THE CITY OF HALIFAX (DEFENDANT)....APPELLANT;

AND

DIANA W. READ (PLAINTIFF).....RESPONDENT.

1928

*May 7.
*Oct. 2.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Municipal corporations—Water supply to dwelling house—Right to impose special rate—Halifax City Charter

The City of Halifax, in 1919, at the request of one W., laid a water main on a street, and connected it with W.'s houses, first taking from W. an agreement to pay $269.45 yearly, as a special rate. This was in accordance with the City's policy, to be satisfied, before laying a main on any street, that there should be a sufficient revenue from the persons taking water therefrom, to defray interest on the cost of the extension, and to require from any person requesting an extension where the number of consumers was insufficient to produce at the usual rates such revenue, an agreement to pay a rate equal to such

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

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revenue, such rate to be proportionately reduced as other consumers became connected with the new main. From the year 1920 the City supplied meters for all water services, and all charges were meter rates. In 1922, when the said main was serving four houses, the plaintiff built a house on the street and applied for water supply. The City required an agreement from plaintiff to pay a special rate of $53.89, being one-fifth of the said sum of $269.45. Its council passed a resolution, and, later, a by-law, requiring that rate from each house on the street, to be proportionately reduced as additional houses were built. Plaintiff refused to make the agreement, and claimed the right to a water supply at the rate in general application throughout the city.

Held, that the special rate imposed was valid, and plaintiff was not entitled to water supply without entering into an agreement to pay it. The *Halifax City Charter,* 1914, especially ss. 671, 525 (1), 676 (1), 499 (1), 492, and c. 54 of 1922 (N.S.), s. 9, considered.

Att. Gen. of Canada v. *City of Toronto,* 23 Can. S.C.R. 514, and *City of Hamilton* v. *Hamilton Distillery Co.,* 38 Can. S.C.R. 239, discussed and explained. The references to "uniform" rates in the *Toronto case* had regard to the essential of uniformity, not in the sense of precise arithmetical equality, but as excluding arbitrary or unjust discrimination; and were not meant to extend the requirements of the common law, by which a by-law must be *intra vires,* certain, consistent with the statutes and the general law, and reasonable. It cannot be said, as a principle of law, that a municipal ordinance, which complies with these essentials, must operate uniformly in every part of the municipal area notwithstanding that the diversity of circumstances requires different considerations for special localities.

Judgment of the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 377) reversed.

Lamont J. held, differing in this respect from the majority of the Court, that the plaintiff should be required to pay, not a flat house rate, but only her proportionate share, as determined by the meters in the houses on the extension, of the said sum of $269.45.

APPEAL by the defendant, by leave granted by the Supreme Court of Nova Scotia, from the judgment of that Court (1) whereby, upon a case stated for the opinion of the Court, under Order XXXIII of the Rules of Court, and referred, by consent, direct to the Court *en banc* for decision, it was held that the plaintiff was entitled to the supply of water to her dwelling house, no. 53 Oakland Road, in the City of Halifax, without entering into an agreement to pay a rate of $53.89 per year, and that the rate imposed by resolution of Council of July 19, 1922, and the by-law of September 14, 1922, was invalid; and that the plaintiff was entitled to the supply of water subject to the ordinary water rates.

(1) (1927) 59 N.S. Rep. 377.

The material facts of the case and the questions in issue are sufficiently stated in the judgments now reported. The appeal was allowed with costs, Lamont J. dissenting in part.

F. H. Bell K.C. for the appellant.

J. E. Read K.C. and *R. M. Fielding* for the respondent.

The judgment of the majority of the court (Duff, Mignault, Newcombe and Smith JJ.) was delivered by

NEWCOMBE J.—The defendant, the City of Halifax, appeals from the judgment of the Supreme Court of Nova Scotia, pronounced in a stated case, wherein two questions concerning water rates were submitted for the opinion of the court, and adjudicated in favour of the respondent.

In 1922 the plaintiff built a dwelling-house at no. 53 Oakland Road in the City of Halifax; the building was commenced in June and completed by 1st September; the plaintiff applied to the City for water supply, which the City was willing to furnish, stipulating, however, that the plaintiff should pay an annual rate of $53.89, for which a bond or agreement was required. The plaintiff would not agree. It is said in the stated case that

upon the completion of the house the defendant refused to turn the water on, but undertakings were arranged between the parties on September 7, and the water was turned on in accordance therewith. All claims for damages were abandoned by the plaintiff, and the action was limited to a claim for a declaration.

The questions submitted are these:

1. Whether the plaintiff was entitled to the supply of water to the dwelling-house number 53 Oakland Road without entering into an agreement to pay a rate of $53.89 per year.

2. Whether the rate imposed by the resolution of Council of 19th July, 1922, and the By-law of September 14th, 1922, was valid.

The facts which led to the dispute are set forth in paragraphs 6 and 7 of the case, as follows:

6. The water system of the Defendant is not in any way connected with or dependent upon the rates and taxes of the City, but is a separate system under the control of the Council of the City, acting by the Committee on Works, and in particular the streets in which main water pipes shall be laid are entirely in the discretion of the said Committee and Council as aforesaid. For many years it has been the policy of the Defendant to be satisfied before laying a main on any Street that there will be a sufficient revenue from the persons taking a supply of water there-

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from to defray the interest on the cost of such extension, and to require of any person requesting an extension on a street upon which the number of consumers was insufficient to produce at the usual rates such revenue, a bond or agreement to pay a rate equal to such revenue, such rate to be proportionately reduced as other consumers become connected with the new main.

