

MEMORIAL GARDENS ASSOCIA- }
TION (CANADA) LIMITED }

APPELLANT;

1958
*Feb. 3, 4
Apr. 22

AND

COLWOOD CEMETERY COMPANY, BOARD OF
CEMETERY TRUSTEES OF GREATER VICTORIA,
CORPORATION OF THE DISTRICT OF SAANICH,
THE CORPORATION OF THE CITY OF VICTORIA,
EDWIN J. FREEMAN, HELEN J. FREEMAN, A. C.
KINNERSLEY, LOLA KINNERSLEY, H. M. PALS-
SON, JEAN LABAN, C. J. LABAN, SHIRLEY R.
CROCKETT, B. I. CROCKETT, F. A. KINNERSLEY,
VERNICE ROCKWELL, PETER C. SHARP, L. H.
SHARP AND ALEXANDER HORBATUK AND PUB-
LIC UTILITIES COMMISSION

RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Public utilities—"Public convenience and necessity"—Meaning of phrase—
Review of decision of Commission—*The Public Utilities Act, R.S.B.C.*
1948, c. 277, ss. 58, 72, 75, 100—*The Cemeteries Act, R.S.B.C. 1948,*
c. 41, ss. 2, 3, as enacted by 1955, c. 7, s. 3.

Per Kerwin C.J. and Taschereau, Cartwright and Abbott JJ.: It is impracticable and undesirable to attempt a precise definition of the phrase "public convenience and necessity". It is clear from the American decisions that the word "necessity" as here used does not bear its strict dictionary meaning. Its meaning must be ascertained in each case by reference to the context and to the objects and purpose of the statute in which it is found; in particular, it has been held that the word is not restricted to present needs but includes provision for the future. *Wabash, C. & W. Ry. Co. v. Commerce Commission* (1923), 141 N.E. 212, referred to.

The Public Utilities Commission of British Columbia granted a certificate of public convenience and necessity to the appellant company for the operation, through a subsidiary company, of a cemetery on Vancouver Island. This certificate was set aside by the Court of Appeal.

Held: The judgment of the Court of Appeal should be set aside and the certificate should be restored.

Per Kerwin C.J. and Taschereau, Cartwright and Abbott JJ.: The Commission's decision that public convenience and necessity required the establishment of a new cemetery was not one of fact but was predominantly the formulation of an opinion based upon the facts established before the Commission. There was evidence to support

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.

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the findings of fact made by the Commission and its exercise of administrative discretion based on those findings should not be interfered with by the Courts. *Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited*, [1957] S.C.R. 185, applied.

Subsidiary grounds of attack on the Commission's decision should be disposed of as follows: (1) the fact that the appellant proposed to operate the cemetery by means of a subsidiary company to which the Commission agreed to grant a second certificate on incorporation was not an objection to the grant of the certificate to the appellant; (2) the fact that the appellant held only an option on the lands in question was not a ground for refusing the certificate, since the option, assuming it to be enforceable, made the appellant an "owner" within the meaning of the statute; (3) there was no ground, in the circumstances of the case, for saying that the Commission had unjustifiably received evidence without permitting the respondents to see it, thus preventing cross-examination and violating the rule *audi alteram partem*. *Toronto Newspaper Guild v. Globe Printing Company*, [1953] 2 S.C.R. 18, distinguished.

Per Locke J.: The option was produced for examination by the Commission with the express consent of counsel for the parties who now objected, and they should not now be heard to allege that the proceedings were invalidated by this circumstance. *Scott v. The Fernie Lumber Company, Limited* (1904), 11 B.C.R. 91 at 96, approved and applied. In other respects, the appeal failed for the reasons given by Sheppard J.A. in his dissenting judgment in the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for British Columbia¹, setting aside a certificate of public convenience and necessity granted by the Public Utilities Commission. Appeal allowed.

Alan B. MacFarlane and *E. A. Popham*, for the appellant.

D. M. Gordon, Q.C., for the respondents.

The judgment of Kerwin C.J. and Taschereau, Cartwright and Abbott JJ. was delivered by

ABBOTT J.:—The question raised on this appeal is whether a certificate of public convenience and necessity issued by the Public Utilities Commission of British Columbia, under the provisions of the *Public Utilities Act*, R.S.B.C. 1948, c. 277, as amended, was authorized in law.

