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In the Privy Council.

VOL. 9

No. 72 of 1936.

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ON APPEAL

FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC

BETWEEN

WILLIAM I. BISHOP LIMITED and
THE BANK OF MONTREAL
(Plaintiffs and Cross-Appellants before Court of King's Bench) ... ... *Appellants*

AND

THE JAMES MACLAREN COMPANY LIMITED
(Defendant and Cross-Respondent before Court of King's Bench) ... ... *Respondent*

RECORD OF PROCEEDINGS.

VOLUME 9.—PROCEEDINGS AND JUDGMENTS IN COURT OF KING'S BENCH.

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43, 1937
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RECORD OF PROCEEDINGS

VOLUME 9

Containing the proceedings in the Court of King's Bench (Appeal Side), the formal Judgments and Judges' Reasons

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RECORD OF PROCEEDINGS

No. 1

10 **The Inscription in Appeal Before the Court of King's Bench**

In the Court of King's Bench — No. 1 — The Inscription in Appeal Before the Court of King's Bench 26 June 1934

The Defendant hereby inscribes this case in appeal before the Court of King's Bench (Appeal Side) at the City of Montreal from the final judgment of the Superior Court of the District of Montcalm, dated the first day of June, 1934, and communicated to the parties in accordance with Article 538 of the Code of Civil Procedure on or about the 10th day of June 1934 maintaining plaintiff's action against defendant for the sum of $293,585.84 with interest and costs; and notice is hereby given to Messrs. Brown, Montgomery and McMichael, attorneys for plaintiffs, that the pre-
20 sent inscription has been this day filed in the office of said Superior Court, and that on the 29th day of June 1934 at 11:30 o'clock in the forenoon (Standard Time) before the Prothonotary of said Superior Court at his office in the Court house at the Village of Mont-Laurier, the defendant will give good and sufficient security that it will effectually prosecute the said appeal and satisfy the condemnation and pay all costs adjudged in case the said judgment should be confirmed, and that defendant will then and there offer as sureties Messrs. Albert and Alexander Maclaren, both manufacturers of the said Town of Buckingham, who will then and there justify as to their sufficiency if so required.
30

Mont-Laurier, June 26, 1934.

(sgd) Aylen and Aylen,
Attorneys for Defendant.

No. 2

The Inscription in the Cross-appeal Before the Court of King's Bench

In the Court of King's Bench — No. 2 — The Inscription in the Cross-appeal before the Court of King's Bench 28 June 1934

40 The plaintiffs hereby inscribe this case in appeal before the Court of King's Bench (Appeal Side) at the City of Montreal from the final judgment of the Superior Court of the District of Montcalm, dated the first day of June, 1934, and communicated to the parties in accordance with Article 538 of the Code of Civil Procedure on or about the 10th day of June, 1934, maintaining plaintiffs' action against defendant for the sum of $293,585.84 with interest and costs but only insofar as said judgment does not award to plaintiff interest from the date of the institution of the action upon the following sums awarded to plaintiffs by said judgment;

In the Court of King's Bench — No. 2 The Inscription in the Cross-appeal before the Court of King's Bench 28 June 1934 (Continued)

namely the sum of $117,075.22 for increased cost of coffer dams and unwatering (Item No. 3); the sum of $81,282.60 for work under winter conditions (Item No. 4); the sum of $18,079.83 for hauling cement for apron in bypass channel (Item No. 10); and the sum of $5823.49 for plant removal (Item No. 12); and notice is hereby given to Messrs. Aylen and Aylen, attorneys for defendant, that the present inscription has been this day filed in the office of the said Superior Court and that on the 29th day of June 1934 at 11:30 o'clock in the forenoon (Standard Time) before the Prothonotary of said Superior Court at his office in the Court House at the Village of Mont-Laurier, the plaintiffs will give good and sufficient security that they will effectually prosecute the said appeal and satisfy the condemnation and pay all costs adjudged in case the said judgment should be confirmed, and that said security will take the form of a surety bond to be given by The Guarantee Company of North America, a company having an office and place of business in the City and District of Montreal and being authorized by law for the purpose of giving such security, which said company will then and there justify as to its sufficiency if so required.

Montreal, June 28, 1934.

Brown, Montgomery and McMichael,
Attorneys for Plaintiffs-appellants.

No. 3

The Factum of Appellant Before the Court of King's Bench

In the Court of King's Bench — No. 3 The Factum of Appellant Before the Court of King's Bench 15 March 1935

Appellant has appealed from the final judgment of the Superior Court of the District of Montcalm, rendered by Honourable Mr. Justice White on June 1st, 1934, maintaining respondent's action against appellant for the sum of $293,585.84 with interest and costs. (See judgment, Vol. VI, pp. 1249-1259).

The action arises out of the construction of the Lievre River Storage Works at Cedar Rapids on the Lievre River between the Townships of Wells and Bigelow, for which respondent William I. Bishop Limited was the contractor. These storage works were constructed between October 1928 and June 1930, and consist of a concrete dam for the purpose of impounding and storing the waters of the River and regulating the supply of water for the benefit of the power-users on the River below the same. As this storage dam was to be owned and operated when completed by The Quebec Streams Commission the construction was under the joint supervision of appellant's engineers and those of the Commission.

Following the completion of the work respondent William I. Bishop Limited registered a claim for privilege and thereafter within the delay of six months provided by law commenced the present action to enforce such privilege, claiming the sum of $412,846.75 as additional compensation over and above the sum of $916,723.57 which it had already received.

The basis of the action is set forth in paragraph 6 of the declaration where it is stated that the amount claimed represents:—

10 "Labour, material, work and services necessarily supplied, outlays made by said plaintiff and expenses to which said plaintiff has been put in connection with the said work as well as in connection with the doing of work actually required for said construction, and approved by defendant, but not provided for in the contract, *or* as damage suffered by the said plaintiff for reasons attributable to the faulty, erroneous and deceptive information supplied and representations made by defendant to said plaintiff as aforesaid." (Vol. 1, p. 3).

20 As respondent William I. Bishop Limited had assigned to The Bank of Montreal all amounts owing under the contract in question, The Bank of Montreal was co-plaintiff in the action and is one of the respondents to the present appeal.

Respondents' claim is divided into a number of separate items, fourteen in all, each practically constituting a separate and distinct cause of action. Throughout the trial these claims were referred to by number as well as by a distinctive title, and the amount claimed in the action with respect to each of such individual claims, and the amount allowed by the judgment are as follows:—

30

Title of Claim	Amount claimed by the action	Amount allowed by the judgment
No. 1—Hardpan Excavation	$ 21,601.45	$ 13,919.45
No. 2—Passing Logs	4,103.72	2,995.42
No. 3—Cofferdams & Unwatering	148,857.15	117,075.22
No. 4—Cofferdam Lower End By-pass	5,563.50	
No. 5—Additional Cost of Rock Excavation	35,100.74	35,100.74
No. 6—Handling & Trimming Excavated Rock	1,990.82	
40 No. 7—Excavating Frozen Material in river bed	2,530.32	2,530.32
No. 8—Work under Winter Conditions	96,832.45	81,282.62
No. 9—Overcharge on Logs	7,220.19	1,429.60
No. 10—Cement for Apron in By-pass Channel	2,239.46	1,879.83
No. 11—Shortage in payment for Class 1 Concrete	31,549.15	31,549.15
No. 12—Plant Removal	5,823.49	5,823.49
No. 13—Standby & Overhead Expense	49,147.41	
No. 14—Interest on Deferred payments	286.90	
TOTAL	$412,846.75	$293,585.84

In the Court of King's Bench
—
No. 3
The Factum of Appellant Before the Court of King's Bench
15 March 1935
(Continued)

The trial was a lengthy one occupying five weeks. One hundred and sixty-five exhibits were fyled by both sides and lengthy written arguments were produced citing many authorities. The judgment, rendered after a delibéré of more than a year, is very brief, comprising, in all only ten pages, including the exposé of the facts, and no additional notes were handed down. One case cited by appellant is distinguished, but no authorities are cited by the learned Trial Judge in support of his conclusions and many of the submissions of the appellant seem to have received no consideration whatsoever. 10

Appellant proposes to deal *First* with the contract itself. *Secondly* with the law applicable to such contracts generally and *Thirdly* to take up and discuss in detail each of the fourteen separate items of respondents' claim.

THE CONTRACT.

The contract based on unit prices is of the same general type as that recently considered by this Court and by the Supreme Court of Canada in the case of Nova Scotia Construction Company vs Quebec Streams Commission hereinafter referred to. (See Contract and Specifications Vol. VI, pp. 1085-1133). 20

The work which respondent Bishop undertook to do is described as being:—

"The complete construction of the Cedar Rapids Storage Dam as shown and indicated on the drawings referred to above and such supplementary plans and details as may be issued by the engineer from time to time." (Vol. VI, p. 1087). 30

Said respondent promised and agreed;

"To furnish all materials, tools and appliances, labour and work of every description required for the complete construction of said dam, excepting only certain materials and equipment which are to be supplied by the owner and which are specifically enumerated hereinafter." (Vol. VI, p. 1085).

40

The division of authority between appellant and the Quebec Streams Commission as regards the control and supervision of the work is provided for in the contract in the following terms:—

"It is further agreed that the construction of the dam shall be carried out and completed under the Engineering supervision and to the satisfaction of the Chief Engineer of the Quebec Streams

Commission, and a Resident Engineer to be appointed by him who shall be his representative on the work and have and exercise the authority granted the Engineer in this contract and specifications in all matters pertaining to and affecting the proper construction of the dam, and its safety and durability.

"It is further understood and agreed, however, that the Owner shall appoint an Engineer who shall represent him during the execution of the work and shall make all measurements and computations of the quantities and costs of work performed by the contractor for the purpose of determining the amount of compensation to be paid to the contractor, and who shall sign and issue all orders for extra work, and prepare and issue all statements or certificates on which monthly and final payments to the contractor are to be based, as authorized and provided for by the terms of this contract.

"And it is understood and agreed that wherever the term Engineer or Resident Engineer is used in the following sections of this contract and specifications, it shall mean the Chief Engineer of the Quebec Streams Commission or his representative the Resident Engineer, excepting in those sections of this contract entitled:—

Extra Work (the first two paragraphs only) and Time of Completion, and Manner and time of making monthly payments,

in which sections or portions thereof mentioned, the term Engineer shall mean, exclusively, the Engineer appointed by the Owner, as provided above." (Vol. VI, pp. 1086-1087).

It is apparent from these provisions of the contract that the authority of the Owner's engineer was extremely limited, as all matters relating to the proper construction of the dam, its safety and durability, were subject to the approval of the Quebec Streams Commission's Engineer, a Government representative, who was not under the control or direction of appellant.

The consideration to be paid to the contractor for his work and services, subject to the provisions hereinafter referred to, was the sum of $609,110.00 referred to as the "Principal Sum". (Vol. VI, p. 1097). The contract further provided that the "Principal Sum of money to be paid to the contractor as specified herein is based on an *estimate* that the quantities of excavation, concrete masonry, forms, reinforcing steel, and other classes of work required to completely construct the dam, and which have been calculated from the dimensions and depths to the bottom of the dam that are shown or indicated on the drawings referred to herein," will be as shown in the Schedule which then follows. (Vol. VI, pp. 1089, 1090).

In the Court of King's Bench
No. 3
The Factum of Appellant Before the Court of King's Bench
15 March 1935
(Continued)

It is then provided that:—

"And said principal sum, plus the sums to be paid as provided for herein for any authorized extra work which shall have been performed by the contractor shall be the limit of the liability of the Owner hereunder provided that the quantities of the various classes of work required to construct the dam shall prove to be the same as those given in the Schedule of quantities hereinbefore contained. 10

"If, however, the quantities of any of the various classes of work required to build the dam shall be different from the corresponding quantities hereinabove given, *due to changes of design or depth of foundations from those used for calculating said quantities,* there shall be added to or deducted from said principal sum according to whether said quantities are increased or diminished, sums computed according to the following table and the net sum produced by these additions and deductions plus the value of any extra work 20 performed by the contractor and computed in the manner hereinbefore provided shall become the total amount to be paid by the Owner to the Contractor for all of the work performed by him under the terms of this contract." (Vol. VI, p. 1097).

Then follows a list of unit prices covering the different classes of work. (Vol. VI, pp. 1097-1098).

The obligation to pay additional compensation by reason of increased quantities as set forth in the Contract (pp. 1090 and 1097) is, how- 30 ever, limited by the following provision, namely:—

"But it is expressly understood and agreed, however, that:

"(a). The quantities given in the foregoing table do not include any additional excavation which the Contractor may choose or be required to do for by-passing or handling the flow of the river during the construction of the dam; nor any materials and labour used for the construction of coffer dams; nor any other work or materials extraneous to the permanent structure of the dam itself 40 which are required for the construction of the dam.

"(b). All of said additional excavation and extraneous work and materials are to be performed and furnished by the Contractor as a part of the work for which the said principal sum is to be the compensation." (Vol. VI p. 1090).

As regards "EXTRA WORK",, the contract provides that:—

"It is understood and agreed by both parties hereto that nothing shall be construed as extra work which is necessary for the proper completion of the work in accordance with the manifest intent of the drawings and specifications and that no claim for additional compensation for any work done under this contract shall be considered or allowed except as hereinafter provided unless such claim is made before the performance of the work in question. The
10 Engineer will issue a written order for the execution of legitimate extra work and no payments for extra work shall be made in the absence of such orders from the Engineer." (Vol. VI, p. 1091).

For such extra work as the Contractor shall perform by virtue of the written authorizations of the Engineer, the owner was required to pay (a) actual cost of labour and materials, plus (b) 37% of said labour and material costs to cover use of small tools, plant maintenance, overhead and superintendence, insurance etc. plus (c) rental for heavy tools and machinery at rates specified. Vol. VI, p. 1092).

20

Changes in the design and dimensions of the dam are provided for by the following clause:—

"It is agreed between all parties hereto that the Owner shall have the right to make such changes in the design and dimensions of the dam as the Engineer may deem necessary or advisable and that changes shall not invalidate this contract. If such changes shall be made and they increase or decrease the quantities of the various classes of work required for the construction of the dam, the prin-
30 cipal sum of money to be paid to the Contractor hereinafter specified, shall be correspondingly increased or decreased by amounts which shall be calculated and determined in the manner hereinafter provided." (Vol. VI, p. 1091).

Progress payments monthly during the progress of the work are provided for and the final payment is to be made within sixty-three days from the date of completion as certified to by the Engineer. For the purpose of establishing the amounts of the monthly payments, the contract provides that the Engineer shall be bound to consider that each branch of
40 the work bears a certain definite relation to the total of the principal sum, in accordance with the table given. (Vol. VI, 1099).

All the work is required to be performed in a thorough and workmanlike manner and in accordance with the terms of the Specifications which are attached to the contract (p.1086). These Specifications are divided into three sections, the first comprising General Conditions; (Vol. VI, pp. 1101-1105); the second dealing with Materials (pp. 1106-1111); and the third with the Contractor's Methods and Workmanship (pp. 1112-

In the Court of King's Bench
No. 3
The Factum of Appellant Before the Court of King's Bench
15 March 1935
(Continued)

1133). Those portions of the Specifications which are relevant to the different claims involved in this appeal will be referred to in dealing with the various claims in detail.

The Engineer for the Owner who prepared the plans and specifications was Hardy S. Ferguson of New York City. D. W. O'Shea was the Resident Engineer on the work representing Mr. Ferguson and the owner. The Chief Egineer for the Quebec Streams Commissions was Olivier Lefebvre, and his representative on the work as Resident Engineer was L. A. DuBreuil.

10

As the quantities of the various classes of work in many cases exceeded the contract estimates, the amounts that became payable to the Contractor under the provisions of the contract were considerably more than the principal sum. The latter as already stated was $609,110.00 whereas respondents have received as the price of this work the sum of $916,723.57. (Vol. I, p. 3).

20

Reference has already been made to the alternative basis of respondents' action, the amount sued for being claimed either as the value of work done but not provided for in the contract *or* alternatively, as damages due by reason of erroneous and deceptive information alleged to have been supplied to the Contractor. (Vol. I, p. 3).

It must be noted at once that the conclusions contain no prayer for resiliation of the contract on the ground of fraud or for any other reason, and appellant respectfully submits that as there is a valid subsisting contract which respondents have not repudiated and could not repudiate, no justification can possibly be found for maintaining respondents' action on the basis of a quantum meruit, and that the alternative claim by way of damages is equally unsound and could only be invoked in the exceptional case of fraud, which the evidence fails completely to substantiate.

30

The contract not being attacked, it stands as a whole and is indivisible. If respondents are to be paid any of the various items included in their demand, they must prove that they are payable under the terms of the contract, or that the amounts in question are due as damages for some breach, positive or negative, of some obligation or undertaking of appellant.

40

THE LAW GOVERNING GENERALLY BUILDING CONTRACTS OF THIS NATURE.

Before proceeding to examine in detail the various items of respondents' claim, appellant proposes to discuss the law governing generally building contracts of the nature of the contract in question in this case,

particularly as regards the claims advanced by respondents for additional compensation on the ground that the plans and specifications were inaccurate, erroneous and deceptive, and that the actual undertaking was one of different character and of much greater magnitude and expense than anticipated.

In dealing with claims of this nature our Courts have commonly 10 referred to English authorities, and for a brief and concise statement of this law appellant refers to the following citations from Halsbury, Laws of England (2nd Edition), Vol. III, viz:—

No. 334:— "Neither the building owner or employer, nor the person who has taken out the quantities, impliedly warrants the correctness of the bills of quantities. If supplied to the builder in the ordinary course they do not amount to anything more than a representation of a belief by the sender that they are accurate."

20

No. 324:— "If the building owner actually guarantees the accuracy of the bills of quantities, he is responsible to the builder for the consequences of any inaccuracy therein; but in the ordinary course of business the building owner or his architect merely forwards the bills of quantities to the builder or contractor for the purpose of a tender. In these circumstances, should the quantities be inaccurate, the employer will be under no liability to a contractor who has tendered, though the inaccuracy in the bills of quantities may have induced the contractor to tender at 30 an inadequate price to construct a complete work for a lump sum. And it makes no difference whether the bills of quantities are prepared by the architect or by an independent quantity surveyor."

No. 333:— "If the building owner or employer has made fraudulent representations as to the facts which have deceived the person tendering and caused him to make a disadvantageous tender, the builder or contractor who has had his tender accepted, on discovering the fraud, may rescind the contract, and, if ne- 40 cessary, bring an action for the purpose. But if he continues to act upon the contract after he has discovered the fraud, he will be held to have abandoned his right to have it rescinded. In such circumstances in an action for work and labour done he cannot recover more than the contract price.

"But, although the right to have the contract rescinded may have been lost, the builder may still have a right of action of tort for deceit against the building owner in addition to his right to recover the price.

"It makes no difference whether the building owner or employer has made the representations himself, or whether they were made with his knowledge or privity by an agent."

No. 638:— "An architect or engineer does not warrant to the builder or contractor the practicability of the plans, drawings and specifications prepared by him, or of the temporary means of construction indicated in the specifications. It is the duty of the contractor to investigate these matters for himself, and any usage for him to rely on the drawings or specifications is bad. If he does not inquire into the matter he runs the risk of not being able to carry out the work, and must take the consequences."

10

In the same sense Hudson on Building Contracts, 5th Edition, states at page 41:—

"There is no implied warranty to the builder of the correctness of estimates and calculations made by the architect under his employment by the building Owner. The architect does no more than state them to be his bona-fide calculations and it is for the contractor to check them or not at his risk."

20

It must be borne in mind when considering the above authorities that the contracts there referred to are fixed price contracts. The rule of law excluding any implied warranty even in contracts of that nature would obviously apply with much greater force to a contract such as that now in question, inasmuch as the quantities therein mentioned are only estimates for the purpose of arriving at a principal sum, with provision for such principal sum being increased or decreased according as these estimates should prove too low or too high.

30

Reference has already been made to the case of the Nova Scotia Construction Company vs Quebec Streams Commission. That case resembles the present one much more closely than any other that has been before our Courts, and the law as set out in that case is, it is submitted, clearly applicable to the present one.

40

The claim of the Nova Scotia Construction Company for additional compensation under a contract substantially of the same nature as that involved in this case came first before Honourable Mr. Justice Sevigny in the Superior Court at Quebec. His judgment is not reported, but appellant quotes as follows from the Superior Court judgment as printed in the Appeal Case, viz:—

"It goes without saying that a project of this kind required great precautions to be taken in order to ensure permanency and avoid such catastrophies as have happened elsewhere due to improper foundations and to defects. Before undertaking work of this kind, it is customary to make an examination of the premises, and formations of the soil; but such examination does not permit the person who lets the project to say with certainty that the contractor will meet with a safe and solid foundation at such a depth, that he will not discover any fault which may increase the difficulties of this work, that he will not find any obstacle resulting from underground waters. There are surprises of this nature not only in the construction of dams, but in many other structures which are to repose upon foundations absolutely safe in the ground.

"On account of the character of such projects, the unit price contract is generally adopted because such a contract protects the proprietor and the contractor as well from unforeseen risks." (Vol. I, p. 46)

"The plans disclosed indications which might lead one to consider that the conditions to be encountered would be about as described. But who could affirm that before having seen them? The Commission had not seen what was underground. To contend that it should have had that information goes to say that it would have made all the excavations and then said to the contractor for such works; my plans indicate the foundations precisely. The statute did not oblige it to take such precautions. Neither it nor the corporations which construct dams proceed in that manner. Plaintiff knew that. If it were unaware that conditions different to those indicated upon the plans might be met with, it could have easily learned that such was more the rule than the exception in projects of this kind, as experienced engineers in similar works testified at the trial." (Vol. I, p. 48).

The nature of the judgment of this Court (also unreported) will be apparent from the following extracts from the Notes of Chief Justice Lafontaine, as printed in the Case for the Supreme Court:—

"L'appelante commence par mettre de côté par sa seule volonté, le contrat intervenu entre les parties et fonde son action sur deux chefs d'action:—

1. *"Le coût réel des travaux"*...............

2. *"Des dommages*............... que l'appelante aurait subis dans l'exécution de son contrat par suite d'omissions et d'inexactitudes dans les

quantités mentionnées aux plans et devis qui aurait induit l'appelante en erreur et ont été la cause que le prix du contrat serait beaucoup trop bas. Aucun de ces deux chefs d'action ne peut être admis. (Vol. I, p. 59).

"Il serait vraiment étrange qu'un entrepreneur malheureux qui a demandé un prix que l'événement a démontré être insuffisant, pourrait mettre de côté un contrat malencontreux et réclamer le prix de ses travaux en vertu d'un prétendu quasi-contrat de quantum-meruit ou d'enrichissement injuste qui ne peuvent avoir aucune application dans l'espèce." (Vol. I, p. 62).

"La condition essentielle d'une réclamation en dommages est la seule faute qui peut être contractuelle ou délictuelle. Comme il s'agit ici de prétendues défectuosités dans les plans et devis, il faudrait pour qu'il y ait eu faute délictuelle supposer le dol ou la fraude de la part de la Commission, de ses officiers ou de ses employés. Or, rien de tel n'est alllégué." (Vol. I, p. 63).

"La faute contractuelle qui rendant passible de dommages-intérêts est le manquement d'une partie dans l'exécution d'un contrat. Dans un contrat d'entreprise, le débiteur c'est l'entrepreneur (l'appelante) tenu à l'exécution des travaux et qui peut y manquer de bien des manières. Quant au maître (l'intimée) sauf quelques droits accessoires de surveillance et de contrôle, son obligation est uniquement de payer le prix convenu. Aussi, ce n'est pas de cela dont l'appelante se plaint comme cause de dommages.

"Suivant l'appelante, les omissions et inexactitudes dans les plan et devis auraient vicié la formation du contrat, par une erreur de consentement. S'il en était ainsi, l'entrepreneur aurait eu une action en résiliation du contrat, à laquelle il n'a pas jugé à propos de recourir. Au contraire, l'appelante a laissé le contrat s'exécuter, le considérant ainsi absolument en existence et par une arrière-pensée, elle réclame de l'intimée des dommages consistant dans la différence entre les prix unitaires qui ont été convenus et le coût réel du contrat (Vol. I, pp. 63-64).

Mr. Justice Bond in the course of his notes says:—

"The conditions to be encountered could not be ascertained with certainty. In many places rivers and channels had to be unwatered before the nature of the bed could be definitely ascertained. The contract required the foundations to be carried to solid rock, and the elevations to be found on the various plans could not be relied upon as being conclusive in this respect." (Vol. I, pp. 84-85).

On appeal to the Supreme Court of Canada, the judgment of the Court of King's Bench (Appeal Side) was unanimously confirmed. See (1933) S.C.R. 220.

In rendering the judgment of the majority of the Court, Cannon J. stated:—

10 "Can a quantum meruit be recovered in this case? The contract would first have to be set aside either by mutual consent of the parties or by a judgment."....(p. 222).

"In the present case, the appellant asked for an extension of time, as provided in the contract, to complete the works, which was granted; but never at any time did elect to have the contract cancelled for the error alleged in the declaration, and the action itself does not pray for such cancellation by the Court. On the contrary, appellant elected to treat the contract as subsisting, claiming that it 20 executed it in its entirety and cannot and does not now ask to avoid it. Art. 1000 C.C. Error, fraud and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them"....(pp. 222-223).

"What I have said disposes, in my opinion, of any attempt to recover for the alleged tort, under 1053 of the Code, because the information that the appellant says it relied upon was, in its view, grossly inaccurate and misleading. GRANT v. THE QUEEN (20 Can. S. C. R. 297), under circumstances more favourable to the pe- 30 titioner, was decided in favour of the Crown. It should have consulted an experienced engineer to prepare a well considered tender and understood that the honest belief and hope of the Respondent's Engineer did not amount to a warranty as to plans and quantities; forsooth, it could have found that out by reading, with enough attention to understand them, the specifications and standard form of contract placed at its disposal."........... (p. 224).

"We agree with the arguments and conclusions contained in the very able and complete judgment of the learned trial judge and 40 the clear cut exposition of the law of contract of the Province of Quebec of the ex-Chief Justice Lafontaine and we concur when he says: "un principe primordial doit dominer tout le litige. C'est celui de la sécurité des contrats que les tribunaux ont pour mission de maintenir, et non pas de refaire pour venir en aide à un contractant malheureux." (p. 225).

It may be convenient to deal here with the considerations mentioned in the judgment on the question of the meaning and effect of the con-

tract generally as distinct from the special treatment by the judgment of the various items claimed.

This general discussion is at Vol VI, pp. 1249, 1250 and 1251.

The trial Judge first makes three points:—

1. That this is not a contract "à forfait" to which Article 1690 C.C. applies; 10

2. That the specifications form part of the contract, and

3. That the specifications contain a clause which is quoted in part and which appears at Vol. VI, p. 1106, line 20.

From these three points and other clauses of the contract, he infers that neither party was fully aware of the magnitude of the undertaking or of the difficulties to be encountered, but that the intention of the parties was that the contractor would complete the work and the owner would pay for it. 20

Leaving aside for the moment the other clauses of the contract, appellant fails to understand how either of the three considerations specially mentioned by the Trial Judge in any way lend support to those conclusions.

Appellant does not rely on Article 1690 C.C. It relies on the terms of the contract. 30

Appellant admits that the specifications form part of the contract and relies on them.

The clause incompletely quoted alone requires to be discussed.

It is to be found in the second section of the specifications dealing with materials.

It reads as follows:— 40

"It is the intention of these specifications to secure thoroughly first-class construction in both material and labour for each of the classes included herein without working an undue hardship on the Contractor. The omission of any clause necessary to obtain the fulfilment of the intention and purposes of the specifications shall not preclude the Engineer from requiring any such omitted necessary requirements. Any work condemned by the Engineer due to imperfect workmanship or materials shall be replaced by the Contractor at his own expense." (Vol. VI, p. 1106)

All that it says, if the middle phrase which has no bearing on this question is omitted, is that the requirement that material and workmanship be first class shall not be enforced so as to work undue hardship on the contractor but that any work condemned by the Engineer due to imperfect workmanship or materials must be replaced by the contractor.

This, in the first place, deals only with the quality of the work and
10 materials and nothing in this case turns on that.

It clearly makes the Engineer the final judge on these questions, as is quite natural. The "undue hardship" qualification of the "first class construction" rule is merely for his guidance.

Other clauses throughout the specifications and the contract clearly show that in these matters he is the final judge.

(See particularly pp. 1086, 1095, 1096, 1100, 1102 and 1104).

20

There is no appeal to the Court from his decision. That question is even excluded from the arbitration clause, p. 1096.

The Engineer is not an employee of the owner. He is the Government Engineer.

The clause has therefore no bearing on the case and specially in no way supports the suggestion that the parties were not fully aware of what the work would be but intended that it should be all done and paid for.

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As to the other clauses referred to generally by the Trial Judge, as they are not mentioned, it is difficult to deal with them.

However, the extracts from the contract quoted in this factum show conclusively that whether the parties were or were not aware of the magnitude or the difficulties of the work, it was understood that the work would be fully performed and that it would be paid for, but that it would be paid for as and only as in the contract provided, namely:

40

1. A lump sum;
2. Unit prices for increased or decreased quantities;
3. Cost and a percentage for extra work performed by virtue of a written authorization of the Engineer.

If the paragraph of the judgment, at line 12, page 1250, is completed by adding the words "as provided in the contract" the "Considerant" is undisputable, but the action should have been dismissed.

If the words to be added are "otherwise than as in the contract provided", there is no warrant in the judgment, in the contract or in law for such a proposition.

An owner can only be bound to pay because he agreed to pay or because he caused damages by his fault.

If the words remain as they are, they are meaningless. 10

The whole question is: On what basis should the work be paid for? The contract basis or another basis?

Part of the arbitration clause is next relied on. From it a first inference is drawn to the effect that each party had the right to believe that the other one was intending to carry out the agreement as made.

That is admitted, and whether either party intended or not is immaterial, either party was bound to do so. 20

The other inference is that this clause tends to destroy the argument that respondent should have ceased work and sued to set aside the contract.

Appellant fails to understand that inference.

In view of the arbitration clause and the state of our law, either party could ask for arbitration on the matters mentioned in the arbitration clause and the other party had the choice to agree to arbitration or to insist 30 on going before the Courts.

That the arbitration clause is not enforceable in our law, is, it is submitted, a well settled proposition.

The point need not, however, be discussed because there is no attempt here to enforce the arbitration clause.

The question also whether or not the differences now submitted to the Court fell under the arbitration clause is, for the same reasons, of no 40 importance now.

It is, however, submitted that, whether the matter was before the Court or before arbitration, neither of them could change or add to the contract.

They could only construe it and apply it to the law as it is and the facts as found.

The argument of appellant to which the trial judge refers here was that if the owner or the Engineer should call upon the contractor to do some work which the latter thought he was not bound to do under the contract and would not give him an extra order or a special contract, his only remedy was to refuse to do that work.

If he did it, when warned that he was called upon to do it for the
10 contract price, he cannot find a basis legal or contractual to claim anything but the contract price.

He holds no agreement save for the contract price and he cannot claim damages as "volenti non fit injuria."

A discussion about arbitration between the contractor and the Resident Engineer in respect of a particular claim and from which nothing came, is also referred to.

20 Appellant fails to see how such an abortive discussion with someone without authority who mentioned the possibility of the protests of the contractor against his decision being referred to arbitration can have any bearing on the case, particularly on this question of the right of the contractor to do the work he claimed he was not bound to do, when ordered to do it as part of the contract, and afterwards claim on a quantum meruit.

The general propositions of appellant may be summarized as follows:—

30 It entered into a contract according to which a certain work had to be performed by the contractor to the satisfaction of the Government Engineer for a certain consideration.

There never was any other contract whatever.

Appellant is, therefore, under no contractual obligation whatever except for what it has thus promised to pay, and, except in respect of one claim (No. 11), it is not denied that it has fully discharged that obligation.
40

It can otherwise owe money to respondent only if it or its duly authorized representative has committed a fault which has caused damage to respondent.

If respondent during the course of the work came to the conclusion that, for any reason whatever, the work that it was asked to perform or that it had to perform to complete the construction was not what it had agreed to do for the consideration mentioned, as if the Engineer did not give an extra order or the owner give a special contract, it could do nothing but refuse to proceed.

The learned Trial Judge distinguished the Nova Scotia case (pp. 1253-1254) on the ground that the contract in that case contained a special clause to the effect that the contractor relied solely on his own knowledge of the character and topography of the country etc, and not on any information given or supplied him by the owner. It is quite true that the contract in the Nova Scotia case did contain such a clause and that it is not found in the present case. Appellant submits, however, that the clause in question is only a statement of the general law, as appears from the authorities cited above, and really added nothing to the contract. It is quite common in drafting a contract to insert *ex abundante cautela* clauses stating in part the general law, to avoid any doubt as to what such law is. The fact that the parties to the present contract did not follow such a course should not be construed as meaning that they intended to waive by implication the law governing such contracts. Moreover, a careful reading of the judgment of this Court in the Nova Scotia case, and the judgment of the Supreme Court confirming the same, will show that the presence of the clause in question was merely an additional reason for arriving at the judgments which were rendered, and that these judgments would have been the same regardless of this clause.

CLAIM 1 — HARDPAN EXCAVATION.

Amount claimed $21,601.45 — Amount allowed $13,919.45

References

Declaration — pars. 7 to 11 — Vol. I — pp. 3-4.
Particulars — par. (b) — Vol. 1 — p. 20.
Plea — par. 6 — Vol. I — pp. 23-24.
Answer — par. 5 — Vol. I — p. 38.
Contract — (Vol. VI — pp. 1090, 1097, 1098).
Specifications — Section III — Vol. VI pp. 1112-1113.
Correspondence — (in order of date)

P21 — Vol. VI, p. 1068
P28 — " " p. 1069
P3 — " " p. 1080
D1 — " " p. 1081
P29 — " " p. 1083
P30 — " " p. 1084

Judgment — Vol. VI, pp. 1251-1252

This claim relates to the excavation of a by-pass for the purpose of diverting the flow of the river from the main channel during the progress of the work. The contract plan B-2571 (Exhibit P-2, Volume of Plans) indicated the proposed location of this by-pass across a point of land on the north or east side of the River. This point can readily be seen on the photograph Exhibit D-13 (Volume of Photographs) which shows a derrick with steam-engine at work on the by-pass.

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As the dam when completed would extend onto the north shore of the river beyond the point where the by-pass was to be excavated, it follows that part of this by-pass would be within the line of dam. This portion of the excavation would, therefore, have been necessary even if some other method of handling the flow of the river had been adopted. The remainder of the excavation in the by-pass, outside the line of dam, was required only for the purpose of the by-pass. The photograph Exhibit D-14 (Volume of Photographs) shows the by-pass with the water flowing through the openings in the dam which had not yet been closed.

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The Specifications, Section III, provided as follows:—

> "Should it be considered advisable to excavate a channel as indicated on Drawing No. B/2571 to by-pass the flow of the river during the time construction work is in progress in the main channel of the river, thus reducing the amount of cofferdam work required, the contractor shall perform all such excavation and other work directly involved at his own expense and cost, except for that part of the excavation which would be required for the dam if the
> 30 channel was not excavated." (Vol. VI, pp. 1112-1113).

The provisions of the contract itself as already stated provided that the contract estimates did not include any additional excavation which the contractor might choose or be required to do for by-passing or handling the flow of the river during the construction of the dam, all of which was to be performed and furnished by the contractor as a part of the work for which the principal sum was to be the compensation.

The contract contained estimates of both the earth and ledge excavation in the different sections of the work (Vol. VI, p. 1089) and unit
40 prices were also specified to be used in case these contract estimates proved to be either above or below the actual quantities (Vol. VI, pp. 1097-1098).

Respondents allege that a portion of the excavation in the by-pass within the line of dam, for which they were paid at the rate provided for earth excavation ($1.23 per cu. yd.) was not earth but "hardpan", which they say is in no way similar to earth excavation and is invariably recognized as in a class by itself. For this they claim two-thirds of the rock

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price namely $2.90 per cu. yd., an arbitrary figure not found in the list of unit prices. They alleged further that the excavation in the by-pass outside the line of dam was also in part hardpan and additional compensation for this excavation was claimed in the Superior Court. By the judgment of that Court, however, respondents were allowed additional compensation only for the so-called "hardpan" excavation within the line of dam, and the claim for similar compensation for such excavation elsewhere in the by-pass was disallowed and is not in issue on the present appeal. 10

The judgment states that only two classes of excavation are provided for by the contract, earth and rock; that in fact a considerable quantity of hard-pan had to be excavated, which cost more than earth excavation; that if respondents were obliged to meet this extra expense on account of something unforeseen, an undue hardship would be imposed on them. This is a reference to the clause in Section II of the Specifications already mentioned, which relates altogether to the quality of materials and labour to be employed and seems to have no application 20 whatsoever to the cost or nature of the excavation that might be encountered.

The judgment finds that "hardpan" excavation in that portion of the by-pass within the line of dam amounted to 8,335 cu. yds., for which respondents were allowed $2.90 per cu. yd. instead of the $1.23 which they had already received. This additional allowance of $1.67 per cu. yd. amounted to $13,919.45, the sum awarded respondents under this item.

Previous to the signing of the contract, while the Bishop Company 30 were considering their tender, D. W. O'Shea, afterwards Resident Engineer for appellant, accompanied Mr. Bishop and one of his engineers McEwen on a visit to the site. (Vol. I, pp. 56-57; 171-172; Vol. III, pp. 499-500). They saw there the location of five test pits that had been dug in the proposed by-pass area, and which are indicated by red circles on the Plan B/2444 (Exhibit P-2). On this occasion Mr. O'Shea informed these parties in answer to their inquiries that the test-pits had disclosed an overlying burden of loam and sand to a varying depth of five to eight feet, and then gravel and occasional boulders right down to the depth of the pits. (Vol. III, p. 499). Respondents have suggested that Mr. O'Shea 40 deliberately misrepresented on this occasion the character of the excavation that was met with in these test-pits. Any such suggestion was, however, completely disproved by the evidence of Messrs. Bergeron and Larocque, both of whom actually worked at the digging of the test-pits in the by-pass. These witnesses corroborated Mr. O'Shea in every particular as to the nature of the excavation actually met with in these test-pits. (Vol. IV, pp. 731-733; 737-739). Further corroboration is given by Mr. Kenny (Vol. V, pp. 918-919).

Moreover, the Trial Judge has found that in fact there was no misrepresentation and that appellant's Engineer disclosed to respondent exactly what the test-pits indicated. (Vol. VI, p. 1252 3rd paragraph).

It is submitted that, having fairly disclosed to respondent Bishop, in answer to inquiries by him, the nature of the excavation as shown by the test-pits, appellant was under no further obligation. If the general
10 character of the excavation in the by-pass in any way differed from what these tests-pits showed, the risk was on the contractor. If he thought a sufficient number of test-pits had not been dug, or that they had not been carried deep enough, he was at liberty to make further explorations himself. The plan shows the depth of each pit.

Under the terms of the contract respondent Bishop was entitled to additional compensation, at the unit prices specified, only in case the estimated quantity of either earth or rock excavation exceeded the contract estimates, due to changes of design or depth of foundation. (Vol. VI, p.
20 1097). Respondents have in fact been paid on this basis, but now seek to obtain further compensation apart from and beyond the contract, on the ground that part of the excavation, although not rock, was more difficult to handle than they expected. This is an attempt to be paid on a basis of *quantum meruit* for carrying out a necessary part of the work, which respondent Bishop by the contract had undertaken to do for a certain price.

Unless respondents can show that the material in question was improperly classified as earth when it should have been classified as rock, the only possible way of bringing this claim under the contract would be as an
30 extra. In order to claim for any work as an extra, however, a written order of the engineer was necessary and no such written order was ever obtained.

Unless the contract is rescinded for some cause for which contracts may be avoided under our Civil Code (which is not asked for) respondents cannot claim on any other basis than the contract. The contract provided for the construction of the dam for the principal sum alone, plus authorized extras, with the proviso that if the quantity of earth excavation or the quantity of rock excavation exceeded the estimates for either of the
40 reasons mentioned, additional compensation at the unit prices specified would be allowed. Whenever either of these classes of excavation ran over the estimates respondents received extra compensation in accordance with the contract. It is submitted respectfully that no further amount can be allowed. What respondents are really asking is that the Court should add a new clause to the contract providing a rate of $2.90 per cu. yd. for hardpan excavation.

Respondents' claim in this connection is based upon the allegation contained in paragraph 9 of the declaration that hardpan excavation "is in-

variably recognized as in a class by itself". It is suggested that the evidence does not justify any such assertion. On the contrary we have heard the greatest possible difference of opinion as to what really constitutes hardpan. No one suggested that it is rock — for one it is earth that requires picking — for another it is earth that requires blasting — for another it is something very hard like a macadamized road, etc. (Vol. I, p. 141; Vol. II, pp. 223, 388; Vol. III, pp. 426, 724-725, 865-866; Vol. V, pp. 908, 1020-1021, 1026, 1031, 1035). 10

One thing at least clearly appears, namely, that hardpan is not rock. It is defined in the Imperial Dictionary, Blackie (1908) Vol. II p. 465 as "the hard stratum of *earth* that lies below the soil." Webster, (Edition 1911) p. 982 defines it as "any *earth* not popularly recognized as rock through which it is hard to dig or to make excavation of any sort". The word in its common acceptance would appear from these definitions to constitute "EARTH" and therefore under the contract should be paid for at the earth price.

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Respondents seek consolation by suggesting that Mr. Ferguson promised arbitration. In the first place Mr Ferguson had no authority to make any such promise and in the second place he did not do so — all he did was to transmit Bishop's demand, to appellant (Exhibit P30, Vol. VI, p. 1084). This can have no possible bearing upon the outcome of the present litigation.

This excavation was carried out during the winter of 1928-29, the contractor using for this purpose equipment known as an "orange-peel bucket". The evidence establishes that the soil in the by-pass was naturally wet 30 (as witness the fact that the test-pits when being dug filled with water after a depth of about 8 feet Vol. II pp. 422-423; Vol. IV, pp. 732, 739), and when frozen would naturally be all the harder for this reason. The orange-peel, digging from the top, was always working in frozen material. Mr. Chadwick, who has had a very wide experience in construction work, has stated that in his opinion an orange-peel would not handle frozen material without dynamite (Vol. IV, p. 849). Mr. Boyd has testified to the same effect (Vol. IV, p. 770). Mention of this is made, as one of respondent's complaints is that they had to dynamite this material.

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It was not to be expected that the whole of this excavation, which ran to a very considerable quantity, would be of the same sort. At one spot, where Professor Mailhot, a witness for respondents, was taken, a small quantity of very hard material was undoubtedly met with. Mr. MacIntosh estimates the quantity of this at 50 cu. yds. (Vol. III, pp. 624-625). It is significant that Professor Mailhot was only taken to this one spot. (Vol. I, p. 143).

The Trial Judge has accepted as correct respondents' estimate as to the amount of this so-called "hardpan" excavation within the line of dam. According to this estimate, which is based on the evidence of Mr. Reiffenstein, the quantity of this material was 8,335 cubic yards. It may be pointed out, however, that Reiffenstein himself was forced to admit on cross-examination that his calculations were "arbitrary and not accurate." (Vol. II, p. 395).

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Respondents have contended that the presence in the contract of an arbitration clause lends support in some way to the claim they now advance. It is apparently suggested that the arbitrators in their discretion had power to compel appellant to pay more than the contract specified and that because no arbitration was held, the Court now has the same power. It is respectfully submitted that this contention is quite unfounded. The question as to whether respondents are or are not entitled to an increased allowance in respect of the so-called hardpan excavation is not solved or made easier of solution by reason of the fact that the contract contained 20 a clause whereby the parties agreed to submit certain disputes to arbitration. We will deal with this matter of arbitration later on in this Factum.

Respondents in the Superior Court cited three cases interpreting Article 1690 of the Civil Code. (Quinlan vs Redmond, 39 S. C. 145; Bernier vs Les Débardeurs etc. 50 S. C. 337; and Legault vs Lallemand, 4 R. J. 245). Appellant believes that Article 1690 has no bearing upon the present contract, in view of the precise provisions in the contract dealing with extra work and payment therefor. Mr. Justice Bond in his Notes of Judgment in Appeal in the Nova Scotia case states that a contract of this nature 30 with a series of unit prices is not a contract *à forfait* to which that Article applies. With this view appellant is quite in agreement.

