Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Attorney-General for the Province of Ontario and others v. *The Canadian Niagara Power Company, from the Court of Appeal for Ontario; delivered the* 22*nd July* 1912.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
SIR CHARLES FITZPATRICK.

[DELIVERED BY LORD MACNAGHTEN.]

The question in this case lies in a narrow compass. But it is one of considerable difficulty. The Trial Judge, Riddell, J., decided the question in favour of the Respondents. The four learned Judges who constituted the Court of Appeal for Ontario, were equally divided in opinion. Moss, C.J., and Garrow, J., were in favour of affirming the decision of the Trial Judge. Meredith and Magee, JJ. were in favour of reversing that decision. And so the judgment of the Trial Judge with a slight variation was upheld.

The result is that this Board is now called upon to determine the meaning and effect of one paragraph in an agreement dated the 15th of July 1899 made between the Commissioners for the Queen Victoria Niagara Falls Park acting therein on their own behalf and with the approval of the Government of the Province of Ontario, who are therein and hereinafter called "the Commis-

" sioners " of the first part, and the Canadian Niagara Power Company of the second part. This agreement was made in pursuance of statutory authority. It modified and varied an agreement dated the 7th of April 1892 made between the Commissioners and the promoters of the then intended Company, afterwards incorporated as the Canadian Niagara Power Company. The statute which incorporated the Company ratified and confirmed the agreement of April 1892, and made it binding upon the Company.

There is no clause or provision in the agreement of 1892 similar to the paragraph in the agreement of July 1899 which is now under consideration. But it is convenient, if not necessary, to consider the provisions of the earlier agreement in order to understand the position of the parties when the agreement of 1899 was made.

By the agreement of the 7th of April 1892 it was (among other things) declared—

(1) That for the purpose of generating electricity and pneumatic power to be transmitted to places beyond the Park the Commissioners grant to the Company a license irrevocably to take water from the Niagara river between the head of Cedar Island and the main land, and to lead the water by means of that natural channel and an extension of it to supply works to be constructed by the Company in buildings and power houses on the main land within the Park upon a location therein described which was to occupy a tract of land of not more than 1,200 feet in length by not more than 100 feet in width; and

(2) That the Company was to have the further right to excavate tunnels to discharge the water led from the Niagara

river to the said buildings and power houses so that such water should emerge below the Horse Shoe Fall at or near the water's edge.

The license was subject to three specified agreements which were already in existence and operative.

By paragraph 4 of the agreement it was declared that the license was granted for the term of 20 years at the rental of $25,000, and that during the second 10 years of that term the rental was to be increased by the sum of $1,000 each year so that in the twentieth year the rental would be $35,000.

At the end of the period of 20 years the Company was to be entitled at their option to a further period of 20 years, and similarly at their option to three further renewals at the like rental. So the effect was in substance that the Company became entitled to a license, or lease as it is sometimes called, for the period of 100 years, terminable at their option at the end of each successive period of 20 years. There was a further provision entitling the Company during the first period of 20 years to terminate the license or lease at any time on giving three months' notice in writing.

There were further powers granted to the Company which it is not necessary to specify.

The Company undertook to begin the work on or before the 1st of May 1897, and to proceed so far with their works on or before the 1st of November 1898 as to have completed water connections for the development of 25,000 horse power, and have actually ready for use, supply, and transmission 10,000 developed horse power by the said last-mentioned day.

By the agreement of July 1899 the time for the construction of the proposed works was extended, and the terms of payment by the

Company for the accommodation and facilities placed at their disposal were varied.

