FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

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BETWEEN

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

AND

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

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## Case for the Respondent.

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RECORD

1. This is an appeal by the Defendant in the action from a judgment p. 81.  
of the Court of Appeal for British Columbia, dated the 6th of June 1933,  
affirming, with one dissentient, the judgment of the Supreme Court of  
British Columbia, dated the 17th of February 1933, in the Respondent's p. 56.  
favour.

2. The Respondent in this action is the Municipal Corporation p. 1.  
of the District of Matsqui, within the Province of British Columbia, and  
the action was brought to enforce certain of the terms of a contract made  
20 by the Respondent with the Appellants' predecessor-in-title.

3. The contract in question is dated the 29th of March 1913 and p. 86.  
was made between the Respondent and the Western Canada Power Company  
Limited whereby the Respondent granted to that company the privilege,  
for a period of forty years, of selling electrical energy for all purposes  
within the municipality, and sundry accessory privileges, such as that  
of erecting steel towers and lines of wire upon and along the municipal  
highways for the purpose, amongst others, of transmitting energy through  
and beyond the municipality, in return for which the company assumed  
30 disregarded by the Appellant.

RESPONDENT'S CASE.

p. 3, l. 30.  
p. 7, l. 32.

4. It is admitted that all the rights and obligations of the Western Canada Power Company Limited were assigned to the Appellant by a contract dated the 1st November, 1916.

p. 88, l. 37.

5. The obligations which the Respondent alleged, and the judgments have found, were broken by the Appellant are those contained in paragraph 11 of the contract between them, which contains a covenant by the Power Company that "the Company will not make any charge for the supplying of electric energy to the Corporation" (the Respondent) "or any of the 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"—within certain local limits. 10

6. It may be convenient to deal first with the latter part of this covenant.

p. 100.  
p. 40, l. 20.  
p. 13, l. 46.

7. It was proved that the Appellant has refused to comply with the request of a man called Beharrell, living within the local limits mentioned in Clause 11 of the Contract, who required service and had asked for the necessary connections. 20

8. The Appellant's contention appears to be that Beharrell could not be described as a "customer," until the necessary connections had been made and he had taken energy from the Appellant.

p. 55, l. 40.  
p. 61, l. 8.  
p. 80, l. 3.

9. The Respondent's contention is that so to read the covenant would entirely nullify its effect since no one could ever qualify under it, and that the word "customer," in the phrase "free of charge to the customer" must be read as an anticipatory designation, conferred upon "anyone requiring service," and thereby being entitled upon demand, to become a customer. This contention was accepted in all the judgments, except that of Mr. Justice McPhillips who does not appear to have dealt with this subject of complaint. 30

10. The other ground of complaint by the Respondent was that the Appellant had in fact made charges for the supply of energy to the Municipality and its inhabitants greater than that paid for similar service by a municipality and the inhabitants thereof other than a city—namely the Municipality of Burnaby.

Ex. 5.  
p. 114.  
p. 46, l. 14.

11. It was proved that the rates charged to the Respondent and its inhabitants were greater than those paid by the Municipality of Burnaby and its inhabitants and that the Municipality of Burnaby was not a city.

12. The Appellant's contentions on the meaning of this provision in Clause 11 were three in number :—

(A) That the words "service" and "similar service" had distinct technical or trade meanings, namely (as to the word "service") "the effort and expense made and incurred in supplying electrical energy, including in particular the cost of generation, transmission and distribution, and (as to the words "similar service") a "service in which there is a substantial similarity in the service" as so defined.

10 (B) That even if the alleged technical or trade meanings were not established, the words "service" and "similar service" still had on the true construction of the contract, the meanings stated in (A).

(C) That paragraph 11 of the contract ought to be read as if the words "to the Western Canada Power Company Limited" had been inserted after the word "paid."

13. The Appellant in its Defence as delivered did not set up any technical or trade meaning of the word "service" or the words "similar service" and it was not until the trial of the action had proceeded for some time before Mr. Justice Gregory that the Appellant applied to amend its Defence. The amendments ultimately allowed are underlined in red ink in the Defence set out in the Record.

14. It is submitted, however, that the evidence eventually adduced, so far from proving the Appellant's contention as to the existence of the alleged technical or trade meanings, was not even admissible.

15. The Respondent submits that the only evidence properly admissible would have been that of witnesses who could depose to the existence of an usage in the trade of selling electrical energy in British Columbia in and previous to the year 1913, the date of the contract; that by virtue of such usage the word "service" had acquired the meaning contended for by the Appellant; and that it was so certain and universally recognised that it must have been taken to have been known to the Respondent in 1913.