Respondents also referred to the case of Wilson vs City of Hull, 48 S. C. 238. The City of Hull case was also mentioned and discussed in the Nova Scotia case, and it was held not to be applicable. See Notes of Lafontaine C. J. The facts in the Hull case were quite different, as appears from the following quotation from the judgment of Archibald C. J.:—

"There can be no question in this case that when the plain- 40 tiff contracted he contracted in respect to earth excavation. There is also no question that the defendant knew that the excavation was in rock for a large part. The proof, I think, sufficiently establishes that, as the plans were made, any contractor would judge that they indicated earth excavation. In any event, there is no question that the contractor did consider that the excavation was earth. Neither can there be any question that the defendant knew that the contractor was contracting in respect to earth excavation. The estimate of the defendant for the work was greatly in excess of the

plaintiff's contract. The defendant knew that the plaintiff valued rock excavation at $3. and at $3 for rock excavation the price of plaintiff's tender would have been greatly exceeded." (p. 240).

Respondents in their written argument produced in the Court below rested their claim fairly and squarely on the contract. The action must therefore, be treated as one *ex contractu.* This being so, under the rule of law laid down by the Supreme Court in the Nova Scotia case, (1933) S. C. R. 220, respondents are not entitled to payment on any other basis than that provided for in the contract.

The only reason given by the learned Trial Judge for condemning appellant in connection with this hardpan claim is the "undue hardship" clause in the specifications, which has already been dealt with. It may, therefore, be fairly assumed that but for the presence of this clause the claim in respect of hardpan would have been rejected. The learned Trial Judge, however, apparently believed that this clause was sufficient authority for either an arbitrator or the Court to order payment of moneys that were not due under the terms of the contract.

The authorities already cited in this Factum dispose effectually, it is submitted, of any suggestion that the amount sued for could be awarded *ex delicto,* in the absence of fraud on the part of appellant, which the judgment of the Superior Court, in disposing of this claim, expressly negatives. (p. 1252).

CLAIM 2 — HANDLING OF APPELLANT'S LOGS.

Amount claimed $4,103.72 — Amount allowed $2,995.42

References

Declaration	— pars. 12-14	— Vol. I pp. 4-5.	
Plea	— par. 7	— Vol. I pp. 24-25.	
Specifications	— Section I Vol. VI, p. 1103.		
Correspondence	— (in order of date)		
	P4	—	Vol. VI p. 1133.
	D2	—	" " p. 1136.
	P5	—	" " p. 1137.
	P31	—	" " p. 1139.
	P32	—	" " p. 1140.
	P33	—	" " p. 1141.
	P34	—	" " p. 1141.
	P35	—	" " p. 1142.
	P36	—	" " p. 1144.
Judgment		—	Vol. VI pp. 1252-1253.

As provision had to be made for the passing of logs coming down the Lievre River during the summer of 1929 while the work was in progress, the specifications contained the following provision:—

"He (the contractor) shall so construct the cofferdams and arrange and manage the construction of the works as a whole that logs of the owner, or of others, may be driven by the site of the dam
10 during the driving season of 1929, and shall provide such opportunities for the passing of logs as the construction work may render necessary." (Vol. VI, p. 1103).

The item of respondents' claim now under consideration is based on the following complaints:—

(a). That appellant neglected and refused to carry out the driving of logs past the site of the works, and

20 (b). That appellant failed to place the necessary booms to accomplish the drive. (Declaration par. 13, vol. I, pp. 4-5).

Respondents for these reasons claimed the cost of a boom supplied by respondent Bishop and alleged expense of handling logs at certain times, plus 37% of such outlay to cover overhead and profit.

By the judgment the actual outlay claimed by respondents, viz, $2,995.42 was allowed. The additional 37% claimed for profit and overhead etc was rejected.

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Respondent Bishop in this connection assumed two obligations:

(1). To so construct the cofferdams and arrange and manage the construction of the works as a whole that logs of the owner, or of others might be driven by the site of the dam during the driving season of 1929, and

(2). To provide such opportunities for the passing of the logs as the construction work might render necessary.

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It is to be noted that appellant assumed no contractual obligations whatsoever towards respondent in respect of driving logs.

It is submitted that the first of the two obligations of respondent above referred to compelled it either to leave an opening in the works of sufficient width for the logs to pass, or else to excavate a by-pass sufficient for that purpose, and that the second of these two obligations can only mean that respondent obligated itself to provide whatever booms or other equipment were necessary to guide the logs into the opening in the dam or by-pass as the case might be.

The evidence shows that when the first of the cofferdam cribs (No. 1 on plan P37) was placed in the river on or about June 15th, 1929, respondent itself constructed a boom out of logs taken from the river and stretched it from the north shore of the river to the outer point of this first crib, for the purpose of preventing the logs from piling against the crib. This would be an indication that respondent at that time expected itself to provide whatever protection the works required, as no request was made to appellant to do so. This boom so placed by respondent did not properly fulfill the object for which it was intended. It was not heavy enough also it was too short, and it was placed too much across the current. The result was that the logs got under it. Mr. Coyle, appellant's Superintendent on the river, warned the Bishop Company's employees of this when the boom was first placed. (Vol. III, pp. 625-626; Vol. IV, pp. 839-840).

Respondent did not provide booms of any kind to keep the logs away from cribs 2 and 3 and never requested appellant to do so, nor to hold back the logs while these two cribs were being placed. (Vol. III, pp. 626-627; Vol. IV, pp. 833, 840-842). These three cribs (Nos 1, 2 and 3) were all on the north side of the river, and the logs were then passing down the channel on the south side where crib No. 4 was placed later (see Plan P-37). No logs had been run through the by-pass as yet. As no boom was provided to protect cribs 2 and 3 some logs naturally piled up against them. Surely if respondent was inconvenienced in any way on this account it had no one but itself to blame.

Mr. T. F. Kenny, an official of the appellant Company, corroborated by Mr. Coyle and Mr. O'Shea, has testified that on July 25th, 1929, he told Mr. Lindskog, Respondent's Superintendent that appellant would co-operate with him by lending booms when requested, or by holding back the logs when requested. (Vol. III, p. 529; Vol. IV, p. 845; Vol. V, pp. 922-923). Shortly after this, on or about August 2nd, appellant was requested to hold back the logs while Crib No. 4 was being placed. (Vol. IV, p. 841). This was the only request of that nature that was made. To carry out this request, appellant at its own expense stretched a boom across the river half a mile above the dam and held back the logs until respondent sent word to let the logs come. (Vol. III, p. 628; Vol. IV, p. 841). During the time that the logs were held up appellant loaned respondent a boom at respondent's request, which was stretched across the river immediately above the dam to divert the logs into the by-pass. (Vol. IV, pp. 841-842).

Obviously a proper boom would have kept the logs back and prevented them from interfering with the cofferdam work. This assertion cannot be questioned, because the diversion of logs to the by-pass was carried out without difficulty by means of a boom, as already explained. Therefore, in view of the great stress laid by respondents on interference from logs, the question of who was really responsible for placing the boom be-

comes one of great importance. As already stated, appellant under the contract assumed no express obligation in this respect. If any such obligation existed, it must be assumed, and it is respectfully submitted that there is nothing in the contract to justify any such assumption. However, even if the obligation did rest on appellant to provide this boom, which is not admitted, surely appellant could not have been expected to do this without being asked. When respondent's work reached the stage where it required
10 protection, surely respondent should have so notified appellant. Instead of that, what does respondent do? When the first crib was completed about June 15th, 1929, respondent proceeded to put it in position without any notice to appellant and without any request that the logs be held back. Moreover, as already explained, respondent itself made up a boom out of logs taken from the river and located it with a view of protecting this crib. If, as it turned out, this boom was too light and did not properly fulfill the function for which it was intended, surely no blame can be attributed to appellant.

The report of respondent's Superintendent Lindskog, dated June
20 17th, copy of which was forwarded to appellant by letter of June 20th (Exhibit P-4, Vol. VI, pp. 1133-1134) states that he (Lindskog) "is afraid of what will happen when the river is turned into the by-pass" and he suggested that a feeding-gap should be installed at the lower end of Lac des Sables, about five miles above the work. There is no suggestion in this report, or in respondent's letter to appellant enclosing same, that appellant was expected to provide booms in the river to protect the cofferdam cribs and to direct the logs down that part of the channel that was still free and unobstructed. On the contrary, respondent was proceeding at
30 this time to do this work itself, without reference to appellant. Respondents' vouchers under Claim 2 contain an item in June 1929 for material, amounting to $90.86. (Vol. VI, p. 1177). Reference to Mr Griffiths' evidence shows that this expenditure, all or practically all of which was for booms, was all previous to the 15th of June. (Vol. III, pp. 477-479).

Respondents' witness Clarke, who appears to have had considerable experience in hydro-electric construction work, when asked whether he had had any experience with logs becoming enmeshed in the faces of cofferdam cribs, replied:—

40 "No, I never had. We have worked on a good many rivers where there were a great many logs, but there was always some arrangement made to keep them back when we were driving the coffers, or to take them around in some other way." (Vol. V, p. 1033).

If it was a dangerous and unusual practice to attempt to build a cofferdam while logs were passing, then respondent should have diverted the logs to the by-pass before the cofferdam work was commenced in the river, or else arranged with appellant to hold back the logs earlier than it did.

The logs did in fact jam in the by-pass on August 21st, as Lindskog had anticipated. This jam did not, however, inconvenience respondent in the prosecution of the work, as there was no work in progress in the by-

pass at that time. (Vol. II, p. 305). Moreover, this jam was broken up by appellant's men under Coyle's direction, except that the Bishop Company loaned the services of a powder man for half a day, as appellant did not wish to take the responsibility of dynamiting so close to respondent's work. (Vol. IV, pp. 843-844).

Appellant respectfully submits that the Water-Course Act invoked by respondents before the Superior Court (especially S. 44 providing that a person driving logs is responsible for the damage he may cause) has no application to the present circumstances, where a Company such as appellant brings in a contractor to do certain work and provides by the contract for the passing of logs during the period of construction.

The decision of the learned Trial Judge to allow this claim has been influenced apparently by the two letters from appellant to respondent, P32 and P34 (Vol. VI, pp. 1140-1141), the judgment stating that the position taken by appellant in these two letters is untenable. By these letters appellant notified respondent that respondent would be held liable for any additional expense incurred by appellant in driving its logs during the season of 1929. No such claim was ever formulated by appellant and even if the contentions of appellant as contained in these two letters are based on a misunderstanding of the effect of the provisions of the specifications above quoted, it is hard to see what effect this would have on the claim now under consideration in view of the circumstances above set forth.

CLAIM 3 — INCREASED COST OF COFFERDAMS & UNWATERING.

Amount claimed $148,857.15 — Amount allowed $117,025.22.

References

Declaration — pars. 15-20 — Vol. I, pp. 5-7
Particulars — pars. (d) & (e) — " " pp. 20-21.
Plea — par. 8 — " " pp. 25-27.
Answer — pars. 12-19 — " " p. 39.
Contract — — " VI, p. 1090.
Specifications — Section III Vol. VI, pp. 1112-1113.
Correspondence — (in order of date)

P41 — Vol. VI — p. 1145.
P6 — " " — p. 1146.
P7 — " " — p. 1147.
P42 — " " — p. 1150.
D3 — " " — p. 1151.
P44 — " " — p. 1154.
P43 — " " — p. 1155.
P45 — " " — p. 1158.
P46 — " " — p. 1159.
P47 — " " — p. 1160.
P48 — " " — p. 1174.

Judgment — Vol. VI. pp. 1253-1255.

This is the most important of the various claims advanced by respondents and is based upon the allegation that whereas the contract plans and certain information alleged to have been communicated to respondent Bishop showed the river bottom at the location of the cofferdams as bare ledge rock, there was in fact an overburden several feet in depth composed of boulders, gravel and other similar material, which caused the unwatering operations to be much more expensive than anticipated, and that
10 this work was made still more difficult and expensive by the large numbers of logs coming down the river.

To this appellant pleaded that the contract plans indicated merely the elevations at which it was expected to find ledge rock at certain points on the river bottom, in accordance with the best information which appellant had been able to obtain by means of soundings, and that when the river channel was unwatered such elevations proved to be substantially correct; that the trouble and difficulty encountered by respondent in unwatering the site was due to the manner in which the cofferdams were constructed;
20 and that appellant at all times brought down its logs in a reasonable and proper manner so as to inconveniencerespondent to the least possible extent.

Appellant had already pleaded generally that any information furnished respondent apart from that contained in the contract, plans and specifications was supplied in answer to inquiries by respondent and was the best information that the appellant had respecting the matters in question; that such information had been obtained by soundings, as was well known to respondent, and was at best only an indication in a general way
30 of the conditions that might exist; that same was given in good faith and without intent to deceive, but that respondent was not entitled to rely upon any information so given as constituting any representation or warranty, and that it rested with respondent to determine or assume the character and nature of the work.

Respondents allege that the actual cost of the cofferdams and unwatering operations was $197,907.35, on which credit is given appellant for $49,050.20 stated to have been received on account. (Vol. I, p. 7). As a matter of fact these so-called payments on account were merely pro-
40 gress payments based upon the assumption required by the contract to be made that cofferdam work and excavation of by-pass channel outside the line of dam represented 10.7% of the principal sum. (Vol. VI, p. 1099). Respondents have proceeded throughout on the assumption that the principal sum is divisible between the different branches of the work in the proportions stated in the contract for calculating monthly progress payments, and that respondents are entitled to claim on a *quantum meruit* basis for each separate branch of the work upon which they claim to have suffered a loss. The appellant has always contested the legality of this basis (See Plea — par. 25, Vol. I, pp. 36-37).

The judgment of the Superior Court allows respondents $117,075.22. This represents the actual cost of the work as alleged by respondents, with an addition of 15% for overhead instead of 37% as claimed, after deducting the payment for which credit is given. (Declaration, par. 19, Vol. I, p. 7; Judgment, Vol. VI, p. 1255). With regard to the 15% allowed for overhead, the judgment states:—

> "This. however, cannot be considered work done under the contract, but damages. This being the case, plaintiff is not entitled to the 37% profit provided by the contract, but *it is admitted at the argument that in this event an allowance of* 15% *for overhead would be fair.*" (Vol. VI, p. 1255). 10

Appellant submits with respect that the learned Trial Judge is in error in stating that appellant conceded 15% for overhead. This is not correct. Appellant made no such admission.

The only indication as to the nature of the river bottom is to be found on the Plan B/2444 (Exhibit P-2, Volume of Plans). This plan purports to show the elevation of ledge rock at certain points on the bed of the river indicated on the plan by an elevation followed by the letter "L". In addition to this alleged representation on the contract plan, respondent in its action also relied upon certain information alleged to have been communicated verbally to respondent, namely:— 20

> "That the bottom of the river upon which the works were to be constructed was unobstructed ledge rock; that the character of the bed of the river being ledge would present no difficulties in unwatering or placing of cofferdams." (Vol. I, p. 20). 30

However, no evidence was offered by respondents in support of these alleged verbal representations.

In order to unwater the site two cofferdams were necessary, one above and one below the location of the dam. During the time the site was unwatered the flow of the river was diverted into the by-pass. Construction work on the upstream cofferdam was begun in March 1929, with the south abutment crib. The position of the abutment cribs, one on each bank, and of the five other cribs on the bed of the river is shown on the Plan P-37. Work was started during the same month on the north abutment crib and both these cribs were filled with rock from the excavation work then in progress. 40

The first crib to be placed in the bed of the river (No. 1 on Exhibit P-37) was built upstream, brought down by cables, and lowered into position next to the north abutment crib on June 14th. As logs were coming

down the river at this time, respondent constructed a log boom for the purpose of keeping the logs away from this crib. This boom did not function properly, however, for the reasons already explained, and logs got underneath and lodged against the crib. (Vol. III, p. 626). Crib No. 2 was also built upstream and was lowered into position on July 16th. This crib was not in line with the abutments, it was "upstream quite a bit". (Vol. III, p. 632). No. 3 Crib was placed on July 22nd, and it lodged in a dis-
10 torted shape as some of the tackle broke. (Vol. III, p. 633). The contractor made no provision to keep logs away from these cribs, and consequently some of them, as might be expected, lodged against the cribs already in position, while others went down the channel near the south shore when Crib No. 4 was afterwards placed. At this time the water had not yet been diverted to the by-pass.

On July 31st respondent's Superintendent Lindskog requested that the logs be held back, as he intended to place Crib No. 4, which would completely block the river channel. This request was promptly acted on by
20 appellant and no logs were allowed to come down the river until August 21st. During this period respondent borrowed from Coyle, appellant's River Superintendent, a boom which was placed across the river upstream of the cofferdam to deflect the logs into the by-pass.

On August 2nd Crib No. 4 was lowered into position, thus blocking the channel from one shore to the other. Following the placing of these cribs, sheeting consisting of wooden planks intended to form the face of the cofferdam, was placed in position, but without the aid of a diver, although the difficulty that was met with in placing this sheeting and the
30 position which it assumed would indicate obstructions on the bed of the river. This planking gradually assumed a slanting position, so that as it approached from each shore a decided "V" shape occurred (Vol. III, p. 636).

Following the placing of the sheeting, toe-filling was dumped into the river above the same. This consisted largely of broken rock. (Vol. III, p. 637). On or about September 13th the toe-filling was considered complete and pumping was begun, but it was soon evident that a considerable leakage existed in the vicinity of Cribs 1 and 3 and the north abut-
40 ment crib. In the latter part of September a diver was sent down for the first time.

For history of cofferdam operations see MacIntosh, Vol. III, pp. 625-643; Coyle, Vol. IV, pp. 839-842, also Lindskog, Vol. II, pp. 225-246 and Steele, Vol. II, pp. 323-328.

On September 26th Mr. Bishop wired to Mr. Ferguson in New York asking him to come up as soon as possible (Exhibit P41, Vol. VI, p. 1145). Mr. Ferguson came up and on October 2nd met Mr. Bishop on the work.

Following this interview, Mr. Bishop prepared a memorandum (Exhibit P7, Vol. VI, p. 1147) which he sent to Mr. Ferguson. This memorandum concluded with a list of the "instructions" which, according to Bishop, Ferguson had given. Upon receipt of this memorandum, Mr. Ferguson replied by letter (Exhibit D3, Vol. VI, p. 1151), taking exception to this memorandum and denying that any instructions or orders had been given by him. Mr. Ferguson stated that at Bishop's request, he had merely made suggestions as to what in his opinion should be done to overcome the diffi- 10 culty. (Vol. IV, pp. 690-691). It must be borne in mind that the cofferdams and unwatering were solely the contractor's responsibility. The contract plans did not indicate any required location for the cofferdams and the contractor was free to place them where he liked. Ferguson as Engineer had no authority to give orders or directions to the contractor as to these cofferdams.

During the month of October the contractor constructed another crib, not originally intended, shown on P37 as No. 5. Later steel sheet piling was placed on the north side of the river where the leakage was worst and 20 by the end of November the unwatering was completed, although the leakage was never altogether overcome.

Respondent seeks to trace the cause of its unwatering difficulties back to the alleged errors on the Plan B2444. The suggestion is that before entering into the contract a material fact known, or which should have been known to Mr. Ferguson, appellant's engineer (viz:—the presence of some overburden on the river bed above ledge rock) was not shown on this Plan. It appears from the evidence of Mr. Stratton, who made the preliminary investigation of conditions for Mr. Ferguson, that although this 30 plan did not disclose any overburden on the river bed at this place, some overburden nevertheless existed, when he made his soundings in 1927. Mr. Stratton explained that he was sent there to find the elevation of ledge rock and that he did so to the best of his ability, sometimes forcing his sounding rod through one or two feet of material overlying the rock. (Vol. III, pp. 587-590). It is submitted, however, that respondent has failed entirely to establish that the leakage which developed in the cofferdams can be attributed to this fact.

The only information disclosed by the Plan B-2444 (Exhibit P-2) 40 which could possibly have had any bearing on the cofferdam was the elevation of ledge rock on a line across the river approximately along the base of the cribs of the upper cofferdam. (Evidence of Bishop, Vol. I, pp. 127-129). These elevations, six in number, were given at points twenty feet apart on this one line, marked "Sta. 4 ... K". There was nothing on the plan to indicate that any borings had been taken, and, therefore, any person familiar with plans would know that they had been obtained by soundings. (Evidence of Lefebvre, Vol. V, p. 911). It seems clear from the evi-

dence of those witnesses who have had experience in building cofferdams that this meagre information was by no means sufficient to properly construct a cofferdam. (Vol. IV, pp. 672-673; 762-768; 850-855, Vol. V pp. 909-910).

Respondent's declaration in this connection can only be interpreted as an allegation that respondent Bishop, having been furnished with information sufficient to build the cofferdam went ahead and built it on the strength of this information which later proved to be incorrect. During the course of the respondents' evidence in chief, this stand was modified to the extent that it appeared respondents' Engineer Reiffenstein had himself taken soundings ten feet apart along four lines across the river (Vol. II, pp. 397-398) and Linskog the Superintendent states that the cribs were built from the information obtained by Reiffenstein. (Vol. II, p. 226).

Afterwards respondents' carpenter-foreman L'Heureux, who was actually in charge of the building and placing of the cofferdam cribs, took soundings himself over the whole area every foot or two. (Vol. V, p. 991). There can be no doubt, therefore, that respondents' employees explored the river bottom at the place where they decided to put their cofferdam much more carefully than appellant had pretended to. L'Heureux states that he found ledge over the whole area (Vol. V, p. 997) and Stratton can hardly be blamed for finding ledge every twenty feet, when L'Heureux found it every foot or two. Either respondent did not at the time rely on Stratton's work at all, as he now says he did, or else the soundings taken by his own officials confirmed the results of Stratton's work.

The appellant produced a considerable amount of evidence to show how a cofferdam should be built and what information it is necessary to obtain before commencing it. (Vol. III, pp. 514-517; Vol. IV, pp. 672-73; 762-768; 850-855; Vol. V, pp. 909-910). Briefly stated this evidence establishes that careful soundings are necessary of the bed of the river two or three feet apart and cribs are then built to conform to the river bottom. These cribs are placed in position and filled with rock to keep them from floating away. Then in front of these cribs and between them, sheeting is placed, the bottom of each piece being also shaped to fit the river bottom. This sheeting is placed in position with the aid of a diver, who verifies that each piece fits properly in its correct place. Then toe-fill, usually sand and gravel (Vol. IV, p. 857), is dumped in front of the sheeting to assist in making the cofferdam water-tight.

Attention is directed particularly to the evidence of Olivier Lefebvre, whose answer when asked if the indications on the Plan B-2444 were sufficient for the construction of a cofferdam, is as follows:—

"Ces renseignements sont indicateurs d'une façon générale de ce à quoi on peut s'attendre quant à la hauteur du lit de la rivière, mais je ne pense pas que personne ne s'aventure à construire un batardeau destiné à s'ajuster au lit de la rivière en se limitant aux renseignements fournis sur la ligne de sondage en question." (Vol. V, p. 909).

This evidence, however, became very much less important after respondent's witness L'Heureux gave his evidence in rebuttal. (Vol. V, pp. 978-1003, especially pp. 979-980; 982; 988; 990-991 and 997-998). This man was carpenter-foreman for respondent Bishop and was in direct charge of the building and placing of the cofferdam cribs and also the sheeting. He has testified that although he was furnished with the results of Mr. Reiffenstein's soundings, he went ahead on his own responsibility, and himself took careful soundings 2 or 3 feet apart over the whole area occupied by the cribs "to find out exactly how the bottom was" (Vol. V, p. 980, l. 1), and states that he found ledge rock. This is the only direct evidence as to what the nature of the river bed under the cofferdam was in 1929. It was not possible to tell where ledge rock actually was at the location of the upper cofferdam, even after the unwatering. (Evidence of Bishop, Vol. I, p. 129).

What now is the importance of the Plan B-2444? Respondents can hardly claim to have been deceived by something that they never relied upon or paid any attention to. L'Heureux, who built and placed the cribs and the sheeting, was given the results of Reiffenstein's soundings, but there is nothing to show that he ever heard of the Plan B-2444.

It is not for appellant to account for the leakage which developed in the cofferdam. The burden of proof is on respondents to establish what the cause of the leakage was and that this cause was attributable to appellant. Respondents have failed entirely to do this. The Court can do no more than guess as the real cause or causes. It is quite impossible on the evidence to assign a definite cause or reason. A number of possible explanations suggest themselves, any one of which might well have been sufficient to have caused the trouble, viz:—

(a) The sheeting was placed without a diver being employed. (Vol. II, p. 236).

(b) The sheeting though apparently resting on ledge was battered down by the use of a ram or wood log hammer. (Vol. V, pp. 984-985 and 997).

(c) The proximity of the rock spoil bank on the north shore, which may have permited the water to penetrate direct to the sheeting. (Vol. III, pp. 630-631; 643).

(d) The manner in which the sheeting met in the middle (V Shape). (Vol. IV, p. 857).

(e) The fact that No. 2 Crib occupied the place where No. 3 was intended to be. (Vol. II, p. 287; Vol. V, pp. 992-993).

Another point to be borne in mind is that the Plan B-2444 contained no information as to the nature of the river bed at the location where the sheeting and toe-filling were placed. The contour lines shown on the plan were merely sketched in between the soundings and do not represent the results of any actual survey. (Vol. III, p. 590). If the alleged overburden played any part in the leakage, it would seem likely that it must have been the overburden that was below the toe-fill and the sheeting, as the water was supposed to be stopped there.

Respondents attempted to show that Crib No. 3 was pushed down the river from its intended position by the logs. This story was clearly refuted by the evidence of MacIntosh and Bergeron, confirmed to some extent by Dubreuil. (Vol. III, pp. 633-634; Vol. IV, pp. 740-742; Vol. V, p. 893). Whether or not the material upon which the cribs actually rested was or was not leaky is really of no importance, in view of the fact that the cribs held. The cribs themselves were not intended to be water-tight. Whether or not there was any overburden under the cribs is really not important.

When we come to the areas where the overburden might be of some significance — under the sheet-piling or under the toe-fill—we find there is no representation on our plan as to what was there. It is not enough for respondent to prove that there was an overburden, he must prove that it was a leaky overburden, that we deceived him as to this fact, that this overburden was at some place where it might cause leakage, as for instance, under the sheeting or under the toe-fill. and that there was no other cause for the leakage. On all these matters which are vital, not only to this claim, but to many of the other claims involved in this action, respondent's evidence falls far short of making the proof required.

Respondent in the Court below when dealing with this claim devoted itself largely to an onslaught on Messrs. Ferguson and Stratton, which it is submitted is most unjust and entirely unwarranted by the evidence. Respondents would have the Court believe that as far back as 1927 when the first preliminary surveys were made, Mr. Ferguson had already evolved a sinister plan to deceive the contractor who would ultimately carry out this work and induce him to tender at an unreasonably low price. This suggestion seems to us utterly fantastic and we are confident that the Court will disregard it entirely.

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The Factum of Appellant Before the Court of King's Bench
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(Continued)

It cannot be disputed that the Plan B-2444 did not disclose the overburden, whatever it was, that Mr. Stratton found in making his investigation in 1927. In view of this, it is suggested that the really important points to be decided under this claim are whether or not respondent was entitled to assume, as it claims to have done, that the river bottom was bare ledge rock; whether respondent was in fact misled, as it claims, by any insufficiency of the plan in this respect and, if so, what part, if any, of the delay and expense in the completion of the cofferdam can be attributed to this cause. The evidence of l'Heureux has, it is submitted, destroyed in a few words all the elaborate attempts of respondents to trace the cause of their troubles to the fact that the plan in question showed no overburden at the location of the dam.

Another complaint of respondents to which they attribute in part the delay in unwatering the site is that appellant's logs coming down the river during June, July and August, 1930, impeded the progress of the work. It is alleged that these logs jammed against the main cofferdam seriously displacing portions of it, increasing the difficulty and volume of the work and making it impossible to place the necessary sheeting in the usual way. (Declaration par. 18, Vol. I, p. 6). This question has been dealt with fully in this factum under Claim 2, to which appellant now refers.

It will be remembered that only one request was made to appellant to hold back its logs. This was on or about August 2nd, and it was promptly complied with. (Vol. IV, p. 841). The suggestion that had been made by respondents' Superintendent on or about June 20th (Vol. VI, pp. 1133 and 1134) was that Appellant should construct a "feeding-gap" some miles above the dam. This would have involved an alteration in appellant's customary method of driving logs throughout the whole course of the work and particularly while the by-pass was open. This request was clearly unjustified and in any event referred to contemplated difficulties in the by-pass, and had no direct connection with the damage allegedly caused by the logs in the latter part of July.

Moreover, even if appellant was in any way responsible for the misplacing of the cribs or for logs being entangled in the cribs, the contractor knew of the trouble at the time and he should not have proceeded with the work until any possible danger from this cause had been removed. Respondent contends that logs remained under or around the cribs and later caused the leakage, although this has been disproved by its own witness l'Heureux, who was in charge of the building and placing of the cribs, and who stated that all the logs which stuck in the cribs were removed. (Vol. V. p. 997).

According to the learned Trial Judge "all the delay, trouble and expense are due to two things:—

"(a) The fact that instead of ledge *at the line on the ground where the dam was to be built,* there was pervious overburden.

"(b) The damage caused by the defendant's logs." (Vol. VI, p. 1255).

It is respectfully submitted that whatever the contract plan may
10 have shown at the line of dam and whatever inference the contractor may have been entitled to draw from such plan as to the nature of the river bottom where the dam was to be constructed, is of no importance in dealing with this claim. The nature of the river bottom where the dam was actually constructed could bear only on Claim 7, Excavating Frozen Material in river bed.

Respondents' own witnesses are unable to state definitely the degree of responsibility which they attribute to the logs and to the overburden respectively, although both Bishop himself and his Superintendent
20 Lindskog believe the logs constituted the greatest impediment. (Vol. I, p. 151; Vol. II, pp. 236, 306-307). It is respectfully submitted that should appellant be exculpated as regards either one of these grounds of complaint, the claim of respondents in respect of unwatering must fail, as there would then be no means of ascertaining the proportion of the damage resulting from the other ground.

In the judgment criticism is directed at Mr. Stratton in connection with the soundings which he took. It is stated that he selected the line of dam and that respondent was entitled to assume that the river bottom
30 was ledge, as shown on the plan, (Vol. VI, pp. 1254-1255). It should be pointed out, however, that Mr. Stratton's soundings where the dam was ultimately located are of no importance in dealing with this claim, which has to do with the cofferdams further upstream and not the dam itself.

The only line of soundings taken by Stratton which might be of importance in dealing with this claim is the line upstream from the dam itself, crossing the river approximately where the lower sides of the cofferdam cribs afterwards rested. (Vol. I, pp. 127-128). There is no evidence as to what overburden, if any, there actually proved to be along this line.
40 (Vol. I, p. 129). Assuming that there was in fact some overburden there, what difference would it have made if respondent had been told of its presence? It was not important as regards the cribs which were afterwards placed along this line. The cribs were not intended to be watertight .The water was not stopped by the cribs and therefore as long as they held (as they did) the overburden under them was of no importance.

Reference is also made in the judgment in dealing with this claim to a clause in the contract providing that any core-drilling or grouting

of seams in the ledge beneath the dam would be considered as extra work. (Vol. VI, p. 1254). The judgment states that this clause plainly showed that both parties considered that the substance beneath the dam was ledge. Surely no such construction can possibly be placed upon this clause, which can only mean that the foundation was to be carried to ledge, as clearly indicated elsewhere in the specifications. Moreover, it is respectfully submitted that the ledge beneath the dam has nothing whatever to do with the merits of the present claim relating as it does to cofferdams, which the contractor was free to place at any position he thought most desirable. 10

Respondents in the Court below, relied on the case of *Dumont and Fraser,* 19 D.L. R. 104. The Privy Council, which affirmed the judgment of the Supreme Court of Canada but on different grounds, decided merely that a certain person was an employee of certain lumbering companies and not an independent contractor, and the action against one of these companies was maintained. In the Lower Courts an important question had been discussed, namely, whether "persons using water-courses for the transmission of timber are liable for damage done to the property of riparian owners without proof of negligence," to use the words of the Privy Council. The respondent Bishop not being a riparian proprietor, however, this case is of no assistance in establishing his contention that appellant drove its logs in an improper manner. 20

Nor does the case of MacLaren vs Electric Reduction Company decided by the Supreme Court and reported in 1926 (D. L. R.) Vol. IV, p. 593, also cited by respondents, seem to have any relevancy to the present case. The claim of the appellant Company in that appeal was that respondent's dam had the effect of slowing up the current and thereby rendered the driving of appellant's logs more difficult and expensive. This contention was rejected on the ground that the slowing up of the current was a necessary consequence of the construction and operation of respondents' dam, and because appellant having itself sold the waterpower in question to respondent, could not complain of the unavoidable consequences of the development thereafter made by respondent. 30

Respondents also relied on the decision of the House of Lords in the case of Pearson vs City of Dublin, 1907 A. C. p. 51. This case was fully discussed in the Nova Scotia case both by Sevigny J. in the Superior Court and in appeal by Lafontaine C.J. and Bond J. The facts of the Dublin case are quite different from those of the present case, as well as from the Nova Scotia case. The principle of law enunciated by the House of Lords which is, no doubt, applicable in Quebec as elsewhere, is as follows:— 40

"A clause in a contract by which the employer disclaims responsibility for the accuracy of the statements and information with

which he supplies the contractor and as to which the contractor is to satisfy himself, does not confer exemption on the employer for statements fraudulently or recklessly made by the employer or his agent.... the contract truly construed contemplated honesty on both sides and protected only against honest mistakes."

CLAIM 4 — COFFERDAM AT LOWER END OF BY-PASS.

10

Amount claimed — $5,563.50

This claim has been disallowed and is no longer in issue.

CLAIM 5 — ADDITIONAL COST OF ROCK EXCAVATION.

Amount claimed $35,100.74 — Amount allowed $35,100.74.

References

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Declaration — pars. 22-26 — Vol. I, pp. 8-9
Plea — par. 10 — Vol. I, pp. 28-29
Contract — Vol. VI, pp. 1089-1091
" — Vol. VI, pp. 1097-1098
Specifications — Section III — Vol. VI, pp. 1113-1114
Correspondence (in order of date)
P8 — Vol. VI — p. 1135
P9 — Vol. VI — p. 1143

30 *Judgment* — Vol. VI, pp. 1255-1256

Respondents allege in support of this item that whereas the contract estimate for rock excavation was 8060 cu. yds., the actual quantity was 21,564 cu. yds. an increase of 167.5%; that respondent Bishop was required by the engineer to remove the greater part of this excess quantity of rock in thin layers, a method of procedure entirely different from and more costly than the ordinary and usual methods of rock excavation. The total cost of the rock excavation, allowing for overhead and profit of 37%, is stated to be $122,417.39. upon which amount respondent gives credit for
40 $87,316.65, leaving a balance of $35,100.74.

The judgment disposes of this important claim with one short paragraph reading as follows:—

"The next item is for additional rock excavation, according to plaintiff's proof this extra work was done and Ferguson at p. 363 expected that it would have to be done. This with the 37% profits amounts to $122,417.39 on account of which has been paid $87,316.65, leaving a balance of $35,100.74 for which the plaintiff is entitled to judgment." (Vol. VI, pp. 1255-1256).

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It was contemplated by the contract that the quantities of rock excavation and other classes of work might exceed the contract estimates, and the contract provided for the additional compensation which respondent was to receive in said event. Respondent has received the full amount payable under the contract in this connection and it is respectfully submitted that no possible basis exists on which a further allowance can be granted.

In building contracts of this nature it is usual to provide for the contractor's compensation by means of unit prices, because though it is possible to determine in advance the result to be achieved, that is to say, the elevation to which the crest of the work must be carried, the design it should have and the kind of foundation upon which the structure is to be erected, it is not possible to ascertain in advance the depth to which it is necessary to go for a safe foundation, and therefore it is not possible to determine in advance the volume of work required to achieve the intended result. It can easily be realized what a great increase there may be in the volume of the work by having to excavate to a greater depth. The volume of the work increases the deeper it is necessary to go down to secure a solid foundation, and as all such work requires a foundation of sound rock, free from all cracks, seams or other objectionable features, it is not possible to determine the actual volume of the work until the excavation has been completed.

The complaint of respondents now under consideration is that the quantities were larger than those mentioned in the contract. That is a thing which was provided for, if not as an unavoidable happening, at least as a possible one, and it was expressly agreed that if it did happen the additional quantities would be paid for at the unit prices mentioned in the contract. (Vol. VI, pp. 1089-1091; 1097-1098). How then can respondent get around the terms of the contract, if the contract is still in force?

A claim of exactly the same nature by the contractor in the Nova Scotia case was disallowed by this Court and by the Supreme Court of Canada. Chief Justice Lafontaine in his Notes of Judgment in that case, as printed for the Supreme Court, (Vol. I, p. 61) says:—

> "Le plus grand reproche fait par l'appelante est relatif aux quantités indiquées aux plan et devis dans les excavations et les travaux en béton, qui ont été plus considérables que celles mentionnées dans la cédule, l'appelante, à certains endroits, ayant été obligée de creuser à des profondeurs plus considérables que celles indiquées aux plans. Or, pour tous ceux qui ont quelque expérience dans des travaux semblables, l'élévation à la base ne peut être indiquée d'une manière certaine parce qu'il peut arriver qu'en creusant le lit d'une rivière l'on rencontre des formations géologiques néces-

sitant des excavations considérables. L'entrepreneur d'ailleurs, en était averti non seulement par la nature du contrat à exécuter, mais par cette clause du contrat que les fondations des barrages devaient être appuyées sur le roc solide, la clause 21 disant:—

"In preparing the foundation for the concrete structure the "bed rock is to be excavated so as to remove all disintegrated rock "and to reach the sound bed rock free from cracks, seams or other "objectionable features."

10

"C'est là, d'ailleurs, une règle élémentaire en matière de barrages et digues, afin d'assurer la solidité des travaux et prévenir les détériorations qui pourraient se faire à la longue par la force de pénétration de l'eau."

The contract in the present case contains a clause very similar to that quoted in the above citation. (See Vol. VI, p. 1114).

20

Bernier J. in his Notes in the Nova Scotia case states:—

"L'un des grands sujets de plainte de la demanderesse consiste en ce que les quantités ont été trouvées plus considérables que celles prévues dans les cédules. Cependant, il va de soi, que cela était nécessairement prévu comme pouvant arriver; si cela arrivait, il semble que tout le bénéfice en serait pour la demanderesse, si les prix mentionnés dans sa soumission étaient suffisants pour ne pas travailler à perte." (Vol. I, p. 70).

30

The learned Trial Judge in this case appears to have been under the impression that this additional excavation was extra work for which respondent has not been paid. The judgment states that "this *extra* work was done" and then goes on to state that respondent is entitled to judgment for the amount awarded. Further, the judgment allows respondents for this item not only their actual outlay as claimed, but also an additional 37% for overhead, etc, as provided in the contract for extra work. There is no attempt to distinguish the judgment in the Nova Scotia case which was cited by appellant in the Court below

40

Reference is made in the judgment to the evidence of Mr. Ferguson at page 363 of the depositions, now to be found at page 716 of Vol. IV, where it is said:—

"A...... I knew very well we could not determine the bottom of the excavation and the masonry at every point, and the contract was expressly framed, or drafted, or there was provision in the contract

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for such conditions that wherever there was excess excavation or masonry above certain specified amounts it was to be paid for at certain prices"....

"Q.—But, you say the contract was expressly framed, or drafted, with the definite idea in view that if excavation was to go deeper there would be provision to pay for it?
A.—Yes." 10

This obviously means merely that the unit prices were to be followed if the excavation ran over the contract estimate, but it is quoted in support of the decision of the Trial Judge to allow a much greater amount.

A further complaint is made by respondents as to the manner in which this excavation was required to be done. They say that instead of being allowed to blast out rock to a depth of six to ten feet or more at a time, they were compelled by the engineer to remove same in layers of two or three feet. (See Vol. I, pp. 113, 158, 185; Vol. II, p. 254). In this 20 connection the Specifications provide:—

"The method of handling the excavation may be of any approved means, but care must be taken that the depth excavated shall be no lower than necessary to conform as clearly as possible to the lines shown on the drawings and provide satisfactory foundations." (Vol. VI, p. 1113)

"In preparing foundations for the concrete structures all loose ledge must be removed and the excavation carried to a suffi- 30 cient depth to provide a safe foundation and remove all open seams or joints which might at some time permit leakage or act as sliding planes.

All this work shall be done as directed by and to the satisfaction of the Engineer." (Vol. VI, p. 1114).

The work was to be done under the supervision and to the satisfaction of the Chief Engineer of the Quebec Streams Commission, Mr. Olivier Lefebvre (Vol. VI, p. 1086). Mr. Lefebvre was examined as a witness 40 and stated that the method of rock excavation ordered by him was a proper and usual one, and the method adopted by him in other contracts carried out for the Commission. (Vol. V. pp. 910-911). He states that even if he had known in advance the exact depth to which the rock excavation had to be carried, he would nevertheless have had the work done in exactly the same way.

Respondent, having agreed to do the work as Mr. Lefebvre should direct, could not refuse to carry out the directions received on the ground

that the requirements of the engineer were unreasonable, even if such had been the case. See Halsbury (2nd Edition) Vol. III, No. 415:—

> "The contractor must obey all reasonable directions or instructions given to him by the architect or engineer, and if he has expressly contracted to carry out the work in accordance with such directions and instructions, he must obey them even if they are un-
10 reasonable, as there is no warranty or implied contract on the part of the employer that the architect or engineer will only give such directions are are reasonable"

It is respectfully submitted that this effectually disposes of respondent's claim in this connection.

CLAIM 6 — HANDLING & TRIMMING EXCAVATED ROCK.

Amount claimed — $1,990.82

20

This item was disallowed by the judgment and is no longer in issue.

CLAIM 7 — EXCAVATING FROZEN MATERIAL IN RIVER BED.

Amount claimed — $2,530.32 — Amount allowed $2,530.32.

References.

Declaration	— pars. 28-30	— Vol. I,	p. 10.
30 *Plea*	— par. 12	— " "	pp. 29-30
Judgment		— Vol. VI,	p. 1256

This claim is based on the allegation that the whole of the river bottom at the dam site is shown on the contract plans as being ledge rock; that as a matter of fact an overburden of boulders, stones, gravel, sand and other material was found overlying the rock which had to be taken out in winter in a frozen condition and that this was as difficult and as expensive to handle as rock.

40 Respondent received payment for this work at the earth price, $1.23, whereas the rock price was $4.35. The difference between the earth price and the rock price, viz: $3.12 per cu. yd. is now claimed for 811 cu. yds. of material, amounting to $2,530.32.

The learned Trial Judge allowed this item and as a reason for so doing invokes the clause in the Specifications already referred to which provided that the intention was to secure thoroughly first class construction in both material and labour without working an undue hardship on

the contractor. The Court states that it was an undue hardship on the contractor to allow him only the earth price, as this material was frozen.

Respondents in the Court below argued that this was not work which had been contracted for at all (inasmuch as the plans showed no earth excavation in the river bed) and that, therefore, respondents were entitled to be paid for this work on a basis of quantum meruit. Appellant respectfully submits that this work was included within the work contracted to be done by respondent and that the clause respecting first-class workmanship and materials has no bearing whatsoever on this item of respondents' claim. 10

Under the contract respondent was to do all work of every kind necessary for the complete construction of the dam (Vol. VI, p. 1085), and this for the principal sum plus authorized extras and additional amounts in the events mentioned, including *inter alia* if the quantities of earth or ledge excavation exceeded the estimates. This material was not ledge; therefore either respondent was obliged to do this work as part of the principal sum, or if he is entitled to any extra allowance, it is the only other allowance mentioned, namely, $1.23 per cu. yd. for excess earth excavation, which he has received. This was in accordance with the contract, which is the law of the parties. This excavation may have been somewhat difficult because the material to be excavated was frozen, but it is submitted that no legal basis exists for increasing the contract price on this account. 20

CLAIM 8 — WORK UNDER WINTER CONDITIONS.

