16, 1941

In the Privy Council

No. of 1940

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

BETWEEN:

INTERNATIONAL RAILWAY COMPANY

(*Plaintiff*) APPELLANT,

AND

THE NIAGARA PARKS COMMISSION

(*Defendant*) RESPONDENT.

RECORD OF PROCEEDINGS

BLAKE & REDDEN,
17, Victoria Street, London, S.W. 1. *Solicitors for the Appellant.*

GARD, LYELL & CO.,
47, Gresham Street, London, E.C. 2. *Solicitors for the Respondent.*

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I.

PLEADINGS, EVIDENCE, JUDGMENTS, ETC.

PART II.

EXHIBITS.

No. 1

Statement of Claim

In the Supreme Court of Ontario.

No. 1.
Statement of Claim,
21st September, 1938.

IN THE SUPREME COURT OF ONTARIO

BETWEEN:

INTERNATIONAL RAILWAY COMPANY

Plaintiff,

AND

THE NIAGARA PARKS COMMISSION

Defendant.

(Writ issued the 29th day of August, 1938)

1. The Plaintiff is a corporation incorporated under the laws of the State of New York, one of the United States of America with statutory corporate capacity and powers under the laws of the Dominion of Canada, and carries on business in the Province of Ontario and elsewhere. The Defendant is a corporation incorporated under the laws of the Province of Ontario.

2. By an agreement in writing dated the 4th day of December, 1891, and made between the Commissioners for the Queen Victoria Niagara Falls Park (in the said agreement and herein referred to as "the Commissioners") and Edmund Boyd Osler and others (in the said agreement and herein referred to as "the Company") it was among other things agreed that "the Company" should have the right to construct and operate certain railways and works as in the said agreement defined, such right to operate to continue for a period of forty years from the 1st day of September, 1892, with certain provisions for renewal, all upon the terms more particularly set forth in the said agreement to which for more particularity the Plaintiff will refer at the trial of this action.

3. All of the property and rights of "the Company" under the said agreement were long prior to the expiration of the said period of forty years vested in the Plaintiff as the successor of "the Company". The rights and obligations of "the Commissioners" under the said agreement were prior to the expiration of the said period of forty years assumed by and vested in and became the rights and obligations of the Defendant.

4. It was provided by the said agreement that at the end of the said period of forty years, if "the Company" was unwilling to renew, "the Company" should be duly compensated by "the Commissioners" for their railways, equipment, machinery and other works, such compensation to be fixed by mutual agreement, or in case of difference by arbitration, as in the said agreement provided, and that at the end of the said term "the Commissioners" should be entitled to possession of the said railways, equipment, machinery and other works of "the Company", and that they should become the property of "the Commissioners".

In the Supreme Court of Ontario.

No. 1. Statement of Claim, 21st September, 1938.

—continued

5. The right of renewal provided for by the said agreement was not exercised, and at the end of the said period of forty years the Defendant took possession of the said railways, equipment, machinery and other works in pursuance of the said agreement, and assumed the ownership thereof, and thereupon and thereafter used and enjoyed the said railways, equipment, machinery and other works to the exclusion of the Plaintiff.

6. The amount of the compensation to be paid to the Plaintiff by the Defendant under the said agreement was not agreed upon between them, but was determined by Order of His Majesty in His Privy Council dated the 15th day of April, 1937, in arbitration proceedings taken pursuant to the said agreement, at the sum of $1,057,436.00, to which Order and proceedings for more particularity the Plaintiff will refer at the trial of this action.

7. The Defendant paid to the Plaintiff on or about the 3rd day of June, 1937, the sum of $1,057,436.00 in respect of the said compensation and the sum of $1,738.25 as interest on the said sum of $1,057,436.00 from the 21st day of May, 1937, to the 2nd day of June, 1937, computed at 5% per annum, and on or about the 12th day of August, 1937, the Defendant paid to the Plaintiff the sum of $22,045.61 as interest on the sum of $179,104.00, part of the amount of said compensation, from the 29th day of May, 1935, to the 15th day of April, 1937, and interest on the said sum of $1,057,436.00 from the 15th day of April, 1937, to the 21st day of May, 1937, such interest being computed at the rate of 5% per annum, but save as aforesaid the Defendant has neglected and refused and still neglects and refuses to pay to the Plaintiff interest upon the amount of the said compensation.

8. THE PLAINTIFF CLAIMS:—

(1)	Interest on $1,057,436.00 from September 1st, 1932, to June 3rd, 1937, at 5% per annum...	$251,322.08
	Less payment on account of interest made on June 3rd, 1937, and 12th August, 1937, as aforesaid	23,783.86
	Balance	$227,538.22

(2) And the Plaintiff claims interest on the balance of interest outstanding from time to time until Judgment.

(3) Costs of action.

(4) Such further and other relief as the nature of the case may require and to the Court may seem meet.

The Plaintiff proposes that this action be tried at the City of Toronto.

DELIVERED this 21st day of September, 1938, by Fasken, Robertson, Aitchison, Pickup & Calvin, 36 Toronto Street, Toronto, Solicitors for the Plaintiff.

No. 2

Statement of Defence

1. The Defendant admits the allegations contained in paragraph (2) and (4) of the Statement of Claim but except as hereinafter expressly admitted denies all other allegations contained in the Statement of Claim.

2. The Plaintiff is a corporation incorporated under the laws of the State of New York and resides at the City of Buffalo in the State of New York. The Defendant is a corporation incorporated under the laws of the Province of Ontario.

3. By an agreement dated the 4th day of December, 1891, between the Commissioners for the Queen Victoria Niagara Falls Park therein called "the Commissioners" and Edmund Boyd Osler therein called "the Company", "the Company" was given an exclusive franchise to construct and operate an electric railway along the top of the west bank of the Niagara River from the Village of Queenston in the County of Lincoln to the Village of Chippawa in the County of Welland.

4. The said agreement provided that if "the Company" were unwilling to renew their franchise at the end of a forty-year period (i.e. September 1st, 1932) they were to be duly compensated by "the Commissioners" for their railway equipment, machinery and other works and that such compensation was to be fixed by mutual agreement or, in case of difference, by arbitration as provided in the said agreement, but such agreement made no provision requiring the Defendant to pay interest on such compensation.

5. By the provision relating to arbitration in the said agreement, one of the arbitrators was to be named and appointed by "the Commissioners", another by "the Company" and a third by the Chief Justice or senior presiding Judge of the Supreme Court of ultimate jurisdiction for Ontario.

6. The Plaintiff was unwilling to renew the said franchise at the end of September 1st, 1932 and was unwilling and refused to fix the amount of compensation by mutual agreement as contemplated in the said agreement of December 4th, 1891, although the Defendant was ready and willing so to do.

7. Mr. R. S. Robertson, K.C., was appointed arbitrator for the Company and Mr. G. W. Mason, K.C., was appointed arbitrator for the Defendant and on the 2nd day of November, 1934, the Chief Justice of Ontario appointed The Honourable Mr. Justice Robert Smith the third arbitrator.

8. On the 9th day of January, 1935, arbitration proceedings were commenced before the said arbitrators and the Plaintiff claimed as compensation for its railway equipment, machinery and other works the sum of $2,424,720.00. On the 29th day of May, 1935, a majority of the arbitrators made an award in favour of the Plaintiff for $179,104.00, and denied the claim of the Plaintiff for interest on grounds set out in their reasons for award.

9. An appeal was taken by the Plaintiff from the award of the majority of the arbitrators to the Court of Appeal for Ontario and a further appeal was taken by the Plaintiff to His Majesty in His Privy Council. On the 15th

In the Supreme Court of Ontario.

No. 2. Statement of Defence, 4th October, 1938.

—continued

day of July, 1937, His Majesty in His Privy Council ordered that the amount of compensation to be paid to the Plaintiff be the sum of $1,057,436.00. On such appeal the Plaintiff claimed the interest now sought to be recovered in this action as appears from clause eleven of case filed for the Appellant and after hearing argument on such claim, their Lordships in the Privy Council refused to allow such interest in such proceedings and the Defendant relies upon such judgment as a bar to this action.

10. The Defendant has paid to the Plaintiff the said sum of $1,057,436.00 awarded as compensation and interest on the said sum of $179,104.00 from May 29th, 1935, being the date of the arbitrators award until April 15th, 1937, the date of the Order of His Majesty in His Privy Council, and interest on the said sum of $1,057,436.00 from April 15th, 1937 until June 2nd, 1937, such interest amounting to the sum of $23,783.86. Such payments constitute full payment and satisfaction of the said judgment of His Majesty in His Privy Council and all interest due thereon according to law.

11. By the said agreement of December 4th, 1891, the Plaintiff is not entitled to interest on any amount that may be awarded as compensation until the amount of compensation becomes fixed either by mutual agreement or by arbitration and the Plaintiff is not otherwise entitled to the interest claimed in the Statement of Claim.

12. The Defendant claims the benefit of sub-section (h) of section 48 of Chap. 118 of the Revised Statutes of Ontario, 1937, being the statute known as The Limitations Act.

13. The Defendant says that The Niagara Parks Commission is a body corporate enjoying all the rights, powers and privileges previously vested in and exercisable by the Commissioners for the Queen Victoria Niagara Falls Park as declared by Chap. 93 of the Revised Statutes of Ontario, 1937, and that the Defendant as such is entitled to immunity from liability in this action, by reason of the Defendant being an emanation or agent of the Crown as established by (1887) 50 Vict. Chap. 13 and all subsequent Acts relating to the Commissioners for Queen Victoria Niagara Falls Park or the Niagara Parks Commission.

14. The Defendant therefore submits that this action should be dismissed with costs.

DELIVERED at Toronto this 4th day of October, A.D., 1937 by Messrs. Slaght, Ferguson and Carrick, 320 Bay Street, Toronto 2, Ontario, solicitors for the Defendant.

No. 3

Reply to Statement of Defence

No. 3. Reply to Statement of Defence, 12th October, 1938.

1. The Plaintiff joins issue on the Statement of Defence delivered herein.

2. The Plaintiff specifically denies the statements contained in paragraph 6 of the Statement of Defence with respect to fixing the amount of compensation by mutual agreement. The facts are that prior to

the expiring of the period of forty years' operation the Plaintiff by letter expressed to the Defendant its desire to determine by agreement with the Defendant the compensation to be paid and requested a meeting for that purpose to be held prior to August 31st, 1932. On many occasions thereafter both by letter and by telephone and other oral communication the Plaintiff endeavoured to bring about a meeting for the purpose aforesaid but the Defendant notwithstanding that on the expiration of the said period of forty years it had proceeded to take possession of the railway, plant and equipment under the agreement of 4th December 1891, persistently and purposely avoided any arrangement for such a meeting. This continued until 22nd March 1934 when the Plaintiff, in default of an agreement as to compensation, notified the Defendant of the appointment by the Plaintiff of an arbitrator on its behalf for the purpose of determining the amount of compensation to be paid and required the Defendant to name its arbitrator so that proceedings to determine the amount of compensation might be commenced forthwith. The defendant again pursued a policy of delay so that it was not until 2nd November 1934 more than two years after Defendant had taken possession of the railway that a board of arbitrators was constituted to fix the compensation. The Plaintiff will at the trial hereof ask leave to refer to the letters exchanged between the parties for the particulars of its attempts to arrange for a discussion of the amount of compensation.

3. The Plaintiff says that neither the arbitrators nor their Lordships in the Privy Council adjudicated upon the claim of the Plaintiff for interest as alleged in paragraphs 8 and 9 of the Statement of Defence but on the contrary they held that a claim for interest upon the amount of compensation was not one that could be determined in the arbitration proceedings.

4. The Plaintiff denies that the Defendant is entitled as an emanation or agent of the Crown to immunity as alleged in paragraph 13 of the Statement of Defence and says that the Defendant is a corporation created by the Legislature of the Province of Ontario with capacity to contract and to sue and to be sued and that throughout its dealings with the Plaintiff it has assumed, exercised and undertaken the rights, powers and liabilities of such a corporation.

5. The Plaintiff further says that even if the Defendant were otherwise entitled to such immunity the Defendant by the letter of its Solicitors when making payment of a sum for interest on the 12th day of August 1937 expressly waived any such immunity and agreed that the claim of the Plaintiff for interest over and above the amount then paid should be determined by action.

DELIVERED this 12th day of October, 1938, by Messrs. Fasken, Robertson, Aitchison, Pickup & Calvin, 36 Toronto Street, Toronto, Ontario, Solicitors for the Plaintiff.

In the Supreme Court of Ontario.

No. 4.
Opening Proceedings at Trial, 12th June, 1939.

No. 4

Opening Proceedings at Trial

Before The Honourable Mr. Justice Kelly, at Toronto, Ontario, June 12, 13 and 14, 1939.

COUNSEL:

J. W. PICKUP, K.C.
J. W. G. THOMPSON — *For the Plaintiff.*

A. G. SLAGHT, K.C.
R. I. FERGUSON, K.C. — *For the Defendant.*

MONDAY, JUNE 12, 1939, AT 11.20 A.M.:

HIS LORDSHIP: I have looked at the record, Mr. Pickup.

MR. PICKUP: Well, perhaps I should say a word in opening, my Lord, or maybe a little bit more than a word. I appear, as your Lordship will observe, for the Plaintiff, the International Railway Company, and Colonel J. W. G. Thompson is with me. Mr. Slaght appears for the Niagara Parks Commission, and Mr. Ferguson is with him.

The action, my Lord, is to recover interest on compensation payable in respect of the taking over by the Niagara Parks Commission of the old railroad that ran around the Niagara River. It is rather a long story. The claim arises under an old agreement confirmed by statute, made in 1891, to which we shall have to refer a little bit later on, under which the railway was operated for some forty years, by first the Niagara Falls Park and River Railway Company. There was an option to renew it for a further term, but that option was never exercised, and generally under the terms of that agreement at the expiration of the franchise period the property was to be taken over by the Parks Commission. Your Lordship will find that there are express provisions in it providing at that date and at that time that the property should be vested, would become vested, in the Parks Commission, and possession was in fact, as we shall show, taken at that time.

The agreement provides that the amount to be paid in the way of compensation is to be fixed by arbitration if the parties should fail to agree; they did not agree, and consequently in due course of time an arbitration did result. Mr. Robertson was appointed as arbitrator for the International Railway Company, eventually Mr. G. W. Mason as arbitrator for the Niagara Parks Commission, and the Honourable Mr. Justice Smith was appointed by order of the Chief Justice of Ontario, (Sir William Mulock at that time), as the third arbitrator. The arbitration then proceeded, and finally the award was made by the arbitrators, amounting to some $179,000. An appeal was taken from that award to the Court of Appeal for Ontario, and there was really no substantial change; we do not need to be concerned much with what happened in the Court of Appeal, because a further appeal was then taken to His Majesty in his Privy Council, with the result that the amount of the compensation was increased to something over a million dollars.

The Commission then sought to treat this, apparently, as being a claim which did not carry interest until the amount was fixed, which is contrary, of course, to our contention. Our contention, of course, will be that there is interest from the moment that possession was taken. However, I think that is the way they have treated it, because they have in fact paid first interest on the million-odd, the final amount of the compensation, from the date of the Privy Council judgment down to the time the payment was made, and of course the million dollars of compensation has been paid and interest on it was paid from the date of the judgment in the Privy Council until the date of payment. But then they went back and made a further adjustment by way of interest, to pay us interest on the sum of $179,000—I am speaking of odd figures, your Lordship will appreciate—from the date of the original award of the arbitrators, treating it, I suppose, as being fixed at that time and therefore bearing interest.

Your Lordship, of course, will appreciate that this possession was taken back on the 1st of September, 1932, it is 1937 before we get the judgment in the Privy Council, and not long before that, before the award itself—it was 1934 when the arbitrators were appointed—with the result that we have had no interest on this large sum of money from the time when possession was taken in 1932 down to the time of the date of the arbitrator's award, which is a period of several years—no interest at all on the large amount, and then only interest on a small amount from that date down to the date of the judgment in the Privy Council. Consequently your Lordship will see from the record that the amount involved in the record is a very substantial sum of money, approximately a quarter of a million dollars.

On the question of interest the arbitrators took the position—and, I shall submit to your Lordship, rightly—that their duty was to fix the amount of the compensation, and that it was no part of their duty to include in the award anything for interest on it. That view your Lordship will find confirmed in this arbitration, in the Privy Council, the Board there saying that any right or claim we have to interest we would have to assert in a separate action, in order not to receive it in the award, that it formed no part of the award.

MR. SLAGHT: They put it that the claim, if any, for interest must be enforced by action—I think that is the way it was put in the Privy Council—and hence we are here. The action is brought to recover that interest.

HIS LORDSHIP: What facts are in dispute?

MR. PICKUP: I do not think there is much in the way of facts.

MR. SLAGHT: Very little. I think we can put the evidence in very briefly, except that there are a number of documents which will have to be disclosed to you in some detail, and that will take some time.

MR. PICKUP: My friend and I have discussed this from the standpoint of convenience, and most of the evidence will be documentary. I propose to start to put it in. Many of the documents, nearly all of them, your Lordship will find already printed in the record in the case which went to England, and we propose to furnish your Lordship with a copy of that, because it is a more convenient place for your Lordship to read it, instead of

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No. 4.
Opening Proceedings at Trial, 12th June, 1939.
—*continued*

having to hunt for each particular exhibit as we are reading from it, although I think as a matter of form and for the record of the Court it might be well for me to mark exhibits as they go in. There will be very little evidence outside of the documents which are put in, but after I have gone a little stage I shall ask your Lordship for leave to put a witness in the box to supplement to some extent some of the correspondence or documents. I think probably the most convenient way to do it would be to run it along as a sort of running story, so that your Lordship will not have to wait until we get to argument to see what a document contains; so, as I put in a document, I think I shall go right through the document or the material parts of it in order that your Lordship will be getting the facts as they go along.

HIS LORDSHIP: I suppose the defendants paid such interest as you have told me about as upon a judgment purely, not under any agreement or document, but, it having been determined by the Court, they decided that they owed interest as on a judgment; is that it?

MR. PICKUP: I suppose so; I don't know.

MR. SLAGHT: I think my friend was surprised, perhaps, to get any interest, but—

HIS LORDSHIP: They seem to be relying on it somewhat now.

MR. SLAGHT: Well, they have a plea which relies on that, but I am quite prepared to meet that when your Lordship sees the correspondence under which the payment was made. We paid it, not as a matter of strict liability, but the situation was this: They got in 1935 an award from the board of arbitration for $179,000, and after all the appeals, that amount having been increased, we took the view that we would pay them interest on that sum from the date when they had it ascertained, and did. As a matter af fact, the Court of Appeal reduced that amount by a few thousand dollars and said the proper amount should be $164,000, but we took no account of that interim reduction in the Court of Appeal. Then they get a judgment in the Privy Council, which will have to be discussed in its terms, because it, as all such judgments do, directs the appellate court from which the appeal came to pronounce the judgment they ought to have pronounced, and directs that the award be varied and that the following be substituted, so that then we computed interest from the date of the filing in the Court of Appeal for Ontario of the King's Order, the 21st of May, it took us a little while to adjust it, and we paid a couple of weeks' interest on the large amount there, but without any admission of liability. Then in our letter when we made the final payment we said, "We suggest you are not entitled to any further rights against our clients. If you think you have any further claim for interest we will accept service of a writ," and after about a year the writ came along, and that was the way in which we paid. But if my friend is at all pressing the fact that we have paid something and contending that it creates this obligation, I think it better that I should deal with that in answer to your Lordship's question rather after you have the documents before you on which payment was made.

HIS LORDSHIP: All right.

MR. PICKUP: My Lord, may I hand you, as I say, for convenience in reference, a copy of the record in the Privy Council. That, of course, is not in as an exhibit. I will put in the exhibits that we propose to put in, and then I will give your Lordship the papers.

MR. SLAGHT: As a matter of convenience, I am quite prepared to have that marked as an exhibit, it containing only matter which was before the Privy Council, and the Privy Council made certain directions regarding the question of interest, so that it is part of the record which will enable you perhaps to appreciate better what they did on the subject of interest. Then we have a plea of res judicata on the record as well in our defence, so that to have this before you will make it easier to determine our plea of res judicata as well.

HIS LORDSHIP: Of course it is before me, but the idea is, if it goes in as an exhibit it will be before a higher court when the time comes.

MR. SLAGHT: Yes.

HIS LORDSHIP: It is up to Mr. Pickup; it is his case at the moment.

MR. PICKUP: I do not propose to put in the whole record, because I have not considered it from that standpoint. I have practically told my friend what I propose to put in in the way of exhibits, but there may be a whole lot more things in the record with which I am not familiar at the moment, and I do not propose to put it in as an exhibit in the case.

MR. SLAGHT: Then when the time comes if I desire to have it made an exhibit in the case I shall present my reasons for so doing.

HIS LORDSHIP: Yes, I think so.

MR. PICKUP: The first exhibit that I want to put in, my Lord, with my friend's concurrence—probably it does not need to go in, but I think for the purpose of the record we had better put it in separately—is the Statute of Ontario, chapter 96 of the Statutes of 1892; it is the statute incorporating the Niagara Falls Park and River Railway Company, with schedules attached, and that statute contains the agreement which is the basis of this action. May we have that marked as Exhibit 1.

EXHIBIT 1: Copy of Ontario Statute, chap. 96 of 55 Vict., 1892.

MR. PICKUP: If your Lordship then will turn to that at page 277—

MR. SLAGHT: Before my friend proceeds, may I say that my position is that these are statutes of Ontario and are all before the Court in this case as such under the section of the Interpretation Act, as all public Acts are before the Court. I see no objection to its being put in in typewritten form, because it is a very old statute and it is a matter of convenience, but there are other later statutes affecting us, and I think there should be incorporated with this the present Act, the Act in force with regard to the status of my clients at the date the action was brought; but that is by law before your Lordship in this case anyway.

MR. PICKUP: Oh, yes, and I quite agree. I am putting that in solely for convenience. I am considering that it is in evidence anyway, and I want to refer to other statutes without putting them in, as my friend has the right to

In the Supreme Court of Ontario.

No. 4.
Opening Proceedings at Trial, 12th June, 1939.

—continued

do as well, but they are not statutes that are likely to need the constant reference that this one will.

MR. SLAGHT: That is chapter 96?

MR. PICKUP: Chapter 96 of the Statutes of 1892.

MR. SLAGHT: I am afraid I interrupted you when you were going to tell his Lordship where that would be found in the black book.

MR. PICKUP: On page 277, my Lord.

I am not going to read the whole of this statute, my Lord, but we shall have to skim over it to give you the substance of it.

You will see the recitals first; we can pass them over. They refer to an agreement which has been entered into, which is the agreement of the 4th of December, 1891, and it was an agreement entered into between the Queen Victoria Niagara Falls Park Commissioners and Mr. Edmund Boyd Osler and others. May I pause at this moment to say to your Lordship—my friend will concur—that the present defendant, the Niagara Parks Commission, is simply a change of name of the Queen Victoria Niagara Falls Park Commission.

Then when you come to section 1, that probably is important—

MR. SLAGHT: So as not to be taken by silence to quite acquiesce in that statement: the present Commission is a successor to the earlier one with a new name, but there are some statutory provisions in the present Act, and possibly vice versa; in other words, the statute today covering the status of the defendants under which we are sued is not quite the same as the old Act, so that when my friend said simply a change of name that is not quite an accurate statement, and there may be some matters to be referred to on that point, so I call my friend's attention to it.

MR. PICKUP: Yes, but my friend does not mean that the present Commission is not the same corporate body. It has different powers, of course, its powers have been in some way changed, but it is the same corporate body.

HIS LORDSHIP: Well, you are both proceeding with extreme caution.

MR. PICKUP: Yes, my Lord.

MR. SLAGHT: There is a considerable amount of money involved, my Lord.

MR. PICKUP: There is a considerable amount involved, and we probably will until we get to the end of it.

Plaintiff's Evidence.
No. 5.
Documentary Evidence.

No. 5

Then, my Lord, I want to read paragraph 1:

(*Counsel reads paragraph* 1, *Record, p.* 62.)

Then section 2 made the parties named a body corporate and politic under the name of "The Niagara Falls Park and River Railway Company".

I do not think I need read 3; it relates to personal liabilities.

I do not think anything turns on 4; it is as to the general powers of the company, one of them being to operate this railroad.

5 and 6 I think we may pass over; they are relating to stock. 8 relates further to powers, 9 as to conduits. Nothing turns on any of those sections so far as this action is concerned.

Section 5 makes applicable certain provisions of the Railway Act, which I do not think are important, nor is there anything in 6, 7, 8, 9 or 10. I do not think there is anything more in that statute that affects the issues in this case, except the agreement itself, which we come to in the schedule to it.

That brings me then to the agreement, my Lord, upon which the action is founded, and it begins at page 287.

MR. SLAGHT: Are you going to call that Exhibit 2 or a schedule to 1?

MR. PICKUP: It is all in as part of 1.

It is dated the 4th day of December, 1891, between the Commission and the persons who were incorporated as the body. I do not need to take your Lordship over the recitals. There are provisions relating to a low level railway, which I think can be eliminated, because they are not in question. Then when we get over to page 289 the agreement proper operates:

(*Counsel reads paragraphs* 1 *and* 2, *Record p.* 72.)

Then there is provision as to the gauge of railways; I do not think we are concerned with that.

Paragraph 4 relates to the location, and nothing turns upon that.

Paragraph 5 is as to sidings; I do not think we need be troubled with that, nor the width of the right of way, which is provided for by 6. These matters relate to construction, and really nothing turns upon them.

Then we pass over to 11, which gave the right to construct and operate inclined railways and elevators.

12 is as to the company's obligation to use due diligence, and so on, build the railroad and get it in operation, with certain forfeiture provisions if they failed.

13 was as to the nature of the franchise.

(*Counsel reads from paragraph* 13, *Record p.* 75.)

14 I think may be passed over.

(*Counsel reads from paragraph* 15, *Record p* 75.)

Then I might refer to section 17 for a moment, but I probably should not pass 16:

(*Counsel reads from paragraph* 16, *Record p.* 75.)

Then I think the next section may be passed over; it related to the appointment of arbitrators for the purpose of fixing the renewal if the renewal was to be had, but that renewal was not exercised, so I think we can forget about it except for that one fact.

MR. SLAGHT: Pardon me you will have to come back to it after you read 26, because in 26, which is important, they adopt the same method of arbitration as is set out in 17, but they do not repeat it in words. That is the only significance. I think you are right to leave it now and come back, perhaps, to it.

In the Supreme Court of Ontario.

Plaintiff's Evidence.

No. 5. Documentary Evidence.

—continued

MR. PICKUP: It only applies, I think, to the appointment of the arbitrators.

MR. SLAGHT: That is all.

MR. PICKUP: That is the way you get the arbitrators appointed. Well, suppose we read it at this stage, and then we won't have to come back to it:

(*Counsel reads from paragraph 17, Record p. 75.*)

Then 18 related to desire to renew, which I think I may pass over. If my friend thinks any of these ought to be read, I hope he will suggest it.

19 provided for the annual rental which was to be paid to the Commissioners of $10,000 a year by way of rental until the determination of the term of forty years; and if the company exercises the option for the second period the rental is to be fixed by arbitration as aforesaid.

I do not think anything turns on clause 20.

21 relates to the low level railway, which is not in question, and so do 22, 23, 24 and 25; they may all be passed over.

Now we come, I think, to what is probably the operating and important section of the agreement, on page 295:

(*Counsel reads paragraphs 26 and 27, Record p. 77.*)

I do not think there is anything in 28 that affects us.

(*Counsel reads paragraph 29, Record p. 78.*)

Your Lordship sees that the property was the property of the company vested in it and so declared, and that at the end of the franchise period it is declared to become the property and become vested in the Commissioners.

30 is simply an agreement that they shall use their best endeavours to have the necessary legislation passed.

MR. SLAGHT: When you comment and say "property of the company", you mean property other than the land, because it is clear from that that the land over which the license was given them under the earlier section is the land always of the Park in fee simple, and it is only these other assets which are the property of the company. I expected you meant that, but when you said that it becomes the property of the company, the land never became the property of the company, but was always in the Park in fee.

MR. PICKUP: The fee simple of the right of way in the Park proper and on the chain reserve is what is reserved in that section; all of the rest of the property did pass, and the rights of way over that property did pass.

I do not think there is anything in 31 or 32.

That, then, my Lord, is the contract.

Then, as a matter of title—and I do not think there is any contention about this—I thought I should put in an extract from the minute book of the old River Company, taking over that agreement in 1892.

This is the extract I handed to you this morning, Mr. Slaght.

MR. SLAGHT: I will facilitate this going in without formal proof, my Lord. It is forty years old.

MR. PICKUP: It proves itself by production as a matter of law, my Lord.

HIS LORDSHIP: You are putting something in as Exhibit 2; what is it?

MR. PICKUP: It is the minutes of a meeting of the shareholders of the Niagara Falls Park and River Railway Company, held on the 14th day of July, 1892.

HIS LORDSHIP: That is, of the company that is in this first agreement you have just read.

MR. PICKUP: Yes. It is very technical, I grant, but I am putting it in so that there will be no question that the company that was then incorporated and authorized to take over this railway and take over this contract did do so; that is all.

HIS LORDSHIP: These are minutes of meeting of your company.

MR. PICKUP: Yes, my Lord—predecessor in title. I am just endeavouring to make sure that I do not leave any gap in title, having in mind that the original agreement was with Edmund Boyd Osler and other named individuals who were to incorporate this company, and I am just reading from page 3 of the exhibit, after issuing stock for the asset, and so on:

> "It was moved by Mr. Creelman seconded by Mr. Houston and unanimously resolved:
>
> "That the action of the Provisional Directors with reference to the Company be and the same is hereby approved and the Minutes of the three meetings of such Provisional Directors are confirmed and the Company doth hereby assume the Agreement dated the fourth day of December 1891 being Schedule B of the Company's Act of Incorporation and the liabilities and engagements which are assumed and entered into therein by Edmund Boyd Osler, Herbert Carlyle Hammond, William Hendrie and Richard Bladworth Angus and doth also assume their personal liability to the Commissioners for the Queen Victoria Niagara Falls Park and it is hereby declared that the said agreement and the properties franchises and advantages therein conferred upon the said parties by the Commissioners shall be henceforth for the benefit of the Company."

HIS LORDSHIP: That could not be disputed now, could it?

MR. PICKUP: I do not think so, my Lord.

HIS LORDSHIP: How could you have recovered in the Privy Council if there was—

MR. PICKUP: We could not, my Lord.

HIS LORDSHIP: Then why are you putting it in?

MR. PICKUP: Just because I do not want to be met with the suggestion that I have not proved my case. If my friend would agree that the title has passed as the result of the Privy Council, then I would not be taking that stand.

HIS LORDSHIP: It was a defence that could have been raised in the other proceedings.

MR. PICKUP: Yes, my Lord.

HIS LORDSHIP: And therefore it is not open now.

MR. PICKUP: I would have thought not; but your Lordship appreciates

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—continued

that, with the amount involved, where I cannot get an admission, one does not want to be taking any chances; I am not taking any time over it, though.

EXHIBIT 2: Extract from minute book of The Niagara Falls Park and River Railway Company (Shareholders' Meeting, July 14, 1892).

MR. PICKUP: Then may I put in as Exhibit 3 the original assignment of that agreement from the Niagara Falls Park and River Railway Company to the present plaintiff, the International Railway Company. I do not need to comment on that; it is simply an assignment of all the rights and benefits under that agreement.

MR. SLAGHT: That is from whom to whom?

MR. PICKUP: From the Niagara Falls Park and River Railway Company to the International Railway Company. The date of the agreement is July 1, 1902.

EXHIBIT 3: Assignment, Niagara Falls Park and River Ry. Co. to International Ry. Co., July 1, 1902.

MR. PICKUP: The next exhibit I propose to put in, my Lord, is some correspondence, which is all in one folder here, and they are all original letters, beginning in July 1931 and extending over until September 28, 1934. All of them, with the exception of the last letter, are found at page 258 of the record in the Privy Council.

MR. SLAGHT: And the following pages.

