43, 1937

In the Privy Council.

No. 72 of 1936.

ON APPEAL FROM THE COURT OF KING'S BENCH (APPEAL SIDE), PROVINCE OF QUEBEC.

BETWEEN

WILLIAM I. BISHOP LIMITED AND BANK OF MONTREAL (Plaintiffs in the Superior Court, Respondents and Cross-Appellants in the Court of King's Bench) - - - - - - - - - - *Appellants*

AND

THE JAMES MACLAREN COMPANY LIMITED (Defendant in the Superior Court, Appellant and Cross-Respondent in the Court of King's Bench) - - - *Respondent.*

CASE FOR THE RESPONDENT.

RESPONDENTS CASE

1. This appeal is brought from two judgments of the Court of King's Bench (Appeal Side), Province of Quebec, Canada, rendered on the 27th day of December, 1935, one maintaining an appeal of the present Respondent from a judgment of the Superior Court and the other dismissing a cross-appeal of the present Appellants from the same judgment.

RECORD. Vol. IX, pp. 91–98, 166–167.

2. The litigation arises out of the construction of the Lievre River Storage Works at Cedar Rapids on the Lievre River between the Townships of Bigelow and McGill, Province of Quebec, for which Appellant William I. Bishop Limited was the contractor. These storage works were constructed
10 for Respondent 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. This storage dam was to be owned and operated when completed by The Quebec Streams Commission, a Government Commission, and the construction was under the joint supervision of Respondent's engineers and those of the Commission.

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RECORD.

Vol. VI, pp. 1227–1230.

Vol. I, pp. 2–19.

3. Following the completion of the work Appellant William I. Bishop Limited registered a claim for privilege under Article 2013 of the Civil Code of Quebec, and thereafter 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.

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

Vol. I, p. 3, ll. 25–33.

> " 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."

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5. As Appellant William I. Bishop Limited had assigned to Appellant The Bank of Montreal all amounts owing under the contract in question, The Bank of Montreal was co-plaintiff in the proceedings.

6. Appellants' claim is divided into a number of separate items, fourteen in all, each practically constituting a separate and distinct cause of action. These claims have been referred to throughout by number as well as by a distinctive title, and the amounts claimed in the action with respect to each of such individual claims, and the amounts allowed by the judgment of the Superior Court, are as follows:—

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Title of Claim.	Amount claimed by the action.	Amount allowed by the Judgment of the Superior Court.
	$	$
No. 1—Hardpan Excavation	21,601.45	13,919.45
No. 2—Passing Logs	4,103.72	2,995.42
No. 3—Cofferdams and 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	—
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

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RECORD.

7. The judgment of the Superior Court also awarded Appellants interest from date of judgment, June 1st, 1934, on $206,061.16, and interest on the balance from date of action, December 9th, 1930. Vol. VI, p. 1259, ll. 1–10.

8. The reasons for judgment in the Superior Court will be found in the judgment of the trial Judge, Honourable Mr. Justice White. Vol. VI, pp. 1249–1259.

9. The present Respondent appealed from the condemnation against it to the Court of King's Bench (Appeal Side) and the present Appellants also entered a cross-appeal from the said judgment on the question of interest only, claiming that they were entitled to interest from date of 10 action on the whole amount awarded. By judgments of the Court of King's Bench rendered on December 27th, 1935, the appeal of the present Respondent was maintained, and the judgment in favour of Appellants was reduced to the sum of $1,429.60 in respect of item No. 9 of Appellant's claim. The cross-appeal of Appellants was dismissed. Honourable Mr. Justice St. Germain dissented from both these judgments, being of the opinion that the judgment against Respondent should be reduced only to the sum of $219,232.63, and that the cross-appeal on the question of interest should be allowed. Vol. IX, pp. 91–98, 166–167. Vol. IX, pp. 146–165, 167–168.

10. The arguments addressed to the Court of King's Bench will be 20 found in the factums of the parties in that Court, which are reproduced in the Record. Vol. IX, pp. 4–90.

11. The reasons for judgment of the Honourable Justices Rivard, Letourneau and Hall will be found in their notes. The Honourable Mr. Justice Bernier concurred in the judgment of the majority of the Court, without delivering any detailed reasons. The reasons of Honourable Mr. Justice St. Germain, who dissented, will be found in his notes. Vol. IX, pp. 99–124, pp. 125–133, pp. 133–145. p. 99. pp. 146–165.

12. Respondent will contend that the judgments of the Court of King's Bench are well-founded in fact and in law and should be affirmed, for the reasons set forth in the notes of judgment of Honourable Justices 30 Rivard, Letourneau and Hall and those contained in the factums of the present Respondent before that Court. pp. 167–168.