7. Previous to May, 1919, no water main had been laid on Oakland Road. On that date Mr. T. J. Walsh applied for a main to be laid to houses which he proposed building on that street. The Engineer reported that the cost of laying the main would be $3,325 and the interest $305.16, and recommended that the main should be laid on, Mr. Walsh entering into an agreement to pay that amount yearly as a special rate. This was approved by the Board of Control. Mr. Walsh executed a bond for the said agreement, and the main was laid, but the Plaintiff does not admit that the rate therein was a special rate. Subsequently it was found that the actual cost of the extension was less than had been estimated and the yearly interest charge was $269.45, which rate was paid by Mr. Walsh in respect to the houses constructed by him.

In July, 1922, at the date of Plaintiff's application there were on Oakland Road four houses in addition to the one proposed to be built by Plaintiff and the Engineer on 19th July recommended the fixing of a special rate of $53.89 for each house. This report was adopted by Council 19th July, 1922.

The learned Chief Justice, who gave the judgment of the Court, prefaced his judgment with these words:

The water system of the city is under the control of the City Council acting by a committee known as the Committee on Works and it is admitted that the Council is not obliged to lay down water pipes on any street of the city. Whether or not water pipes should be so laid down on any particular street was entirely in the discretion of the Council and for many years it had been the policy of the city not to extend its water system to a new street unless satisfied that there would be a sufficient revenue from residents taking water to defray the interest on the cost of laying down the water pipes.

This statement is, of course, consistent with paragraph 6 above quoted, and, together with the admissions, is out of question. The Committee on Works has taken the place of the Board of Control.

It is enacted by s. 671 of the *Halifax City Charter*, 1914, that:

671. (1) The owner of any dwelling-house situated on any portion of a street through which a main pipe is laid, shall be entitled, on application to the Board of Control, to a service pipe one-half inch in diameter to such house.

(2) Such service pipe shall be laid at the expense of the City from the main pipe to the line of the street through the wall of the house, if the wall is on the line of the street.

(3) The cost of laying such service pipe beyond the line of the street shall be borne by the applicant.

This section regulates the mode and capacity of the connection with the source of supply, and the incidence of the

cost, where the dwelling-house is situated " on any portion of a street through which a main pipe is laid." Whether a main pipe is laid through Oakland Road does not appear, although it is shown by par. 7 of the case that, subsequent to May, 1919, pursuant to agreement with Mr. Walsh, an extension of the city water mains was laid to the houses which he constructed, or to the sites where these houses were to be built, and presumably they were between Cartaret Street and Studley Street, which is the next crossing to the westward of Cartaret, because it is provided by the City by-law of 14th September, 1922, entitled " A By-law of the City of Halifax to make a special rate for water on a portion of Oakland Road," that:

> Each property fronting on Oakland Road on which a house is erected between Cartaret street and Studley street shall be charged a water rate for water supplied it of $53.89 per annum the same being the amount required at present to produce six per cent. on the cost of the extension of the water service in that district, the same to be proportionately reduced as additional houses are erected on the said portion of the said street.

This by-law applies the practice, of long standing, which is alluded to in par. 6 of the case; but that practice is not shown to have been previously sanctioned by by-law, except in so far as the facts narrated in par. 6 may be considered as evidence of a by-law.

The power of the City to make such a by-law is in question. It depends upon the inherent powers of the corporation, and upon subs. 1 of s. 525, and subs. 1 of s. 676, by which it is enacted that:

> 525. (1) The Board of Control, from time to time by By-law to be approved by the Council, may:
>
> (*a*) Prescribe rates payable in respect to water other than the rates controlled by the statute;
>
> (*b*) make regulations in respect to the mode of imposing, collecting, or enforcing payment of water rates;
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> * * * * *
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> 676. (1) The Council, on the recommendation of the Board of Control, may make ordinances, rules and regulations regulating the construction, location, maintenance, operation, renewal and removal of any main pipe or service pipe, conduit or tube, for any purpose, or belonging to any person, firm or corporation or association, upon, or along any street, park or public place of the City.

According to one reading, s. 525, subs. 1 (*a*), means that the Council may prescribe rates in substitution for those enacted by statute. But, if the meaning be that the Council may prescribe rates for such services only as have not been

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rated by statute, and that is in effect the plaintiff's contention, it is argued, upon that interpretation, that the rate in question is "controlled by the statute," because of subs. (1) of s. 499, which provides that:

> 499. (1) Every owner of property supplied with water through a water meter, in lieu of the rates for domestic purposes or special or extra rates specified in respect to such water in the preceding sections, shall in respect to such water passing through such meter, pay such rates and such annual rental upon the meter, as are from time to time fixed by the Board of Control, and approved by the Council.