MR. PICKUP: Yes, and the following pages, of course. It is correspondence between the two parties, although some of it is by the solicitors—between the Commission and its solicitors, and the International Railway Company. It is at this stage, my Lord, during this correspondence, that I do want to supplement the correspondence with some evidence from Mr. Yungbluth, and it might be convenient if your Lordship would permit that I now call him and put him in the box; but, as he is suffering from a weak leg and he cannot rest upon it, I thought perhaps your Lordship would permit him to be provided with a chair.

HIS LORDSHIP: Yes.

No. 6

Plaintiff's Evidence. No. 6. Bernard J. Yungbluth, Examination.

BERNARD J. YUNGBLUTH, Sworn.

EXAMINED BY MR. PICKUP:

Q. Mr. Yungbluth, you are the President and I think General Manager of the International Railway Company. A. Yes, sir.

Q. We do not need you just at the moment, but a little later on we shall.

Then turning again, my Lord, to page 258 of the record, we find the first letter, dated July 27, 1931, written by Mr. Yungbluth to the Niagara Parks Commission, just prior to the time of the expiration of the forty-year franchise. It expired, as your Lordship will remember—

HIS LORDSHIP: A year later.

MR. PICKUP: Yes; in the end of August 1932, I believe.

The letter says:

(*Counsel reads from letter, Exhibit 4a, Record p.* 83.)

Then follows a letter of July 31, 1931, from Mr. Jackson, the General Manager of the Commission, to Mr. Yungbluth:

(*Counsel reads from letter, Exhibit 4b, Record p.* 84.)

Then the letter of May 27, 1932, written by Mr. Yungbluth to the Commission:

(*Counsel reads from letter, Exhibit 4c, Record p.* 84.)

Q. At that stage, Mr. Yungbluth, I want to ask you a question. Was there some interview between you and someone representing the Commission as to that carry-over, relating to Labour Day, prior to the date of this letter of May 27? A. Yes, there was.

Q. What was that? A. Mr. Jackson, General Manager for the Parks Commission, called me on the telephone and suggested that—

MR. SLAGHT: I am instructed, my Lord, that all negotiations had in this matter were had without prejudice.

MR. PICKUP: Certainly not this: an agreement as to operating the railway for a few days beyond, on any basis whereby any such operation would not prejudice—surely!

MR. SLAGHT: Well, those are my instructions.

MR. PICKUP: Well, let me put this question to the witness, then:

Q. Was there anything, any arrangement by you, or discussion, that what was being said to you on that day between you and Mr. Jackson, should be without prejudice? A. Only as recited in the exchange of letters.

Q. That is, that the operation should be without prejudice? A. That the operation should be without prejudice.

MR. SLAGHT: "Upon the understanding and condition that the said continuation will not be considered or treated as an extension of the agreement, but will be entirely without prejudice to the rights and position of both parties to the said agreement."

Now as I understand my friend, he is going to offer evidence bearing on the extension matter, and it was declared to be without prejudice, even in this letter.

MR. PICKUP: What I want to show is from whom this request comes. I do not want my friend in argument to say we carried on for eleven days and therefore we must lose eleven days' interest.

MR. SLAGHT: I could not argue it, in face of the provision. My friend I think has not got the purport of it. It says:

"Upon the understanding and condition that the said continuation will not be considered or treated as an extension of the agreement, but will be entirely without prejudice to the rights and position of both parties."

Therefore conversations about it, when offered in evidence by my friend, must be for the purpose of influencing the Court on some point or other, as to which I am in the dark at the moment; but, as the extension of the arrangement—it

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Bernard J. Yungbluth, Examination.

—continued

is called an understanding—is to be treated entirely without prejudice, I do not think we ought to have evidence upon it.

MR. PICKUP: Well, if my friend is going, by some general objection of that kind, to try to exclude all interviews these parties had, I take the position they are not without prejudice, and I know of no arrangement whereby conversations are without prejudice. The fact of operating the railway is not to prejudice, I grant, and we have expressly provided that, but it is one thing to say that the operation or certain acts shall not prejudice parties, and quite another thing to say that a certain conversation is without prejudice and therefore cannot be used; and I say the latter does not exist in this case, and I press the evidence, my Lord.

HIS LORDSHIP: Well, go ahead. The objection is noted.

MR. PICKUP: Q. All right, Mr. Yungbluth, tell us what took place? A. There was a telephone conversation arising from Mr. Jackson, General Manager of the Parks Commission, to me, suggesting that the public would be inconvenienced if the literal terms of the contract were adhered to and the road closed down or we failed to operate it after August 31. Therefore he suggested that over the Labour Day week-end and until and through Sunday, September 11, the road be operated. I told him we were quite willing to do that, if it was a matter—if it would be made a matter of a written understanding, and it was so made by the exchange of letters.

Q. And now you are referring to the letter I have just read, of May 27, are you? A. Yes, and I am also referring to the response to that letter, which you will read.

Q. Yes, we will come to that.

Then going on with the next letter, my Lord, which is on page 260, it is dated May 30, 1932, from the Superintending Engineer of the Commission to Mr. Yungbluth; it is merely an acknowledgment of his letter of the 27th.

Then on July 29 of the same year comes the further letter from the General Manager of the Commission, Mr. Jackson, to Mr. Yungbluth, reading:

(*Counsel reads from letter, Exhibit 4e, Record p.* 85.)

Then the next letter is August 15, 1932, written by Mr. Yungbluth to the Niagara Parks Commission:

(*Counsel reads from letter, Exhibit 4f, Record p.* 86.)

There is just one thing in that letter to which I want to call attention, and that is the statement contained in it that prior to that you had furnished their engineers with considerable data in aid of their valuation of the railway; will you tell us what that was, Mr. Yungbluth? A. Yes. Mr. Jackson, the General Manager of the Parks Commission, and his engineer, an engineer employed by him for the purpose—

MR. SLAGHT: I take it, my Lord, this is all subject to my objection to its admissibility, which I have already made.

MR. PICKUP: May I go on, my Lord?

HIS LORDSHIP: Yes.

MR. PICKUP: Q. Go on, Mr. Yungbluth? A. Mr. Jackson and his en-

gineer, Mr. Bunnell, called upon me at Buffalo and asked for considerable engineering data, which would enable them to make an appraisal of the value of the property to be turned over, and they were given every assistance and all of the information available which they desired to enable them to do that. In addition they were given operating statistics, revenues, expenses, schedules of fares.

Q. And when was that, Mr. Yungbluth, approximately?

A. As I remember it, it was following our original letter to them—following by some months our original letter to them.

Q. Well, this letter to which I am now referring is August 15, 1932; how long prior to that?

A. Oh, I would say perhaps ninety days prior to that.

MR. PICKUP: Then, my Lord, I am going on with the letter of August 20, 1932, from the Superintending Engineer to Mr. Yungbluth:

(*Counsel reads from letter, Exhibit 4g, Record p.* 86.)

Then follows the reply, on September 10, 1932, to Mr. Yungbluth from Mr. Jackson:

(*Counsel reads from letter, Exhibit 4h, Record p.* 87.)

That is September 1932; the next letter is July 1933; I shall read the letter, and then I want to ask Mr. Yungbluth something about it. It is written by Mr. Yungbluth to the Niagara Parks Commission, dated July 28, 1933, and reads:

(*Counsel reads from letter, Exhibit 4i, Record p.* 88.)

Q. In connection with that, Mr. Yungbluth, would you just tell us what, if anything, occurred in the interim between the previous letter of August 20, 1932, when you were to be advised of the date for the appointment, and July—or probably you might take it as September, because I see the letter refers to two telephone conversations that you had in September with Mr. Jackson? A. In those telephone conversations, since no date was immediately suggested for a meeting, we told Mr. Jackson that we would be glad to serve the convenience of the Commission and would be present at a meeting if four days' notice were given to us, we would lay aside other matters and meet their convenience in that respect; otherwise, beyond the date of that letter we appointed Mr. McCarthy our attorney, and he—

Q. That is, Mr. D. L. McCarthy? A. Mr. D. L. McCarthy of Toronto, our attorney; and he had various conversations with Mr. Tilley, who at that time was appointed by the Parks Commission.

MR. SLAGHT: Q. Excuse me: do I gather—I did not catch it—the appointment of Mr. McCarthy and the conference with Mr. Tilley occurred prior to the letter of July 1933? A. After the letter.

MR. PICKUP: Q. He is speaking of the letter of July 1933, Mr. Yungbluth. A. Oh, I am speaking—

HIS LORDSHIP: Q. After the letter of August 1932? A. After the letter of August—

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—continued

MR. PICKUP: Q. The previous letter was September 10, 1932, when Mr. Jackson had requested you to give some tentative dates. A. Yes. It was after the date of that letter.

MR. SLAGHT: I gathered the witness meant prior to the letter of 1933.

MR. PICKUP: Oh, yes.

MR. SLAGHT: I just wanted to make it clear.

MR. PICKUP: Q. When was it that Mr. McCarthy was engaged, approximately? A. I do not remember the exact date; it was immediately after the date of the letter here, September 1933.

Q. September 10, 1932? A. 1932.

Q. Then you said something about Mr. Tilley being appointed; I was wondering what, if any, explanation there is for that gap between September 1932 and August 1933? A. I was about to relate that, Mr. Pickup.

Q. Well, tell us that? A. Mr. McCarthy was appointed to represent us, and in the meantime Mr. Tilley succeeded another counsel which the Parks Commission had, whose name escapes me at the moment, and then Mr. Tilley was said to be leaving for—

MR. SLAGHT: I object to what Mr. Tilley was said to be doing. I think anything the witness knows he can tell us, my Lord, but I have not Mr. Tilley here to check up on this.

WITNESS: Well, Mr. Tilley left in January for England.

MR. SLAGHT: The witness does not know that. He should be informed that he must tell us what he knows, if this has any bearing.

MR. PICKUP: Then I will put it in a way to which my friend cannot have any objection—

HIS LORDSHIP: This is all an effort to show it was not your fault there was delay.

MR. PICKUP: Exactly.

HIS LORDSHIP: So when it comes to interest you will not be in the position that you were a party to this delay and agreeing to it.

MR. PICKUP: Quite. What I want the witness to tell us is this:

Q. Why did you not write such a letter as you did on July 28, 1933, before the date you did? Why was it?

A. Because the party with whom Mr. McCarthy was to deal was in Europe for a considerable part of that time; that is Mr. Tilley, who was representative of the Parks Commission.

Q. That is the information you had? A. That is the information that we had from Mr. McCarthy.

Q. And what was the information, if you had any, as to when Mr. Tilley would return from England?

A. The information was that Mr. Tilley would return in March.

HIS LORDSHIP: Now, just a minute. This witness says that the reason there was not any step taken from September 1932 till July 1933 was that his mind was affected by information that there was no purpose in writing, because counsel who was representing the defendant was not available.

MR. PICKUP: Yes.

HIS LORDSHIP: That is all he says.

MR. PICKUP: That is all he says; that is all I wanted from him.

Q. Now, is there anything— A. It was in that period, too, Mr. Pickup, that I went to see Mr. Chaplin, who was a member of the Parks Commission. I visited him at his home in an endeavour to have him arrange for a meeting, which we had been unsuccessful in arranging for in any other way, of our company's representatives with the Parks Commission.

HIS LORDSHIP: Q. When was this? A. That was in November 1932, as I remember it.

MR. PICKUP: Q. With what result, if any, Mr. Yungbluth?

MR. SLAGHT: My same objection covers this, that it was all without prejudice; counsel had agreed, I am instructed, that it was without prejudice.

MR. PICKUP: Counsel had nothing to do with this interview—nothing whatever; they were not even there.

WITNESS: Mr. Chaplin and I sat down together in his home, we alone, and I asked him if he would not arrange in some way for a meeting so that the parties could get together as the contract contemplated. Mr. Chaplin said that he had no authority to speak and did not presume to speak for the Commission, and he gave me his own personal views regarding the subject.

MR. PICKUP: Well, we do not need to go into that, if he was not in a position to speak for the Commission.

HIS LORDSHIP: That does not help much. You saw somebody who had no authority and did not do anything.

MR. PICKUP: Q. He was one of the Commissioners? A. He was one of the Commissioners.

MR. PICKUP: The Honourable J. D. Chaplin.

MR. SLAGHT: And in the meantime it was in counsel's hands, in Mr. McCarthy's hands.

MR. PICKUP: Q. You said your information was that Mr. Tilley would return in March, you said?

A. Yes.

Q. Now, anything else between March and the letter of July? A. Yes; the newspapers carried the account of a change in the personnel—

MR. SLAGHT: My Lord, trial by newspaper we cannot have.

HIS LORDSHIP: No.

MR. PICKUP: No, but if there is information, as the witness is proposing to tell us, that a reorganization of the Commission occurred at that time, and that that information came by newspaper—

HIS LORDSHIP: It seems to me that if anything turns upon efforts made to bring this thing to a head, it surely is a strange businessman's policy to go and see a member of a commission and wait till counsel come back, when all he had to do to fix his rights is to serve a notice.

MR. SLAGHT: That is our position. There are some later letters which my friend will put in, beginning to give an indignant account of our viewpoint here, but I do not think it will do much harm. However, I always feel, when a witness starts off to say, "I read in the newspaper something," it is hopeless for me to expect to check him and cross-examine him; and surely, if

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—continued

there is anything of virtue in the evidence, there is a different way to prove it than by this method.

HIS LORDSHIP: Mr. Slaght, perhaps this will settle it: Apparently this witness was the mind of the plaintiff company, and what affected his mind, whether it was true or false, is his explanation of his delay. It does not matter if what was in the newspaper was false; he is giving an explanation of why he delayed. That is why you are offering it.

MR. PICKUP: Just why we did not get more insistent than we were.

HIS LORDSHIP: Perhaps I used the word "delay" wrongly. Nobody is admitting anything here.

MR. PICKUP: Anyway, it comes out in Mr. Sommerville's later letter, about the re-organization of the Commission at this time. I think I will leave it there.

MR. SLAGHT: We did not even learn which newspaper it was.

MR. PICKUP: I do not think it matters, because there is no question that the re-organization took place, and we felt that we should not be pressing too hard with the new Commissioners.

Q. Then I shall go on, unless there is something else apart from what you saw in the newspaper that you wanted to tell us as to that period prior—

A. No, there is nothing else.

MR. PICKUP: Then the letter of August 5, 1933, is the reply, from the Superintending Engineer to Mr. Yungbluth:

(*Counsel reads from letter, Exhibit 4j, Record p.* 89.)

Then a letter of September 15, 1933, written to the Niagara Parks Commission by Mr. Yungbluth:

(*Counsel reads from letter, Exhibit 4k, Record p.* 89.)

Then the reply, dated October 19, 1933, to Mr. Yungbluth, this time from Mr. Sommerville.

Q. Do you know who Mr. Sommerville was? Was he the Chairman?
A. Mr. Sommerville was Chairman of the Niagara Parks Commission.

MR. PICKUP: It reads:

(*Counsel reads from letter, Exhibit 4l, Record p.* 90.)

Then the letter of March 22, 1934, to the Commission from Mr. Yungbluth:

(*Counsel reads from letter, Exhibit 4m, Record p.* 91.)

Then the reply, my lord, dated March 28, 1934, written by Mr. Jackson to the International Railway Company:

(*Counsel reads from letter, Exhibit 4n, Record p.* 92.)

Then the reply is dated April 9, 1934, from Mr. Yungbluth to the Niagara Parks Commission:

(*Counsel reads from letter, Exhibit 4o, Record p.* 94.)

Then the letter of April 20, 1934, from Mr. Jackson to the International Railway Company.

(*Counsel reads from letter, Exhibit 4p, Record p.* 96.)

April 30, 1934, from Mr. Jackson to International Railway Company:

(*Counsel reads from letter, Exhibit 4q, Record p.* 96.)

Then a letter dated June 7, 1934, from Mr. Yungbluth to the Niagara Parks Commission:

(*Counsel reads from letter, Exhibit 4r, Record p.* 97.)

Then the reply, dated June 9, 1934, from Mr. Jackson to the International Railway Company:

(*Counsel reads from letter, Exhibit 4s, Record p.* 97.)

Then follows a letter of June 20, 1934, from Mr. Yungbluth to Niagara Parks Commission:

(*Counsel reads from letter, Exhibit 4t, Record p.* 98.)

That is the close of that correspondence, my Lord, but there is one other letter which I added to it, and it forms part of this exhibit, just to complete the picture. It is a letter of September 28, 1934, written by Mr. Slaght to Mr. McCarthy, and it reads:

(*Counsel reads from letter, Exhibit 4u, Record p.* 99.)

EXHIBIT 4: File of correspondence between International Ry. Co. and Niagara Parks Commission or their solicitors.

MR. PICKUP: Q. Then there were one or two questions I wanted to put to you specificially, Mr. Yungbluth, with regard to Mr. Jackson's letter which we read of March 28, 1934. I think your evidence may have covered this, but, just for certainty: He says in that letter, under date of May 26, 1932:

> "Mr. Yungbluth conferred with Mr. Jackson at the Park Offices and stated that I.R.C. was entitled to 'reproduction value, less depreciation,' for its properties. It was then made quite plain to Mr. Yungbluth that the view of the Parks Commission was that due compensation consisted of 'scrap value'."

What about that, Mr. Yungbluth?

A. That was stated to me to be Mr. Jackson's own personal view, and he disclaimed any knowledge as to what the Parks Commission itself might hold in that regard.

Q. At that time had they got their report from their engineer? A. They had not yet received their report from their engineers, which was being prepared based upon information which they had solicited and gotten from us.

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—continued

Q. Did he say anything about that? A. Yes; he said that as soon as that report was ready they would arrange for a round-table discussion between the engineer and myself and between me—or with me and one of my engineers, which meeting was never held.

Q. Also the statement in that letter referring to an interview on November 19, 1932, between you and the Hon. J. D. Chaplin, in which it is stated that "the various phases incident to the termination of the agreement of December 4th, 1891, were discussed at length and the position of the Commission stated"—what do you say as to that? A. That is incorrect. Mr. Chaplin specifically told me that he did not know the views of the Commission and had no authority to speak for them, but he gave me his own personal views, and they were stated to be such.

Q. Then, Mr. Yungbluth, I want now to get from you what took place and when, as to taking over of possession. I have read the correspondence, and I do not want you to go over that but just what actually took place about that? A. We have testified that the operation of the road continued for eleven days in September 1932 for the purposes of accommodating the public who would be relying upon that sort of transportation. On the following day, on September 12, we formally, perhaps with a little ceremony, turned over the keys of the railroad to Mr. Jackson, Mr. Bond and Mr. Jackson's daughter happened to be in the party, together with perhaps a dozen of my associates. On that day we made a trip over the entire line, and at the end of that trip I formally presented Mr. Jackson with the keys as a symbol of taking over by them and the giving over by us to them of the railway.

Q. And from that date forward who had possession of the railway and works of the company? A. The Parks Commission.

MR. PICKUP: Then, my Lord, I desire to put in the original order appointing the third arbitrator, which is dated the 2nd day of November, 1934.

EXHIBIT 5: Order appointing third arbitrator, Nov. 2, 1934.

MR. PICKUP: Your Lordship will find that on page 1 of the record.

MR. SLAGHT: Is that Sir William Mulock's order?

MR. PICKUP: That is Sir William Mulock's order, dated November 2, 1934, appointing the third arbitrator. In the meantime apparently the Commission had named Mr. Mason. The order recites:

(*Counsel reads from Exhibit 5, paragraphs 2 and 3, Record p.* 102.)

Then I propose next to put in the award of the arbitrators. Your Lordship will find the award in the record, also beginning at page 1, at the bottom of the page.

EXHIBIT 6: Award of Arbitrators, May 29, 1935.

MR. SLAGHT: What is the date of the formal award?

MR. PICKUP: The date of the formal award is May 29, 1935. It first recites:

(*Counsel reads from Exhibit* 5, *paragraph* 1, *Record p.* 102.)

HIS LORDSHIP: Where are you reading from?

MR. PICKUP: I was reading too high up; I was reading the judge's order. I beg your Lordship's pardon. It is at the bottom of page 1.

MR. SLAGHT: Have you attached the schedules to the copy you put in?

MR. PICKUP: Well, I thought I had, but if I have not I want them in. No, I shall have to do that.

MR. SLAGHT: Yes, I want them in.

MR. PICKUP: Well, we both want them in. I notice that the schedules are not in that, and if we may we will supplement them.

HIS LORDSHIP: You can just attach them to the exhibit that is in.

MR. PICKUP: Yes. I may get a copy that has them attached to it, and substitute it.

MR. SLAGHT: The schedules are found at pages 5, 6, 7 and 8 of the black book. It may be understood, perhaps, now, that they are part of this exhibit and physically will be supplemented by my friend.

HIS LORDSHIP: Yes.

MR. PICKUP: Oh, yes; I so intend.

This recites whereas the Commissioners entered into an agreement, and whereas the agreement was approved, and so on, and then it recites certain provisions of the agreement, which we need not read again. I think there is a recital on page 2, my Lord, to which I should call attention, right in the award itself:

(*Counsel reads from Exhibit* 6, *paragraphs* 3 *and* 4, *Record p.* 103.)

Then on page 4 I should refer also to the award:

(*Counsel reads from Exhibit* 6, *paragraphs* 13, 14 *and* 15, *Record p.* 105.)

The Privy Council, of course, adopted the other reconstruction value, and therefore took the alternative values which the arbitrators had placed upon the property on that basis. Page 5 gives your Lordship an idea of a fair description of the properties—land, grading, ties, rails, etc., paving, roadway tools, crossings and signs, bridges, highway bridge, Ellis Street retaining wall, Colt's culvert, Whitty's culvert, Bowman's culvert, Smeaton's culvert, Queenston retaining wall, small culverts and pipes, signal system, telephone system, poles and fixtures, distribution system, rolling stock, Bridge Street building, Clifton incline, Clifton machinery, Whirlpool incline, Whirlpool shelter, power house, shop equipment, furniture and fire equipment, materials and supplies, and power plant machinery.

Then as to the reconstruction value, we are not concerned with figures, and I do not think, so far as I am concerned, I have anything to say about the remaining part of that exhibit.

That, then, is the award of the arbitrators.

Next I put in the King's Order, my Lord, dated the 23rd day of April, 1937.

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EXHIBIT 7: His Majesty's Order, April 23, 1937.

MR. PICKUP: I do not think I need weary your Lordship with the recital, except that it refers, down toward the bottom of the page, in the same recital, to the parties being respectively the successors in interest; that is referred to right in the formal order of the Privy Council. Perhaps I ought to read a little of that; your Lordship will probably need it in other respects, and I may be trying to take too big a short cut to pass it by.

(*Counsel reads Exhibit 7, Record p.* 111.)

Then there is the formal concluding paragraph.

(Adjourned at 1.00 p.m. until 2.30 p.m.)

(On resuming at 2.30 p.m.):

BERNARD J. YUNGBLUTH, Recalled.

MR. PICKUP: I had just put in, my Lord, before lunch the King's Order, but there were three letters that I have added to Exhibit 4. My own idea was to put them in separately, but I see I had listed them, and I had furnished a list of all the letters in Exhibit 4, so my friend and I thought it better to add them to Exhibit 4, although they are at a later period of time. I shall now refer to them. They are two letters from Mr. Slaght to Mr. McCarthy, dated June 3, 1937, and a third letter from Mr. Slaght to Mr. McCarthy, dated August 12, 1937.

HIS LORDSHIP: They are all from Mr. Slaght to Mr. McCarthy?

MR. PICKUP: Yes, my Lord.

(Three letters added to *Exhibit* 4).

MR. PICKUP: These are letters enclosing interest and dealing with the subject of interest. The first is dated June 3, 1937, from Slaght, Ferguson & Carrick to D. L. McCarthy, K.C.:

(*Counsel reads from letter, Exhibit 4w, Record p.* 99.)

Then on the very same day a further letter saying:

(*Counsel reads from letter, Exhibit 4w, Record p.* 100.)

Your Lordship will see that we give credit; the way we compute the interest is, we take the interest from the date of possession to the date of payment, figure that out at five per cent, and then credit against it the total amount they have paid for interest, and ask for the balance.

Then the letter of August 12, 1937, from Mr. Slaght to Mr. McCarthy:

(*Counsel reads from letter, Exhibit 4x, paragraphs 1 and 2, Record p.* 101.)

Your Lordship will remember the interest—

HIS LORDSHIP: The actual order in the Privy Council has been dated as the 15th of April, and I suppose the formal order of the Court of Appeal was the 21st of May.

MR. SLAGHT: Yes. It did not become a formal order against us until filed out here under the Privy Council Act, and then it becomes effectual.

HIS LORDSHIP: I read the record at noon.

MR. PICKUP: That then paid us interest on the total amount of the award from April 15, 1937, to May 12.

HIS LORDSHIP: The date of payment.

MR. PICKUP: Well, we had already recovered interest, I think, from May 21. The principal amount was paid on June 3, but he had already given us interest on that from May 21. Now he goes back with this letter and gathers up the interest from April 15 to May 21, so that the two together would pay us interest on the amount of the award from April 15 to the date of payment, June 3. Then secondly he includes in that cheque that day interest on the $179,109 from May 29, 1935, the date of the arbitrators' award, until April 15, 1937, at five per cent.

HIS LORDSHIP: By your method of crediting you solve all nice questions by simply taking interest up to the final date.

MR. PICKUP: And then giving him credit for all he paid.

HIS LORDSHIP: Without allotting it anywhere.

MR. PICKUP: No. I think that was the simple way to do it. Then, continuing on with the letter:

> "With the previous payments made we have computed the above to constitute full payment of all our clients obligation at present payable —bearing in mind that there will be a further amount payable when you have taxed the costs to which your clients are entitled. So soon as these are taxed we will procure for you a cheque for the amount."

MR. SLAGHT: That was done, I may say.

MR. PICKUP: Oh, yes, that is all cleaned up. There is nothing involved now at all except this matter of interest.

(*Counsel reads from letter, Exhibit 4x, paragraphs 3, 4 and 5, Record p. 101.*)

HIS LORDSHIP: That is the letter that you in your reply claim to be a waiver.

MR. PICKUP: Yes, my Lord.

Then, my Lord, one other exhibit I wanted to put in, just to follow that up; it is the writ of summons itself in the action, upon which is endorsed the acceptance of service pursuant to that arrangement; all I put it in for is the fact of accepting service.

EXHIBIT 8: Writ of Summons in International Ry. Co. v. Niagara Parks Commission.

MR. SLAGHT: What is the date of the writ?

MR. PICKUP: The 29th day of August, 1938.

I think that is all from this witness.

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MR. SLAGHT: My Lord, I should like, if I may, to cross-examine Mr. Yungbluth without waiving the objection I took as to the inadmissibility of certain of his evidence. I think that is a proper course for me to be allowed to pursue.

CROSS-EXAMINED BY MR. SLAGHT:

Q. Mr. Yungbluth, you have on behalf of your company had perhaps most of all to do with both the preliminary steps which led up to arbitration and the conduct of the arbitration itself? A. More than some other member of the company, you mean?

Q. Yes. A. Yes.

Q. His Lordship seemed to think you were the mind that was really dominant in this matter, so to speak, on behalf of your corporation? A. Yes, that is right.

Q. And you were present during the arbitration at Niagara Falls? A. I was.

Q. We had somewhat of a siege—forty-five days, if I remember rightly? A. It was quite a time.

Q. In the interval between September 1932 and July 1933 you told my friend that one of the reasons for your not being active or pressing was that you understood that Mr. Tilley was away in England? A. Yes, that is one of the reasons.

Q. I beg your pardon? A. Yes, that is correct.

Q. You have already told us that shortly after September 1932 you appointed Mr. McCarthy on your behalf? A. That is my recollection, yes.

Q. Yes, I think you are right. And the way you put it then was, Mr. McCarthy got in touch with Mr. Tilley, who had been appointed by the Parks Commission? A. Yes.

Q. Are you telling us that you thought Mr. Tilley was in England during the entire period from September 1932 to March 1933? A. No. I said, Mr. Slaght, that Mr. Tilley according to our information sailed for England in January and returned in March.

Q. Well, I think that is closer to my instructions. Then you told us about having seen Mr. Chaplin. Now, the Board of the Niagara Parks Commission, against whom you seem to register some complaint, perhaps more in your letters than in your evidence—let me ask you at that time whether the Honourable George S. Henry was member of that Board? A. Well, it is my recollection that—I do not remember just when Mr. Henry resigned from the Board; I know that he was the Chairman of the Board for quite a while, and then he was succeeded by Home Smith.

Q. Yes, you are right, but I suggest to you that at the time you turned over in September 1932 to the Park Mr. Henry was then the Chairman of the Board?

A. At that time, yes, that is my understanding.

Q. And Colonel Clark Raymond, K.C.—of St. Catharines, is it?—was a member of the Board?

A. He was a member of the Board.

Q. Mr. Norman Sommerville, K.C., a member of the Board but not yet President, and later became President between the taking over in September 1932 and the arbitration later on? A. You mean by President, Chairman.

Q. Chairman, I mean, yes; thank you. Then the late Mr. Home Smith was a member of the Board during part of that interval until he died? A. Well, it is my recollection that Home Smith preceded Mr. Sommerville.

Q. Yes, but succeeded Mr. Henry? A. Mr. Henry.

Q. That is right. So that for some time at least of the interval we have been reviewing Mr. Home Smith was a member of the Board? A. That is my understanding.

Q. And Dr. Grant? A. Was a member of the Board at one time.

Q. A member of the Board at one time during this interval that we have been reviewing? A. I think that is right.

Q. And then Mr. Harry Oakes, lately we hear Sir Harry Oakes but plain Harry Oakes at that time, was also a member of the Board during part of the interval under review? A. I think that is correct.

Q. Now, these gentlemen, I suggest to you, are all gentlemen of, may I put it, high standing and integrity, so far as you know, in the industrial or commercial life of this country? A. I know nothing to the contrary on that.

Q. I think you know a little more than that, do you not?—that they are men of high repute and integrity? A. Well, I do not know that I could say that I know it; I understand that to be the case.

Q. Well, you do not quarrel with it if I assert that? A. No, no.

Q. Well, that is a very fair answer, I think, you are putting to me. Men that you would not expect to be guilty of any business trickery? A. I would not expect it, no.

Q. I thank you for that. Now, when we come to your letter of September 15, 1933, which is found at page 263 of the black book, I see in that letter, at the foot of page 263, you put forward the value of the railways, equipment, machinery and other works—perhaps you have it before you; have you?

A. I have a copy of that letter.

Q. You can follow it with me—at approximately two and a half million dollars; is that right?

A. Yes.

Q. And you meant that; I assume you meant that as the value you placed upon it? A. That was our idea, yes.

Q. That was your idea; and you persevered in your idea, if I remember rightly, because you put in on behalf of the Railway Company before the arbitrators—in Exhibit 7, Mr. Pickup—you put in a value as of August 31, 1932, of a sum of $2,424,720; that figure we heard a good deal, so you may be refreshed with it, and I show you I am taking it from Exhibits 7 and 7A put in at the opening of the arbitration if you will remember? A. I remember.

HIS LORDSHIP: Not 7 on this trial.

MR. SLAGHT: No, my Lord; 7 and 7A—there is a combination here I will explain in a moment. They were put forward by the Railway Com-

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pany in support of their claim contained in a letter as the amount they asked the Board to award them, and that went in at the early stage of the arbitration, and was a basis which they worked from with the various witnesses. To identify it, as the witness has for me, I should like to have this Exhibit 7, my Lord, marked Exhibit 9 in this trial.

MR. PICKUP: I do not know what this is directed to. I know of no pleading on the record that relates to that, nor have I seen the exhibit. There is no plea about anything of that kind, and why that should go in in this trial I do not see.

MR. SLAGHT: My friend this morning took some time in directing evidence, both verbal and by correspondence, as I understood it—and it could be receivable for no other purpose that I can imagine—to indicate that he acquired some rights because of what had transpired between the taking over in 1932 and the actual commencement of the arbitration; and I anticipate an argument from him that either some substantive rights accrued to his clients because of conduct on our part which was improper or sought to delay matters or that he was in advance excusing any claim I might urge in argument that his clients had been dilatory. Now, in either respect, he having opened that and having put in a letter where a claim is put forward for two and a half million, I am merely, I think, exercising my proper rights of cross-examination in showing that that claim asserted then was consistently followed up. Surely, if his evidence was admissible, mine is in reply.