Paragraph 2 is expressed in the following words :—

"The said agreement of the 7th April 1892, in respect " of the amount of rentals and period for which the same is " payable is hereby amended by providing that from and " after the first day of May 1899, the rent payable under " the said agreement in lieu of that specified in paragraph 4 " thereof shall be up to the first day of May 1949, the sum " of fifteen thousand dollars per annum, payable half-yearly " on the same days and times as specified in said para- " graph 4 of said agreement, and in addition thereto " payment at the rate of the sum of one dollar per annum " for each electrical horse power generated and used and " sold or disposed of over ten thousand electrical horse " power up to twenty thousand electrical horse power, and " the further payment of the sum of seventy-five cents. for " each electrical horse power generated and used and sold or " disposed of over twenty thousand electrical horse power up " to thirty thousand electrical horse power, and the further " payment of the sum of fifty cents. for each electrical horse " power generated and used and sold or disposed of over " thirty thousand electrical horse power; that is to say, by " way of example, that on generation and use and sale or " disposal of thirty thousand electrical horse power the " gross rental shall be $32,500 per annum payable half- " yearly, and so on in case of further development as above " provided, and that such rates shall apply to power sup- " plied or used either in Canada or the United States. Such " additional rentals as shall be payable for and from such " generation and sale or other disposition as aforesaid to the " Commissioners shall be payable half-yearly at the rate " above specified on the first days of November and May in " each year for all power sold in the said several half-yearly " periods from the day of sale; and within ten days after " said first days of November and May in each year on " which such additional rentals shall be payable respec- " tively the treasurer, or if no treasurer the head officer of " the Company, shall deliver to the Commissioners a verified " statement of the electrical horse power generated and used " and sold or disposed of during the preceding half-year, " and the books of the Company shall be open to inspection " and examination by the Commissioners or their agent for " the purpose of verifying or testing the correctness of such " statement; and if any question or dispute arises in respect " of such return or of any statement delivered at any time

" by the Company to the Commissioners of the quantity or " amount of the electrical horse power generated and used " and sold or disposed of or of the amount payable for such " additional rentals the High Court of Justice of Ontario " shall have jurisdiction to hear and determine the same " and to enforce the giving of the information required."

The whole question turns on the meaning and effect of that paragraph.

In lieu of a fixed rental mounting up by annual increments to $35,000 a year, the Commissioners agreed to accept, and the Company agreed to pay, a fixed rental of $15,000 a year and an additional rental varying in amount by reference to the electricity generated and used and sold or disposed of by the Company.

So far the parties are agreed. The dispute is as to the method of computing this additional rental.

To assist the Court in coming to a right conclusion the parties agreed on admissions as to the methods according to which electricity is disposed of in ordinary commercial practice.

These methods are conveniently summarised in the Respondent's case as follows :—

" (1.) A contract whereby the customer has the right to " receive continuously a certain amount of power and pays for " it on the basis of the amount he is entitled to receive. He " has the right to call for it, and he pays for it, whether in " fact he calls for it or not, and whether in fact the power is " ever generated or not."

This method is known as the Flat rate contract.

" (2.) A contract whereby the customer takes what power " he wants, as and when he wants it, and pays on the basis " of the exact number of kilowatt hours, or the horse-power " hours taken."

That method is known as the Meter contract.

" (3.) A contract whereby the customer takes what power " he wants as and when he wants it, but pays on the basis of " what is called " the peak," that is to say, on the basis of " the number of watts or of horse-power made use of by him " at the instant of maximum use."

That method is known as the Peak contract.

The Flat rate contract may be left out of consideration.

Much argument was expended on the comparative advantages of the Meter contract and the Peak contract.

It may, however, be doubted (if it is permissible to express a doubt on the subject after the able and elaborate arguments addressed to this Board by the learned Counsel on both sides) whether the solution of the question at issue is more advanced or more embarrassed by a discussion as to the merits or the applicability of these two methods of contract.

One thing is plain. This contract is neither a Meter contract nor a Peak contract, for the simple reason that the Commissioners do not create or produce any vendible commodity.

The part of the Commissioners is to place at the disposal of the Company (whether you call the instrument of disposition a license or a lease) a strip of the Park lying by the water's edge just above the Horse Shoe Fall, together with the use of a portion of the flow of the river, as it passes, for the purpose of constructing electrical works and generating there electricity for transmission beyond the limits of the Park. They neither generate nor dispose of electricity themselves.

The result is that, when the contract speaks of an additional rental *for* electrical power generated and used and sold or disposed of over and above a certain quantity or amount it cannot mean that the additional payment is "in "consideration of" or "remuneration for" the power generated and disposed of. It must mean that the rental is to be calculated by reference to the amount or quantity of power generated and disposed of by the Company, that is, that when the amount or quantity generated and disposed of by the Company is so much the rental to be paid

to the Commissioners is to be calculated by reference to it.