And it is said in the case that:

> At a meeting of the Council held on the 29th January, 1920, the Council by resolution directed the Engineer to place a meter on every unmetered water service in the City, which resolution the Engineer proceeded to carry out. Since that date no new service pipe has been installed without a meter being placed upon it and meters were placed as rapidly as possible upon all existing services which work was completed in about one year from date of resolution. Since that time there has been no water service in the City not supplied with a meter and all charges for water have been meter rates fixed by the Council and no charges for water have been made on a rate mentioned in Section 486.

Now the intention of the by-law of 14th September, I would say, obviously, was that the Oakland Road houses were to pay the by-law rate, not in lieu of rates "for domestic purposes", because these houses never became subject to those rates, the compensation having been specially regulated otherwise; and not in lieu of the "special or extra rates specified in respect of such water in the preceding sections", because these "preceding sections" never had any application to the case. The by-law rate was imposed in virtue of the powers which the City had to regulate the supply of water in cases outside the pipe lines, where the introduction of the water was in the discretion of the Council. And, with the greatest respect for the contrary view, I am persuaded that the Council had adequate power. *Selwyn's Nisi Prius,* 13th Ed., pp. 1129, *et seq.*

It is not disputed that the construction of a main into Oakland Road, in the circumstances disclosed by the case, was within the powers of the City. The Walsh agreement is not printed, nor is it introduced as an exhibit, but it was subject to the terms of that agreement that the main was laid. What we know about the agreement has already been stated. It seems to have been contemplated that incoming house owners should, as a temporary condition, by agreement, contribute the interest charges upon the cost of con-

struction, until these could be produced by the application of the general rates in force within the pipe lines. So long as the latter rates would yield less than the interest, it was necessary, and good faith required, if the policy which the City had the right to dictate was to be maintained, that the conventional rate as stipulated with Mr. Walsh should be levied, and I see nothing in sec. 671, or in any other provision of the Act, which must be construed to the contrary.

The argument is, and the plaintiff's case seems to depend upon the view, that, since a main pipe exists on the street, the plaintiff is entitled to a connection, and therefore, upon demand, to a supply of water at the usual meter rates, irrespective of the effect which this might have upon the agreement, or its special purpose, or whether or not compatible with the conditions in pursuance of which the main was laid. But I should have thought that the house owners who are permitted to use the main by reason of the agreement may be required to do so *cum onere*; indeed, the burden must accompany the privilege, if the terms upon which the City was induced to build the main be enforceable. Section 671, which provides for a one-half inch service pipe, does not otherwise regulate the use or supply of the water. There are conditions under which the water may be turned on or off, and these may be regulated by the by-laws under ss. 525 and 676. The language of the statute would, in my view, have to be intractable to convince one that the person who built upon the street next after Mr. Walsh, could demand a supply of water at meter rate, and so escape the terms which the City had, in its discretion, stipulated and sanctioned.

By s. 9 of c. 54, 1922, it is enacted that,

> In the case of any property in respect to which the Council fixes a special rate for the supply of water, the Engineer may require the owner to enter into an agreement to pay such special rate before turning on the water to such property, and, if such property is sold, a supply of water thereto may be refused and the water turned off until the new owner has entered into such agreement.

If, therefore, as I think, the rate in question be a special rate for the supply of water, within the meaning of this section, there is express legislative recognition and sanction for requiring the owner to enter into an agreement to pay such special rate before the turning on of the water; and, as to the validity of the Walsh agreement, and the power of the

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City to apply it, the general subject was one with regard to which, admittedly, the City was authorized to exercise its discretion, and it cannot be doubtful that, if the plaintiff desired to avail herself of a service which the City was empowered, but not bound, to render, she could not insist upon the performance for a consideration less than that which the City had reasonably stipulated.

It is also argued for the respondent that the water rates must be uniform throughout the city, and that a special rate could not be authorized, or sanctioned by by-law, and two decisions of this Court were cited to support these contentions: the cases are *Attorney-General of Canada* v. *City of Toronto* (1) and *City of Hamilton* v. *Hamilton Distillery Co.* (2). There are some references to uniformity by Sir Henry Strong, the learned Chief Justice who gave the judgment of the court in the former case; but I have no doubt that these were not meant to extend the requirements of the common law, by which a by-law must be *intra vires*, certain, consistent with the statutes and the general law, and reasonable. I find no authority or principle of law for the proposition that an ordinance of a municipal corporation, which complies with these essentials, must operate uniformly in every part of the municipal area, notwithstanding that the diversity of circumstances requires different considerations for special localities. I am satisfied that, when the learned Chief Justice introduced the word "uniform," he meant to include nothing new as essential to the validity of a by-law, and a careful examination of his judgment makes this evident. What he regarded as a requisite or an essential was uniformity, not in the sense of precise arithmetical equality, but as excluding arbitrary or unjust discrimination. The by-law now in question is of the class which, as has been said, should be benevolently interpreted; nevertheless there may be cases, which it is not necessary for present purposes to define or to illustrate, where, in the words of the cases, a by-law is found to be capricious and oppressive; partial and unequal in its operation as between different classes; manifestly unjust; disclosing bad faith; involving such oppressive or gratuitous interference with the rights of those subject to it as can find no justification in