MR. PICKUP: I put in all the correspondence this morning because I wanted to cover historically the whole situation. I mentioned to my friend that there were certain letters I would have to put in, and he said, "Well, you are not going to put some of them in and not all of them." I said, "No, I will put them all in, so we will have the whole story." With that I put them all in. Now, because incidentally in one of those letters there is some statement that the property is valued by our people at two and a half million dollars, why that should lead to some cross-examination as to whether that was or was not true—

HIS LORDSHIP: No, he is not being asked whether it was true or not.

MR. PICKUP: Or whether it was persisted in or whether it was not, I do not see that it makes any difference. I do not know of anywhere where that occurs except in one letter, that the amount of their claim was two and a half million dollars. But why that should bring in the whole details of how the two and a half million was made up or—

MR. SLAGHT: I am not going into that at all. I am going to show that they asserted to us a claim for two and a half million dollars, they have never receded from it, they have followed it by filing approximately a claim for that amount, and I am always skeptical of these letters, eighteen in number, that are put in for purely historical purposes, and then when we come to argument there may be matters in them that are leaned upon as giving rights in the matter or taking rights away.

MR. PICKUP: Why are we concerned with the detail of the two and a half million dollars, so as to put in a long exhibit? If my friend wanted to

ask the witness whether he had maintained that claim before the arbitrators, I think he had already asked and been told that, but why we are concerned with the details of that exhibit I do not see, and that is the reason for my objection.

HIS LORDSHIP: Well, of course, I do not know any rule that would exclude it, and I cannot see any harm it would do, so it is going in. You have made your objection.

MR. SLAGHT: Then this becomes Exhibit 9.

EXHIBIT 9: International Railway Co. Canadian Division, Reproduction Cost New As Of August 31, 1932, including General Overheads. (Exhibits 7 and 7A on arbitration).

MR. SLAGHT: Q: As part of Exhibit 9 in this trial, and made part of 7 by being called 7A on the hearing before the arbitrators, I show you a sheet which towards the close of the trial was put in, which purported to set out your claim to the Board in three ways: reproduction cost, depreciation including obsolescence, and present value; you see that sheet?

A. Yes, I do.

Q. The totals were not put on at the time it was put in, but for convenience of the Court only I have pinned to it a memorandum added to statement 7A, showing total amounts—for convenience of the Court, because we did not feel at liberty to alter the exhibit. I see the present value crept up a little bit during the progress of the arbitration, and you ultimately claim $2,622,375, because I tell you, subject to the additions being correct, that is the total of the items you set out in the third column. You can make an answer that is subject to the addition memorandum being correct, that that would be so, if you agree with me? A. Well, I remember that there was such a sheet as this, and this looks like the sheet that I had in mind. I think you are right.

Q. Well, your counsel has the original in his office, because it was taken from the Court of Appeal by consent.

MR. PICKUP: You mean his counsel that he had at that time, or do you mean me?—because I was not his counsel or in that arbitration.

MR. SLAGHT: My friend secured this exhibit from the Court of Appeal by arrangement with my office, or someone in his office did. So that would appear—

MR. PICKUP: Not in connection with this trial.

MR. SLAGHT: Q. I am not going into these details at all, but I want to see if you agree with me as to the course this matter took, as your counsel says it is historical; and the present value then was put at $2,622,000? A. Yes. I assume that that addition is correctly made.

Q. You must make that reservation. I have had it checked, but it is subject to be shown not to be.

HIS LORDSHIP: Well, what is Exhibit 9?

MR. SLAGHT: Exhibit 9 is called Exhibit 7 and 7A so put in on the arbitration. 7 was created at the early part of the arbitration, 7A was put in

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after the evidence for the Railway Company had been largely put in, and the Railway Company segregated the evidence of various parties, and the figures that they then said they ought to be paid, so that it has those two figures.

HIS LORDSHIP: Then it is the plaintiff's statement at the arbitration of its claim.

MR. SLAGHT: Of its claim.

HIS LORDSHIP: And how it is made up.

MR. SLAGHT: And how it is made up; and I am not going to trouble the Court, and I do not think you will have to bother, my Lord, as to the details of how it was made up.

Q. I note that in the letter Mr. Sommerville wrote you on October 19—the part to which I refer being at the top of page 265—Mr. Sommerville said that he had had a chat with Mr. McCarthy, and was looking forward to seeing him again, relative to the matters mentioned in your letter. October 19, 1933, letter, Sommerville to Yungbluth—do you find that one? A. Yes, I have it.

Q. The last paragraph. Do you suggest that Mr. Sommerville, who you told us was then President, did not see Mr. McCarthy in the matter? A. I do not remember having said that.

Q. I do not remember you having said it, but I want to see if you had any doubt to cast upon that assertion made to you by Mr. Sommerville?

A. I think not.

Q. Then one or two more matters here. Now, if you will turn to Mr. Jackson's letter to you of March 28, 1934, where he seemed to be putting his best foot forward—that your Lordship will find at the top of page 267; it begins at the foot of the previous page—you have already told us that you quarrel with the statement under date of May 26, 1932, in as much as, as Mr. Jackson puts it, what he was making plain to you was the view of the Parks Commission, whereas you refined it by saying you understood that to be Mr. Jackson's personal view? A. I certainly did so understand from my conversation with him, that that was his personal view, and he added that no doubt the Commission would agree with it.

Q. Well, that is what I was just going to ask you. Now that we have covered that, I will leave that item. Then will you look a little further down in Mr. Jackson's letter—on the same page, 267, my Lord—and this item is under November 19, 1932; Mr. Jackson there tells you:

> "Mr. Yungbluth conferred with Commissioner, the Hon. J. D. Chaplin, M.P., in St. Catharines, for the best part of a Saturday afternoon, when the various phases incident to the termination of the agreement of December 4th, 1891, were discussed at length and the position of the Commission stated."

Let me first ask you, was it on a Saturday afternoon?

A. I think it was.

Q. And did it take some time? A. Yes; I was there about two hours, I think.

Q. And we have already heard from you that Mr. Chaplin was an authorized member of the Commission at that time, was he not? A. Yes.

Q. So that these two hours were not spent in mere platitudes, or possibly some even pleasanter but casual way, they were spent in discussing the business between you? A. Yes, the business between us, this particular business, yes.

Q. This particular business; well, that is perhaps all you had between you and the Parks at that time. And I notice that in your letter which you wrote a few days later, dated April 9, as I have analyzed it—it begins, my Lord, at page 268—I have gone through that letter, from beginning to end, Mr. Yungbluth, and I see no denial of the statement that Mr. Jackson put in his letter at page 267 as to what occurred between Chaplin and yourself on the Saturday afternoon; you did not deny that, did you?

A. No. I think that is covered by our statement here, that our omission to comment upon all of those things is not to be deemed an admission of their accuracy.

Q. I notice that too; that is a very excellent reservation to put, but as a matter of comment I want to indicate to your mind that if Mr. Jackson had misstated what went on for two hours on a Saturday afternoon, I suggest to you it would have been worth while your picking that out and saying that was not true; you did not do that, and I suggest to you that it was a fairly true statement of what occurred?

A. It was not a fair statement of what occurred.

MR. PICKUP: I think you should call to his attention the beginning of the second paragraph on page 269, where he said, "We have never known the views of the Commission." It is general language, of course, but it is not—

MR. SLAGHT: I thank you.

Q. You do say, as your counsel points out, which I had overlooked:

"We have never known the views of the Commission as to the amount of compensation to be paid to us."

So that, except as that may be a denial, I put it to you, you did not otherwise contradict Jackson's way of putting it? A. No; I do not think that it was necessary to contradict it.

Q. You did not think it was necessary; well, that is all right. Now, will you look at the next paragraph in Jackson's letter of March 28, 1934, and go down to where he deals with it in this way, halfway down, "Again, at this meeting it was disclosed"—do you see that? A. In which paragraph? The paragraph following the November 19 paragraph?

Q. No, it is under the date of November 19.

HIS LORDSHIP: It is about line 29.

MR. SLAGHT: Yes, line 28.

WITNESS: I have got a typewritten copy here, Mr. Slaght.

MR. SLAGHT: Q. Then cast your eye to the second paragraph, under the date November 19, and run down six or eight lines, and you will find "Again, at this meeting"; do you see that? A. Yes, I see where you mean.

Q. "Again, at this meeting, it was disclosed that after allowance for depreciation, obsolescence and all items of deterioration, I. R. C. demanded $2,500,000 as due compensation for its properties, a figure so

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startling that the Commission has been unable to find a formula for bridging the distance between the two viewpoints, although it has made diligent search."

I suggest you did not deny that; in fact, you told me today, I think—is that a correct statement?

A. I think so.

Q. Then we will pass that. Now, the next one is rather important, if you will look now just at the next paragraph, which I read to you:

"It is the duty of the Commission to save the taxpayers of the Province from unnecessary costs and expenses, but where is the stopping place on the road from 'scrap value' to $2,500,000 for 11 miles of electric railway abandoned after losing well on to a million dollars in the last 12 years of its fitful life, and at the rate of over $100,000 per annum latterly."

Now, you did not deny that statement, as I find it, in the letter you replied to? A. I do not think any denial was necessary.

Q. Well, I quite accept that. It is true, as he said, that you abandoned the railway, because you remember you had the right to keep it on for another twenty years if you had not wanted to give it up, so that perhaps he should have used "relinquish", but you either relinquished or abandoned the railway back to the Park; that is true, isn't it? A. Certainly.

Q. And the statement is true in effect that you had lost well on to a million dollars in the last twelve years of its fitful life, and at the rate of over $100,000 per annum latterly; you know that is so?

A. Well, I know the history of it, and I know what appeared in the arbitration case, yes.

Q. Well, I am going to refer you, so that you may answer my question, to an exhibit filed by your company, known as Exhibit 68 in the arbitration case; it was a schedule prepared by your Mr. Schmunk and put in by your own counsel, was it not? A. That is my recollection, yes.

Q. And your Mr. Schmunk was an expert accountant from the United States who served your company as a part-time auditor on your affairs? A. That is right.

Q. And therefore, coming from you, I am going to take it as gospel that from the year 1920 on to the 1st of September, 1932, your company operated always in the red, in other words with an annual loss; that is what the report shows. I have run that over, and I may tell you the loss in 1920 was $34,474, and the last couple of years of twelve months, in 1930 the loss was $103,000 odd, and in 1931 the loss was $112,000 odd. Then you remember you only operated for eight months in 1932, from the 1st of January to the 1st of September, and for the eight months the loss was $78,000 odd. Those total up to a large figure, and show that for the last three years you were losing at the rate of $100,000 a year; that would be correct, wouldn't it?

A. I assume the addition is correct, yes. That is all the more reason, Mr. Slaght, why we are entitled to every consideration at the termination of our agreement to build and operate a railroad and turn it over to the Parks Commission. We discharged our obligations, even though it meant a very severe financial loss.

Q. That is an answer I do not mind your making—that is a matter of argument—but I have a purpose in establishing this.

I do not think it is necessary to put this in as an exhibit, my Lord, because the witness has admitted to me what I wanted to establish.

Now, a question was raised as to uncertainty about a number of properties by Mr. Jackson in the correspondence. In his letter to you of March 28, 1934—the portion to which I refer is at the top of page 268 of the black book; it is a long better—paragraph 3:

". . . . it is not yet known definitely and precisely the items which vest in the Parks Commission, and it is suggested that such a catalogue should be in the Commission's hands, when a conference could still take place if you think it desirable."

You note that in his letter? A. I remember it; I do not see it here now.

Q. You remember that. Then your letter in reply of April 9, right at the top of page 269, but it is in the second paragraph of your carbon copy, reads as follows:

"If there is any 'uncertainty about a number of properties,' this is the first time it has been suggested to us. Surely any 'uncertainty' now claimed to exist should have been resolved in the time that has elapsed since your valuation of the property."

Now, I want to put this to you, Mr. Yungbluth: there was a good deal of uncertainty in the minds of your company as to what items would vest in the Park and for which you would be entitled to compensation under the agreement, was there not? A. Oh, I don't think so.

Q. Well, I suggest to you that you put forward at the outset a claim for a hotel that you had built over there adjacent to the railway; do you remember that?

A. We built no hotel there.

Q. Well, bought one, then? A. No.

Q. A site for a hotel? A. There was a hotel site purchased over there.

Q. There was a hotel site; and you put forward as part of your claim before the arbitration and in the early stage of the arbitration an item for $21,000 compensation you claimed from the Park for the hotel site?

A. Yes. You would not call that an uncertainty in our minds as to what was to be handed over.

Q. Well, I am just going to develop the facts, and then we shall leave it to the Court to say whether it was uncertainty in your minds or not. And early in the arbitration, after some evidence came out about it, your counsel abandoned your claim for the $21,000 for the hotel site? A. Are you asking me?

Q. I am asking you. A. I think that is right.

Q. And no allowance was made for it, of course?

A. And the property was not turned over finally.

Q. No; you kept the property? A. That is right.

Q. We are dealing with uncertainties now, because you challenge that. I suggest to you that there were a grea many other items as to which there was

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uncertainty which had to be resolved u timately by the arbitrators, as to whether or not they were matters that you were entitled to include and say to the Park, "You have got to take them"; do you recall that? A. Yes, but it seems to me that goes beyond the questions raised in this letter.

Q. Well, leave that again to the Court, if you will, and, if you don't mind, tell me whether that was the fact? A. There were those uncertainties naturally before the arbitration board. They had to be resolved by the board.

Q. But what I want to get at is, those uncertainties—if you had put them into a schedule and handed them to the Park, as you were asked to do, they would have been resolved in the minds of the Park, as to what items and things you were claiming for, wouldn't they? A. Yes, and if they had asked us those questions in the early days of our attempt at negotiation with them we would have broken our backs to give them that information, together with all the other information which we did give them, which they asked for; but to advance a thing of that kind, a request of that kind, at the eleventh hour, when our patience was broken—

Q. That was too much for you? A. Was just too much for me.

Q. So you refused to furnish a schedule of the items of the assets for which you sought compensation?

A. No, we did not.

Q. Well, I am going to refer you to the letter where you did refuse it. Do you say again you did not? I thought you just told me that, because of either pique or that that broke your back, being asked at such a late stage, you refused it? A. No, I said to you in my testimony this morning that we gave the Parks Commission early in 1932, before the railroad was turned over to them—

A VOICE: '31.

WITNESS: It was before the railroad was turned over, whether in 1931 or 1932—all of the information which Mr. Jackson and Mr. Bunnell requested.

MR. SLAGHT: Q. During negotiations which we heard went on for some time—if you are putting it on the ground of pique, I want to permit you to, but during those negotiations they asked you about items so that they could resolve these uncertainties in their own minds and try to reach a figure, did they not?

A. I think the whole—that whole matter can best be answered by referring to the letter which they write to me and my response to them. I do not think that there is anything further that I could say that would be useful to the Court in answering that question.

Q. Is that something we have already had?

A. It is what we are talking about now, Mr. Slaght.

Q. Well, I am just going to read you what you said; if you want to read it, perhaps I can hand it to you more quickly. It is your letter of April 9 that I have in mind. It is at the foot of page 269 of the black book, my Lord. It is at least three quarters through your letter Mr. Yungbluth, if that will help you:

"If for the purposes of a conference—"

MR. PICKUP: It is the paragraph before that that he wants.

MR. SLAGHT: Q. My friend suggests you want this one beginning, "We have given your engineers." You find for me what you want to put to me on this. You have asked to answer the question by referring to your letter. A. I am quite willing that you should proceed.

Q. Is that the phrase you have in mind?

A. Well, let me see.

Q. I will put it to you. I think it is. Your counsel thinks it is. Well down in that letter you say:

"We have given your engineers all the information and furnished them with all the data they requested."

A. Mr. Slaght, may I interrupt you?

Q. Yes. A. Look at the second paragraph.

Q. "If there is any 'uncertainty about a number of properties,' this is the first time it has been suggested to us. Surely any 'uncertainty' now claimed to exist should have been resolved in the time that has elapsed since your valuation of the property. Mr. Yungbluth at no time undertook to supply any claimed 'deficiency'."

You mean deficiency as to uncertainty as to what you were claiming, or what does that mean? A. Well, maybe I can relate it to his letter. Perhaps he used that language. He said there was an uncertainty as to what properties would—

Q. Would vest in the Park and have to be paid for; if he did not put it that way— A. That is correct. That is what he meant, without using his language. And I said that there was no request made of me or of the company concerning any properties, any parcels, listed under that heading, before we got his letter. Consequently we had not been remiss in not furnishing him anything that he may have asked for. That was the first we had heard about it, and at that late date we said we would not supply it.

MR. PICKUP: And the witness has not probably found the reference in Mr. Jackson's letter where Jackson expressly made the statement that Mr. Yungbluth undertook to supply the deficiency. That is where he is using the language, and he says Mr. Yungbluth at no time undertook—

MR. SLAGHT: I shall be glad to go to that.

MR. PICKUP: On page 267, line 25 or 26:

"This meeting took place on July 20th, when it was found that there was some uncertainty about a number of properties and Mr. Yungbluth undertook to supply the deficiency."

Mr. Yungbluth then says:

"Mr. Yungbluth at no time undertook to supply any claimed 'deficiency'."

MR. SLAGHT: Q. Your counsel takes us back to a clause in the letter from Jackson to you of March 28, where, about the line he indicates, he says:

"This meeting took place on July 20th, when it was found that there was some uncertainty about a number of properties and Mr. Yungbluth un-

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Plaintiff's Evidence.

No. 6.

Bernard J. Yungbluth, Cross-Examination.

—continued

dertook to supply the deficiency. Nothing further has been heard, however."

Now, turning from that language, Jackson to Yungbluth, you say, at the top of page 269, in your letter of April 9:

"If there is any 'uncertainty about a number of properties,' this is the first time it has been suggested to us. Surely any 'uncertainty' now claimed to exist should have been resolved in the time that has elapsed since your valuation of the property. Mr. Yungbluth at no time undertook to supply any claimed 'deficiency'."

Was there a claimed deficiency?

A. The letter says there was not, and there was not.

Q. No, it does not; it says you at no time undertook to supply any claimed deficiency? A. Doesn't it also say that if there is any uncertainty about the number of properties this is the first time that it has been suggested to us?

Q. Quite so, a flat-flooted statement to that effect. Then we find that, whether for good or bad reasons, you were not prepared prior to arbitration to furnish them with a catalogue of the items you claimed for? A. We furnished them all of the information that we thought and they thought was useful along that line in the days before the railroad was relinquished to them, and it came with bad grace to wait three years and then ask for something that might have been had in the first three months.

Q. Now, will you— A. During the interval we were denied the privilege of sitting down with the Board of the Park Commission, notwithstanding our many requests.

Q. I am going to quote now, or at least I am going to refer to a letter of request of April 20, 1934, Jackson to you, where he wanted information, on page 270 of the black book. He acknowledges your letter. He says:

"To be specific about the properties requiring further information . . . ."

Have you got his letter of the 20th? A. Yes, I have a copy.

Q. It is in the second paragraph I am starting, to save time, Mr. Yungbluth:

"To be specific about the properties requiring further information, reference should be made to the undertaking to say whether the following vested in this Commission:"

and then he outlines four items, and then says something else. Now, you never furnished that information, although he asked for it? A. That is obvious from the correspondence, I think, which followed.

HIS LORDSHIP: Q. What is obvious? A. That we did not furnish it.

MR. SLAGHT: Q. Then I suggest to you that, although you did not furnish it, when you got to the board of arbitrators you put forward claims for those items, and that the board of arbitration threw three of them out; what do you say? A. I do not remember the details of it.

Q. You do not remember the details of it?

A. No, I do not.

Q. Well, I shall just refer you to the page, or your counsel can check it

up if he likes, and then we shall pass from this matter. This will appear in the schedule to Exhibit 6, which is the award, which schedule your Lordship has not yet got, because it has not been supplemented, but we can look at it on page 6 of the black book, where the schedule is set out. My friend suggested that we might now mark these three schedules, my Lord, actually in the black book as the exhibits, as part of Exhibit 6.

HIS LORDSHIP: What is that suggestion?

MR. PICKUP: As we have not actually got the schedules copied, Mr. Slaght and I were both agreed that, if it was satisfactory, we would simply use the black book as the exhibit.

HIS LORDSHIP: As part of Exhibit 6?

MR. PICKUP: As part of Exhibit 6, because they are shown there.

MR. SLAGHT: The black book becomes part of Exhibit 6, and I will enumerate the pages, to avoid dispute: beginning with page 5, page 6, page 7, page 8 and part of page 9.

Schedules A, B and C to award, set out on pages 5, 6, 7, 8 and part of 9 of Record in Privy Council, added to EXHIBIT 6.

MR. SLAGHT: Q. Now, looking at those schedules to Exhibit 6, Mr. Yungbluth, I am going to remind you that the Commissioners dealing with the land said, about two thirds of the way down:

> "Land—We have not included parcels 121(a) and 121(b) of a total value of $1,100.
> Grading—We have omitted the Lewiston bridge line $2,885.
> Track—we have not included Lewiston bridge line
> reconstruction cost $13,295.00
> and C.N.E. turnout reconstrution cost 900.00
> a total of ..... $14,195.00."

Then over at page 9, at the top of the page, 121(a) disallowed as not being within terms of agreement, item 121(a) and 121(b)—those are repetitions—then the other items at the foot of page 8 are shown, not property of the railway, and so on. So that after you put forward these what I choose to call uncertainty items the board threw a lot of them out, which I suggest did make a real condition of uncertainty which could be a bona fide one in the minds of yourselves and of the Park prior to arbitration, did it not, giving both sides credit for sticking up for their own viewpoint? A. I do not deny that there might be certain items of that kind, and that these items may be subject to uncertainties.

Q. Well, that covers that, thank you.

HIS LORDSHIP: Q. Items of that kind—what do you mean by items of that kind? A. Items here related in the letter of April 20.

Q. I mean, what is "that kind"? A. Land and certain little bits of track. There are two items of land and two items of small bits of track.

Q. But what kind of items is it that you are talking about? "That kind"—what kind do you mean?

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No. 6.

Bernard J. Yungbluth, Cross-Examination.

—continued

A. Here is some land outside of the right of way at Queenston Heights; that is the land that Mr. Slaght referred to as being a hotel site. It was purchased in the early days as a hotel site, and it lies close to the right of way, and it was intended to be used for the building of a hotel for the promotion of traffic on the line.

MR. SLAGHT: And when they came to the award—I think I can make it clear in accordance with the witness's own idea—when they came to put forward their claim to the board, they put this hotel in and said, "Pay us $21,000." We had not got particulars of that beforehand, but we disputed it, and the board held, it is not within the purview of the agreement that you are entitled to force that upon the Park, because of the character of the land and its acquisition, and it is dehors the railway as a railway. Then the other items they purchased during the course of years. When they wanted to build a switch they would purchase a little piece of land, and these other four or five items, and they would let a part go into disuse and not be used at all for years. So the result, my Lord—although I should reserve it for argument, I shall conclude with this explanation—is that when we came to get the real claim in court as filed before the board of arbitrators, a number of these items were put in about which we said we were uncertain as to whether they were asking for them or not, they sought them, and they failed as to some of them and I think as to one or two others they succeeded. So that is all this cross-examination—

HIS LORDSHIP: Q. That is what I want to know. You are admitting that there were some items of which you did not furnish particulars, and of which the defendants could not know; is that what your admission amounted to? A. I admitted, my Lord, that in their letter of April 20, 1934, which was after we had appointed our arbitrator, as I remember, they recited certain items, four in number, about which they in their minds were uncertain as to what our claims were. They said that three years after the—they had known that the company intended relinquishing the railway and turning it back to them under the contract. That was the first time they had raised the question.

HIS LORDSHIP: You say you are arguing about it. You did not help me very much, but it is all right. You see, I wanted to know the justification for anything you did; I wanted to know what that admission amounted to. I have not got it.

MR. SLAGHT: I think his answer in his letter makes it pretty clear, my Lord. He says, "This is too late. We are going to give you nothing more. You are going to have battle now." That is the way we had to take it, because we sought specific information as to whether the following vested in the Commission; we set them out, one, two, three, four, and we got a cold answer, "No information to you about those." Then the arbitration was determined upon by them and they went on with it. I put it in because, if all this evidence meant anything this morning, it meant that we were at fault in not negotiating enough, and that we were not trying to settle.

Q. Then, Mr. Yungbluth, let me put this question to you: at the arbitration, which, as you have told me, you attended, do you recall Mr. Wilson, the engineer, being called. A. Yes.

Q. And Mr. Waller, the manager of the Hamilton Street Railway? A. Yes, I remember.

Q. And Mr. Harry Acres, the engineer?

A. I remember the name, yes.

Q. And Mr. A. E. K. Bunnell, another engineer?

A. Yes.

Q. All called by the Parks Commission as witnesses?

A. Right.

Q. I suggest to you that they all said in effect—you will tell me if I am wrong—that, based upon Mr. Schmurk's Exhibit 68, which we have, and their own knowledge of railways, it would not be possible for anyone to operate this railway at a profit?

MR. PICKUP: I object to that. My friend has no right to introduce evidence of other witnesses by saying to this witness, "Didn't you hear them say such-and-such a thing in some other proceeding?" and thereby get that in evidence in this case. If my friend wants that evidence from those people, his duty is to call them, not to get somebody to come to court and say, "I heard them say so."

MR. SLAGHT: Then I shall add this to it before your Lordship rules on the question:

Q. And that after sitting there and hearing evidence to that effect the Railway Company called no one to deny their sworn statements? Now, don't answer for a moment, till his Lordship rules upon it.

HIS LORDSHIP: I do not know what point there is in the question, but I do not see any reason for shutting it out.

MR. PICKUP: The reason, my Lord, is just the one which I have urged. If my friend can make a statement that way and get before this Court evidence of that fact by having someone come forward and say, "Well, I was in court and heard him say it, and there was no answer or no denial of it,"—

MR. SLAGHT: That is all it goes for.

MR. PICKUP: That is not evidence.

MR. SLAGHT: It does not prove anything. It is just a matter of showing that was not a point of controversy in this, and I want to discuss it as having a bearing on interest later on.

MR. PICKUP: If it is not proving anything don't let us have it, but if it does prove anything let us have it proved properly. I say it is hearsay and is not evidence.

MR. SLAGHT: This is very different from hearsay. The witness comes forward, and I am cross-examining. He is the mind of the railway, and was present and heard these witnesses testify. My question is that in effect they said that this railway could not be operated at a profit from September 1932 on, and that you and your railway called no one to question the accuracy of those statements; that is the question.

MR. PICKUP: A further objection to it is this: Why in the world should the Railway Company call any answer to that in the arbitration?—because it was in no way in question in the arbitration. The agreement provided that nothing was to be paid for the franchise, and we succeeded in the Privy

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Plaintiff's Evidence.

No. 6.

Bernard J. Yungbluth, Cross-Examination.

—continued

Council in maintaining our view, that that shut out any question of profits or losses in arriving at value, because of the very fact that the franchise right was excluded. The Privy Council so held, and why should we answer it, when we took that view and were right in it?

MR. SLAGHT: I do not want to argue my case at present, but, if I may, I shall put it this way: The language used is an obligation to duly compensate the Railway Company for their railway, equipment, machinery and other works. While it is quite true that the franchise was not to be valued, and of course the minute the franchise plus the railway went back to the Park they had a franchise which was theirs always, the right to operate being in the charter, we tendered evidence to show that if it went back to the Park with a franchise and the physical assets could not be operated at a profit, that was another reason why a lower value must be placed upon it, because then any board attempting to value it as a going concern to be operated and capable of operation, which was one of three alternative types of valuation discussed, must reject an allowance on that. A second type of valuation was, should it be scrap only? A third type was, should it, in view of English authorities, be reconstruction cost new less depreciation, and were the terms of the contract such that we were bound to pay on that?

I have a purpose, that perhaps my friend has not divined, when I come to argue interest; I bear in mind that this is a case for interest only, but there are various considerations that surround the facts, and perhaps I should tell him now that some of the cases indicate that, if the matter is capable of operation at a profit, and is taken possession of either voluntarily or by expropriation proceedings, that is an element as to whether the taker or getter, as we were in this case—it was forced upon us, as you will see later—should pay interest or should not pay interest.

I do press—my friend has protected himself by an objection—that this question should be answered.

MR. PICKUP: Again I insist upon my objection. My friend does not seem to realize that this question has been argued once in the Privy Council. Throughout this case he has taken that view—I mean throughout the arbitration he has taken the view—that, just because a property was being operated not at a profit, when you take the value, on what would be the ordinary plan of valuation of it, then, because you have got to exclude franchise or the right to operate, if you have got a value that is nothing you cannot make it any greater by taking away the franchise, and surely it must be less. That is what my friend says, and has said throughout. That argument has been presented to all the courts, and it was presented in the Privy Council, and the Privy Council says that is all wrong, the basis of it is a different basis, and what that means is that that excluding of the franchise forces you to adopt a reconstruction value and not a scrap value. That was our position throughout, and we have never attempted to answer this evidence as to whether it was operating at a profit or not, because we have taken the position that it has nothing to do with the value that the arbitrators had to find under that agreement. My friend then, by having brought some evidence there before that Court to show that thus and so were the facts on that, which we said was an utterly immaterial issue, can-

not take advantage, when we have been held to be right, of our silence, and then say, "Well, now, I have proved it in this case, because I have called a witness who has said that he heard it said in the other case, and now I have got it in as evidence in this case." That is offending, my Lord, against the very first rule of evidence, that you must produce the best evidence. If a witness knows as a fact that there is operation at a loss, or if three witnesses know that, and it is material that you should have their evidence, there is only one way you can have their evidence, and that is by having them brought here and having them swear to it under oath, not by having somebody else come here and say, "I heard them say so." I think my friend will admit that he could not possibly make that evidence, but he is trying to make it evidence by adding this to it: "You were present in court and you heard that statement, and therefore I can adduce it in evidence as being a statement made in your presence which was not denied." That principle might be invoked, but the moment he invokes that principle I say it cannot be invoked when it is an immaterial statement, when we are under no duty to deny it, when we are saying it is irrelevant to the issues, and I am not going to call evidence to the contrary. Trials would be drawn out to a most prodigious length if counsel on an immaterial issue had to deny everything the other man said, at the expense in some other proceeding of having it proved against him, just because he did not see fit to deny it. That is the objection I am trying to express, my Lord.

HIS LORDSHIP: You have expressed it very well. The only thing is, the question simply is this: you did not at the arbitration proceedings call evidence to deny statements that the railway could not be operated at a profit. Now I take it that the answer is simply No, from what you have said, that they did not call evidence. That does not prove that it could not be operated at a profit; it does not prove anything about it; it just lies there till we see what Mr. Slaght does with it, or what you do with it on re-examination, if you wanted your witness to say his counsel instructs him it has nothing to do with the case.

MR. PICKUP: I take it, then, my Lord, that it is merely innocuous and that it is irrelevant, and therefore cannot hurt me.

HIS LORDSHIP: On cross-examination you have told me a lot that I would not know at the time that question is put to the witness, and you are asking me to jump ahead and, because of something that you tell me which should come later in the trial, prevent this question; but at the time the question is asked I cannot see how I have any right to exclude it, watching it to see that it does not develop into some wrong method of proof; but it is just a question put to the witness, and I am going to hear it. You have made your objection, and if I am wrong—

MR. SLAGHT: Q. I think that is so, is it not, Mr. Yungbluth, that, for whatever reasons you may have been advised or otherwise, your company did not call evidence to deny that specific point?

A. That is correct.

Q. That is all, thank you.

In the Supreme Court of Ontario.

Plaintiff's Evidence.

No. 6.

Bernard J. Yungbluth, Re-examination.