THE CONTRACT.

13. Respondent begs leave to quote from the contract between the parties certain paragraphs which have special relevance to the matters at issue on the present appeal.

The contract by its first clause provided :—

> " That, in consideration of the sums of money to be paid by
> " the Owner as provided herein, the Contractor promises and
> " agrees to build for the Owner a dam, to be known as the Cedar
> 40 " Rapids Storage Dam, across the Lievre River on Lots A, Range 4,
> " Bigelow Township and 1, in Range 1, Township of McGill, Labelle
> " County, Quebec, at a line established on the ground the location

Vol. VI, p. 1085, ll. 30–38.

RECORD.

" of which is indicated on a map attached hereto and forming
" a part hereof, which is entitled, Cedar Rapids Storage Dam,
" Lievre River, Quebec, Canada, General Plan, Sections and
" Elevations of Dam."

The work which Appellant William I. Bishop Limited undertook to do is described as being :—

Vol. VI, p. 1087, ll. 35–39.

" 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." 10

Said Appellant promised and agreed:

Vol. VI, p. 1085, ll. 42–47.

" 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."

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

Vol. VI, p. 1086, l. 17. p. 1087, l. 3.

" It is further agreed that the construction of the dam shall 20
" 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 specifica-
" tions 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 30
" 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 40
" 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." RECORD.

15. 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." The contract 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 10 " 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, p. 1089, ll. 30–40.

It was also provided 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 20 " hereinafter provided. But it is expressly understood and agreed, " however, that : Vol. VI, p. 1090, ll. 25–45.

(*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 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 the said additional excavation and extraneous 30 " 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."

16. A further clause provided :—

" 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 40 " contained. Vol. VI, p. 1097, ll. 4–11.

" If, however, the quantities of any of the various classes of " work required to build the dam shall be different from the corre- " sponding quantities hereinbefore given, due to changes of design " or depth of foundations from those used for calculating said Vol. VI, p. 1097, ll. 12–23.

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" 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 producted by these additions and deductions plus the value
" of any 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."

17. As regards " EXTRA WORK," the contract provided that :—

Vol. VI, p. 1091, ll. 37–45.

" It is understood and agreed by both parties hereto that nothing 10
" 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 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. 1092, ll. 1–32.

For such extra work as the Contractor should perform by virtue of 20 the written authorization of the Engineer, the owner was required to pay (*a*) actual cost of labour and materials, plus (*b*) 37 per cent. 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.

18. Changes in the design and dimensions of the dam were provided for by the following clause :—

Vol. VI, p. 1091, ll. 24–33.

" 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 30
" 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 provided."

19. As the quantities of the various classes of work in many cases exceeded the contract estimates, the amounts that became payable to the Appellants under the provisions of the contract were considerably more 40 than the principal sum. The latter as already stated was $601,110.00 whereas Appellants have received as the price of this work the sum of $916, 723.57.

Vol. I, p. 3, l. 15.

20. Respondent will contend that, as there is a valid subsisting contract which Appellants have not repudiated and could not repudiate, no justification exists for maintaining Appellants' action in whole or in part. The contract not being attacked, it stands as a whole and is indivisible and if Appellants 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 Respondent. It is Respondent's submission that Appellants have failed to make such proof.

RECORD.

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CLAIM 1 :— HARDPAN EXCAVATION.

21. This claim is for additional compensation in respect of a portion of the excavation required for the construction of the dam. Appellants claim that whereas the contract provided for only two classes of excavation, viz. :—" earth " and " ledge," a portion of the material excavated proved to be " hardpan." For this they claim two-thirds of the rock price, viz. :— $2.90 per cubic yard, an arbitrary figure not found in the contract.

Vol. I, p. 3, l. 35–p. 4, l. 38.

22. In the Superior Court Appellants were awarded the sum of $13,919.35 in respect of that portion of the so-called " hardpan " excavation which was within the line of dam. The balance of the claim, which represented excavation done outside the line of dam in connection with the by-passing of the river, was disallowed. The learned Trial Judge, in maintaining this claim in part, based himself upon a certain clause in the second section of the Specifications. This section of the Specifications is entitled " Materials " and the clause in question reads as follows :—

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Vol. VI, p. 1251, l. 16–p. 1252, l. 25.

> " 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 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, ll. 20–28.

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The learned Judge stated that this particular excavation cost more than earth excavation and that Appellants thereby suffered undue hardship.