(1) (1893) 23 Can. S.C.R. 514. (2) (1907) 38 Can. S.C.R. 239.

the minds of reasonable men; and in such cases, as was said by Russell C.J., in *Kruse* v. *Johnson* (1) "the question of unreasonableness can properly be regarded." See also *Slattery* v. *Naylor* (2). It is, I think, plainly to be inferred from the language of Strong C.J., that it was for vice of this kind that he condemned the by-law in the *Toronto case* (3). That seems to be manifest by the context, and by the statement of the ground upon which the decision is put. The learned Chief Justice adopted a passage from *Dillon on Municipal Corporations,* 4th Ed., sec. 319 (see the 5th Ed., Vol. II, secs. 598 *et seq.*) wherein it is said in effect that every by-law must be reasonable, and not inconsistent with any statute or the general principles of the common law, and that, in the United States, the courts have often affirmed that, while municipal corporations have a general incidental power to make ordinances, these "must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State." This, the learned Chief Justice very truly says, is not new law, and he refers to *Norris* v. *Staps* (4), a case of a municipality under letters patent. He finds that the Toronto by-law discriminates against the Crown, and says that he can conceive no stronger case of a by-law conflicting with the policy of the law; that "it is unreasonable and unfair", in making an unwarranted discrimination against the particular consumer of water. Therefore I conclude that the by-law was condemned for inequality or discrimination, and perhaps also as conflicting with the legislation in the particular case, and the decision was, I am convinced, intended and serves as an authority for nothing more. And this is consistent with the decision of the majority in the *Hamilton case* (5), in which *Attorney General of Canada* v. *City of Toronto* (6) was cited as the governing decision. It is perhaps worth while to quote the following observations of Idington J. in the later case, at pp. 253 and 254. The learned judge says, referring to the *Toronto case* (6).

There may be cases wherein the cost of supplying the water may render an even rate per gallon most inequitable. I can conceive of cases,

(1) [1898] 2 Q.B. 91, at pp. 99, 100.
(2) (1888) 13 App. Cas., 446, at p. 453.
(3) (1893) 23 Can. S.C.R. 514.
(4) Hobart, Ed. of 1724, p. 210.
(5) (1907) 38 Can. S.C.R. 239.
(6) (1893) 23 Can. S.C.R. 514.

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where the uniform charge of a flat rate per gallon might be in itself a grave discrimination against some of those supplied, in possession of properties having great natural advantages, and in favour of those whose properties had corresponding natural disadvantages, to supply whom might cost double that of the former. I will not go further than to say that I have not overlooked possible modifications of rates that might exist and yet not be improperly discriminating in character. If the "uniformity of rates" spoken of by Sir Henry Strong in his judgment in the *Toronto case* (1), excludes the possibility of giving due consideration to such possible conditions, then I cannot in that regard agree with it. I do not, however, so read it. The general principles it enunciates, and at some length elucidates I heartily agree in. I would regret to see them impaired.

Of course each case depends upon its own legislation, but I find nothing in the *Halifax City Charter* to prohibit such an arrangement as was made with Mr. Walsh and incidentally proposed for those who desired to build houses on Oakland Road in advance of the development of the street, and before the consumption of water there would become adequate to yield, by the general system of rates, the interest upon the cost of the necessary works to introduce the water into the street. It seems not only fair and just, but also very equitable in the common interest, that, when a new street is laid out in an outlying district, before the demand is sufficient to justify the introduction of expensive waterworks, persons attracted to it for residential purposes, or perhaps having building lots to utilize in the locality, should be subjected to reasonable terms or stipulations for defraying temporarily the cost of water, if specially introduced for their accommodation while the street is in course of settlement, and unable to pay its way. Moreover, the practice seems to have proved its worth and convenience through a long course of experience.

The City was required by s. 492 to impose and levy certain extra and special rates for specified structures, and for buildings supplied by pipes exceeding one-half inch in diameter; but these provisions do not curtail the general powers of the City to make reasonable provision for special cases not otherwise provided for. And it does not follow that, because the Statute insists upon provision for certain specified cases, therefore other special cases, not provided for, may not be accommodated upon reasonable principles.

But now it is suggested, although the point was not made either in the court below or in this court, and although it is not supported by any admission or evidence, that the amount of the special rate for which the respondent was re-

(1) (1893) 23 Can. S.C.R. 514.