RE-EXAMINED BY MR. PICKUP:

Q. Just a moment, Mr. Yungbluth. You were being asked a little while ago about whether you had admitted something or not. Now I want to put this to you: with regard to these four items that were referred to in Mr. Jackson's letter to you of April 20, is there anything about that at all except the letter itself? Was there anything else that took place except the letter? I may not be making that very plain. When you got this letter of April 20, 1934, I think you have already said that that is the first intimation you had of any kind regarding uncertainty, and this was an explanation of it. Was there any reply to the letter, either verbally or in writing? A. No. The only reply to that—I beg your pardon, there was no reply to that letter, because the next letter from the Parks Commission was dated April 30, and our reply was addressed to that one.

Q. Then the fact is, I take it, that whatever inference would be drawn, it is to be drawn from whatever the letter says, plus silence? A. That is correct.

MR. SLAGHT: Now, that is not leading, but it is misstating inadvertently the fact, because the inference which the Court may or may not see fit to draw is not confined to silence; it is fortified by a statement from the witness, that at that late stage—he did not say pique, but he said that was the last straw, or something of the sort—to be asked for that at that late stage was too much for him, and he would not give it then. He has sworn to that, so my friend should not put to his own witness that the only inference or the only evidence upon which an inference could be drawn is just the wording of the letter. That is for the Court, surely.

MR. PICKUP: What I want to call to your Lordship's attention is the way in which this comes. There is no request, really, in that letter. That letter is more in the nature of an explanation of some dispute over an uncertainty that has arisen. In the second letter one man has said, "Well, there is something here that is uncertain. You have not given us a certain catalogue." Mr. Yungbluth comes right back and says, "You never mentioned anything that was uncertain to me." Then comes this letter:

> "To be specific about the properties requiring further information, reference should be made to the undertaking to say whether the following vested in the Commission."

Then we have:

> "Obviously mutual recriminations will not be helpful in reaching a settlement. An arbitrator to represent the Commission will therefore be named, and you will be advised in a few days."

It is not a letter requesting information; it is rather a letter trying to justify some statement he has made in a previous letter, and, as the witness says, that was unanswered. My friend carried that forward, to try to get him to admit now, "Well, we did not furnish certain information." What I am trying to make clear is that whatever admission there is is in just remaining silent in answer to that letter. My friend says the reason for my silence was thus and so.

That is all, thank you, Mr. Yungbluth.

(Witness retires).

MR. PICKUP: That is the case, my Lord.

MR. SLAGHT: Will your Lordship permit me a couple of moments for consultation?

HIS LORDSHIP: Yes.

MR. SLAGHT: My friend has closed his case, as I understand it.

MR. PICKUP: Yes.

No. 7

Defence

MR. SLAGHT: Then, my Lord, I want to offer as an exhibit the black book, which you have before you and which heretofore has been put before you only as a matter of convenience, w th the single exception that three schedules to Exhibit 6 have been marked in there and have become part of Exhibit 6. This matter cropped up this morning, and I reserved my right to make such application as this until a later stage, when I should offer evidence. My friend and I then had the understanding that he would not take exception to the proof of the black book as a matter of formal proof without my calling a witness from the Registrar's office to say that it was a record, but that he would not agree to its admission as a relevant exhibit in the case as a whole. Therefore I now apply, relying upon the undertaking that formal proof will not be required from me, and ask to have it marked as an exhibit in its entirety in the case, upon this ground: Referring to my statement of defence, your Lordship will find that in paragraphs 7 and 8 the course of the proceedings is traced, and the course there pleaded has been substantiated by evidence now up to this stage; then in paragraph 9 we plead that an appeal was taken, and then plead that on the 15th of July, 1937, His Majesty in His Privy Council ordered that the amount of compensation to be paid to the plaintiff be the sum of $1,057,000; on such appeal the plaintiff claimed the interest now sought to be recovered in this action, as appears from — clause 23, it should be; 11 is there, and it is a clerical error. Is it 11 in your Lordship's, or 23?

HIS LORDSHIP: It is 11.

MR. SLAGHT: That should be 23. As appears from clause 23, page 9, of the case filed for the appellant, and after hearing argument on such claim their Lordships in the Privy Council refused to allow such interest in such proceedings, and the defendant relies upon such judgment as a bar to this action.

Now, it will do no harm for the purpose of this argument for your Lordship to look with me at what I contend is a claim in those proceedings, and therefore entitles me to rely on a bar by way of res judicata. The law as to res judicata, as I apprehend it—

HIS LORDSHIP: The pleadings may be looked at in the enquiry to find out whether the same thing was the subject of litigation before.

MR. SLAGHT: Yes—not only the pleadings, because this book contains more than pleadings. Your Lordship may rule partly with me, and exclude part of it. I have had some little experience with the plea of res judicata, in two criminal cases only, I think; I have not argued a case in the civil

In the Supreme Court of Ontario.

Defendant's Evidence.
No. 7.
Discussion.

—continued

courts on that for some time, but the principle is the same. To present it as a defence the defendant must place before the Court the entire record, and when I say record I mean that in the broadest sense, as including everything that transpired before the other court, on whose conduct he relies as making the plea good in the present case. The reason for that is, the court to whom the plea is advanced, this Court, in order to decide it properly one way or the other, must have placed before it the writ, the pleadings, the evidence—I put in eight volumes of evidence once in a criminal trial—and the formal judgment of the earlier court that is alleged in the defence to have dealt with the matter in such a way and on such evidence and charges and facts as constitute a true previous adjudication. Therefore, in that view, I am in the position now as though the Registrar or an appropriate witness were here to say, "This is the Privy Council record on which they rendered the King's Order," and I ask that it be received and admitted in evidence before your Lordship's Court, every word of it. It comprises the entire record that His Majesty's Judicial Committee had before it within the four corners of it in determining the case on which I rely, and their decision. So, whether I succeed with my plea ultimately or not, your Lordship would, I submit, be in error at this stage to deprive me of the right of proving an entire record in a previous trial which I say constitutes a previous adjudication of the claim sought here.

MR. PICKUP: As to this, my Lord, I have said to my friend that I was not making any objection to formal proof, and will not object to this on any such ground as that; and if I understand him correctly to be only suggesting that this be in for the purpose of the plea of res judicata, I am not concerned. I certainly would object to a black book going in as evidence of the facts, but I have no objection to it going in as evidence of what was before the Privy Council, but nothing more. I, of course, have not read the evidence before the Privy Council; as I have said, I was not in that case. The evidence, or a good deal of the evidence, taken on the arbitration regarding various facts appears in this book; there are various exhibits which appear in this book. I, of course, object to the black book being now put in as proof of the facts that those exhibits or that evidence state, but I have no objection to it as being proof of what was before the Privy Council. That is, I take it, what you want.

MR. SLAGHT: That is the ground on which I think it is admissible in evidence in this case, because it is that record, and that is the ground upon which I am seeking its admission. I had not considered whether some or any of the documents or evidence in it are available to me on any other ground. At all events, I submit that on the record as it now stands this black book is receivable in evidence. I am not circumscribing the use the Court may subsequently make of it as evidence in my application—

HIS LORDSHIP: It is sufficient, at any rate, that you have a right to put it in now as an exhibit, so that it will be available for me for one purpose and—

MR. PICKUP: Oh, no, my Lord; my friend has no such right as that. My friend cannot bring a whole book, such as a minute book—we had this question arise not long ago, my Lord: the other side said, "We are going to put in a minute book." I said, "I do not know what the minute book contains. I

insist upon knowing what is being put in in evidence against me. You can't simply bring a bound book, any more than you could bring something else up, and say, 'This is a book,' and simply put it in that way." Chief Justice Rose said, "No, you can't do that, but what you can do is this: you refer to the minutes you are going to have put in in evidence, and those will become evidence, but you can't put a whole book in like that." No more can my friend come along and put this book in in this way. If it contains things which are evidence, then he has the right to put them in, but I have the right to know what is going in. My friend can read this up at home, and knows what is in that book; I do not know what is in it. That is the unfairness of it. That is why I was saying that, so far as being a record of what was before the Privy Council is concerned, there is no doubt that that is the book which was before the Privy Council, and it is evidence of that, but the moment my friend seeks to use that as the reason for getting this book in as evidence of something else, then I say he is entirely beyond his rights, and I object to anything going in evidence without my knowing what it is. I have the right to meet it, and I have the right to know what evidence is being put against me. My friend cannot just put it in in that form, saying, "Here is a big book," or bring ten volumes and put them in simply because they are minute books or something which might be evidence. It is never admitted in that bald way, my Lord, just because of the unfairness of it. Your Lordship cannot possibly tell whether it is evidence or not until you see the different items; you cannot say that any one exhibit in there is evidence until you see what it is, any more than I can say whether I am willing to have it go in until I see what it is. My friend cannot simply say, "Oh, well, never mind whether it is evidence or not, I won't even tell the judge what it is," and get it in in that way.

HIS LORDSHIP: So as to save further discussion, I am allowing it in in so far as it may be necessary to establish exactly what issues were before the Privy Council in the previous arbitration.

MR. SLAGHT: I can reassure my friend, if the Court will permit me to interrupt without being rude, that that is the purpose for which I put it in, and I do not expect to press the Court to give it any significance beyond proof that it is the record that the Privy Council had before them when they rendered judgment. That perhaps will reassure my friend.

I interrupted the Court, because I do want to be permitted, before your Lordship deals with it, to say this: my friend said, "That is the unfairness of it; I do not know what is in the book." He does not mean to charge me with unfairness, I know, because staring him in the face for six months has been my plea that this decision in the Privy Council is res judicata against him in this case, and my friend is so good a lawyer that he knows that if I offer evidence in support of that plea I must prove this book. He has had a copy of the book for six months, and does know that in support of that plea, unless it is a frivolous plea, this book must be proved. I cannot see any unfairness in that state of affairs.

HIS LORDSHIP: You both agree loudly and loudly, and more loudly, that that is what you are doing. It is in now as Exhibit 10.

In the Supreme Court of Ontario.

Defendant's Evidence. No. 7. Discussion.

—continued

EXHIBIT 10: Record of Proceedings in the Privy Council.

MR. PICKUP: I take it it is in only for the limited purpose, my Lord. I have never agreed to its going in for anything else except the one thing.

HIS LORDSHIP: You have not agreed to anything. It is now Exhibit 10, and the only possible evidence it could be of anything is as to what issues were raised and decided as matters of substance by the Privy Council decision.

MR. PICKUP: I have no objection to that.

MR. SLAGHT: That closes the defence, my Lord.

(Adjourned at 4.10 p.m., Monday, June 12, 1939, until 10.30 a.m., Tuesday, June 13, 1939).

Argument proceeded on Tuesday, June 13, 1939, from 10.30 a.m. until 12.40 p.m., and from 2.30 p.m. until 4.55 p.m.; and on Wednesday, June 14, 1939, from 10.30 a.m. until 12.55 p.m., and from 2.15 p.m. until 3.45 p.m.

JUDGMENT RESERVED

Certified correct, R. N. Dickson, C.S.R., Official Reporter, S.C.O.

No. 8. Judgment of Kelly, J., 24th July, 1939.

No. 8

Judgment of Kelly, J.

THE HONOURABLE MR. JUSTICE KELLY. — Monday the 24th day July, 1939.

This action coming on for trial on the 12th, 13th and 14th days of June, 1939, before this Court at the sittings holden at the City of Toronto for the trial of actions without a jury, in the presence of counsel for all parties; upon hearing read the pleadings and hearing the evidence adduced and what was alleged by Counsel aforesaid, this Court was pleased to direct this action to stand over for judgment, and the same coming on this day for judgment:

1. THIS COURT DOTH ORDER AND ADJUDGE that this action be and the same is hereby dismissed.

2. AND THIS COURT DOTH FURTHER ORDER that the Plaintiff, International Railway Company, do pay to the Defendant The Niagara Parks Commission, its costs of this action forthwith after taxation thereof.

JUDGMENT signed the 4th day of August, 1939.

Entered J.B. 76, page 87
August 5, 1939. E.B.

G. P. McHUGH,
Assistant Registrar, S.C.O.

No. 9. Reasons for Judgment of Kelly, J., 24th July, 1939.

No. 9

Reasons for Judgment of Kelly, J.

This action is based on a contract, made between the predecessors of the parties, dated 4th December, 1891. When the contract otherwise came to an end on 1st September, 1932, the defendant owed the plaintiff thereunder a large sum of money, and, pursuant to the terms of the contract, arbitration proceedings were had to determine the amount. On 29th May, 1935, by a

majority award, the arbitrators fixed the amount at $179, 104.00. This amount was reduced by the unanimous judgment of the Court of Appeal, but by the decision of the Privy Council given 23rd April, 1937, was increased to $1,057,-436.00. This last amount has been paid together with interest from the dates of the respective awards to the date of payment.

The nature of the plaintiff's claim may be stated as follows: The contract was simply a purchase and sale agreement respecting the plaintiff's lands and the sum awarded in the arbitration proceedings was purchase money. In equity, the purchase price of land bears interest, until paid, from the date when under the contract the purchaser takes possession or may safely do so. The defendant could have taken possession on 1st September 1932, and the award was paid on 3rd June, 1937. The plaintiff is therefore entitled to interest at 5% per annum on the amount of the award from 1st September 1932 to 3rd June 1937. After credit is given for such interest as was paid, the net amount of the claim in this action is $227,538.22.

It is to be observed that the amount claimed for interest is not claimed by way of damages, and that the claim is not based on secs. 33 to 35 of The Judicature Act, R.S.O. 1937, chap. 100, nor upon any other statute. The plaintiff relies solely upon the principle or rule of equity which gives to the vendor of land interest on unpaid purchase money from the date when the purchaser takes, or may safely take, possession under the agreement. To avoid confusion, I ignore for the present a secondary claim for interest on the main amount claimed from 3rd June 1937 to the date of judgment, such secondary claim resting, of course, on a different basis.

Two main defences to this action are set up.

First. The contract is not one for the purchase and sale of land, and does not itself, expressly or by implication, provide for the payment of interest.

Second. The defendant is an emanation from the Crown and a servant of the Crown. The contract sued on was made on the Crown's behalf respecting property of the Crown. The defendant is therefore not liable to be sued on such a contract, but the plaintiff must seek his remedy, if any, by petition of right.

Before dealing with these defences it is advisable, I think, to consider briefly the application and the limitations of the equitable rule on which the plaintiff relies. The rule is stated in the headnote to *Birch v. Joy* (1852) 3 H. of L. 565:—

"It is a general rule of equity that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase money, and the purchase money retained by him will carry interest to be paid by him to the seller."

The rule has been applied to compulsory purchases of land under certain statutes, interest being payable from the date of taking possession, or from the date when the purchaser might prudently have taken possession, and not from the date of the arbitrators' award fixing the amount of compensation. *Rhys v. Dare Valley Railway Co.* (1874) L.R. 19 Eq. 93; *In re Piggott and G.W.R.* (1881) 18 Ch.D. 146. In *Inglewood Pulp and Paper Co. v. N.B.*

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Electric Power Commission (1928) A.C. 492, on appeal from an award by arbitrators, the Privy Council decided that the principle applied to any statutory expropriation of land unless the statute clearly shows a contrary intention. In our own Court, see *Re Davies and James Bay R.W. Co.* (1910) 20 O.L.R. 534; *In re Cavanagh and the Canada Atlantic Ry. Co.* (1907) 14 O.L.R. 523.

The limitations to the application of the rule must be noticed. The House of Lords refused to apply it to the compulsory taking of goods; *Swift v. Board of Trade* (1925) A.C. 520; so, also, the Supreme Court of Canada; *Canadian Drug Co. v. Board of Lieutenant-Governor in Council* (1925) S.C.R. 23. In a case where a ship had been requisitioned by the Canadian Government, it was sought to apply the principle so that interest would run on the compensation awarded, it being argued that the Government had the profits from the ship while in possession; but the Supreme Court of Canada disallowed the interest, holding that the right to interest does not depend on the income-earning capacity of the property requisitioned; *The King v. Mackay* (1930) S.C.R. 130. At page 132 of the report, Anglin, C.J.O. uses this language:

"Interest is allowed on the purchase money of land which is the subject of a sale; or on the value of land which is the subject of expropriation under certain statutes, but that is upon the ground of implied contract which is deemed to arise on the giving of notice to treat."

In re Richard and Great Western Ry. (1905) 1 K.B. 68, seems to make it clear that the application of the principle is confined to transfers of land and will not be extended by analogy to other kinds of transactions. Under English statutes, an owner of minerals lying under or near a railway line must give to the railway company notice of his intention to work the mine. If the company gives notice of its willingness to pay compensation, the owner of the minerals may not thereafter mine them. The amount of compensation is then fixed in arbitration proceedings. In the case cited, the Court refused to allow interest, from the date of the company's notice, on the amount of compensation awarded, proceeding on the simple ground that there had been no transfer of any land in the course of the transaction: the minerals remained still the property of the owner who gave the notice, although he could do nothing with them.

A number of other cases were cited and discussed during the argument. With the possible exception of two, which may be called the Toronto Railway cases (reported *Toronto, City v. Toronto Ry. Co.* (1925) A.C. 177 and (1926) 59 O.L.R. 73), they do not in my opinion add anything to the rules laid down in the cases cited affecting the application of the equitable principle relied on by the plaintiff. Before discussing the Toronto Railway cases, I propose to consider the contract between the parties in this case to determine whether it is in truth an agreement for the sale of the land of the plaintiff to the defendant.

I have said that the contract was made originally between the predecessors of the parties, but, as nothing turns upon that, the contract may be discussed as if one between the plaintiff and defendant from its date. The contract has been considered and authoritatively described in the Privy Council; *International Railway Company v. The Niagara Parks Commission* (1937)

O.R. 607. The description by Lord Macmillan in that case enables me to dispense with a good deal of detail.

By the contract, dated 4th December, 1891, the Commission gave permission and the Company undertook to construct and equip a first-class railway over the lands of the Commission according to plans and specifications and on a location approved by the Commission. The Company undertook to acquire and hold under the Commission any elevators and railways then existing on the lands. Subject to a right of renewal given to the Company which was never exercised, the contract without anything more came to an end 1st September 1932. Certain obligations and payments were imposed and required during the life of the contract, but these have no bearing, it seems to me, on the question whether the contract was one for the purchase and sale of lands. Under the contract, the Company undertook to acquire any lands necessary for the railway and not included in the Commission's holdings; at the termination of the contract the Company was the owner in fee of lands so acquired to the value of $30,450.00 which passed to the Commission.

Because, after the contract was executed, no further agreement or notice was required, it will make for a clearer view of its nature if the years intervening between the beginning and end of the contract are disregarded. All that had occurred in those years had ceased to be of any importance, so far as this case is concerned, on 1st September 1932. Looked at in this way, what was the contract?

It seems to me that it was simply a contract between the owner of land and another whereby that other undertook to construct and equip a railway on the lands of the owner and to deliver possession of the complete railway to the owner on a fixed day, retaining only a right to be compensated secured by a charge which was to give no right to possession.

It is argued on behalf of the plaintiff that this is an agreement for the sale of lands to the defendant. What lands? All the plaintiff's rights over the defendant's lands expired on 1st September 1932 and were not the subject of any transfer. Under the contract, the plaintiff did certain work and brought certain materials to the defendant's lands and for this it is to be duly compensated. It is true that, "subject to the defendant's rights as owner of the land," the railway and equipment are to remain the property of the plaintiff during the life of the contract; but, whatever this may mean, (it may refer to such equipment as was not affixed to the land), I cannot see that it affects the question to be decided here, nor that it makes any difference to the nature of the transaction that delivery of the railway contracted for takes place 40 years after rather than immediately upon construction. On the 4th December 1891, the Company agreed to transfer something to the Commission; if that something was land, then it was "land" which the Company was to construct. With great respect I do not agree with this reasoning, and unless bound by authority cannot so hold. It appears to me that, if the contract was not simply, one *sui generis*, falling into no particular class, it was essentially one for the supply of work and material. In the main, therefore, subject to authority, I think the compensation money was not purchase money for land but simply money due under a contract.

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Mr. Slaght based an argument, which perhaps I do not clearly follow, on the use of the words "duly compensate", contending that those words in some way in themselves exclude all interest. "Compensation" is the word commonly used in the cases and statutes to distinguish a compulsory taking or expropriation from a sale by agreement. See the cases cited and The Public Works Act, R.S.O. 1937, ch. 54, ss. 21 to 35; The Municipal Act, R.S.O. 1937, ch. 266, Part XV. It is perhaps sufficient to notice that Section 351 of the latter Act reads:

"The arbitrator may allow interest on the compensation at the rate of 5% per annum from a day fixed by him." Although the word seems to have no direct bearing on the question of interest, its use may indicate that the contracting parties did not regard the agreement as one of sale and purchase. It is not suggested that there is anything in the nature of expropriation in the transaction.

I have mentioned the fact that, to the extent of $30,450, lands which had been acquired by the Company pursuant to the contract were transferred to the Commission. These lands had not been the property of the Commission and do represent a sale or transfer of land to the Commission. If this transfer and the portion of the compensation paid on its account are severable from the remainder of the contract, which I doubt, the equitable rule relied on might apply to the sum of $30,450, so as to entitle the Company to interest on that sum from the date of taking possession, 1st September 1932, to the date of the award, and in that event interest on that interest from 3rd June 1937 to the date of judgment. Since the rule sought to be applied is one of equity, it can scarcely be argued that because of land valued at $30,000, interest amounting to $250,000 on a general contract should be paid. Mr. Pickup definitely disclaimed any reliance on the fact that this small amount of land was transferred and contended throughout that even if there had been no land of this kind, the contract would still be one for the purchase and sale of land.

Mr. Pickup tells me that, no matter what my opinion may otherwise be, I am compelled by authority, in a case indistinguishable on the facts, to hold that the agreement in the case at bar is one for the sale of land, and he cites the Toronto Railway cases; (1925) A.C. 177 and 59 O.L.R. 73. The facts in those cases are fully set out in the judgment of Viscount Cave in the Privy Council, and I quote from the report at page 179:

"In the year 1891 the Corporation (of the City of Toronto), having agreed to take over from the Toronto Street Railway Company (an old company which has now disappeared) the street railways of that company in Toronto and the real and personal property connected therewith, invited tenders for the purchase of an exclusive right to operate surface street railways in Toronto (except in certain parts of the City) for a period of twenty years, which was to be extended to thirty years in the event of legislation being obtained to enable that to be done. Under the conditions of sale upon which the tenders were to be made the person whose tender was to be accepted (therein called "the purchaser") was to take over all the property to be acquired by the City

from the Toronto Street Railway Company at the amount of the award under which the City was to acquire that property."

"There were also other conditions of sale, including the following:

"7. At the termination of this contract the City may (in the event of the Council so determining) take over all the real and personal property necessary to be used in connection with the working of the said railways, at a value to be determined by one or more arbitrators . . ."

The contract resulting from the acceptance of a tender was confirmed by statute, which contained this provision:

"If the City of Toronto desires to exercise the right of taking over the property necessary to be used in the working of the railways at the termination of the said period, it shall, not less than twelve months prior thereto, give . . . to the company . . . notice of its intention so to do."

The City did give the notice, the award of the arbitrators was confirmed by the Privy Council, and in the Appellate Division of this Court in subsequent litigation the Company was held entitled to interest on the amount of compensation awarded. The decision is, of course, binding on me.

I think that the Toronto Railway case is clearly distinguishable from the case at bar. In the former case there was an outright sale by the City to the successful tenderer, the City retaining only an option to purchase which it was under no obligation to exercise. If the option had not been exercised the Company which had been the successful tenderer would have remained the absolute owner of the property purchased but without any right to operate street railways in the City of Toronto. When the City by an independent act exercised its option, a new agreement for the purchase of the real and personal property necessarily used by the company in connection with the railway was effected. The equitable rule applicable to purchase money of land was applied to the compensation payable under the agreement. Because of the inclusion of personal with real property, the case appears to extend the application of the equitable rule farther than any earlier case. Counsel were able to refer me to no other case which carried the rule so far. I think that the case must be taken to hold that where there is a contract for the sale of real property, designed for a particular purpose, personal property necessarily incidental to the use of the real property for that purpose, will fall within the application of the rule.

I do not think that I should be justified in extending still farther the application of the rule. As I view the facts, in the case at bar there was no sale or transfer of land under the contract, except as the merest incidental. The contract between the parties, while it dealt with the use and improvement of the defendant's land, in no sense looked to purchase and sale. Treating the contract as one between two ordinary private parties, I can see no reason why the provisions of the Judicature Act relating to the payment of interest should not govern the rights of the parties here. The plaintiff agrees, I understand, that nothing in that Act, apart from the equitable rule it has unsuccessfully invoked before me, gives it any right to interest.

Before turning to consider the second ground of defence, I should point

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out that it is not suggested on behalf of the plaintiff, that the contract itself, by its terms or by necessary inference therefrom, provides for payment of any interest. It is my opinion that, if no question of land were raised, no one could argue that any interest whatever is payable by any term of the contract express or implied.

The second ground of defence raises the general question of the right to sue a servant of the Crown on a contract made on the Crown's behalf, and necessitates an inquiry into the status of the defendant and whether the contract sued on here is one made on the Crown's behalf. Many authorities were referred to by counsel, but it is not necessary, I think, to deal with them all, and I do not propose to do so.

The law is well settled that, apart from some special statutory provision, a subject seeking to recover on a contract made with the Crown must proceed by petition of right: *The King v. Central Railway Signal Company* (1933) S.C.R. 555, per Duff, C.J.C., at page 563; and an action is not maintainable on such a contract against the servant of the Crown who actually made the contract either personally or in his official capacity; *Palmer v. Hutchinson* (1881) 6 App. Cas. 619, at 626. The fact that the Crown servant is incorporated does not in any way affect this rule: *Public Works Commissioners v. Pontypridd Masonic Hall Company* (1920) 2 K.B. 233. In *Mackenzie-Kennedy Air Council* (1927) 2 K.B. 517, it was held that, notwithstanding the fact that the Act establishing the Air Council expressly provided that "The Air Council may sue and be sued and may for all purposes be described by that name," an action could not be maintained against the Air Council, whether a corporation or not, in its capacity as representing the Crown.

In *Rattenbury v. Land Settlement* Board (1929) S.C.R. 52, Newcombe, J., at page 63, said:

"While it is certainly true that the revenues of the Crown cannot be reached by judicial process to satisfy a demand against an officer or servant of the Crown in any capacity, whether incorporated or not, . . . the Court will interfere to restrain ultra vires or illegal acts by a statutory body."

The plaintiff relies on *Graham v. Public Works Commissioners* (1901) 2 K.B. 781. This was the decision of two judges, Ridley and Phillimore, JJ., sitting as a Divisional Court. The headnote accurately sets out the result of the case and is as follows:

"An action will lie against His Majesty's Commissioners of Public Works and Buildings, who are incorporated by statute, for damages for breach of a contract entered into by them with a firm of builders for the erection of a public building.

"So held by Ridley, J., because the Commissioners must be taken to have made the contract specially themselves, and not as agents of the Crown;

"By Phillimore, J., because the Commissioners are in the position of servants of the Crown who may be sued on their contracts for the purpose of obtaining a judgment declaratory of the right of the subject who has contracted with them."

So far as this decision rests on the reasoning of Phillimore, J., it must be

taken to have been overruled by the unanimous decision of the Court of Appeal in *Hosier Brothers v. Derby* (1918) 2 K.B. 671, which held that an action on a contract could no more be brought against a servant of the Crown for a declaration as to what the contract meant than for substantive relief on the contract itself. The *Graham* case was cited on the argument before the Court of Appeal. See also the report of *Mackenzie-Kennedy v. Air Council* (1927) 2 K.B. 517, at page 518, where the reporter's statement of facts indicates that the Court of Appeal had held in connected litigation that claims in contract could be raised only by petition of right and not by action.

I think the authorities I have cited correctly set out the law, and it follows that, if the defendant in the present case was a servant or agent of the Crown and entered into the contract in that capacity, this action is not maintainable. The *Graham* case relied on by the plaintiff will apply only if the defendant can "be taken to have made the contract specially themselves, and not as agents of the Crown."

In *Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896) 28 O.R. 1, a Divisional Court considered the status of the present defendant, under another name, as it was at the time the contract the subject of this present litigation was executed. The headnote reads in part:

"The Commissioners, under the provisions of the statutes in that behalf, under any circumstances, act in the discharge of their various duties as 'an emanation from the Crown' or as agent of the Crown. . . ."

As Mr. Pickup contends that this was not the decision of the Court, a consideration of what actually was decided thereby is necessary.

The action was in tort for injuries received by the plaintiff caused by a fall through a defective fence or railing at the edge of the cliff on the lands of the Commission. The Court was composed of two Judges. Meredith, C.J. begins his judgment, at page 4, as follows:

"I have reluctantly come to the conclusion that the plaintiff's action cannot be maintained. I say reluctantly because the jury have found that the plaintiff has, without any contributory negligence on her part, suffered a very severe injury owing to acts of negligence on the part of the defendants' servants, for which she has a moral claim to be indemnified, and which, had the Legislature of this Province adopted what I may be permitted to call the more enlightened policy as to the liability of the Crown for wrongs committed by its servants which finds a place in the legislation of Canada and of several of the colonies of the Empire, might possibly have been a legal claim also against the Province"; and, commencing at page 10 of the report he discusses the statute controlling the Commission and establishing its status. There can be no doubt that Meredith, C.J. was of the clear opinion that the defendant Commission was the servant or agent of the Crown. Although Meredith, C.J. found that the defendant Commission seemed also to have a good defence on the merits apart from Crown immunity, Rose, J. decided for the defendant on the sole ground that an action for tort could not be maintained against the Crown.

I have been referred to nothing in subsequent statutes that would in any

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—continued

way affect the status of the defendant, and the decision of the Divisional Court is, therefore, binding on me.

In *Re Oakes and Township of Stamford* (1926) 58 O.L.R. 624, a Divisional Court again held that the Commissioners were an emanation or agents of the Crown and that they held lands, which technically were vested in them, for the Crown and in no other capacity.

Again, in *Queen Victoria Niagara Falls Park Commissioners v. International Railway Co.* (1928) 63 O.L.R. 49, both Fisher, J., as he then was, at trial, and Grant, J.A., who delivered the main judgment on appeal, assumed without question that the plaintiff Commissioners were in fact the Crown *qua* the action and the rights of the parties.

Finally, there is a passage in the judgment of Meredith, C.J.C.P. in *Scott v. Governors of University of Toronto* (1913) 24 O.W.R. 325, at page 326, which is to the same effect.

I am of the opinion that by judicial authority I am bound to hold that the defendant Commission is an emanation from the Crown and the servant or agent of the Crown. If no such judicial authority existed, an examination of the Statute, the Niagara Parks Act, R.S.O. 1937, ch. 93, would lead to the same conclusion. Practically every power given to the Commission by that Act is subject to the control of the Lieutenant-Governor in Council. An order in council is apparently necessary for the dismissal of the humblest servant of the Commission. I shall not go over the Act in detail but wish to draw attention to one or two sections.

"9. All works or land whereon any expenditure is authorized in pursuance of this Act shall be deemed and are declared to be public works of Ontario notwithstanding that they are in the care or charge of the Commission."

The Public Works Act, section 7, provides that: "All public works . . . not under control of the Government of Canada, shall unless otherwise provided by law be and remain vested in His Majesty and under the control of the Department."

By section 21 of the Niagara Parks Act, all revenue of the Commission, not spent in one of the three ways permitted by the section, is to form part of the Consolidated Revenue Fund of Ontario.

Turning to the contract itself, as well as to the statute confirming it, we find it recited that the Commissioners act therein "on their own behalf as well as on behalf and with the approval of the Government of the Province of Ontario."

It is clear, I think, that the second ground of defence, on the settled authorities must prevail. The defendant is an emanation of the Crown and it expressly entered into the contract in question on behalf of the Crown. What effect the words "on their own behalf" may have on the contract I do not know. It is plain that the defendant Commission has no other capacity than that of Crown agent or servant. It is not sought to hold any individuals liable, and the Commission is sued in its official capacity. The position of the Commission is not the same as that held by the Public Works Commissioners as described by Ridley, J., in the *Graham* case; (1901) 2 K.B. 781, as the contract here is plainly one in which the Commissioners have no in-

terest except as the agent of the Crown and as dealing with Crown lands.

