

The Hydro-Electric Power Commission of Ontario - - *Appellant*

v.

The Coniagas Reduction Company, Limited - - - *Respondent*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH MAY, 1933.

Present at the Hearing:

LORD ATKIN.

LORD TOMLIN.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

[*Delivered by* LORD THANKERTON.]

This is an appeal from the judgment of the Court of Appeal for Ontario, dated the 20th April, 1932, which dismissed an appeal from the judgment of the Honourable Mr. Justice Raney, of the Supreme Court of Ontario, dated the 22nd July, 1931.

The action is for a declaration that an agreement made on the 8th November, 1907, between the Falls Power Company, Limited, the predecessors of the appellant, and the Clifton Sand Gravel and Construction Company, Limited, the predecessors of the respondent, is a perpetual agreement, at the option of the respondent, and that a notice given by the appellant to the respondent on the 14th May, 1928, purporting to terminate the agreement from and after the 18th May, 1928, was invalid and ineffective for that purpose. The action was brought by the respondent, by agreement with the appellant, in order that their rights under the agreement should be ascertained, and both

parties agree that they should be considered to have succeeded to the respective rights and obligations of the original parties to the agreement.

Article first of the agreement, in which the appellant now represents "the Power Company," and the respondent now represents "the Purchaser," provides :

"First. The Power Company hereby agrees to sell, deliver and maintain, at the outside wall of the transformer house of the purchaser at Thorold, Ontario, for power, lighting and electro-chemical purposes only, electric energy in the form of three-phase alternating current at approximately twenty-five cycles per second periodicity and at approximately 12,000 volts, to the amount of one hundred and fifty horse-power or more.

Said power to be delivered continuously twenty-four hours each day and every day in the year so far as reasonable diligence will enable the power company so to do, for a period of five years from the commencement of actual delivery, and this agreement shall continue in force for further periods of five years each, unless notice in writing is given by the purchaser to the company at least six months previous to the expiration of any five-year period."

Under article second of the agreement provision was made for payment by the power company for the electric energy furnished by monthly payments at a prescribed rate per kilowatt-hour, with a minimum payment of 125 dollars per month, but it was provided that the purchaser might, at his option, "at any time within one year from the commencement of actual delivery of electric energy, change the form or method of payment to a flat rate per horse-power year under the terms and conditions specified in contract form No. 6, which is hereto attached and made part of this agreement."

Article fourth provides, "The power company hereby agrees to sell and the purchaser agrees to purchase and take from the power company any and all electric energy which it may require during the term of this agreement for the operation of its plant and any and all extensions or additions thereto except as hereinafter provided," subject to certain conditions as to the supply of energy in excess of 750 horse-power. Articles tenth and eleventh provide as follows :—

"Tenth. If default shall be made at any time by the purchaser in paying for the electric energy delivered to it by the power company under and pursuant to the terms of this agreement, and if such default shall continue for a period of sixty days after demand, then the power company shall have the right at its option to terminate this agreement : or, without terminating or in any wise voiding this agreement, to discontinue the delivery of electric energy until all money due to it under the terms hereof from the purchaser shall have been paid : and this option may be exercised by the power company whenever and as often as any such default shall occur and continue for said period of sixty days after demand, and delay or omission on the part of the power company to exercise such option at any time shall not be deemed to be a waiver of its rights to exercise such option whenever such default on the part of the purchaser shall occur. Eleventh. This agreement shall be binding upon, and shall enure to the benefit of the successors, lessees and assigns of the respective parties hereto."

The delivery of electric energy under the agreement commenced on the 18th May, 1908, and on the 28th December, 1909, the purchaser exercised the option conferred by article fourth of the agreement, and the supply from the 1st January, 1910, was taken on the flat-rate basis, thus bringing into operation contract form No. 6 appended to the agreement.

Article first of the contract form No. 6 makes the same provision with regard to the continuance in force of the agreement as article first of the agreement already quoted, but, in addition, specifically provides that the amount of energy "agreed to be taken and paid for" is never to be considered as less than 150 horse-power. The only other material articles of the contract form are the fourth and eleventh, the latter of which is identical with the tenth article of the agreement. Article fourth of the contract form provides as follows:—

"Fourth. It is hereby agreed by and between the parties hereto that electric power cannot be delivered by the power company except when the purchaser takes the same, and that whenever the word 'deliver' is used in this agreement with reference to electric power, it means readiness and ability on the part of the power company to deliver power continuously to the purchaser; and the maintenance by the power company of approximately the agreed voltage at approximately 25 cycles per second at the point of measurement shall, for the purpose of this agreement, constitute delivery of the power provided for, and the above specified number of firm electric horse-power shall be the amount of electric power which the purchaser hereby agrees to pay for whether he takes the same or not."