quired to sign was ascertained upon a wrong principle; that the respondent's liability should have been limited to her proportionate share of the interest charges, having regard to the precise quantity of water which she used, as shewn by meter; and that, inasmuch as the $53.89, or one-fifth of the total interest chargeable, represents an equal amount against each of the five householders, including the respondent, which might or might not have been the result if meter rates were applied, the respondent was therefore justified in refusing to sign. This comes to saying in effect that the by-law is unreasonable, and may therefore be declared void, because each of the five is declared liable for one-fifth. But I do not think that this proposition is any more established than it is alleged as a cause of complaint. Here is an area within the city, outside the water service, and destitute of water, to which, however, water may, if desired, be introduced by and at the discretion of the city authorities, who may, in the special circumstances, look to those who enjoy the service to pay the interest upon the cost incurred by the City of introducing the water to their houses. There are five houses within the area, evidently ordinary dwelling-houses of comparable dimensions. There are several ways—perhaps many ways—by which a division of the charge among those participating might not unfairly be reached; but there is no obligation by law or agreement, so far as I have been able to discover, to resort to meters to measure exactly the quarts or gallons which each householder consumes; and I am by no means satisfied that the City has done anything unreasonable in distributing the burden of the taxation in equal shares among those whom, at their request, it has brought into contact with the system. The difference, if any, in cost or expenditure for the service as between any one proprietor and each of the others is practically negligible. The whole expense is for service equally essential for each of the five. One may, perhaps, use a little less or a little more water than another, but it would seem to be unfair, rather than otherwise, that the proprietors should therefore contribute in different measure for the cost of the installation which made the common service possible, and for which the City insisted upon receiving indemnity in the manner and to the extent stipulated or intended by the agreement, and sanctioned by the by-law.

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I would allow the appeal and reverse the findings, with costs throughout.

LAMONT J. (dissenting in part)—This is an appeal from a judgment of the Supreme Court of Nova Scotia, *en banc*, upon a special case stated under Order XXXIII of the Rules of Court, and referred by consent directly to the Court *en banc* for decision. The amount involved in the appeal is small, but as the action is in the nature of a test case, and as the owners of a considerable number of other houses are in the same position as the respondent, leave to appeal to this Court was granted. The sole point involved in the appeal is the rate at which the respondent is entitled to have a water supply for domestic purposes from the appellant for her dwelling house on Oakland Road, Halifax.

The stated case sets out the material facts. Paragraph 6 reads as follows:—

> 6. The water system of the Defendant (Appellant) is not in any way connected with or dependent upon the rates and taxes of the City, but is a separate system under the control of the Council of the City, acting by the Committee on Works, and in particular the streets in which main water pipes shall be laid are entirely in the discretion of the said Committee and Council as aforesaid. For many years it has been the policy of the Defendant to be satisfied before laying a main on any Street that there will be a sufficient revenue from the persons taking a supply of water therefrom to defray the interest on the cost of such extension and to require of any person requesting an extension on a street upon which the number of consumers was insufficient to produce at the usual rates such revenue, a bond or agreement to pay a rate equal to such revenue, such rate to be proportionately reduced as other consumers become connected with the new main.

Prior to 1919 there was no water main on Oakland Road. In the month of May of that year Mr. T. J. Walsh requested the appellant to construct a water main along that street and connect the same with three houses he proposed building on property abutting thereon, and he agreed to pay yearly as a special rate for his water supply the sum of $269.45, being the interest at 6% on the cost of the construction of the main. The main was constructed and Mr. Walsh paid that sum in respect of the houses built by him.

In June, 1922, the respondent commenced the erection of a dwelling house on property fronting on that portion of Oakland Road served by the main. On July 14 she wrote to the appellant demanding a water supply for her house under the provisions of section 671 of the City Charter. At that time the main was serving four houses

on Oakland Road. On July 19 the respondent was informed that before her house could be connected with the main she must sign a bond conditioned for the payment of "a special rate." This bond she refused to give and, on July 22, gave notice of action. The appellant thereupon furnished the pipe connection but refused to turn on the water unless she would agree to pay a special rate of $53.89 (⅕ of the $269.45). To this she would not consent. By an arrangement between the parties, the water was turned on, the respondent's claim for damages was withdrawn and the action was limited to a claim for a declaration that the respondent was entitled to a water supply without entering into an agreement to pay a special rate.

The respondent's contention is that she was entitled to a water supply at the water rate in general application throughout the city. The contention of the appellant is that she is entitled to a water supply only at the "special rate" fixed for dwelling houses in the locality in which her house is situated. This special rate had been recommended by the engineer whose recommendation was adopted by the Council by resolution on July 19, 1922. After the commencement of the action but before the date for filing a statement of defence had expired, the Council passed the following by-law:—

A By-law of the City of Halifax to make a special rate for water on a portion of Oakland Road.

Be it enacted by the Mayor and Council of the City of Halifax as follows:—

"Each property fronting on Oakland Road on which a house is erected between Cartaret Street and Studley Street shall be charged a water rate for water supplied it of $53.89 per annum the same being the amount required at present to produce six per cent. on the cost of the extension of the water service in that district, the same to be proportionately reduced as additional houses are erected on the said portion of the said street."

This by-law was passed September 14, 1922. The position taken by the respondent in respect thereto was that the Council had no power to fix a special rate for Oakland Road.

The questions raised by the stated case are:—

1. Whether the plaintiff was entitled to the supply of water to the dwelling house number 53 Oakland Road without entering into an agreement to pay a rate of $53.89 per year.

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2. Whether the rate imposed by the resolution of Council of 19th July, 1922, and the by-law of September 14, 1922, was valid.

The Supreme Court of Nova Scotia *en banc* answered the first of these questions in the affirmative, and the second in the negative, being of opinion that the City Council had no authority to pass either the resolution of July 19 or the by-law of September 14. On these answers judgment was entered for the plaintiff and from that judgment this appeal is brought.