In its reply, the plaintiff sets up an estoppel or waiver which, I am told, prevents the defendant from denying the plaintiff's right to maintain this action because of any Crown prerogative. The plea is based on a letter, dated August 12, 1937, written by the solicitors who then acted for the Commission to the solicitor for the Company. It was a letter with which was enclosed a cheque for $22,051.61 interest on the award, and which explained how the amount was made up. The paragraphs relied on by the plaintiff are as follows:

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"We are making the above payment on the understanding that by accepting this cheque you do not admit that it constitutes payment in full and that you are at liberty to cash same and still enter suit for any balance you claim for—if your clients still adhere to the view that any further interest is due."

"Should they decide to sue, we are obtaining instructions to accept service of the writ."

The writ was issued and the solicitors who wrote the letter accepted service and appeared and defended the action.

It is argued that the letter I have quoted and the acceptance of service in some way prevent the defendant from setting up that the action is not maintainable. I find myself quite unable to believe that the letter was intended by the defendant's solicitors or taken by the plaintiff to have any such meaning. The letter was written, I think, with no other meaning than that any further claim would be resisted and was, at worst, a somewhat cocky invitation to a fight. In my opinion the contention of the plaintiff as regards this letter is without merit. On the point of the authority of the solicitors to bind the Consolidated Revenues of the Province by such a letter, *Walkerville Brewery Ltd. v. The King* (1939) S.C.R. 52 may be referred to. I cannot see how any estoppel is raised against the Crown, and if this letter is to be regarded as an agreement, there was an entire absence of consideration, since neither the acceptance of the cheque without prejudice nor the issue of the writ was in any sense consideration for such a promise.

This action is therefore dismissed with costs.

No. 10

Notice of Appeal

In the Court of Appeal for Ontario.

No. 10.
Notice of Appeal 8th September, 1939.

TAKE NOTICE that the plaintiff appeals to the Court of Appeal for Ontario from the Judgment pronounced herein by The Honourable Mr. Justice Kelly on the 24th day of July 1939 and asks that the said Judgment should be reversed and that Judgment should be entered for the Plaintiff for the amount claimed in this action upon the following grounds:—

1. THAT the said Judgment is contrary to law and evidence.

2. THAT upon the facts of this case the Plaintiff, is in law upon well established principles of equity, entitled to be paid interest on the amount of the purchase money for its railway taken over by the Defendant from the

In the Court of Appeal for Ontario.

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—*continued*

time when possession was taken by the Defendant until the time when the purchase money was paid and that the learned trial Judge erred in not so holding and in not applying these equitable principles to this case.

3. THAT the equitable principles relied upon by the Plaintiff are of wider application than application to the purchase money payable in respect of a purchase or expropriation of land and that the learned trial Judge erred in holding that these principles are so confined.

4. THAT the property which was the subject matter of this purchase was land within the meaning of the cases referring to this principle as a principle applicable to purchase of land.

5. THAT the contract in question in this action, upon its true construction, was one providing for the purchase by the Defendant from the Plaintiff of a complete railway as a going concern, consisting of some lands owned in fee simple, right-of-way, railway tracks, power house and plant, other buildings and other property of similar character, all of which had for forty years been the property of the Plaintiff. The learned trial Judge erred in construing this contract as being merely a contract for the construction of a railway and delivery thereof to the Defendant on a fixed day or as being merely a contract for the supply of work and material.

6. THAT the learned trial Judge erred in fact and was under a misapprehension of fact in considering that land amounting only to $30,450.00 was involved in this purchase. This figure was taken from a schedule to the award of the arbitrators and as the schedule plainly shows it did not include improvements to land, right-of-way or other interests in land less than the fee simple, power house and other buildings, culverts, bridges, etc.

7. THAT the learned trial Judge, while considering himself bound by the Toronto Railway cases (City of Toronto v. Toronto Railway Company (1925) A.C. 177 and 59 O.L.R. 73) erred in law in his attempted distinction of them and in not following them.

8. THAT the learned trial Judge in not following the Toronto Railway cases misapprehended the purpose for which they were cited and relied on by Counsel. These cases were not cited as authority for the proposition that the agreement in question in this case was an agreement for the sale of land, but that the equitable principles requiring payment of interest, relied upon by the Plaintiff, are principles applicable to a purchase of a utility such as a railway and that where the cases refer to this principle as one applicable to sales of land they are not referring only to a fee simple or some other legal estate in land.

9. THAT the learned trial Judge erred in considering the Defendant to be the Crown and in holding that the Defendant as an emanation from the Crown could not be sued in this action.

10. THAT the Defendant is a corporation created by Statute with express statutory capacity and authority to be sued and the contract sued upon is one made by that corporation expressly on its own behalf as well as on behalf of the Province of Ontario and a contract which by Statute was declared

to be binding upon the Defendant. The learned trial Judge erred in treating this action as one brought against a servant of the Crown in respect of a contract made on the Crown's behalf.

11. THAT the learned trial Judge erred in considering that the remedy of the Plaintiff was by Petition of Right against the Crown.

12. THAT Petition of Right is not a remedy which the Plaintiff could pursue against the Defendant Corporation.

13. THAT, in any event, the learned trial Judge erred in giving effect in this action to the defence that the Defendant Corporation could not be sued, firstly because such defence is not pleaded, and secondly because of the fact that the Defendant Corporation prior to commencement of this action through its counsel suggested that the controversy between the parties put in issue in this action should be determined by Writ and agreed to accept and did accept service of such Writ on behalf of the Defendant Corporation.

14. THAT in the circumstances the Defendant should be held estopped from asserting in this action an immunity from action in the Supreme Court or that the controversy between the parties should be determined by a proceeding by way of Petition of Right.

15. THAT if the circumstances aforesaid do not constitute estoppel they should be treated as constituting an agreement binding upon the Defendant to determine the question in dispute in this action and as being a waiver of immunity from action (if any) which the Defendant might otherwise have claimed.

16. THAT in any event the learned trial Judge has erred in overlooking the rights of the Plaintiff against the Defendant Corporation irrespective of whatever rights the Plaintiff might have (if any) against the Crown. The contract upon which this action is based having been made with the Defendant Corporation expressly on its own behalf and having by Statute been declared to be binding upon the Defendant Corporation, the learned trial Judge has in effect denied to the Plaintiff any remedy against the Defendant Corporation by holding that its only remedy is one by Petition of Right against the Crown.

DATED at Toronto this 8th day of September, 1939.

Fasken, Robertson, Aitchison, Pickup & Calvin, 36 Toronto Street, Toronto, Ontario, Solicitors for the Plaintiff.

To the above-named Defendant;
and to Messrs. Slaght, Ferguson & Carrick,
320 Bay Street, Toronto, Ontario, its solicitors.

In the Court of Appeal for Ontario.

No. 11

Order of Court of Appeal for Ontario

No. 11. Order of Court of Appeal for Ontario, 31st October, 1939.

THE HONOURABLE
MR. JUSTICE RIDDELL
THE HONOURABLE
MR. JUSTICE MCTAGUE
THE HONOURABLE
MR. JUSTICE GILLANDERS

Tuesday, the 31st day of October, 1939.

UPON MOTION made unto this Court on the 12th and 13th days of October, 1939, by Counsel on behalf of the Plaintiff by way of appeal from the Judgment of the Honourable Mr. Justice Kelly dated the 24th day of July, 1939, in the presence of Counsel for the Defendant; upon hearing read the pleadings, the evidence adduced at the trial and what was alleged by Counsel aforesaid, and Judgment having been reserved unto this day;

1. THIS COURT DOTH ORDER that this appeal be and the same is hereby dismissed.

2. AND THIS COURT DOTH FURTHER ORDER that the Plaintiff, International Railway Company, do pay to the Defendant, The Niagara Parks Commission, its costs of this appeal forthwith after taxation thereof.

Entered O.B. 174, page 242.
November 7, 1939. H.F.

Chas. W. Smyth,
Registrar, S.C.O.

No. 12. Reasons for Judgment of Court of Appeal, 31st October, 1939.

No. 12

Reasons for Judgment of Court of Appeal

BEFORE RIDDELL, MCTAGUE AND GILLANDERS, J.J.A.

J. W. Pickup, K.C., and *J. W. G. Thompson*, for Plaintiff, (Appellant).

A. G. Slaght, K.C., and *R. I. Ferguson*, K.C., for Defendant, (Respondent).

Argued 12th and 13th October, 1939.

MCTAGUE, J.A.: This is an appeal from a judgment of the Honourable Mr. Justice Kelly dated the 24th day of July, 1939.

The action is for interest on moneys awarded the Plaintiff as compensation in an arbitration proceeding as finally determined by the Judicial Committee of the Privy Council. See *International Railway Co. v. Niagara Parks Commission* (1937) O.R. 607.

The facts are sufficiently set forth in Lord Macmillan's judgment and in the judgment of my brother Kelly appealed from. Suffice it to say that neither the arbitrators nor the Privy Council dealt with the matter of interest, the Judicial Committee holding that the Plaintiff must seek enforcement of its claim to interest, if any, in separate proceedings.

As Kelly, J., points out in his admirable and very able judgment, the Plaintiff bases its claim on the well known principle in equity enunciated in *Birch v. Joy* (1852) 3 H.L.C. 565, that "It is a general rule of equity that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase money and that the purchase money being retained by him will carry interest to be paid by him to the seller." The rule applies in vendor and purchaser agreements with respect to sale of lands. It does not apply to contracts for the purchase and sale of goods or chattels as such when not part and parcel of a contract involving the sale of lands. It seems quite clear that it does apply in cases involving the sale of lands which include equipment and buildings all as part of a railway undertaking. *Toronto v. Toronto Railway Co.* (1925) A.C. 177, and (1926) 59 O.L.R. 73.

The rule is only applicable where the relation of vendor and purchaser truly exists, and such a relationship has been held to exist in cases of compulsory expropriation where it is created by the notice to treat. *Rhys v. Dare Valley Railway Co.* (1874) L.R. 19 Equity 93, and *Inglewood Pulp and Paper Co. v. New Brunswick Electric Power Commission* (1928) A.C. 492. Or where one of the parties to a franchise agreement has an option to buy and exercises the option. *City of Toronto v. Toronto Railway Co.* (1925) A. C. 177. Where there is a true vendor and purchaser relationship the right to receive interest takes the place of the right to retain possession as pointed out by Lord Warrington of Clyffe in *Inglewood Pulp and Paper Co. Ltd. v. New Brunswick Electric Power Commission* (1928) A.C. 493 at 499.

Generally speaking, I am in agreement with the analysis of the learned trial Judge as to the nature of the contract dated the 4th of December, 1891, although I am not disposed to compromise myself and baldly define it as one for the supply of work and material. I rather prefer to view it as an agreement by which the Defendant granted the Plaintiff's predecessors as private undertakers a franchise for a limited period, coupled with an obligation on the part of the Plaintiff at the end of the period to accept compensation to be ascertained by arbitration in the manner provided in the agreement for whatever investment they had made pursuant to the franchise originally granted them.

Viewed in this way, it must be apparent that at the end of the period the Plaintiff had nothing to sell. They did not then own a railway. All they had was a right to compensation for the loss of their investment under their original contract. It seems to me that the transaction which took place at the end of the period is part and parcel of the franchise agreement and cannot be considered in any way separate from it. That this view is the correct one appears to be substantiated very definitely by paragraph 26 of the agreement by which the Plaintiff is specifically obligated to give up possession before compensation is ascertained or paid. In my opinion this is not a vendor and purchaser transaction in the true sense of the word at all, and the Plaintiff, being specifically disentitled to possession under the contract, cannot have interest in lieu thereof under the equitable principle. The contract itself is silent as to interest, and there can be no relief in law as contrasted with equity.

On the other branch of the case by which he held that this proceeding

In the Court of Appeal for Ontario.

No. 12. Reasons for Judgment of Court of Appeal, 31st October, 1939.

—continued

could only be launched by petition of right, I am also in accord with my brother Kelly. The Defendant is an emanation of the Crown. It has been so held to be in this Court as pointed out in the trial Judge's reasons. Once that conclusion is established, it follows that it must be proceeded against by petition of right unless one can find statutory authority for holding otherwise. The mere fact that the Defendant Commission is defined as a corporation makes no difference. One must look beyond that and ascertain whether the immunity against action except by petition of right has been waived either in the statute creating the corporation or in some other statute. There can be no doubt as pointed out by Phillimore, J., in *Graham v. His Majesty's Commissioners of Public Works* (1901), 2 K.B. 781, that it is within the competence of the Crown for its own convenience or that of His Majesty's subjects to waive its rights and permit its emanation to be sued in the ordinary way. But such intention must be clear from the statute. In the light of more recent decisions the *Graham* case as a decision may perhaps be considered to have been overruled, but the principle enunciated by Phillimore, J., in this regard is still good law. In regard to the Defendant here, I can find nothing in the statutes which would take away its immunity to be proceeded against otherwise than by petition of right. The mere fact that it is defined as a corporation and that under the Interpretation Act, R.S.O. 1937, ch. 1, sec. 28, a corporation may sue or be sued is not strong enough to destroy its usual right as an emanation of the Crown.

In *Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation,* 1939 O.W.N. 507, this Court held that the Canadian Broadcasting Corporation, although an emanation of the Crown, could be proceeded against in the ordinary Courts without petition of right. That decision was based upon a special section of the incorporating Act when read together with the powers given to the corporation. In other words, we concluded that the Canadian Broadcasting Corporation was in essence one of commercial character and that for its own convenience and that of persons contracting with it, it could sue or be sued in the ordinary Courts in the ordinary way. The statute creating the Niagara Parks Commission is quite different. The Commission holds its lands as trustee for the Crown, and its surplus goes into the consolidated revenue fund. There is nothing in its Act to take away the immunity to which an emanation of the Crown is in law entitled, and the Interpretation Act is not specific enough to justify a conclusion in favour of the plaintiff's contention.

The Plaintiff did not seriously press any claim to interest under the provisions of The Judicature Act, R.S.O. 1937, ch. 100. In any event I do not think they apply to this case. I also agree with the learned trial Judge's view of the significance to be fairly attached to the letter of August 12th, 1937.

The rights of the Plaintiff here can only arise out of the contract of the 4th day of December, 1891. That contract specifically provided what the Plaintiff was to be entitled to at the end of the term as compensation for its investment and how it was to be ascertained. While there was a good deal of unnecessary delay in ascertaining the compensation no question of bad faith arises.

For these reasons I think the Plaintiff is not entitled to succeed. I would affirm the judgment below and dismiss the appeal with costs.

RIDDELL, J.A.: I agree in the result.
GILLANDERS, J.A.: I agree and have nothing to add.

In the Court of Appeal for Ontario.

No. 12. Reasons for Judgment of Court of Appeal, 31st October, 1939.

—continued

No. 13

Order Approving Security and Admitting Appeal by Plaintiff

No. 13. Order Approving security and admitting Appeal by Plaintiff, 19th December, 1939.

THE HONOURABLE
MR. JUSTICE MCTAGUE
in Chambers.

Tuesday, the 19th day of December, A.D. 1939.

UPON the application of the Plaintiff, in the presence of Counsel for the Plaintiff and the Defendant, for an Order admitting the appeal of the Plaintiff to His Majesty in His Privy Council, and upon reading the pleadings, the Judgment of the Honourable Mr. Justice Kelly dated the 24th day of July, 1939, and the Order of the Court of Appeal of the Province of Ontario, dated the 31st day of October, A.D. 1939, and the receipt of the Canadian Bank of Commerce for the sum of Two Thousand Dollars ($2,000.00) paid to the credit of the account in this action in the Supreme Court of Ontario under The Privy Council Appeals Act, and upon hearing Counsel aforesaid;

1. IT IS ORDERED that the said sum of Two Thousand Dollars ($2,000.00) paid into Court by the Plaintiff as security that it will effectually prosecute its appeal to His Majesty in His Privy Council from the said Order of the Court of Appeal and pay such costs and damages as may be awarded in case the Order appealed from is confirmed be and the same is hereby allowed and approved and that the said appeal of the Plaintiff be admitted.

2. AND IT IS FURTHER ORDERED that the costs of this application be costs in the said appeal.

Entered O.B. 174, page 416,
December 20, 1939. H.F.

CHAS. W. SMYTH,
Registrar, S.C.O.

In the Supreme Court of Ontario.

Exhibits, Ex. 1. Act Incorporating Niagara Falls P. and R. Rly., 14th April, 1892.

PART II.—EXHIBITS.

Exhibit 1
(Plaintiff's Exhibit)

Statutes of Legislature of Ontario Printed for Convenience of Reference

CHAPTER 96

An Act to Incorporate the Niagara Falls Park and River Railway Company, with Schedules Attached. (Chap. 96 of 55 Vict., 1892).

CHAPTER 96

An Act to incorporate the Niagara Falls Park and River Railway Company
(Assented to 14th April, 1892).

Preamble.

WHEREAS the Commissioners of the Queen Victoria Niagara Falls Park, acting on their own behalf as well as on behalf and with the approval of the Government of the Province of Ontario did, on the fourth day of December, 1891, enter into an agreement (fully set out in the schedule B. hereto) with Edmund Boyd Osler, Herbert Carlyle Hammond, William Hendrie, and Richard Bladworth Angus, in the said agreement described as the company, whereby it was agreed that in consideration of certain matters therein contained the said company would build an Electric Railway so as to furnish better access to the public property of Ontario at the Falls of Niagara, known as the Queen Victoria Niagara Falls Park proper; and whereas, by the said agreement it was provided that the railway to be worked by electricity should pass through the said Park according to plans and specifications, to be approved of by the Commissioners, and by the Commissioner of Public Works of the Province of Ontario, and that the right of way through the Park proper should be provided by the Commissioners, and that the right of way from Queenston to the Park proper should be provided by the Commissioners on the terms in the said agreement specified; and whereas it is desirable that the aforesaid parties in the said agreement described as "the company" be duly incorporated and be empowered by means of an Act of incorporation of the Legislature of Ontario to raise capital to carry out the terms of the said agreement and exercise such other powers as are hereby conferred;

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Agreement between Park Commissioners and Corporation confirmed.

1. The agreement between the Commissioners for the Queen Victoria Niagara Falls Park and the said Edmund Boyd Osler, Herbert Carlyle Hammond, William Hendrie and Richard Bladworth Angus, dated the fourth day of December, 1891, and as set forth in schedule "B." hereto, and in this Act hereinafter designated as "the agreement," is hereby approved, ratified, confirmed and declared to be valid and binding on the parties thereto; and each of the parties thereto is hereby authorized and empowered to do whatever is necessary to give effect to the substance and intention of the provisions of the

agreement, and is hereby declared to have and have had power to do all acts necessary to give effect to the same.

2. The said Edmund Boyd Osler, Herbert Carlyle Hammond, William Hendrie, and Richard Bladworth Angus, together with all such persons and corporations as shall become shareholders in the company hereby incorporated, shall be and are hereby constituted a body corporate and politic by and in the name of "The Niagara Falls Park and River Railway Company." Incorporation.

3. Subject to paragraph (f) in the first part of the agreement relating to the personal liabilities and engagements of the individual parties to the agreement, and subject also to the other provisions of the said agreement the company by this Act incorporated shall have power to acquire upon such terms as may be agreed upon, all rights and powers granted by the agreement by the Park Commissioners, and also the benefit of any work that has been done, and any moneys that have been expended in connection with the said electric railway or works prior to the organization of the said company, and the personal liability to the Park Commissioners or others thereunder shall not cease or determine until the works and equipment in paragraph (f) in the first part of the agreement shall have been constructed and ready for operation as in said paragraph provided. Personal liability of Corporators.

4. The company shall have power and authority— Powers of Company.

(1) To construct and operate an electric railway from the waters of the Niagara river along the top of the west bank of the Niagara river from some point in the village of Queenston, in the County of Lincoln, to the village of Chippawa, to be known as the High Level Railway from Queenston to the southern end of the Queen Victoria Niagara Falls Park, such electric railway to be laid out, constructed and operated in accordance with the terms provided by the agreement. Location of line.

(2) To construct and operate extensions of the said electric railway from Chippawa to Fort Erie, and from Queenston to the town of Niagara as may be determined. Extension.

(3) To acquire, own, erect and manage one or more hotels at or near the Niagara Falls and elsewhere near the line of railway, but the powers of expropriation in *The Railway Act of Ontario* shall not apply to this subsection. Hotels. Rev. Stat. c. 170.

(4) To erect wharves, piers, docks, stations, power houses, workshops and offices, and to purchase lands for any of the company's such purposes and to sell and convey such portions of any of such lands as may be found superfluous for any such purpose. Wharves, etc.

(5) To construct, purchase, charter and navigate steamers and vessels for the purpose of traffic in connection with said railway, and to establish connections between their wharves, piers and docks and their said railway at such point or points as such connections may be required. The powers of expropriation in *The Railway Act of Ontario* shall not be exercised by the company in respect of the water frontage in Queenston at present owned by the Niagara Navigation Company to the extent of 325 feet in a southerly direction from the north limit of the wharf of the said company as at present constructed. Steamers and Vessels.

(6) To take and hold stock in any navigation or steamboat company. Stock in Steamboat Company.

In elevator companies.

(7) To take stock in any company or companies formed or to be formed for the construction of elevators, lifts or other works along the Niagara river.

In street car companies.

(8) The company shall also have the power to acquire the whole or any part of the stock of any street car company heretofore or hereafter incorporated according to the laws of this Province and which touches or connects with the line or lines of railway hereby authorized, or any of them. The company shall also have power to run its cars on the lines of any street car company, having first obtained permission from such company so to do.

Conduits.

(9) Subject to the recommendation of the Park Commissioners approved by the Lieutenant-Governor in Council, the company shall have the power by expropriation or otherwise to acquire the right to convey electricity required for the working of the railway and lighting the same, over, through or under lands other than the right of way of the Railways by this Act authorized to be built, as well as the right of way, and to lay conduits under or erect poles and wires on or over such lands as may be determined by the company, and the rights and liabilities of the company in respect thereof shall be the same as is provided by *The Railway Act of Ontario,* in respect of other lands required for the use of the railway, and also when the right to convey such electricity has been conceded to the company by the parties having a right to make such concession and along and upon any of the public roads and highways or across any of the waters in this Province by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the cords or wires of such lines, or the conduits for such electricity, provided such works are not so constructed as to incommode the public use of such roads or highways, nor to be a nuisance thereto, or to impede the free access to any house or other building erected in the vicinity of same or to endanger the same, or injuriously to interrupt the navigation of such waters, and electricity so conveyed shall not be used for any other purpose than to work and light the said railway. The rights hereby conferred upon the company shall not be exercised within the limits of the Queen Victoria Niagara Falls Park without the consent of the Commissioners thereof on the approval of the Lieutenant-Governor in Council.

Certain provisions of Rev. Stat. c. 170 to apply.

5. The clauses and provisions of *The Railway Act of Ontario* and the amendments thereto, except sub-section 18 of section 9 and, save as barred, varied or excepted by this Act including the Act passed in the 53rd year of Her Majesty's reign, and chaptered 45, shall form part of this Act, and the following provisions of the said Railway Act as amended shall be excluded in respect of the Park proper as in the agreement defined, nor be exercisable in relation thereto by the company by this Act incorporated, viz.:—"Powers" except in so far as the exercise of sub-section 10 and the borrowing powers of the company are of the powers to be exercised over the whole undertaking, "plans and surveys," "lands and their valuation," "mines," "highways and bridges," "fences" except subject to section 6 of this Act, "proceedings where additional space required," "traffic arrangements."

Powers of Lieutenant-Governor in Council.

6. The Lieutenant-Governor in Council may from time to time, as may be deemed expedient, amend, change and alter as regards the company any or all of the provisions of section 30 of *The Railway Act of Ontario* or the

sub-sections thereof, and make such amendments, changes or alterations applicable to the whole or any part or parts of the said railway of the said company.

A copy of any such orders in council shall be filed with the clerk of every municipality through which the said railway, or any part thereof, shall be operated.

Motive power.

7. The Railways shall be operated by electric power only but between Queenston and the Whirlpool, the Lieutenant-Governor in Council may permit electric power to be dispensed with temporarily for the use of steam power to be generated by anthracite coal.

Capital stock.

8. The capital stock of the said company shall be the sum of $1,000,000 to be divided into shares of $100 each, and the money thereby raised shall be applied, in the first place, to the payment of all fees, expenses and disbursements for the procuring the passing of this Act, and for making the surveys, plans and estimates connected with the railway, and all the rest and remainder of such money shall be applied towards making, completing and maintaining the said railway, and to the other purposes of this Act.

Provisional Directors.

9. The persons named in the first section of this Act shall be and are hereby constituted a board of provisional directors of the said company, three of whom shall be a quorum, and shall hold office as such until other directors shall be appointed, under the provisions of this Act, by the shareholders and shall have power and authority to fill vacancies occurring therein, to associate with themselves therein not more than three other persons, who shall thereupon become and be directors of the company equally with themselves, to open stock books and procure subscriptions for the undertaking, to make calls upon subscribers, to cause surveys and plans to be made and executed, to call a general meeting of the shareholders for the election of directors as hereinafter provided, and generally to do all such other acts as a board of directors under *The Railway Act of Ontario* may lawfully do.

Rev. Stat. c. 170.

First annual meeting.

10. When and as soon as shares to the amount of $300,000 of the capital stock of the company shall have been subscribed, and 25 per centum shall have been paid into a chartered bank of the Dominion, having an office in the Province of Ontario, the provisional directors, or a majority of those present at a meeting duly called for the purpose, shall call a meeting of the subscribers for the purpose of electing directors, giving at least four weeks' notice in the *Ontario Gazette*, and in one newspaper published in the town of Niagara Falls, of the time, place and object of such meeting, and at such general meeting the shareholders present, either in person or by proxy, who shall at the opening of such meeting have paid ten per centum on the stock subscribed by them, shall elect seven persons to be directors of the said company, in manner and qualified as hereinafter described, which said directors shall constitute a board of directors; and the sum so paid shall not be withdrawn from the bank except for the purposes of this Act.

Annual meetings.

11. Thereafter the general annual meeting of the shareholders of the said company shall be held in the city of Toronto or elsewhere, as the directors may deem most convenient, on such days and hours as may be directed by the by-laws of the said company, and public notice thereof shall be given at

least four weeks previously in the *Ontario Gazette*, and once a week for the same period in some newspaper published in the said town and in each of the counties from which a bonus may have been received.

Quorum of directors and appointment of paid director.

12. A majority of the directors shall form a quorum for the transaction of business, and the said board of directors may employ one or more of their number as paid director or directors: provided, however, that no person shall be elected a director unless he shall be the holder and owner of at least ten shares of the stock of the said company, and shall have paid up all calls upon the stock.

Power of directors to exclude persons from subscribing for stock.

13. The provisional or elected directors of the company may in their discretion exclude anyone from subscribing for stock in the said company, or may before allotment cancel the subscription and return the deposit of any person, if they are of the opinion that such person would hinder, delay or prevent the company from proceeding with and completing their undertaking under the provisions of this Act, or that such person's membership is for other reasons undesirable, and if, at any time, more than the whole stock shall have been subscribed the said board of directors shall allocate or apportion it amongst the subscribers as they shall deem most advantageous and conducive to the furtherance of the undertaking.

Allotment of stock.

14. It shall be lawful for the directors in procuring subscriptions for stock to allot such stock in such amounts and subject to the payment of such calls of such amount and at such times and at such discount as they may think fit, or they may agree for the sale of such stock, or any part thereof, at such price as they may think fit, and may stipulate for the payment of the purchase money at the time of subscription, or by instalments, and the amount of every such instalment, as and when payable, shall be deemed to be money due in respect of a call made in accordance with the provisions contained in section 35 of *The Railway Act of Ontario*, and non-payment of any such instalment shall carry with it all the rights, incidents and consequences as mentioned in the said Act, as in the case of a call due by a shareholder on a share.

Rev. Stat. c. 170.

Power to make certain payments in stock.

15. The said directors may pay, or agree to pay, in paid up stock, or in bonds of the said company, such sums as they may deem expedient, to engineers or contractors, or for right of way, or material or plant, or rolling stock, buildings or lands, and also subject to the sanction of a vote of the shareholders, for the services of the promoters or other persons who may be employed by the directors for the purpose of assisting the directors in the furtherance of the undertaking, or purchase of the right of way, or material, plant or rolling stock, whether such promoters or other persons be provisional or elected directors or not, and any agreement so made shall be binding on the company.

Exemption from taxation.

16. It shall be lawful for the corporation of any municipality, through any part of which the railways of the said company pass, or are situate, by by-laws specially passed for that purpose, to exempt the said company and its property within such municipality, either in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum, or otherwise, in gross, or by way of commutation or composition for payment, or in lieu of all or any municipal rates or assessments to be imposed by such muni-

cipal corporation, and for such term of years as to such municipal corporation may seem expedient, not exceeding twenty-one years, and any such by-law shall not be repealed unless in conformity with a condition contained therein.

Power to become parties to promissory notes, etc.

17. The said company shall have power and authority to become parties to promissory notes and bills of exchange for sums not less than one hundred dollars, and any such promissory note made or endorsed by the president or vice-president of the company and countersigned by the secretary and treasurer of the said company and under the general or special authority of a majority of a quorum of the directors, shall be binding on the said company; and every such promissory note or bill of exchange so made shall be presumed to have been made with proper authority, until the contrary be shewn, and in no case shall it be necessary to have the seal of the said company affixed to such promissory note or bill of exchange; nor shall the president or vice-president, or the secretary and treasurer, be individually responsible for the same, unless the said promissory notes or bills of exchange have been issued without the sanction and authority, either general or special, of the board of directors, as herein provided and enacted: provided, however, that nothing in this section shall be construed to authorize the said company to issue notes or bills of exchange payable to bearer, or intended to be circulated as money, or as the notes or bills of a bank.

Issue of bonds.

18. The directors of the said company shall have power to issue bonds of the company for the purpose of raising money for prosecuting the said undertaking, the whole amount of the issue of such bonds not to exceed in all the sum of $45,000 for each mile of the said railway and the actual cash value of the wharves, piers, docks, steamers, vessels and other water craft, incline railways, elevators and hotels of the company and the equipment thereof respectively, but such bonds shall be limited as a charge so as not to interfere with the terms of section 26 of the agreement; and the amount of compensation under section 26 for the railway, its equipment, machinery and works between Queenston and Chippawa shall not include the value of hotels, vessels, steamboats, nor the value of any other equipment or works than such as may be incidental to the use of electric power, nor any excess of the value of the class of work prescribed by the plans and specifications which shall have been approved by the Commissioner of Public Works, nor stocks in navigating companies, or in companies building or operating elevators or incline railways, nor the cost or value of elevators or inclined railways, except the elevators or inclined railways expressly authorized to be built or acquired under the agreement, nor of any other works not expressly and specifically provided for by the said agreement set forth in the schedule hereto.

Power to mortgage bonds.

19. The said company hereby incorporated may, from time to time, for advances of money to be made thereon, mortgage or pledge any bonds which they can under the powers of this Act issue for construction of the said railway or otherwise, subject to the provisions in the preceding section contained.

Right of Aliens.

20. All shareholders in the said company, whether British subjects or aliens, or residents of Canada or elsewhere, have and shall have equal rights

—*continued*

to hold stock in the said company and to vote on the same and to be eligible to office in the said company.

Plans to be subject to approval of Commissioner of Public Works.

21. Before proceeding with the construction of the said railways, plans and maps shewing the location thereof, with profile, cross sections and specifications, and determining and including the width of right of way where not already expressly provided and specified in the agreement shall be submitted to and approved by the Commissioner of Public Works; and the said company shall also submit in detail, to the Commissioner of Public Works, plans and drawings of the carriages or coaches proposed to be used for passenger traffic, for his approval, and the same shall be approved of by him before the said carriages or coaches shall be used upon the said railways, and before proceeding with any changes or expansions in the plans and specifications affecting the system of the renewal of the construction of the said railways and the building of the said carriages or coaches such changes, expansions or renewals shall be subject from time to time to the inspection, direction and approval of the Commissioner of Public Works on such terms as he may require of the company, and copies of all such railways, plans, with cross-sections and specifications shall be deposited in the Department of Public Works for Ontario.