Amount claimed $96,832.45 —Amount allowed $81,282.62. 30
Declaration — pars. 31-32 — Vol. I, pp. 10-11.
Plea — par. 13 — " " pp. 30-31.
Judgment — Vol. VI p. 1256.

The basis of this claim is that on account of the increased quantities of work required to be done beyond what was shown by the contract estimates, and because of the delay in unwatering the site due, as is alleged, to wrong information regarding the nature of the river bottom, respondent was forced to do nearly 15,000 cu. yds. of concrete and to erect nearly 500 tons of structural steel work under winter conditions instead of under what respondent call the "normal working season conditions contemplated by the contract." 40

According to respondents' figures the actual additional cost of this work by reason of being carried out in winter was $70,680.62. This amount is claimed, plus 37% for overhead and profit. The judgment allows the additional cost as calculated by respondent, plus 15% additional instead of 37%.

The construction of the dam in question was commenced on October 1st, 1928 and was required to be completed by March 31st, 1930. The work was, therefore to be spread over a period of eighteen months, with winter conditions prevailing ordinarily for about two-thirds of that period. Respondent, therefore, must have expected that a large amount of this work would require to be done in winter, but nevertheless under the contract the unit prices for excess quantities of concrete and structural
10 steel work were not in any way made dependent upon the weather that would be encountered.

Claims of this nature have frequently been made by contractors in other law-suits. In *Vinet vs Canadian Light & Power Company* (54 S. C. 134), a claim by a contractor for additional compensation based upon the allegation that, in consequence of the increased quantity of work, he was obliged to do in winter what was contemplated would be done in summer was dismissed by the Court of Review.

20 In *Fraser Brace Company vs Canadian Light & Power Company* (49 S. C. 145), one of the claims of plaintiff (the contractor) was for additional compensation for work done in winter. This claim was dismissed. See Charbonneau J. at p. 151 as follows:—

> "Supposing the plaintiffs were of opinion that those delays were attributable to the company defendant, their only recourse was to refuse to do the work for the same unit price, stop their men and if the company did not agree to a new scale of prices, give up the job altogether and claim damages.' '

30

Halsbury's Laws of England — (2nd Edition) Volume 3, No. 399 says:—

> "The occurrence of bad weather or storms is also no excuse for non-performance of the contract, as the variableness of the climate is a circumstance which must have been in the contemplation of the parties when the contract was made."

See in the same sense *Hudson on Building Contracts* (5th Edition)
40 p. 228.

The winter work for which additional compensation is claimed under this item is stated to be due (1) to increased quantities of work and (2) to delays in unwatering. The present claim is, therefore, an accessory one and under no circumstances can it be allowed unless the appellant should be held responsible for the delays on which it is based. However, even if the conclusion should be reached that the delays complained of, or some of them, should be attributed to appellant, it does not follow that this accessory claim, which is so remote, should be maintained. (C.C. 1074).

The point might also be made at this place that the victim of a breach of contract is not entitled in addition to his actual loss to an addition of either 37% as claimed by respondent or 15% as allowed by the Court.

CLAIM 9 — OVERCHARGE ON LOGS.

Amount claimed $7,220.19 — Amount allowed $1,429.60 10

This claim is not based on the construction contract, but on an alleged verbal agreement for the sale of lumber by appellant to respondent Bishop. The judgment of the Superior Court has maintained this claim in part, and as it bears no relation to the other claims now at issue, and is based upon matters of fact, appellant now states that it acquiesces in the judgment as regards this item.

CLAIM 10 — CEMENT FOR APRON IN BY-PASS CHANNEL

20

Amount claimed $2,239.46 — Amount allowed $1,879.83.

References.

Declaration — par. 35 — Vol. I, p. 12
Plea. — par. 15 — Vol. I, pp. 31-32
Judgment Vol. VI, p. 1256

The Engineer, under the authority conferred on him by the contract to make changes in the design and dimensions of the work during 30 its progress, decided to place a "concrete apron" in the by-pass channel. Respondents claim that they were obliged to bring in about fifty-five additional tons of cement for this work in the spring of the year 1930, which cost more than if the work had been ordered earlier when the winter roads were in use.

Respondents estimate the additional cost as being $1,634.64, which amount was claimed with 37% extra for overhead and profit. The judgment allowed the additional cost as calculated by respondent, with 15% additional instead of 37%. 40

Appellant submits that this claim cannot be upheld under any provision of the contract between the parties. The placing of this concrete apron in the by-pass for a short distance downstream constituted a slight change in design which the Engineer as above stated was entitled to make under the contract.

"It is agreed between all parties hereto that the Owner shall have the right to make such changes in the design and dimensions

of the dam as the Engineer may deem necessary or advisable, and that changes shall not invalidate this contract. If such changes shall be made and they increase or decrease the quantities of the various classes of work required for the construction of the dam, the principal sum of money to be paid to the Contractor hereinafter specified, shall be correspondingly increased or decreased by amounts which shall be calculated and determined in the manner hereinafter
10 provided." (Vol. VI, p. 1091.)

This work involved a small increase in the amount of rock excavation and in the amount of concrete, for both of which respondent was paid at the unit prices provided in the contract for excess quantities.

This work was ordered on or about March 13th, 1930 and was completed on or about March 22nd. (Vol. III, pp. 542, 644) Mr. MacIntosh states that up to the first of April the winter roads were still in use. (Vol. III, p. 644). Whether they were or not, it is submitted that the authority of the
20 Engineer to order this work to be done was not limited in any way by the season of the year. Mr. Bishop's views as set forth in his deposition (Vol. I, pp. 160-162) would, if accepted, reduce the matter to an absurdity.

CLAIM 11 — SHORTAGE IN PAYMENT FOR CLASS 1 CONCRETE.

Amount claimed $31,549.15 — Amount allowed $31,549.15.

References.

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Declaration — pars. 36-38 — Vol. I, pp. 13-14.
Plea — par. 16 — " " pp. 32-34.
Contract — — Vol. VI, p. 1097.
— " " p. 1098, (j) & (k).
Specifications — Section III Vol. VI, p. 1110.
Correspondence — (in order of date)
D30 — Vol. VI, p. 1224
P10 — " " p. 1225.
Judgment — Vol. VI, pp. 1256-1257.

40

The Specifications provide (Vol. VI, p. 1110) as follows:—

"All walls having no reinforcing steel and which are more than 5 feet thick, and also all heavy foundations, may contain up to 30% of sound stones not less than one cubic foot in size. ..."

This claim involves merely the calculation of the payments to which respondent became entitled on account of concrete work. The trouble arises because the engineer ordered a substitution of concrete without plums

(stones) for concrete with plums. The reason for so doing so is immaterial. Respondents cannot be paid on the basis they claim unless the substitution of one class of concrete for another is to be considered as involving "a change in design or depth of foundation." (Vol. VI, p. 1097). In the Superior Court, respondents contended that the design of the dam was changed when one kind of material was substituted for another. This, it is submitted, is an impossible contention. The dam in either case is built of concrete, the shape is the same, and, therefore, the design is the same. 10 The only difference is that imbedded in the concrete and hidden from view are fewer boulders or stones than there might have been. The letter Exhibit D30 explains the manner in which the amount paid respondent was calculated. (Vol. VI, p. 1224).

From the unit prices contained in the contract, Vol. VI, p. 1098, items (j) and (k), it will be seen that when the quantity of Class I concrete without plums was increased due to a change of design or depth of foundation, respondent was to receive $18.92 per cu. yd. and where the quantity of concrete with plums was increased for either one of the same 20 reasons, respondent was to receive $17.16 per cu. yd. Therefore, the increased cost of the first class over the second is the difference between these two amounts, namely $1.76 per cu. yd. and this is the amount that respondent received by way of additional compensation where concrete of one class was substituted for concrete of another class.

The judgment itself states that respondents are entitled to be paid the difference provided by the contract between the two classes of concrete. This difference is what respondents have in fact actually received, but the judgment nevertheless condemns appellant as if no substitution 30 had been made. If respondents were paid in the manner they claim, they would be receiving excess payments for more excess work than was actually done.

CLAIM 12 — PLANT REMOVAL.

Amount claimed $5,823.49 — Amount allowed $5,823.49

References.

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Declaration — par. 39 — Vol. I, p. 14.
Particulars — par. (i) — Vol. I, p. 22.
Plea — par. 17 — Vol. I, p. 34.
Judgment — Vol. VI, p. 1257.

This claim also is an accessory one, and is based upon delays alleged to have been caused respondent Bishop by reason of the fact that the quantities of certain classes of work proved to be in excess of the contract estimates, and also because of the delay in unwatering the site. Respon-

dents claim that respondent Bishop was delayed approximately three months in the prosecution of the work for these reasons which are attributed to appellant, with the result that he was unable to move out the heavy plant and equipment on the winter roads of January and February 1930.

By the terms of the contract the removal of plant is expressly in-
10 cluded in the principal sum. (Vol. VI, p. 1099). No mention is made of the season of the year when this plant was expected to be removed and it may be fairly presumed, therefore, that no particular season of the year was in the contemplation of the parties at the time the contract was entered into. At the most respondent could not at such an early date have conceived more than a hope of being able to get his machinery out some months before the contract was to be completed. It is, therefore, submitted that damages under this head are much too remote and do not come within Article 1074 of the Civil Code, even if the responsibility for the delays rests on appellant, which is denied.

20

CLAIM 13 — STANDBY AND OVERHEAD EXPENSE.

Amount claimed $49,147.41.

This claim was disallowed by the judgment and is no longer in issue.

CLAIM 14 — INTEREST ON FINAL PAYMENTS.

Amount claimed $286.90

30

This claim was disallowed by the judgment and is no longer in issue.

RE: ARBITRATION CLAUSE IN THE CONTRACT

References.

Declaration — pars. 44-52 — Vol. I, pp. 16-17.
Plea — par. 21 — Vol. I, pp. 35-36.

40 The allegations of respondents in this connection are contained in paragraphs 44 to 52 of the declaration. It is respectfully submitted that they are irrelevant to the matters in dispute and can have no possible bearing on the outcome of the present action. Yet they appear to have influenced the learned Trial Judge to no little extent, as the following passage from the judgment would indicate:—

"While there is apparently no way of enforcing this clause it does give each party the right to believe that the other is intending to carry out the agreement as made and this must tend to destroy

In the Court of King's Bench — No. 3 The Factum of Appellant Before the Court of King's Bench 15 March 1935 (Continued)

the argument of the defence, that the Plaintiff should have ceased work and brought an action to set aside the contract...." (Vol. VI, p. 1250).

The contract provided for the submission to arbitration of certain disputes that might arise between the parties. (Vol. VI, p. 1096). As respondents were obliged to concede, however, and as the judgment finds, the law of this Province does not sanction a specific performance of this obligation by either party thereto. 10

The facts are that on April 8th, 1929, respondent Bishop stated by letter Exhibit P-29 (Vol. VI, p. 1083) that it demanded an arbitration in connection with hardpan excavation. This demand was made to Mr. Ferguson, who advised respondent that its letter had been forwarded to appellant (Exhibit P30 — Vol. VI, p. 1084). Nothing more was heard of the matter until December 9th, 1929, when respondents' solicitors submitted informally to appellant's solicitors a draft agreement for arbitration (Exhibit P11 Vol. VI, pp. 1161-1173). Some correspondence ensued during the 20 months of January and February, 1930, between the solicitors of the parties, without any result, but respondent did not take any definite step in the matter until November 6th, 1930 when a notarial protest was served upon appellant (Exhibit P18, Vol. VI, pp. 1233-1234). This was some five months after the termination of the work and less than a month before the institution of the present action on December 4th, 1930. Some months before this protest was served, respondent had registered a claim for privilege as a contractor (Exhibit P-19, Vol. VI, pp. 1227-1230) and the delay of six months within which action was necessary to enforce this privilege had almost expired. (C.C. 2013f). 30

Under the circumstances, it is not surprising that appellant preferred to allow events to follow their natural course and have the matter submitted to the courts, as appellant under the law was entitled to do, and as respondents themselves were obviously intending to do.

COST OF THE WORK.

The judgment of the Superior Court accepted without question the 40 evidence offered by respondents as to the actual cost of certain portions of the work, without any reference to the objections of appellant as to the sufficiency of this proof. Appellant submitted in the Court below, and now respectfully submits to this Court, that the proof made by respondents through the witness Griffiths in this respect is not satisfactory. (See Vol. III, pp. 442-497).

Mr. Griffiths was employed as an auditor. He was stationed at High Falls where another contract was being carried out simultaneously and he

went to Cedars only from time to time. (Vol. III, p. 442). He has not and does not pretend to have any personal first hand knowledge of the facts which are sought to be proved through him. The lengthy summary produced by him (Exhibit P-116, Vol. VI, pp. 1177-1210) is made up from records, the correctness of which he cannot personally swear to.

The distribution of the labour costs, which is the most important item, could only be proved by the time-keeper, who summarized daily the reports handed him by the various foremen, and who prepared a summary for each bi-weekly period. (Vol. III, pp. 443-444). The charge for material could only be established properly by the evidence of the store-keeper, whose duty it was, apparently, to verify the particular branch of the work for which the material handed out by him was intended. (Vol. III, pp. 445-446). No explanation has been given as to why these two parties were not called. If they were available, it was clearly respondents' duty to call them in order to make the best possible proof. If they were not available, then secondary evidence such as that made by Griffiths might be admitted, but only if the Court was satisfied that the best evidence could not be obtained.

The cross-examination of Griffiths as regards the account produced by him (Exhibit P-116) might have been carried on endlessly, but it soon became apparent that no useful purpose could be served by such cross-examination, inasmuch as whenever any apparent inconsistency was called to his attention he was unable, as was only to be expected, to cast any light upon it.

In its action respondents credit appellant with certain payments as having been received on account of the various branches of the work. (See pars. 7, 19, 25, 30 and 37 of the declaration, Vol. I). This would create the impression that the contract was a severable one, and that a fixed proportion of the consideration could be assigned to each branch of the work. It is quite clear from the provision of the contract respecting payment (Vol. VI, pp. 1098-1100) that no such assumption is justifiable. The advances made to respondent from month to month as the work progressed, were payments on account of the contract as a whole and cannot be definitely assigned to any particular branch or branches of the work. For the purpose of establishing the amounts of these monthly payments, and for no other purpose, "the Engineer shall consider that the value of the various parts of the work required for the construction of the dam," shall be those set forth in the table given. (Vol. VI, p. 1099).

The system adopted by respondents of assigning credits to the different branches of the work on the basis of the monthly estimates is very helpful to them in connection with their demand to be recouped for alleged losses on certain parts of the work, while wholly disregarding other

In the Court of King's Bench — No. 3 The Factum of Appellant Before the Court of King's Bench 15 March 1935 (Continued)

parts, but it is based on an assumption which respondents under the contract are not entitled to make. It is neither alleged nor proved whether on the job as a whole, respondents made a profit or sustained a loss.

Respondents very optimistically assume that normally everything would have turned out exactly in accordance with the plan which had been drawn up at the commencement of the work, and that their profits would have been just what had been counted upon. If such optimism were justi- 10 fied, contracting would not be the risky occupation that it is. In order to maintain respondents' action the Court would have to assume that respondents were entitled to the actual cost of any or all of the items of the work, plus an allowance for profit and overhead, and this in the absence of any allegation or proof as to whether on the contract as a whole they had made a profit or suffered a loss. Even if respondents had been proceeding with this work under the most favourable possible circumstances, even if there had been no logs at all brought down the river, even if there had been no overburden anywhere on the river bed, it is certainly quite possible that the job might have cost vastly more than respondents antici- 20 pated, without appellant being in any way liable for the consequences.

CONCLUSION

For the foregoing reasons appellant respectfully asks that the present apeal be allowed, with costs against respondents, and that the judgment in favour of respondents in the Superior Court be reduced to the sum of $1,429.60 (on account of Claim No. 9), with appropriate costs for an action of that amount.

30

Montreal, March 15th 1935.

Aylen & Aylen,
Attorneys for Appellant.

Aime Geoffrion, K.C.,
Counsel.

No. 4

In the Court of King's Bench — No. 4 The Factums of Respondents and Cross-Appellants before the Court of King's Bench 6 May 1935

The Factums of Respondents and Cross-appellants Before the Court of King's Bench 40

This was an action to recover $412,846.75. It was maintained in the Superior Court for the District of Montcalm, White J., for $293,585.84. Both parties have appealed; the Defendant against the condemnation; and the Plaintiffs because the judgment awarded interest on $206,061.16 only from the date of the judgment, 10th June, 1934, instead of as claimed from the date of the action, 9th December, 1930, a difference of three and one half years or 17½% equal to $36,060.70.

The action was for work performed by the Plaintiff, William I. Bishop, Limited, for the Defendant in the years 1928, 1929 and 1930 in the construction of a storage dam known as the Cedar Rapids Storage Dam, on the Lièvre River in the County of Labelle.

The plans for this work had been prepared by an American Engineer, Hardy S. Ferguson of New York, and it was carried out under the
10 joint supervision of a resident Engineer appointed by and representing Mr. Ferguson and Engineers of the Quebec Streams Commission to whom the reservoir was to be turned over to operate when completed.

The Bishop Company tendered in writing for this work in July, 1928, and its tender was accepted on the 15th November, 1928. Operations were commenced immediately, but it was not until the 23rd May, 1929, that the formal contract was signed by the parties, the delay being due to some difficulty in securing the Government's formal approval of the plans. The form of the document had, however, been agreed upon at the
20 outset and when it was signed, there was inserted the following clause: "This contract shall avail and be binding on the parties hereto as if signed on November 15th, 1928." (Vol. 6, page 1100, lines 46 and 47).

It is the Plaintiff's case that the work to be done proved to be substantially different from that shown by the original plans and specifications but that under the express and implied terms of the contract, a) the Bishop Company was required to complete the job, and b), is entitled to be compensated for having done so. The Superior Court found in favor of Plaintiffs and we submit its judgment is supported by the documentary
30 and the oral evidence.

1. THE CONTRACT.

This contract is printed in Volume 6, pages 1085 to 1133 inclusively. Under it William I. Bishop, Limited, undertook "to build for the owners a dam to be known as Cedar Rapids Storage Dam across the Lièvre River.... at a line established on the ground, the location of which is indicated on a map attached hereto and forming part hereof." (Page 1085, Lines 31-37).
40

It is submitted that under this contract the contractor was required "to furnish all materials, tools and appliances, labour and work of every description required for the complete construction of said dam" (P. 1085, LL. 41-44).

It was "agreed that the construction of the dam shall be carried out and completed" (P. 1086, LL. 19-20).

The work to be performed "consists of the complete construction of the Cedar Rapids Storage Dam" (P. 1087, LL. 26-27).

(P. 1106, LL. 20-30) "It is the intention of these specifications to secure thoroughly first-class construction in both material and labour for each of the classes included herein without working *an undue hardship on the Contractor*. The omission of any clause necessary to obtain the fulfillment of the intention and purpose of the specifications shall not preclude the Engineer from requiring any such omitted necessary requirements..." 10

(P. 1133, LL. 11-13) "... said specifications and any and all parts thereof shall be binding on both parties the same as if contained in the body of said contract.........................."

These obligations of the contractor were undertaken "in consideration of the sums of money to be paid by the Owner as provided herein." (P. 1085, LL. 29-30)

20

(P. 1089, LL. 30-40) "....the principal sum of money to be paid to the Contractor as specified herein, is based on an estimate that the quantities of excavation, concrete masonry, forms reinforcing steel, and other classes of work required to completely construct the dam and which have been calculated from the dimensions and depths to the bottom of the dam that are shown or indicated on the drawings referred to herein will be as follows ..."

(P. 1090, LL. 23-30) "It is further agreed that should the quantities of excavation, concrete and other classes of work which are listed in the above schedule for the satisfactory completion of the structure be different from those contained in the said schedule, additions or deductions from the principal sum of money herein named shall be made in the manner hereinafter provided." 30

(P. 1091, LL. 40-47) "....No claim for *additional compensation* for any work done under this contract shall be considered or allowed except as hereinafter provided *unless such claim is made before the performance of the work* in question..........."

40

(P. 1092. LL. 1-30) "....For such extra work as the contractor shall perform by virtue of the written authorization of the Engineer, *the Owner* shall pay to the Contractor, in addition to the principal sum herein specified, sums of money equal to...........

(a) the actual cost of the labour and material;

(b) 37% of said labour, and material costs .... to be considered the cost of the Contractor of small tools, plant maintenance,

overhead, superintendence, insurance and other indirect costs of performing said extra work, and shall include the profit to be received by the Contractor therefor;....

(c) amounts which shall be compensation for the use of heavy tools and machinery at the per diem rate set out ...."

10 (P. 1096. LL. 32-34) "....should any dispute arise as to the interpretation of the terms of this contract as to cost of changes and extra work performed, or in regard to any other matter regarding the execution or final settlement of this contract, it shall be refererd to a Board of three arbitrators............... and its decision shall be final and binding on both parties."

(P. 1097. LL. 3-15) "....The sum of Six Hundred and Nine Thousand and One Hundred Dollars ($609,100.00) referred to elsewhere herein as the principal sum........... plus the sums to be paid as provided herein
20 for any authorized extra work.......... shall be the limit of the liability of the Owner hereunder *provided that the quantities of the various classes of work required to construct the dam shall prove to be the same as those given in the schedule of quantities hereinbefore contained.*"

It is submitted that this last clause places a limitation on the liability of the Owner only if the quantities of the various classes of work turn out to be the same as those given in the schedule.

It is further submitted that the Owner undertook by the contract to
30 pay as compensation for the work to be performed:

1.— The principal sum of money based on an estimate of the quantities of work to be done as expressed at page 1089.

2.— Such additions, if any, as might be brought about by increases in the quantities of excavation, concrete and other classes of work listed in the schedule as provided for at page 1090.

3.— The cost of such extra work as might be ordered in writing
40 by the Engineer as provided for on page 1082.

4.— Such additional sums as might be allowed by a Board of arbitration set up under the clause written at page 1096, the only restriction in that respect being that no claim for additional compensation might be allowed unless such claim was made before the performance of the work in question, as set out at page 1091.

— *The Nature of this Contract.* —

It is not a contract *à forfait.*

(Quinlan and Redmond, 39 S. C. 145)

HELD: 1o "A convenant in a contract for the erection of a building for a stated price, that the architect may order alterations in the course of the work, entailing a proportionate increase or diminution in the price, takes the contract out of the operation of Art. 1690 C. C. and renders the restriction therein, as to recourse for extra work, inapplicable." 10

(Bernier et al, vs Les Débardeurs Syndiqués du Port de Montréal, 50 S.C. 337)

"L'article 1690 C. civ., relativement aux changements dans les plans et devis et aux travaux additionnels ne s'applique pas lorsqu'il est spécifié dans le marché entre l'entrepreneur et le propriétaire que ce dernier aura le droit de faire des changements et que le prix du contrat sera augmenté ou diminué en conséquence. Dans ce cas, les règles ordinaires de la preuve s'appliquent...." 20

and (Legault vs Lallemand, 4 R. de J. 245)

"JUGE: 1o. Que l'art. 1690 C. Civil n'est rigoureusement applicable qu'aux conventions réunissant tous les caractères d'un forfait pur et simple, mais ne saurait être étendu au cas où les parties, tout en stipulant le forfait, y ont ajouté des clauses et conditions qui le modifient. 30

Qu'ainsi lorsque, dans la convention, le propriétaire s'est réservé le droit de faire, au cours des travaux, les changements et augmentations qu'il jugerait convenables, et a même fixé le prix des travaux supplémentaires, par analogie avec ceux du marché, l'entrepreneur qui a exécuté de tels travaux sans autorisation par écrit est admis à établir l'existence du consentement du propriétaire d'après les règles ordinaires de la preuve testimoniale; en sorte que s'il y a un commencement de preuve par écrit, le tribunal peut compléter ce commencement de preuve par la preuve testimoniale et par des présomptions graves, précises et concordantes. 40

Que ces présomptions peuvent être puisés notamment dans le fait que les travaux exécutés en dehors du devis ont été commandés par le propriétaire, faits à sa connaissance et surveillés par son architecte;"

and (Beaudry-Lacantinerie Louage II, No. 4005 and No. 4006)

Bearing in mind that this contract is somewhat unique in document of its *genre* in that it does not, as do most contracts for such construction, carry a clause imposing upon the contractor the responsibility for securing his own foundation data and relieving the owner or his engineers from responsibility for the information as to foundations contain-
10 ed in the contract plans, it is submitted that the Plaintiff Company became party to a contract under which:—

a) It was entitled to rely, as it did rely, upon the absolute accuracy and correctness of the information supplied in the plans.

b) It was entitled to rely, as it did rely, that when disputes as to the respective rights and obligations of the parties arose, the undertaking to arbitrate such disputes would be carried out in good faith.

20 *c)* It was entitled to rely, as it did rely, upon such a construction of the contract as would not entail undue hardship upon the contractor in the conduct of the work.

The Trial Judge found in this connection as follows:— (VOL. 6, page 1250).

"THAT neither of the parties were fully aware of the magnitude of the undertaking or of the difficulties which would be encountered in its carrying out, but that the intention of the parties
30 was, that no matter how difficult the work might prove to be the contractor was to complete the work and the owner was to pay for it.

(d) "It is further provided on page 14: 'Should any dis-
"pute arise as to the interpretation of the terms of this contract as
"to the cost of changes and extra work performed or in regard to
"any other matter regarding the execution or final settlement of
"this contract, it shall be referred to a board of three arbitrators
"and its decision shall be final and binding on both parties.' "
40

"WHILE there is apparently no way of enforcing this clause it does give each party the right to believe that the other is intending to carry out the agreement as made, and this must tend to destroy the argument of the defence, that the Plaintiffs should have ceased work and brought an action to set aside the contract, not only is this clause in the agreement, but when the question of hard-pan came up for discussion between Bishop and O'Shea arbitration was discussed as the method ofsettlement, although nothing definite was decided at that time."

PLAINTIFFS' CLAIM.

1.—HARDPAN.

THE first item of Plaintiffs'claim is for excavating hardpan.

This claim arises for work done in the by-pass or water diversion channel, where it is submitted the evidence of the Plaintiffs' witnesses abundantly proves that a material, commercially known as "hardpan", of greater consistency and of far greater difficulty to excavate existed in quantities totalling 12,935 cubic yards, of which 4600 cubic yards were found in the by-pass channel elsewhere than on the actual site of the dam and 8335 cubic yards on the actual site of the dam. (Declaration paragraphs 7, 8 and 9, Vol. 1, pp. 3 and 4). (Evidence, Bishop, Vol. I, p. 70, et seq; Mailhot, p. 139, et seq; McEwen, p. 175 et seq; and p. 202 et seq; Lindskog, Vol. 2, p. 223 et seq; Reiffenstein, p. 361, et seq, and at page 388 et seq; Acres, Vol. 3. p. 425 et seq.) 10 20

The evidence of these witnesses is confirmed by the evidence of O'-Shea, Defendant's witness, Vol. 3 at p. 504, where extracts from his diary show that this difficult material was encountered, and at pages 508 and 509, where he refers to the use of dynamite. McIntosh on cross-examination at page 662 admits that the Orange Peel Bucket was broken by "banging on the hard stuff". Further than this, perusal of the correspondence and memoranda relating to the Plaintiff's complaints, we confidently submit, establishes beyond question the fact that neither Mr. Ferguson nor his subordinate questioned the existence of the hardpan; we refer particularly to the following exhibits, all in Vol. 6; P.21 at page 1068; P 28 at page 1069; P.3 at page 1080 and D.1 at page 1081, and the Court's attention is directed to the fact that when Mr. Ferguson (D-1) takes his final position he does not attempt to negative the existence of the hardpan. 30

The existence of the material conceded, the evidence as to the value of its excavation being uncontradicted, the question of interpretation of the contract as bearing upon Plaintiffs' right to recover should be explored. 40

In the Superior Court it was necessary to consider the matter in two aspects, (1) hardpan excavated on the actual site of the dam, and (2) hardpan excavated in the by-pass channel elsewhere than on the actual site of dam.

In the first instance the contractor's right to be compensated would seem to be unquestioned. The site of the dam in the by-pass chan-

nel includes the "stoney gate spill-ways" section 3 as described in the contract (Page 1088). Page 1089 of the contract discloses that the excavation in this section was to consist of earth and ledge only.

As previously indicated there is no clause in the contract which obliges the contractor to make investigations for his own account, and it is, therefore, we submit, elementary and fundamental that the contractor is entitled to rely upon the representations made to him in contract, plans and specifications. The contractor knew by examination of the Plan B2444 that the Owner's engineers had investigated the locus of the by-pass and of that point in it which the dam crosses. The test pits shown on the plan and the evidence of O'Shea, the defendant's engineer, make this statement incontrovertible. In addition we have the evidence of both Bishop and McEwen that before their tender was submitted on the work O'Shea informed them that the material in the by-pass consisted of first, five feet of sand and loam and, next, gravelly material with occasional boulders. The contract itself, page 1089, shows that where the dam crosses the by-pass there would be no other excavation than earth and ledge. Certainly, therefore, it was represented to Bishop affirmatively that no hardpan would exist in this section. That being so, failing some principle of law, which would compel the contractor to an election as between the performance of the contract with no compensation for this unexpected material, or for dissolution of the contract and damages, the contractor would be entitled to compensation. It will be submitted, no doubt, by the Defendant that under the decision of the Supreme Court in the case of Nova Scotia Construction vs Quebec Streams Commission the contractor should have optated for the dissolution of his contract and that not having sought its cancellation in this action his recovery is barred. Such an argument, however, overlooks certain essential differences between the contract now under consideration and that with which the Supreme Court had to deal. Such an argument also overlooks the situation created by the conduct of the parties in this case.

At the risk of repetition the Court's attention is called to the fact that as early as November 21st, 1928, Mr. Bishop intimated to the defendant's engineer the presence of this material in the cut, and put forward his claim to extra remuneration in respect of that item. The evidence of O'Shea indicates that on February 22nd, 1929, the existence of the hardpan having developed into something far more serious than either Mr. Bishop or Mr. Ferguson had hoped it would, Mr. Bishop advised Mr. O'Shea at breakfast on the morning of the 21st February that if he (O'Shea) were still of the opinion that only two classes of excavation could be considered on the job he (Bishop) would stop all excavation on the by-pass channel on Saturday and ask for arbitration, and that, later in the morning, Mr. Bishop said that although he would not stop the excavation he would still ask for an arbitration, in reply to which Mr. O'Shea told Bishop that if he (Bishop) wrote to O'Shea on the subject he (O'Shea) would procure the attention of Ferguson in the following week.

Going back for a moment to the situation as it existed in November, 1928, we observe from Mr. Ferguson's correspondence that he intimated that Bishop should continue with the possibility in view that the hardpan would be negligible in quantity, and this notwithstanding the fact that Mr. Bishop had plainly indicated his intention to demand extra remuneration for the excavation of this material.

The situation then is, that, relying upon the covenant of the owners to arbitrate, the contractor elected, as we submit he might in law properly do, to continue the contract and trust to arbitration to compensate him, it being duly noted that he had given notice of his intention to ask for arbitration of this matter.

It is common ground that the owners refused to arbitrate and we submit that it does not now lie in the mouth of the owners, having induced the contractor with the bait of the arbitration clause to continue, to set up a claim that the contractor was bound to ask for cancellation, or, in other words, that having performed in the face of the misrepresentation he is now prevented from asking the Court to take the place of the arbitrators to whom the owners agreed to submit such matters of difference.

Further in support of this contention, we submit that remuneration for excavation of this material is not excluded by the contract, which dealt only with earth and with rock, witnesses of both parties being in accord that hardpan is essentially a classification by itself, unless the contract otherwise provides. It is quite plain that where the contract has failed to provide for quantities they are to be provided for, to decide that the contractor must, more particularly perhaps in so far as that portion of the work on the actual site of the dam is concerned, bear the expense occasioned to him by the Defendant's erroneous representations of the material to be encountered, would be an absolute negation of that clause in the specifications which is found in section number 2, and reads "it is the intention of these specifications to secure thoroughly first class construction in both material and labor for each of the classes included herein without working an undue hardship on the contractor."

The amount of material excavated in that portion of the dam across the by-pass channel is 8335 cubic yards, for which the Plaintiffs received the earth price of $1.23 or $10,252.05. It is the contention of the Plaintiffs that for this excavation they should have been paid a sum of $2.90 per cubic yard, or $23,971.50, leaving an amount due to the Plaintiffs, and which we submit they are undoubtedly entitled to recover, of $13,919.45.

In further support of our claim on this score we rely upon the decision of the Court of Review in the case of Wilson et al and the City of Hull, 48 S.C. page 238.—

"1. Dans les soumissions que font les entrepreneurs de creusage et de posage de canaux d'égoûts, ils sont justifiables de prendre pour acquis qu'ils ne trouveront pas de roc ou de pierre à extraire lorsque le plan et les devis de l'ingénieur ne l'indiquent pas.

2. Lorsque l'entrepreneur dans ce cas, mentionne un prix pour la terre et un autre beaucoup plus élevé pour le roc, mais se basant sur le fait que le plan et les devis ne mentionnaient aucune pierre dans le sol, contracte pour une somme globale représentant des travaux de terre seulement, il a le droit de se faire payer le prix mentionné pour le roc, s'il en rencontre en quantité considérable dans l'exécution des travaux, bien que cela constitue une augmentation du prix convenu."

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and Dalloz, Code Annotés, article 1793, Numbers 83, 84, 85, 88, 89, 90, 91 and 93. No. 93 is typical:—

20

"93... Que, lorsqu'il est constant qu'un délai diffère substantiellement de celui qui avait l'objet du marché, l'entrepreneur a droit à l'allocation d'un prix autre que celui qu'il avait accepté par erreur."

and Guillouard, Traité du Louage, 3e. Ed. T. 2 No. 893, and Dalloz, Rept. Supp. Louage d'Ouvrage et d'Industrie, Numbers 92 and 93. No. 93 is as follows:—

30

"C'est par application de ces principes qu'il a été jugé, d'une part, qu'il était dû un supplément de prix, si, des sondages préliminaires ayant été opérés pour déterminer la fixation du prix, les terrains rencontrés par l'entrepreneur diffèrent essentiellement de ceux qu'avaient fait prévoir les sondages."

To sum up the evidence on that point we submit that the existence of the Hardpan is proved by the following:

a) By calling attention to it on November 21st, (Exhibit P.21) and getting the answer thereto which is Exhibit P.28.

40

b) By Mailhot's examination of it and testimony concerning it in Court;

c) By the testimony of Lindskog, Reiffenstein and Bishop;

d) By the testimony of Acres;

e) By the entries of O'Shea's diary on November 12, (page 504 of Vcl. 3;) November 16th, (page 504); November 23rd, (page 506); November 29th, (page 507): December 17th, concerning the use of dynamite to loosen up the soil (page 509);

f) By O'Shea's admission that what he found was something quite different. To refer to his own note "Our testpits showed no evidence of Hardpan". 10

g) By Mr. Geoffrion's question to Mr. O'Shea on page 577 at the top of the page;

h) By the fact that though dynamite was being used on November 17th, McIntosh proves on page 662 that there was no frost to contend with until after his return from his Christmas holiday;

i) By the fact that the orange peel was in good condition when it arrived but that it soon became broken from banging on hard stuff; 20

j) By the photograph of August 22nd (Exhibit D.14);

k) By the conversation of February 22nd, (page 510 of his evidence, Vol. 3.)

l) By the letter of February 22nd, (Exhibit P.3) Vol. 6, page 1080;

m) By the inference to be drawn from the terms of Mr. Ferguson's letter of March 22nd, (Exhibit D-1, page 1081,) which was subsequent to his visit for the express purpose of dealing with the Hardpan situation. 30

It is interesting to compare, in this respect, the letter of November 28th (Exhibit P.28, page 1069) with the letter (Exhibit D-1 of March 22nd, which is at page 1081).

Here is an incident which was prior to the signing of the contract with respect to which it was expressly understood that there would be arbitration and that our claim for exta compensation would be taken care of in that way. O'Shea admits that the situation was different from what had been anticipated and the difference was a substantial one. That difference meant that there had been error as to the nature of the work to be performed. We would have been entitled to cancellation had the agreement been one that we were to do the work at the price specified without qualification. Both parties agreed at the time that we must do the work whatever the difficulties were, and that we would be entitled to have our claim 40

for extra remuneration determined by a Board of arbitrators, without being prejudiced by the fact that we were to go on. — Now, we did seek arbitration as alleged in paragraphs 45 to 52 inclusively of the declaration and we did not get it. Defendant's answer to these allegations is that we did not persist in our request for arbitration. To disprove this answer we refer to our Exhibit (P.11) being our letter of December 29th, 1929, with the list of our claims attached; our exhibit (P.12) being the acknowledg-
10 ment by Defendant's solicitors; our correspondence with them of January 6th and 7th, 1930, (Exhibits P.13 and P.14); our further correspondence of February 21, 1930, February 28th, 1930, and March 1st, 1930, (Exhibits P.15, P.16, P.17); our notarial protest of the 6th November, 1930, (Exhibit P.18). All these exhibits are in Vol. 6.

Unfortunately no adequate machinery seems to exist in our law to enforce the specific performance of an undertaking to arbitrate, and though there was here a dispute with respect to which the parties agreed in their correspondence that the arbitration clause in the contract to be
20 signed would apply, and we were thus induced to go on without resorting to the remedy of abandoning the undertaking. Defendant has neglected and refused to carry out its agreement in that regard and we had to assert the claim before the Court, and we submit that the Court is to deal with it as it would have been dealt with by the arbitrators.

The contractor had claimed a further sum of $7682.00 for excavating hardpan in that part of the by-pass channel outside the actual site of the dam. This part of his claim was refused by the Trial Judge who dealt with the whole claim as follows:—
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> "Only two classes of excavation are provided for by the contract, earth and rock. — The evidence shows that beyond doubt a considerable amount of hard-pan had to be excavated, at a large additional cost over earth excavation."

The defendants' answer to thisclaim is in substance:

(A) There was litfle or none of this hard-pan, that which plaintiffs call hard-pan was really earth which had become frozen
40 owing to the lateness of the season.

(B) Test pits had been opened by Defendant, and these apparently did not disclose hard-pan, in fact O'Shea informed Plaintiff before tender was made that the test pits showed first five feet of sand and loam, and next gravelly material with occasional boulders, consequently, no mention of hard-pan is contained in the contract.

In the Court of King's Bench — No. 4 The Factums of Respondents and Cross-Appellants before the Court of King's Bench 6 May 1935 (Continued)

THAT the material was hard-pan seems free from doubt. Mr. Mailhot a professor of geology proves it as does H. G. Ayers, a well known contractor, and also Plaintiffs' men who worked on it. It was certainly there and had to be excavated. It is not mentioned in the contract, consequently defendant wants to pay for it as earth. Plaintiff says it cost almost as much to excavate as rock. Ferguson at page 368 says that Plaintiff protested about it and he does not remember why he (Ferguson) did not attend to the matter in the beginning. Plaintiff and O'Shea spoke of recommending arbitration. 10

IF Plaintiff has to meet this extra expense on account of something unforseen, it certainly is imposing "an undue hardship on the contractor".

THE amount thus excavated in that portion of the dam across the by-pass channel is 8335 cubic yards at $2.90 per yard, (two thirds of rock price) amounts to $23,971.50, on account of which Plaintiff acknowledges to have received the earth price of $10,252.05, leaving a balance of $13,919.45 for which Plaintiff should recover. 20

AS to the 4600 cubic feet in the by-pass, the contract provides that any additional excavation "for by-passing or handling the flow of the river, shall form part of the principal sum." Plaintiff claims however, that it was represented by Defendants' engineers that the test-pits showed sand, loam and gravelly material and some boulders. It is not shown that this was a misrepresentation. All that it means is that in the exact places where these test-pits were dug, there did not happen to be any hardpan. There not being any misrepresentation, Plaintiff is not entitled to recover for the hardpan in the by-pass which is not part of the dam. 30

— 2 —

HANDLING DEFENDANT'S LOGS

This claim which is set up in paragraphs 12 and 13 of Plaintiffs' Declaration is to some extent involved or connected with a subsequent claim for damages suffered by the Plaintiff in connection with the unwatering of the site of the dam due to Defendant's misconduct in its handling of the logs, but for purpose of clarity and convenience we propose to deal with it as a separate item. 40

Perhaps this claim can be approached best by first considering what the respective duties and obligations of the parties were, regardless of the contract, and then considering to what extent one or both of the parties

permitted his rights or obligations to be modified or changed by the document. We submit, in the first place, that the right of any riparian owner to drive or float his logs from one point on a stream to another is a right which does not entitle him to its use in disregard of all other persons pursuing their lawful occasions upon or in the stream and that this right must be exercised by the person who floats or drives the logs with due regard to the rights of other persons lawfully using either the waters or
10 banks of the stream. Secondly, we submit that the obligation, generally speaking, of any person legally empowered to dam or divert the waters of a stream, towards persons having a right to use the waters for floating of logs is that he shall provide suitable and proper means of passage for the logs and that this obligation does not extend so far as to relieve the party using the waters of the stream for floatage purposes from his duty to exercise due care in such use so as not to damage or injure others.

In other words we submit that quite apart from any modification which may be found in the contract the situation of the MacLaren Com-
20 pany and the Bishop Company in law would be as follows:—

The MacLaren Company has undoubtedly had the right to drive their logs on the river, but in so doing it was always incumbent upon them to conduct their driving operations so as not to cause damage to others (sic utere tuo ut alienum non lædas). The Bishop Company were lawfully upon the river having been put into possession for the purposes of the contract, of the banks of the river by the owners, the Defendant. They were in damming and diverting the channel of the river, acting in the exercise of rights of the owner obtained from the Province of Quebec, and certainly,
30 as regards persons other than the owners, it was the duty of the Bishop Company to provide reasonable opportunities for the passage of logs rightfully driven in the stream. Whatever may have been the duty or obligation of the Bishop Company towards the owners apart from the clauses of the contract we find that in the specification the duty was imposed upon the contractor to so "construct the cofferdams and erect and manage the construction of the works as a whole that logs of the owners, or of others, *may be driven* by the site of the dam during the driving season of 1929, and shall provide such opportunities for the passage of logs as the construction work may render necessary."
40

After the general position enunciated above, if sound, can it be reasonably argued that the words just quoted, which are the only words in the contract dealing with the subject matter, in any way limit, modify or restrict the right of the contractor to demand the exercise of all due care in the driving of the logs by the owner or by others. The evidence is undoubtedly clear that in the driving of his logs the owner was absolutely reckless of the rights of the contractor and not only so but, if the situation could have been said to have been aggravated, the stand taken by the

owner in the letters of August 3rd and August 21st, 1929 (Exhibit P.32 and P.34) (Vol. VI. pp. 1140-1141) indicated an absolute disregard of the Plaintiffs' position and persistence on the part of the Defendant in a situation which obviously must have been causing great expense and difficulty to the plaintiffs, and we submit that in the face of these letters the defendant cannot now be heard to say, with any expectation of belief, that there was any attempt on its part at co-operation in the matter of passing of the logs. 10

Indeed the clause in the specification quoted above indicates quite plainly that what was contemplated was that when the logs approached the site of the dam they would be driven past it, and not left to the mercy of the currents, and certainly the Plaintiffs accepted no responsibility for the driving. The evidence is clear on this branch of the case that the logs as they approached the works of the Plaintiffs caused serious damage and greatly increased the difficulty of the work, and that such handling of the logs as was done by the Plaintiffs was done in an effort to minimize the damage and that but for this effort on the part of the Plaintiffs very much larger sums than the amount claimed in this item would inevitably have been claimed, and rightfully claimed, from the Defendants. 20

The actual cost, without any overhead to the Plaintiffs, of this work and the material used in connection with it was $2995.42 and Plaintiffs felt they were entitled to an allowance for overhead and to the profit which they might reasonably expect to receive from the efforts of their force had they been otherwise employed. The contract recognized an allowance of 37% for profit, overhead,etc., as being a reasonable and proper one, and we submitted that the Trial Court would not be guilty of excessive generosity if, in addition to the actual outlay for labor and material it allowed the further sum of $1,108.30, giving a total of $4,103.72. 30

The Trial Judge, however, allowed the bare sum of $2995.42 with interest from the date of the institution of the action. He dealt with this item as follows:—

> "THE next item for which Plaintiff claims is for handling "Defendants logs. The contract provides that the contractor 'shall "so construct the cofferdams and erect and manage the construction 40 "of the works as a whole that logs of the owner or of others may "be driven by the site of the dam during the driving season of 1929, "and shall provide such opportunities for the passage of logs as "the construction work may render necessary.'
>
> THE decision of this item will decide the next item in so far as the damage caused to the cofferdams, and the delay which resulted therefrom is concerned.