The right of an owner of a dwelling house in the City of Halifax to receive a supply of water from the City is provided for by section 671 of the City Charter which reads as follows:—

671. (1) The owner of any dwelling-house situated on any portion of a street through which a main pipe is laid, shall be entitled, on application to the Board of Control, to a service pipe one-half-inch in diameter to such house.

For the respondent it was contended that the right to a service pipe, given by this section, carries with it a right to a supply if water running through the pipe. As a matter of construction I agree that such would ordinarily be the case. But an owner's right to a supply of water is dependent upon his willingness to pay a proper rate for that supply. In *Dominion of Canada* v. *City of Levis* (1), the question was as to the right of the Dominion to a supply of water for one of its buildings in the City of Levis and the amount to be paid therefor. The City offered to furnish the supply for $300 a year, while the Dominion offered only $35. In giving judgment their Lordships of the Privy Council, at page 511, say:—

Water supplied at the cost of the municipality from artificially constructed waterworks is in the nature of a merchantable commodity, and their Lordships are of opinion, that unless some statutory right is established, the Government of Canada cannot claim to have a supply of water for the Government building, unless it is prepared to pay and to continue to pay in respect thereof a fair and reasonable price.

Although such water was in the nature of a merchantable commodity and the supplying of the same would ordinarily be subject to an agreement express or implied as to price, their Lordships point out that the City of Levis, as a dealer in water on whom there has been conferred by statute a position of great and special advantage, might well be held

(1) [1919] A.C. 505.

to be under an implied obligation to give a water supply to owners of houses within the area of supply, provided that such owner was willing to make fair and reasonable payment therefor. Apart therefore from statutory provisions determining the rate, the respondent was entitled to have a supply of water for her dwelling house upon payment of a reasonable rate for the same.

The City Charter of 1914 makes provision for two separate systems by which the rates to be paid may be determined. The first, contained in sections 486 to 498, is designated the "general rate." The other, contained in section 499, is called the "meter rate." The general rate is based upon the values of property within the water pipe lines and is divided into two classes. First, a fire protection rate upon all lands, and secondly, a rate upon every dwelling house and the land occupied thereby. In addition to this general rate, section 492 provides that "special" and "extra" rates shall be levied on certain properties. These are buildings owned and occupied by or for the Imperial, Dominion or Provincial Governments, Breweries, Distilleries, Hotels, Founderies, etc. The special rates to be levied in these cases are such as the Board of Control may deem right. Then in respect of a number of other properties such as livery stables, bar-rooms, closets, fountains, and buildings under construction where water is required for building purposes, the statute itself fixes the special rates to be charged.

As an alternative to this system of rating, the Board of Control with the approval of the Council is authorized, by section 499, to adopt a system under which the rates would be based upon the actual consumption of water as shown by the meters. This section is as follows:

499. (1) Every owner of property supplied with water through a water meter, in lieu of the rates for domestic purposes or special or extra rates specified in respect to such water in the preceding sections, shall in respect to such water passing through such meter, pay such rates and such annual rental upon the meter, as are from time to time fixed by the Board of Control, and approved by the Council.

(2) Nothing in this section shall exempt any one from paying fire protection rates.

The powers of the Board of Control have since been transferred to the Committee on Works.

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With reference to the system of rating in actual operation when this action was commenced, the stated case contains the following:—

At a meeting of the Council held on the 29th January, 1920, the Council by resolution directed the Engineer to place a meter on every unmetered water service in the City which resolution the Engineer proceeded to carry out. Since that date no new service pipe has been installed without a meter being placed upon it and meters were placed as rapidly as possible upon all existing services which work was completed in about one year from date of resolution. Since that time there has been no water service in the City not supplied with a meter and all charges for water have been meter rates fixed by the Council and no charges for water have been made on the rate mentioned in Section 486.

Since the early part of 1921, therefore, the system of determining the rates to be paid as set out in section 486, including the "special" and "extra" rates, provided for in section 492, has not been in operation. Only the alternative system authorized by section 499 has been in actual use.

From the judgment appealed against it would appear that in the court below the appellant relied upon section 9 of Chapter 54 of 1922 as the statutory authority for fixing the special rate of $53.89 for the respondent's house. That section is as follows:—

9. In the case of any property in respect to which the Council fixes a special rate for the supply of water, the Engineer may require the owner to enter into an agreement to pay such special rate before turning on the water to such property and if such property is sold, a supply of water thereto may be refused and the water turned off until the new owner has entered into such agreement.

Before us counsel for the appellant disclaimed any intention of relying upon section 9, as authorizing the special rate. The authority to fix that rate, he contended, was contained in sections 499 and 525.

Section 525, in part, reads as follows:—

(1) The Board of Control, from time to time by by-law to be approved by the Council, may—

(a) prescribe rates payable in respect to water other than the rates controlled by the statute;

On behalf of the respondent it was contended that section 499 authorized a meter rate only, and that this implied a quantity charge which must be uniform; and he cited as authority therefor the judgments of this court in *Attorney-General of Canada* v. *The City of Toronto* (1), and *City of Hamilton* v. *Hamilton Distillery Company* (2)

(1) (1893) 23 Can. S.C.R. 514. (2) (1907) 38 Can. S.C.R. 239.