The view of the Respondents is stated very clearly in their Printed Case to which Mr. Nesbitt referred. Their Lordships are glad to have had the opportunity of reading in print and considering the argument so presented in addition to listening to the oral address of Counsel.

"The payment," they say, "is stated to be 'at the rate " 'of the sum of one dollar per annum for each electrical " 'horse-power.' The words 'at the rate of' mean that the " payment is to be calculated for all periods on the basis of " one dollar for a full period of a year. The method of " working out the clause is simple. Take each day of the " year, or each hour of the year, or each instant, according to " reasonable possibility or convenience. Ascertain, that is to " say, measure the horse-power being generated at that time, " less waste and the Respondent's own user. In the case of " an instant this is absolute. In the case of an hour or a " day a reasonably correct result is obtained by averaging a " number of readings, for instance, taken at regular " intervals. Find the rental for the period in question " whether it is a day or an hour or an instant, 'at the rate " of' one dollar per annum, that is to say, by applying " the appropriate fraction of one dollar. These various " results, whether of days, hours, or instants, may then be " added together, and the total arrived at for the year. " Where the power runs above 20,000 horse-power a different " rate will become applicable to the portion above 20,000, " and so with 30,000, but this does not affect the principle, " and introduces no inconvenience into the calculation."

Sir Robert Finlay, on the other hand, said that that was an impossible task, or a task so difficult as to be practically impossible. No doubt the method proposed by the Respondents is not so simple as that proposed by the Appellants. And it seems far more troublesome. But their Lordships are not satisfied that the difficulty is insurmountable or so formidable as to turn the scale in favour of the Appellants.

It was contended by the Appellants that the true standard was the highest amount or quantity of electricity generated and used and sold or

disposed of which the accommodation and facilities furnished by the Commissioners enabled the Company to attain, and that that point once attained remained the standard until a higher point was reached.

It seems to their Lordships that the two methods are equally fair and equally reasonable. The fairness, of course, depends on the rate adopted. But there is no complaint by either party on that score.

The fact that the rate is lowered as the amount or quantity of electricity developed becomes larger, so that ultimately for additional development the rate is reduced to 50 cents seems rather to tell against the view presented by the Respondents. But that is only a slight indication of the meaning of the parties. The example given by way of illustration points more strongly in the same direction. But after all the example is not conclusive. The question must depend upon the fair meaning of the language used. The case is not susceptible of much argument. It rather lends itself to minute criticism which would be out of place in this judgment.

On the whole, not without some doubt and hesitation, their Lordships have come to the conclusion that the view of the Appellants is to be preferred mainly on the ground that there are some expressions which it seems impossible to reconcile with the contention of the Respondents, as, for instance, the direction that increased rental is to be payable not simply "*for*"—a word which has already been criticised—but "*from*" the development of higher power.

It was urged on behalf of the Respondents that if in consequence of some sudden emergency the demand on their resources should raise the standard abnormally it would be a very serious thing and a very harsh thing, and tie them down

to that standard for the whole remainder of the period of a hundred years. There is no doubt force in that objection. But the Appellants replied: "You can relieve yourselves from the "burden of the contract if it is really oppressive "at the end of each period of 20 years until you "come to the last period, and the omission of a "precaution to guard against a contingency "which was either overlooked at the time by "your inadvertence, or disregarded then as "unimportant, is no reason for putting a strained "construction on the words of the second edition "of a solemn contract. If you want the contract "reformed you must come to terms with us. "And we are quite willing to remove your "objection by consenting to treat each yearly "or half-yearly period as distinct and self-"contained." That seems a reasonable offer, embodying a provision which apparently would obviate the danger apprehended by the Respondents, but which their Lordships are unable to find in the contract as it stands.

Their Lordships will humbly advise His Majesty that the Appeal ought to be allowed and a decree made in favour of the Appellants.

The costs paid under the Order of the High Court must be refunded.

There will be no order as to costs.

In the Privy Council.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO AND OTHERS.

v.

THE CANADIAN NIAGARA POWER COMPANY.

DELIVERED BY LORD MACNAGHTEN.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1912.