UNDER all the circumstances of the case and the wording of the contract, what is the meaning of the words 'may be driven'. Does it mean that during the driving season the Plaintiff should leave sufficient space between its cofferdam as would enable the defendant using its knowledge and skill as log drivers (which is their line of business) to drive their logs through, or does it mean that the Plaintiffs who are not in the log driving business, to un-
10 dertake apart from leaving the necessary space for the logs to be driven through either to do the driving itself, which it never agreed to do, or allow each particular log to use its own judgment as to the facilities which Plaintiff had provided for its passage.

MR. KENNEY'S letter P.32 and P.34 indicate clearly the position taken by the Defendant. That is to say, not only does the defendant claim that it is under no obligation to drive or take care of the logs in any way, but actually wants to hold the plaintiff responsible for any additional expenses in driving the logs 'which
20 they might be put to by reason of the works which Plaintiff was doing for Defendant under the contract in question. There is no provision in the contract that Plaintiff should bear any part of this expense, and the position taken by Defendant is in my opinion untenable. The cost of handling these logs is shown to be for labor and materials $2995.42 for which Plaintiff is entitled to judgment.

As to the 37% which Plaintiff asks for, the work of handling Defendant's logs is not provided for by the contract, and being work not contemplated by the contract, this cannot be allowed."

30

Before leaving this claim it is,we think, expedient to point out that no question of cancellation of the contract or election for non-performance can possibly arise in connection with this claim.

The statutory law in this respect is to be found in S. R. Q. 1925, chapter 46. Section 31 of that chapter expresses the right to drive logs. Section 44 provides that no person may exercise this right without being liable for all damages caused by his operations on rivers, streams, lakes, creeks, or ponds, or on the banks thereof. Section 54 compels him to place
40 men at every bridge under which his logs are to pass.

The logs being driven on this river were cut from Crown Lands. From Dumont vs Fraser, in the Supreme Court, S. C. R. 49, page 158, we extract the following:—

"Les défendeurs sont concessionnaires de coupe de bois, leurs droits et leurs obligations sont régis par les lois des terres de la couronne ou ce que j'appellerai notre code forestier.

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Ces dispositions de code forestier lient les porteurs de coupe et ces derniers n'ont pas le droit de s'y soustraire en invoquant la loi commune."

The Supreme Court reversed the judgment of the Court of King's Bench, reported at 21 K. B.365, and its decision was affirmed by the Privy Council, 19 D. L. R. 104.

10

We also rely on Ward vs Township of Grenville, 32 S. C. R. 510; Ste. Anne Fish and Game Club vs Rivière Ouelle Pulp and Lumber Company, 45 S. C. R. 1.

We beg to call attention to the terms of Defendants' Plea. (Paragraph 7, sub-paragraph a) The Contractor is charged with liability in respect to the driving of logs because, (1), of the failure of said Plaintiffs to provide guide booms; and because, (2), the gaps left between the coffer-dam cribs were too narrow to permit the passage of logs.

20

As to the first point, it is submitted that providing guide booms was no part of our duty. — It was a duty which rested upon the Owner of the logs and our only contractual undertaking was to provide "such opportunities for the passage of logs as the construction work rendered necessary." (Contract, Vol. 6, page 1103, line 24.)

On the second point, we submit that the whole of the evidence is to the effect that the gaps left between the cribs were quite wide enough.

As to the general construction of the clause we rely on the decision 30 in the case of MacLaren Company, Limited, vs Electric Reduction Company, Limited, which went to the Supreme Court and is reported at D. L. R. 1926, Vol. IV., page 593. We particularly rely on the terms of Mr. Justice Rinfret's judgment in the Trial Court in which he held that because the Maclaren Company had expressly agreed to the construction of a dam, though they had stipulated that there would be no interference with their driving facilities in the river, they must nevertheless suffer without complaint the inconvenience to their driving operations which resulted from slowing down the current, that result being a necessary consequence of the thing which they had expressly authorized, namely the placing of 40 a dam across the stream. This judgment was an application of the general principle that when a contract is made for the main purpose of authorizing or requiring the doing of a specific thing, no matter what may be the terms of the incidental clause of the contract, the results which are a necessary consequence of doing the thing for which the contract mainly provides are implicitly authorized. We submit that this principle is one of general application and that a typical illustration of how it operates is to be found in article 552 of the Civil Code.

— 3 —

INCREASED COST OF COFFER DAMS AND UNWATERING

The consideration of this claim involves *prima facie* a somewhat complicated and intricate situation, both from the standpoint of the facts
10 and of the law. We have here an undoubted hardship suffered by the Plaintiffs involving them in huge expenditures, in serious delays, disruption and disorganization of their whole contract, from two causes, both, we submit, well founded in law; yet, in the nature of things, the practical impossibility of absolutely allocating to one or the other cause an exact amount of monetary damages renders it somewhat difficult to discuss the claim with that clarity which is desired.

The cause to which the Plaintiffs attributed their damage in connection with the coffer dam are broadly speaking, two. In the first place
20 they say the Defendant so drove his logs as to create jams in front of their coffer dam cribs, as a result of which logs became lodged in the interstices of the cribs to such an extent that it was not commercially practical with the equipment available to remove them, and to a similar and equal extent logs became lodged in the bed of the river upstream from their coffer dam, so that it was impossible for them to sheath their coffer dam in the way they normally would have done, all of which added materially to the expense of construction and to the difficulty of making the structure water tight. In the second place, although it was positively represented to them in their contract that they had all across the bed of the river ledge rock,
30 without overburden, upon which to place their coffer dam, which would create a most favourable situation for obtaining an absolutely water tight coffer dam at a minimum of expense and delay, in point of fact the representations made to them were absolutely misleading. There was an overburden of pervious nature overlying the ledge to a depth of some nine feet, as a result of which it was impossible for them to obtain a water tight coffer dam by the methods, which, relying upon those representations, they adopted and which would have been perfectly proper methods had the representations been correct.

40 Having thus stated generally the predisposing causes of the damages claimed by Plaintiffs under this head, we proceed to deal in more detail with each of them, and since it very closely relates to the claim last considered, we shall deal with the situation created by the logs. — The evidence of all the witnesses produced by Plaintiffs not contradicted or attempted to be contradicted by any of Defendant's witnesses, save the witness Coyle, is that the logs of the Defendant came down stream in large quantities, so large in fact that even the precautions taken by the Plaintiffs to keep them off the coffer dam were useless; that they jammed

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against the cribs of the Plaintiffs' coffer dam and in one instance drove a crib several feet downstream and necessitated the placing of the sheathing of Plaintiffs' coffer dam upstream from the face of the cribs a distance varying from two to fifteen or sixteen feet, necessitating fill of heavy material between the sheathing and the cribs, the construction of a falsework of struts and walers which would, but for the presence of the logs, have been unnecessary. The presence of the logs further made it impossible to drive the wooden sheathing through the overburden and even in some instances, prevented the sheathing from reaching the surface of the river bed. This necessitated the use of some 11,000 yards of toefill, an abnormal quantity, and manifestly most expensive to place, the result being that when the coffer dam construction had been completed in so far as the placing of the cribs and wooden sheathing and toefill was concerned, it was found impossible, notwithstanding the use of three times the normally anticipated pumping equipment on the job, to lower the water between the upstream and downstream coffer dams to any appreciable extent. This being the case, Mr. Ferguson, the Defendant's engineer, was called in and it was his opinion that the bed of the river upstream from the coffer dam should be blanketed with more toefill, which suggestion was followed and although Mr. Ferguson expressed the opinion that the soundings indicated on his plan were correct, he nevertheless undertook to have the location core drilled so that some definite assurance might be obtained. This undertaking on Mr. Ferguson's part was not fulfilled because he afterwards decided that an electrical apparatus, which he admits upon cross-examination, would not be accurate within three or four feet, could be used in substitution at less expense to the owners.

The second complaint of Mr. Bishop with respect to the inaccuracy of the contract is undoubtedly incontrovertible in the light of the evidence submitted.—

What were the rights of the contractor? We submit, first, that the owner was bound, in preparing plans, and more particularly so important a plan as that of the topography of the site to employ a competent engineer with experience in the preparation of plans of that kind. Second, that after this engineer had procured his information the contractor was entitled to have it fully, fairly and accurately transcribed upon the plan and to be given all the information with respect to the site which the owner or his engineer had obtained and that the information given should represent accurately the conditions existent at the site. How far have the owners and their engineers discharged their obligations in respect of the matter? Mr. Stratton who took the soundings stated that "so far as taking soundings in rivers was concerned he was practically without experience when he arrived at the Lievre." (Vol. 3, page 591, line 40). We must ask the Court to give special consideration to the evidence of Mr. Stratton, and especially to his answers on cross-examination. It is he who made the only examina-

tion of the site which was made prior to the calling for tenders and it is the results of his investigation that were supposed to be portrayed on the plans. He admits his inexperience, he admits the methods he used to investigate the river bed were unreliable and he admits that his plan did not even present a true picture of what he thought he had found by his unreliable methods. (Vol. 3, page 559, lines 30 et seq.) We feel quite con-
10 fident that after having considered the evidence of Mr. Stratton, the Court will have no difficulty in coming to the conclusion that so far from being a competent and experienced man in the class of work that he was sent out to do, he was inexperienced and incompetent and prepared a plan which in no way truly represented conditions as they existed, and what stronger evidence in support of our statement in this respect could be found than the cross-examination of Mr. Ferguson (Vol. 4, at pp. 697, 698 & 699)?

It seems somewhat difficult for one to conceive what reasons could have actuated Mr. Stratton, in preparing so obviously a negligent and in-
20 accurate representation of the conditions which actually existed at the site of the work, but possibly the best excuse that can be offered for Mr. Stratton can be summed up as follows: In the first place, Mr. Stratton had been given a responsibility for which his previous training and experience were absolutely inadequate. He it was who had been asked to select a site for the dam. — For reasons best known to himself he selected the site upon which the dam was constructed. Possibly he felt that in order to justify his selection he must make it appear that the locus selected by him was one upon which the dam could be built at a minimum of expense, hoping, for he was clearly not qualified to form a worth-while
30 opinion on the subject, that subsequent developments would justify his guess or, if not, that the contractor would be the one to pay the piper. — Whatever theory one adopts as to Mr. Stratton's mental processes surely the consequence of his errors and incompetence must be borne by the defendant who employed an engineering expert of that calibre.

Whatever may be said about the competence or incompetence of Mr. Stratton, so far as responsibility is concerned for the ultimate consequences, can, we submit, in law be applied with equal force to Mr. Ferguson because our position in the law is that the incompetence of Mr.
40 Ferguson's employee is the incompetence of Mr. Ferguson, and the incompetence of Mr. Ferguson is the incompetence of the owner. Surely, there can be no principle of law more firmly established than this, that if I employ a servant to perform an act requiring skill and as a result of his unskillfulness I cause prejudice or damage to others I must compensate those who have suffered in the same way as if the lack of skill had been my own.

When we come to consider the question of Mr. Ferguson we have, we submit, only to refer to his own evidence on the subject. We do not

propose to comment on his evidence but we would ask the Court to read it carefully, more particularly the cross-examination which is found in Vol. 4, on pages 694 to 728 inclusive, and our submission is this: After reading that evidence one can come to no other conclusion than that a contractor examining the plan B-2444 would be led to believe that he had work to be done, as far as the unwatering is concerned, which could be performed expeditiously and at the absolute minimum of expense for work of that kind. Next, the conclusion from Mr. Ferguson's evidence is that any errors in the topographical plan might entail serious prejudice and entail increased cost to the contractor. Now it is perfectly clear, we submit, that if an engineer, acting for an owner, is permitted to advertise to the contracting world at large that he has a job to be performed which is simple in its nature and capable of performance at the minimum of cost, the prices which the owner will obtain when tenders are called would not be those which would be submitted if the information given to the contractors disclosed the probability or even possibility of real difficulties. Is it not reasonable to suppose that Mr. Ferguson, the engineer, was actuated by the desire to procure for his principals the lowest possible price for their work? What other reason can be suggested for the fact that Mr. Ferguson refrained from disclosing on Plan B-2444 information which Mr. Stratton thought he had, namely, that there was overburden where ledge is shown on the plan, unless Mr. Ferguson felt that to disclose the fact that the surface of the river bed was not ledge, as the plan shows, would enhance the price of bidding contractors?

Had Mr. Ferguson disclosed, as he admits it was his duty to do, the fact that Mr. Stratton had discovered in spite of his inadequate and unreliable methods, a certain amount of overburden, it would possibly have suggested to the contractors the necessity for some further investigation of the site before they made their tenders; but Mr. Ferguson failed to disclose that information. Are we not naturally led to the conclusion that it was a desire to protect the interest of the owner rather than give a fair and full disclosure to the contractor which actuated him to do so?

We have found it somewhat difficult to extract from the evidence of all the witnesses who testified as to the consequences of the misinformation on the plan particular references which would be of more assistance to the Court, than a general perusal of their evidence. Such a vast amount of testimony was offered upon this subject that we feel in order to do it justice the Court will be obliged to read closely the evidence of all the witnesses called by both parties on this subject. There are, however, one or two facts which stand out above all others as indicating that the position taken by the Plaintiffs with reference to the nature of the material in the river bed is correct. In the first place Mr. Ferguson, in order to justify his position that it was not the pervious nature of the river bed but some error in design or construction of the cofferdam which caused the difficul-

ty of unwatering made a statement that at a certain time he had observed silt or toefill material that had washed through the sheathing and the crevices of the coffer-dam and this to a height permitting one to walk across the channel. Fortunately, however, for the contractor, an imperishable record of what actually existed in the river bed below the upstream coffer dam was produced in the form of a photograph which showed that, with the water lowered some four feet below the elevation at which it was on
10 the date of Mr. Ferguson's visit, it would even then have been impossible to walk across the river below the upstream coffer dam, and that far from there being silt or other material which showed as having washed through the crevices there actually was at the time of Mr. Ferguson's visit to the site more than four feet of water straight across the river with no earth or other solid material in sight.

Further no attempt was made by witnesses for the Defendant to contradict the evidence of practical witnesses for Plaintiffs who were on the work and who definitely stated that when the pumping had been suf-
20 ficiently far advanced to permit of ocular observation, they observed the water coming in streams through the overburden and, again, no witness for the Defendant seriously attempts to deny the existence of the overburden. Even Stratton, whose plan absolutely negatives the existence of overburden, admits that with the inadequate equipment he had he discovered it to the extent of two and one-half feet. The Defendant itself, on the certificate of its engineer, paid for material other than rock excavated at the site of the dam, in the river section. That is the best evidence that it was there since we were paid for removing it, and according to the plans and the estimates none was to be expected.
30

Now, one is forced, we submit, to consider this state of affairs. If engineers and owners are to be permitted, for the purpose of obtaining low bids, to offer contractors information which will induce them to tender lower than otherwise they would do and to enrich themselves at the expense of the contractor when the actual state of affairs becomes known, it means the sanction of an immorality in business matters that neither law nor justice can support. Thus the Plaintiffs contend that applying either ethical, moral or legal standards to the conditions as they existed in the contract under discussion, they are entitled to be compensated for the
40 extra expense they have been put to by reason of the untrue representations made by the Defendants or on their behalf and the question for the Court to consider on this particular claim is the amount to which Plaintiffs are entitled.

Particulars of the extra expense incurred by Plaintiff with respect to this particular claim are contained in paragraph 19 of the Declaration and in exhibit P.116 at Vol. 6. p. 1178 and following, and we submit that the actual outlay which is alleged to have been made by Plain-

tiffs is amply justified by the evidence upon this point given by Plaintiffs' accounting witnesses. The only item that might be said to be open to argument is the one of 37% for overhead, use of plant, etc., and the Trial Judge reduced this to 15% in his judgment which is as follows:—

"The next item is the increased cost of cofferdams and unwatering.

10

THE Plaintiff seeks to hold Defendant responsible for this item on two grounds:

(a) The damage caused by the logs.

(b) The fact that on the plan upon which the tender was made, 'the line established on the ground' (page 1 of the contract) was marked L. admittedly meaning ledge, while as a matter of fact it was not ledge at all, but had an over burden of a pervious nature, in some places as much as nine feet, so that it was only after much delay and large extra cost, that the cofferdams could be made sufficiently water-tight for the work to be proceeded with.

20

THE Defendant contends that Plaintiff should not have relied upon the statements on the plan, but should have verified them all, and cites several cases in support of the contention, principally the Nova Scotia Construction Co. and The Quebec Streams Commission. It must be noted however that the contract in the Nova Scotia case contains a special clause that 'the agreement is made 'and entered into by the contractor.... solely on his own knowledge, 'information and judgment of the character and topography of 'the country, its streams, water courses and rainfall and subject 'to the same, and upon information derived from other sources 'than the commission etc.' No such clause is in the contract under consideration in this case.

30

THE contract calls for the building of a dam 'at a line es'tablished on the ground, the location of which is indicated on a map 'attached hereto.'

40

IT is admitted by both parties that the dam was built on the line on the ground indicated on the map, and that the letters L on the map mean ledge. In addition to this the contract provides at page 9: 'It is further agreed that any core drilling or grouting of 'seams in the ledge beneath the dam which may be required by the 'engineer shall be considered as extra work, and be paid for as 'such in the manner provided herein for other extra work.'

THIS clause plainly shows that both parties considered that the substance beneath the dam was ledge.

IT is intimated by the defence in the examination of witnesses and at the argument, that Plaintiff should have verified the finding of ledge, even to the extent of core boring. The contract as we have just seen provides that if core boring is considered necessary by the engineer, (either Stream Commission's of Defendant's page 2-A of the contract) it shall be paid for as extra work.—

IT would seem from the evidence that core boring might have saved much of the trouble, but there is no suggestion that the Engineer ever considered it necessary and under the contract it was up to him.

THE Plan B-2444 was certainly not accurate, and plaintiff was misled as to the difficulties which he would have to face in the placing of coffer-dams and the unwatering operations generally. Stratton was the man who obtained the information upon which the plan B-2444 was made, and his evidence shows that he had not had sufficient experience to be entrusted with such an important piece of work. He selected the "line on the ground," the site of the dam. Surely plaintiff had the right to suppose that when the site of the dam had been chosen by a well known firm of hydraulic Engineers that at that particular spot the river bottom was ledge, as marked on the plan, and that site had been chosen because it was ledge.

DEFENDANT argues that Plaintiff did not rely on Stratton's findings but checked it up themselves. The evidence shows that the soundings made by Reiffenstein and l'Heureux were merely for the purpose of getting the depth of the water and the shape of the river bottom so that L'Heureux who was the foreman carpenter would know how to make his cribs. The Defendant tries to show that the cribs for the cofferdams were not propertly made, but the evidence on this point is not convincing. All the delay, trouble and expense are due to two things:

(a) The fact that instead of ledge at the line on the ground, where the dam was to be built there was pervious over burden.
(b) The damage caused by the defendant's logs.

THE amount of loss proved by Plaintiff is $144,457.92 being for extra crib-work, sheeting and toe fill, steel sheet piling, including taking in heavy pile driver, pumping, removing of coffer-dams, boats, etc.

THIS however cannot be considered work done under the contract but damages. This being the case plaintiff is not entitled to the 37% profits provided by the contract, but it is admitted at the argument that in this event an allowance of 15% for overhead would be fair. This amounts to $21,667.50, making in all $166,125.52, upon which Plaintiff acknowledges to have received $49,050.20 leaving a balance of $117,075.22 for which Plaintiff is entitled to judgment." 10

The Trial Judge however allowed interest on this amount only from the date of judgment and it is claimed on the cross-appeal that it should run from the date of the institution of the action.

In a general way the consequences of the unwatering difficulties are conclusively shown by the statement made by Mr. Lefebvre in his report of 1929 for the Quebec Streams Commission. This appears at Vol. 5, page 912, lines 10 et seq. "The unwatering of the dam site was quite difficult and the work was delayed a few months on that account. Pouring 20 concrete will have to be made during most of the winter and the work will be completed early in the Spring."

It is proved by Mr. Acres that up to the 15th of October all efforts were directed towards coping with difficulties arising out of the presence of the logs, and the delay from the 15th of October was due to the porous nature of the river bed. (Vol. 3, pages 430 and 436.) Without these difficulties, we could have done the unwatering for $49,050.20 included in the estimate. This is proved by Mr. Bishop in Vol. 5 at page 1042.

30

As to the erroneous information conveyed by Plan B-2444, Mr. Lefebvre states in Vol. 5 at page 911, that he would read this plan as showing bare ledge rock at every point where the letter "L" appears.

Mr. Ferguson makes the same admission at the top of page 717 of Vol. 4. At pages 672, 701, 715, 716, Mr. Ferguson also admits that by the word "topography" as applied to the bed of the stream, was meant the contour and form or substance and of what it consists "and that anyone reading the plans without any other information from Mr. Stratton would understand that it consisted of ledge at the elevations shown without any 40 over burden." He further adds at p. 716, "I felt a few feet of overburden probably would be something to be paid for." The Trial Court agreed with him.

We rely on the decision of the House of Lords in the case of Pearson and Sons and the City of Dublin, 1907, A. C. 351.

It is quite true that under normal conditions the proper recourse would have been for rescision of the contract as was held by the Supreme

Court in the Nova Scotia case, relying on the decision of the Privy Council in the case of the United States Machinery Company and Brunet, cited therein, L. R. 1909, A. C. at p. 339. But when we protested we were instructed to go ahead with the work at whatever cost and have the matter of our right to increased compensation determined by arbitration. (See exhibit D.3 Vol. 6 p. 1153 at LL. 43 et seq.)

10 We also refer to P.31 to P.36 inclusively, Vol. 6. pp. 1139-1144, being the letters exchanged with respect to the driving of the logs where the defendant's officers themselves expressly stated that both parties' rights had been fully protected by their respective protests and would be taken care of afterwards.

We also call attention to the fact that no fault was found with the way we had proceeded and that on October 2nd, we were directed to go on and put in still more toefill. (See Exhibit P.6 and Exhibit P.7, Vol. 6, pp. 1146-1147) (See also the extracts from O'Shea's diary in Vol. 3. at pp.
20 526, 527, 528 and 551. "Bishop intimated that information on drawing B-2444 showing ledge was wrong, and that consequently he feels he has done all his contract calls for and should be paid for any more. Mr. Ferguson refuses to decide on this saying it was a matter to be decided by themselves and that an arbitration was the proper means. — Ferguson was very insistent that the job should not be held up. Bishop ready to throw up but surprised me by being less wild than I expected.")....

— 4 —

30 COFFER-DAM AT THE LOWER END OF THE BY-PASS.

This claim was disallowed.

— 5 —

ADDITIONAL COST OF ROCK EXCAVATED.

Reference to paragraphs 22 to 26 inclusive of the Declaration exposes in detail the basis upon which this claim is put forward by the con-
40 tractor. It may, we submit, be briefly summarized as follows:

In the contract as offered to the Plaintiffs a total amount of rock excavation of 8000 cubic yards was in contemplation. In point of fact the completion of the contract involved the excavation by the Plaintiff of 21564 cubic yards, or slightly less than three times as much. It is true that under the contract in certain specified localities provision was made for radical increases in depth, and, in the locations in respect of which such provision was made, the Plaintiffs were remunerated at the price stipu-

lated in the contract. Apparently the engineering staff who prepared the contract were satisfied that there could be no possibility of the necessity of excavation of radically increased depths, save at the points which are mentioned in the contract, because were it otherwise one could only justify their having failed to make such provision at other points by a suggestion that they intended to impose risk and hardship upon the Plaintiffs. It must, therefore, come as somewhat of a surprise to all concerned when upon examination of the profiles indicating the proposed base of the dam and those which indicate the actual line of the base of the dam, one discovers that the major portion of the over-run in rock quantities is found at places where no provision is made for increased payments in regard to increased depth.

The Plaintiffs complain not only of this radically increased and excessive over-run in rock quantities at points where no provision was made in the contract for increases in unit prices, but also of the fact that in practically every other place where rock was to be excavated the method imposed by the engineers for the Defendant was one, the only result of which could be, to increase the cost of Plaintiff's operations, namely the practice of removing the rock in thin layers rather than making apt investigations to determine within reasonable limits the actual depth of the defective rock, in order that the contractor might remove it as quickly and with as little expense as possible.—

There might be some increases "but the contract was expressly framed or drafted with the definite idea in view that if excavation was to go deeper there would be provision to pay for it." Vol. 4, p. 716, line 24.

Undoubtedly a strict construction of certain expressions in the contract and a literal interpretation of it without due regard to those clauses which, we submit, were designed to provide that in cases of doubt a generous and liberal treatment of the contractor would ensue, makes the position of the Plaintiffs with respect to this particular claim a somewhat difficult one. When, however, one takes into consideration the fact that the contract itself leaves somewhat at large the question of what is and what is not extra work, and only makes the decision of the engineers final and conclusive as to quality of materials and workmanship, leaving to arbitration disputes "as to cost of changes and extra work performed, or in regard to any other matter regarding the execution or final settlement of this contract" it is submitted that the contractor in this action is upon an entirely different footing as to the risks undertaken by him from that which was occupied by the contractor in the Nova Scotia Construction case. — This view and this argument are, we submit, reinforced by the clause in the specification which clearly shows that the intention of the contract is to secure first class construction "without working an undue hardship on the contractor". We submit, for instance, had the Defendant

loyally carried out those provisions of the contract which provided for arbitration and had the cost of the contract with respect to the rock excavation been submitted to arbitrators thoroughly conversant with the method of execution of contracts of this kind, there could clearly be no doubt as to the judgment of such a tribunal where quantities so largely overran those anticipated and the method for dealing with them was that imposed by the owner in the present instance.

10

It is our submission, therefore, giving to the contract that liberal construction which we submit it should receive by reason of the clause quoted and its general tenor and the impression which we submit would be conveyed to the contractor bidding upon the job, the claim in question should receive the favorable consideration of this Court and under this head of the case Plaintiffs should receive $35,100.74 which is the net amount claimed after allowance for all payments received for rock excavation. The details are to be found in Vol. 6, pages 1189-1190 and 1191.

20

— 6 —

HANDLING AND TRIMMING EXCAVATED ROCK.

This claim was disallowed.

— 7 —

FROZEN MATERIALS IN THE RIVER-BED

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We refer the Court to paragraphs 28 to 30 inclusive of the declaration.

It is common ground that in the quantities to be excavated on the bed of the river only rock was in contemplation of the parties, and it cannot be said that the contractor tendered to remove any earth in that locality. It is equally agreed by both parties that there was removed from the bed of the river 811 cubic yards of material other than ledge rock, although the plans had indicated that only ledge rock would be found there.

40

It is common ground that the material other than ledge rock which occurred in the bed of the river was removed by the contractor and no one has ventured to dispute the evidence of his witnesses that this material when removed consisted of boulders, stones, gravel and sand, that it was taken out in the middle of winter in a frozen condition and was much more difficult and expensive to handle than earth. In fact Plaintiffs' witnesses are unanimous in saying that it could not be handled at less costs than ledge rock. Now, the question is whether, having in mind that the removal of this material formed no part of the work which the contractor had

specifically contracted to do, it would under the terms of the contract itself be extra work to be performed, and there can be no doubt that had the Defendant fulfilled its obligation to arbitrate this question, among others, its liability or non-liability to compensate the Plaintiffs as an extra for the performance of this work would properly have been the subject of arbitration proceedings. For the arbitration proceedings which the contract contemplated the Defendant endeavours to substitute *ex parte* the decision of its employee O'Shea. If in the light of the plain words of the contract one can come to the conclusion that the contractor would enjoy the same benefit from the decision of Mr. O'Shea as he could from the decision of an impartial tribunal constituted under the arbitration clauses of the agreement, then little remains to be said; but, if, as we submit, the contract does not make express provision for payment of this work and the Defendant has, as there is no doubt he has done, refused to resort to the tribunal constituted by the contract, we submit it was a matter proper for submission to the Court, and we equally submit that on the evidence the Court was right in giving judgment in Plaintiffs' favour on this item. The amount involved is made up by Plaintiffs on the basis of the rock price less the earth excavation price paid by Defendant on O'Shea's certificate, leaving a net amount of $2530.32 for which the Trial Court gave judgment, finding as follows:—

> "The next item is for excavating 811 cubic yards of frozen boulders etc., at rock price $4.35 which was paid at earth price $1.23, leaving a difference of $2,530.32. There is no provision in the contract except for earth and rock. This material was certainly not ordinary earth excavation and was as expensive as rock. It would obviously be imposing undue hardship on the contractor to make him accept the earth price — consequently plaintiff is entitled to this amount."

— 8 —

WORK UNDER WINTER CONDITIONS

This claim which is set up in paragraphs 31 and 32 of the declaration, while of very great importance to Plaintiffs and involving a very considerable amount of money, is so closely interwoven with the claim of the Plaintiffs with respect to the excessive cost of coffer damming and unwatering of the stream, that it can be disposed of by a brief but, we submit cogent argument.

Let us first dispose of those questions of fact about which there can be no dispute. In the first place it is conceded that the pouring of concrete under winter conditions such as prevailed in the locality in question is vastly more expensive than the same work would be under conditions

which obtain in the Spring, Summer and Fall. Some attempt was made by both parties to generalize as to the percentage difference per yard of concrete, but the Plaintiffs concede that to generalize upon such a subject is dangerous. The Court, in arriving at a conclusion found that all this extra cost has been definitely established by witnesses for the Plaintiffs, and it is our submission that on a consideration of the whole evidence there has been no real effort made by the Defendant to dispute the figures to which
10 we have just now referred. It must, we submit, be conceded in view of the figures established by the Plaintiffs that no sane person would undertake work of this kind in the winter time save by compulsion of causes beyond his control. It is clearly established that the Plaintiffs in the present case did work in the winter time and the logical mind naturally wonders why. Examination of the evidence of Mr. Bishop and of the witnesses called in support of Plaintiffs' case shows that not only from the standpoint of theory but also in usual practice and performance with the plant and equipment provided by the Plaintiffs the work to be done under his contract, as well as the remarkable over-run of quantities which he encountered,
20 could have been performed under these weather conditions most propitious for inexpensive operation, unless the contractor had been compelled to do otherwise for some reason. Without going too much into detail we would like to stress in particular Mr. Bishop's evidence upon this point and would call to the Court's attention the progress charts both of anticipated performance and of actual performance which were produced by him. To what cause then must we inevitably attribute the fact that the Plaintiffs were compelled to undertake the erection of forms and the pouring of concrete in unseasonable winter weather. Can it be other than that the unwatering difficulties experienced in the bed of the river so delayed the
30 performance of the work that in order to perform his obligation with respect to the completion date he found himself compelled to proceed under these adverse winter conditions?

It would be idle we think to reiterate the detail of the argument submitted under claim No. 3. but we submit that when the Court came to the conclusion that the coffer damming difficulties arose from the fault of the Defendant both by reason of its delict with regard to the logs and the inadequacy of its plans and the misrepresentations contained therein, then it could not fail to conclude that the delay occasioned by those dif-
40 ficulties in the river was the compelling cause of the contractor working under winter conditions and that the Defendant is equally liable for the additional expense thereby occasioned.

It might be urged and argued that it would have been more prudent for the Plaintiff, having completed the work essential to the unwatering and excavation of the river bed, to have held over their further operations until the Spring. No great stretch of the imagination is required, we submit, to visualize, having in mind the nature of the river bed, the complete

disappearance in the spring floods of the succeeding year, of the work done the previous summer and fall in the river bed. With respect to this claim the Plaintiffs claimed judgment for the sum of $96,832.45, this amount being made up of his actual outlay for labour and material of $70,680.62, with the 37% added. The Trial Court allowed the $70,680.62 plus 15% for overhead and plant or $81,282.62 expressly holding that "the delay was caused by the porous nature of the overburden at the places marked ledge, and the delay caused by defendant's logs" (Vol. 6, p. 1256.). 10

The connection between the winter work and the delay in the unwatering is clearly expressed in Mr. Lefebvre's report already cited; Vol. 5, page 912. "The unwatering of the dam site was quite difficult and the work was delayed a few months on that account. Pouring concrete will have to be made during most of the winter and the work will be completed early in the spring."

The manner in which Plaintiffs' calculation of the additional cost is made is clearly set out in our Exhibit P.49 (Vol. 6, p. 1240), and P.116 20 (at vol. 6, page 1193). Our exhibit P.120 (Vol. 6, page 1247) shows the additional costs of building the forms for the concrete during the winter months to have been about $18,000.00. No special claim was made for this extra cost and it is our submission on this point our evidence has established that the winter work actually cost us more than the sum we sued for. — Even if the Court had been inclined to consider that some of the items in this chapter might be open to criticism, the $18,000.00 of additional cost of the forms provided a margin which would have made it easy for the Court to award at least the amount set out in the declaration in that regard. Some attempt was made by the defendant to challenge these 30 costs by Mr. Chadwick's evidence. Mr. Chadwick stated that in a general way for common concrete $1.30 might be a sufficient increase, but when cross-examined and made to realize what the actual conditions were, he raised his figure to $2.70 per yard and we submit that our evidence of $3.20 per yard remains intact. This is another item on which we contend on our cross-appeal the interest should run from the date of the action.

— 9 —

OVERCHARGE ON LOGS 40

This was a claim for $6893.68 which Plaintiffs claimed was an overcharge on logs delivered to the contractor by the owner. The owner had billed the contractor for $25,735.06 and had retained that amount out of the sums payable to the contractor for work performed. The contractor contended that the sum really due should have been only $18,842.28 because he had been billed according to quantities measured in board feet after he had himself caused the lumber to be sawn; whilst he had bought

the logs in the round subject, as he contended, to measurement according to the Quebec Government scale. He claimed that made a difference of 29% because it is possible and usual to get out of logs measured according to Quebec scale, that percentage more of deals or boards when they are carefully sawn. The Trial Judge did not accept Plaintiffs' evidence as sufficiently convincing on that score. But he did find that the Defendant had collected for one lot of 1,100,318 feet at $20.00 per thousand feet when
10 only 1,028.838 feet had been delivered; a difference of 71,480 feet equal to $1429.60 for which he gave judgment. The particulars in this respect are in Vol. 6 at pages 1201 and 1202 and the evidence is in the testimony of H. C. Griffith, Vol. 3 at p. 437.

— 10 —

CEMENT FOR APRON IN BY-PASS CHANNEL

We refer to paragraph 35 of the declaration in which this claim is set up, and to Vol. 6. page 1204, where the details of a revised claim are
20 shown.

The evidence of this claim can, from Plaintiffs' point of view, be summed up as follows: At a certain time the engineers in charge of the work decided that a concrete apron should be laid in the by-pass channel to avoid the possibility of erosion. This apron formed no part of the original design of the dam. The giving of this order necessarily increased the quantity of cement required for completion of the work. Now, had the Plaintiffs been notified while transportation facilities permitted of economical transport of the cement this claim would not exist. In point of
30 fact, however, the decision to lay this apron was arrived at when the winter roads were breaking up and no definite information as to the quantity of cement required was given the contractor until the excavation required for the apron had been completed. When definite information became available winter roads were gone and the transportation of the additional cement which the construction of the apron had entailed became a very much more expensive proposition than it otherwise would have been, and it is the submission of the Plaintiffs that this additional cost of transportation formed part of the extra cost of the apron and that they should, under the terms of their contract, be compensated for it. Compensation
40 under the terms of the contract would involve repayment of his actual outlay plus 37%, which amounts to $1454 03 after due credit for the cost which would have been involved had the hauling been done on winter roads.

The trial Court overlooked this revision of the claim which appears in Mr. Griffith's evidence, Vol. 3. page 470 and following, and it must be confessed that he was led into that error by the factums of both parties which failed to call his attention to it. In the result he allowed as item 10 of his judgment $1879.83 whilst it should be only $1454.03. But it should bear interest from the date of the action.

In the Court of King's Bench — No. 4 The Factums of Respondents and Cross-Appellants before the Court of King's Bench 6 May 1935 (Continued)

It is quite clear that this apron was an extra. It was not an increase in the quantity of the concrete in the dam, but the building of another unit altogether and should be paid for under the extra work clause of the contract. If one will refer to Mr. McIntosh's diary, Exhibit P.106 not printed, one will see what a tremendously difficult problem it was to get this cement in at that time, and Mr. O'Shea admitted that this extra cement was required only because of the building of this apron and that the contractor had enough on hand when the order for the apron was given to complete 10 the rest of the job. (Vol. 3, page 581, Lines 20 et seq.)

— 11 —

SHORTAGE IN PAYMENT FOR CLASS 1 CONCRETE

This claim involves practically no disputed questions of facts and depends in its entirety upon the proper construction of the contract between Plaintiff and Defendant. At page 1097, Vol. 6, of the contract are found the provisions for additions to or deductions from the principal 20 sum according to whether quantities are increased or diminished, and at page 1098 it is provided that for each cubic yard of class 1 concrete without plums by which the scheduled quantities are increased there is to be an increase of $18.92, and for each cubic yard of Class 1 concrete without plums by which the quantities are decreased there is to be a deduction of $9.81 while in the following schedule it is provided that for each cubic yard of Class 1 concrete with plums by which the scheduled quantities are increased there is to be an increase of $17.16 while there is to be a deduction of $9.31 for each cubic yard of Class 1 concrete with plums by which the scheduled quantities are decreased. — It is common ground that the 30 Class 1 concrete without plums actually poured was 23,656 cubic yards, while the quantity scheduled in the contract was 9690 cubic yards. Applying the unit price above referred to, $18.92, we find that the contractor's price should have been increased by $264,236.72 on this head. It is equally beyond dispute that the contract quantities of Class 1 concrete with plums were 10,800 cubic yards, while the actual quantity of this class poured was 6,781, a decrease of 4,019 cubic yards. Applying to this the figure $9.31 referred to in (k) on page 1098 we find that the contract price should be decreased by $37,416.89 on this head, leaving a net increase of $226,819.83. — The engineer's estimates in respect of class 1 concrete have only allowed 40 the Plaintiffs the sum of $195,270.68 leaving a net difference in the contractor's favor of $31,549.15. The figures above referred to are not disputed and it is our submission that any construction of the contract other than that which Plaintiff upholds must clearly be in absolute contradiction and negation of these clear and unambiguous words. The evidence, as the Court will find, disclosed that the Defendant itself up to a certain point so interpreted the contract, but that the bright idea occurred to some one when the latter estimates were going through that since they had the

funds in their hands they might insist upon an arbitrary construction of the contract involving as we have previously said the negation of its terms and retain the amount in question leaving it to Plaintiffs to assert their rights. We submit that the terms of the contract are clear and unequivocal and that Plaintiffs are, beyond question, entitled to be paid the amount claimed, and the Trial Court so found (Vol. 6 p. 1257).

10

— 12 —

PLANT REMOVAL

This claim falls with the class of those which arise from the damage resultant upon the erroneous representation of the Defendant in its plans and its misconduct in the driving of its logs. The evidence establishes, we submit, that Plaintiffs could, but for the difficulties encountered in the bed of the stream, have completed its work well within that period of time which would have permitted Plaintiffs' plant to have been removed from the locus of the work over winter roads, which in that locality offer
20 the most economical method of transportation. Due to the fault of Defendant, details of which appeared before in evidence and argument relating to the claim for unwatering the river bed, delays were ocasioned to Plaintiffs which prevented their use of these favourable transportation facilities, hence an additional delay and loss to Plaintiffs of $5247.06 instead of $5823.49 as set up in paragraph 39 of the Declaration and established by the evidence of Plaintiffs' witness Griffith. The details of this claim are in Volume 6, at pages 1205 and 1206, and the evidence in Vol. 3 at pages 471 et seq. There was no dispute in the factums of the parties as to accuracy of the figures and no special reference to the adjustment
30 and in consequence the Trial Court overlooked the adjustment and gave judgment for the original claim $5823.49 which must be reduced to $5247.06 but which should bear interest from the date of the action.

— 13 —

STANDBY AND OVERHEAD EXPENSES

These claims which total $49,147.41 are set up in paragraphs 40 and 41 of the declaration and the particulars were proved by Mr. Griffith in Vol. 3, at pages 474 et seq. The Trial Court however, refused to allow
40 them.—

— 14 —

INTEREST

Claim number 14 related to interest claimed by Plaintiffs in respect of delays in the payment of sums due from the defendant. The amount involved was in comparison with the total amount at issue a trifling one, but in view of the attitude which Defendant adopted during the course of the contract, Plaintiffs felt justified in insisting upon payment of the amount claimed, namely $286.90 but the Trial Court disallowed it.

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CONCLUSIONS

The total amount of the judgment must be reduced by $1002.23 because of the two clerical errors to which we ourselves have drawn attention, i. e., the allowance of $1879.83 instead of $1454.03 on claim number 10 and the allowance of $5823.49 instead of $5,247.06 on claim number 12. These two errors were clearly clerical errors that would have been corrected without any appeal as soon as attention was called to them and we submit that the judgment should be confirmed in all other respects and the main appeal dismissed. 10

(CROSS-APPEAL)

As we have already pointed out, the Trial Judge gave interest on four items from the date of judgment only instead of from the date of the action. Plaintiffs made a cross-appeal limiting it, however, to this one point.

It is our submission that it clearly appears from the evidence and the judgment that no interest beyond the date of the action was included in the amounts awarded for these items and that being the case Plaintiffs were entitled to interest thereon from the date of the action, and the amount being a substantial one, $36,060.70, it warranted the cross-appeal. 20

We rely upon the judgment of this Court in the case of the Montreal Gas Company and Vasey, 8 K.B., 412, (See note of Judge Wurtele at p. 431) and the confirmation of the Privy Council in this respect. (Can. Rep. 12 A.C., 301, at page 307) from which we quote as follows:—

"The learned Chief Justice considered that the first judgment must be taken to include interest in the damages awarded up to the date of the judgment; this, however, does not appear to have been done, and, in the absence of any evidence that it was so comprised, their Lordship think they must treat interest from the date of the action as not included in the damages. Then, as it appears that the respondent was entitled to recover interest from the date the appellants were put "en demeure" by the service of process, the judgment of the Court of Queens Bench in this respect must be considered not to have been successfully impeached." 30

We also rely upon the decision of this Court in Great Northern Construction Company et al vs Ross et al, 25 K.B. 385, and Mr. Justice Dorion's judgment in the Quebec Harbour Commissioners vs New Zealand and Shipping Company, 50 C. S. 305. 40

On the strength of these decisions and on the general principle that a judgment is a declaration of rights and operates as such from the date the action was brought, it is respectfully submitted that the cross-appeal should be allowed.

Montreal, May 6th 1935.

Brown, Montgomery & McMichael,
Attorneys for Respondents on the Main Appeal
and Appellants on the Cross-appeal.

Louis St. Laurent, K.C.,
Counsel.

In the Court of King's Bench — No. 5 The Factum of cross-respondent before the Court of King's Bench 10 Sept. 1935

No. 5

The Factum of Cross-respondent Before the Court of King's Bench

The Appellants have appealed on the question of interest only from the judgment of the Superior Court of the District of Montcalm, rendered 10 by Honourable Mr. Justice White, dated June 1st, 1934 and recorded as of June 10th, 1934. By this judgment the action of the present Appellants against Respondent was maintained for the sum of $293,585.84, with interest on $206,061.16 from the date of judgment and interest on the balance from the date of action, December 9th, 1930. By their appeal appellants claim that they should have been awarded interest on the full amount of the judgment from the date of action.

The present Respondent has also appealed from said judgment and in its factum in support of its own appeal, to which Respondent now re-20 fers, all the facts of the case have been fully dealt with.

