

**A QUESTION OF DISALLOWANCE:
ARGUMENT BEFORE THE PRIVY
COUNCIL ON THE PETITIONS FOR
THE VETOING OF THE POWER
LEGISLATION OF ONTARIO. THE CREDIT
OF CANADA, THE SUPREME ISSUE**

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A question of disallowance: argument before the Privy Council on the petitions for the vetoing of the power legislation of Ontario. The Credit of Canada, the supreme issue by Francis Henry Chrysler

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FRANCIS HENRY CHRYSLER

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A QUESTION OF DISALLOWANCE

Argument

BEFORE THE PRIVY COUNCIL ON THE
PETITIONS FOR THE VETOING OF
THE POWER LEGISLATION
OF ONTARIO

THE CREDIT OF CANADA
THE SUPREME ISSUE

OTTAWA, October 7th, 1909.

**BEFORE A SUB-COMMITTEE OF
THE PRIVY COUNCIL.**

PRESENT:

THE RIGHT HONORABLE SIR WILFRID LAURIER,

THE HONORABLE WILLIAM PUGSLEY.

Mr. E. L. Newcombe appears at the request of the Minister of Justice.

F. H. Chrysler, K.C., and W. M. German, K.C., appear in the interests of the petitioner.

MR. CHRYSLER: I have been requested to present to this Committee of the Council the petition of Mr. John A. Murray, of the City of Toronto, who asks that the Government shall exercise certain of its powers. At the moment, I will only give the substance of his petition. The allegations in the petition I will reserve until I have made some explanation of the facts, but he asks that His Excellency may be pleased to disallow an Act which is referred to here, and which is chapter 19 of the Statutes of Ontario, passed in the Session of 1909. The reasons summed up in the last paragraph of the petition are that the legislation is *ultra vires* of the Ontario Legislature; that in assuming to close the courts to litigants, and assuming to validate contracts which have been declared illegal, the legislation is contrary to the principles which should govern British legislation, and ought to be disallowed.

The Act passed is the last of a series of Acts which deal with the powers of a body called the Hydro Electric Power Commission, and there are four Acts in all, passed in four years, 1906, 1907, 1908 and 1909. It is necessary to refer at some length to this legislation, in order to understand the provisions of the Act, the only Act which we attack here, that is, this Statute of 1909.

THE LEGISLATION ON THE SUBJECT.

In 1906 the first Act, chapter 15, created a Commission which was to be a corporate body to consist of three persons, two of whom might be members of the Executive Council of Ontario, and one must be; that is, of the three, either one or two should be members of the Executive Council; in fact the Commission, I think, has been uniformly composed of two members of the Executive Council, the present members being the Hon. Adam Beck and the Hon. J. S. Hendrie, and the third gentleman is Mr. McNaught. The first Act is only important as illustrating the change in the powers of the Commission which was made by the legislation of 1907. The Act of 1906 was repealed in 1907, and very much the same measure re-enacted, with a very important fundamental difference in the scope of the powers of the Commission.

The first Statute contemplated that the Commission should acquire power by lease or otherwise, from power companies, and should build transmission lines in the Province, distributing electricity for use by municipalities, for their own use, or, if desired by them, for sale to persons desiring to purchase it from the municipalities. But it involved this difference in the position of the parties concerned: that the municipalities who should take from the Power Commission would be furnished power at a certain definite cost, the Commission paying a lesser sum for the generation of the power, and putting a price upon it which should, at all events, fully recoup them for the cost of their transmission lines and the cost of operation, and leave them as independent vendors of power to the municipalities. The manner in which the price was fixed was not exactly the naming of one sum, but a sum was to be named—and this appears clear from section 15 of the Act of 1906—a sum was named as the price per horsepower payable by any municipal corporation, under the terms of contract, delivered at the municipality, and, in addition to that, two other elements of price were to be added, namely, interest at the rate of four per cent. upon the moneys expended by the Commission on capital account, and an annual sum sufficient to form in thirty years a sinking fund for the retirement of the securities issued by the Province of Ontario for the payment of the cost of the

works. And, thirdly—and that is common to both schemes—the cost of operating, maintaining, repairing, renewing and insuring the said works, plant, machinery and appliances.

Then, as this was to be entered into, not with one municipality, but with an unlimited number of municipalities, so far as the legislation provided, it was to be an option extended to all municipalities within reach of the transmission lines which were contemplated conveying power from the waterpowers on the Niagara River, and also the scope of the Act is wide enough and its intention is that if waterpowers in other parts of the Province should be found suitable for the purpose, that transmission lines might be constructed by the Hydro Electric Power Commission, and the same conditions extended to other municipalities anywhere in the Province. It involved, of course, the dealing with a large number of municipalities who would only enter voluntarily into such a scheme. On the face of it, it could not be known until the municipalities had been consulted and had determined their wishes in the matter, whether the number would be ten, twenty, or one hundred or five hundred municipalities. The scope of it was entirely dependent upon the favor with which the scheme would be received by the municipalities.

PROVISION AS TO PAYMENT.

Then the payment that I have indicated was to be made, not by one, but by all the municipalities entering into it, and, as between themselves, the payment of the elements of cost to the Hydro Electric Power Commission was provided for in this way, by section 16:—

“The Accountant of the Commission shall annually adjust and apportion the amounts payable by municipal corporations to the Commission under the next preceding section.”

That is, the whole apportionment of cost between one or a hundred municipalities rested nominally with the Accountant of the Commission.

In the next Act that was changed to the Commission itself.