23. In the Court of King's Bench this item was disallowed. Mr. Justice Letourneau in his notes expressed the opinion that this clause in the specifications had no bearing on the price of the work, but merely referred to the quality of the materials and workmanship which the supervising Engineer was entitled to exact. Mr. Justice Rivard came to the same conclusion. Mr. Justice Letourneau further pointed out that although the presence of hardpan was at least suspected by the parties to the contract,

Vol. IX, p. 126, ll. 37–49.

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Vol. IX, p. 109, ll. 23–35.

RECORD.

Vol. IX, p. 126, ll. 26–28.

as mention is made of it in one part of the specifications, nevertheless no unit price was agreed upon for any hardpan excavation.

24. It will be submitted with respect that the clause above quoted, upon which the learned trial Judge based his judgment maintaining this claim in part, applied merely to the quality of the materials and workmanship to be provided, a matter upon which the Engineer of the Quebec Streams Commission was by the contract constituted the final judge, without any recourse even to arbitration. This appears from the arbitration clause in the contract where it is provided :—

Vol. VI, p. 1096, ll. 30–33.

"It is understood and agreed by both parties that the " Engineer's decision regarding the quality of the materials and " workmanship to be furnished under the terms of this contract " shall be final and binding."

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25. Respondent will contend further that under the terms of the contract Appellants were only entitled to additional compensation in case the actual quantity of either earth or ledge excavation exceeded the contract estimates, due to a change of design or depth of foundations; that Appellants 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 ledge, was more difficult to handle than they expected, which is an attempt to be paid on a basis of *quantum meruit* for carrying out a necessary part of the work which Appellant the Bishop Company had undertaken by the contract to do for a certain price. Respondent begs leave to refer in this connection to a recent judgment of the Supreme Court of Canada in a case from the Province of Quebec, dealing with a construction contract of the same general nature as the contract in this case, viz. :—*Nova Scotia Construction Company vs. Quebec Streams Commission* (1933) S.C.R. p. 220.

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26. In his judgment the learned trial Judge stated that no misrepresentation on the part of Respondent as to the nature of the material to be excavated had been proved and that Respondent's Engineer had merely told the representatives of Appellant the Bishop Company what was disclosed by the test pits which had been dug previous to the letting of the contract.

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Vol. VI, p. 1252, ll. 20–25.

27. Respondent will contend further that on the evidence the material in question was in fact " earth " excavation and was properly so classified by the Engineer.

CLAIM 2 :— HANDLING OF APPELLANTS' LOGS.

28. 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 :—

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Vol. VI, p. 1103, ll. 20–25.

" 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 during the driving season of 1929, and shall provide
" such opportunities for the passage of logs as the construction
" work may render necessary."

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

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

(*b*) That Respondent failed to place the necessary booms to accomplish the drive.

Vol. I, p. 4, l. 40–p. 5, l. 31.

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

Vol. I, p. 5, ll. 10–20.

31. By the judgment of the Superior Court the actual outlay claimed by Appellants, viz. :—$2,995.42, was allowed. The additional 37% claimed for profit and overhead was rejected.

Vol. VI, p. 1252, l. 28–p. 1253, l. 24.

32. In the Court of King's Bench this claim was disallowed. Mr. Justice Letourneau in his Notes, after quoting the provisions of the specifications above referred to, states :—

" Ceci ne peut avoir d'autre sens, dans les circonstances que je
20 " viens de souligner, que ce que veut l'appalante, à savoir que
" l'entrepreneur devait aussi voir à ce que ses travaux n'arrêtassent
" pas, au passage, les billots de l'appellante 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."

Vol. IX, p. 128, ll. 23–34.

30 Mr. Justice Rivard in dealing with this claim states in his notes :—

" 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 convenablement 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
40 " passage du bois à travers les obstructions du barrage temporaire."

Vol. IX, p. 111, ll. 36–44.

And Mr. Justice Hall says :—

" I am of the opinion that it is impossible so to narrow the Respondent's obligations. The words 'to provide such opportunities'

Vol. IX, p. 138, l. 46–p. 139, l. 5.

RECORD.

" 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."

33. Respondent will contend that it was under no obligation to supply the boom or provide the labour for which Appellants seek to be reimbursed, and that Appellant the Bishop Company clearly recognized that this was the case by itself placing booms without calling on Respondent to do so. 10

34. It will be submitted alternatively that even if Respondent was under any obligation to protect the work of Appellant Bishop from the logs passing down the river, Respondent could not have been expected to do so without notification from Appellant.