By the *Cemeteries Act Amendment Act, 1955* (B.C.), c. 7, cemeteries in British Columbia were brought under the jurisdiction of the Public Utilities Commission as constituted under the *Public Utilities Act*, the relevant

¹(1957), 22 W.W.R. 348, 9 D.L.R. (2d) 653, 75 C.R.T.C. 292.

sections of the *Cemeteries Act*, R.S.B.C. 1948, c. 41, as enacted by s. 3 of the 1955 statute, reading as follows:

Regulation of Cemeteries, Crematoria, and Columbaria.

2. A cemetery shall not be established or enlarged until the Minister of Health and Welfare has approved of the site of the cemetery as a fit and proper place for the interment of the dead and the owner thereof has obtained from the Commission a certificate of public convenience and necessity under the "Public Utilities Act."

3. (1) The Commission shall have jurisdiction over all cemeteries, columbaria, and crematoria, and the owners thereof, and shall exercise with respect thereto all the powers, duties, and functions relating to public utilities conferred or imposed by the "Public Utilities Act" on the Commission, to the extent to which such powers, duties, and functions are exercisable, and the provisions of the "Public Utilities Act" (other than Part IV thereof), so far as appropriate, shall apply to cemeteries, columbaria, crematoria, and the owners thereof.

(2) Without limiting the generality of subsection (1) and notwithstanding the provisions of the "Cemetery Companies Act," the "Cremation Act," or the "Municipal Cemeteries Act," the Commission may, with the approval of the Lieutenant-Governor in Council, make regulations:

- (a) Respecting the burial, disinterment, removal, and disposal of the bodies or other remains of deceased persons;
- (b) Respecting the plans, survey, arrangement, condition, care, sale, and conveyancing of lots, plots, and other cemetery grounds and property;
- (c) Respecting the erection, arrangement, and removal of tombs, vaults, monuments, gravestones, markers, copings, fences, hedges, shrubs, plants, and trees in cemeteries;
- (d) Respecting charges for the sale and care of lots and plots;
- (e) Respecting the collection, amounts to be collected, and investment of funds for perpetual care and maintenance of cemeteries;
- (f) Requiring the filing or registration of plans of cemeteries and prescribing the contents and details of such plans, and requiring that burials be made in accordance with such plans;

and such regulations may be general in their application or may be made applicable specially to any particular locality or cemetery.

(3) Every person who fails or refuses to obey a regulation of the Commission made under this section is guilty of an offence and liable, on summary conviction, to a penalty of not less than ten dollars and not more than five hundred dollars.

The appellant proposed to establish and operate a new cemetery in the vicinity of Victoria and, as required by the statute, applied to the Public Utilities Commission for a certificate of public convenience and necessity. There were at the time two cemeteries in the area, one, the Colwood Cemetery, operated by a privately-owned company, the other, the Royal Oak Cemetery, a municipally-operated cemetery controlled by the City of Victoria and the Municipality of Saanich. Appellant's application was

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opposed by those in control of the two existing cemeteries and by certain owners of property adjoining the site of the proposed new cemetery.

After a hearing at which evidence was taken as to the need for cemeteries in the Victoria area, both present and future, the Commission issued the certificate requested. Under s. 100 of the *Public Utilities Act* an appeal from a decision of the Commission lies to the Court of Appeal, by leave, only upon a question of law or as to the jurisdiction of the Commission. Appeal was taken to the Court of Appeal for British Columbia and by a majority decision the Court of Appeal¹ allowed the appeal and held that the certificate should be set aside. The present appeal is from that judgment. Sheppard J. A., while dissenting on the main issues raised, would have referred the matter back to the Commission for a rehearing on one matter.

The term "public convenience and necessity" appears to have been brought into the statute law in Canada from the United States and a great many decisions were cited to us indicating the meaning given to the term in that country. It is clear from these decisions that the word "necessity" as contained in these American statutes cannot be given its dictionary meaning in the strict sense: *Canton-East Liverpool Coach Co. et al. v. Public Utilities Commission of Ohio*²; *Wisconsin Telephone Co. v. Railroad Commission of Wisconsin et al.*³; *Wabash, C. & W. Ry. Co. v. Commerce Commission*⁴; *San Diego & Coronado Ferry Co. v. Railroad Commission of California et al.*⁵ The meaning in a given case must be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.