The judgment awards Appellants interest from the date of service of the action, as claimed, on all the items except the following:—

CLAIM 3—INCREASED COST OF COFFER-DAMS & UN-WATERING

Amount awarded $117,075.22

30 CLAIM 8—WORK UNDER WINTER CONDITIONS

Amount awarded $81,282.62

CLAIM 10—CEMENT FOR APRON IN BY-PASS CHANNEL

Amount awarded $1,879.83

CLAIM 12—PLANT REMOVAL

Amount awarded $5,823.49

40 The amount awarded Appellants under Claim 3 above mentioned is stated in the judgment to be awarded not as something due under the contract, but as damages. (Volume VI, p. 1255, l. 30). In allowing this sum as damages the Court expressly declares that interest is to run only from date of judgment. This can only mean that the learned Trial Judge in assessing the damages which he considered payable had calculated the amount due up to the date of judgment and therefore any interest that may be owing in connection with such item must be treated as being in-

cluded in the amount awarded. There is, therefore, no conflict between the judgment in this case on the matter of interest and the case of Montreal Gas Company & Vasey 8 K. B. 412 upon which appellants rely.

Claim Number 8 is of the same nature. It is stated in the judgment that "this is another item in the nature of damages." (Volume VI, p. 1256, l. 30) The same observations would therefore apply as in the case of Claim 3. 10

As to Claim 10, it is apparent from the remarks of the learned Trial Judge at page 1256, ll. 40-50, that the amount awarded under this claim was also awarded by way of damages and not as something due under the contract. No other conclusion is possible when the nature of the claim itself is considered. The same principle applies to Claim 12, which was maintained on the basis of damages and not as something due under the contract. (See Judgment, p. 1257, ll. 20-40).

The basis on which the learned Trial Judge has awarded interest 20 therefore seems quite clear. As regards amounts that he found to be owing under the contract, he awarded interest from the date of service of the action. As regards the four items above mentioned, he did not consider that these were due under the contract, but as damages, and in assessing the damages he expressly declared that interest would only run from date of judgment. It is respectfully submitted that if it should be found that Appellants are entitled to the whole or any part of the amounts awarded under these items, that this Court also should award interest only from the date of judgment, as was done by the Trial Judge.

30

Respondent, of course, does not admit that Appellant's claim as regards any of these items is well-founded, and in its own appeal has urged that the claim of Appellants as regards all of these four items should be dismissed *in toto*.

For the foregoing reasons Respondent respectfully asks that the present appeal of Appellants be dismissed with costs.

Montreal, September 10th, 1935.

40

Aylen & Aylen,
Attorneys for Respondent.

Aimé Geoffrion, K.C.,
Counsel.

In the Court of King's Bench

No. 6 Formal Judgment of the Court of King's Bench Maintaining the Appeal of The James MacLaren Company Limited 27 Dec. 1935

No. 6

Formal Judgment of the Court of King's Bench Maintaining the Appeal of The James MacLaren Company Limited.

Province de Québec
10 District de Montréal

COUR DU BANC DU ROI
(En Appel)

Montréal, le vingt-septième jour de décembre 1935.

CORAM:—BERNIER, RIVARD, LETOURNEAU, HALL, ST-GERMAIN, JJ.

No. 870

THE JAMES MACLAREN COMPANY,
corps politique et incorporé ayant sa principale place d'affaires dans la ville de Buckingham, district de Hull,

20 APPELANTE,

&

WILLIAM I. BISHOP LIMITED,
corps politique et incorporé ayant sa principale place d'affaires en la cité de Montréal et BANK OF MONTREAL, corps politique et incorporé ayant sa principale place d'affaires en la cité de Montréal,

INTIMEES,

&

30

A. DUBREUIL,
Régistrateur de la division d'enregistrement du comté de Labelle,

MIS EN CAUSE.

LA COUR, après avoir entendu les parties par leurs procureurs respectifs sur le mérite du présent appel, avoir examiné le dossier et sur le tout délibéré;

40 ATTENDU que pour régulariser le débit de la Lièvre à son propre bénéfice comme à l'usage des industries situées sur le parcours de cette rivière, la Compagnie-Appelante a formé le projet d'y établir un barrage à l'endroit appelé Rapides des Cèdres, dans le comté de Labelle;

ATTENDU que l'Intimée William I. Bishop Limited, a offert ses services comme entrepreneur et que sa soumission ayant été acceptée le 5 novembre 1928, les travaux commencèrent aussitôt, et que bien que la signature du contrat ait été différée jusqu'au 23 mai 1929, on y trouve une clause pourvoyant à ce qu'il soit sensé avoir été fait et signé le 15 novembre 1928;

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27 Dec. 1935
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ATTENDU que ce barrage, une fois construit, devait appartenir à la Commission des Eaux Courantes de Québec et que ceci impliquait pour les travaux à faire, un contrôle et une direction de son ingénieur;

ATTENDU que bien que pour un montant initial de $609,100., ce contrat pourvoyait à certaines additions ou déductions suivant des prix de série ou de base, arrêtés à ce contrat;

10

ATTENDU qu'il résulte des termes mêmes du dit contrat qu'il devait être exécuté jusqu'au bout et sans que l'entrepreneur en pût demander l'annulation, quelque changement qu'on pût faire aux plans au cours de l'entreprise, sauf indemnité d'après ce qu'il y était pourvu pour chaque cas;

ATTENDU que le contrat en question a été exécuté et qu'après avoir déjà touché comme prix une somme de $916,723.57, les Intimées William I. Bishop Limited et la Banque de Montréal demandent par action un montant additionnel de $412,846.75 que le tribunal de première instance a admis jusqu'à concurrence de $293,585.84, adjugeant cette dernière somme à la Banque Intimée comme cessionnaire, le tout selon les précisions que comporte le tableau que voici:—

20

Title of Claim	Amount claimed by the Action	Amount allowed by the judgment
No. 1—Hardpan Excavation	$ 21,601.45	$ 13,919.45
No. 2—Passing logs	4,103.72	2,995.42
No. 3—Cofferdam & Unwatering	148,857.15	117,075.22
No. 4—Cofferdam Lower End By-pass	5,563.50	
No. 5—Additionnal cost of Rock Excavation	55,100.74	35,100.74
No. 6—Handling & Trimming Excavated Rock	1,990.82	
No. 7—Excavating Frozen Material in river bed	2,530.32	2,530.32
No. 8—Work under winter conditions	96,832.45	81,282.62
No. 9—Overcharge on Logs	7,220.19	1,429.60
No. 10—Cement for Apron in By-pass channel	2,239.46	1,879.83
No. 11—Shortage in payment for Class 1 Concrete	31,549.15	31,549.15
No. 12—Plant removal	5,823.49	5,823.49
No. 13—Standby & Overhead Expense	49,147.41	
No. 14—Interest on Deferred payments	286.90	
	$412,846.75	$293,585.84

30

40

ATTENDU que la Compagnie THE JAMES McLAREN COMPANY LIMITED en appelle du jugement de la Cour Supérieure, reconnaissant toutefois comme fondé l'item 9 du tableau précité et acquiesçant pour autant à une condamnation de $1429.60;

CONSIDERANT que les parties ont entendu, par leur contrat en question, pourvoir à tout ce qui présentement les divise et que c'est sous 10 l'empire de ce contrat exclusivement que les travaux dont il s'agit ont été demandés et exécutés, chaque partie comptant seulement au cas d'un conflit, sur l'arbitrage de la clause du contrat que voici:—

"It is understood and agreed by both parties that the Engineer's decision regarding the quality of the materials or workmanship to be furnished under the terms of this contract shall be final and binding. Should any dispute arise as to the interpretation of the terms of this contract, as to cost of changes and extra work performed, or in regard to any other matter regarding the execution 20 or final settlement of this contract, it shall be referred to a Board of three arbitrators . ."

CONSIDERANT que faute d'avoir eu recours à cet arbitrage, les parties se sont pour tout ce qui aurait pu en être l'objet, soumis à une décision du tribunal compétent;

CONSIDERANT qu'il y a lieu en conséquence d'examiner séparément le bien fondé de chacun des items du tableau susmentionné — sauf celui de $1429.60 reconnu par l'Appelante—, et que la Cour Supérieure a 30 admis;

CONSIDERANT que pour ce qui est de l'item No. 1 et qui se rapporte au creusage de l'argile durci (hardpan excavation), le contrat et les devis qui s'y rattachent ne comportent qu'une seule distinction: ou du "roc" ou de la "terre", et que pour chacun de ces deux cas, le contrat fixe expressément le prix à être payé;

CONSIDERANT que si même il fallait dire que ce que les Intimés ont ainsi représenté comme du "hardpan" en était véritablement, il reste- 40 rait d'après la preuve que ce n'était pas du "roc", et que les Intimées étaient en conséquence réduites à ne pourvoir charger que selon l'autre alternative, savoir comme pour de la "terre";

CONSIDERANT que les Intimées ne peuvent à ce sujet invoquer la clause des devis incorporés au contrat et qui après avoir prescrit que les matériaux ou les ouvrages seraient de première classe, font la réserve: "without working an undue hardship on the Contractor", puisque cette

réserve est, selon le contexte, particulière à la nature de l'ouvrage et du matériel et ne peut être d'aucun effet à l'encontre des termes mêmes du contrat ou pour en altérer les prix;

CONSIDERANT que l'Intimée William I. Bishop Limited ne pouvait quant à ce premier item de son compte, charger autrement qu'au prix convenu pour la "terre" et qu'ayant reçu le plein montant de ce qui lui était dû sur cette base, l'action serait mal fondée et le jugement devrait être infirmé quant au surplus; 10

CONSIDERANT que l'item No. 2 pour flottage du bois de l'Appelante (Passing Logs) dépend de l'interprétation qu'il convient de donner à la clause suivante du contrat:—

"He shall so contract the coffer dams and arrange and manage the construction of the works as a whole, that logs of the owner, may be driven by the site of the dam during the driving season of 1929, and shall provide such opportunities for the passage of logs as the contruction work may render necessary." 20

CONSIDERANT que la première partie de cette clause du contrat pourvoit à une ouverture suffisante au passage du bois flotté, mais que la seconde implique qu'il devait en outre être pourvu à des moyens pour que les billots ne s'arrêtent ou ne se perdent;

CONSIDERANT qu'il n'y avait à ce sujet qu'un seul moyen pratique, celui des estacades voulues;

30

CONSIDERANT que l'Intimée William I. Bishop Limited a, de fait, accepté de recourir à ce moyen, mais que les estacades qu'elle a ainsi prétendu établir se sont trouvées insuffisantes et inefficaces parce que trop minces, trop faibles et improprement orientées par rapport au courant;

CONSIDERANT que ladite Intimée doit au fait de n'avoir pas pris les précautions voulues et que lui imposait son contrat, d'avoir souffert les ennuis et les troubles qui lui sont venu des billots à la dérive, et qu'elle doit en conséquence subir les dommages qui ont pu lui en résulter;

40

CONSIDERANT que l'item No. 3 pour coût plus élevé des batardeaux et de l'assèchement (cofferdams and unwatering) se rapporte à la construction et à l'efficacité d'un barrage temporaire qu'il fallait à l'Intimée Wm. I. Bishop Limited pour exécuter son entreprise, conséquemment à un accessoire qui était plutôt pour son compte, dont elle avait seule la direction et le contrôle et que couvrait son prix global;

CONSIDERANT que les Intimées font reposer les dommages de cet item sur deux griefs: a) l'appelante en fournissant à l'Intimée Wm. I.

Bishop Limited un certain plan, lui aurait donné des informations erronées touchant le lit de la rivière à l'endroit où elle a voulu mettre son batardeau; b) le bois flotté par la Compagnie-Appelante aurait empêché ladite Intimée de faire étanche ce barrage temporaire;

CONSIDERANT que les sondages qui apparaissent au plan remis (p-2) n'était nullement faits en vue du barrage temporaire que l'Intimée
10 Wm. I. Bishop Limited se devait d'établir pour l'exécution des travaux entrepris, mais seulement pour déterminer le meilleur site de la digue;

CONSIDERANT qu'à sa face le plan en question était insuffisant; qu'il était de la prudence la plus élémentaire de connaître autrement la nature et le lit de la rivière à l'endroit du batardeau afin d'y descendre et arrêter comme il convenait les caissons; qu'en fait l'Intimée Wm. I. Bishop Limited a procédé à un examen nouveau du lit de la rivière avant d'y établir son barrage temporaire et que c'est sans en aucune façon s'assujettir aux prétendues indications du plan reçu qu'elle établi ce barrage;

20

CONSIDERANT que pour les motifs déjà donnés l'Intimée Wm. I. Bishop Limited ne peut s'en prendre qu'à elle-même d'avoir été ennuyée et retardée par le bois flotté;

CONSIDERANT qu'il résulte de la preuve que l'Intimée William I. Bishop Limited a plutôt dû à un défaut de soins et de précautions d'avoir eu des difficultés au sujet de l'établissement de son barrage temporaire et d'avoir subi les inconvénients qui sont invoqués au soutien du présent item de la réclamation;

30

CONSIDERANT que les Intimées doivent en conséquence supporter seules la prétendue perte que représente cet item;

CONSIDERANT que l'item No. 5 suivant est pour coût additionnel du creusage dans le roc (additional cost of rock excavation), non que les Intimées prétendent n'avoir pas été payées au prix convenu et pour le nombre de verges cubes qui effectivement ont été enlevés, mais parce que l'entrepreneur aurait été assujetti à procéder par couches plus minces qu'il n'aurait voulu;

40

CONSIDERANT que la clause du contrat qui a trait à cette partie de l'ouvrage se lit:—

"In preparing foundations for the concrete structures all loose ledge must be removed and the excavation carried to a sufficient depth to provide a safe foundation and remove all open seams or joints which might at some time permit leakage or act as sliding planes.

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(Continued)

All this work shall be done as directed by and to the satisfaction of the Engineer.

Cut-off trenches approximately as shown upon the drawings shall be excavated in the ledge with minimum dimensions indicated. Great care should be used with explosives in excavating these trenches so as not to shatter the ledge unnecessarily or open any cracks which shall cause leakage or allow water to exert pressure underneath the structure...."

10

CONSIDERANT qu'il résulte du témoignage de l'ingénieur qui avait la direction de ces travaux spéciaux, qu'il a été procédé selon qu'on devait et que le mode qu'auraient voulu les Intimées présente des inconvénients sérieux auxquels, dans les circonstances, ne pouvait être assujettie l'Appelante;

CONSIDERANT que le montant de cet item aurait en conséquence dû être refusé;

20

CONSIDERANT que dès avant de formuler l'item No. 7 suivant de son compte pour extraction de matières gelées dans le lit de la rivière (excavating frozen material in river), l'Intimée Wm. I. Bishop Limited avait déjà reçu pour les 811 verges cubes de sable, de gravier et de cailloux qui étaient sur le roc du fond de la rivière, le prix qu'elle avait stipulé pour extraction de la terre, savoir $1.25 la verge cube;

CONSIDERANT que pour les motifs déjà donnés, la clause de "undue hardship" ne saurait venir au secours des Intimées quant à cet item particulier, ni le prix stipulé au contrat pour du "roc" s'y appliquer;

30

CONSIDERANT que ces matières du lit de la rivière n'ont été gelées et durcies que par suite de retards dont l'Intimé Wm. I. Bishop Limited est seule responsable;

CONSIDERANT que cet item de la réclamation aurait dû être refusé;

CONSIDERANT que l'item No. 8 suivant pour travail durant l'hiver (work under winter conditions) et que les Intimées font encore découler du retard apporté, soit que celui-ci provienne des difficultés et de l'insuffisance du batardeau et de l'assèchement plus difficile du lit de la rivière ou de l'ampleur même des travaux ordonnés, doit également être refusé par les motifs que l'Intimée Wm. I. Bishop est d'après la preuve seule responsable de la première de ces deux causes de retard et que pour ce qui est de la seconde cause, celle de quantités plus considérables, il y a eu paiement selon que prévu au contrat;

40

CONSIDERANT que l'item 10 du tableau ci-dessus et qui est pour ciment du tablier (cement for apron in by-pass channel) vient de ce que l'Intimée William I. Bishop Limited, requise seulement en date du 13 mars 1930 de faire comme *extra* ce tablier du canal de dérivation, se serait ainsi vue forcée d'employer tout le ciment qu'elle avait encore sur les lieux et qu'elle gardait pour finir par ailleurs l'entreprise, encourant ainsi et à raison de la perte du bénéfice des chemins d'hiver pour suppléer à 10 cette carence, des dommages que le tribunal de première instance a fixés à $1879.83;

CONSIDERANT que l'Intimée William I. Bishop Limited était assujettie par son contrat à l'obligation d'exécuter cet *extra* comme tout autre, sans égard au moment ou à la saison où il pourrait lui être demandé, et que celle-ci a été selon les prix convenus payée de cet ouvrage additionnel;

CONSIDERANT qu'il résulte de la preuve que même à cette date 20 du 13 mars 1930, les chemins d'hiver existaient encore et que l'Intimée William I. Bishop Limited eut pu en tirer parti pour refaire la provision de ciment qu'il lui fallait;

CONSIDERANT que cet item de dommages est en conséquence mal fondé;

CONSIDERANT que l'item No. 11 suivant et qui est pour changement de classe de béton (shortage for class 1 concrete) tient également à l'interprétation qu'il convient de donner au contrat quant à une réserve 30 qui s'y trouve, celle pourvoyant à des augmentations ou réductions d'après certains prix de base spéciaux, pour le cas d'un changement particulier: "due to changes of design or depth of foundations from those used for calculating said quantities, there shall be added to or deducted from said principle sum according to whether said quantities are increased or diminished, sums computed according to the following table...";

CONSIDERANT que les chiffres donnés de part et d'autre au sujet de l'item dont il s'agit, ont été reconnus comme exacts, et que le sort de cet item dépend plutôt et exclusivement du bénéfice que les Intimées pou- 40 vaient être admises à tirer de cette réserve faite au contrat;

CONSIDERANT que le changement ainsi prévu ne s'est pas réalisé et que conséquemment les Intimées ne peuvent bénéficier de la réserve en question;

CONSIDERANT qu'il ne s'est agi là que d'une simple substitution d'un ciment No. 1 "without plums" à un ciment No 1 "with plums", et que le paiement reçu par l'Intimée Wm. I. Bishop Limited couvrait ce qui lui était dû à ce sujet;

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—
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27 Dec. 1935
(Continued)

CONSIDERANT que l'item en question aurait en conséquence dû être refusé;

CONSIDERANT que le dernier item du tableau ci-dessus (No. 12) pour enlèvement du matériel (plant removal), résulte encore et exclusivement des retards que les Intimées ont voulu mettre au compte de l'Appelante, mais dont elles doivent plutôt, pour les raisons déjà données, avoir toute la responsabilité; 10

CONSIDERANT que l'item en question doit par suite être pareillement refusé aux Intimées;

CONSIDERANT qu'il y a lieu en conséquence de faire droit à l'appel et de rejeter la demande, sauf quant à cette somme de $1429.60 de l'item No. 9 (overcharge on logs) qui a été justement admise comme encore due au moment de l'institution de la poursuite;

CONSIDERANT qu'en admettant la demande pour le montant susmentionné de $1429.60, il est juste de le faire avec intérêt à compter de la 20 signification et les dépens d'une action de cette classe, mais que par contre et eu égard au fait que la presque totalité de l'enquête se rapporte plutôt aux autres items, ceux qui sont refusés comme non fondés, il serait injuste de faire entrer en taxation contre l'Appelante, plus que un dixième des dépenses encourues et taxables de ce chef de l'enquête;

PAR CES MOTIFS: —

FAIT DROIT à l'appel avec dépens; INFIRME le jugement dont il est appel, et, STATUANT à nouveau, MAINTIENT l'action pour un 30 montant de $1429.60 avec intérêt sur cette somme à compter de la signification de l'action, et ORDONNE au Mis en Cause, en sa qualité de Régistrateur de la Division d'Enregistrement du Comté de Labelle, de rayer quant à tout tel surplus le privilège qui, à la demande de William I. Bishop Limited a été enregistré sur l'immeuble suivant, savoir:

"Lot "A" in the 4th Range of the Township of Biglow in the County of Labelle, and the lots Nos. 1 and 2 in the 1st Range of the Township of McGill in the County of Labelle",

que le tribunal de première instance a reconnu et confirmé quant à tout le 40 montant de sa condamnation en capital, intérêts et dépens; les dépens auxquelle l'Appelante reste présentement condamnée et qui par ailleurs sont ceux de la classe du montant de $1429.60 qui est accordé aux Intimées, devront toutefois pour ce qui est de l'enquête n'entrer en taxation contre elle que pour un dixième de ce qui a été encouru de ce chef de l'enquête.

Monsieur le juge St-Germain dissident quant au montant.

(signé) Séverin Letourneau
J.C.B.R.

In the Court of King's Bench

No. 7
The Notes of Hon. Mr. Justice Bernier

No. 7

The Notes of Hon. Mr. Justice Bernier

Je suis d'opinion de faire droit à l'appel avec dépens; je condamnerais la Défenderesse à la somme de $1429.60, avec intérêts, et les dé-
10 pens d'une action de ce montant.

Je rejetterais le contre-appel avec dépens.

(Signé) Alphonse Bernier
J.C.B.R.

In the Court of King's Bench

No. 8
The Notes of Hon. Mr. Justice Rivard

No. 8

20

The Notes of Hon. Mr. Justice Rivard

Je fais droit à l'appel de la défenderesse The James MacLaren Company Limited, avec dépens de l'appel en sa faveur contre les demanderesses W. I. Bishop Ltd. et al.

Statuant à nouveau, sur l'action des demanderesses, je condamne la compagnie défenderesse à payer $1429.60 avec intérêts à compter de la signification de l'action et les frais en Cour Supérieure, les dits frais ne devant cependant comprendre qu'un dixième des frais d'enquête, sténo-
30 graphie et transcription.

Je rejette le contre-appel avec dépens.

(Signé) Adjutor Rivard
J.C.B.R.

Montréal, 28 décembre 1935.

40

DELIBERE

RIVARD, J.

Pour régulariser le débit de la Lièvre à son propre bénéfice comme à l'usage des industries situées sur le parcours de cette rivière, la compagnie appelante, The James MacLaren Company Limited, avait formé le projet d'y établir un barrage à l'endroit appelé Rapide des Cèdres, dans le comté de Labelle.

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—
No. 8
The Notes of Hon. Mr. Justice Rivard
(Continued)

Le 29 juillet 1928, la compagnie intimée, William I. Bishop Limited, offrait ses services comme entrepreneur; et sa soumission ayant été acceptée le 5 novembre suivant, les travaux commencèrent aussitôt. Cependant, le contrat ne fut définitivement signé que six mois plus tard, le 23 mai 1929, mais avec l'entente qu'il s'appliquerait à l'entreprise comme s'il avait été fait le 15 novembre 1928: "This contract shall avail and be binding on the parties hereto as if signed on November 15th 1928." (D.c., page 1100). 10

Ce barrage du rapide des Cèdres, une fois construit, devait appartenir à la Commission des eaux courantes de Québec (S.R.Q. 1925, ch. 46, art. 68); c'est ce qui explique le concours de la Commission dans l'entreprise et le pouvoir de contrôle et de direction attribué à son ingénieur en chef sur les travaux.

C'est l'exécution de ce contrat qui a été la source du présent litige.

La construction du barrage fut terminée le 15 juin 1930. Suivant 20 les conventions, des paiements avaient été faits à l'entrepreneur durant les travaux; mais le 26 juin 1930, il fit enrégistrer un privilège pour la somme de $660,228.03. D'autres paiements ayant été effectués, la compagnie Bishop se trouva avoir reçu en tout $916,723.57.

Enfin, le 9 décembre 1930, prétendant qu'elle était encore créancière pour $412,846.75, la compagnie Bishop prit une action en recouvrement de cette somme et en confirmation de son privilège pour autant.

Par jugement du 1er juin 1934, la Cour Supérieure a adjugé à la 30 compagnie Bishop les conclusions de son action jusqu'à concurrence de $293,585.84, avec intérêts sur $206,061.16 à compter de la date du jugement et sur le reste à compter de l'action, et les frais.

La compagnie MacLaren en appelle.

Elle admet un item de $1429.60. Cet item mentionné au no 9 des réclamations de l'action, et qui était originairement de $7220.19, a été réduit par la Cour supérieure à ladite somme de $1429.60. La compagnie MacLaren acquiesce au jugement sur ce point; mais elle demande que l'action 40 soit rejetée quant au surplus.

De son côté, la compagnie Bishop entend faire maintenir le jugement, sauf correction de deux erreurs, savoir:

1o—Sur l'item No 10, le chiffre de la somme accordée par la Cour Supérieure devrait être de $1454.03 au lieu de $1879.83; différence: $425.80.
2o—Sur l'item no 12, on aurait dû compter $5247.06 au lieu de $5,823.49; différence: $576.43.

La correction de ces deux erreurs ramènerait le total du jugement à $292,583.61; et la compagnie Bishop prétend que le jugement est bien fondé pour cette somme, tandis que la compagnie MacLaren soutient qu'elle ne devrait être que de $1429.60.

De plus, la compagnie Bishop se plaint par contre-appel que la Cour supérieure ne lui a accordé d'intérêts sur une partie de la somme qu'à
10 compter de la date du jugement. Elle prétend avoir droit à l'intérêt sur le tout à partir du 9 décembre 1930, date de son action, à quoi la compagnie MacLaren s'oppose.

(La Banque de Montréal se trouve jointe à la compagnie Bishop comme demanderesse, parce que les droits de cette dernière lui avaient été transportés).

L'action de la compagnie Bishop est basée sur le contrat intervenu
20 entre elle et la compagnie MacLaren. Diverses conventions consignées dans ce contrat devront être rappelées à mesure qu'il sera besoin, au cours de l'examen des réclamations mais il peut être utile de signaler dès le début quelques clauses de portée générale, afin de pouvoir ensuite y référer brièvement.

1o—On remarque d'abord que. pour les considérations stipulées, la compagnie Bishop entreprenait d'exécuter complètement l'entreprise, y compris les changements qui pourraient être apportés au projet primitif. Une estimation des quantités quant au creusage, au béton, à tous les ou-
30 vrages préparatoires, et à tout ce qui concernait l'érection même du barrage, était faite dans le contrat; mais il était expressément convenu que tout cela n'était qu'approximatif et qu'en tout cas quelque travail qu'il fallût accomplir, la compagnie Bishop l'entreprenait et devait l'exécuter aux conditions du contrat, avec les augmentations les additions et les changements.

En somme, la compagnie Bishop entreprenait de construire le barrage du rapide des Cèdres pour un prix dont le total, quoique estimé d'abord à $609,100.00, devait être déterminé par addition ou déduction suivant
40 les prix de série fixés dans le contrat pour chaque verge cube ou chaque pied carré de plus ou de moins que les quantités y mentionnées.

Ceci, qui apparaît à plusieur endroits, se trouvait spécialement stipulé dans la clause suivante (D.c. p. 1096):

> "In consideration of the faithful performance on the part of the Contractor of all the covenants and agreements herein contained the Owner agrees to pay to the Contractor in the manner and at

the times hereinafter specified the sum of Six hundred, and nine thousand one hundred dollars ($609,100.00) referred to elsewhere herein as the principal sum, and said principal sum, plus the sums to be paid as provided for herein for any authorized extra work which shall have been performed by the Contractor shall be the limit of the liability of the Owner hereunder provided that the quantities of the various classes of work required to construct the dam shall prove to be the same as those given in the schedule of quantities hereinbefore contained. 10

"If, however, the quantities of any of the various classes of work required to build the dam shall be different from the corresponding quantities hereinbefore given due to changes of design or depth of foundations from those used for calculating said quantities, there shall be added to or deducted from said principal sum according to whether said quantities are increased or diminished, sums computed according to the following table and the net sum produced by these additions and deductions plus the value of any 20 extra work performed by the Contractor and computed in the manner hereinbefore provided, shall become the total amount to be paid by the Owner to the Contractor for all of the work performed by him under the terms of this contract;"

Suivait une série de prix sur laquelle devaient être calculées les augmentations et les déductions du prix total mentionné.

En conséquence, il n'y avait pas lieu pour la compagnie Bishop de demander l'annulation du contrat, quelque changement qu'on ait fait dans 30 les plans au cours de l'entreprise, parce qu'il était spécialement convenu que ces changements pourraient en effet être ordonnées et qu'elle serait tenue de les exécuter aux conditions stipulées.

2o—Nous venons de voir que le total de $609,100. n'était qu'approximatif; il pouvait varier suivant les quantités du travail qui serait exécuté; le tout devrait en tout cas être établi suivant les prix de série convenus.

On avait même prévu le coût de tout travail additionnel (extra work). Rien ne devait être compris dans cette classe de travaux de ce qui 40 était nécessaire pour le parachèvement de l'ouvrage; mais si la compagnie Bishop avait à exécuter quelque travail qui pût vraiment être compté comme additionnel, elle ne pouvait réclamer de compensation que si son propre ingénieur avait ordonné ce travail par écrit et si la réclamation était faite avant l'exécution. Le travail additionnel fait dans ces dernières conditions devait être payé au coût réel du travail et des matériaux, plus 37%. (D.C. p. 1091).

"It is understood and agreed by both parties hereto that nothing shall be construed as extra work which is necessary for the proper completion of the work in accordance with the manifest intent of the drawings and specifications and that no claim for additional compensation for any work done under this contract shall be considered or allowed except as hereinafter provided unless such claim is made before the performance of the work in question. The
10 Engineer will issue a written order for the execution of legitimate extra work and no payments for extra work shall be made in the absence of such orders from the Engineer.

"For such extra work as the Contractor shall perform by virtue of the written authorizations of the Engineer, the Owner shall pay to the Contractor, in addition to the principal sum hereinafter specified, sums of money equal to:

"(a) The actual cost of the labor directly employed for,
20 and the materials used in performing said extra work; plus
"(b) thirty-seven (37) per cent of said labor and material costs, it being agreed by both parties that said thirty-seven percent thereof shall be considered to be the cost to the Contractor of small tools, plans maintenance, overhead and superintendence insurance and other indirect costs of performing said extra work, and that it shall include the profit to be received by the Contractor therefor".

3o—Le contrat (D.C. p. 185 et s.) est censé comprendre les spéci-
30 fications (D.c. p. 1101 et s.), lequelles en font partie (D.c. pp. 1086 et 1133).

4o—Nous avons vu les pouvoirs attribués à l'ingénieur du propriétaire quant aux *extras* (D.C. p. 1086 et 1091). Pour tout le reste, l'ingénieur en chef de la Commission des eaux courantes exerçait un contrôle souverain sur l'entreprise. (D.C. p. 1086).

"It is further agreed that the construction of the dam shall be carried out and completed under the Engineering Supervision and to
40 the satisfaction of the Chief Engineer of the Quebec Streams Commission, and a Resident Engineer to be appointed by him who shall be his representative on the work and have and exercise the authority granted the Engineer in this contract and specifications in all matters pertaining to and affecting the proper construction of the dam, and its safety and durability."

5o—Il est opportun de noter aussi la clause suivante invoquée par la compagnie MacLaren. (D.C. p. 1106):

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"It is the intention of these specifications to secure thoroughly first-class construction in both material and labor for each of the classes included herein without working an undue hardship on the Contractor. The omission of any clause necessary to obtain the fulfillment of the intention and purposes of the specifications shall not preclude the Engineer from requiring any such omitted necessary requirements. Any work condemned by the Engineer due to imperfect workmanship or materials shall be replaced by the Contractor at his own expense". 10

Qu'est-ce qu'il faut entendre par "an undue hardship"? Le contexte et l'ensemble du contrat donnent à cette expression sa véritable portée.

6o—Le contrat prévoyait un recours à l'arbitrage, au cas de difficultés (D.C. p. 1096):

"it is understood and agreed by both parties that the Engineer's decision regarding the quality of the materials or workmanship to be furnished under the terms of this contract shall be final and binding. Should any dispute arise as to the interpretation of the terms of this contract, as to cost of changes and extra work performed, or in regard to any other matter regarding the execution or final settlement of this contract, it shall be referred to a Board of three arbitrators; One to be selected by the Owner, one to be selected by the Contractor, and the third to be selected by the two thus chosen. A written report of its findings shall be furnished by this Board; one copy to the Owner, and one copy to the Contractor, and its decision shall be final and binding on both parties and the compensation and expenses of said arbitrators for each case thus referred shall be paid for by the party against whom the decision shall be rendered". 20 30

Aucun arbitrage n'a eu lieu, la compagnie Bishop prétend justement que, n'ayant aucun moyen de forcer la compagnie MacLaren à ce recours de l'arbitrage, elle est en droit de demander aux tribunaux de prononcer sur le différent surgi entre les parties.

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Telle qu'exposée dans la déclaration, la réclamation de la compagnie Bishop comprenait 14 chefs, numérotés consécutivement.

Quatre de ces chefs ont été rejetés par la Cour supérieure; ce sont les numéros 4, 6, 13 et 14. Il n'en est plus question en appel.

L'item numéro 9, au chiffre de $1429.60, a été admis par la compagnie MacLaren, comme nous l'avons vu ci-dessus.

Il reste donc à déterminer les droits des parties sur 9 chefs de réclamation, savoir: les numéros 1, 2, 3, 5, 7, 8, 10, 11 et 12. Les voici, avec l'indication abrégée de leur objet et le montant accordé sur chacun par la Cour supérieure.

Réclamation No. 1:	Hardpan excavation	$13,919.45
Réclamation No. 2:	Handling of logs	2,995.42
10 Réclamation No. 3:	Increased cost of cofferdams & unwatering	17,075.22
Réclamation No. 5:	Additional cost of rock excavation	35,100.74
Réclamation No. 7:	Excavation frozen material in river bed	2,530.32
Réclamation No. 8:	Work under winter conditions	81,282.62
Réclamation No. 10:	Cement for apron in by-pass channel	1,879.83
Réclamation No. 11:	Shortage in payment for class concrete	31,549.15
Réclamation No. 12:	Plant removal	5,823.49

Comme nous l'avons vu, la réclamation No. 10 doit être réduite à
20 $1,454.03, et la réclamation No. 12 $5,247.06.

Dans sa déclaration, la compagnie Bishop, avant d'alléguer chaque item en particulier, a dit d'une façon générale ce que représentent ces réclamations:

"... labour, material, work and services necessarily supplied, outlays made by said Plaintiff and expenses to which said Paintiff has been put in connection with the said work as well as in connection with the doing of work actually required for said construction and approved by Defendant
30 but not provided for in the contract or as damage suffered by said Plaintiff for reasons attributable to the faulty, erroneous and deceptive information supplied and representations made by Defendant to said Plaintiff".

Cette allégation paraît se rapporter à trois cas distincts; travaux compris dans l'exécution de l'entreprise, tels que prévus par le contrat et non encore payés; travaux non prévus par le contrat, mais exigés au cours de l'entreprise et encore dus; dommages attribuables à la faute, à l'erreur et aux fausses représentations de la compagnie MacLaren. De cette
40 sorte, la compagnie Bishop se trouverait à réclamer, outre des dommages, le prix de travaux qu'elle avait entreprise d'exécuter et de plus du travail additionnel, de *l'extra work.* Cependant il serait difficile de classer exactement sous chacun de ces chefs les neuf réclamations qui nous sont soumises. Les contestations que font les parties portent le plus souvent sur ce point précis; s'agit-il de travaux prévus, *d'extras,* ou de dommages? Sur plus d'un item, la compagnie Bishop paraît vouloir se réclamer de ces trois causes d'action à la fois, alors qu'au contraire la compagnie MacLaren soutient plutôt que tous les travaux exécutés étaient compris dans

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ceux que prévoyait le contrat et ont été payés aux différents prix stipulés. Le plus simple est d'examiner l'un après l'autre chaque item sauf à renvoyer de l'un à l'autre ou aux clauses du contrat citées ci-dessus, quand il sera besoin, pour abréger le raisonnement.

RECLAMATION No 1.

Creusage de l'argile durcie
(Hardpan excavation).

10

Pour construire l'écluse projetée, il fallait nécessairement assécher la rivière à l'endroit désigné; cela exigeait des travaux particuliers de nature à fermer la rivière en amont et en aval et à y établir une sorte de barrière; il pouvait être nécessaire aussi de pratiquer un canal de dérivation pour détourner temporairement le cours de l'eau. Cela avait été prévu dans le contrat: (D.c. p. 1112):

"The Contractor will be required to construct, maintain and remove all the coffer-dams which are necessary for the construction of the work hereinbefore described. Should it be considered advisable to excavate a channel as indicated on drawing no. B-2571 to by-pass the flow of the river during the time construction works is in progress in the main channel of the river, thus reducing the amount of coffer-dam work required, the Contractor shall perform all such excavation and other work directly involved at his own expense and cost, except for that part of the excavation which would be required for the dam if the channel was not excavated. He shall also do all pumping required to perform the work on the areas within the coffer-dam. At the proper stages of the work, the Contractor shall remove the coffer-dams and leave no part of the work in place which in the judgment of the Engineer will interfere with the operation of the dam".

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30

Il fut en effet jugé opportun, outre la construction de bâtardeaux et l'établissement de barrières de palplanches en travers de la rivière, de pratiquer sur la rive nord une tranchée devant servir à détourner les eaux amassées en amont. Le plan B 2571 indiquait approximativement l'endroit ou ce canal pouvait être établi et nous venons de lire dans les spécifications les conditions auxquelles devait être fait le creusement; l'entrepreneur devait exécuter tous les travaux nécessaires à cette fin à ses frais et dépens, sauf seulement pour cette partie du creusement qui eût été requis en vue de la construction de la chaussée même si le canal n'avait pas été fait à cet endroit. En effet la chaussée devait s'étendre, non seulement en travers du lit naturel de la Lièvre, mais encore sur la rive nord jusqu'à une distance qui comprenait le site du canal de dérivation.

40

La difficulté dont nous devons parler sous ce premier chef a surgi à propos du coût du creusement du canal de dérivation. A la lecture de la clause ci-dessus, on voit immédiatement que la question ne saurait se rapporter qu'aux travaux faits à l'endroit où devait être assise l'écluse en travers du canal. Aussi cette réclamation de la compagnie Bishop a-t-elle été rejetée par la Cour Supérieure quant au reste c'est-à-dire quant au creusement de la tranchée en dehors du site du barrage.

10

Il est donc arrivé qu'en creusant le canal, et spécialement en creusant cette partie du canal où le barrage devait être construit, la compagnie Bishop a rencontré, à une certaine profondeur, un lit qu'on a qualifié de *hardpan,* constitué apparemment d'argile durcie, plus difficile à extraire que la terre meuble ou le sable mêlé de cailloux roulés. Sur l'emplacement du barrage, on a dû extraire de cette argile 8335 verges cubes.

Or le contrat prévoyait des prix différents pour l'extraction de la terre et pour l'extraction du roc: $1.25 pour chaque verge cube de terre et 20 $4.35 pour chaque verge cube de roc (D.c. p. 1097).

Le hardpan devait-il être compté comme de la terre ou du roc?

Une preuve assez longue a été faite là-dessus. (Sur ce point comme sur les autres, je crois pouvoir m'abstenir de reproduire ici l'analyse qu'il a fallu faire des témoignages ce qui alourdirait inutilement ces notes et ne constituerait qu'une nomenclature sèche et fastidieuse couvrant au-delà de 1000 pages de preuve; j'indiquerai dans une sorte d'appendice, les principaux renvois au dossier conjoint qu'il y aura lieu de faire sur chacune 30 des réclamations).

L'analyse la plus juste de tout ce que les témoins ont dit me paraît être d'abord que le *hardpan* ne doit certainement pas être compté comme étant du roc. Aucun témoin ne l'a prétendu: et la compagnie Bishop elle-même ne le soutient pas, puisqu'elle ne demande pour l'extraction de cette matière que les $\frac{2}{3}$ du prix qu'elle était en droit de demander pour l'extraction du roc.

L'assimilation du *hardpan* au roc étant donc écartée et aucune clas-40 sification particulière de cette matière qu'est le *hardpan* n'étant prévue au contrat, il ne reste, d'après les conventions écrites, qu'à traiter comme terre l'argile durcie ou tout autre lit du sol plus ou moins difficile à extraire et qui n'est pas du roc. Aussi bien, est-il évident qu'en creusant à une certaine profondeur, on doit s'attendre à rencontrer des lits plus ou moins durs; si un entrepreneur entend avoir des rémunérations spéciales suivant les difficultés qui peuvent surgir à cause de la dureté des lits qu'il rencontre, il lui appartient d'exiger une classification détaillée des différents sols possibles. S'il entreprend en vertu d'un contrat qui ne mentionne que deux

espèces de sols, le roc et la terre, il se trouve lié et ne pourra exiger paiement que suivant les prix stipulés pour ces deux espèces d'extractions. Accorder dans ces conditions un prix spécial pour l'extraction de l'argile durcie ou *hardpan,* prix qui n'est ni celui stipulé pour l'extraction du roc, ni celui qui a été prévu pour l'extraction de la terre, ce serait introduire dans le contrat une classification que les parties n'y ont point mise et un taux de rémunération qui n'a pas été convenu; ce serait refaire le contrat arrêté entre les parties, et sur lequel la compagnie demanderesse elle-même prétend baser son action. 10

Au surplus, qu'est-ce en réalité que le *hardpan* rencontré dans le creusement du canal? Les témoins ne s'entendent guère la-dessus. Tout ce qu'on peut sûrement déduire de leurs témoignages, c'est que ce n'était certainement pas du roc, mais que c'était une matière plus dure que la terre meuble ou le sable et par conséquent d'une extraction plus difficile. Et c'est précisément à cause de la difficulté qu'on éprouve à déterminer exactement la nature des différents lits du sol que la Commission des eaux courantes, par exemple, prend toujours le soin, dans les contrats qu'elle 20 contrôle, de ne prévoir que deux classes: le roc et la terre, tout ce qui n'est pas roc devant être compté comme de la terre. C'est sans doute pour cette même raison que, dans le contrat qui nous est soumis, on s'est abstenu de faire des distinctions qui eussent donné lieu à de multiples débats. Cela, du reste, paraît juste; car en réalité ce qu'on appelle *hardpan* est bien de la terre; c'est, comme disent les lexicographes, "the hard stratum of earth that lies below the soil", ou "any earth not popularly recognized as rock through which it is hard to dig or to make excavations of any sort".

On nous a cité sur ce point diverses décisions et autorités, comme 30 l'arrêt de la Cour supérieure dans la cause de Wilson vs. la Cité de Hull (48 S.C., p. 238) et une couple d'arrêts des cours de France; mais les solutions doivent nécessairement différer suivant les circonstances particulières de chaque cas et surtout suivant les contrats intervenus. Quand il est expressément représenté qu'il ne se trouve aucune pierre dans le sol à creuser et qu'en conséquence, le creusement est entrepris uniquement comme constituant un travail de terre, il est évident que le prix peut être augmenté si l'on rencontre du roc, surtout lorsque le propriétaire de l'entreprise savait que tel était le cas et ne l'a pas révélé. De même, si un déblai diffère substantiellement de celui qui avait fait l'objet des marchés, l'entrepreneur 40 peut avoir droit à une rémunération autre que le prix qu'il avait accepté par erreur. Mais, dans notre espèce, le contrat est clair et précis. Si l'on n'y a pas spécifié d'intermédiaire entre le roc et la terre, c'est ce que tout ce qui n'était pas l'un devait être l'autre.

Comme je l'ai dit, la compagnie Bishop a demandé et obtenu de la Cour supérieure un prix spécial pour l'extraction du *hardpan,* soit les $\frac{2}{3}$ de ce qu'elle aurait eu pour l'extraction du roc, c'est-à-dire $2.90. Or elle

n'a reçu que le prix stipulé pour l'extraction de la terre, $1.25. Elle réclame donc, par verge cube, la différence, $1.67, soit: pour 8335 verges cubes, la somme de $13,919.45.

En vertu de quelle convention peut-elle obtenir ce prix? Sa réclamation ne pouvant s'appuyer sur aucune clause du contrat, il faudrait donc que l'extraction du *hardpan* fut compté comme travail additionnel ou *extra*.
10 Mais, nous l'avons vu, la compagnie Bishop ne peut demander aucune rémunération pour travail *extra,* à moins que ce travail n'ait été exécuté sur un ordre écrit de son ingénieur; et jamais aucun ordre de ce genre n'a été donné.

La compagnie Bishop invoque aussi à ce propos la clause du contrat qui prévoit un arbitrage et que nous avons citée plus haut (D.c. p. 1096). Pour quelque raison que ce soit, il n'y a pas eu d'arbitrage. Si le différent avait été soumis à des arbitres, ceux-ci auraient dû en juger suivant le contrat; car la clause qui les concerne ne leur permet pas d'en sortir. Ils au-
20 raient donc eu à décider seulement si l'argile durcie, la glaise ou le *hardpan* étaient de la terre ou du roc. Nous avons à prononcer sur le même point.