35. Upon the evidence Respondent will contend that any difficulty or damage suffered by Appellants by reason of logs, was due to the insufficiency of the protection provided by Appellant Bishop itself; that Respondent offered to assist Appellant by lending booms or holding back logs when requested; that Respondent did in fact comply with requests by said Appellant in this connection; and that Respondent was not in default to perform any obligation as regards the driving of logs which was imposed upon Respondent either by the contract or by the general law. 20

36. In the Courts below Appellants invoked certain provisions of the Water-Course Act (R.S.Q. 1925, Chapter 46), especially section 44 providing that a person driving logs is responsible for the damage he may cause. It will be submitted that this Act has no application to the present circumstances, where a Company such as Respondent brings in a contractor to do certain work in a river and provides by the contract for the passing of logs during the period of construction. 30

CLAIM 3 :—INCREASED COST OF COFFERDAMS AND UNWATERING.

Vol. I, p. 5, l. 32–p. 7, l. 34.

37. Appellants claimed that whereas the contract plans and certain information alleged to have been communicated to Appellant William I. Bishop Limited showed the river bottom at the location of the cofferdams as bare ledge rock, that there was in fact an overburden several feet in depth, composed of boulders, gravel and other similar material; that this resulted in serious leakage through the cofferdam, which caused the unwatering operations to be much more expensive than anticipated and that this work was made still more difficult and expensive by the large number of logs coming down the river. Appellants claimed the alleged cost of this work, plus 37 per cent. for overhead and profit, amounting in all to $148,857.15 after crediting Respondent with part of the contract price. 40

RECORD.

38. In the Superior Court Appellants' claim was maintained to the extent of $117,075.22, representing the actual cost of the work as alleged by Appellants, with an addition of 15 per cent. for overhead instead of 37 per cent. as claimed, after deducting the payment for which credit is given.

Vol. VI, p. 1253, l. 26–p. 1255, l. 38.

39. In the Court of King's Bench this claim was disallowed for the reasons set forth in the formal judgment of the Court and in the notes of Honourable Justices Rivard, Letourneau and Hall to which Respondent begs leave to refer.

Vol. IX, p. 94, l. 40–p. 95, l. 32 pp. 112–115. pp. 128–130. pp. 140–142.

40. The only indication as to the nature of the river bottom is to be 10 found on the Plan B2444. 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."

Vol. VIII, Exhibit P2.

41. In addition to this alleged representation on the contract plan, Appellants in their action also relied upon certain information alleged to have been communicated verbally to Appellant Bishop, namely :—

" 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 un- " watering or placing of cofferdams."

Vol. I, p. 20, ll. 7–10.

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

42. The contract plans did not indicate any required location for the cofferdams and Appellant Bishop was free to place them where he liked.

43. As regards this item of Appellants' claim, Respondent will contend :—

(*a*). That the meagre information disclosed by the contract plans as to the nature of the river bottom at the location where the cofferdam was placed was by no means sufficient to enable Appellant the Bishop Company to properly construct its cofferdam;

(*b*). That upon the evidence Appellant knew this and did not in fact 30 rely upon the plan in this connection, but proceeded by its own employees to make careful soundings of the river bottom for the purpose of constructing the cofferdam;

(*c*). That it was not for Respondent to account for the leakage which developed in the cofferdam and which Appellants state resulted in the cost thereof being greatly increased;

(*d*). That the burden of proof is upon Appellants to establish what the cause of the leakage was, and that this cause was attributable to Respondent, which Appellants have failed entirely to do;

(*e*). That as regards the alleged trouble from logs, it was the duty of 40 Appellant Bishop to protect his cofferdam from the logs coming down the river, and that Appellant Bishop recognized that this was the case by itself placing booms in the river without calling upon Respondent to do so;

RECORD.

(*f*). That any difficulty or damage suffered by Appellants by reason of logs was due to the insufficiency of the protection provided by Appellant the Bishop Company itself;

(*g*). That even if Respondent was in any way responsible for logs becoming entangled in the cribs of the cofferdam or otherwise interfering with the work, Appellant Bishop knew of the trouble at the time and should not have proceeded with the work until any possible danger from this cause had been removed.

(*h*). That even if Respondent was under any obligation to protect the work of Appellant Bishop from the logs passing down the river, 10 Respondent could not have been expected to do so without notification from Appellant.

(*i*). That under the contract nothing beyond the principal sum was to be paid for cofferdam work.

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

44. This claim was disallowed in the Superior Court and is no longer in issue.

CLAIM 5 :— ADDITIONAL COST OF ROCK EXCAVATION.

Vol. I, p. 8, l. 25–p. 9, l. 33.

45. This claim for additional compensation in respect of rock excavation is advanced on two grounds, (*a*) because the amount of rock excavation 20 exceeded the contract estimate and (*b*) because of the alleged costly manner in which the Engineer required Appellant William I. Bishop Limited to remove a portion of the rock.