The electric power was taken and paid for during three completed periods of five years and during part of the fourth period from May, 1923 to May, 1928; but in 1926 the respondent closed down its works and dismantled a large part of its plant, and in October, 1926, at the request of the respondent, the appellant disconnected its transmission wires at the outside of the respondents' works for an indefinite period, since when no power has been supplied or taken. Payment on the minimum basis of 150 horse-power continued to be made and accepted until the close of the fourth five-year period in May, 1928.

On the 14th May, 1928, the appellant gave written notice to the respondent that "the agreement for power supply between the Coniagas Reduction Company and the Ontario Power Company dated November, 1907, is to cease and terminate on and after May 18, 1928." The respondent declined to accept this notice and continued to tender the minimum monthly payments under the agreement, which the appellant declined to receive. The present action was thereupon commenced.

The respondent maintains that the contract is for a perpetual supply of electric power, so long as the respondent does not give written notice of termination six months prior to the expiry of any five-year period in terms of article first of the agreement, and that the appellant's notice of the 14th May, 1928, was invalid and ineffective.

The appellant maintains in the first place that, having regard to the nature of the agreement, it is not perpetual, and that the appellant is entitled to terminate it on reasonable notice. The appellant relies on the fact that the purchaser was a commercial company, arranging for a supply of electric power by which to operate its cobalt silver-ore smelting works, and that by the agreement the price payable for the power was stereotyped, and argues that it is inconceivable that parties could have intended that the agreement should be binding in perpetuity. In view of the express terms of the agreement, their Lordships are unable to accept this contention. If a power to terminate on reasonable notice is to be implied, it must be available to either party, and it would seem to follow—as, indeed, appears to have been the view of the appellant—that the expiry of a five-year period would be the only reasonable occasion for such a notice. But the agreement expressly gives such a power to the respondent, and omits to extend it to the appellant. The agreement also provides for a minimum payment even when no supply of power is being taken by the purchaser. It may further be noted that the appellant is given an express power of termination, which is limited to cases of default in payments by the respondent. Where the power to terminate is expressly given to only one of the parties and there is provision for a continuous payment by the purchaser, whether he avails himself of the counter-consideration or not, it seems impossible to extend the power to terminate to the other party by implication of law.

The appellant next maintained that it was an implied condition of the contract that there should be an existing transformer house for the purchaser's works in operation, and that there should be a going smelting business, this being the basis on which the parties contracted; that these conditions no longer existed and that the appellant was therefore entitled to hold the contract as at an end. Their Lordships are unable to find sufficient ground for such an implication; the contract was for a supply of electric energy for power, lighting and electro-chemical purposes, and the benefits of the supply could be assigned by the purchaser, and, provided the supply was used only for these purposes, there appears to be no reason for limiting the character of the works for which it was used; further, as already indicated, there was no obligation to take the supply, provided that the minimum payment was continued. If the purchaser finds the minimum payment too heavy a burden in such circumstances, he has the power to terminate the contract on the expiry of the current five-year period.

Lastly, the appellant submitted an argument on the construction of article first of the agreement, which was favourably regarded by Magee, J., who gave a dissenting judgment in the Court of Appeal. After the provision of the initial period of five years, the article proceeds, "and this agreement shall

continue in force for further periods of five years each, unless notice in writing is given by the purchaser to the company at least six months previous to the expiration of any five-year period." The contention is that the plurality of the words "further periods" was satisfied by the completion of the second and third periods of five years, or, alternatively, that it implies a reasonable number of further five-year periods. Their Lordships are unable to see any reason for limiting the natural meaning of the words used, which clearly relate to an indefinite number of years and cannot affect the question of the perpetuity of the agreement.

Their Lordships, accordingly, will humbly advise His Majesty that the judgment of the Court of Appeal for Ontario dated the 20th April, 1932, and the judgment of Mr. Justice Raney, of the Supreme Court of Ontario, dated the 22nd July, 1931, should be affirmed and the appeal dismissed with costs.

In the Privy Council.

THE HYDRO-ELECTRIC POWER COMMISSION
OF ONTARIO

^{a.}
THE CONIAGAS REDUCTION COMPANY,
LIMITED.

DELIVERED BY LORD THANKERTON.

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