La compagnie Bishop voudrait se retrancher derrière une autre clause du contrat, que nous avons également citée plus haut, et où il est dit que l'intention des parties est d'assurer que la construction du barrage sera tout à fait de première classe tant quant aux matériaux qu'à l'ouvrage, "without working an undue hardship on the contractor".

Sûrement cette clause ne saurait justifier une surélévation des prix
30 de série, pour la seule raison que, dans le creusement du canal, on a rencontré des lits plus ou moins durs. Cela ne concerne en aucune façon la qualité de premier ordre qu'on entendait exiger dans l'exécution de l'entreprise; et d'autre part ce n'est pas exercer à l'égard de l'entrepreneur une sévérité injuste que d'exiger qu'il fasse les creusements requis au prix convenu.

Enfin, la compagnie Bishop, pour se raccrocher sans doute à la doctrine énoncée dans certaines décisions auxquelles nous avons fait plus haut allusion, prétend que l'extraction du *hardpan* devrait lui être payée plus
40 cher, parce que la compagnie MacLaren l'aurait trompée, en ce point, par de fausses représentations.

Après une longue et minutieuse analyse de la preuve sur ce point, je dois déclarer que je ne trouve rien dans le dossier qui puisse soutenir cette prétention. De même, le premier juge avait trouvé qu'il n'y avait pas eu de fausses représentations et je ne puis que confirmer sa décision sur ce point. Dans les trous de cinq à huit pieds qu'on avait pratiqués sur le parcours où le canal devait être creusé, il n'y avait pas de *hardpan;* et

c'est là tout ce qui a été montré à la compagnie Bishop. Aucune garantie qu'on n'en trouverait pas ailleurs ou plus avant n'avait été faite. La compagnie Bishop s'est contentée de ces informations et je ne vois pas comment elle pourrait aujourd'hui se plaindre; ni les plans préparés par la compagnie MacLaren, ni le contrat, ni les spécifications, ni l'inspection des lieux en compagnie des ingénieurs de l'appelante ne constituaient de fausses représentations, et si vraiment la compagnie Bishop a souffert d'avoir entrepris cet ouvrage sans être mieux renseignée, elle ne peut s'en prendre qu'à elle-même. 10

Je ferais donc droit à l'appel sur ce premier chef de la réclamation; la Cour supérieure a accordé la somme de $3,919.45 pour l'extraction du hardpan et je rejetterais cette partie de la demande.

RECLAMATION NO. 2

Flottage du bois de l'appelante (Handling of appellant's logs). 20

La compagnie MacLaren faisait, en 1929, l'abattage du bois sur les terres de la Couronne le long de la Lièvre, et la descente de ce bois devait nécessairement se faire par cette rivière. C'est l'industrie régulièrement exercée par l'appelante.

Notons qu'en vertu des lois concernant le flottage du bois sur les rivières et les lacs (S.R.Q. 1925, chap. 46), la compagnie MacLaren, comme tous les autres commerçants de même genre, avait le droit de descendre son bois par la rivière, mais était responsable des dommages qui pouvaient être causés par ses opérations. 30

Il est évident que la descente du bois était susceptible de causer des dommages aux ouvrages que la compagnie Bishop établissait dans la rivière, au rapide des Cèdres, pour l'exécution de son entreprise.

D'autre part, il faut remarquer que les parties ne se trouvaient pas l'une vis-à-vis de l'autre dans la même situation qui se rencontre généralement, lorsque un marchand de bois, en descendant ses billes par une rivière, cause un préjudice à quelque propriétaire riverain. La compagnie MacLaren, propriétaire riveraine au rapide des Cèdres, avait chargé la compagnie Bishop d'y construire un barrage et l'avait en quelque sorte mise à sa place pour y accomplir un travail qui devait nécessairement obstruer le cours de l'eau. Dans ces conditions, leurs relations ne se trouvaient pas régies seulement par la loi générale qui règle le flottage sur les rivières, mais dépendaient d'abord des conventions intervenues entre les parties. 40

Aussi le cas avait-il été prévu dans le contrat par la clause suivante des spécifications (D.C. p. 1103):

"He shall so construct the coffer dams arrange and manage the construction of the work as a whole, that logs of the owner, or of others, may be driven by the site of the dam during the driving season of 1929, and shall provide such opportunities for the passage of logs as the construction work may render necessary".

10

A quoi cette clause obligeait-elle la compagnie Bishop?

Elle devait exécuter l'entreprise de telle sorte que le flottage du bois ne fût pas empêché par les travaux.

Or, ces travaux consistaient d'abord dans l'établissement d'un barrage temporaire du cours de la rivière, en vue de l'assécher à l'endroit où serait assise la chaussée. Le barrage temporaire une fois complété, le passage des billes devait se faire par le canal de dérivation, et c'est en effet
20 ce qui eut lieu. (Il est vrai qu'une embâcle se produisit alors en travers des piliers déjà construits; mais cet embaras ne concerne pas la présente réclamation; c'est ce qui est arrivé dans la rivière dont il s'agit.) Mais, aussi longtemps que le canal de dérivation n'était pas ouvert, et pendant qu'on construisait le barrage temporaire dans le lit de la rivière, la compagnie Bishop devait laisser à travers les batardeaux et les palplanches une ouverture praticable pour le passage du bois flotté. En effet, il appert que la compagnie Bishop laissa dans le barrage temporaire un passage libre suffisant, par où le bois pouvait descendre. Mais, pour protéger les ouvrages en construction, il fallait de plus que les billes de bois flottées fussent
30 dirigées vers cette ouverture, et qu'on ne les laissât pas descendre à vau-l'eau entre les deux rives. A qui incombait-il de les diriger de la sorte, de fournir aux billes de bois *l'occasion*, pourrait-on dire, *the opportunity*, de s'engager dans l'ouverture destinée à leur passage?

La compagnie Bishop, outre l'obligation de laisser une ouverture convenable dans le barrage, devait, dit le contrat, "provide such opportunities for the passage of logs as the construction work may render necessary". Or, il est évident et la preuve établit que des estacades con-
40 venablement construites et placées en amont auraient conduit le bois vers le passage ouvert, par quoi tout danger de dommages eût été évité. Il appartenait à la compagnie Bishop de prendre ces mesures nécessaires, puisqu'elle était tenue de faire ce qui était opportun pour le passage du bois à travers les obstructions du barrage temporaire.

C'est aussi ce qu'elle-même avait compris. Elle entreprit d'abord de diriger la descente du bois au moyen d'estacades; mais ces estacades, trop faibles et mal placées, laissaient passer les billes. De là, outre des dom-

mages qui font l'objet d'autres réclamations, des dépenses que la compagnie Bishop veut recouvrer au chiffre de $2,995.42. Elle n'y a pas droit, parce qu'elle était tenue de faire elle-même le travail pour lequel elle veut être rémunérée.

La compagnie Bishop reproche surtout à l'appelante d'avoir envoyé son bois par grandes masses dans la rivière; mais des estacades proprement construites et placées auraient conduit le bois, même flotté en masses, vers l'ouverture pratiquée dans le barrage. La compagnie MacLaren n'est responsable ni des dépenses faites pour diriger le bois, ni de l'insuffisance des moyens employés. 10

Je conclus que l'appel est bien fondé sur ce point, et que cette réclamation devrait être rejetée.

RECLAMATION NO. 3

Coût plus élevé des batardeaux et de l'assèchement. 20

(Increased cost of cofferdam and unwatering).

Pour asseoir les fondations de la digue, il fallait donc assècher la rivière à cet endroit; et pour l'assèchement de la rivière, il était nécessaire de barrer le cours de l'eau en amont. On y parvient en calant en travers des batardeaux, sur lesquels s'appuit une barrière de palplanches. On fait la même chose en aval.

Pour la construction des batardeeaux et de tout le barrage temporaire, aussi bien que pour l'assèchement de la rivière, le contrat ne prévoyait aucun prix de série. Tout ce travail devait être fait par la compagnie Bishop pour la rémunération comprise dans le prix global. On avait estimé que 10.7% du prix global représentait le coût de ce travail particulier (D.C. p. 1099) y compris le creusage du canal de dérivation. Voir la clause suivante du contrat (D.C. p. 1090): 30

"It is further agreed that, should the quantities of excavation, concrete and other classes of work which are listed in the above schedule required for the satisfactory completion of the structure be different from those contained in said schedule, additions or deductions from the principal sum of money herein named shall be made in the manner hereinafter provided. 40

"But it is expressly understood and agreed, however, that: (a) The quantities given in the foregoing table do not include any additional excavation which the Contractor may choose or be required to do for bypassing or handling the flow of the river during

the construction of the dam; nor any materials and labor used for the construction of coffer-dams; nor any other work or materials extraneous to the permanent structure of the dam itself which are required for the construction of the dam.

(b) All of said additional excavation and extraneous work and materials are to be performed and furnished by the Contractor as a
10 part of the work for which the said principal sum is to be the compensation".

(Voir aussi la clause des specifications de la page 1112 du D.C., citée ci-dessus).

La compagnie Bishop allègue que le travail de construction des batardeaux et de l'assèchement de la rivière a été plus coûteux qu'il ne l'aurait dû; 10.7% du prix global lui aurait donné $49,050.20, et elle admet donc avoir reçu cette somme; mais elle prétend que cet ouvrage lui a coûté
20 $144,457.92, à quoi elle ajoute 37%, ce qui donne un total de $197,907.35. Après déduction de ce qu'elle a reçu,elle aurait encore droit à $148,857.15. Ses conclusions sur ce point lui ont été accordées par la Cour supérieure, sauf qu'il a été ajouté 15% au lieu de 37%, de sorte que le jugement de première instance lui donne $117,075.22.

La compagnie Bishop paraît bien considérer ce travail comme étant de *l'extra work,* puisqu'elle ajoute 37% au coût réel; et, d'autre part, on s'explique mal pourquoi le premier juge lui accorde 15%. En tout cas, le travail n'a pas été fait sur l'ordre écrit de l'ingénieur de la compagnie
30 MacLaren et ne peut par conséquent donner lieu à une réclamation à titre d'ouvrage additionnel. Aussi est-ce plutôt à titre de dommages que le premier juge a accordé à la compagnie Bishop la somme susdite.

Le droit à ces dommages viendrait de deux sources:

1o—La première cause serait qu'en lui communiquant le plan P2, la compagnie MacLaren aurait fourni à la compagnie Bishop des information erronées touchant le lit de la rivière à l'endroit où le barrage temporaire a été installé en amont.
40
2o—Une autre cause des dommages serait la difficulté que le bois flotté par la compagnie MacLaren aurait opposée à l'établissement d'un barrage étanche.

1o—Sur le premier point, on remarque en effet que sur le plan P2 (B2444) il apparaît des indications qu'on avait fait certains sondages à six endroits différents, à 20 pds de distance l'un de l'autre, à travers la rivière, et qu'aux endroits marqués par ces sondages il y avait du roc. Or il

paraît que sur toute la ligne de ces sondages il y avait au fond de la rivière du sable, du gravier, des cailloux, etc., et qu'on ne pouvait atteindre le roc qu'après avoir enlevé ces matériaux. La compagnie Bishop prétend que par là elle a été induite en erreur et qu'elle a éprouvé les plus grandes difficultés à faire un barrage étanche à cause du fond inégal de la rivière, qu'elle n'avait pas prévu.

Sa prétention sur ce point ne saurait être soutenue. 10

D'abord, il faut remarquer que les sondages indiqués sur le plan P2 n'étaient nullement faits en vue du barrage temporaire. On avait sondé un peu partout pour déterminer le meilleur site de la digue, mais les indications qu'on avait faites de ces sondages sur le plan ne prétendaient pas représenter exactement le lit de la rivière, sa nature et son profil.

La compagnie Bishop devait le savoir. Avec l'ingénieur de la Commission des eaux courantes, on peut affirmer qu'elle n'a pas dû croire que ces quelques sondages, isolés et faits à 20 pieds de distance l'un de l'autre, 20 constituaient des données suffisantes pour permettre la construction de batardeaux et de palplanches qui s'ajusteraient parfaitement au lit de façon à créer un barrage étanche.

En fait, la compagnie Bishop, avant d'entreprendre la construction du barrage temporaire, a fait faire elle-même d'autres sondages.

Si donc elle a mal calculé la forme et l'ajustement de ses batardeaux et de ses palplanches, c'est dû soit à son imprudence, soit à sa propre erreur ou à quelque défectuosité de son ouvrage. D'ailleurs le cloisonnage n'a pas été posé sur la ligne des sondages indiqués sur le plan P2, 30 mais à 12 ou 15 pieds plus haut. L'emplacement de la chaussée était déterminé; mais l'entrepreneur pouvait placer son barrage temporaire où il voulait et procéder à l'assèchement du lit de la manière qui lui convenait.

Pourquoi cette cloison n'était-elle pas étanche? Il peut y avoir des raisons nombreuses; en tout cas, on ne saurait en attribuer la cause aux informations fournies par la compagnie MacLaren. Les seules informations auraient consisté dans les indications du plan B2333, lesquelles n'avaient pas pour objet de faire connaître les conditions du lit ou bien du barrage 40 temporaire. La compagnie Bishop na d'ailleurs pas pris ces indications.

Là-dessus, la preuve est plutôt faible. Il semble bien, cependant, que les billes de bois arrêtées par les batardeaux, accumulées même, ont dû être la cause de difficultés et de dépenses. Mais rien de cela ne se serait produit, si la descente du bois avait été convenablement dirigée comme nous l'avons vu. Or, nous l'avons dit aussi, il incombait à la compagnie Bishop de prendre les mesures nécessaires ou simplement opportunes pour

assurer le passage du bois par les ouvertures destinées à les recevoir. Elle ne l'a pas fait; elle doit être tenue responsable des conséquences de son défaut et par conséquent des dépenses occasionnées par ce défaut.

De plus, on pourrait se demander dans quelles proportions ce surplus de dépenses devrait être attribué à la première et à la deuxième des causes alléguées. Pour combien la compagnie Bishop a-t-elle été obligée 10 de faire des dépenses à raison du bois flotté, et pour combien à raison de l'erreur commise par elle touchant le lit de la rivière? On cherche en vain dans le dossier quelque indication qui permette de le dire avec exactitude. Quelques témoins ont donné là-dessus leur opinion, mais sans rien pouvoir préciser. D'ailleurs, il n'importe pas, puisque ni l'une ni l'autre cause de dommages ne doit être attribuée à la compagnie MacLaren.

Je rejetterais donc cette réclamation, parce que la compagnie MacLaren n'est pas responsable de l'erreur concernant le lit de la rivière, et que la compagnie Bishop est elle-même responsable du dommage qu'elle 20 prétend avoir été causé par le passage du bois.

RECLAMATION NO. 5

Coût additionnel du creusage dans le roc.

(Additional cost of rock excavation)

Le contrat prévoyait l'extraction de 8060 verges cubes de roc.

30 En fait il a été extrait 21,564 verges cubes.

C'est un excès, dit la compagnie Bishop, qui lui donnerait droit à un prix plus élevé que le prix unitaire. Elle prétend que c'est de *l'extra work* et elle charge en conséquence 37% de plus, par quoi elle arrive à un solde de $35,100.74, que la Cour supérieure lui a adjugé.

Il y aurait là travail *extra,* suivant la compagnie Bishop, pour deux raisons; d'abord, parce que l'écart serait trop grand entre la quantité mentionnée au contrat et la quantité réelle; ensuite parce que l'ingénieur a 40 exigé que l'extraction se fasse par lits et non en profondeur.

Quant aux quantités, la compagnie Bishop a été payée de son travail, de tout le travail qu'elle a fait, suivant les séries de prix déterminées par le contrat. Ces prix avaient été ainsi prévus, ainsi que le contrat l'explique, précisément en vue des augmentations qui seraient trouvées opportunes pendant l'exécution. Le même cas se présente dans toutes les entreprises de ce genre. Il faut avant tout faire un ouvrage solide et il est impossible de prévoir d'avance jusqu'a quelle profondeur il faudra creuser

pour obtenir la base voulue. Le contrat a donc été fait pour prévoir les augmentations de quantité, quelles qu'elles soient. Puisqu'elle a été payée au prix stipulé, la compagnie Bishop ne peut être admise à se plaindre qu'elle ait reçu le coût de l'extraction de 21,564 verges plutôt que de 8060 verges seulement.

Quant au mode de procéder, il était sujet aux directions de l'ingénieur de la Commission des eaux courantes, et la compagnie Bishop s'était engagée à s'y conformer (Contrat, D.C. p. 1114) : 10

> "In preparing foundations for the concrete structures all loose ledge must be removed and the excavation carried to a sufficient depth to provide a safe foundation and remove all open seams or joints which might at some time permit leakage or act as sliding planes.
>
> "All this work shall be done as directed by and to the satisfaction of the Engineer." 20

Et les ordres donnés par l'ingénieur de la Commission des eaux courantes touchant ce point sont parfaitement justifiés. Je rejetterais cette réclamation de la demanderesse.

RECLAMATION NO. 7

Extraction de matières gelées dans la rivière.

(Excavating frozen material in river bed). 30

Il a fallu enlever 811 verges cubes de sable, de gravier, de cailloux, qui se trouvaient sur le roc du fond de la rivière. Pour ce travail la compagnie Bishop a été payée aux prix stipulé pour l'extraction de la terre, savoir: $1.23 la v.c. Elle voudrait recevoir le prix stipulé pour l'extraction du roc, parce que, dit-elle c'était aussi difficile et que ce serait une *undue hardship* pour elle que d'être payée moins.

Au prix de l'extraction du roc, elle aurait droit à un surplus de $2,530.32; c'est ce que la Cour supérieure lui a accordé. 40

Parce que la matière à extraire était gelée, le travail a pu être plus difficile; mais il était compris dans les prix stipulés au contrat. Pour les raisons que j'ai mentionnées plus haut, puisque ce n'était pas du roc, ce devait être compté comme de la terre.

D'ailleurs je ne vois pas comment la clause où il est question *d'undue hardship* pourrait ici s'appliquer.

Je rejetterais donc également cette réclamation.

RECLAMATION NO. 8

Travail durant l'hiver.

(Work under winter conditions).

La compagnie Bishop a dû travailler l'hiver et ce travail a coûté plus cher. De ce chef elle prétend réclamer et la Cour supérieure lui a ac-
10 cordé $70,680.62. En prétendant que c'était là un *extra,* la Compagnie Bishop demandait de plus 37%, ce qui portait sa demande à $96,832.45. La Cour supérieure lui a accordé 15% seulement, ce qui fait en tout $81,282.62.

Cette augmentation du coût du travail dû aux conditions plus difficiles de l'hiver serait attribuable à deux causes; en premier lieu, l'augmentation des quantités et par conséquent de l'ouvrage à accomplir; en deuxième lieu, le retard apporté à l'assèchement de la rivière.

Quant aux quantités, j'ai déjà dit, comment il était pourvu à leur
20 augmentation et pourquoi la compagnie Bishop ne pouvait être admise à s'en plaindre.

Pour le retard causé par l'assèchement plus difficile de la rivière, l'argument que j'ai fait plus haut concernant cet assèchement doit s'appliquer encore ici.

En conséquence, je rejette cette huitième réclamation de la demanderesse.

30

RECLAMATION NO. 10

Ciment pour tablier.

(Cement for apron in by-pass channel).

Au cours des travaux, un changement fut fait dans les plans de cette partie de la digue qui traversait le canal de dérivation; les ingénieurs y ajoutèrent un tablier.

Cette modification était faite en conformité des stipulations du contrat; la compagnie MacLaren avait donc droit de faire faire ce travail et
40 la compagnie Bishop était obligée de l'exécuter aux prix stipulés. Mais cette dernière se plaint que, quand elle fut avertie du changement, il était trop tard dans la saison pour transporter par les chemins d'hiver le ciment requis et qu'elle dut faire ce transport au printemps, ce qui lui aurait occasionné des dépenses additionnelles pour lesquelles elle a obtenu de la Cour supérieure $1879.83, soit; $1634.64, différence du coût de transport entre l'hiver et l'été, plus $245.19 représentant 15%. Il y a là, nous l'avons vu, une erreur que fait paraître la preuve. La somme devrait être de $1454.03.

En tout cas cette réclamation est faite à titre *d'extra,* et la compagnie Bishop demandait un surplus de 37% conformément aux conventions. Il importe peu cependant. Car le changement a été fait par l'ingénieur chargé du contrôle et de la direction des travaux et suivant les dispositions du contrat, comme il apparaît à la clause que nous avons citée ci-dessus (D.C. p. 1091); il n'y a rien dans les conventions qui puisse justifier une demande pour travail *extra* ou pour coût additionnel d'un travail quelconque, à raison de la date où les plans furent changés et où ce travail dut être fait. 10

En conséquence, je ferais droit à l'appel sur cette réclamation No. 10.

RECLAMATION NO. 11

Changement de classe de béton.

(Shortage for class 1 concrete)

20

Sur cet item, la compagnie Bishop avait demandé et elle a obtenu $31,549.15.

Pour comprendre comment la difficulté a surgi, la position que prend chacune des parties et la solution qu'il convient d'apporter, il faut d'abord rappeler certaines données fournies par le contrat dans les séries de prix qui suivent la clause citée ci-dessus en premier lieu (D.C. pp. 1096, 1097).

Deux classes de béton étaient prévues; l'une de béton pur, sans cailloux, sans *plums,* comme dit le contrat; c'était le béton No. 1; et l'autre, avec cailloux, *with plums.* 30

On avait par ailleurs, dans l'estimation première des quantités probable tablé sur 10800 verges cubes de béton avec cailloux et sur 9690 v.c. béton No. 1.

Or il était pourvu que pour chaque verge cube qu'il faudrait couler de plus que les quantités ci-dessus, on paierait les prix suivants: $77.16 par verge cube de béton avec cailloux et $18.92 par v.c. de béton No. 1, soit: une différence de $1.76. De plus il était convenu que s'il était coulé moins de béton qu'il n'en était mentionné dans l'estimation approximative sur laquelle le prix global avait été fixé, on déduirait les prix suivants; pour chaque v.c. de moins de béton No. 1: $9.81, et pour chaque v.c. de moins de béton avec cailloux: $9.31. 40

Or, dans une certaine partie de la digue, un changement dans la composition du béton a été fait par les ingénieurs; une quantité qui devait

être coulée avec des cailloux a dû être faite avec du béton No. 1. C'est ainsi que la compagnie Bishop, au lieu d'avoir à couler 9690 v.c. de béton No. 1, a dû en faire 23656 v.c. soit: 13,966 v.c. de plus.

D'autre part, au lieu de faire 10800 v.c. de béton avec cailloux, elle n'en a fait que 6,781 v.c., soit: 4019 v.c. de moins.

10 Ces faits sont avérés. La seule difficulté qui se présente est dans la façon dont il faut calculer le prix du travail ainsi exécuté.

La compagnie Bishop établit son compte de la manière suivante:

13966 v.c. de béton no 1 de plus que la quantité estimé d'abord représentant au prix de $18.92 stipulé pour chaque v.c. d'augmentation, la somme de	$264,236.72
4,019 v.c. de béton avec cailloux de moins que la quantité estimée représentant, au prix de $9.81 convenu pour chaque v.c. de diminution, une somme de	37,416.89
La différence est de	$226,819.83
Sur quoi il a été payé	195,270.68
De sorte qu'il reste dû	$ 31,549.15

20

On le voit, la compagnie Bishop compte d'une part qu'il y a eu diminution de travail, et d'autre part augmentation.

30 La compagnie MacLaren répond que ce n'est pas un cas d'augmentation et de diminution du travail, mais plutôt la substitution d'une classe de béton à une autre; et elle établit le compte comme suit:

Au lieu de 9690 v.c. de béton no. 1, la compagnie Bishop en a coulé 23,656 v.c. et la différence, 13,966, représente au prix de $18.92	$264,236.72
Mais d'autre part, au lieu de 10,800 v.c. de béton avec cailloux, la compagnie Bishop n'a coulé que 6,781 v.c., soit une différence de 4,019 v.c., pour lesquelles elle aurait été payée au prix de $17.16, soit	68,968.04
En conséquence, la compagnie Bishop avait droit pour ce travail à	$195,270.68

40

et c'est ce que la Compagnie MacLaren lui a payé

Le calcul de la défenderesse peut s'établir aussi de la manière suivante:

Sur les 13966 v.c. de béton no 1 que la compagnie Bishop a coulés de plus, il y en avait 9947 qui doivent lui être payés à $18.92 la v.c. soit	$188,197.24
et il y en avait 4,019 v.c. pour lesquelles elle se trouvait payée déjà au prix du béton avec cailloux, savoir: au prix de $17.16 la v.c. et sur lesquelles elle a droit de recevoir de plus la différence de $1.76, savoir	7,073.44
Ce qui donne exactement la somme payée à la compagnie Bishop, soit	$195,270.68

10

En effet, il y a lieu de présumer que le prix stipulé pour les quantités augmentées est le même que celui sur lequel on a tablé pour établir le prix global. Ceci me paraît décider toute la question et j'approuve le calcul de la compagnie MacLaren.

20

Je ferais droit à l'appel sur ce point.

RECLAMATION NO. 12

Enlèvement du matériel

(Plant removal)

30

La compagnie Bishop a demandé et obtenu de ce chef $5,823.59, ce qui comprend 15% de plus que le coût réellement établi. Nous l'avons vu, il y a là une erreur admise de $576.43.

L'enlèvement du matériel aurait été plus dispendieux qu'on ne s'y attendait, parce qu'il a été fait au printemps par des chemins plus diffiles que durant la saison d'hiver. Même, certaines machines lourdes ont dû passer l'été sur les lieux.

Les faits paraissent suffisamment établis; mais il s'agit de savoir à quel titre la compagnie Bishop peut réclamer de ce chef.

40

La dépense additionnelle pour l'enlèvement du matériel est attribuée par la compagnie Bishop à un retard dont elle veut tenir la compagnie MacLaren responsable parce que ce retard aurait pour cause l'augmentation des quantités des travaux à exécuter et les délais dus à de fausses informations.

Notons d'abord que l'enlèvement du matériel était compris dans le prix global, où il représentait une proportion de 1.56%, mais sans aucune augmentation prévue. Il n'y a absolument rien dans les conventions, pas plus dans le contrat que dans les spécifications, qui fixe la date de cet enlèvement ou permette de déterminer la saison durant laquelle il pourra se faire.

10 D'ailleurs, nous avons déjà dit que la compagnie MacLaren ne peut être tenue responsable que suivant les prix stipulés pour les augmentations de quantités; le droit de faire des augmentations devait nécessairement prolonger l'exécution de l'entreprise; et pour tout ce qui n'était pas prévu ou qui n'était pas des extras, le prix global représentait une rémunération acceptée.

Quant au retard dû à de prétendu fausses informations, nous avons déjà vu comment il est impossible d'en tenir compte.

20 En conséquence, je ferais pareillement droit à l'appel sur ce dernier chef de la réclamation.

CONCLUSION

Pour se rendre mieux compte de la position prise par les parties et de leurs droits respectifs, il a nécessairement fallu étudier plus d'une question accessoire, questions de faits et questions de droit, dont je n'ai cependant pas parlé. Les conclusions auxquelles je me suis arrêté sur chaque chef de réclamation rendaient inutiles de plus longues considérations.

30 Il n'y a donc que la réclamation No. 9, admise au chiffre de $1,429.60, pour laquelle il doit y avoir jugement.

Je rejetterais toutes les autres.

Je ferais droit à l'appel avec dépens, et statuant à nouveau, je condamnerais la défenderesse à $1,429.60, avec intérêt du jour de la signification de l'action, et les frais d'une action de ce montant.

40

SUR LE CONTRE-APPEL.

Vu la décision à laquelle je suis venu sur l'appel principal, le contre-appel doit être rejeté. En effet ce contre-appel ne s'appliquait qu'à l'adjudication des intérêts sur les items 3, 8, 10 et 12; et ces items sont rejetés. Sur l'item No. 9, admis et maintenu, le jugement accorde l'intérêt à partir de l'action.

Je rejetterais donc le contre-appel avec dépens.

APPENDICE

Principaux renvois aux pages du dossier conjoint pour l'étude de chacune des réclamations en particulier.

Sur la réclamation No. 1. 10

Plaidoiries: pp. 3, 4, 20, 23, 38.
Contrat: pp. 1088, 1089, 1090, 1097, 1098, 1106, 1112, 1113.
Lettres: pp. 1068 (P21) ; 1071 (P28) ; 1069 (P28) ; 1074 et 1076 (P58) ; 1080 (03) ; 1081 (D1) ; 1083 (P29) ; 1078 (P32) ; 1084 (P30) ; 1173 (P12) ; 1210 (P13) ; 1211 (P14) ; 1223 (P17) ; 1233 (P18).

Dépositions:

Bishop: pp. 56, 70, 171. 20
O'Shea: pp. 422, 400, 504, 506, 507, 509, 510.
Larocque: pp. 731, 732.
Bergeron: pp. 737, 739.
Kenny: pp. 918, 922.
Mailhot: pp. 139, 141, 143.
Lindskog: p. 223.
Reiffenstein: pp. 361, 388, 395.
Acres: pp. 425, 426, 1035.
Ferguson: pp. 368, 724.
Chadwick: pp. 849, 865. 30
Lefebvre: p. 908.
Kayser: pp. 1020, 1026.
Clarke: p. 1031.
McIntosh: pp. 524, 622, 624, 628, 662.
McEwen: pp. 175, 202.

Sur la réclamation No. 2.

Plaidoiries: pp. 4, 5, 24, 25.
Contrat: p. 1103. 40
Exhibit P116: p. 1177.
Lettres: pp. 1133 (Pr) ; 1136 (D2) ; 1137 (P5) ; 1139 (P31) ; 1140 (P32) ; 1141 (P33 et P34) ; 1142 (P35) ; 1144 (P36).

Dépositions:

McIntosh: pp. 625 à 628.
Jamer: p. 833.

O'Shea: p. 529.
Kenny: pp. 922, 923.
Coyle: pp. 839 à 845.
Griffith: pp. 477 à 479.
Clarke: p. 1033.
Lindskog: p. 305, 227, 289.

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10 *Sur la réclamation No. 3:*

Plaidoiries: pp. 5, 7, 20, 21, 25, 27 et 39.
Contrat: pp. 1090, 1099, 1112 et 1113.
Exhibit P 116: p. 1178 à 1218.
Lettres: pp. 1139 à 1147 (P31, P32, P33, P34, P35, P36, P6, P7, P41) 1150 (P42); 1151 (D3); 1154 (P44); 1155 (P43); 1158 (P45); 1159 (P46); 1160 (P47); 1174 (P48).

Dépositions:
20
Lindskog: pp. 225, 226, 236, 246, 287, 306, 307.
Bishop: pp. 127, 128, 129, 151.
McIntosh: pp. 625, 626, 630 à 637, 643.
Steele: pp. 323 à 328.
Ferguson: pp. 690, 691.
Stratton: pp. 587, 590, 591, 672, 673, 694 à 728.
O'Shea: pp. 514, 517, 559.
Bergeron: pp. 740 à 742.
Boyd. pp. 762 à 768.
30 Chadwick: pp. 850 à 857.
Dubreuil: p. 893.
Reiffenstein: pp. 397, 398.
L'Heureux: pp. 978 à 1003.
Lefebvre: pp. 909 à 911.
Coyle: p. 841.
Acres: pp. 430 à 436.

Sur la réclamation No. 5.

40 *Plaidoiries:* pp. 8, 9, 28, 29.
Contrat: pp. 1086, 1089, 1090, 1091, 1097, 1098, 1113, 1114.
Lettres: pp. 1135, (P8); 1143 (P9).

Dépositions: Bishop: pp. 113, 158.

McEwen: p. 185.
Lindskog: p. 254.
Ferguson. p. 716.
Lefebvre: pp. 910, 911.

Sur la réclamation No. 7.
Plaidoiries: pp. 10, 29, 30.
Contrat: pp. 1085, 1097, 1098.

Sur la réclamation No. 8.

Plaidoiries: pp. 10, 11, 30, 31.
Exhibits: pp. 1240 (P49); 1193 à 1200 (P116); 1247 (P120). 10

Dépositions:

Bishop: passim
Lefebvre: p. 912.

Sur la réclamation No. 10.

Plaidoiries: pp. 12, 31, 32.
Contrat: p. 1091. 20
Exhibit P 116: p. 1204.

Dépositions:

Griffith: p. 470.
O'Shea: pp. 542, 581.
McIntosh: p. 644.
Bishop: pp. 160, 162.

Sur la réclamation No. 11. 30

Plaidoiries: pp. 13, 14, 32, 34.
Contrat: pp. 1097, 1098, 1110.
Lettres: pp. 1224 (D30); 1225 (P10).

Sur la réclamation No. 12.

Plaidoiries: pp. 14, 22, 24.
Contrat: p. 1099.
Exhibit P 116: p. 1205. 40

Dépositions:

Griffith: pp. 471 et s.

In the Court of King's Bench

No. 9 The Notes of Hon. Mr. Justice Letourneau

No. 9

The Notes of Hon. Mr. Justice Letourneau

William I. Bishop Limited a entrepris et fait pour le compte de l'Appelante, un barrage de la Rivière Lièvre, dans le comté Labelle.

10

Son contrat stipulait comme prix initial une somme de $609,100.00, et il y était pourvu à certaines charges additionnelles, le cas échéant.

En fait, le travail ayant été accompli, l'Appelante a reconnu et payé à son entrepreneur un montant de $916,723.57.

Non content, celui-ci réclame par la présente action, une somme additionnelle de $412,846.75, qui représenterait, d'après lui, la valeur d'un surplus d'ouvrage fait ou de matériaux fournis, ou qui devrait lui être accordée à titre de *dommages*.

20

Voici le tableau des items qui composent cette réclamation, avec l'indication de ce qui en a été décidé en première instance:

Title of claim	Amount claimed by the Action	Amount allowed by the Judgment
No. 1—Hardpan Excavation	$ 21,601.45	$ 13,919.45
No. 2—Passing Logs	4,103.72	2,995.42
No. 3—Cofferdams & Unwatering	148,857.15	117,075.22
30 No. 4—Cofferdam Lower End By-pass	5,563.50	
No. 5—Additional Cost of Rock Excavation	35,100.74	35,100.74
No. 6—Handling & Trimming Excavated Rock	1,990.82	
No. 7—Excavating Frozen Material in river bed	2,530.32	2,530.32
No. 8—Work done under Winter Conditions	96,832.45	81,282.62
No. 9—Overcharge on Logs	7,220.19	1,429.60
No. 10—Cement for Apron in By-pass Channel	2,239.46	1,879.83
No. 11—Shortage in payment for Class 1 Concrete (40)	31,549.15	31,549.15
No. 12—Plant removal	5,823.49	5,823.49
No. 13—Standby & Overhead Expenses	49,147.41	
No. 14—Interest on Deferred payments	286.90	
TOTAL	$412,846.75	$293,585.84

In the Court of King's Bench
—
No. 9
The Notes of Hon. Mr. Justice Letourneau
(Continued)

Comme on le voit, de quatorze item, quatre ont été refusés; ce sont les numéros 4, 6, 13 et 14. Les autres ont été admis, mais avec, en certains cas, des réductions plus ou moins considérables.

La défenderesse ainsi condamnée en appelle, prétendant que la demande aurait dû être réduite à l'item 9 ci-dessus qu'elle admet, soit une somme de $1429.60 avec intérêt et les dépens d'une action de ce montant.

10

La demanderesse, de son côté, loge un contre-appel pour obtenir que quant à certains des items qui lui ont été accordés, l'intérêt court non pas seulement à compter du jugement *à quo,* selon qu'il a été dit, mais bien plutôt à compter de l'assignation.

Etant donné la conclusion à laquelle j'en viens ci-après quant à l'appel de la défenderesse, ce contre-appel de la demanderesse tombe de lui-même nécessairement.

Revenant donc à l'appel de la défenderesse, je dois maintenant et en toute déférence examiner et peser chacun des items qui ont été accordés en première instance.

20

HARDPAN EXCAVATION. — Il est acquis au débat, pour ce qui est des excavations, que le contrat se borne à envisager la "terre" et le "roc"; rien n'y est stipulé quant à du *"hardpan"*. Et pourtant l'on en soupçonnait bien l'existence à cet endroit, puisque le contrat en fait par ailleurs mention (p. 1115).

On ne peut donc soutenir qu'il y a eu là oubli ou imprévision; manifestement les parties ont entendu dire et ont dit que pour ces excavations, il n'y aurait qu'une distinction à faire, qu'une seule ligne de démarcation vaudrait et serait admise; ou du roc ou de la terre. Tout ce qui ne pourrait être considéré *roc* ne pourrait être chargé que comme *terre* et au prix de la terre.

30

C'est en vain que pour venir au secours de l'entrepreneur l'on voudrait recourir à une clause des devis incorporée au contrat et qui se lit:—

> "It is the intention of these specifications to secure thoroughly first class construction in both material and labor for each of the classes included herein without working an undue hardship on the Contractor...".

40

Cette clause particulière a trait à la nature de l'ouvrage ou du matériel, mais n'a rien à faire quant aux prix arrêtés pour ce qui, en tout cas, devait être fait.

L'Excavation dont il s'agit devait être faite et l'on a pris la peine de stipuler au contrat qu'il serait alloué tel prix de base ou tel autre, selon qu'il s'agirait de *roc* ou de *terre.*

On ne peut à mon humble avis sortir de là: l'ouvrage devait en tout cas être exécuté et c'est selon que pourvu au contrat que le prix en devait être établi. Or c'est ainsi et sur cette base que l'Intimée a été payée.

Au surplus, j'ai peine à croire, en face de l'ensemble de la preuve, que véritablement l'on fût en présence de *hardpan*. Surtout si ce qu'il faut entendre par ce terme n'est pas seulement un mélange de terre, de gravier
10 et de cailloux, durci au point de ne pouvoir être labouré, selon que nous le dit le témoin Mailhot (p. 141) et que nous le retrouvons à une note du Corpus Juris (Vol. 20, p. 214), mais est encore une composition si dure qu'une pelle mécanique de 70 tonnes ne pourrait en avoir raison sans qu'on ait au préalable dynamité ce mélange, selon que le soutiennent les experts Kayser et Clarke, amenés par l'Appelante en contre-preuve.

Il est à noter que ces deux experts n'ont pas vu l'endroit dont il s'agit, qu'ils supposent un *hardpan* tel qu'on peut l'imaginer scientifiquement. Or, aucun des nombreux témoins qui ont connu l'endroit précis
20 dont il s'agit, ne va jusque-là; aucun n'établit qu'une pelle mécanique n'aurait pas suffi, et M. Bishop lui-même, questionné à ce sujet, s'efforce plutôt d'établir qu'il eut été trop dispendieux d'amener là une pelle mécanique. Ceci n'est-il pas admettre qu'elle eut pu suffire; même sans avoir à se servir au préalable de dynamite, puisque c'est en somme pour ce cas seulement que M. Bishop était examiné, le "derrick orange peel" bien moins puissant et moins effectif qu'une pelle mécanique, que l'on avait sur les lieux étant tenu pour suffisant si l'on se donnait le trouble de dynamiter d'abord.

30 On a bien effectivement dynamité à certains endroits, mais d'après une certaine preuve, c'était plutôt parce que la surface s'était durcie sous l'effet de la gelée.

De l'ensemble des témoignages de tous ceux qui ont vu ce sol particulier, ce mélange de terre, de gravier et de cailloux, il semble qu'il n'eut pas été impossible d'y passer la charrue.

Cette impression où je reste après avoir lu la preuve me met plus à l'aise encore pour interpréter le contrat comme je le fais au sujet des
40 excavations et pour conclure que l'Intimée n'était pas quant à cette charge particulière de son compte, en face de quelque chose pouvant être regardé comme du roc; qu'il s'agissait bien plutôt de terre. D'autant qu'en lui comptant le prix de son creusage à cet endroit, l'on a effectivement traité comme rocs ceux des cailloux qui en grosseur dépassaient une demi-verge.

Pour ce premier item, le dossier ne me paraît pas justifier le judgment *a quo*.

PASSING LOGS. — Ici encore, c'est, à mon humble avis, le contrat et le contrat uniquement qui règle le cas. Il y est dit:—

"He (the contractor) shall so construct the coffer dams and arrange and manage the construction of the works as a whole, that logs of the owner, or of others, may be driven by the site of the dam during the driving season of 1929, and shall provide such opportunities for the passage of logs as the construction work may render necessary". 10

Manifestement, la première partie de cette clause eut suffi s'il se fut simplement agi pour l'Intimée de laisser ouvert un passage suffisant.

Cette première partie de la clause pourvoit non seulement à l'espace requis qui devait être laissé libre, mais encore quant à l'existence de ce passage, à la façon dont seraient faites les constructions.

Mais il y a plus dans cette clause:—

20

"..... and shall provide such opportunities for the passage of logs as the construction work may render necessary".

Ceci ne peut avoir d'autre sens, dans les circonstances que je viens de souligner, que ce que veut l'Appelante, à savoir que l'entrepreneur devait aussi voir à ce que ses travaux n'arrêtassent pas, au passage, les billots de l'Appelante ou de tous autres.

Et c'est ainsi que l'a d'abord compris l'Intimée elle-même, puisqu'en outre d'avoir eu là des hommes avec des piques pour diriger les billots qui donnaient contre son batardeau, elle avait prétendu y installer encore les estacades nécessaires. Seulement ces estacades insuffisantes, trop faibles et trop minces n'ont pu retenir les billots comme on y avait compté. De là la cause du trouble. 30

J'infirmerais donc également quant à cet item.

COFFERDAMS & UNWATERING. — C'est une augmentation du coût des travaux que réclame l'Intimée sous ce titre.

40

Elle apporte au soutien de cette partie de sa demande deux raisons:—

Premièrement: elle aurait été induite en erreur par l'exhibition ou la remise d'un plan, quant au lit de la rivière. Au lieu du roc (ledge) qu'indiquait ce plan, on se serait plutôt trouvé en présence d'une couche de gravier, cailloux, etc., variant de un à neuf pieds, juxtaposée au roc du lit de la rivière. Ceci aurait compliqué l'installation du batardeau en amont et aurait nui à son efficacité.

Secondement: la présence des billots de l'Appelante aurait également nui à cette installation du batardeau en question.

Ce que j'ai dit plus haut quant à l'obligation de l'Intimée de pourvoir au passage des billots, suffit je crois à disposer du second de ses griefs, celui que les billots auraient à cet endroit pris une fausse direction et donné contre le batardeau au lieu de descendre le courant dans l'espace
10 qui avait été ménagé à cet effet.

Et il est à noter que les témoins de l'Intimée attribuent à cette présence des billots, bien plus qu'à l'erreur du plan, la cause de troubles que l'on a entendu couvrir par ce présent item de la demande; et si cette cause principale qu'a été la présence des billots doit disparaître, comme je le crois, quelle proportion de responsabilité aurait donc pu être encourue par la remise d'un plan erroné? ... Nous ne le savons pas, et ceci, à mon humble avis, suffirait à faire dire que la preuve est sur ce point insuffisante.
20

Mais il y a plus, c'est qu'aucune relation de cause à effet n'est ici vraiment établie entre cette prétendue fausse indication du plan et ce qui en fait s'est passé, soit au sujet de l'installation du batardeau, soit quant à son efficacité.

Car, notons-le, l'Intimée ne peut se plaindre et ne se plaint effectivement à aucune autre égard du lit de la rivière à cet endroit.

Aucune mauvaise foi quelconque ne peut chez l'Appelante résulter de ce fait que l'Intimée aurait eu son plan B-2444 (P-2), plutôt fait pour
30 lui permettre de situer exactement l'endroit où elle voulait asseoir son barrage et sans aucun rapport, conséquemment, avec une installation de batardeau qui, pour tout le monde d'après la preuve, supposait un examen particulier du fond, du lit de la rivière à l'endroit précis où devait reposer ce batardeau. L'Ingénieur Olivier Lefebvre qui avait pour le Gouvernement de la Province la suprême direction de l'entreprise, peint bien, à mon sens, la situation quand témoignant au sujet de l'effet possible que le plan en question devait avoir pour un entrepreneur, il dit (Vol. 5, p. 909) :—

40 "R.—Ces renseignements sont indicateurs d'une façon générale de ce à quoi on peut s'attendre quant à la hauteur du lit de la rivière, mais je ne pense pas que personne ne s'aventure à construire un batardeau destiné à s'ajuster au lit de la rivière en se limitant aux renseignements fournis sur la ligne de sondage en question.