Erection of telephone and telegraph wires and electric works.

22. For the purpose of operating and lighting the said railway, the company shall have power to erect poles or make conduits for wires, and to construct and maintain telegraph or telephone lines along the lines of railway, and connect the same with their offices, stations and other works, and for any of such purposes shall have all the powers conferred upon telegraph companies by chapter 158 of the Revised Statutes of Ontario, 1887, and may take tolls or fees for the use of the telegraph or telephone lines by the public.

Transfer of stock.

23. Shares in the capital stock of the company may be transferred by any form of instrument in writing, but no transfer shall become effectual unless the stock or scrip certificates issued in respect to shares intended to be transferred are surrendered to the company, or the surrender thereof dispensed with by the company.

Regulations as to transfer of shares.

24. The directors may from time to time, make such regulations as they shall think fit, for facilitating the transfer and registration of shares of stock, and the forms in respect thereof, as well in this Province as elsewhere, and as to the closing of the register of transfers for the purpose of dividends, as they shall find expedient, and all such regulations, not being inconsistent with the provisions of this Act, and of *The Railway Act of Ontario*, as altered or modified by this Act, shall be valid and binding.

Rev. Stat. c. 170.

Form of conveyances.

25. Conveyances of land, to the said company, for the purpose of and powers given by this Act, made in the form set out in schedule "A" hereunder written, or to the like effect, shall be sufficient conveyance to the said company, their successors and assigns, of the estate and interest, and sufficient bar of dower respectively of all persons executing the same; and such conveyances shall be registered in the same manner, and upon such proof of execution as is required under the registry laws of Ontario; and no registrar shall be entitled to demand more than seventy-five cents for registering the same, including all

entries and certificates thereof, and the certificates endorsed on the duplicates thereof.

Power to purchase whole lots in certain cases.

26. Whenever it shall be necessary for the purpose of procuring sufficient lands for stations or gravel pits, or for constructing, maintaining and using the said railways, and in case, by purchasing the whole of any lot or parcel of land over which the railways are to run, the company can obtain the same at a more reasonable price, or to greater advantage than by purchasing the railway line only, the company may purchase, hold, use, and enjoy such lands, and also the right of way thereto, if the same be separated from their railway, and may sell and convey the same, or any part thereof, from time to time as they may deem expedient; but the compulsory clauses of *The Railway Act of Ontario* shall not apply to this section, nor shall the same apply to the Park Proper.

Rev. Stat. c. 170.

Commencement and completion of railway.

27. The construction of that portion of the said railway lying between Queenston and Chippawa, and on the high level, shall be completed in accordance with section 15 of the agreement, unless extended by the Lieutenant-Governor in Council, and shall be duly operated during the existence of the said agreement and subject to the terms thereof, and the construction of the said railway, between Niagara and Queenston and between Chippawa and Fort Erie, shall be commenced within five years, and be completed within seven years, after the passing of this Act.

Construction of low level railway.

28. In respect of the low level railway mentioned in section 20 of the agreement, and the terms and conditions on which the same may be built and operated as in the agreement is provided, the Lieutenant-Governor in Council, in the event of the company in the agreement mentioned, or the company hereby incorporated if it shall have duly acquired the rights of the company in the agreement mentioned in pursuance of the powers contained in section 3 of this Act, having duly exercised the option given to build and proceed forthwith with the building and operating the low level railway as in the agreement provided, may extend to the company in the agreement mentioned or to the company hereby incorporated the powers in this Act contained in respect of such matters and powers as are by this Act conferred to build and operate the high level railway subject to the power of revocation by the Lieutenant-Governor in Council of such right to build and operate the said low level railway in the event of the said low level railway not being built and fully equipped for operation in accordance with the agreement and within the period by the agreement required to build the same and have the same ready for operation and duly operating the same during the existence of the said agreement and subject to the terms thereof; and in the event of the company in the agreement mentioned or the company hereby incorporated, if it shall have duly acquired the rights of the company in the agreement mentioned in respect of the said low level railway declining to build the low level railway as by the said agreement provided, the Lieutenant-Governor in Council may grant to any person or persons individually or grant to any person or persons a charter of incorporation by Letters Patent under the Great Seal. All such powers which by this Act may be conferred upon the company in the agreement mentioned or on the com-

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pany hereby incorporated, to build and operate the low level railway as in the agreement mentioned in respect of such matters, subject to the due operation of the said low level railway during the existence of the said agreement and subject to the terms thereof, and such further powers as are by this Act conferred upon the company by this Act incorporated, to build and operate the high level railway, together with such rights and powers to raise capital for such purposes as to the Lieutenant-Governor in Council may seem to be expedient and necessary, and such charter of incorporation by Letters Patent under the Great Seal shall, and is hereby declared to be as valid and effectual as an Act of the Legislature of Ontario; provided always that such Letters Patent shall be laid before the Legislature at the first session ensuing the granting thereof.

SCHEDULE "A."

(Section 25)

Know all men by these presents, that I (*or* we) (*insert the name or names of the vendor or vendors*), in consideration of dollars paid to me (*or* us), by the Niagara Falls Park and River Railway Company, the receipt whereof is hereby acknowledged, do grant and convey unto the said company, and I (*or* we) (*insert the name or names of any other party or parties*) in consideration of dollars paid to me (*or* us), by the said company, the receipt whereof is hereby acknowledged, do grant and release all that certain parcel (*or* those certain parcels), (*as the case may be*), of land situated (*describe the lands*), the same having been selected and laid out by the said company for the purposes of its railway, to hold with the appurtenances unto the said Niagara Falls Park and River Railway Company, their successors and assigns (*here insert any other clauses, covenants or conditions required*) and I (*or* we) the wife (*or* wives), of the said do hereby bar my (*or* our) dower in the said lands.

As witness my (*or* our) hand and seal (*or* hands and seals), this day of one thousand, eight hundred and

Signed, Sealed and Delivered in presence of } [L.S.]

SCHEDULE "B."

(Section 1)

This agreement, made this fourth day of December, one thousand eight hundred and ninety-one, between the commissioners for the Queen Victoria Niagara Falls Park, acting herein on their own behalf as well as on behalf and with the approval of the Government of the Province of Ontario, and hereinafter called "the commissioners" of the first part, and Edmund Boyd Osler and Herbert Carlyle Hammond, both of the city of Toronto, in the Province of Ontario, brokers, William Hendrie, of the city of Hamilton in the

said Province, contractor, and Richard Bladworth Angus, of the city of Montreal, in the Province of Quebec, gentleman, hereinafter called "the company" of the second part;

Whereas the Company desires to construct and operate an electric railway along the top of the west bank of the Niagara River from the village of Queenston, in the county of Lincoln, to the village of Chippawa, in the county of Welland, and to extend the same as they may deem advisable to the town of Niagara, in the said county of Lincoln, and to the village of Fort Erie, in the said county of Welland, and to establish steamboat connections at the places named, or some of them, and the said railway between Queenston and Chippawa is hereinafter referred to as "the high level railway";

And whereas it is the intention of the company to apply to the Legislature of Ontario at its next session for a charter of incorporation to enable them and such others as may be associated with them in the undertaking to construct and operate the said railway and other works hereinafter referred to, and to execute effectively the engagements entered into herein on their part;

And whereas the company desire to secure the rights of way to construct their said railway through and in the Queen Victoria Niagara Falls Park, which is the property of the commissioners, and through and over other lands of the commissioners, and also through and over lands held or contracted for by the commissioners under contracts with and licenses from the owners thereof respectively, and the commissioners have agreed to provide such rights of way upon the terms and conditions and for the considerations hereinafter expressed and contained or intended so to be;

And whereas the company desire to secure the option of constructing and operating the "low level railway" as hereinafter defined and also certain privileges in the Park and along the Niagara River and its western bank which option and privileges the commissioners have agreed to give to the company for the time and upon the terms and conditions and for the considerations hereinafter expressed;

And whereas for convenience and to prevent ambiguity it is agreed and understood by and between the said parties hereto and is hereby declared as follows, that is to say:—

(a) The expression "park proper" wherever it occurs herein shall be understood to mean the Queen Victoria Niagara Falls park south of its original boundary in front of the Clifton house and running easterly to the Niagara river.

(b) The expression "low level railway" whenever it occurs herein shall be understood to mean a line of railway under the cliff which forms the west bank of the Niagara river, and as near to the edge of the waters of the river as circumstances will permit and extending as the commissioners may determine from within that part of the park proper below the bank to the north limit of the lands of the commissioners being the south limit of the military reserve at Queenston or between such intermediate points as the commissioners may determine.

(c) The expression "the company" wherever it occurs herein shall be understood to mean not only the individuals above named as parties hereto of

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the second part, but also their and each of their heirs, executors, administrators and assigns and the company to be incorporated as hereinbefore mentioned and its successors and assigns.

(d) The expression "the commissioners" wherever it occurs herein shall be understood to mean not only the parties hereto of the first part but also their successors and assigns and those who for the time being may be the commissioners of the Queen Victoria Niagara Falls park.

(e) In the event of the company failing to secure at the next session of the Legislature of Ontario such charter as will enable them to carry out effectively the building of "the high level railway" and to acquire the other rights and properties in fulfillment of the objects hereinbefore recited, they will under the authority of the commissioners in so far as the said authority may have effect under the powers vested in the commissioners or otherwise if such powers be sufficient for the purpose and with the resources of the company and as an unincorporated partnership or otherwise build, equip and operate the said high level railway as hereinafter provided and such other works as may be required of the parties of the second part to be by them done or acquired under the terms of this agreement.

(f) The company to be incorporated as aforesaid shall assume all the liabilities and engagements which are assumed and entered into herein by the parties hereto of the second part and their personal liability to the commissioners shall cease and determine when such liabilities and engagements have been assumed by such company and in the event of the said parties being unable to secure incorporation such personal liabilities and engagements shall cease when the said high level railway shall have been constructed from Queenston to Chippawa and shall be fully equipped and ready for operation and after that event the said liabilities and engagements including the payment of rent after the first year's payment shall be enforced against the said railway and its appurtenances, including all works to be acquired or built by the company as by this agreement is provided, or against the said incorporated company as the case may be, and not against the parties hereto of the second part, their heirs, executors, administrators or assigns or any of them, except in so far as they may have incurred liability as members of such incorporated company, but they shall nevertheless be personally liable for the cash payment and the first year's rent and for the building and equipping of the said high level railway.

Now therefore this agreement witnesseth as follows, this is to say:—

1. The commissioners do hereby license and permit the company to construct a first class electric railway with single or double tracks as may hereafter be agreed upon between them and the company in and through the park proper from its northern to its southern boundary and on and over the other lands of the commissioners from the northern boundary of the park proper to a point in or near the village of Queenston, and so far as the license of occupation recently obtained by the chairman of the commissioners from the militia department extends, and the commissioners will provide the right of way therefor of the required widths the railway herein referred to being part of the

high level railway and the same shall be in accordance with the provisos, conditions and agreements hereinafter contained.

2. The company shall construct, equip and operate the said railway and shall extend the same to Chippawa creek with sufficient sidings and equipments to meet the development of traffic. It shall not, however, be compulsory upon the company to operate the railway between the first day of December and the first day March in each year except between the Grand Trunk railway station at the town of Niagara Falls and the upper islands within the park proper.

3. The said railway is to be four feet eight and a half inches gauge and is to be laid with steel rails of not less than forty-five pounds to the lineal yard, fastened with fish plates, the formation ballast, bridges and all other structures to be of such material and to be built between Chippawa and Queenston according to plans and specifications to be approved of by the commissioners and by the Commissioner of Public Works of the Province of Ontario.

4. The location of the said railway in the park proper and on that portion of the commissioners' property known as "the chain reserve" extending from the north boundary of the park proper to the north boundary of the town of Niagara Falls shall be as the commissioners may decide.

5. No sidings are to be laid down in the park proper without the assent of the commissioners, but any sidings which they may determine to be required in the public interest shall be constructed by the company, the right of way for the same being provided by the commissioners of a width not exceeding twelve feet.

6. The right of way through the park proper shall be twelve feet for a single track where the railway is built on the surface. In cuttings and embankments the width is not to exceed twelve feet at grade.

7. The railway is to be constructed upon the chain reserve along and on top of the bank of the river north of the park proper so far as it can be conveniently used to reach Queenston, but deviations may be made to avoid large expenditure.

8. For the right of way over the chain reserve north of the park proper in so far as regards the extent of the present and any future interest of the commissioners therein and the benefit of the contracts already entered into between the commissioners and various land owners for purchase of right of way and for the deviations above mentioned including the lands by such contracts acquired or thereby intended so to be, the company shall pay to the commissioners the sum of ten thousand dollars, which payment is to be made in cash by the company to the commissioners when they have decided upon the location of the said high level railway and have given their assent to the commencement of the work of construction, and the commissioners shall have no further claim against the company for land damages, or for lands injuriously affected by the construction or operation of the railway (unless the same shall not be constructed in accordance with the plans and specifications provided for by paragraph 3 of this agreement) or in respect of any claims for working the said railways or works. Any territory required for deviations or

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otherwise in addition to the above shall be provided and paid for by the company who in acquiring such other territory and until they receive the requisite rights, powers and franchises by Act of the Legislature of Ontario, may exercise all the rights, powers and franchises possessed by, and if necessary, in the name of the commissioners.

9. At terminal points, namely Queenston and Chippawa, the company shall construct sufficient landing places in the form of wharves to receive steamers. Such structures shall be built on plans to be approved of by the commissioners. At Chippawa terminus the company shall provide sufficient ground for terminal buildings with all necessary accommodation, and also sufficient ground for like terminal and necessary accommodation at Queenston if the land embraced in the license of the militia department be inadequate for the purpose.

10. The company shall not erect any buildings or sheds within the limits of the park proper without special permission from the commissioners, and shall not carry on any work thereon that will in any way disfigure it, of which works, whether disfiguring or not, the commissioners are to be the sole judges. The company are to have the full use of all plans and surveys in possession of the commissioners or made at their instance, but such plans and surveys are not to be taken as the decision of the commissioners in respect of any works herein agreed to be done or which may hereafter be proposed to be done.

11. The company shall have the right to construct and operate inclined railways and elevators at such points north of the Niagara Falls ferry as may be approved of by the commissioners, and the company may use such portions of the chain reserve and thence down to the water as may be required for such construction and operation. The company shall also have the right to acquire and operate such inclined railways and lifts which have already been constructed north of the ferry together with the machinery and works connected therewith upon payment in cash to the proprietors or occupiers thereof respectively of the amount that may be fixed by arbitration or by private arrangement or otherwise for obtaining possession from the present occupiers thereof, including costs incurred by the commissioners. The company may exercise and the commissioners do hereby empower the company to exercise such rights and powers as the commissioners possess in respect of the acquisition of such works, and if necessary, the company may do so in the name of the commissioners.

12. The company shall and they do hereby undertake that they will with due diligence and within a reasonable time, and without any delay that is avoidable, and not later than six months from the date hereof, take steps to acquire the rights and properties in the next preceding paragraph mentioned, including the rights now claimed by occupancy or otherwise, and will pay the compensation money therefor so soon as the same has been ascertained, and the costs of the commissioners aforesaid, and on the acquisition thereof, the company shall hold the same under the commissioners free from any claim against the commissioners by or in right of said proprietors or occupiers, which holdings under or attornments to the commissioners shall not make the company liable to pay any rents other than they have herein agreed to pay. If the com-

pany shall not have acquired the said rights and properties within two years from the date hereof, the commissioners may acquire the same, and may use them to all intents and purposes as if this agreement had never been entered into, and free from any claim by the company to enjoy the same, or any benefits or rights connected therewith.

13. The commissioners shall not grant or confer upon any other company or person any right to construct and op rate any railway or tramway within the limits of the park, or any right to construct and operate lifts or inclined railways north of the Niagara Falls ferry and on any part of the chain reserve, or on the slope between the chain reserve and the river, except as is hereinafter provided in connection with the low level railway, and so long as this agreement is in force the commissioners will not themselves engage in any such construction or operation.

14. The commissioners will assent to an arrangement being made between the company and the municipal corporation of the town of Niagara Falls for the supply to the company of power for working the railway and the machinery necessary to operate and light the railway, and if an arrangement satisfactory to the company cannot be made between the company and the said municipal corporation, the commissioners will grant to the company such necessary rights as will enable them to procure from the waters above the falls the power required for the above purposes.

15. The company do hereby undertake to build the said high level railway between Chippawa creek and Queenston in every respect fit for traffic not later than the first day of September next, and in the event of the company not being able to procure the right of way between the park proper and Chippawa in time to enable them to finish the whole work within that time, the commissioners will give a reasonable extension of time for finishing that section of the work.

16. The company may commence the construction of the said railway whenever the location has been decided upon by the commissioners, and the plans and specifications approved in accordance with paragraph 3 of this agreement, and the right to operate the same shall begin on the first day of September next, or so soon (before or after that date) as the said railway or any section thereof has been constructed and is ready for operation, and shall extend to a period of forty years from the said first day of September, one thousand eight hundred and ninety-two, and shall be renewable on the request by the company for a further period of twenty years as hereinafter provided.

17. If at the end of the said period of forty years the commissioners shall demand from the company for the further period of twenty years the payment of a greater clear annual sum than the sum hereby and hereinafter agreed to be paid for the said period of forty years, then if the parties hereto cannot agree as to the same, the amount to be paid for such further period, not less than the rents previously paid, shall be ascertained by three arbitrators or a majority of them, one of whom shall be named and appointed by the commissioners, another by the company (the parties hereto of the second part) and the third by the Chief Justice or senior presiding Judge of the provincial court of ultimate appellate jurisdiction for Ontario, and the award of such arbitrators shall be subject to the same provision of law as if the said arbitrators had been appointed by the said parties upon a voluntary reference under the

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Revised Statute of Ontario respecting Arbitrations and References. Either party to such arbitration may appeal from the award upon any question of law or fact to the said provincial court of ultimate appellate jurisdiction for Ontario and the said court shall have the same jurisdiction therein as a Judge has on an appeal from a report or certificate under section 4 of the aforesaid Revised Statute respecting Arbitrations and References.

18. If the company desire to renew for such further period of twenty years, notice of such desire to renew shall be given by the company to the commissioners in writing at least twelve months before the expiration of the forty year period.

19. In addition to all other payments to be made by the company to the commissioners as hereinbefore stated, for right of way and for the privileges hereinbefore mentioned, the company shall pay to the commissioners a clear annual sum of ten thousand dollars by way of rental for each and every year until the termination of the said period or term of forty years and if the company exercise the option of operating the said railway for the second period they will pay to the commissioners, by way of rental, the sum which may be mutually agreed upon as such rental, or which may be fixed by arbitration as aforesaid. All payments to be made to the commissioners quarterly, and to be calculated from the first day of September, one thousand eight hundred and ninety-two, whether the railway be completed or not. The rent shall be paid although the company may not by virtue of this agreement be able to exercise the rights and powers to construct and operate the said railway, it being understood that the commissioners do not guarantee the rights, interests and franchises hereby conveyed to the company, and do not covenant for the quiet enjoyment thereof, except as against the acts of the commissioners and their successors, and anyone claiming by, through or under them.

20. The commissioners reserve the right upon six months notice being given in writing by them to the company, to authorize the company to build and operate the said low level railway, and if at any time within the six months after such notice shall have been given the company declare by notice in writing to the commissioners that they are about to proceed with the work, the company shall build the said low level railway and have the same ready for operation within twelve months after notice hereinbefore mentioned shall have been given by the commissioners to the company. The commissioners shall provide the right of way for such railway, subject to the like terms which the parties hereto have agreed upon in respect of the extent of the interest of the commissioners over the chain reserve for the high level railway. If the notice be to build the railway to any point short of Queenston the company shall nevertheless have the right to extend the same at low level to Queenston, and as far as the lands of the commissioners extend, that is to say, to the south boundary of the military reserve at Queenston, and the company shall have the right to build on such land and to make such connections between the said low level railway and the said high level railway as may be required in the public interest.

21. In the event of the notice to construct such low level railway being given by the commissioners to the company at any date previous to first September, one thousand eight hundred and ninety-seven, the company shall for the privilege of building such railway and for the right of way from the park

proper to the south boundary of the said military reserve at Queenston, and for the aforesaid connections pay to the commissioners a further annual rental of seven thousand five hundred dollars in quarterly payments during the whole period of occupation under the terms of this agreement by the company, such rental to begin at the end of twelve months from the time of the giving of the said notice by the commissioners.

22. In the event of the commissioners not giving notice in writing on any date previous to first September, one thousand eight hundred and ninety-seven, that they require the construction of the said low level railway to be proceeded with, and of the company declaring by notice in writing as aforesaid that they are about to proceed with the work, the amount of the annual rent in respect of such low level railway to be paid by the company to the commissioners shall be determined by arbitration in the manner provided by section 17.

23. In the event of the company declining to build the low level railway, upon either notice hereinbefore provided, the commissioners may grant the power to any other company or persons to build and operate such low level railway. The omission by the company of the giving of the notice in writing, declaring their liability to proceed with the work above provided for shall be deemed conclusive of the refusal by the company of the option to build the said low level railway.

24. In the event of the company exercising the option to construct and operate the said low level railway, the mode of construction and form of roadbed thereof, the class of carriages to be used for the same and all regulations relating to the safety and the use of the railway and its equipments shall be such as the commissioners shall require and approve.

25. The term of years for operating the low level railway shall terminate at the termination of the time hereinbefore provided for operating the said high level railway and shall be subject to renewal, expiration, determination or arbitration in respect of valuation of charge thereon for rent, compensation and liens in favour of bondholders or the company as the case may be in the same manner as is hereinbefore and hereinafter provided in respect of the high level railway, and in the event of the company not constructing the low level railway in pursuance of any notice to be given to the company or option hereinbefore conferred upon the company then the commissioners may confer upon any other company or persons who shall construct and operate the said low level railway as hereinbefore provided, the right to construct elevators at such points as the commissioners may select for the purpose of passenger traffic to and from the low level railway to the top of the cliff, and under such regulations as the commissioners may prescribe, due compensation to be made to the company parties hereto as may be agreed upon in respect of the arrangements and facilities required to transfer such passenger traffic to and from the low level railway to the top of the cliff, and in case of difference, to be ascertained by arbitration as hereinbefore provided by paragraph 17 of this agreement.

26. If at the end of the said period of forty years, the company are unwilling to renew, or at the end of the further period of twenty years, if the company continue to hold for such further period, the company shall be duly compensated by the commissioners for their railways, equipment, machinery

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and other works including the low level railway, if the same shall have been constructed and then held by the company under this agreement, as also the high level railway from Chippawa to Queenston, and including also their works in Chippawa and Queenston, but not in respect of any franchises for holding or operating the same, such compensation to be fixed by mutual agreement, or in case of difference, by arbitration as in paragraph 17 of this agreement, but the failure before the expiration of any such term, to fix such compensation in manner aforesaid, or to pay before such expiration, the amount of compensation so fixed, shall not entitle the company to retain possession meanwhile of the said railways, equipment, machinery and works, by this agreement to be constructed or operated, but the same shall nevertheless and notwithstanding that the commissioners may have taken possession thereof remain subject to such liens and charges save as to possession as aforesaid, as may exist in favour of bond-holders or debenture-holders of the company and the company shall retain a lien or charge thereon, save as to possession as aforesaid for the compensation of their railway, equipment, machinery and works to be agreed upon as aforesaid, or so to be awarded to them provided, however, that all such liens and charges shall not exceed the amount that may be agreed upon or may be awarded for such compensation as aforesaid.

27. In respect of all rights and authorities which the commissioners by the agreement, have conferred or have agreed to confer upon the company to exercise in and about the execution of the works to be constructed, and operating or working the same, and of all other matters herein agreed upon, the company will indemnify the commissioners in respect of the exercise of said rights by the company, and will hold them free from liability to any person or persons whomsoever.

28. The rights conferred by this agreement upon the company, and the liabilities undertaken by the company, shall not be construed to be conditional upon the company procuring the Act of incorporation herein provided for.

29. Subject always to the terms and provisions of this agreement, and to the rights of the commissioners as the owners in fee simple of the right of way in the park proper and on the chain reserve, the said railways and their equipment and the other works constructed or required under this agreement, shall upon such construction or acquisition, as the case may be, be vested in and shall be the property of the company who shall, subject as aforesaid, be entitled to operate, manage and control the same during the period or periods respectively above mentioned, it being however hereby declared, understood and agreed, that at the end of the said first or second periods, as the case may be, the whole of the company's said high level railway from Queenston to Chippawa, and the said low level railway, if then held by the company under this agreement, together with their equipment and the machinery and works aforesaid, including the elevators or lifts acquired or built and including also the works in Queenston and Chippawa shall become the property of the commissioners, subject to the payment of compensation to be agreed upon or awarded as the case may be, and as is hereinbefore provided for.

30. The parties hereto shall use their best endeavours to procure, and either party hereto may apply to the Legislature of Ontario at its next session,

for an Act of incorporation, enabling the parties hereto, of the second part and those who may be associated with them in the undertaking to carry on the said railways and works as an incorporated company with sufficient powers to enable them to raise such capital by bond, debenture, stock, mortgage or otherwise, and as may be deemed sufficient to carry out the foregoing contract, and to enable them to construct and operate effectively, the said railways and steamboats and other works as is hereinbefore provided for, and either party hereto may at the next session of the said Legislature or otherwise apply to the said Legislature for an Act to ratify and confirm this agreement.

31. The rents hereby agreed to be paid are hereby declared to be a first and preferential charge upon the said railways and works and the company shall not create any lien, charge or incumbrance upon the said railways or works or any of them by bond, debenture, mortgage or otherwise which will interfere with or prevent the commissioners from procuring payment of the rent hereby reserved or any part thereof and no simple contract creditor or other creditor of the company is to have any claim against the said railway or works or any part thereof in priority to the claim of the commissioners for rent.

32. The company's tariff for passenger fares shall be a reasonable one and shall be subject to the approval of the commissioners provided however that the commissioners shall not have the right to insist upon such a tariff as will prevent the company operating the said railway or railways at a fair profit but it shall be their privilege to exact from the company the imposition of reasonable rates only.

In witness whereof the corporate seal of the commissioners has been hereunto affixed by their chairman who has also signed the same, and the parties hereto of the second part have hereunto set their hands and seals the day and year aforesaid.

Signed, sealed and delivered by the chairman of the commissioners in the presence of
C. S. GZOWSKI, JR.,

(SEAL) C. S. GZOWSKI,
Chairman.

and by the said Edmund Boyd Osler, Herbert Carlyle Hammond and William Hendrie in the presence of
R. A. SMITH,

E. B. OSLER,
per H. C. HAMMOND,
(SEAL) Attorney.

and by the said Richard Bladworth Angus in the presence of
A. R. G. HEWARD,
Montreal.

(SEAL) H. C. HAMMOND.

(SEAL) WM. HENDRIE.

(SEAL) R. B. ANGUS.

and by the said Edmund Boyd Osler personally as well as through his attorney Herbert C. Hammond in the presence of
R. A. SMITH.

(SEAL) ED'D B. OSLER.

In the Supreme Court of Ontario.

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Exhibits.

Ex. 2.

Extract from Minute Book of The Niagara Falls Park and River Railway, 14th July, 1892.

Exhibit 2

(Plaintiff's Exhibit)

Extract from Minute Book of the Niagara Falls Park and River Railway Company

Minutes of the First Meeting of the Shareholders of The Niagara Falls Park and River Railway Company held at No. 23 Toronto Street Toronto on Thursday the 14th day of July 1892 at Two o'clock in the afternoon.

The following Shareholders were present:

Edmund Boyd Osler
Richard Bladworth Angus
William Hendrie
Herbert C. Hammond (represented by E. B. Osler)
Adam R. Creelman
George C. Loveys
Robert A. Smith and
Stewart F. Houston

being all the Shareholders of the Company.

On motion Mr. Edmund Boyd Osler was elected Chairman of the Meeting and Mr. George C. Loveys Secretary.

Notice of meeting waived.

It was moved by Mr. Hendrie, seconded by Mr. Angus and unanimously resolved that the four weeks notice of this Meeting provided for by Section 10 of the Company's Act of Incorporation be and the same is hereby waived. And it is declared that this meeting has been regularly and duly called for the purpose of electing Directors and of transacting any other business as effectually as if the notice above referred to had been duly given.

The election of Directors was then proceeded with.

The following Shareholders were elected Directors of the Company for the ensuing year:

Directors elected.

Edmund Boyd Osler
Herbert C. Hammond
William Hendrie
Richard Bladworth Angus
Adam R. Creelman
George C. Loveys
Robert A. Smith.

The following resolution was moved by Mr. Creelman and seconded by Mr. Houston and unanimously adopted:

Whereas Edmund Boyd Osler, Herbert C. Hammond, William Hendrie and Richard Bladworth Angus have subscribed for Capital Stock in the Company for the aggregate amount of Two hundred and ninety-six thousand dol-

lars and the same has been allotted to them in the following proportions that is to say:

Edmund Boyd Osler	740 shares	$74,000.00
Herbert C. Hammond	"	74,000.00
William Hendrie	"	74,000.00
Richard Bladworth Angus	"	74,000.00

And whereas the said four Shareholders were the promoters of the Company and have all performed valuable services and have expended moneys and incurred very heavy individual liability for the benefit of the Company such services having been rendered in procuring an Agreement with and certain privileges from the Commissioners of the Queen Victoria Niagara Falls Park, in procuring the Charter of the Company, in securing right of way and in divers other ways in furtherance of the undertaking and they have agreed with the Company to transfer to the company the results of their services including the benefit of the said Agreement which is of very great value in consideration of the sum of Three Hundred thousand dollars.

Payment for services in stock and cash.

And whereas the Company has agreed to pay the said sum for such services and benefits and to issue the stock hereinafter referred to in part payment therefor.

Now therefore it is resolved that the issue to the persons above named of paid up stock in the Company for the amounts so subscribed by them as aforesaid without payment of any further or other sum or sums of money beyond the payment of twenty-five per cent thereon already paid up, be and the same hereby is sanctioned and the Directors are hereby authorized, empowered and directed to forthwith issue such paid up stock to the said shareholders in the above proportions and it is hereby declared that the same shall be fully paid up stock and that no further call or calls shall be made upon the said shareholders for any further payment in respect of the said subscriptions.

And it is further resolved that the Directors do forthwith out of the funds of the Company pay to the said Osler, Hammond, Hendrie and Angus the sum of Seventy-eight thousand dollars the remainder of the said consideration money.

It was moved by Mr. Creelman seconded by Mr. Houston and unanimously resolved:

Minutes of meetings of provisional directors confirmed.

That the action of the Provisional Directors with reference to the Company be and the same is hereby approved and the Minutes of the three meetings of such Provisional Directors are confirmed and the Company doth hereby assume the Agreement dated the fourth day of December 1891 being Schedule B of the Company's Act of Incorporation and the liabilities and engagements which are assumed and entered into therein by Edmund Boyd Osler, Herbert Carlyle Hammond, William Hendrie and Richard Bladworth Angus and doth also assume their personal liability to the Commissioners for for the Queen Victoria Niagara Falls Park and it is hereby declared that the said agreement and the properties, franchises and advantages therein conferred upon the said parties by the Commissioners shall be henceforth for the benefit of the Company.

Agt. of 4 Dec. '91 confirmed.

In the Supreme Court of Ontario.

Exhibits.
Ex. 3.
Agreement of Purchase and Sale between the Niagara Falls Park & River Railway Co. and International Railway Company, 1st July, 1902.

Exhibit 3

(Plaintiff's Exhibit)

Agreement of Purchase and Sale

made in quadruplicate the 1st day of July, A.D. 1902, between

The Niagara Falls Park & River Railway Company

(hereinafter called the Vendor) party of the first part, and the

International Railway Company,

a corporation organized and existing under the laws of the State of New York (hereinafter called the Purchaser) party of the second part.