The term "necessity" has also been held to be not restricted to present needs but to include provision for the future: *Wabash, C. & W. Ry. Co. v. Commerce Commission*, *supra*, at p. 215, and this indeed would seem to follow from s. 12 of the *Public Utilities Act*, which provides that the certificate may issue where public convenience and necessity "require or *will require*" such construction or operation.

¹ (1957), 22 W.W.R. 348, 9 D.L.R. (2d) 653, 75 C.R.T.C. 292.

² (1930), 174 N.E. 244.

⁴ (1923), 141 N.E. 212 at 214.

³ (1916), 156 N.W. 615.

⁵ (1930), 292 P. 640 at 643.

It is obvious I think, that the phrase "public convenience and necessity" when applied to cemeteries cannot be given precisely the same connotation as when it is applied to those operations more commonly looked upon as public utilities, such as electric power services, water-distribution systems, railway lines and the like, and this is borne out both by the terms of the statute which I have quoted and by the decisions of the American Courts to which we were referred.

The phrase also appears in *The Municipal Franchises Act*, R.S.O. 1950, c. 249 (considered by this Court in *Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited*¹), in the *Aeronautics Act*, R.S.C. 1952, c. 2, and I have no doubt in other provincial and federal statutes, and it would, I think, be both impracticable and undesirable to attempt a precise definition of general application of what constitutes public convenience and necessity. As has been frequently pointed out in the American decisions, the meaning in a given case should be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.

As this Court held in the *Union Gas* case, *supra*, the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

The findings of fact made by the Commission have been concisely set forth by Sheppard J.A. in his reasons², and are in part as follows:

(1) That there are two established cemeteries in the district in question, namely, Royal Oak and Colwood, and these have vacant space adequate for immediate needs;

¹ [1957] S.C.R. 185, 7 D.L.R. (2d) 65, 75 C.R.T.C. 1.

² 22 W.W.R. at p. 362.

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(2) That the services proposed by the appellant company are similar to those now available at Royal Oak; that Colwood is not a modern, but an older, type of cemetery; that Colwood has proposed modernizing but that may be reconsidered if the respondent [now appellant] company is permitted to establish a cemetery;

(3) That the established cemeteries, Royal Oak and Colwood, are not adequate for the future; that the available space at Royal Oak will be filled in 10 to 15 years; that the need for the future is recognized by both these cemeteries in that both are presently negotiating for additional land;

(4) That vacant cemetery spaces will be needed for the future; that the modern-type cemetery may, by reducing the public demand for cremation, increase the rate at which the available space will be filled.

There was evidence before the Commission upon which it could make the findings of fact which it did. In my opinion the majority of the Court of Appeal in holding that in law the Commission could not find necessity upon the facts recited in its judgment was merely substituting its opinion for that of the Commission. As this Court held in the *Union Gas* case, *supra*, this is not a question of law upon which an appeal is given, and the Court below was therefore without jurisdiction. It would have been otherwise if it had been shown that the Commission had given a meaning to the words of the statute which as a matter of law they could not bear.

Three subsidiary points were raised by respondents. As set out in their factum these are as follows:

1. The Commission went beyond the authority given by the statute by granting the appellant a certificate, though the appellant was not meant to establish or operate the cemetery itself, but to form a subsidiary to do that, to which the Commission bound themselves to give a second certificate;

2. The appellant had no basis for its application for a certificate except an option to buy a site, and the statute required it to be an "owner";

3. The Commission unjustifiably received evidence of the option without permitting the respondents to see it, thus preventing cross-examination and infringing the *audi alteram partem* rule.

As to points 1 and 2, I agree with the views expressed by Sheppard J.A. that the certificate appears to be within the powers conferred by the statute and that the option held by appellant, assuming it to be enforceable, did enable appellant to obtain and assert a control sufficient to constitute appellant an owner within the meaning of the statute.

As to the third point, at the hearing before the Commission appellant called as witnesses the persons from whom the option referred to had been obtained, and the

option itself was filed with the Commission. Appellant was apparently unwilling to exhibit the document to respondents at that time since this would have involved disclosing the purchase-price and the transcript of evidence on this point reads in part as follows:

Mr. GORDON: Just one point, since the option itself has been the subject-matter of considerable discussion. I wonder if it might be produced for examination by the Commission? There have been certain representations regarding it as to detail, as to length of time and certain questions have now arisen. Could the Commission have it produced, merely to verify statements that have been made?