....

Q.—Etes-vous en état de nous dire quelle est la première opération que la construction de batardeau doit faire, un constructeur muni de ce plan-là?

R.—Cela dépend voyez-vous, des conditions auxquelles il s'attend, mais généralement, on pratique toute une série de sondages à espaces très rapprochés pour avoir une idée exacte et détaillée des diverses hauteurs du lit de la rivière, et on essaie autant que possible de construire la base du batardeau pour qu'en le callant ce batardeau s'ajuste aux aspérités, au lit de la rivière."

Et c'est si bien le cas, que c'est précisément ce que l'Intimée s'est préoccupé de faire avant l'installation du batardeau en question, quoi qu'elle veuille aujourd'hui prétendre. Ses employés Reiffenstein et l'Heureux ont vu à faire ces sondages et ces mesurages que suppose l'ingénieur Lefebvre et ils en témoignent d'une façon non équivoque. 10

On a donc ainsi été à même de se rendre compte de la nature du lit de la rivière et si à ce moment, on n'y a pas attaché plus d'importance, c'est que l'on a consenti à descendre le batardeau sur ce fond tel qu'il était. Ce n'est qu'après coup qu'on a songé à s'en faire un grief.

20

Mais, je le répète, on savait ou tout au moins l'on a été à même de savoir.

D'ailleurs, la preuve faite ne permet pas de dire que ce lit de la rivière à l'endroit en question — à supposer qu'il fût le même au moment où l'employé Stratton cherchait pour l'Appelante les indications qui devaient permettre à celle-ci de situer son barrage—, ait été cause des inconvénients dont prétend avoir souffert l'Intimée. On a retrouvé sous l'un de ses caissons, un des énormes cailloux qu'elle admet avoir descendu et glissé dans le courant sous le prétexte d'y retenir plus facilement ce caisson. 30

Surtout, rien n'est moins établi qu'il faille rattacher à l'existence de cette couche de gravier superposée au roc du lit de la rivière, ces fuites d'eau dont l'Intimée dit avoir souffert.

Je reste sous l'impression, d'après l'ensemble de la preuve, qu'avec plus de soin, l'Intimée eut pu éviter les ennuis qui lui sont venus de ce chef d'une installation de son batardeau.

40

A ce sujet encore, je prononcerais contre elle et en faveur de l'appel.

ADDITIONAL COST OF ROCK EXCAVATION. — Ce grief viendrait de ce que faute d'avoir mieux connu la nature du sol, soit l'exacte profondeur à laquelle l'on devait rencontrer le roc solide à l'endroit précis où devait être le barrage, l'on aurait imposé à l'entrepreneur un procédé plus coûteux qu'il n'était nécessaire en exigeant de lui qu'il minât successivement à de faibles profondeurs plutôt que d'en venir d'un seul coup à la profondeur qu'il fallait.

Ceci, nécessairement a donné lieu à plus de travail et de dépenses.

Cependant, une preuve qui n'est pas contredite établit que c'est ainsi qu'il fallait procéder dans les circonstances où l'on était; que la quantité de roc qui a été enlevée devait l'être. L'opinion de l'ingénieur Lefebvre qui avait, comme je l'ai déjà dit, la direction suprême de l'entreprise, corroborée par celle de son assistant sur les lieux, ne laisse aucun
10 doute à ce sujet.

Aussi, j'incline à débouter également l'Intimée de la réclamation qu'elle a formulée à ce sujet.

EXCAVATING FROZEN MATERIAL IN RIVER BED. — Il n'y a aucun doute que d'après son contrat, l'Intimée était tenue d'enlever ce matériel. De fait, elle l'a enlevé. C'est comme pour de la terre qu'on l'a payée, puisqu'en fait ce n'était pas véritablement du roc, et pour les raisons que j'ai données en discutant l'item "Excavation", rien de plus ne
20 pouvait à ce sujet lui être alloué.

Le fait que ce matériel était gelé vient de ce qu'il n'a pas été enlevé avant l'hiver, et si comme je crois l'avoir déjà établi l'Intimée est seule responsable des grands retards qui se sont produits dans son entreprise, elle ne peut encore s'en prendre qu'à elle-même de cette conséquence additionnelle qu'ont pu avoir ces retards.

Ici non plus l'on ne peut recourir à la clause du "undue hardship on the Contractor".
30

Je tiendrais cet item pour également mal fondé.

WORK UNDER WINTER CONDITIONS. — Si c'est à raison de la seule ampleur et d'une exécution normale des travaux que l'Intimée a dû opérer en hiver, elle ne peut s'en plaindre puisqu'il s'agissait encore de ce qu'elle avait entrepris et devait faire. Si c'est à cause du retard que les billots et les difficultés de l'assèchement du lit de la rivière ont apporté, je crois avoir déjà démontré qu'elle ne peut s'en prendre qu'à elle-même.
40

Cet item également doit être refusé.

OVERCHARGE ON LOGS. — Cet item de $1429.60 est fondé et devait être accordé, selon que le reconnaît l'Appelante en son Mémoire.

CEMENT FOR APRON IN BY-PASS CHANNEL. — L'intimée demande cette somme additionnelle parce que l'extra en question commandé aux premiers jours de mars de 1930 aurait eu pour conséquence l'absorption complète de tout le ciment qu'elle avait en réserve sur les

lieux à ce moment, l'obligeant ainsi à se pourvoir autrement alors que déjà prétend-elle, elle n'avait plus le bénéfice des chemins d'hiver et conséquemment à très grands frais.

L'Intimée était incontestablement tenue par son contrat à cet extra, si seulement il lui était demandé, et rien n'indique qu'on dût le lui demander en hiver.

10

D'ailleurs, au moment où ceci a été effectivement ordonné, soit le 13 mars 1930, les chemins d'hiver existaient encore d'après la preuve, et là encore l'Intimée ne peut s'en prendre qu'à elle-même de n'avoir pas vu en temps à ce supplément de ciment sur lequel elle dit avoir compté.

Je lui refuserais aussi cet item.

SHORTAGE IN PAYMENT FOR CLASS 1 CONCRETE. — Les chiffres fournis de part et d'autre me paraissent avoir été et devoir être admis comme exacts. Il s'agit plutôt, selon que le dit l'Intimée dans son Mémoire, d'une juste interprétation du contrat. Le cas tombe-t-il sous le coup de cette clause (p. 1097) ou "due to changes of design or depth of foundations from those used for calculating said quantities, there shall be added to or deducted from said principal sum according to whether said quantities are increased or diminished, sums computed according to the following table, etc."

20

Si oui, il n'y a qu'à faire jouer les diminutions ou augmentations de quantités tel qu'elles ont été prévues au tableau qui vient à la suite de cette clause et l'Intimée aurait raison dans ses prétentions. Mais s'il s'agit au contraire d'une simple substitution d'un ciment No. 1 "without plums" à un ciment No. 1 "with plums", sans que la chose puisse être rattachée à la charge sus-mentionnée et soit due "to changes of design or depth of foundations from those used for calculating said quantities", il me semble qu'il faille plutôt décider en faveur de l'Appelante quoi qu'en ait d'abord pensé son représentant O'Shea selon que nous le révèle une lettre qu'il adressait à l'Intimée le 9 Mars 1930 et qui est produite comme exhibit D-30.

30

Je ne vois rien au dossier qui me permette de conclure ici autrement qu'à une simple substitution et conséquemment la différence de prix qui effectivement a été payée à l'Intimée par l'Appelante devrait marquer la limite de responsabilité de cette dernière.

40

Je rejetterais également cet item de la demande.

PLANT REMOVAL. — Il s'agit encore de l'une des conséquences de ce retard de trois mois environ qu'auraient causé à la demanderesse-Intimée certains travaux additionnels, l'ennui des billots et l'état du lit de la rivière.

Or, j'ai déjà dit que seule elle doit avoir toute responsabilité à ce sujet.

Il s'ensuit que l'item doit lui être refusé.

Sur le tout, je ferais droit à l'appel avec dépens; j'infirmerais le jugement rendu quant à tous les item qui nous ont été soumis, sauf celui de $1429.60 pour "overcharge on logs"; et, statuant à nouveau, j'accorderais
10 la demande mais jusqu'à concurrence seulement de cette somme de $1429.60 avec intérêt et les dépens d'une action de ce montant, ces dépens se limitant pour l'enquête à un dixième de ce qui a été encouru de ce chef.

(Signé) Séverin Letourneau,
J.C.B.R.

No. 10

20 **The Notes of Hon. Mr. Justice Hall**

The Respondent, by its action, demanded $412,000, made up partly of sums representing labor, material, work and services necessarily supplied under its contract with the Company-Appellant, and partly as damages suffered by it as the result of erroneous and deceptive information supplied, and representations made, by the latter.

Although the Respondent's tender was accepted, and the work begun before the contract was signed, it is common ground that the terms
30 and conditions of the contract itself, which was dated the 23rd May, 1929, govern the obligations of both parties.

The Company-Appellant, having decided to construct a dam on the Lièvre river, in the locality known as Cedar Rapids, which was to be under the control and supervision, and ultimately to revert to the ownership, of the Quebec Streams' Commission, retained the services of Mr. H. S. Ferguson of New York, to design and supervise the building of the dam; and with the object of deciding the exact point at which the dam should be constructed, Mr. Ferguson sent his assistant, Mr. Stratton, to the Lièvre
40 river to make a preliminary survey of the bed of the stream, in order to secure the necessary information.

In carrying out this work, Mr. Stratton took a series of soundings in different parts of Cedar Rapids, and prepared a plan indicating the elevation of the bed of the river at various points.

As will be noted in greater detail when we come to consider the construction of the cofferdam, Mr.Stratton marked on his plan, after the figures of most of the elevation, the letter 'L', indicating ledge rock, which he had identified by forcing the steel rod, with which he took the

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soundings, through the loose material, technically known as "overburden", which overlay the riverbed.

It is important to note, however, in passing, that Mr. Stratton's survey was not intended to be definitive, but solely to enable Mr. Ferguson to decide upon the proper location of the dam. (Ferguson p. 716).

On receipt of this information, Mr. Ferguson chose the site, proceeded to design the dam to be thereon erected, and make an approximate estimate of the extent of the excavation and the quantities of material that would be required. 10

As the river at that locality was only approximately 150 feet wide, Mr. Ferguson recognized that it would be impracticable to unwater the bed of the river in sections, and formed the opinion that any contractor, whose tender might be accepted, would consider it preferable to divert the flow of the river through an artificialchannel, known as a by-pass.

20

The only practicable site for the by-pass was on the north bank of the river, and, in order to discover what character of material would be met with in the excavation, five test pits were sunk at different places to a depth sufficient to reach the elevation which would be necessary to provide for the full flow of the river.

For this purpose, it was not necessary that the engineer should carry the pits to ledge rock, and they were sunk to a depth of only 18 or 20 feet.

When the tenders were called for, Mr. Bishop, the President of the Company-Respondent, and his chief engineer, after having taken communication of the various plans, proceeded to the site in order to familiarise themselves with the conditions, and there had an opportunity to obtain from Mr. O'Shea a description of the material that had been identified in the test pits. 30

It was clearly understood, and was subsequently provided by the contract, that the excavation of the by-pass, and the unwatering of the river-bed, were to be undertaken by the contractor at his own discretion, and at his own risk, while the dam itself, and the excavation therefor, were to be under the final control and direction of the chief engineer of the Quebec Stream's Commission. 40

While, then, it was possible for Mr. Ferguson to make an approximate estimate of the extent of the excavation and material that would be required, it is obvious that it was impossible to tell, from the preliminary survey, the exact character of the ledge rock that might be met with, and the exact depth to which the foundations would have to be carried, under the direction of the Streams' Commission.

The contractor was thus conversant with these conditions, as a result of which, as is said by the learned Trial Judge:

"Neither of the parties were fully aware of the magnitude of the undertaking, or of the difficulties which would be encountered in its carrying out."

10 Having thus familiarised himself with the characteristics of the locality, and taken communication of the plans, knowing that the work was to be executed to the satisfaction of the Quebec Streams' Commission; that the extent of excavation might be materially increased, and that changes might be made both in design and material, Mr. Bishop submitted a first tender which was not accepted.

It was at first proposed that the dam should be completed by March, 1929, but when the delay was extended until the 31st March, 1930, and largely because the additional time enabled the contractor to make some
20 economies (McEwen p. 190), Bishop's tender was reduced by $10,000, to $609,000, and was accepted.

That figure was intended to cover the completed structure, but, in view of the probability that changes would be made, the contract specified the "Quantities of work on which the Contract Price is Based", and made provision for the unit prices of increased quantities.

The contract was, therefore, one of a hybrid character, and was of a highly speculative nature, as appears from the fact that, while the con-
30 tract price was $609,000, the contractor was actually paid $916,000, and, by his action, demanded a still further sum of $412,000.

In this connection, it is pertinent to quote the express provisions of the contract:—

"It is further agreed that, should the quantities of excavation, concrete and other classes of work which are listed in the above schedule required for the satisfactory completion of the structure be different from those contained in said schedule, additions or de-
40 ductions from the principal sum of money herein named shall be made in the manner hereinafter provided.

But it is expressly understood and agreed, however, that:

(a) The quantities given in the foregoing table do not include any additional excavation which the Contractor may choose or be required to do for *bypassing or handling the flow of the river during the construction of the dam;* nor any materials and labor used for the *construction of cofferdams;* nor any

other work or materials extraneous to the permanent structure of the dam itself which are required for the construction of the dam.

(b) All of said additional excavation and extraneous work and materials are to be performed and furnished by the Contractor as a part of the work for which the said principal sum is to be the compensation. 10

There are other clauses governing extra work ordered by the Supervising Engineer, but as these were all duly certified, and have been paid for in full, they are not relevant to the issues in this appeal.

Although the contract fixed the 31st March, 1930, as the date of final completion, the Respondent contends that the work could have been completed by November or December, 1929, and, in support, submits a chart showing "Possible progress with same actual quantities, assuming correct information and proper handling of logs by owners". (Exh. D.5.) 20

That means, of course, that neither the additional excavation ordered by the Engineer of the Streams' Commission, nor the resultant increase of materials, nor the extra work ordered, disadvantageously affected the contractor's anticipations.

Attention may here be drawn to a general provision in the Specifications (p. 1106), to the effect that:—

"It is the intention of these specifications to secure thoroughly 30 first-class construction in both material and labour for each of the classes included herein, *without working undue hardship on the contractor.*"

The general basis of the Respondent's action is that erroneous and misleading information was given with regard to the character of the material that would be met with in the excavation of the by-pass; that the plans showing the levels of the river bottom were erroneous and misleading, as the result of which the Contractor met with serious and unanticipated difficulties in placing his cofferdams, and in unwatering the site 40 of the dam; that the Company-Appellant was negligent in the manner of handling its logs while driving them past the Contractor's works, and thus the work was rendered much more expensive, and so delayed its completion that the Contractor was subjected to the further expense of pouring his concrete during the winter, and of removing his plant after the winter roads had broken up.

The details of the Respondent's claim can be examined more appropriately by discussing the different heads under which they are grouped.

"HARDPAN".

The Judgment has awarded the Company-Respondent the sum of $13,919.45, as damages for the increased cost of excavating that part of the by-pass which is crossed by the dam site, because of the fact that consolidated material, technically known, as "hardpan" was encountered, while the contractor was led to believe that nothing but earth would be found.

10

The bypass was to be excavated by the contractor at his own expense "except for that part of the excavation which would be required for the dam if the channel was not excavated". (Specifications p. 1112).

There is no doubt that hardpan was found at certain places in the by-pass, but it is not clearly established what had actually occurred within the lines of the dam site proper.

20 Prof. Mailhot examined the excavation at one place only (p. 143), and Mr. McIntosh (p. 624) who was present on that occasion say that that place was below the dam site.

While the contractor started to excavate early in November, he began the lower end and continued his operations in that connection throughout the winter.

There are no data which fix the date when the excavation reached the dam site, but it would appear probable that that locality was not reached until the end of December or the 1st of January, by which time, according
30 to McIntosh (p. 622) the ground was frozen.

The test pits disclose the fact that there was a great deal of seepage in the sub-soil, and, with the arrival of winter weather, the material would certainly be frozen, and as difficult to excavate as was the overburden of 811 cubic yards found in the bed of the river after it was unwatered, for which the contractor has a similar claim for additional expenses.

The information disclosed by the test pits was properly and fairly communicated to the contractor, and by the testimony of Mr. O'Shea, the
40 engineer in charge, and the laborers who actually did the work, it is established that no hardpan was encountered, although they were obliged, on one or two occasions, to blast boulders.

It is contended by the Appellant that, even if hardpan was encountered, it could have been easily handled had the contractor made use of a steam-shovel instead of an orange-peel excavator.

This theory has been controverted by the Respondent's experts, and Mr. Bishop adds that the expense of bringing in a steam-shovel would have been prohibitive.

I do not venture, therefore, to express an opinion on this controversy, as, in view of the terms of the contract itself, it appears to me to be irrelevant.

The contract has provided for only two classes of material to be excavated, that is, rock and earth.

While Prof. Mailhot says that hardpan is not earth, and is not rock (p. 139), it does, in my opinion, properly fall within the general category of earth, rather than of rock. Hardpan is boulder clay, that is, a consolidated earth, but not rock.

This is another indication of the highly speculative character of the contract, for, while it is not at all unusual to meet with hardpan in the course of excavating through earth, the contractor voluntarily assumed that risk by consenting to a classification which provided for only two categories of material, rock and earth.

I conclude, therefore, that this part of the claim should be disallowed.

HANDLING APPELLANT'S LOGS:
AMOUNT ALLOWED $2,995.42.

It is provided by the contract that the contractor shall so construct the cofferdams and arrange and manage the constructions of the works as a whole, that the logs of the owner (Company-Appellant) *may be driven* by the site of the dam during the driving season of 1929, and shall provide such opportunities for the passing of logs as the construction work may render necessary.

It was thus anticipated that logs would be floated down the river during the course of the Respondent's operations, and the question to be decided is whether the expense of handling them at this point should be borne by the Company-Appellant or by the Respondent.

It is contended by Counsel for the Respondent that the words *"may be driven"*, assume that the Appellant would, with its own men, do the driving, and that the sole obligation resting on the former was to "provide such opportunities — as may be necessary", that is, to leave openings or channels in its work as would be sufficient for the passage of the floating logs.

I am of the opinion that it is impossible so to narrow the Respondent's obligations. The words "to provide such opportunities" seem necessarily to imply the provision of booms to direct the logs to the channels, and to prevent them being entangled in different parts of the Respondent's work.

Such was certainly the Respondent's view of its duty when the work was begun, for the first booms were constructed and placed by its own workmen without the knowledge or advice of the Appellant.

The first crib of the cofferdam was placed next to the north abutment on the 15th June, and the first boom was run from a point 500 feet upstream, on the northern bank to the outermost corner of crib 1, thus 10 directing the logs to the center of the river, which was still open, and preventing them from swinging back into an eddy which swept around towards the spot where the by-pass was later opened.

When crib 2 was prepared it was intended that it should be sunk alongside crib No. 1, but, through misfortune, or mishandling, it was carried by the current to the center of the river, thus leaving a channel between crib 1 and crib 2, and another channel between crib 2 and the south abutment.

20 Crib 3, was subsequently prepared to fill the gap between crib 1 and crib 2. It would appear obvious to a layman that, to protect crib 3, the boom should have been carried from crib 1 to crib 2, but that was not done until after crib 3 was placed, and it is altogether probable that the great difficulty met with when the logs are said to have pushed crib 3 down before it was loaded, was due to the fact that the booms had not been placed to direct them to the channel south of crib 2.

Of course, as Lindskog says (p. 289), it was impossible to keep the boom in place while crib 3 was actually being located, but it should have 30 been placed as soon as that operation was completed, and it would thus have successfully protected that crib from the logs, which did not come down until some four or five hours later.

Had the boom, at that time, been moved to the southern corner of crib 2, the logs would have been directed into the channel, subsequently blocked by crib 4, a channel 30 feet wide carrying at least 15 feet of water. (Lindskog p. 227).

Counsel for the Respondent lay particular emphasis on the com- 40 plaints about logs, contained in Lindskog's letter of June 17th, 1929, (p. 1134), which was forwarded by Mr. Bishop to the Company-Appellant, but it is to be noted that, while that letter was written two days after the placing of crib 1, the trouble indicated was "logs piling up in the eddy, and I am afraid of what will happen when the river is turned into the by-pass." There is not a word suggesting that the logs interfered with the placing of the cribs, nor is there any request that the logs should be held up, but merely "not to send down a whole boom of logs at one time".

Nor is there any suggestion that the Appellant was responsible for the placing of proper booms. Indeed, when Mr. Kenny offered to assist with booms, Lindskog declined the offer. (Coyle p. 845).

The first and only time Lindskog requested that logs should be held back, was about Aug. 1st, just prior to the placing of crib 4, and the request was at once complied with, the logs being held up for three weeks.

10

I conclude, therefore, that this item should be disallowed.

COFFERDAMS AND UNWATERING.

The Respondent had great difficulty in completing his cofferdam, and in making it sufficiently watertight to permit of the unwatering of the river-bed for the excavation of the damsite, and the construction of the dam.

20

Two causes are cited as responsible for this difficulty; first, the trouble with the logs, which prevented the proper placing of the cribs and sheathing, and second, the erroneous information about the river-bottom, contained in Plan B-2444.

Most of the witnesses express the opinion that the logs were the biggest factor, (Lindskog p. 236); the whole cause of the delay. (Acres p. 436). Mr. Bishop himself says: "We might have contended with the bottom, but the logs were the most important factor." (p. 151).

30

As the handling of the logs has already been considered, it is unnecessary to say more than that the trouble and delay were due to causes for which the Respondent itself was responsible.

With regard to the alleged erroneous information conveyed by the elevations of ledge-rock in the Plan B.2444, it is contended that the Respondent was misled into the belief that the cribs of the cofferdam would rest on rock without overburden, and that the difficulties met with were due to porous overburden, the presence of which made it at first impossible to secure a watertight structure.

40

After the cribs were all in place, blocking, with the exception of narrow gaps, the entire stream, it was proposed to complete the cofferdam by installing plank sheathing on the upstream face of the cribs. But, as logs caught in the cribs, or between them, prevented the sheathing being placed close to the cribs, it had to be located some distance upstream, and could not be forced through the overburden.

It is to be noted, however, that the Superintendent, Lindskog, the crib-foreman L'Heureux, and the Resident-engineer, all took soundings before the cribs were built and placed.

This was, no doubt, the proper course, since the soundings taken by Stratton were 20 feet apart, and quite insufficient to supply the data required for the proper construction of the cribs.

10

Now Lindskog's or Reiffenstein's soundings, produced as Exhibit P.112, show four lines across the river between the north and south abutments, the lowest reaching only elevation 79.2. In the center of the stream there appears to be very little variation in the depth, the soundings varying only between 84.7 and 81.7.

Stratton's soundings disclose, near the northern abutment, the presence of a deep channel, reaching elevations 72.9 to 73.7.

20 Having Stratton's soundings when he made his own survey, Lindskog could not, or should not, have failed to observe a discrepancy of 6 feet. If he actually found the lowest level of the bottom at 79.2, while Stratton showed an elevation of 72.9, there was a clear indication that the latter had thrust his sounding-rod through an overburden. L'Heureux relied on Reiffenstein's soundings, but before proceeding to construct the cribs, which should be made to conform generally to the bottom of the river, he took other, and more extensive soundings himself, to find out exactly how the bottom was. (p. 980).

30 Neither of these men, experienced as they were in such work, could have failed to observe the discrepancies between their soundings, and those of Stratton. Nevertheless, not one word of complaint was uttered, the deeper soundings on Plan B.2444 were ignored, and the cribs were constructed to conform to their own soundings. The first reference to the undisclosed overburden was made by Mr. Bishop, in a telegram to Ferguson on the 26th September, 1929. (p. 1145).

It is fully disclosed by the evidence that the greatest difficulty with leaks was met with just at that locality where Stratton's soundings indi-
40 cated a deep channel, which Lindskog's soundings failed to note. It was across that deep channel that the steel-sheeting, which ultimately stopped the leaks, was placed.

Mr. Bishop, with frank complacency, claims the credit for the idea of driving steel-sheet piling at that point, which, he says "enabled us to meet conditions, and shows that I knew how to stop it (the leaking)". (p. 100).

Owing to the difficulty in placing the cribs, and the impossibility of overcoming the leaks, even after the wooden sheathing, toefilling and

other devices, the work was held up from Aug. 3rd, the date when the last crib was placed, until the middle of November, when the steel-sheeting was driven. For upwards of three months the Respondent's workmen were struggling, and resorting to many useless devices.

It is a striking fact that it was during this period that the Chief Engineer, Mr. McEwen was called to Newfoundland, and was continuously absent from Cedar Rapids from May 29th, until Oct. 22nd, 1929. (p. 206). 10

Mr. Bishop himself was absent during the months of July and August. If he knew in October that steel-sheet piling was an appropriate remedy, he surely might have ordered it the 1st of September instead of the 14th October. Had Mr. McEwen been in attendance, instead of entrusting to subordinates the supremely important work of building the cofferdam, it is not unreasonable to assume that the difficulty would not have arisen, or that it would have been promptly overcome.

As has been noted, it is essential that the general character of the 20 bottom of the river should be accurately known in order that the cribs may be properly shaped.

Now crib 2 was designed for a place adjoining crib 1, on the northern side of the river, where, according to Stratton's soundings, the bottom was about 72, and according to Reiffenstein 81 (approximately). Unfortunately for the Respondent, its Superintendent and workmen, in the absence of the Chief Engineer, placed crib 2 much farther south, where the elevations were entirely different.

30

While it is true that the greatest quantity of leaking was under or around cribs 1 and 3, still the misfortunes and faulty placing of crib 2, contributed to the general defects of the cofferdam.

I conclude, therefore, that the difficulties met with in building the cofferdam, and in the unwatering whether due to the logs, or to unidentified overburden, were occasioned by the carelessness of the Respondent's employees, and that the item of $117,075.22, awarded by the Trial Judge, should be disallowed.

40

ADDITIONAL COST OF ROCK EXCAVATION — $35,100.74.

The judgment confirms, in its entirety, the Respondent's claim, which is to the effect that, while the contract estimate for rock excavation was 8060 cubic yards, the actual quantity ordered by the Supervising Engineers was 21,564 cubic yards; that the method of excavation in thin layers, also ordered by the Engineers, was more expensive than the ordinary and usual methods, with the result that the total cost, allowing

for overhead and profit of 37% (as provided for extras), amounted to $122,417.39, on account of which $87,316.65 has been paid, leaving the balance of $35,100.74.

In the first place, it may be observed that this was not an extra, it was clearly contemplated by the Contract, and the increased quantity of rock excavation was to be paid for at unit prices, which was done. The
10 profit of 35% is clearly not applicable to an item of this sort.

Then, the Respondent expressly agreed to conform to the orders of the Supervising Engineers, who were the sole arbiters of how far, and in what manner, the rock should be excavated.

It is, in my opinion, fully established that it was impossible to discover in advance how deep the rock should be excavated, and that the method ordered, that is, proceeding by shallow stages, was altogether proper.
20

The Specifications provide:—

> "In preparing foundations for the concrete structures all loose ledge must be removed and the excavation carried to a sufficient depth to provide a safe foundation and remove all open seams or joints which might at some time permit leakage or act as sliding planes.
>
> All this work shall be done as directed by and to the satisfaction of
> 30 the Engineer." (Vol. VI, p. 1114).

I conclude, therefore, that this item must also be disallowed.

EXCAVATING FROZEN MATERIAL IN RIVER-BED — $2,530.32.

When the dam-site was unwatered, it was discovered that 811 cubic yards of earth, which overlay the rock, had first to be excavated, but, as winter already had arrived, and the earth was frozen, it was as hard to excavate as rock, and the rock-price is, therefore, claimed.
40

The Trial Judge observes that: "it would obviously be imposing an undue hardship on the contractor to make him accept the earth price — consequently the plaintiff is entitled to this amount."

The so-called "hardship clause" has no application to such an instance as this, and, in any event, the delay was, as has been already indicated, due to the Respondent's own fault.

This item should also be disallowed.

WORK UNDER WINTER CONDITIONS — $81,282.62.
PLANT REMOVAL — $5,823.49.

The only basis for these items is the assumption that the delay in unwatering was due to the Appellant's neglect in failing to handle the logs properly, and in giving erroneous information about the river-bed, questions that have already been fully examined. 10

As the respondent itself was responsible for the delay, it is not entitled to recover any increased costs from the Appellant.

OVERCHARGE ON LOGS: $1,429.60

This item is admitted.

--- 20

CEMENT FOR APRON IN BY-PASS CHANNEL — $1,879.83.

This was extra work ordered by the Engineer on or about the 13th March, 1930, completed on March 22nd, and for which the Respondent was duly paid the unit prices provided in the contract for excess quantities.

But the Respondent claims that it was obliged to bring in 55 additional tons of cement for this work in the Spring of the year, which cost more than if the work had been ordered earlier when the winter roads were 30 in use.

There are two reasons why this claim should be disallowed.

First, had the Respondent itself not delayed the work for upwards of three months, during the summer of 1929, the necessity for the cement apron would have been observed before March 13th; and, secondly, in any event the winter roads were available until at least April 1st, and six weeks was ample delay to enable the Respondent to bring in, at ordinary cost, the extra cement. 40

This item should be disallowed.

SHORTAGE IN PAYMENT FOR CLASS 1 CONCRETE — $31,549.15.

The contract, after itemising the estimated quantities of work (p. 1089), which were, of course, included in the principal sum, proceeded to add:—

"If, however, the quantities of any of the various classes of work required to build the dam shall be different from the corresponding quantities hereinbefore given, *due to changes of design or depth of foundations* from those used for calculating said quantities, there shall be added to or deducted from said principal sum according to whether said quantities are increased or diminished, sums computed according to the following table."

10

The new schedule of prices was to apply, therefore, only when the extra quantities were required by "changes of design or depth of foundation", and then to quantities exceeding the original estimate.

It was originally estimated that class 1 concrete, *without plums,* would be only 9690 cubic yards, and concrete *with plums* 10,800.

But, by changes, not in design, but a mere redistribution of the concrete with, and the concrete without plums, the respective quantities were 20 altered to concrete *without plums* 13,709 cubic yards, and concrete with plums 6,781 cubic yards.

The Respondent claims that all the concrete without plums, over the contract estimate, should be treated as new concrete called for by a change in design or depth of foundation.

I concur with Mr. Justice Letourneau in the opinion that the redistribution of the class 1 concrete estimated in the Contract, does not amount to a change in design, and that, therefore, the basis upon which 30 the Respondent was actually paid was correct.

This item should, therefore, also be disallowed.

On the whole, I conclude that the appeal should be allowed, and that the judgment should be reduced to the sum of $1,429.60; with interest and costs.

CROSS-APPEAL.

40

It follows from the foregoing, that the Cross-Appeal should be dismissed, with costs.

November 22nd. 1935.

(Signed) A. Rives Hall,
J.C.K.B.

No. 11

The Notes of Hon. Mr. Justice St. Germain

10

This is an appeal from a judgment of the Superior Court, District of Montcalm, dated June 1st, 1934, condemning the James MacLaren Company Limited, Defendant-Appellant, to pay to the Bank of Montreal the sum of $293,585.84, for the benefit and account of William I. Bishop Limited, Plaintiff-Respondent.

On or about November 15th, 1928, a contract was entered into between said Plaintiff and Defendant for the construction of a certain storage dam known as CEDARS RAPIDS STORAGE DAM to be consructed across the Lievre River.

20

That contract, based on unit prices, was entirely completed to the satisfaction of the Defendant in June 1930. The consideration to be paid to the contractor for his work and services was the sum of $609,100.00 referred to in the contract as the "Principal sum", that sum having been fixed upon an estimate of the quantities of excavation, concrete masonry, forms, reinforcing steel, and other classes of work required to completely construct the dam, which had been calculated from the dimensions and depths to the bottom of the dam according to plans and specifications.

30

Although the contract price based upon the above mentioned data was the said sum of $609,100.00, the Defendant has already paid for work to the amount of $916,723.57 and the Plaintiff-Respondent, by its present action, has claimed an additional sum of $412,846.75, representing, as alleged in its Declaration, labour, material, work and services necessarily supplied, outlays made by said Plaintiff and expenses to which said Plaintiff has been put in connection with the said work as well as in connection with the doing of work actually required for said construction and approved of by Defendant but not provided for in the contract, or as damages suffered by the said Plaintiff for reasons attributable to the faulty, erroneous and deceptive information supplied and representations made by Defendant to said Plaintiff.

40

The Respondent's claim may be divided into fourteen items, four of which have been rejected and the others allowed by the judgment a quo. These different items with the amount claimed and the amount allowed are described as follows in the Appellant's factum:—

Title of Claim	Amount claimed by the Action	Amount allowed by the Judgment
No. 1—Hardpan Excavation	$ 21,601.45	$ 13,919.45
No. 2—Passing Logs	4,103.72	2,995.42
No. 3—Cofferdams & Unwatering	148,857.15	117,075.22
No. 4—Cofferdam Lower End By-Pass	5,563.50	
10 No. 5—Additional Cost of Rock Excavation	35,100.74	35,100.74
No. 6—Handling & Trimming Excavated Rock	1,990.82	
No. 7—Excavating Frozen Material in River bed	2,530.32	2,530.32
No. 8—Work under winter conditions	96,832.45	81,282.62
No. 9—Overcharge on Logs	7,220.19	1,429.60
No. 10—Cement for Apron in By-Pass Channel	2,239.46	1,879.83
No. 11—Shortage in payment for Class 1 20 Concrete	31,549.15	31,549.15
No. 12—Plant Removal	5,823.49	5,823.49
No. 13—Standby & Overhead Expense	49,147.41	
No. 14—Interest on Deferred Payments	286.90	
TOTAL	$412,846.75	$293,585.84

We will now deal with each of these items separately.

30 ITEM No. 1 — HARDPAN EXCAVATION:—

Here is an extract from the judgment a quo regarding this item:—

The first item of Plaintiffs' claim is for excavating hardpan.

Only two classes of excavation are provided for by the contract, earth and rock. The evidence shows that beyond doubt a considerable amount of hardpan had to be excavated, at a large additional cost over earth excavation.

40

The Defendants' answer to this claim is in substance:

a) There was little or none of this hardpan; that which Plaintiffs call hardpan was really earth which had become frozen owing to the lateness of the season;

b) Test pits had been opened by Defendant, and these apparently did not disclose hardpan, in fact O'Shea informed Plaintiff before tender was made that the test pits showed first five feet of sand

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(Continued)

and loam, and next gravelly material with occasional boulders, consequently, no mention of hardpan is contained in the contract.

That the material was hardpan seems free from doubt. Mr. Mailhot, a professor of geology, proves it, as does H. C. Ayers, a well known contractor, and also Plaintiffs' men who worked on it. It was certainly there and had to be excavated. It is not mentioned in the contract, consequently Defendant wants to pay for it as earth. 10
Plaintiff says it cost almost as much to excavate as rock. Ferguson at page 368 says that Plaintiff protested about it and he does not remember why he (Ferguson) did not attend to the matter in the beginning. Plaintiff and O'Shea spoke of recommending arbitration.

If Plaintiff has to meet this extra expense on account of something unforeseen, it certainly is imposing "an undue hardship on the contractor".

20

The amount thus excavated in that portion of the dam across the by-pass channel is 8335 cubic yards at $2.90 per yard, (two-thirds of rock price) amounts to $23,971.50 on account of which Plaintiff acknowledged to have received the earth price or $10,252.05, leaving a balance of $13,919.45 for which Plaintiff should recover.

WHAT IS HARDPAN? The Appellant in its factum quotes WEBSTER, 1911 ed., p. 982, defining HARDPAN as:—

> Any earth not popularly recognized as rock through which it is hard to dig or to make excavations of any sort. 30

The Appellant concludes from that definition that the word HARDPAN, in its common acceptance, would appear to constitute earth and therefore, under the contract, should be paid for at the earth price.

There is one thing which is not questioned and that is: hardpan is "any earth through which it is hard to dig or to make excavations of any sort", but what is more controversial is whether, in a contract for the construction of a dam, wherein a certain price is fixed for the excavation of earth and another price for the excavation of rock, the excavation of "hardpan" should be classified as excavation of earth, or should not rather be classified as excavation of rock. 40

I did not verify if in WEBSTER, 1911 ed., cited by the Appellant, the definition of the word "hardpan" is limited to the above mentioned quotation, but in WEBSTER'S NEW INTERNATIONAL DIRECTORY, 1924 ed., "hardpan" is defined as follows:—

HARDPAN n. Chiefly U.S. 1. Any earth not popularly recognized as rock, through which it is hard to dig or to make excavations of any sort. It may be: (1) semi-indurated clay, with or without admixture of stony matter; (2) cemented gravel; or (3) clay, with or without admixture of stony matter, which is very tough because of its strong cohesion.

10 HARDPAN is a material that may be regarded geologically as being rock in the process of formation. Any clay that has become so hardened by heat or pressure as to be an incipient shale, is *hardpan*. Any sand that has been partly cemented by the deposition of a small amount of iron oxide of carbonate of lime in its pores, is also *hardpan*.... There is no marked line dividing rock from earth, the one passing insensibly into the other ... The processes of solidification, be they physical or chemical, may be found illustrated in nature's laboratory in all stages from the softest clay, through *hardpan* and shale, to the hardest state.

20

(Engineering News)

That definition justifies absolutely the statement made by Mr. Olivier Lefebvre, Chief Engineer of La Commission des Eaux Courantes de Quebec, when examined in the case as a Defendant's witness:

Q. Etes-vous capable de donner la définition de ce qui est communément appelé "hardpan"?

R. Tout le monde ne s'entend pas là-dessus, et c'est pour
30 cette raison, parce qu'on ne s'entend pas que nous, à la Commission des Eaux Courantes, nous avons éliminé de notre classification ce matériel à excaver, ce type, et nous n'avons que deux classes d'excavation: le roc et la terre.

....

....

Cross-examined upon that statement by Respondent's Counsel, Mr. Lefebvre adds the following:—

40 Q. Répondant à une question qui vous a été posée au sujet du "hardpan", vous avez dit, je crois, que votre pratique maintenant était de faire vos devis et contrats pour ne pourvoir qu'à deux classes de déblais: le roc et tout ce qui n'était pas roc, dans l'autre classe?

R. Oui, monsieur.

Q. Je présume que vous le stipulez expressément dans vos contrats et dans vos devis?

R. Absolument.

Q. Et lorsque vous avez dit: "Nous avons éliminé cette classe de "hardpan', vous vouliez dire par les termes exprès de vos contrats et de vos devis, vous déclarez à l'entrepreneur qu'il n'y aurait aucune telle spécification?

R. Oui, monsieur.

Q. Que tout ce qui ne sera pas roc, et je présume que vous mettez une définition de ce qui doit être considéré comme roc?

R. Oui, monsieur. 10

Q. Sera payé dans l'autre classe?

R. Oui, monsieur.

By Mr. Geoffrion, C.R.:—

Q. Voulez-vous donner un exemple de cela?

R. Notre devis du lac Kenogami est très clair.

By Mr. St-Laurent, C.R:—

20

Q. Vous dites expressément à ceux qui vont vous soumettre leur prix pour les déblais, roc défini de telle façon, vous aurez tel prix, vous aurez le prix stipulé pour le roc?

R. Oui, monsieur.

Q. Et pour tout autre déblai, quelle qu'en soit la dureté. vous aurez l'autre prix, que vous aurez stipulé?

R. C'est cela.

It is to be noted that in the contract under discussion there is no definition of what must be considered "earth" or "rock", and therefore 30 if, as quoted from the Engineering News in WEBSTER, "hardpan" is a material that may be regarded geologically as being rock in the process of formation and that there is no marked line dividing rock from earth, the one passing insensibly into the other, why should we classify "hardpan" as earth rather than rock, when these words "earth" and "rock" are used in the contract in reference to price excavation, when a higher price is fixed for rock, owing to its difficulty of excavation, and "hardpan" is almost as difficult to excavate as rock?

If I had to adopt one of the two classifications mentioned in the 40 contract, I would classify "hardpan" as rock rather than earth because, as regards the difficulty of excavation, "hardpan" is much nearer rock than earth. The Appellant should not therefore complain if the Respondent asks $2.90 per cubic yard for hardpan excavation, instead of $3.50 for rock excavation.

The Appellant says that the only reason given by the learned trial judge for condemning Appellant in connection with this hardpan claim is the "undue hardship" clause in the specifications which reads as follows:

It is the intention of these specifications to secure thoroughly first-class construction in both material and labour for each of the classes included herein without working an undue hardship on the Contractor....

I agree with the Appellant that all the above clause says is that the requirement that material and workmanship be first-class shall not be 10 enforced so as to work undue hardship on the contractor, but on the other hand that clause may be helpful for interpreting the fair character of the contract as a whole and seeing that hardpan excavation is almost as costly as rock excavation, would it not be also an undue hardship and unfair to the Respondent to classify hardpan excavation, in the present case, as earth excavation?

For the reasons above mentioned, I would confirm the judgment a quo for that first item.

20 ITEM NO. 2 — PASSING LOGS:—

Plaintiff alleges in its Declaration:—

12. HANDLING OF DEFENDANT'S LOGS.

That one of said Plaintiff's obligations under the contract was to adjust its works in a manner to provide opportunity for the passage of logs by Defendant, and said obligation was duly fulfilled by said Plaintiff, and said Plaintiff was not obliged by the contract to provide labour and facilities for the actual driving of the said logs 30 by the site of the dam.

13. That notwithstanding the above, Defendant neglected and refused to carry out the driving of said logs past the site of the works and to place the necessary booms to accomplish the drive, and Defendant by said neglect rendered it necessary for said Plaintiff itself to supply booms and labour and to pass said logs in order to safeguard the works at an expense of four thousand one hundred and three dollars and seventy-two cents and said Plaintiff is entitled to claim from Defendant said sum rendered necessary by 40 reason of Defendant's said neglect, which sum is made up as follows:—

Cost of boom and expense of handling logs:—

Labour	$2,858.59
Material	136.83
	$2,995.42
37% Profit, Overhead etc.	1,108.30
	$4,103.72

The Defendant says in its Plea:—

7. a) That any expense incurred by said Plaintiff in connection with the passing of Defendant's logs was due to the failure of said Plaintiff to supply adequate facilities for such operations or suitable opportunities for the passage of such logs as said Plaintiff undertook to do by said contract, and especially because of the failure of said Plaintiff to provide guide booms and because the gaps left between the cofferdam cribs were too narrow to permit the free passage of logs. 10

b) Defendant endeavoured at all times to bring down its logs so as to inconvenience said Plaintiff to the least possible extent and frequently to assist said Plaintiff held back its logs for considerable periods at great inconvenience and loss to Defendant. The judgment appealed from regarding that item reads as follows:

The next item for which Plaintiff claims is for handling Defendant's logs. The contract provides that the contractor "shall so construct the cofferdams and erect and manage the construction of the works as a whole that logs of the owner or of others may be driven by the site of the dam during the driving season of 1929, and shall provide such opportunities for the passage of logs as the construction work may render necessary". 20

The decision of this item will decide the next item in so far as the damage caused to the cofferdams and the delay which resulted therefrom is concerned. 30

Under all the circumstances of the case and the wording of the contract, what is the meaning of the words "may be driven"? Does it mean that during the driving season the Plaintiffs should leave sufficient space between its cofferdams as would enable the Defendant using its knowledge and skill as log drivers (which is their line of business) to drive their logs through, or does it mean that the Plaintiffs who are not in the log driving business, to undertake, apart from leaving the necessary space for the logs to be driven through either to do the driving itself, which it never agreed to do, or allow each particular log to use its own judgment as to the facilities which Plaintiff had provided for its passage. 40

Mr. Kenny's letter indicates clearly the position taken by the Defendant. That is to say, not only does the defendant claim that it is under no obligation to *drive* or take care of the logs in any way, but actually wants to hold the plaintiff responsible for any additional expense in driving the logs which they might be put to by

reason of the works which Plaintiff was doing for defendant under the contract in question. There is no provision in the contract that Plaintiff should bear any part of this expense, and the position taken by defendant is in my opinion untenable. The cost of handling these logs is shown to be for labour and materials $2995.42 for which Plaintiff is entitled to judgment.