WHEREAS, under and by virtue of Chapter 54 of the Statutes of the Dominion of Canada of 1900 as amended by Chapter 9 of the Statutes of the Dominion of Canada of 1902, and under and by virtue of Chapter 86 of the Statutes of the Province of Ontario of 1901, as amended by Section 30 of Chapter 12 of the Statutes of the Province of Ontario of 1902, and under and by virtue of all other statutes and authority enabling them in that behalf, the parties hereto have entered into these presents; and

WHEREAS, the International Traction Company, a corporation organized and existing under the laws of the State of New Jersey (hereinafter called the Traction Company) owns all the outstanding shares of the capital stock of the Vendor except seventy (70) shares which are held by the directors of the Vendor, all of whom have assented to the execution hereof;

NOW, it is hereby agreed by and between the parties hereto as follows:

1. For and in consideration of the issue and delivery by the Purchaser to the Traction Company at the time of the execution of these presents of the certificate of indebtedness of the Purchaser for the sum of seven hundred thirty-three thousand, three hundred fifty-eight and forty-six hundredths dollars ($733,358.46) the due execution and delivery of which certificate of indebtedness is hereby acknowledged by the Vendor, the Vendor has agreed to sell and transfer, and by these presents does grant, bargain, sell, transfer, convey and assign unto the Purchaser, its successors and assigns, the whole of the assets, business, undertaking, property, name, franchise and good will of the Vendor, together with all other property whatsoever, both real and personal of the Vendor, and all rights and incidents appurtenant thereto, and all other things belonging to or owned or possessed by, or vested in the Vendor, or to which it may be or become entitled, to hold unto and to the use of the purchaser, its successors and assigns forever.

2. The Purchaser agrees that it will pay, satisfy, perform and discharge all debts, liabilities, contracts and engagements of the Vendor and that it will indemnify the Vendor and its shareholders and each and every of them against all proceedings, claims and demands in respect thereof.

3. The Vendor agrees from time to time at the expense of the Purchaser to execute and do all such assurances and things for better vesting the whole and every part of the subject matter of the said sale in the Purchaser and giv-

ing to it the full benefit of this agreement as shall be reasonably required by the Purchaser.

4. The execution of this agreement shall *ipso facto* vest in the Purchaser the interest and title in and to the property the subject matter of this agreement, and the business, property, real and personal and all rights and incidents appurtenant thereto and all other things belonging to the Vendor shall be taken and deemed to be transferred to and vested in the Purchaser without further act or deed.

IN WITNESS WHEREOF each of the parties hereto has caused these presents to be signed by its President or Vice-President and its corporate seal to be hereunto affixed and attested by its Secretary the day and year first above written.

THE NIAGARA FALLS PARK & RIVER RAILWAY COMPANY,

By W. CARYL ELY,
President.

Attest:
RICHARD F. RANKINE,
Secretary.

INTERNATIONAL RAILWAY COMPANY,

By W. CARYL ELY,
President.

Attest:
RICHARD F. RANKINE,
Secretary.

In the Supreme Court of Ontario.

Exhibits.
Ex. 3.
Agreement of Purchase and Sale between the Niagara Falls Park & River Railway Co. and International Railway Company, 1st July, 1902.

—continued

Exhibit 4a

(Plaintiff's Exhibit)

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

Letter from B. J. Yungbluth to Niagara Parks Commission

INTERNATIONAL RAILWAY COMPANY

Niagara Parks Commission,
Niagara Falls, Ontario.

July 27, 1931.

Gentlemen:

The agreement of December 4, 1891, under which we have been operating our Canadian Division, provides that if we desire to renew for a further period of 20 years, we shall so notify your Commission before September 1, 1931.

We have decided that we will not seek a renewal at the expiration of the original period of 40 years. The agreement will, therefore, terminate on August 31, 1932.

We shall be glad to discuss at any time the details to be provided for in terminating the agreement.

Very truly yours,
B. J. YUNGBLUTH,
President.

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—continued

Exhibit 4b

(Plaintiff's Exhibit)

Letter from General Manager of Niagara Parks Commission to B. J. Yungbluth

NIAGARA PARKS COMMISSION

July 31, 1931.

Dear Mr. Yungbluth:

I beg to acknowledge your letter of July 27th intimating that the agreement of December 4th, 1891, will be terminated by the International Railway Company on August 31st, 1932. The attention of the Commission will be drawn to this matter at its first meeting.

Yours very truly,
JOHN H. JACKSON,
General Manager.

B. J. Yungbluth, Esquire,
President and General Manager,
International Railway Company,
210 Pearl Street,
Buffalo, N.Y.

Exhibit 4c

(Plaintiff's Exhibit)

Letter from B. J. Yungbluth to Niagara Parks Commission

INTERNATIONAL RAILWAY COMPANY

May 27th, 1932.

Niagara Parks Commission,
Niagara Falls, Ontario.

Gentlemen:

The agreement covering the lease of our Canadian Division will expire on August 31, 1932, and we have informed you of our intention to discontinue our operation on that date.

In view of the fact that cessation of operation on August 31 would inconvenience the travelling public over the Labor Day holiday, we are willing to continue service on the Canadian Division until Midnight, Sunday, September 11, 1932, upon the understanding and condition that the said continuation will not be considered or treated as an extension of the agreement, but will be entirely without prejudice to the rights and position of both parties to the said agreement.

Very truly yours,
B. J. YUNGBLUTH,
President.

Accepted for Niagara Parks Commission.

Exhibit 4d

(Plaintiff's Exhibit)

Letter from Superintending Engineer of Niagara Parks Commission to B. J. Yungbluth

NIAGARA PARKS COMMISSION

May 30, 1932.

Dear Mr. Yungbluth:

This will acknowledge receipt of your letter of May 27th, 1932.

Yours very truly,

JAMES R. BOND,
Superintending Engineer.

B. J. Yungbluth, Esquire,
President and General Manager,
International Railway Company,
Buffalo, N.Y.

Exhibit 4e

(Plaintiff's Exhibit)

Letter from General Manager of Niagara Parks Commission to B. J. Yungbluth

NIAGARA PARKS COMMISSION

July 29, 1932.

Dear Mr. Yungbluth:

Referring to your letter of May 27th, I beg to advise you that the Parks Commission is agreeable to your continuation of the electric railway service on the Canadian Division until midnight, Sunday, September 11, 1932, the operation to be without prejudice to the rights of the parties to the agreement of December 4th, 1891.

Yours very truly,

JOHN H. JACKSON,
General Manager.

B. J. Yungbluth, Esquire,
President and General Manager,
International Railway Company,
Buffalo, N.Y.

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—continued

Exhibit 4f

(Plaintiff's Exhibit)

Letter from B. J. Yungbluth to Niagara Parks Commission

INTERNATIONAL RAILWAY COMPANY

Niagara Parks Commission,
Niagara Falls, Ontario.

August 15, 1932.

Gentlemen:

During the past several months, as no doubt you have been advised, we have furnished your valuation engineers with considerable data in aid of their valuation of our Park & River Division formerly known as The Niagara Falls Park & River Railway. In view of the time that has elapsed since your engineers entered upon their work of valuation, we assume that they have completed their task and submitted their report to you. We are desirous of determining by agreement with you the sum which shall represent fair and adequate compensation to us for our railways, equipment, machinery and other works which, under the terms of the agreement entered into December 4, 1891, between our respective predecessors in interest, become your property on August 31, 1932, at midnight.

It is our desire in this instance, as it has been in the past, to suit your convenience as to time and place of meeting. Will you kindly suggest some time prior to August 31, 1932, when we may meet with you at your office for the purpose of reaching an agreement as to the amount of compensation to be paid to us as provided in the above mentioned agreement.

Very truly yours,
B. J. YUNGBLUTH,
President.

Exhibit 4g

(Plaintiff's Exhibit)

Letter from Superintending Engineer of Niagara Parks Commission to B. J. Yungbluth

NIAGARA PARKS COMMISSION

August 20, 1932.

Dear Sir:

I wish to acknowledge receipt of your letter of the 15th instant, relative to the termination of the lease of the Park and River Division of the International Railway Company, and in reply would advise that Mr. Jackson is away on holiday. Your letter will be brought to his attention immediately upon his return.

Yours very truly,
JAMES R. BOND,
Superintending Engineer.

B. J. Yungbluth, Esquire,
President and General Manager,
International Railway Company,
210 Pearl Street,
Buffalo, N.Y.

Exhibit 4h

(Plaintiff's Exhibit)

Letter from General Manager of Niagara Parks Commission to B. J. Yungbluth

NIAGARA PARKS COMMISSION

September 10, 1932.

Dear Mr. Yungbluth:

Your letter of the 15th ultimo came to my attention on my return to the office.

As you suggest, it seems desirable and indeed the agreement expressly contemplates that the parties shall make an effort to agree upon the amount of compensation. Clause 26 of the agreement provides that the compensation shall be fixed by mutual agreement, or, in case of difference, by arbitration. It must, therefore, be ascertained whether there is a real difference between us. I shall be glad, therefore, if you would telephone me a few tentative dates convenient to you. I assume you will have present with you one of your associates and probably your counsel and if that is so, I will do the same.

It is needless to discuss the basis on which compensation is to be ascertained prior to the meeting, but I may say the view of the Commission is that the railways, equipment, machinery and other works have no value except a scrap value.

Possibly when your Company considered the question of renewal it was under the impression that the rental could not be less than the present rental. I may say that the terms of the agreement in this regard would not be insisted on, but as I understood your conversation with me some months ago, your Board of Directors had canvassed this situation and decided not to seek a renewal even upon modified terms.

Yours very truly,
JOHN H. JACKSON,
General Manager.

B. J. Yungbluth, Esquire,
President and General Manager,
International Railway Company,
Buffalo, N.Y.

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—*continued*

Exhibit 4i

(Plaintiff's Exhibit)

Letter from B. J. Yungbluth to Niagara Parks Commission

INTERNATIONAL RAILWAY COMPANY

July 28, 1933.

Niagara Parks Commission,
Niagara Falls, Ontario.

Gentlemen:

We have been hoping to meet with your Board to determine by agreement the sum which would represent fair and adequate compensation to us for our railways, equipment, machinery and other works, formerly owned by Niagara Falls Park and River Railway Company, which, under the terms of the agreement dated December 4, 1891, between our respective predecessors in interest, became your property on August 31, 1932, at midnight, subject, of course, to the payment of compensation as provided in the agreement. We have been encouraged in that hope by Mr. Jackson's letter of September 10, 1932, in reply to our letter of August 15, 1932, in which we requested that you suggest some time prior to August 31, 1932, when we could meet with you at your office for the purpose of reaching an agreement as to the amount of compensation to be paid to us. In response to Mr. Jackson's suggestion that we telephone him a few tentative dates on which we could meet with you, we telephoned Mr. Jackson on September 21, 1932, when he stated that he would give us four days notice of the date on which it would be convenient for you to meet with us. Again on September 28, 1932, we telephoned Mr. Jackson and inquired whether he had any suggestion as to a date on which the meeting could be held, to which he replied that the matter was in the hands of your solicitors and he would communicate with us as soon as he was in a position to suggest a date.

We quite appreciate that the subject matter of the proposed conference is one which has necessitated the expenditure of some time. We trust, however, that we shall not seem to be unduly pressing if we suggest that the proposed meeting be held in the near future. Mr. Jackson has informed us that he is planning to be absent from his office during the month of August. We, therefore, suggest that a meeting for the purposes stated be held at your offices in Niagara Falls, Ontario, at some time convenient for you between the first and the fifteenth days of September this year.

Very truly yours,

B. J. YUNGBLUTH,
President.

Exhibit 4j

(Plaintiff's Exhibit)

Letter from Superintending Engineer of Niagara Parks Commission to B. J. Yungbluth

NIAGARA PARKS COMMISSION

August 5, 1933.

Dear Sirs:

I wish to acknowledge receipt of your letter of July 28th relative to a meeting with the Niagara Parks Commission to discuss matters pertaining to the former Niagara Falls Park and River Railway.

At the present time our General Manager, Mr. Jackson, is away on holiday and will not be back until the first portion of September. Immediately upon his return this matter will be brought to his attention.

Yours very truly,

JAMES R. BOND,
Superintending Engineer.

International Railway Company,
Walbridge Building,
Court and Franklin Streets,
Buffalo, N.Y.
JRB/H

Exhibit 4k

(Plaintiff's Exhibit)

Letter from B. J. Yungbluth to Niagara Parks Commission

INTERNATIONAL RAILWAY COMPANY

Niagara Parks Commission,
Niagara Falls, Ontario.

September 15, 1933.

Gentlemen:

Please refer to our letter of July 28, 1933.

More than a year has elapsed since our railways, equipment, machinery and other works valued at approximately two and a half million dollars were taken by you under the terms of the agreement dated December 4, 1891, subject to the payment of fair and adequate compensation therefor. In conformity with the terms and spirit of that agreement, we have repeatedly attempted to meet with your Board for the purpose of fixing by mutual agreement the amount of compensation to be paid to us. We regret that our repeated efforts have failed. The agreement clearly indicates that you and we shall make a sincere effort to fix by mutual agreement the amount of compensation to be paid so that unnecessary costs and expenses of an arbitration proceeding and appeals incident thereto may be saved to the taxpayers of Ontario and ourselves.

Not only have we desired to fix by mutual agreement the amount of compensation to be paid to us, but we have desired to and have co-operated with you in every manner possible. Long prior to August 15, 1932, we furnished your valuation engineers with considerable data in aid of their valuation of

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—*continued*

our property. When we wrote you on August 15, 1932, stating that we were desirous of determining by agreement the amount of compensation to be paid to us and asking you to suggest some time prior to August 31, 1932, when we could meet with you at your office for the purpose of reaching an agreement, we did not conceive the possibility of the delays which have ensued. When we wrote you on July 28, this year, suggesting that a meeting for the purposes stated be held at your offices in Niagara Falls, Ontario, at some time convenient to you between the 1st and 15th days of September, this year, we expected and respectfully submit we had a right to expect co-operation from you.

It is still our desire to serve your convenience and again we request you to designate a time and place in the near future when we may meet for the purpose of fixing by mutual agreement, if possible, the amount of compensation to be paid to us for our property. We think it quite unfair that we have been deprived of our property so long a time. Common fairness and justice require active co-operation by you to the end that the amount of compensation to be paid to us shall be determined and paid. Why may we not have that co-operation?

Very truly yours,
INTERNATIONAL RAILWAY COMPANY
By B. J. Yungbluth,
President.

Exhibit 41

(Plaintiff's Exhibit)

Letter from Norman Sommerville, Chairman of Niagara Parks Commission to B. J. Yungbluth

NIAGARA PARKS COMMISSION

B. J. Yungbluth, Esquire,
President,
International Railway Co.,
Buffalo, N.Y.,
U.S.A.

Toronto, October 19th, 1933.

Dear Sir:

A copy of your letter of the fifteenth of September, to the Niagara Parks Commission has been forwarded to me, as Chairman of the Commission.

You are doubtless aware of the reorganization of the Commission quite recently, and of the absence of some of the members. There has therefore been some difficulty in arranging a meeting of the Commission to discuss the matters referred to in your letter. I am hoping that we shall have a meeting at an early date, and following that meeting, I shall communicate with you further.

In the meantime, I have had a chat with Mr. McCarthy, and am looking forward to seeing him again, relative to the matters mentioned in your letter. I had delayed replying in the hope that I might be able to give you a definite date when the Commission might be meeting. However, I am writing you tentatively now, so that you may know this matter is being given attention by the new Board.

Yours very truly,
NORMAN SOMMERVILLE.

Exhibit 4m

(Plaintiff's Exhibit)

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

Letter from B. J. Yungbluth to Niagara Parks Commission (containing appointment of Mr. R. S. Robertson as arbitrator)

INTERNATIONAL RAILWAY COMPANY

March 22, 1934.

Niagara Parks Commission,
Niagara Falls, Ontario.

Gentlemen:

—continued

Since August 15, 1932, we have repeatedly attempted to meet with you for the purpose of determining by mutual agreement the sum which shall represent fair and adequate compensation to us for our railways, equipment, machinery and other works which, under the terms of an agreement dated December 4, 1891, between our respective predecessors in interest, became your property on August 31, 1932, at midnight, subject to the payment of compensation to us as provided in the Agreement. In particular please refer to our letters to you dated August 15, 1932, July 28, 1933, and September 15, 1933.

On October 20, 1933, we received a letter from Mr. Norman Somerville, K.C., your chairman, dated October 19, 1933, in which he stated that a copy of our letter of September 15, 1933, had been forwarded to him, that he expected to have a meeting of your Commission at a then early date and would communicate with us further. We have received no communication from you or your chairman since October 20, 1933.

Mr. D. L. McCarthy, K.C., who has been acting on our behalf, advises us that during the past several months he has made repeated efforts to arrange a meeting through your chairman without any success whatever.

Not only have we desired to fix by mutual agreement the amount of compensation to be paid to us but we have co-operated with you in every manner possible. Long prior to August 15, 1932, we furnished your valuation engineers with considerable data in aid of their valuation of our property. When we wrote you on August 15, 1932, stating that we were desirous of determining by mutual agreement the amount of compensation to be paid to us and asked you to suggest some time prior to August 31, 1932, when we could meet with you at your office for the purpose of reaching an agreement, we did not conceive the possibility of the delay which has ensued. When we wrote you on July 28, 1933, suggesting that a meeting for the purposes stated be held at your offices in Niagara Falls, Ontario, at some time convenient to you between the 1st and 15th days of September of that year, we expected and respectfully submit we had a right to expect co-operation from you. While our patience was strained when again we wrote you on September 15, 1933, it was then inconceivable that you would continue to ignore the clear provisions of the agreement between our respective predecessors in interest dated December 4, 1891. That agreement clearly implies, if it does not expressly state, that you and we shall make a sincere effort to fix by mutual agreement the amount

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—continued

of compensation to be paid so that large and wholly unnecessary costs and expenses of arbitration and possible appeals incident thereto may be saved to the taxpayers of your Province and to ourselves.

We have done everything possible to meet with you and carry out the spirit and the terms of the agreement. That which perhaps should have been apparent to us more than a year ago is now made perfectly plain—you do not propose to attempt to fix by agreement the amount of compensation to be paid to us. It is grossly unjust to deprive us of our property longer. Therefore, we have no alternative but to proceed to arbitration.

Pursuant to the terms of the agreement dated December 4, 1891, we name Mr. R. S. Robertson, K.C., as our arbitrator and hereby demand that you name your arbitrator as required in said agreement, failing which we shall take the necessary steps under the provisions of the Arbitration Act to compel you to name an arbitrator so that arbitration proceedings may be commenced forthwith.

Very truly yours,
INTERNATIONAL RAILWAY COMPANY
By B. J. Yungbluth,
President.

Exhibit 4n

(Plaintiff's Exhibit)

Letter from General Manager of Niagara Parks Commission to International Railway Company

NIAGARA PARKS COMMISSION

March 28, 1934.

Dear Sirs:

Your letter of March 22nd received. Written with legal precision and breathing out threats, it omits, perhaps inadvertently, certain important features. In fact it contains only a record of I. R. C. letters and leaves a very unfinished picture. Permit me to add to the recital:

MAY 26TH, 1932.

Mr. Yungbluth conferred with Mr. Jackson at the Park Offices and stated that I. R. C. was entitled to "reproduction value, less depreciation," for its properties. It was then made quite plain to Mr. Yungbluth that the view of the Parks Commission was that due compensation consisted of "scrap value".

SEPTEMBER 10TH, 1932.

Letter from Mr. Jackson to Mr. Yungbluth asking for tentative convenient dates and whether counsel would be present. This letter repeated the position of the Commission, namely, that the railways, equipment, machinery and other works had no value except a "scrap value", and advised that the full terms of the agreement would not be insisted upon if a renewal were desired.

NOVEMBER 19TH, 1932.

Mr. Yungbluth conferred with Commissioner, the Hon. J. D. Chaplin, M.P., in St. Catharines, for the best part of a Saturday afternoon, when the

various phases incident to the termination of the agreement of December 4th, 1891, were discussed at length and the position of the Commission stated.

During the first half of 1933 Mr. Yungbluth appeared to desire a conference with myself as General Manager of the Commission, and finally called at the Park Offices on June 1st to arrange for a definite appointment. This meeting took place on July 20th, when it was found that there was some uncertainty about a number of properties and Mr. Yungbluth undertook to supply the deficiency. Nothing further has been heard however. Again, at this meeting it was disclosed that after allowance for depreciation, obsolescence and all items of deterioration, I. R. C. demanded $2,500,000 as due compensation for its properties, a figure so startling that the Commission has been unable to find a formula for bridging the distance between the two viewpoints, although it has made diligent search.

It is the duty of the Commission to save the taxpayers of the Province from unnecessary costs and expenses, but where is the stopping place on the road from "scrap value" to $2,500,000 for 11 miles of electric railway abandoned after losing well on to a million dollars in the last 12 years of its fitful life, and at the rate of over $100,000 per annum latterly.

The International Railway Company knew the views of the Commission from the very beginning, and was in no way prevented or hindered from appointing an arbitrator. It was obviously the anxiety of I. R. C. to discuss the matter with the Commission that has caused the delay.

This Commission has never failed to co-operate with I. R. C., not only regarding the Park & River Division but in every other particular, and notably on the two occasions when the Falls View Bridge was threatened with disastrous competition. Furthermore the Commission protected I. R. C. beyond its legal obligations during the whole period of its electric railway ownership.

Your counsel, Mr. D. L. McCarthy, K.C., knows from the Chairman of this Commission that the matter has been referred to W. N. Tilley, K.C., with a view to arranging for the very conference you desire, and it is undoubtedly due to the engagements of both counsel that this has not taken place.

While engineers employed by the Commission have had certain statements it is not yet known definitely and precisely the items which vest in the Parks Commission, and it is suggested that such a catalogue should be in the Commission's hands, when a conference could still take place if you think it desirable.

It is a matter for regret that some of the terms in your letter should have been used, for this has not been the attitude of the parties toward each other in the past, nor need it be now or in the future. Indeed the elapsed time is not so great when all of the circumstances are taken into consideration.

It goes without saying that the Commission will carry out its legal obligations in regard to the agreement of December 4th, 1891, but I shall await a reply to this letter.

Yours very truly,

JOHN H. JACKSON,
General Manager.

International Railway Company,
Buffalo, N. Y.

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—continued

Exhibit 4o

(Plaintiff's Exhibit)

Letter from B. J. Yungbluth to Niagara Parks Commission

INTERNATIONAL RAILWAY COMPANY

April 9, 1934.

Niagara Parks Commission,
Niagara Falls, Ontario.

Gentlemen:

We acknowledge the receipt of your letter dated March 28, 1934. It appears to us quite obvious from your letter that you seek further to delay the performance of your plain duty to compensate us for our railways, machinery, equipment and other works by now engaging in correspondence concerning relatively immaterial matters. While we do not propose to aid you in the furtherance of any such purpose, we feel compelled to comment upon certain statements in your letter. Our omission to comment upon all of them is not to be deemed an admission of their accuracy.

If there is any "uncertainty about a number of properties", this is the first time it has been suggested to us. Surely any "uncertainty" now claimed to exist should have been resolved in the time that has elapsed since your valuation of the property. Mr. Yungbluth at no time undertook to supply any claimed "deficiency".

We have never known the views of the Commission as to the amount of compensation to be paid to us. We have earnestly and patiently endeavoured to learn them in order to determine whether we could agree upon the subject and thereby avoid the unwarranted and useless expense of arbitration proceedings. We have not taken seriously the theory advanced by Mr. Jackson at the time of the interview mentioned in your letter that compensation should be based upon "scrap value". We have not sought an agreement upon theories. We have sought a businesslike discussion and agreement upon a business proposition. An initial disagreement as to theories certainly did not stand in the way of an endeavor by the parties to arrive at an agreement. We cannot but draw the conclusion that you shared this view from your letter of September 10, 1932, in which you said:

"As you suggest, it seems desirable and indeed the agreement expressly contemplates that the parties shall make an effort to agree upon the amount of compensation. Clause 26 of the agreement provides that the compensation shall be fixed by mutual agreement, or, in case of difference, by arbitration. It must, therefore, be ascertained whether there is a real difference between us. I shall be glad, therefore, if you would telephone me a few tentative dates convenient to you. I assume you will have present with you one of your associates and probably your counsel and if that is so, I will do the same.

"It is needless to discuss the basis on which compensation is to be ascertained prior to the meeting, but I may say the view of the Commission is that the railways, equipment, machinery and other works have no value except a scrap value."

In accordance with Mr. Jackson's suggestion, we telephoned him on September 21, 1932, and he then stated he would give us four days' notice of the date on which it would be convenient for you to meet with us. We have never received such notice.

We have given your engineers all the information and furnished them with all the data they requested. We have co-operated with them 100%. If after all the time that has elapsed since your engineers made their valuation of the property you do not know "definitely and precisely the items which vest in the Parks Commission", we are at a loss to know the reason.

If for the purposes of a conference you now require from us a "catalogue", why did you not need it on September 10, 1932, when you wrote your letter above quoted? After all the hindrance and delay which have ensued, we do not now propose to furnish you with a "catalogue". A "catalogue" would not further enlighten you; its preparation would cause further delay.

We are advised by Mr. McCarthy that Mr. Tilley and he were in entire agreement as to the desirability of a conference between you and ourselves, but that apparently no steps have been taken by you towards that end.

While the statement in your letter of March 28, 1934, "It was obviously the anxiety of International Railway Company to discuss the matter with the Commission that has caused the delay", is entirely in error as to incidental delays, it is essentially true in its charge that to the Company must be ascribed the effort to avoid an arbitration, with its attendant costs. We were anxious "to discuss the matter with the Commission" because the agreement provides that the parties shall endeavor to determine by mutual agreement the amount of compensation to be paid to us. We know of no better way to approach an agreement than "to discuss the matter". In view of our repeated efforts during the last year and seven months to meet with you for the purpose of determining by mutual agreement, if possible, the amount of compensation to be paid to us and in view of your acts tantamount to a refusal to meet with us, we demand that you name your arbitrator in accordance with the terms of the agreement dated December 4, 1891.

Very truly yours,

INTERNATIONAL RAILWAY COMPANY
By B. J. Yungbluth,
President.

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—continued

Exhibit 4p
(Plaintiff's Exhibit)

Letter from General Manager of Niagara Parks Commission to International Railway Company

NIAGARA PARKS COMMISSION

April 20, 1934.

Dear Sirs:

Your letter of April 9th received. It is passing strange that officials of the International Railway Company have not taken seriously the view that due compensation consisted of scrap value, for it is very difficult to see how it could have been brought more clearly to the attention of I. R. C., and that view represents the firm conviction of the Commission.

To be specific about the properties requiring further information, reference should be made to the undertaking to say whether the following vested in the Commission:

1. Land outside of the right of way at Queenston Heights.
2. The track at Queenston Dock jointly used by the electric railway and the Hydro-Electric Power Commission of Ontario.
3. Lands in the Village of Queenston not recently used for railway purposes.
4. The spur from the main line on Queen Street in the Village of Queenston to the Queenston Bridge.

Obviously mutual recriminations will not be helpful in reaching a settlement. An arbitrator to represent the Commission will therefore be named, and you will be advised in a few days.

Yours very truly,
JOHN H. JACKSON,
General Manager.

International Railway Company,
Buffalo,
New York.

Exhibit 4q
(Plaintiff's Exhibit)

Letter from General Manager of Niagara Parks Commission to International Railway Company

NIAGARA PARKS COMMISSION

April 30, 1934.

Dear Sirs:

Referring to my letter of April 20th, I have now to advise you that the Niagara Parks Commission has appointed D. B. Hanna, Esquire, to act as its arbitrator in the matter of determining the amount to be paid to the International Railway Company as due compensation for the railways, equipment, machinery and other works, pursuant to the terms of the agreement of December 4th, 1891.

Yours very truly,
JOHN H. JACKSON,
General Manager.

International Railway Company,
Buffalo,
New York.

Exhibit 4r

(Plaintiff's Exhibit)

Letter from B. J. Yungbluth to Niagara Parks Commission

INTERNATIONAL RAILWAY COMPANY

Niagara Parks Commission,
Niagara Falls, Ontario.

June 7, 1934.

Gentlemen:

Attention—Mr. John H. Jackson, General Manager.

In your letter dated April 30, 1934, you advised us that you had appointed D. B. Hanna, Esq., to act as your arbitrator in the matter of determining the amount to be paid to us for our railways, equipment, machinery and other works under the terms of an agreement dated December 4, 1891. Last week Mr. R. S. Robertson, K.C., appointed as our arbitrator under the terms of that agreement, sought to confer with Mr. Hanna relative to the proposed arbitration proceeding. Mr. Hanna advised him that he had received no notice of his appointment either from the Government or from Niagara Parks Commission, and therefore, declined to confer with Mr. Robertson upon the subject. If Mr. Hanna is to act as arbitrator for Niagara Parks Commission, will you not kindly so advise him so the proceeding will not be further delayed?

Yours very truly,

INTERNATIONAL RAILWAY COMPANY
By B. J. Yungbluth,
President.

Exhibit 4s

(Plaintiff's Exhibit)

Letter from General Manager of Niagara Parks Commission to International Railway Company

NIAGARA PARKS COMMISSION

June 9, 1934.

Dear Sirs:

Your letter of June 7th received. D. B. Hanna, Esquire, of the City of Toronto, was advised some days ago of his appointment as one of the arbitrators under the terms of the agreement dated December 4th, 1891.

Yours very truly,

JOHN H. JACKSON,
General Manager.

International Railway Company,
Buffalo,

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—continued

Exhibit 4t
(Plaintiff's Exhibit)

Letter from B. J. Yungbluth to Niagara Parks Commission

INTERNATIONAL RAILWAY COMPANY

June 20, 1934.

Niagara Parks Commission,
Niagara Falls, Ontario.
Gentlemen:

Attention—Mr. John H. Jackson, General Manager.

Since receiving your letter dated April 30, 1934, in which you advised that you had appointed D. B. Hanna, Esquire, to act as your arbitrator in the matter of determining the amount of compensation to be paid to us under the terms of the agreement dated December 4, 1891, Mr. R. S. Robertson, K.C., appointed as our arbitrator in the matter has attempted on several occasions to discuss with Mr. Hanna the subject of a third arbitrator. Mr. Hanna has consistently declined to discuss the subject, stating that he has no authority to do so. Likewise, Mr. McCarthy's attempts to procure the appointment of a third arbitrator, in conjunction with Mr Tilley, have been unavailing.

Therefore, you will please be advised that we shall make application to His Lordship, Sir William Mulock, Chief Justice of Ontario, at his Chambers at Osgoode Hall, Toronto, on the 22nd day of June, 1934, at 10.30 o'clock in the forenoon of that day or as soon thereafter as we may be heard for the appointment of a third arbitrator to determine the amount of compensation to be paid to us for our railways, equipment, machinery and other works, including also the works in Chippawa and Queenston, pursuant to the terms of the said agreement between the Commissioners for the Queen Victoria Niagara Falls Park and Edmund Boyd Osler and others, dated December 4, 1891.

Let me add that upon such application the correspondence exchanged between you and us or parts thereof may be read.

Yours very truly,

INTERNATIONAL RAILWAY COMPANY
By B. J. Yungbluth,
President.

Exhibit 4u
(Plaintiff's Exhibit)

Letter from A. G. Slaght to D. L. McCarthy

ARTHUR GRAEME SLAGHT, K.C.,
320 Bay Street, Toronto.

Personal — September 28th, 1934.

D. L. McCarthy, Esquire, K.C.
320 Bay Street,
Toronto, Ontario.

Dear Mr. McCarthy,

Since my return from vacation I have been in Court almost continuously, hence have not been able to attend to correspondence.

I have your letter with regard to completing the Board, and shall be glad to facilitate this.

I have just been advised, however, by the new Commission that Mr. D. B. Hanna, proposed arbitrator for the Commission, has resigned his position, and his resignation has been accepted. This will make it necessary for the Commission to appoint a new arbitrator, and I will take steps towards having this done, and advise you.

Yours sincerely,

AGS/B — A. G. SLAGHT.
Delivered. — B.