Mr. MACFARLANE: I am prepared to produce it to the Commission but not to my learned friends. Now, I state that that option has been executed by these people, Mr. and Mrs. Turner. These people have sworn under oath here to-day that they executed such an option. I state that the option is in favor of James H. Edwards, the President of Memorial Gardens Association of Canada Limited. They swear the property that it covers and they swear the expiry date. I have the option here but I am not going to tell my learned friends the price that Memorial Gardens Association Limited is paying for this property, which they would dearly like to know and which is Mr. and Mrs. Turner's private business. The company doesn't care if everybody knows but Mr. and Mrs. Turner are selling it for a price, it is up to them.

Mr. GORDON: It is essential to the jurisprudence to produce the document about which you are discussing. It is the document, the very basis of the matter which we are dealing with. Simply to make an oath on something when—

The CHAIRMAN: I think the document should be produced to the Commission, whose officers are under oath not to disclose confidential information, but if the document itself does contain certain information that is confidential, it needn't be disclosed to the public.

Mr. MACFARLANE: That is my point. I am quite happy to disclose the information to the Commission but I don't feel it is such that should be disclosed—

Mr. GORDON: May I just simply add this, that in respect to this option, certain statements were made as to when it was entered into, as to what period it was extended to, asking the Commission to make a hurried decision in order to meet with its requirements. If these things are all in the option, we know at least that is *bona fide* but having sworn statements made without the basic documents there at least to the Commission, is of little value.

The CHAIRMAN: The Commission will have the opportunity of comparing the statements with the document.

Mr. GORDON: Well, that is perfectly satisfactory to me.

It does not appear from the record that any person opposing the application other than Mr. Gordon asked for the production of the option and Mr. Gordon stated that he was satisfied with the procedure proposed by the Commission. These circumstances clearly distinguish this case

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from that of *Toronto Newspaper Guild v. Globe Printing Company*¹. In these circumstances and in view of the provisions of ss. 58, 72 and 75 of the *Public Utilities Act* in my opinion this third point does not avail the respondents.

For the reasons which I have given, as well as for those of Sheppard J.A. as to the main issue, with which I am in substantial agreement, I would allow the appeal with costs here and below and restore the certificate.

LOCKE J.:—With the exception hereinafter mentioned, I agree with the reasons for judgment delivered by Mr. Justice Sheppard.

While the record does not disclose the fact, I assume that Mr. Gordon, who cross-examined certain of the witnesses on behalf of the Colwood Cemetery Company, is a member of the bar of British Columbia and that he acted in that capacity at the hearing before the Public Utilities Commission. We were informed at the hearing of this appeal that the person referred to was not Mr. D. M. Gordon, Q.C., who appeared for the respondents before us.

The passage from the transcript quoted in the reasons of my brother Abbott, which I have had the advantage of reading, shows that Mr. Gordon asked that the option might be produced for examination by the Commission “merely to verify statements that have been made”. The chairman ruled that this should be done and counsel for the appellant at once agreed that the information should be disclosed to the Commission. When the chairman said that the Commission would have the opportunity of comparing the statements that had been made with the document, Mr. Gordon said that that was perfectly satisfactory. None of the other parties represented before the Commission appear to have evidenced any interest in the nature of the option. Having thus led the members of the Commission to understand that the course proposed was satisfactory to his clients, they should not now be heard to allege that the proceedings were invalidated by the

¹[1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561, 106 C.C.C. 225.

very course of conduct that they assented to: *Scott v. The Fernie Lumber Company, Limited*¹.

I would allow this appeal with costs in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Clay, MacFarlane, Ellis & Popham, Victoria.

Solicitors for the respondent Colwood Cemetery Company: Crease & Co., Victoria.

Solicitors for the respondent cemetery trustees: Gregory, Grant, Cox & Harvey, Victoria.

Solicitors for the respondent District of Saanich: Manzer, Wootton & Drake, Victoria.

Solicitor for the respondent District of Victoria: T. P. O'Grady, Victoria.

Solicitor for the individual respondents: A. J. Patton, Victoria.

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