10 As to the 37% which Plaintiff asks for, the work of handling Defendant's logs is not provided for by the contract, and being work not contemplated by the contract, this cannot be allowed.

That item rests entirely upon the interpretation of the above quoted clause of the specifications.

Appellant says:—

Respondent Bishop in this connection assumed two obliga-
20 tions:—

1) To so construct the cofferdams and arrange and manage the construction of the works as a whole that logs of the owner, or of others might be driven by the site of the dam during the driving season of 1929, and

2) To provide such opportunities for the passing of the logs as the construction work might render necessary.

Regarding the first of these two obligations assumed by Respon-
30 dent Bishop, that is: "to so construct the cofferdams that the logs of the owner or of others may be driven by the site of the dam during the driving season of 1929", I cannot see that any serious complaint has been made by the Appellant and the evidence is rather to the effect that the gaps left between the cribs were quite wide enough.

Regarding the second obligation, that is: "to provide such opportunities for the passing of the logs as the construction work might render necessary", it is submitted that said obligation can only mean that Respondent obligated itself to provide whatever booms or other equipment
40 were necessary to guide the logs into the opening in the dam.

With great respect, I cannot agree with that interpretation of the Appellant's counsel.

It is impossible for me to construe these words "to provide such opportunities for the passing of the logs", as meaning that Respondent obligated itself to provide whatever booms or other equipment were necessary to guide the logs into the opening in the dam. These words "to

provide such opportunities for the passing of logs" cannot but mean to provide times or places favourable for executing the passing of the logs. These words "to provide such opportunities" do not, according to me, suggest the obligation of furnishing anything necessary for the actual execution of the work, but only favourable circumstances of time or place.

The evidence shows, (says the Appellant) that when the first of the cofferdam cribs was placed in the river on or about June 15th 1929, Respondent itself constructed a boom out of logs taken from the river and stretched it from the north shore of the river to the outer point of this first crib, for the purpose of preventing the logs from piling against the crib. This would be an indication that Respondent at that time expected itself to provide whatever protection the works required, as no request was made to Appellant to do so. This boom so placed by Respondent did not properly fulfil the object for which it was intended. It was not heavy enough, also it was too short, and it was placed too much across the current. The result was that the logs got under it. 10 20

Obviously a proper boom would have kept the logs back and prevented them from interfering with the cofferdam work. This assertion cannot be questioned, because the diversion of logs to the by-pass was carried out without difficulty by means of a boom, as already explained. Therefore, in view of the great stress laid by respondents on interference from logs, the question of who was really responsible for placing the boom becomes one of great importance. As already stated, Appellant under the contract assumed no express obligation in this respect. If any such obligation existed, 30 it must be assumed, and it is respectfully submitted that there is nothing in the contract to justify any such assumption. However, even if the obligation did rest on Appellant to provide this boom, which is not admitted, surely Appellant could not have been expected to do this without being asked.

Again, I cannot agree with that reasoning of the Appellant's counsel and I must come to the conclusion that it was Appellant's obligation to provide a proper boom for keeping the logs back and preventing them from interfering with the cofferdam work. It is not necessary that such obliga- 40 tion be mentioned in the contract in question if, on the other hand, such obligation exists under the law.

Upon that point, the Respondent's counsel submitted in the first place:—

That the right of any riparian owner to drive or float his logs from one point on a stream to another is a right which does not entitle him to its use in disregard of all other persons pursuing

their lawful occasions upon or in the stream and that this right must be exercised by the person who floats or drives the logs with due regard to the rights of other persons lawfully using either the waters or banks of the stream;

Secondly:

That the obligation, generally speaking, of any person legally empowered to dam or divert the waters of a stream, towards persons having a right to use the waters for floating of logs is that he shall provide suitable and proper means of passage for the logs and that this obligation does not extend so far as to relieve the party using the waters of the stream for floatage purposes from his duty to exercise due care in such use so as not to damage or injure others.

In other words, that quite apart from any modification which may be found in the contract the situation of the MacLaren Company and of the Bishop Company in law should be as follows:—

The MacLaren Company has undoubtedly had the right to drive their logs on the river, but in so doing it was always incumbent upon them to conduct their driving operations so as not to cause damage to others (sic utere tuo ut alienum non laedas). The Bishop Company were lawfully upon the river having been put into possession for the purposes of the contract, of the banks of the river by the owners, the Defendant. They were, in damming and diverting the channel of the river, acting in the exercise of rights of the owner obtained from the Province of Quebec, and certainly, as regards persons other than the owners, it was the duty of the Bishop Company to provide reasonable opportunities for the passage of logs rightfully driven in the stream.

I entirely agree with the Respondent's counsel. I would therefore, for these reasons, in addition to those of the trial judge, conclude that the Respondent is entitled to the amount allowed by the judgment a quo for this second item, i.e. $2,995.42.

ITEM No. 3 — INCREASED COST OF COFFERDAMS AND UNWATERING:—

With reference to this item, which is the most important of the various claims submitted by Respondent, the judgment a quo reads as follows:—

The Plaintiff seeks to hold Defendant responsible for this item on two grounds:

a) The damage caused by the logs;

b) The fact that on the plan upon which the tender was made, "the line established on the ground" (page 1 of contract) was marked L admittedly meaning ledge, while as a matter of fact it was not ledge at all, but had an overburden of a pervious nature, in some places as much as nine feet, so that it was only after much delay and large extra cost, that the cofferdams could be made sufficiently water-tight for the work to be proceeded with. 10

The Defendant contends that Plaintiff should not have relied upon the statements on the plan, but should have verified them all, and cites several cases in support of the contention, principally the Nova Scotia Construction Co. and The Quebec Streams Commission. It must be noted however that the contract in the Nova Scotia case contains a special clause that "the agreement is made and entered into by the contractor.... solely on his own knowledge, information and judgment of the character and topography of the country, its 20 streams, water courses and rainfall and subject to the same, and upon information derived from other sources than the commission, etc." No such clause is in the contract under consideration in this case.

The contract calls for the building of a dam "at a line established on the ground, the location of which is indicated on a map attached hereto".

It is admitted by both parties that the dam was built on the 30 line on the ground indicated on the map, and that the letters L on the map mean ledge. In addition to this the contract provides at page 9: "It is further agreed that any core drilling or grouting of seams in the ledge beneath the dam which may be required by the engineer shall be considered as extra work and be paid for as such in the manner provided herein for other extra work".

This clause plainly shows that both parties considered that the substance beneath the dam was *ledge*.

It is intimated by the defence in the examination of witnesses 40 and at the argument, that Plaintiff should have verified the finding of ledge, even to the extent of core boring. The contract as we have just seen provides that if core boring is considered necessary by the engineer (either Stream Commission's or Defendant's, page 2-A of contract) it shall be paid for as extra work.

It would seem from the evidence that core boring might have saved much of the trouble, but there is no suggestion that the Engineer ever considered it necessary and under the contract it was up to him.

The plan B-2444 was certainly not accurate, and plaintiff was misled as to the difficulties which he would have to face in the placing of cofferdams and the unwatering operations generally. Stratton was the man who obtained the information upon which the plan B-2444 was made, and his evidence shows that he had not had sufficient experience to be entrusted with such an important piece of work. He selected the "line on the ground", the site of the
10 dam. Surely plaintiff had the right to suppose that when the site of the dam had been chosen by a well known firm of hydraulic engineers that at that particular spot the river bottom was ledge, as marked on the plan, and that that site had been chosen because it was ledge.

Defendant argues that Plaintiff did not rely on Stratton's findings but checked it up themselves. The evidence shows that the soundings made by Reiffenstein and L'Heureux were merely for the purpose of getting the depth of the water and the shape of the
20 river bottom so that L'Heureux who was the foreman carpenter would know how to make his cribs. The Defendant tries to show that the cribs for the cofferdams were not properly made, but the evidence on this point is not convincing. All the delay, trouble and expense are due to two things;

a) The fact that instead of ledge at the line on the ground, where the dam was to be built, there was pervious overburden;

b) The damage caused by Defendant's logs.

30

The amount of loss proved by Plaintiff is $144,457.92 being for extra crib work, sheeting and toefill, steel sheet piling, including taking in heavy pile driver, pumping, removing of cofferdam, boats, etc.

This however cannot be considered work done under the contract but damages. This being the case Plaintiff is not entitled to the 37% profit provided by the contract, but it is admitted at the argument that in this event an allowance of 15% for overhead would
40 be fair. This amounts to $21,667.50, making in all $166,125.52 upon which Plaintiff acknowledges to have received $49,050.20 leaving balance of $117,075.22 for which Plaintiff is entitled to judgment.

Regarding the Appellant's logs as being one of the two causes responsible for the damages claimed by Respondent under this heading, the Appellant's counsel says in his factum: "This question has been dealt with fully under claim No. 2 to which Appellant now refers". Evidently, the Appellant's counsel here reaffirms that the Respondent, according to the terms of the contract, having assumed the obligation "to provide such

opportunities for the passing of the logs as the construction might render necessary", it belonged to said Respondent to provide whatever booms or other equipment were necessary to guide the logs into the opening in the dam, so as to prevent them from interfering with the cofferdam work, and that therefore the Appellant cannot be responsible for any damage claimed under the present item as caused by the Defendant's logs.

Seeing the conclusion to which I have arrived as to the interpretation of the contract, with reference to the clause above referred to, I must therefore conclude that the Defendant's logs are responsible for damages claimed under the present item. 10

Upon that subject matter, I accept the following statement made by the Respondent in his factum as being conform to the evidence:—

> The evidence of all the witnesses produced by Plaintiffs not contradicted or attempted to be contradicted by any of Defendant's witnesses, save the witness Coyle, is that the logs of the Defendant came downstream in large quantities, so large in fact that even the precautions taken by the Plaintiffs to keep them off the cofferdam were useless; that they jammed against the cribs of the Plaintiffs' cofferdam and in one instance drove a crib several feet downstream and necessitated the placing of the sheathing of Plaintiffs' cofferdam upstream from the face of the cribs, a distance varying from two to fifteen or sixteen feet, necessitating fill of heavy material between the sheathing and the cribs, the construction of a false-work of struts and walers which would, but for the presence of the logs, have been unnecessary. The presence of the logs further made it impossible to drive the wooden sheathing through the overburden and even in some instances, prevented the sheathing from reaching the surface of the river bed. This necessitated the use of some 11,000 yards of toefill, an abnormal quantity, and manifestly most expensive to place, the result being that when the cofferdam construction had been completed in so far as the placing of the cribs and wooden sheathing and toefill was concerned, it was found impossible, notwithstanding the use of three times the normally anticipated pumping equipment on the job, to lower the water between the upstream and downstream cofferdams to any appreciable extent. This being the case, Mr. Ferguson, the Defendant's engineer, was called in and it was his opinion that the bed of the stream upstream from the cofferdam should be blanketed with more toefill, which suggestion was followed and although Mr. Ferguson expressed the opinion that the soundings indicated on his plan were correct, he nevertheless undertook to have the location core drilled so that some definite assurance might be obtained. This undertaking on Mr. Ferguson's part was not fulfilled because he afterwards decided that an electrical

20 30 40

A. Yes, I think I recall that.

Q. And you would agree with him?

A. Yes, I would.

Q. You would agree with him that it was rather difficult to distinguish between a boulder and ledge when you hit it with a sixteen foot rod?

A. Well, it is.

Q. You sent Mr. Stratton up there, and he brought back some information, ostensibly? 10

A. Yes.

Q. He put that information on a plan?

A. Yes.

Q. You used that plan to design the dam?

A. I did.

Q. When you read the plan for the design of the dam, did you read those elevations in the river as being the elevations of the surface of the river bed?

A. I have already told you I cannot remember that. I assumed those were points at which he had found rock, but I do not remember whether he told me there was anything over the rock or not, as he told you in Court. 20

Q. But, if he did not tell you that, you would naturally read it as being the surface?

A. If he did not tell me that, yes sir.

Q. Because, obviously, a topographical plan would show the contours of the surface?

A. Yes.

Q. In all fairness, the topography of the surface of that river bed, and the nature of the material of which the surface was composed, were matters of extreme importance to the contractor in the unwatering, were they not? 30

A. They certainly were.

Q. And, if he received a topographical plan which showed that the surface of the river bed was ledge, when, as a matter of fact, the person who had investigated it, knew it was not ledge, then he would not be getting correct information on a point of extreme importance to him, would he?

40

Witness:— You are now referring to this cofferdam construction?

Counsel:—I am referring to the information that was given by the plan.

A. On the cofferdam construction, I would judge a contractor who did not investigate the nature of the bottom he had to contend with had not done all he should do.

apparatus, which he admits upon cross-examination, would not be accurate within three or four feet, could be used in substitution at less expense to the owners.

The second cause for the damage claimed under this heading is the fact that:

10 The information, data and contract plans showed the river bottom as bare ledge rock and the said Plaintiff was justified in relying upon the said information and plans and did so rely upon them in making its tender and entering into the contract and planning its work and placing the cofferdams required for unwatering the site of the dam;

That the said information, data and contract plans proved to be entirely erroneous, inasmuch as the river bottom instead of being bare ledge rock was covered for a depth of many feet by broken 20 rock, boulders, stones, gravel and other similar material, which allowed the water to pass under the cofferdams in such volume as to prevent the unwatering of the site by the usual methods adopted for ledge rock.

With reference to that second cause of damages, I concur in the findings of the judgment a quo and I may say that the evidence of Mr. Ferguson, a Consulting Engineer who designed the Cedars dam for the Appellant Company and one of its engineers during the construction, supports the findings of the judgment that:

30 The plan B-2444 was certainly not accurate and that Plaintiff was misled as to the difficulties which he would have to face in the placing of cofferdams and the unwatering operations generally, that Stratton was the man who obtained the information upon which the plan B-2444 was made, and that his evidence shows that he had not had sufficient experience to be entrusted with such an important piece of work.

Here are extracts from Mr. Ferguson's testimony upon that sub-40 ject matter:—

Cross-examined by Mr. Forsyth:—

Q. The question I referred to about Mr. Stratton was this. At page 183 of his deposition I said "I want you to be frank about this and tell me frankly that to attempt to ascertain with a sixteen feet rod at the end of a line, whether the bottom is ledge or not, is a hopelessly inaccurate way of going about it", and he said: "Yes sir".

Q. I ask you whether the information as to the topography of the river bed and as to the material of which it consists are not of extreme importance to the contractor, from the point of view of the unwatering?

A. Yes; I have said so.

Q. And I ask you again whether an ordinary person reading that plan, without any opportunity of conversation with Mr. Stratton, would not take it for granted that the elevations shown on the plan were the elevations of the surface of the river bed?

A. I believe he would, yes, unless told to the contrary.

Q. And, if Mr. Stratton had been plunging the rod down 2½ feet in different places, and had indicated the elevation at which the rod stopped rather than the elevation at which it took bottom, then, to that extent, the plan did not convey accurate information?

A. It did not show the actual level of the surface of the river bed.

Q. And, if it showed an elevation, say "89.2L", a person without opportunity of conversation with Mr. Stratton would naturally assume that the surface of the river bed was ledge at that elevation, would he not?

A. Yes, I think he would, from that plan.

Q. I do not know it, but I would suggest to you that a person who failed to disclose the fact that there was a certain amount of overburden over the ledge elevations had not done what he should do with respect to displaying information on his plan?

A. That is your opinion.

Q. That is my opinion. Do you agree with it?

A. No, I do not.

Q. You do not share it?

A. No.

Q. You think it was quite all right for him to put on this plan...

A. (interrupting) I think the contractors should have...

Q. (interrupting) Do not talk about the contractor, I am talking to you about what the engineer should have done.

A. I think if he had been asked he should have furnished the contractor any information he had in his possession.

Q. And, I suggest to you if he had in his possession any information which contradicted the information on the plan, he should have given it without being asked for it. Do you not think so?

A. Yes, I think he should.

Q. Obviously, Mr. Stratton had information in his possession which this plan does not disclose; had he not?

A. Yes.

A. And, the information of Mr. Stratton was the information of Mr. Ferguson?

A. So far as I can recollect at this time.

The Appellant claims that this evidence is not of much importance since L'Heureux, the foreman-carpenter for Defendant Bishop and who was in direct charge of the building and placing of the cofferdam cribs and also the sheating, testified that although he was furnished with the results of Mr. Reiffenstein's soundings, he went ahead on his own responsibility, and himself took careful soundings two or three feet apart over the whole area occupied by the cribs "to find out exactly how the bottom was" and states that he found ledge rock. 10

In addition to the answer given on that point in the judgment a quo above recited, it must be pointed out that had Mr. Ferguson disclosed the fact that Mr. Stratton had discovered, in spite of his inadequate and unreliable methods, a certain amount of overburden, it would possibly have suggested to the contractor the necessity for some further investigation of the site before Respondent made its tender.

20

For these reasons, I would therefore confirm the judgment a quo with reference to item No. 3 and allow Plaintiff the damages as fixed by the trial judge to the sum of $117,075.22.

ITEM NO. 4 — COFFERDAM LOWER END BY-PASS:—

This item was disallowed.

ITEM No. 5 — ADDITIONAL COST OF ROCK EXCAVATION:—

For the reasons given by my colleagues, Messrs. Justices Rivard and Hall, I would disallow the claim referred to in that item. 30

ITEM No. 6 — HANDLING AND TRIMMING EXCAVATED ROCK:—

This item was also disallowed by the judgment a quo.

ITEM No. 7 — EXCAVATED FROZEN MATERIAL IN RIVER BED:—

I would allow that item, first because the contract plan did not disclose the nature of the river bottom where the dam was actually constructed; second, because, on account of undue delay for the unwatering, that excavation had to be done in winter and therefore more costly. 40

ITEM No. 8 — WORK UNDER WINTER CONDITIONS:—

The present claim (says the Appellant in his factum) is an accessory one and under no circumstances can it be allowed unless the Appellant should be held responsible for the delays on which it

is based. However, even if the conclusion should be reached that the delays complained of, or some of them, should be attributed to Appellant, it does not follow that this accessory claim, which is so remote, should be maintained.

For the reasons given in the judgment a quo, I would admit this item for the amount as fixed in said judgment.

10

Art. 1074 C.C. enacts that:

> The debtor is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation when his breach of it is not accompanied by fraud.

In the present instance, the connection between the winter work and the delay in the unwatering is clearly expressed in the report from Mr. Olivier Lefebvre, Chief Engineer of La Commission des Eaux Courantes:—

20

> The unwatering of the dam site was quite difficult and the work was delayed a few months on that account. Pouring concrete will have to be made during most of the winter and the work will be completed early in the Spring.

ITEM No. 9 — OVERCHARGE ON LOGS:—

The judgment of the Superior Court has maintained this claim in part for the amount $1,429.60 and the Appellant states in its factum that
30 it acquiesces in the judgment as regards this item.

ITEM No. 10—CEMENT FOR APRON IN BY-PASS CHANNEL:—

For the reasons given by my colleague, Mr. Justice Rivard, I would reject that item.

ITEM No. 11 — SHORTAGE IN PAYMENT FOR CLASS I CONCRETE:—

40

This claim is based upon the following clause of the contract:—

> If, however, the quantities of any of the various classes of work required to build the dam shall be different from the corresponding quantities hereinbefore given, due to changes of design or depth of foundations from those used for calculating said quantities, there shall be added to or deducted from said principal sum, according to whether said quantities are increased or diminished, sums computed according to the following table and the net sum produced by these additions and deductions plus the value of any

In the Court of King's Bench
—
No. 11
The Notes of Hon. Mr. Justice St. Germain
(Continued)

extra work performed by the contractor and computed in the manner hereinbefore provided, shall become the total amount to be paid by the Owner to the Contractor for all of the work performed by him under the terms of this contract:

j) For each cubic yard of Class 1 concrete without plums
by which the scheduled quantities are increased, add $18.92
" " " " " " decreased, deduct 9.81 10

k) For each cubic yard of Class 1 concrete with plums
by which the scheduled quantities are increased, add 17.16
" " " " " " decreased, deduct 9.31

During the course of the works, the Engineer ordered a substitution of concrete without plums for concrete with plums. As already mentioned, the principal sum of money to be paid to the contractor, as fixed in the contract, was based on an estimate that the quantities of excava- 20 tion, concrete masonry, forms, reinforcing steel, and other classes of work required to completely construct the dam and which would be as follows:—

Concrete masonry without plums	—	9690 cubic yards
Class 1 with plums	—	10800 cubic yards

It is admitted that Class 1 concrete without plums actually poured was 23656 cubic yards, i.e., 13966 cubic yards more than the quantities scheduled in the contract, and that the quantity of Class 1 concrete with plums actually poured was 6781 cubic yards, a decrease therefore of 4019 30 cubic yards.

Both parties agree to apply the unit price of $18.92 above referred to for each cubic yard of Class 1 concrete without plums over the quantities scheduled, but where they disagree, is how to calculate for the decrease of 4019 cubic yards of Class 1 concrete with plums.

The Appellant contends that this substitution of one kind of material for another does not constitute a change in the design of the dam and therefore the Respondent must be paid at the rate of $17.16 for the 40 quantities of Class 1 concrete with plums actually poured, i.e., 6781 cubic yards, while the Respondent submits that the terms of the contract are clear and unequivocal and that owing to the substitution of material, instead of being paid according to the quantities of Class 1 concrete with plums actually poured, there should be deducted from the principal sum only the amount arrived at by multiplying the number of cubic yards of this class of concrete with plums not poured, i.e., 4019 cubic yards, by the sum of $9.31, as mentioned in the schedule which would make a net difference in the contractor's favour of $31,549.15.

I come to the conclusion that this substitution of one kind of concrete for another kind of concrete, or of one quality of concrete for another quality of concrete, does not constitute a change of design and that, therefore, the contractor must be paid for each kind of concrete, according to the number of cubic yards actually poured and for the prices stipulated in the schedule. I would therefore dismiss that claim.

10 ITEM No. 12 — PLANT REMOVAL:—

This claim is also an accessory one and is based as claim No. 8 upon delays alleged to have been caused Respondent Bishop and attributed to Appellant in unwatering the site.

The Respondent submits that it was delayed approximately three months in the prosecution of his work with the result that he was unable to move out the heavy plant and equipment on the winter roads of January and February 1930.

20

Though I have come to the conclusion to allow claim No. 8, I do not think that this particular claim should also be allowed.

According to the contract, the dam was to be substantially completed and ready for storage of water on or before March 31st 1930. We must presume therefore that the Respondent had then foreseen that the work might not be terminated before the 31st March 1930. Under these circumstances, the Respondent should have established without any doubt that at the end of March 1930, there were still good winter roads, while, on 30 the contrary, in its Declaration, it claimed a certain amount from the Appellant for damages in connection with an extra ordered on or about March 13th 1930, for the placing of a Concrete Apron on the By-Pass Channel, because it would not have been notified in time to get the material required in for that work over the winter roads.

For these reasons, I would not allow this item.

ITEM No. 13 — STANDBY AND OVERHEAD EXPENSE:—

40 This claim was disallowed by the judgment a quo.

ITEM No. 14 — INTEREST ON DEFERRED PAYMENTS:—

This claim was disallowed by the judgment a quo.

On the whole, I therefore conclude that this appeal should be *maintained,* with costs, and the judgment appealed from reduced to the sum of $219,232.63, with interest from the service of the action, seeing that I am of the opinion to maintain the Respondent's Cross-Appeal.

(Signed) Paul St. Germain,
J.C.K.B.

In the Court of King's Bench

No. 12
Formal Judgment of the Court of King's Bench Dismissing the Cross-appeal of William I. Bishop Limited et al.
27 Dec. 1935

No. 12

Formal Judgment of the Court of King's Bench Dismissing the Cross-appeal of William I. Bishop Limited et al.

Province de Québec
District de Montréal

COUR DU BANC DU ROI
(En Appel)

10

MONTREAL, le vingt-septième jour de décembre, mil neuf cent trente-cinq.

CORAM: BERNIER, RIVARD, LETOURNEAU, HALL, ST. GERMAIN, JJ.
No. 874.

WILLIAM I. BISHOP LIMITED, ET THE BANK OF MONTREAL, deux corps politiques et incorporés ayant respectivement leur principale place d'affaires en la Cité de Montréal, district de Montréal, 20

APPELANTES,

— vs —

THE JAMES MACLAREN COMPANY LIMITED,
corps politique et incorporé ayant sa principale place d'affaires dans la ville de Buckingham, district de Hull,

INTIMEE, 30

— & —

A. DUBREUIL,
Régistrateur de la Division d'enregistrement du Comté de Labelle,

MIS EN CAUSE.

LA COUR, après avoir entendu les parties par leurs procureurs respectifs sur le mérite du présent appel, avoir examiné le dossier et sur le tout délibéré:— 40

ATTENDU que l'Intimée condamnée par le jugement *a quo* a payer aux Appelantes ou plus exactement à The Bank of Montreal comme cessionnaire de sa co-Appelante William I. Bishop Limited, une somme de $293,585.84, en a elle-même appelé de cette condamnation;

ATTENDU que les demanderesses non satisfaites de n'avoir obtenu l'intérêt sur certains des items qui leur ont été accordés qu'à compter du jugement au lieu d'avoir obtenu que cet intérêt leur soit compté de l'institution de l'action, interjettent de leur côté appel à ce sujet;

In the Court of King's Bench — No. 12 Formal Judgment of the Court of King's Bench Dismissing the Cross-appeal of William I. Bishop Limited et al. 27 Dec. 1935 (Continued)

CONSIDERANT que sur l'appel susmentionné de l'Intimée, décidé ce jour, les items pour lesquels il est ainsi demandé plus d'intérêt par les Appelantes, ont été rejetés quant au capital même;

CONSIDERANT qu'il en résulte nécessairement que le present appel des demanderesses doit être rejeté avec dépens;

10 PAR CE MOTIF,

REJETTE avec dépens l'appel des demanderesses.

M. le juge St. Germain dissident.

(signé) Severin Letourneau
J.C.B.R.

20

In the Court of King's Bench — No. 13 Notes of Hon. Mr. Justice St. Germain on the Cross-appeal

No. 13

Notes of Hon. Mr. Justice St. Germain on the Cross-appeal

The Appellants have appealed solely on the question of interest from the judgment of the Superior Court rendered by Mr. Justice White, on the first June 1934.

By that judgment, the action of the present Appellants was maintained for the sum of $293,585.84, with interest, but only from the date of 30 judgment for the item allowed as damages, while interest from the date of the action for the other items.

By their appeal, Appellants relying specially upon the judgment of this Court in the case of MONTREAL GAS CO'Y & VASEY (8 K.B. 412), confirmed by the Privy Council (Can. Rep. 12 A.C. 301), submit that they should have been awarded interest from the date of action for the full amount of judgment.

The Respondent answers that in allowing certain items as damages, 40 the Court expressly declares that interest is to run only from date of judgment and that this can only mean that the learned trial judge, in assessing the damages which he considered payable, had calculated the amount due up to the date of judgment and that therefore any interest that may be owing in connection with such item must be treated as being included in the amount awarded. Consequently, adds the Respondent, there is no conflict between the judgment in this case on the matter of interest and the case of MONTREAL GAS & VASEY upon which Appellants rely.

I may say that I do not find anything in the judgment to warrant that statement of the Respondent. For each of the items allowed as dam-

In the Court of King's Bench — No. 13 Notes of Hon. Mr. Justice St. Germain on the Cross-appeal (Continued)

ages, the trial judge seems to have relied only upon the figures disclosed at the Enquête, without in any case taking into consideration the question of interest.

In that case of the MONTREAL GAS COMPANY & VASEY, we read the following remarks in the judment of the Privy Council, delivered by Sir Henry Strong:—

> The learned Chief Justice considered that the first judgment must be taken to include interest in the damages awarded up to the date of the judgment; this, however, does not appear to have been done, and, in the absence of any evidence that it was so comprised, their Lordships think they must treat interest from the date of the action as not included in the damages. Then, as it appears from the respondent was entitled to recover interest from the date the appellants were put "en demeure" by the service of process, the judgment of the Court of Queen's Bench in this respect must be considered not to have been successfully impeached. 10

In coming to the conclusion, in the present case, that the interest should run from the date of action, or rather from the date of the service of the action, even for the items allowed as damages, I do not consider to conclude against the decision rendered by this Court in the case of GRIMALDI & RESTALDI (54 B.R. 197). 20

In that latter case of GRIMALDI, the claim was for personal damages resulting from an accident, while in the present case, the claim is for real damages, which is a distinction made in the MONTREAL GAS & VASEY case by the Court of Appeal; (see remarks of Mr. Justice Wurtele, 8 K.B. p. 431 and of Mr. Justice Langelier, p. 436). 30

For these reasons, I would *maintain* this appeal and would condemn the Respondent to pay the interest from the date of the service of the action, even for the items allowed as damages.

(signed)

J.C.K.B.

No. 14

In the Court of King's Bench — No. 14 Certificate of the Clerk of Appeals of Receipt of only one Judge's Notes in the cross-appeal 29 Apr. 1936

Certificate of the Clerk of Appeals of Receipt of only one Judge's Notes in the cross-appeal 40

CERTIFICATE AS TO RECEIPT OF JUDGE'S NOTES

I hereby certify that I have not received any notes of judgment in the Cross-appeal in this cause other than the notes of Honourable Mr. Justice St. Germain.

Montreal, April 29, 1936.

Pouliot & Laporte,
Clerk of Appeals.

In the Court of King's Bench

No. 15
Notice of Appeal to His Majesty in His Privy Council with Motion to Fix Delay to Furnish Security
17 Jan. 1936

No. 15

Notice of Appeal to His Majesty in His Privy Council with Motion to Fix Delay to Furnish Security

10 MOTION TO FIX A DELAY FOR FURNISHING SECURITY IN APPEAL TO HIS MAJESTY IN HIS PRIVY COUNCIL.

The said Respondents and Cross-Appellants intend to inscribe in appeal to His Majesty in his Privy Council from the judgments rendered in this cause on the 27th day of December 1935 by this Honourable Court and pray that a delay be fixed by this Honourable Court within which the Respondents and Cross-Appellants shall furnish good and sufficient security as required by law that they will effectively prosecute the said appeal and pay any costs and damages which may be ordered against them in case
20 the said judgments be confirmed; the whole with costs to follow.

Montreal, January 17, 1936.

(signed) Phelan, Fleet, Robertson & Abbott,
Attorneys for Respondents and Cross-Appellants.

NOTICE

30

Messrs. Aylen and Aylen,
Attorneys for Appellant and Cross-respondent.

TAKE NOTICE of the foregoing motion to fix the delay to furnish security and that the same will be presented for allowance before the Court of King's Bench in appeal sitting in the Court House for the District of Montreal on the 22nd day of January 1936 at 10.00 o'clock in the forenoon or so soon thereafter as counsel may be heard and do you govern yourselves accordingly.
40

Montreal, January 17, 1936.

(sgd.) Phelan, Fleet, Robertson & Abbott,
Attorneys for Respondents and Cross-appellants.

January 18, 1936.
Received copy
(sgd) Aylen and Aylen
Attys. for Appellant and Cross-respondent.

In the Court of King's Bench

No. 16
Judgment of Hon. Mr. Justice Hall on the above Motion
31 Jan. 1936

No. 16

Judgment of Hon. Mr. Justice Hall on the above Motion

The parties having been heard; seeing the declaration of William I. Bishop, Limited, and the Bank of Montreal, that they intend to inscribe in appeal to His Majesty in his Privy Council from the final Judgments rendered in this cause, on the 27th day of September, 1935;

10

WHEREAS under the provisions of Article 68 of the Code of Civil Procedure of the Province of Quebec, an appeal lies from the said judgment to His Majesty in his Privy Council;

I, the undersigned Judge of the Court of King's Bench, sitting in Chambers, fix at fifteen days from this date, the delay during which the said William I. Bishop and the Bank of Montreal, may give the security required by law for the said appeal, in accordance with the provisions of Article 1249 of the Code of Civil Procedure of the Province of Quebec, in the manner and for the purposes therein mentioned; the whole with costs to follow.

20

(Signed) A. Rives Hall,
Justice of the Court of King's Bench.

In the Court of King's Bench

No. 17
Notice of Furnishing Security
10 Feb. 1936

No. 17

Notice of Furnishing Security

To: Mtres Aylen and Aylen,
Attorneys for Appellants and Cross-respondents,
Ottawa, Ont.

30

NOTICE OF FURNISHING OF SECURITY

Sirs,

Take notice that on the 13th day of Februray, 1936, at 11 o'clock in the forenoon, before a judge of the Honourable Court of King's Bench, Appeal Side, for the District of Montreal, sitting in Chambers in the Court House, Montreal, Respondents and Cross-appellants will furnish the security required for the costs of Appellant and Cross-respondent in this cause in their appeal to His Majesty in his Privy Council, the whole in accordance with the judgment of Honourable Mr. Justice A. Rives Hall, rendered January 31, 1936, the said security to be in the form of a surety bond of The Royal Trust Company, a body politic and corporate, duly incorporated, having its head office and chief place of business in the City and District of Montreal and duly authorized to become surety before the Courts of the Province of Quebec, and do you govern yourselves accordingly.

40

Montreal, February 10, 1936.

(signed) Phelan, Fleet, Robertson & Abbott,
Attorneys for Respondents and
Cross-appellants.

No. 18

Surety Bond of The Royal Trust Company

WHEREAS final judgments were rendered by the Court of King's Bench, sitting in appeal at the City of Montreal, on the twenty-seventh day of December, nineteen hundred and thirty-five on the appeal and the cross-appeal from the judgment rendered in this cause in the Superior Court for the
10 District of Montcalm by Mr. Justice C. D. White, June first, nineteen hundred and thirty-four, the said appeal and cross-appeal having been made respectively by The James Maclaren Company Limited, defendant in the said Superior Court, and William I. Bishop Limited et al., plaintiffs in the said Superior Court;

WHEREAS the said William I. Bishop Limited et al., feel aggrieved by the said jugdments and appeal therefrom to His Majesty in his Privy Council sitting in London, England, thus rendering necessary the security required by Article 1249 of the Code of Civil Procedure;

20 THEREFORE these presents testify that on the thirteenth day of February, 1936, at the City of Montreal before Honourable Mr. Justice Severin Letourneau, the undersigned, one of the justices of this Court of King's Bench, Appeal Side, came and appeared The Royal Trust Company a body politic and corporate, duly incorporated by Special Act of the Legislature of the Province of Quebec, being 55-56 Vic., cap. 79 and amending Acts, and having its head office at 105 St. James Street West, in the City of Montreal, and duly authorized to become surety before the Courts of the Province of Quebec under and by virtue of Order-in-Council dated at the City of Quebec October 17, 1900 following the provisions of the Act
30 63 Vic., cap. 44. the said authorisation having been published in the Quebec Official Gazette on the fifteenth of December, 1900, the said The Royal Trust Company herein represented by Wentworth Roy Dillon, assistant trust officer, duly authorized hereto by resolution of the Executive Committee of the Board of Directors, a certified copy thereof being attached hereto and which said Company has acknowledged and hereby acknowledges itself to be the legal surety of William I. Bishop Limited and the Bank of Montreal, appellants in regard to the said appeal; and the said The Royal Trust Company hereby promises, binds and obliges itself that
40 in case the said appellants do not effectually prosecute the said appeal and do not satisfy the condemnation and pay all costs and damages adjudged in case the judgments appealed from are confirmed by His Majesty's Privy Council sitting in appeal, then the said The Royal Trust Company, surety, will satisfy the said condemnation and pay all costs and damages which may be hereafter adjudged to the use and profit of the said Respondent, The James MacLaren Company Limited, its administrators, successors and assigns, the liability of The Royal Trust Company, however, not to exceed in any event the sum of Five hundred pounds Sterling (£500).

In the Court of King's Bench — No. 18 Surety Bond of The Royal Trust Company 13 Feb. 1936 (Continued)

AND the said The Royal Trust Company has signed these presents by its duly authorized representative as aforesaid.

Taken and acknowledged before me
at Montreal this thirteenth day
of February, 1936.
(signed) Severin Letourneau
A Justice of the Court of
King's Bench — Appeal Side.

The Royal Trust Company
(signed) W. R. Dillon
Assistant trust officer.

10

In the Court of King's Bench — No. 19 Consent of Parties as to the Contents of the Record Transcript to His Majesty in His Privy Council 15 Apr. 1936

No. 19

Consent of Parties as to the Contents of the Transcript Record for His Majesty in His Privy Council

CONSENT OF THE PARTIES AS TO THE CONTENTS OF THE TRANSCRIPT RECORD FOR HIS MAJESTY IN HIS PRIVY COUNCIL

20

We, the undersigned, attorneys for the parties herein, do hereby consent that the following documents shall compose the Record of printed proceedings for His Majesty's Privy Council:

(1) All the documents printed in the Appeal to the Court of King's Bench, being Volumes 1 to 8 of the Record.

(2) The inscription in Appeal before the Court of King's Bench.

(3) The inscription in the Cross-appeal before the Court of King's Bench.

30

(4) The Factum of Appellant before the Court of King's Bench.

(5) The Factums of Respondents and Cross-appellants before the Court of King's Bench.

(6) The Factum of Cross-respondent before the Court of King's Bench.

(7) Formal judgment of the Court of King's Bench maintaining the Appeal.

40

(8) The notes of Honourable Mr. Justice Bernier.

(9) The notes of Honourable Mr. Justice Rivard.

(10) The notes of Honourable Mr. Justice Letourneau.

(11) The notes of Honourable Mr. Justice Hall.

(12) The notes of Honourable Mr. Justice St. Germain.

(13) Formal judgment of the Court of King's Bench dismissing the Cross-appeal.

In the Court of King's Bench — No. 19 Consent of Parties as to the Contents of the Record Transcript to His Majesty in His Privy Council 15 Apr. 1936 (Continued)

(14) Notes of Honourable Mr. Justice St. Germain on the Cross-appeal.

(15) Certificate of the Clerk of Appeals of receipt of only one judge's notes in the Cross-appeal.

(16) Notice of appeal with motion to fix a delay to furnish security.

10

(17) Judgment of Honourable Mr. Justice Hall on the above motion.

(18) Notice of giving security.

(19) Surety bond of The Royal Trust Company.

(20) Consent of parties as to the contents of the Record Transcript to His Majesty in His Privy Council.

20

(21) Fiat for Transcript of Record to His Majesty in His Privy Council.

Montreal, April 15th 1936.

(Signed) Aylen & Aylen,
Attorneys for Appellant and Cross-respondent.

30

(signed) Phelan, Fleet, Robertson &Abbott,
Attorneys for Respondents and Cross-appellants.

Record approved:

AYLEN & AYLEN,
Attorneys for Appellant and Cross-respondent.

40

PHELAN, FLEET, ROBERTSON & ABBOTT,
Attorneys for Respondents and Cross-appellants.

In the Court of King's Bench
—
No. 20
Fiat for Transcript of Record to His Majesty in His Privy Council
22 Apr. 1936

No. 20

Fiat for Transcript of Record to His Majesty in His Privy Council

FIAT FOR TRANSCRIPT OF RECORD

We require the preparation of the Transcript Record in appeal to His Majesty in His Privy Council, the said Transcript to consist of and include only:

(1) All the documents printed in the Appeal to the Court of King's Bench, being Volumes 1 to 8 of the Record. 10

(2) The inscription in Appeal before the Court of King's Bench.

(3) The inscription in the Cross-appeal before the Court of King's Bench.

(4) The Factum of Appellant before the Court of King's Bench.

(5) The Factums of Respondents and Cross-appellants before the Court of King's Bench.

(6) The Factum of Cross-respondent before the Court of King's Bench. 20

(7) Formal judgment of the Court of King's Bench maintaining the Appeal.

(8) The notes of Honourable Mr. Justice Bernier.

(9) The notes of Honourable Mr. Justice Rivard.

(10) The notes of Honourable Mr. Justice Letourneau.

(11) The notes of Honourable Mr. Justice Hall.

(12) The notes of Honourable Mr. Justice St. Germain. 30

(13) Formal judgment of the Court of King's Bench dismissing the Cross-appeal.

(14) Notes of Honourable Mr. Justice St. Germain on the Cross-appeal.

(15) Certificate of the Clerk of Appeals of receipt of only one judge's notes in the Cross-appeal.

(16) Notice of Appeal with motion to fix delay to furnish security.

(17) Judgment of Honourable Mr. Justice Hall on the above motion. 40

(18) Notice of giving security.

(19) Surety bond of The Royal Trust Company.

(20) Consent of parties as to the contents of the Record Transcript to His Majesty in His Privy Council.

(21) Fiat for Transcript of Record to His Majesty in His Privy Council.

Montreal, April 22, 1936.

Phelan, Fleet, Robertson & Abbott,
Attorneys for Respondents and Cross-appellants.

Certificate of Clerk of Appeals

Certificate of Clerk of Appeals.

We, the undersigned Alphonse Pouliot and Clovis Laporte, K.C., Clerk of Appeals of His Majesty's Court of King's Bench for the Province of Quebec, do hereby certify that the present transcript, from page one to page 174 contains

10

True and faithful copies of all the original papers, documents, proceedings and of judgments of His Majesty's Superior Court for the Province of Quebec, sitting in the City of Montreal.

Transmitted to the Appeal Office, in the said City of Montreal, as the Record of the said Superior Court in the cause therein lately pending and determined between The James MacLaren Company Limited, Plaintiff and William I. Bishop et al., Defendant.

20 And also true copies of all the proceedings of the said Court of King's Bench (Appeal Side) and the final judgment therein rendered on the said Appeal instituted by the said Defendant.

In faith and testimony whereof, we have, to these presents, set and subscribed our signature and affixed the seal of the said Court of King's Bench, (Appeal Side).

Given at the City of Montreal, in that part of the Dominion of Canada, called the Province of Quebec, this day in
30 the year of Our Lord one thousand nine hundred and thirty six.

POULIOT & LAPORTE,

L. S.

Clerk of Appeals.

40

In the Court of King's Bench

Certificate of Chief Justice

Certificate of Chief Justice.

I, the undersigned Honorable Sir Mathias Tellier, Chief Justice of the Province of Quebec, do hereby certify that the said Alphonse Pouliot and Clovis Laporte, K.C., are Clerk of the Court of King's Bench, on the Appeal Side thereof, and that the initials "P and L" subscribed at every eight pages and the signature "Pouliot & Laporte" of the certificate above written, is their proper signature and hand writing. 10

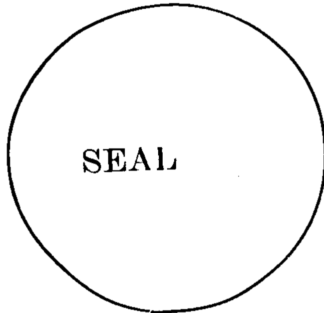
I do further certify that the said Pouliot & Laporte as such Clerk, are the Keeper of the Record of the said Court, and the proper Officer to certify the proceedings of the same, and that the seal above set is the seal of the said Court, and was so affixed under the sanction of the Court.

In testimony whereof, I have hereunto set my hand and seal, at the City of Montreal, in the Province of Quebec, this day of in the year of Our Lord one thousand nine hundred and thirty six and of His Majesty's Reign, the first. 20

SIR MATHIAS TELLIER,

30

L.S. Chief Justice of the Province of Quebec.



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In the Privy Council.

VOL. 9

No. 72 of 1936.

ON APPEAL

FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC

BETWEEN

WILLIAM I. BISHOP LIMITED and
THE BANK OF MONTREAL
(Plaintiffs and Cross-Appellants before Court of King's Bench) ... ... *Appellants*

AND

THE JAMES MACLAREN COMPANY LIMITED
(Defendant and Cross-Respondent before Court of King's Bench) ... ... *Respondent*

RECORD OF PROCEEDINGS.

VOLUME 9.—PROCEEDINGS AND JUDGMENTS IN COURT OF KING'S BENCH.

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Strand, W.C.2,
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