Exhibit 4v
(Plaintiff's Exhibit)

Letter from Slaght, Ferguson & Carrick to D. L. McCarthy

SLAGHT, FERGUSON & CARRICK,
Barristers, etc.

1111 Canada Permanent Building,
320 Bay Street,
Toronto, 2.

D. L. McCarthy, Esquire, K.C.
320 Bay Street,
Toronto, Ontario.

June 3rd, 1937.

Dear Sir:

Re Niagara Parks Commission and International Railway Company.

We are herewith enclosing a cheque No. B5198 dated June 2nd, 1937, on the Canadian Bank of Commerce drawn by the Niagara Parks Commission payable to the International Railway Company for $1,060,000.00.

This cheque covers the amount of the Award, namely, $1,057,436.00 and a further amount payable on account of the 937£ 2s 1d costs taxed in the Privy Council.

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—continued

We shall let you have a further cheque for the balance of the said costs and for any interest we consider due, as soon as we receive it from the Niagara Parks Commission.

Yours very truly,

SLAGHT, FERGUSON & CARRICK,
Per D. D. Carrick.

DDC/AB
Encl.
Delivered.

Exhibit 4w
(Plaintiff's Exhibit)

Letter from Slaght, Ferguson & Carrick to D. L. McCarthy

SLAGHT, FERGUSON & CARRICK,
Barristers, etc.

1111 Canada Permanent Building,
320 Bay Street,
Toronto, 2.

June 3rd, 1937.

D. L. McCarthy, Esquire, K.C.
320 Bay Street,
Toronto, Ontario.

Dear Sir:

Re International Railway Company vs. Niagara Parks Commission.

I am herewith delivering to you a cheque for $3,793.00 dated June 3rd, 1937, from the Niagara Parks Commission payable to the International Railway Company and numbered B5209. This cheque together with the cheque for $1,060,000.00 delivered to you this morning covers the amount of the Award of $1,057,436.00 and interest on the Award from May 21st to June 2nd, 1937, being 12 days, at 5% and amounting to $1,738.25 and the taxable costs in the Privy Council of £937 2s 1d at $4.92 and seven-eighths cents amounting to $4,618.75. These three items total $1,063,793.00 the amount of the two cheques which we have delivered to you today.

Yours very truly,

SLAGHT, FERGUSON & CARRICK,
Per D. D. Carrick.

DDC/AB

In the Supreme Court of Ontario.

Exhibits.
Ex. 4.
File of Correspondence Between I.R.C. & N.P.C. or their Solicitors, Commencing on 27th July, 1931, to 12th August, 1937.

—continued

Exhibit 4x
(Plaintiff's Exhibit)

Letter from Slaght, Ferguson & Carrick to D. L. McCarthy

SLAGHT, FERGUSON & CARRICK,
Barristers, etc.

1111 Canada Permanent Building,
320 Bay Street,
Toronto, 2.

D. L. McCarthy, Esquire, K.C. August 12th, 1937.
320 Bay Street,
Toronto, Ontario.

Dear Mr. McCarthy:

Re International Railway Company and Niagara Parks Commission.

We beg to enclose our clients cheque to your order for $22,045.61 which has been computed as the balance due for interest under the judgment of the Privy Council. It is made up as follows:

(a) Interest on the amount of the Award, which is $1,057,436 from April 15, 1937, to May 21, 1937, at 5% being	$ 5,214.75
(b) Interest on the $179,104, from May 29, 1935, the date of the Arbitrators' Award, until April 15, 1937, at 5% being	16,830.86
Total	$22,045.61

With the previous payments made we have computed the above to constitute full payment of all our clients' obligation at present payable—bearing in mind that there will be a further amount payable when you have taxed the costs to which your clients are entitled. So soon as these are taxed we will procure for you a cheque for the amount.

We appreciate your clients have claimed a further and larger sum for interest and we regret that we could not reach an agreement with you as to the amount properly due.

We are making the above payment on the understanding that by accepting this cheque you do not admit that it constitutes payment in full and that you are at liberty to cash same and still enter suit for any balance you claim for—if your clients still adhere to the view that any further interest is due.

Should they decide to sue, we are obtaining instructions to accept service of the writ.

Yours very truly,

SLAGHT, FERGUSON & CARRICK,
Per D. D. Carrick.

DDC/EP
Encl.

In the Supreme Court of Ontario.

Exhibits.
Ex. 5.
Order of the Chief Justice of Ontario Appointing Arbitrators, 2nd November, 1934.

Exhibit 5

(Plaintiff's Exhibit)

Order of the Chief Justice of Ontario Appointing Arbitrators

IN THE MATTER OF AN ARBITRATION.

THE HONOURABLE THE CHIEF JUSTICE OF ONTARIO — Friday, the 2nd day of November, 1934.

BETWEEN:

INTERNATIONAL RAILWAY COMPANY,
and
THE NIAGARA PARKS COMMISSION.

WHEREAS, by failure to mutually agree, a difference exists between International Railway Company, alleged successor in interest to The Niagara Falls Park and River Railway Company, alleged successor in interest to Edmund Boyd Osler, et al., and The Niagara Parks Commission, alleged successor to the Commissioners for the Queen Victoria Niagara Falls Park, as to the compensation (if any) to be paid to International Railway Company under the terms of an agreement dated December 4, 1891, between said Commissioners for the Queen Victoria Niagara Falls Park and said Edmund Boyd Osler, et al., which agreement was confirmed by Act of Parliament of the Province of Ontario, Chapter 96 of the Statutes of 55 Victoria 1892, and

WHEREAS, pursuant to the terms of said agreement International Railway Company has named and appointed Mr. R. S. Robertson, K.C., of Toronto, Canada, as arbitrator, and The Niagara Parks Commission has named and appointed Mr. Gershom W. Mason, K.C., of Toronto, Canada, as arbitrator;

NOW, THEREFORE, pursuant to the terms of said agreement and the powers vested in me by law, I hereby name and appoint the Honourable Robert Smith, formerly a Justice of the Supreme Court of Canada, as third arbitrator.

W. MULOCK,
C.J.O.

Exhibit 6

(Plaintiff's Exhibit)

Award with Schedules "A", "B", "C"

IN THE MATTER OF AN ARBITRATION.

BETWEEN:

INTERNATIONAL RAILWAY COMPANY,
and
THE NIAGARA PARKS COMMISSION.

WHEREAS the Commissioners for The Queen Victoria Niagara Falls Park entered into an agreement in writing, dated the 4th day of December, 1891, with Edmund Boyd Osler, Herbert Carlyle Hammond, William Hendrie and Richard Bladworth Angus relating to the construction and operation of an electric railway from the Village of Queenston in the County of Lincoln to the Village of Chippawa in the County of Welland;

AND WHEREAS by an Act of the Legislature of the Province of Ontario, assented to on the 14th day of April, 1892, 55 Victoria, chapter 96, the said agreement was approved, ratified and confirmed and declared to be valid and binding on the parties thereto;

AND WHEREAS International Railway Company has succeeded to the right, title and interest of the said Edmund Boyd Osler, Herbert Carlyle Hammond, William Hendrie and Richard Bladworth Angus;

AND WHEREAS by an Act of the Legislature of the said Province, 17 George V, chapter 24, the name of "The Commissioners for the Queen Victoria Niagara Falls Park" was changed to "The Niagara Parks Commission";

AND WHEREAS the said Agreement dated the 4th day of December, 1891, contained inter alia the following paragraphs:

"16. The company may commence the construction of the said railway whenever the location has been decided upon by the commissioners, and the plans and specifications approved in accordance with paragraph 3 of this agreement, and the right to operate the same shall begin on the first day of September next, or so soon (before or after that date) as the said railway or any section thereof has been constructed and is ready for operation, and shall extend to a period of forty years from the said first day of September, one thousand eight hundred and ninety-two, and shall be renewable on the request by the company for a further period of twenty years as hereinafter provided."

"26. If at the end of the said period of forty years, the company are unwilling to renew, or at the end of the further period of twenty years, if the company continue to hold for such further period, the company shall be duly compensated by the commissioners for their railways, equipment, machinery and other works including the low level railway, if the same shall have been constructed and then held by the company under this agreement, as also the high level railway from Chippawa to Queenston,

In the Supreme Court of Ontario.

Exhibits.
Ex. 6.
Award with Schedules "A", "B", "C", 29th May, 1935.

—continued

and including also their works in Chippawa and Queenston, but not in respect of any franchises for holding or operating the same, such compensation to be fixed by mutual agreement, or in case of difference, by arbitration, as in paragraph 17 of this agreement, but the failure before the expiration of any such term, to fix such compensation in manner aforesaid, or to pay before such expiration, the amount of compensation so fixed, shall not entitle the company to retain possession meanwhile of the said railways, equipment, machinery and works, by this agreement to be constructed or operated, but the same shall nevertheless and notwithstanding that the commissioners may have taken possession thereof remain subject to such liens and charges save as to possession as aforesaid, as may exist in favor of bondholders or debenture holders of the company and the company shall retain a lien or charge thereon, save as to possession as aforesaid for the compensation of their railway, equipment, machinery and works to be agreed upon as aforesaid, or so to be awarded to them provided, however, that all such liens and charges shall not exceed the amount that may be agreed upon or may be awarded for such compensation as aforesaid."

"29. Subject always to the terms and provisions of this agreement, and to the rights of the commissioners as the owners in fee simple of the right of way in the park proper and on the chain reserve, the said railways and their equipment and the other works constructed or required under this agreement, shall upon such construction or acquisition, as the case may be, be vested in and shall be the property of the company who shall, subject as aforesaid, be entitled to operate, manage and control the same during the period or periods respectively above mentioned, it being however hereby declared, understood and agreed, that at the end of the said first or second periods, as the case may be, the whole of the company's said high level railway from Queenston to Chippawa, and the said low level railway, if then held by the company under this agreement, together with their equipment and the machinery and works aforesaid, including the elevators or lifts acquired or built and including also the works in Queenston and Chippawa shall become the property of the commissioners, subject to the payment of compensation to be agreed upon or awarded as the case may be, and as is hereinbefore provided for."

AND WHEREAS the railway referred to in the said agreement, dated the 4th day of December, 1891, as the high level railway, was constructed but the railway therein referred to as the low level railway was not constructed.

AND WHEREAS at the end of the period of forty years referred to in paragraphs 16 and 26 of the said agreement, dated the 4th day of December, 1891, the International Railway Company was unwilling to renew.

AND WHEREAS the compensation to be paid by the Niagara Parks Commission to International Railway Company under the terms of the said agreement, dated the 4th day of December, 1891, was not fixed by mutual agreement.

In the Supreme Court of Ontario.

Exhibits.
Ex. 6.
Award with Schedules "A", "B", "C", 29th May, 1935.
—*continued*

AND WHEREAS Robert Spelman Robertson and Gershom William Mason were appointed arbitrators by the International Railway and the Niagara Parks Commission respectively.

AND WHEREAS pursuant to the provisions of paragraph 17 of the said agreement dated the 4th day of December, 1891, the Chief Justice of the Supreme Court of Ontario appointed The Honourable Robert Smith as third arbitrator.

AND WHEREAS the said arbitrators duly took upon themselves the burden of the arbitration as provided in the said agreement, dated the 4th day of December, 1891, and the said statute of the Legislature of the Province of Ontario, 55 Victoria, chapter 96, and have heard the evidence adduced by and the argument on behalf of the parties as to the amount of compensation payable to International Railway Company by the Niagara Parks Commission.

NOW THEREFORE, we, the said The Honourable Robert Smith and Gershom William Mason, being two of the above-named arbitrators (the other of the said arbitrators not joining in this award although present at the making thereof), do hereby make and publish our award in manner following, that is to say:—

We fix, award, adjudge and determine the amount of the compensation to be paid to International Railway Company to be the sum of One hundred and seventy-nine thousand one hundred and four dollars ($179,104).

We have not included any sum for interest on the amount of the compensation, being of opinion that this is a matter beyond our jurisdiction.

We have thought it advisable to set out in the reasons for our award the amount of compensation which might be arrived at by applying the method of valuation urged upon us on behalf of International Railway Company and the amounts which, in our opinion, would be proper amounts to be allowed in the event that it should be found that certain items for which we have made no allowance should have been included or that certain items for which we have made allowance should be allowed on some other basis, or that certain items which we have included should not have been so included.

We award, adjudge and determine that the Niagara Parks Commission do pay to International Railway Company its taxable costs of this arbitration excluding therefrom such costs as have been the subject of agreement between the parties.

IN WITNESS WHEREOF we, the said The Honourable Robert Smith and Gershom William Mason (being a majority of the said arbitrators) have hereunto set our hands this 29th day of May, 1935.

R. SMITH.
GERSHOM W. MASON.

SIGNED and PUBLISHED the 29th day of May, 1935, by the said The Honourable Robert Smith and Gershom William Mason (the above-mentioned Robert Spelman Robertson being present at the time although not joining in the award) in the presence of:

J. J. DALEY.

In the Supreme Court of Ontario.

Exhibits.
Ex. 6.
Award with Schedules "A", "B", "C", 29th May, 1935.
—*continued*

"A"

Value of Property as of August 31, 1932

Land	$	23,930.00
Grading		25,000.00
Ties		1,300.00
Rails, etc.		12,395.00
Paving		3,271.00
Roadway tools		184.00
Crossings and signs		400.00
Bridges		578.00
Highway bridge		11,440.00
Ellis Street retaining wall		1,944.00
Colt's culvert		2,344.00
Whitty's culvert		1,096.00
Bowman's culvert		3,661.00
Smeaton's culvert		480.00
Queenston retaining wall		1,513.00
Small culverts and pipes		7,019.00
Signal system		170.00
Telephone system		5.00
Poles and fixtures		404.00
Distribution system		12,000.00
Rolling stock		1,402.00
Bridge Street building		1,500.00
Clifton incline		18,288.00
Clifton machinery		6,000.00
Whirlpool incline		11,740.00
Whirlpool shelter		240.00
Power house		25,000.00
Shop equipment		300.00
Furniture and fire equipment		200.00
Materials and supplies		300.00
Power plant machinery		5,000.00
		$179,104.00

"B"

Statement of Reconstruction Cost as of September 1, 1932, and of Depreciated Value on Basis of Reconstruction Less Depreciation.

	Reconstruction Cost	Depreciated Value
Land	$30,450.00	$30,450.00
Organization, engineering, legal expenses	30,000,00	
Correspondence and legal expenses	17,500.00	
Payment Parks Commission	17,500.00	
Taxes during construction	750.00	
Interest during construction	62,405.00	
Engineering during construction	50,000.00	144,437.00
Grading	155,896.00	155,896.00
Track	346,788.00	156,251.00
Paving	3,675.00	3,271.00
Roadway tools	306.00	184.00
Crossings and signs	3,723.00	1,867.00
Bridges numbers 1 to 7	50,124.00	33,085.00
Culverts and retaining walls	28,184.00	18,057.00
Signal system	723.00	600.00
Telephone system	2,400.00	1,440.00
Poles and fixtures	39,323.00	12,010.00
Distribution system	63,066.00	27,760.00
Rolling stock	148,392.00	84,616.00
Clifton incline building	24,537.00	18,288.00
Bridge Street building	4,500.00	3,321.00
Whirlpool incline building	20,000.00	11,740.00
Whirlpool shelter	401.00	240.00
Power House, including wheel pit, tunnel, etc.	152,310.00	137,079.00
Clifton incline machinery	10,000.00	6,000.00
Shop equipment	1,257.00	500.00
Furniture and fire equipment	1,001.00	200.00
Power plant equipment	148,793.00	120,000.00
Materials and supplies	680.00	300.00
	$1,414,684.00	$967,592.00

—*continued*

In the Supreme Court of Ontario.

Exhibits. Ex. 6. Award with Schedules "A", "B", "C", 29th May, 1935.

—*continued*

MEMORANDA

LAND—We have not included parcels 121(a) and 121(b) of a total value of $1,100.

GRADING—We have omitted the Lewiston bridge line $2,885.

TRACK—We have not included Lewiston bridge line reconstruction cost ..... $ 13,295.00
and C. N. E. turnout reconstruction cost 900.00

a total of ..... $ 14,195.00

Depreciated value—$6,400.00 (of both).

BRIDGES—We have included bridges numbers 1 to 7 inclusive on basis of substituting concrete for masonry in abutments, reconstruction cost $50,124.00 and depreciated value $33,085.00. If concrete were not substituted the figures would be $67,112. and $50,971.

We have not included railway bridge 8. If it were included the reproduction cost of substructure would be $3,394. and of the superstructure $16,460.—in all $19,850. while the depreciated values would be $3,055. and $11,522. respectively or $14,577. in all.

We have not included highway bridge 8(a), the reproduction cost of substructure would be $8,234. and for superstructure $6,933. in all $15,167. while the depreciated values would be $6,587. and $4,853. respectively in all $11,440.

POLES AND FIXTURES—We have deducted the Lewiston bridge line which makes a difference of $580. in reproduction cost and $180. in depreciated value.

DISTRIBUTION SYSTEM—We have deducted the Lewiston bridge line, making a difference in reconstruction costs of $934. and in depreciated value of $415.

POWER HOUSE—We have taken concrete as substituted for a portion of the masonry, chiefly the masonry below grade. If the substitution were not permissible the amount to be added for reconstruction cost would be $26,715. and the amount to be added to the depreciated value $24,044.

INTAKE—We have not included the intake. If it were included the reproduction cost would be $43,325. and the depreciated value $22,862.

We have included in grading the Macklem Street loop valued by the Park at $172. and by the Railway at $428. The grading on the land of the Niagara Power Company at Chippawa valued by the Park at $240. and by the Railway at $570.

The fill in the ravines known as Colt's and Whitty's and Bowman's valued by the Park at $68,412. on which we have placed a value of $85,937.

The land subject to the Hydro easement at Queenston on which the Park has placed a value of $25. and the Railway at $126.

The lands sold to the Hydro Electric Power Commission at Queenston over which the railway runs valued by the Park at $391. and by the Railway at $866.

We have included in the track figures the Macklem loop valued by the Park at $3,767. and by the Railway at $4,864. the depreciated value being fixed by the Park at $1,205. and by the Railway at $3,259. The track on the Canadian Niagara Power Company's land at Chippawa valued by the Park at $3,435. and by the Railway at $4,440., the depreciated value being fixed by the Park at $1,099. and by the Railway at $2,975. The table rock loop valued by the Park at $1,668. and by the Railway at $3,335., the depreciated value being fixed by the Park at $534. and by the Railway at $2,234. The track on the land subject to the Hydro easement at Queenston valued by the Park at $5,100. and by the Railway at $6,180., the depreciated values being put by the Park at $1,632. and by the Railway at $4,141. and the track on the land conveyed to the Hydro Electric Power Commission at Queenston valued by the Park at $5,312. and by the Railway at $6,535., the depreciated value being placed by the Park at $1,700. and by the Railway at $4,378.

We have included in the power and line equipment the Macklem Street loop valued by the Park at $427. and by the Railway at $563. the depreciated value being put by the Park at $124.00 and by the Railway at $360. The equipment on the lands of the Canadian Niagara Power Commission at Chippawa valued by the Park at $403. and by the Railway at $499. the depreciated value being $117. and $319. respectively. The equipment on the land subject to the Hydro easement at Queenston valued by the Park at $323. and by the Railway at $433., the depreciated value being $94. and $277. respectively and the equipment on the Hydro land at Queenston valued by the Park at $322. and by the Railway at $433., the depreciated value being $93.00 and $277. respectively.

NOTE. With regard to all of the above, except the substitution of concrete for masonry, the figures exclude depreciation from obsolescence.

In the Supreme Court of Ontario.

Exhibits.
Ex. 6.
Award with Schedules "A", "B", "C", 29th May, 1935.

—*continued*

"C"

Railway Land Following the Order in Exhibit 7.

Land	Value if acquired for railway purposes as of August 31, 1932	Value as of August 31, 1932
Parcel D-106	$ 5,940.00	$ 4,000.00
B-106	2,475.00	2,000.00
A(1)-106	5,000.00	5,000.00
E & F-106	2,640.00	1,100.00
C & D-107	1,325.00	600.00
A(1)-107	520.00	220.00
A & B-109	5,000.00	4,840.00
111	1,200.00	1,200.00
112	588.00	588.00
113	737.00	737.00
115	200.00	120.00
116	450.00	350.00
118 Not property of railway		
120(a)	900.00	450.00
120(c)	500.00	500.00
122(a), (b)	1,275.00	1,275.00
124	450.00	450.00
125	1,250.00	500.00
	$30,450.00	$23,930.00
121(a) Disallowed as not being within terms of agreement.	450.00	450.00
121(b) Disallowed as not being within terms of agreement.	650.00	650.00

Exhibit 7
(Plaintiff's Exhibit)

In the Supreme Court of Ontario.

Exhibits.
Ex. 7.
King's Order, 23rd April, 1937.

Law Stamps
$0.50

King's Order

SEAL

AT THE COURT AT WINDSOR CASTLE

The 23rd day of April, 1937

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

Lord President	Mr. Chancellor of the Duchy of Lancaster
Mr. Secretary Eden	Sir Nevile Henderson
Sir Alexander Hardinge	

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 15th day of April 1937, in the words following, viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the Court of Appeal for Ontario in the matter of the Act 55 Vict. (Ont.) Chap. 96 and the Schedules thereto and in the matter of an Arbitration thereunder between the International Railway Company Appellants and the Niagara Parks Commission Respondents (Privy Council Appeal No. 89 of 1936) and likewise a humble Petition of the Appellants setting forth that a difference arose between the Appellants and the Respondents as to the compensation (if any) to be paid to the Appellants by the Respondents under the terms of an agreement dated the 4th December 1891 (made between parties to whose interests the Appellants and the Respondents were respectively the successors) confirmed by an Act of the Legislature of the Province of Ontario (55 Vict. (Ont.) Chap. 96): that the difference was referred to the arbitration of Robert Spelman Robertson (appointed by the Appellants) Gershom William Mason (appointed by the Respondents) and the Honourable Robert Smith (appointed by the Chief Justice of Ontario pursuant to paragraph 17 of the agreement dated the 4th December 1891): that the Honourable Robert Smith and Gershom William Mason (Robert Spelman Robertson not joining in the award) made and published the award dated the 29th May 1935 fixing the amount of the compensation to be paid to the Appellants by the Respondents at the sum of $179,104.00: that the Appellants appealed to the Court of Appeal and moved to set the same aside on the ground *inter alia* that the majority Arbitrators had erred in law and in fact in the method adopted in arriving at the compensation: that the Court of Appeal by Order dated the 31st December 1935 awarded the compensation to be paid to the

In the Supreme Court of Ontario.

Exhibits.
Ex. 7.
King's Order, 23rd April, 1937.

—continued

Appellants by the Respondents at the sum of $168,714.00 (except for certain items relating to the Lewiston Bridge line and to the Railway Bridge) and granted leave to the Respondents to cross-appeal from portions of the majority award dealing with particular matters mentioned in the Order and ordered that it be referred back to the Arbitrators to determine the additional amount of compensation to be paid on a salvage or scrap basis by the Respondents in respect of the items relating to the Lewiston Bridge line and to the Railway Bridge: that the Appellants obtained an Order admitting an Appeal to Your Majesty in Council from the Order dated the 31st December 1935: And humbly praying Your Majesty in Council to take this Appeal into consideration and that the Order of the Court of Appeal dated the 31st December 1935 may be reversed altered or varied or for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the Parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that this Appeal ought to be allowed and the Order of the Court of Appeal for Ontario dated the 31st day of December 1935 set aside except in so far as it ordered the Respondents to pay to the Appellants their costs o the Cross-Appeal and motion for leave to cross-appeal; (2) that the case ought to be remitted to the said Court of Appeal with a direction to pronounce an Order that the award of the majority Arbitrators be varied and as varied be as follows:—'(a) We fix, award, adjudge and determine the amount of the compensation to be paid to the International Railway Company to be the sum of one million, fifty-seven thousand, four hundred and thirty-six dollars ($1,057,436). (b) We fix, award, adjudge and determine that the Niagara Parks Commission do pay to the International Railway Company their taxable costs of this arbitration excluding therefrom such costs as have been the subject of agreement between the Parties'; and (3) that there ought to be paid by the Respondents to the Appellants their costs of the Appeal to the said Court of Appeal their costs of this Appeal incurred in the said Court of Appeal and the sum of £937 2s. 1d. for their costs thereof incurred in England."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Lieutenant-Governor of the Province of Ontario for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. Hankey.

Entered O.B. 161 pages 557-8.
May 21, 1937.
H. F.

Exhibit 8
(Plaintiff's Exhibit)

Endorsement on Writ of Summons

No. 1969 A.D. 1938

IN THE SUPREME COURT OF ONTARIO

INTERNATIONAL RAILWAY COMPANY

vs.

THE NIAGARA FALLS PARKS COMMISSION

WRIT OF SUMMONS

GENERAL FORM

This Writ was issued by Fasken, Robertson, Aitchison, Pickup & Calvin, of the City of Toronto
in the County of York
Solicitors for the said Plaintiff a Company residing at Buffalo in the State of New York.

We hereby accept service on Sept. 7th 1938 of the within Writ of Summons on behalf of the Defendant, and undertake to enter appearance thereto in accordance with the exigencies thereof.

Slaght, Ferguson & Carrick

Fasken, Robertson, Aitchison,
Pickup & Calvin.
Plaintiff's Solicitors.

Exhibit 9

(Defendant's Exhibit — Extract Only)

Exhibits. Ex. 9. Index to Amount of Reproduction Cost, Depreciation Including Obsolescence and Present Value, 31st August, 1932.

INTERNATIONAL RAILWAY COMPANY (PARK AND RIVER DIVISION)

Index to Amount of Reproduction Cost, Depreciation Including Obsolescence and Present Value as of August 31, 1932, as testified to by Claimants' Witnesses. Arranged in Conformity with Page 1 of Exhibit No. 7.

	Reproduction Costs		*Depreciation Including Obsolescence*		*Present Value*	
Item	*Amount*	*Reference*	*Amount*	*Reference*	*Amount*	*Reference*
Organization, engineering and legal expenses prior to construction	$ 43,000	(Lowe Ex-19 P-214)	None	(Lowe P-241-45)	$ 43,000	(Lowe Ex-19)
Cost of financing	113,082(A)	(Lowe Ex-19 P-218)	"	(Lowe P-241-45)	113,082	(Lowe Ex-19)
Administration and legal expenses during construction	18,650	(Lowe Ex-19 P-223)	"	(Lowe P-241-45)	18,650	(Lowe Ex-19)
Payment, Park Commission prior to and during construction	18,333	(Lowe Ex-19 P-224)	"	(Lowe P-241-45)	18,333	(Lowe Ex-19)
Taxes during construction	6,700	(Lowe Ex-19 P-226)	"	(Lowe P-241-45)	6,700	(Lowe Ex-19)
Interest during construction	139,323(A)	(Lowe Ex-19 P-228)	"	(Lowe P-241-45)	139,323	(Lowe Ex-19)
Cost of engineering	50,000	(Lowe Ex-19 P-229)	"	(Lowe P-241-45)	50,000	(Lowe Ex-19)
Land	132,420	(Misener-Milne Ex 7 Revised)	"	—	132,420	(Misener-Milne Ex-7 Revised)
Grading	219,854(B)	(Robertson Ex-53 P-1946)	"	—	219,854	(Robertson Ex-53)
	227,031	(Ullman Ex-99 P-2434)	"	—	227,031	(Ullman Ex-99)
Track work	431,051	(Miller Ex-7 Revised Ex-293)	100,544	(Riexinger Ex-295)	330,507	(Riexinger Ex-295)
			144,101	(Andrew Ex-96 Ex-294)	286,950	(Andrew Ex-96) (Ex-294)
Paving	4,366*	(Robertson Ex-7 P-1947)	480	(Riexinger Ex-162)	3,886	(Riexinger Ex-162 P-3356)
Roadway tools	306*	(Ex-7 Ex-92 P-2304)	122	(Riexinger Ex-162)	184	(Riexinger Ex-162 P-3358)
Crossings and signs	3,865*	(Miller Ex-7 P-1377 Ex-92 P-2304)	1,927	(Riexinger Ex-162)	1,938	(Riexinger Ex-162 P-3359)
Bridges	111,955	(Robertson Ex-54 P-1966-67)	—		—	
		(Mantel Ex-48 P-1804)	—		—	
	110,283	(Pratley Ex-46 P-1754 Ex-91 P-2302)	11,408	(Pratley Ex-46)	98 875	(Pratley Ex-46 P-1754)
Culverts	28,184*	(Robertson Ex-56, 63 Ex-90 P-2302)	1,197	(Ullman Ex-161)	26,987	(Ullman Ex-161 P-3342)
Signal system	723*	(Baskin Ex-7 P-1531 Ex-92 P-2304)	30	(Willoughby Ex-163)	693	(Willoughby Ex-163 P-3381)
Telephone system	2,798	(Baskin Ex-7 P-1535)	835	(Willoughby Ex-163)	1,963	(Willoughby Ex-163 P-3383)
Poles and fixtures	49,337	(Baskin Ex-7 P-1559)	25,517	(Willoughby Ex-163)	23,820	(Willoughby Ex-163 P-3398)
Distribution system	66,447	(Baskin Ex-7 P-1599)	16,919	(Willoughby Ex-163)	49,362	(Willoughby Ex-163 P-3408)
Rolling stock	148,392	(Beattie Ex-94 P-2316)	50,663	(Kunz Ex-95)	97,729	(Kunz Ex-95 P-2360)
Clifton incline machinery	12,028	(Kunz Ex-86 P-2285)	2,141(C)	(Kunz Ex-87)	9,887(C)	(Kunz Ex-87 P-2288)
Shop equipment	1,257*	(Ex-7 Ex-92 P-2304)	—	—	—	—
Furniture	749*	(Ex-7 Ex-92 P-2304)	—	—	—	—
Fire equipment	252*	(Ex-7 Ex-92 P-2304)	—	—	—	—
Power house equipment	202,372	(Baskin Ex-7 P-1523-29)	39,046	(Creager Ex-165)	163,326	(Creager Ex-165 P-3532)
Materials and supplies	680*	(Young Ex-7 Ex-92 P-2304)	72	(Young P-3574)	608	(Young P-3574)
Prepaid taxes	5,154	(Schmunk Ex-7, 167-171 P-3612-14)	None	—	5,154	(Schmunk Ex-7, 167-171)
Buildings and Structures						
Clifton incline building	46,746	(Robertson Ex-60 P-1996)	—	—	—	—
" " "	48,919	(Oxley Ex-51 P-1867)	6,256	(Oxley Ex-51)	42,663	(Oxley Ex-51 P 1867)
Bridge street station	6,257	(Robertson Ex-57 P-1988)	—	—	—	—
" " "	6,055	(Oxley Ex-50 P-1850)	1,970	(Oxley Ex-50)	4 085	(Oxley Ex-50 P-1850)
Whirlpool incline building	23,461	(Robertson Ex-58 P-1994)	7,656	(Kunz Ex-88)	15,805	(Kunz Ex-88 P-2291)
" " shelter	685	(Robertson Ex-59 P-1995)	376	(Kunz Ex-89)	309	(Kunz Ex-89 P-2293)
Power house and structures	279,789	(Robertson Ex-61 P-2000A)	—	—	—	—
" " " "	261.299	(Oxley Ex-49 P-1845)	15,937	(Oxley Ex-49)	245,362	(Oxley Ex-49 P-1845)
" " " "	264.133	(Robertson Revised Ex-291)	—	—	—	—
" " " "	260,139	(Oxley Revised Ex-291)	16,750	(Oxley Ex-291)	243,889	(Oxley Ex-291)

NOTE: *Agreed Reproduction Cost; (A) Changes with Reproduction Cost of Physical Property; (B) Clearing and Grubbing Reproduction Cost agreed (P-1935-36)

MEMORANDUM ADDED TO STATEMENT 7A SHEWING TOTAL AMOUNTS FOR CONVENIENCE OF COURT.

Reproduction Cost, Column 1—$3,346,075. *Depreciation Including Obsolescence, Column* 2—$443,947 *Present Value as Claimed, Column* 3—$2,622,375.