16. The Appellant called only two witnesses on this subject. The first one, Mr. Gray, was a consulting engineer, practising in the United States, without any experience in the Province of British Columbia. The second one, Mr. Walker, did not come to this Province until two years after the contract. Neither of these witnesses gave any evidence of the character required. The only question as to the existence of the alleged technical or trade meanings put to these witnesses was "has the word 'service' in the electrical industry a distinct trade and technical meaning"? Mr. Gray

p. 29,  
ll. 31-37.

replied :—“ in public utilities circles ‘ service ’ means the act of supplying some general demand ”—“ Electric service would mean the Act of providing facilities and supplying electric energy. That is what we generally understand is electric service.” Mr. Walker said :—“ I would define the meaning of ‘ service ’ as the act of furnishing certain facilities in the electrical business as you supply in the railway or telephone business. In other words, you are supplying a general service or demand.” Q. “ Has it always had that meaning to your knowledge ? ”—A. “ To the best of my knowledge.”

p. 53, l. 8.  
p. 79, l. 44.

17. The Respondent submits that this evidence was inadmissible and that it was in any event quite insufficient to establish the alleged technical or trade meanings, for the reasons given by Mr. Justice Murphy and Mr. Justice M. A. Macdonald. 10

p. 53, l. 39.  
p. 75, l. 8.

18. With regard to the Appellant’s contention as to the meaning of the word “ service ” based on the construction of the contract itself, the Respondent relies on the reasons for rejecting it given by the same two learned judges.

p. 88, l. 39.

19. The Appellant alleged that it did not supply electrical energy to the Municipality of Burnaby or its inhabitants, and its third contention on the construction of paragraph 11 of the contract means in effect that the words “ any Municipality ” mean “ any Municipality supplied by the Appellant.” This construction the Appellant bases on the supposed necessity of introducing some limitation, the Appellant suggesting that otherwise the words would mean “ paid for similar service by any municipality ” in the whole world. But this is to confuse a limitation of the payee with a local limitation ; the limitation of locality is inherent in the facts that this was a contract made in British Columbia, and to be performed in the Province ; no words of limitation as to locality are required, because the Province is the only sphere within which the contract operates. Moreover, the language of the byelaw and the contract, differentiating between district and city municipalities, recalls the Provincial Statute under which municipalities are incorporated and which likewise distinguishes municipalities as cities or districts (R.S.B.C. 1911, c. 172, s. 3, s. 4). The Respondent relies for an answer to this contention of the Appellant on the reasoning of Mr. Justice Murphy, and Mr. Justice M. A. Macdonald. 20

p. 85, l. 19.  
p. 88, l. 40.  
p. 52, l. 24.  
p. 79, l. 29.

20. The Respondent submits that the words “ any Municipality ” mean “ any Municipality in British Columbia ” and are not confined to Municipalities supplied by the Appellant. The Respondent alternatively submits that, even if the words are so confined, the Appellant does in fact supply electrical energy to the Municipality of Burnaby and its inhabitants. The Appellant, while retaining its separate legal identity, has become one of a group of companies, owned and controlled by the 40

Ex. 9.  
p. 45, l. 40.

British Columbia Power Corporation Limited, which are all operated as one system. Under a contract made between the Appellant and another company of the group, the British Columbia Electric Railway Company Limited, all power generated either by the Appellant or the other company goes into a common network, and the individual mass of power is used indiscriminately in supplying both the Respondent and its inhabitants and Burnaby and its inhabitants: bills identical in form are sent to the consumers in Matsqui District Corporation and Burnaby District, and in such bills the consumer is stated to be indebted "to the British Columbia Electric Railway Co. Limited and British Columbia Electric Power & Gas Co. Ltd. or Western Power Co. of Canada Limited."

21. The Appellant, in addition to its other defences, alleged that by a contract dated the 23rd of September 1921 and made between the Respondent and the Appellant, the original contract was altered by striking out paragraph 11, thereby relieving the Appellant of the obligation to charge no higher rate than that paid elsewhere. But it was conceded by the Appellant in the course of the trial that this second contract was inoperative because the requirements of the relevant section, namely s. 34 of the Statutes of British Columbia 1916 c. 44 had not been complied with.

22. The Respondent, therefore, submits that the judgment appealed from is right and that this Appeal ought to be dismissed for the following (among other)

### REASONS.

- (A) BECAUSE the Appellant was charging for the supply of electrical energy to the Respondent and its inhabitants a rate greater than that paid for similar service by another district municipality and its inhabitants, namely Burnaby.
- (B) BECAUSE on the facts the Appellant was supplying electrical energy to the Municipality of Burnaby and its inhabitants.
- (C) BECAUSE the Appellant was bound to comply with the request of L. T. Beharrell.
- (D) BECAUSE the Judgments delivered by Mr. Justice Murphy, concurred in by the Chief Justice of British Columbia, and by Mr. Justice M. A. Macdonald are right.

D. N. PRITT,

C. W. MEASOR.

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**Case for the Respondent.**

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**WHITE & LEONARD,**  
Bank Buildings,  
Ludgate Circus, E.C.4.  
*Respondent's Solicitors.*