In the former of these cases, Strong C.J., after pointing out that the City of Toronto was under a statutory obligation to furnish water to all who might apply for it, and inferring therefrom a legislative intention that the water should be supplied upon some fixed and uniform schedule of rates, at page 520 said:—

> In other words, the city, like its predecessors in title the waterworks commissioners, is in a sense a trustee of the waterworks, not for the body of ratepayers exclusively but for the benefit of the general public, or at least of that portion of it resident in the city; and they are to dispense the water for the benefit of all, charging only such rates as are uniform, fair and reasonable.

On the argument stress was laid upon the word "uniform" which, it was contended, meant an equal rate per gallon to all householders.

I do not read the judgment of Strong C.J., as laying down the principle that the rate charged per gallon for water passing through the meters must be the same, regardless of the circumstances under which the water was supplied. The rates must be fair and reasonable. A fixed rate per gallon which would be fair and reasonable for one householder would be fair and reasonable for another if the circumstances under which the water was supplied to each were the same. But, where the circumstances are not similar, the imposition of a uniform rate per gallon might be neither just nor reasonable. In the *Toronto case* (1), Gwynne J. limited the application of the principle of the uniform rate to customers supplied "under like circumstances." At page 526 he said:—

> In my opinion the corporation has no power to impose a greater rate or charge for water supplied to a consumer who is not liable for or subject to the assessable rate upon real property than *under like circumstances* they do impose upon consumers of water who are subjected to such assessable rate.

The question in that case was as to the validity of a by-law which allowed a discount of 50 per cent. from the water rates if paid within the first two months of the half year for which they were due, but which excepted from the benefit of the discount Government buildings which were exempt from city taxes. The by-law was held to be invalid.

(1) (1893) 23 Can. S.C.R. 514.

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In the *Hamilton case* (1), the question was whether the City could lawfully charge one class of manufacturer a higher price for water supplied than another, both classes being supplied by meter, and the only difference between them being the nature of their business. It was held that under a general power to fix the rates, the City of Hamilton could not, as to prices charged, discriminate as between different members of the same class of customers.

The authority to fix the rates for water supplied through meters given to the appellant by section 499 does not, in my opinion, necessarily compel it to impose a uniform gallon rate for water consumed upon all householders supplied. Where, as in the present case, a main water pipe has been extended into a locality into which it would not otherwise have been laid by reason of an agreement on part of a householder or householders to pay the interest on the cost of its construction and on the understanding that as other houses are built and served by the main the owners thereof will pay their proportionate share of such interest, the appellant, in my opinion, has authority to impose a special rate on those served by the main sufficient at least to cover such interest charges. Section 9, above quoted, recognizes the existence of such authority and provides certain means of enforcing the special rate. The language of the section is "In the case of any property in respect to which the council fixes a special rate for the supply of water," etc. This language clearly presupposes power in the council to fix a special rate, and I do not find anything in section 499 which could be construed as being inconsistent with its exercise. The obligation imposed on owners by that section is to pay such rates as are fixed by the Board of Control and approved of by the Council. As I read the City Charter and amendments thereto, the intention of the Legislature was to leave it to the discretion of the committee of the council to fix rates which would be fair and reasonable, excepting always those cases in which the statute itself fixes the rates. This does not imply that the council is authorized to exercise an arbitrary discretion, for a by-law imposing rates may be subject to judicial scrutiny to determine whether it is fair and

(1) (1907) 38 Can. S.C.R. 239.

reasonable under the circumstances or whether it amounts to an unwarranted discrimination as between the appellant's different customers. In determining the question of reasonableness, the court, where its opinion is sought, will have regard to all the circumstances of the particular city or corporation whose by-law is under review, the object sought to be attained thereby and the necessity therefor, always bearing in mind that the power to declare a by-law void because it is unreasonable is one which must be exercised with great care.

Now unless section 9 can be read as implying a power in the council to impose a special rate, I can find for it no field of operation, for I cannot accept the construction placed upon it by the court below, namely, that the "special rate" there referred to means the special rate for which provision was made in section 492. I think it clear that the special rate mentioned in section 9 is the entire sum to be paid by the property owner for his supply of water, for the meter rate adopted by the council in 1920 was in lieu of all other rates covered by sections 486 and 492. Under section 492 the special rate therein referred to is merely a rate additional or supplemental to the general rate provided for in s. 486. To hold that the words " special rate " had the same meaning in s. 9 as they had in s. 492 would be to attribute to the appellant, when it obtained the amendment of 1922 (s. 9), an intention to obtain legislation enabling it to require an agreement from an owner to pay the supplemental rate under s. 492 without including in the agreement the general rate payable under s. 486. It would also attribute to the appellant an intention, in 1922, of protecting a supplemental special rate the use of which it had previously discontinued. The meaning to be attributed to the word " special " in s. 9, in my opinion, is, " different from the ordinary ", " something additional to the usual or ordinary ", and the " fixing of a special rate " means the fixing of a rate which is different from the rate generally applicable.