Now, so that the Committee may follow the sequence of events, that was assented to on the 14th May, 1906, and the matter became one of considerable public importance, and a large number of municipalities were invited or solicited to take an interest

in the Hydro Electric Commission's scheme, and a large number of municipalities were, by the councils of the municipalities, asked to vote upon the question, the broad question—not the question whether, upon certain definite terms they would take water from the Hydro Electric Commission—but a sort of general question, and I will refer to the terms of it, because it is shown in one of the cases. It was, in substance, "Does the municipality desire to obtain from the Hydro Electric Power Commission power at a cost not exceeding a figure mentioned?" (which was different in the different municipalities). That question was voted upon extensively in the municipalities, I understand, in the general municipal elections of 1907. I have taken that for granted, and I think that is right.

The Committee are aware that in the Province of Ontario the municipal elections take place in the first week in January. It is not necessary that these questions submitted to the ratepayers should be voted upon at that time, but it is a convenient practice, because they are voting anyway, and they are then asked such questions, and this question was asked in at least 16 municipalities, large and important cities, some of them, whether they desired to acquire power under the scheme of the Hydro Electric Power Commission, at a cost not exceeding, in the case of Toronto, \$18.10 per horsepower. That question was the broad one placed before the electors: \$18.10, be it observed, being the price delivered at the confines of the municipality of Toronto, and so with the other municipalities. The electors voted, not for a by-law approving the terms of the contract, but voted an answer to that broad question in 16 municipalities, and then, after that vote which took place in 1907, the legislation of 1907 was enacted, which is chapter 10 of the Ontario Statutes of 1907.

A CHANGE OF POLICY.

That Act repealed, as I have said, the Act of 1906, and propounded in terms which do not vary very much from the terms of the Statute of 1906, but, when closely examined and considered, propounded what was substantially a new scheme, completely varying the terms of the scheme which had been put before the electors in these different municipalities in the January elections

of that year. The difference was this; for some reason—I do not know whether the reasons of policy which dictated the change have been indicated—the Government and the Hydro Electric Power Commission came to the conclusion that the arrangement they were proposing was not a desirable one. The Hydro Electric Power Commission was, in the first scheme, a vendor of power. It might contract losses, it might contract large liabilities, and the municipalities, of course, were only liable to the amount for which they had pledged themselves, and could not be liable for any more, and the ultimate loss in that case, if there was loss, would fall upon the Commission, and its debts would have to be assumed by the Province of Ontario.

They, therefore, in the Act of 1907, took a new position. They said: "We are not going to be vendors of power, we are going to be a simple agency for the municipalities. We will make a contract with power producers at Niagara Falls, or elsewhere, we will contract with them to deliver to us power at the boundary line of the power company's premises. We will erect such transmission line or lines, as may be necessary, and we will enter into contracts with the municipalities to deliver to them power based upon the price which shall be the price of power delivered at the generating company's premises, plus, as before, the proportion of the sinking fund, and plus the amount required to meet the loss in distribution." This is clear by the provisions of section 12 of the Act of 1907:—

"Any municipal corporation may apply to the Commission for the transmission and supply to the corporation of electrical power or energy for the use of the corporation and the inhabitants of the Municipality for lighting, heating and power purposes, or for any or either of such purposes, or for any of the purposes mentioned in section 74, and the Commission shall thereupon furnish to the corporation a statement of the maximum price per horsepower at which the electrical power or energy will be supplied *at the point of development or of its delivery to the Commission* and an estimate of the cost of constructing or providing a transmission line by means of which the amount of electrical power or energy required by the corporation is to be supplied and of maintaining the same, and may furnish to the corporation plans and specifications of the works, plant, machinery and appliances necessary for the distribution of such power or energy by the corporation, and an estimate of the cost thereof, and such other information as the

Commission may deem advisable. The Council may thereupon enter into a provisional contract with the Commission for the supply of electrical power or energy for the purposes mentioned in this Act."

Then that this new element of cost was shifted from the Commission is clear from section 18, which replaces section 15 of the previous Act:—

"In addition to the price per horsepower payable by any municipal corporation under the terms of a contract entered into with the Commission, *which shall be the cost of the power to the Commission at the point of development, or of its delivery to the Commission*, the corporation shall annually pay to the Commission its proportion as adjusted by the Commission of the following charges:—

"(a) Interest at the rate of four per cent. upon the moneys expended by the Commission on capital account in the construction or purchase of the works.

"(b) An annual sum sufficient to form in thirty years a sinking fund for the retirement of the securities issued by the Province under this Act for the payment of the costs of the work.

"(c) Line loss and the cost of operating, maintaining, repairing, renewing and insuring the works."

Then the last sub-section introduces a new element, necessarily consequent upon the change in the charge being based upon cost at point of delivery to the Commission, instead of at the line of the municipality.

This part of the cost of operation by the Hydro Electric Commission, the line loss in transmission and "the cost of operating, maintaining, repairing, renewing and insuring the works," is to be paid proportionately by the municipalities which shall enter into the scheme, instead of, as before, being covered in the difference in the cost imposed upon them and the cost which the Commission paid for its power.

The difference, as the Committee will see, was fundamental. I am not questioning the wisdom of the second plan at all; but it is sufficient for present purposes to say that it was fundamental, that the Hydro Electric Power Commission, instead of being a vendor of power, acting upon its own responsibility, and with its responsibilities and liability for error, became a mere agency of the municipalities employed by them to carry out a joint transmission power scheme, at their cost, without their supervision, and without their consent, except as expressed in that vote which was