The appellant having, as I hold, authority to levy a special rate on the owners of houses on Oakland Road, had it authority to fix, as against each house, the sum mentioned in the by-law? The by-law, which simply confirmed the resolution of July 19, fixed a flat rate of $53.89 for each

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of the five houses. This was arrived at by dividing by five the $269.45 which Mr. Walsh had agreed to pay. That is, each householder was charged a special flat rate of one-fifth of the interest on the cost of constructing the main. On this point the question is: Had the council authority to call upon each of the five householders to pay the same sum regardless of the amount of water consumed by him, or only his proportionate share of the $269.45 on a meter basis?

The stated case contains the following: "Since that time" (early in 1921) "there has been no water service in the city not supplied with a meter and all charges for water have been meter rates fixed by the council." Taken literally this statement means that even on Oakland Road the charges made were meter rates. As this is inconsistent with the by-law I take it that the parties intended the statement to mean that all charges for water other than those on Oakland Road were meter rates. A meter rate, I understand to be, a charge based upon the quantity of water passing through the meter. The council having, by its resolution of January 29th, 1920, adopted the meter system, the respondent would have a right to complain of inequitable treatment if she established that her meter rate was higher than that of her neighbours on Oakland Road. Once that was established, the onus, in my opinion, would be on the appellant to shew that as between the respondent and her neighbours it was fair and reasonable that she should pay a higher meter rate than they. The imposition of a flat house rate means that the owner of a small house occupying, say, 25 feet of ground, and using but little water, must pay for that water the same sum as the owner of a large house occupying 100 feet of ground and using four times as much water. The water supplied to the householders on Oakland Road was supplied by the appellant from artificially constructed water-works and was, therefore, in the nature of a merchantable commodity. Being a merchantable commodity, supplied to the householders under exactly similar circumstances, the price to each, as pointed out in the above mentioned cases, should be the same; otherwise there would be discrimination. *Prima facie,* therefore, if the respondent paid a higher price per gallon for the water consumed by her than was paid

by her neighbours on Oakland Road, she was being discriminated against. But here we have to face this difficulty: The case does not disclose the relative consumption of the five householders on Oakland Road. There is no material from which we can determine whether the respondent's proportionate share of the $269.45, as determined by the meter, would be more than, equal to, or less than, $53.89. It would, in my opinion, be an unwarranted assumption to hold that each householder consumed the same quantity of water. We know that the water consumed in each house passed through a meter and, to my mind, the adoption of a meter rate carries with it the idea that the charges to be made in respect thereof will be based upon the amount of water consumed. Once it was shewn that the appellant had adopted the meter system for the city, and that the charges fixed for Oakland Road were computed on a basis inconsistent therewith, the respondent was entitled to call upon the appellant to justify the adoption of a system for Oakland Road based upon the number of houses owned rather than upon the amount of water consumed. No such justification has been made or attempted. It has not been shewn that it was necessary in the appellant's interests, or even desirable, that the ordinary method of ascertaining the amount payable by a householder for water should be changed from a meter to a flat house rate. It cannot, as far as I can see, make any difference to the appellant whether the householders on Oakland Road make up the $269.45 by an equal contribution from each or by a contribution based upon the quantity of water passing through their respective meters.

As I read the above authorities, the principles to be applied to this case are: The appellant in supplying its citizens with water supplies them with a merchantable commodity. Those supplied from the Oakland Road main are supplied under exactly similar circumstances. The price which the City can charge for its commodity when sold to different customers under similar circumstances must be the same to each. That is, such price must not only be fair and reasonable but it must be uniform.

On the material before us we cannot say that the appellant charged the householders on Oakland Road the same price for water supplied in like circumstances and, there-

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fore, cannot say that the $53.89 charged the respondent was a fair and reasonable sum for the water supplied to her. She was, therefore, justified in refusing to sign an agreement to pay that sum.

This, however, in my opinion, does not conclude the appeal. The last two paragraphs of the stated case read as follows:—

> If the Court is of the opinion in the affirmative of the first question or in the negative of the second question, then judgment shall be entered for a declaration that the plaintiff was entitled to the supply of water for the dwelling house, number 53 Oakland Road, subject to the ordinary rates and for costs.
>
> If the Court shall be of opinion in the negative of the said first question or in the affirmative of the second question, then judgment shall be entered for the defendant with costs.

The formal judgment below contains the following:—

> It is ordered, adjudged, decreed and declared that the plaintiff was and is entitled to a supply of water for her dwelling house number 53 Oakland Road, Halifax, N.S., subject to the ordinary water meter rates.

For the reasons I have given above, the respondent was not and is not entitled to a water supply at the ordinary water meter rates. She is entitled to it only upon payment of her proportionate share of the $269.45 fixed by the council based on the water consumed, and the appellant is entitled to require her to sign an agreement to pay that share before turning on the water. Notwithstanding the agreement of the parties in the stated case as to the form the judgment should take, it is the duty of the court to give the judgment which will carry into effect the rights of the parties.

The appeal, therefore, should be allowed, the judgment below set aside, and judgment entered declaring the plaintiff to be entitled to a supply of water only upon entering into an agreement to pay her proportionate share, as determined by the meter, of the $269.45.

As both parties agreed to submit the case to us in the form in which it appears, I think justice will be done by directing that the parties pay their own costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *F. H. Bell.*

Solicitor for the respondent: *R. M. Fielding.*