Vol. VI, p. 1255, l. 44–p. 1256, l. 3.

46. In the Superior Court this claim was maintained in full and Appellants were awarded the sum of $35,100.74 under this head. The only reason given by the learned trial Judge is contained in the following paragraph from his judgment, viz. :—

" The next item is for additional rock excavation, according
" to plaintiffs' proof this extra work was done and Ferguson at
" p. 363 expected that it would have to be done. This with the 30
" 37 per cent. 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. IX, p. 131, ll. 5–10.

Vol. IX, p. 162, l. 30.

47. In the Court of King's Bench this claim was disallowed, Mr. Justice Letourneau stating in his Notes that the evidence showed that no unnecessary amount of rock was removed and that the manner in which this work was done was a proper one. Mr. Justice St. Germain concurred with the majority of the Court in rejecting this item of the claim.

48. Appellants have been paid for all excess rock excavation at the unit prices mentioned in the contract. The paragraph quoted above from 40 the judgment of the learned trial Judge would indicate that he was

erroneously under the impression that this was extra work for which Appellants had not been paid. RECORD.

49. As to the contention of Appellants that they are entitled to be paid the amount in question because the rock excavation exceeded the contract estimate, Respondent will contend that the contract provided for such a possibility and for the compensation which Appellant Bishop was to receive in such event, and that Appellants, having been compensated for all this work in the manner provided by the contract, have no valid claim for any additional compensation.

10 50. As to the complaint of Appellants regarding the manner in which this work was required to be done, the specifications provided that the method of handling the excavation might be of any approved means, that excavation was to be carried to a sufficient depth to provide a safe foundation, and that all this work should be done " as directed by and to the satisfaction of the Engineer." Under the contract this means the Chief Engineer of the Quebec Streams Commission, Mr. Olivier Lefebvre, and Mr. Lefebvre when examined as a witness stated that the method of rock excavation employed was a proper and usual one and the method adopted by him in other contracts carried out for the Commission. Vol. VI, p. 1114, ll. 11-12. Vol. V, p. 911, ll. 8-20.

20 51. It will be submitted on behalf of Respondent that as Appellant Bishop had agreed to do the work as Mr. Lefebvre should direct, it was not open to Appellant to complain of the manner in which the work was ordered to be done, even if the Engineer's requirements had been unreasonable; that as a matter of fact it appears from the evidence that the Engineer's orders were perfectly reasonable and proper, and in accordance with the specifications.

CLAIM 6:—HANDLING AND TRIMMING EXCAVATED ROCK.

52. This claim was disallowed in the Superior Court and is no longer in issue.

30 CLAIM 7:—EXCAVATING FROZEN MATERIAL IN RIVER BED.

53. This claim is based on the allegation that the whole of the river bottom at the site of the dam 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. Appellants received payment for this work at the earth price of $1.23 per cubic yard, and they claim to be entitled to the rock price of $4.35 per cubic yard. Vol. I, p. 10, ll. 15-40.

54. The learned trial Judge allowed this item and as a reason for so doing invoked the clause in the specifications already referred to, which 40 provided that the intention was to secure thoroughly first-class construction in both material and labour without working an undue hardship on the Vol. VI, p. 1256, ll. 10-19.

RECORD.

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

Vol. IX, p. 96, ll. 20–39.

55. In the Court of King's Bench this item was disallowed on the ground that the "undue hardship" clause was not applicable; that the material in question was not rock and therefore under the contract only the earth price should be allowed; and because any delay in the prosecution of the work which necessitated this work being done in winter instead of in summer was due to Appellants and not to Respondent.

56. Respondent will contend that under the contract Appellants were to do all work of every kind necessary for the complete construction of the dam for the principal sum, plus authorized extras and additional amounts in the events mentioned, including *inter alia* should the quantities of earth or rock excavation exceed the contract estimates. This material was not rock, therefore, either Appellants were obliged to do this work as part of the principal sum or, if they are entitled to any extra allowance, it is the only other allowance mentioned, namely :—$1.23 per cubic yard for excess earth excavation, which they have already received.

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CLAIM 8 :— WORK UNDER WINTER CONDITIONS.

Vol. I, p. 10, l. 43 – p. 11, l. 40.

57. 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, Appellant Bishop was forced to do nearly 15,000 cubic yards of concrete work and to erect nearly 500 tons of structural steel under winter conditions instead of under what Appellants call the "normal working season conditions contemplated by the contract." According to Appellants' figures the actual additional cost of this work by reason of being carried out in winter was $70,680.62. This amount was claimed, plus 37% for overhead and profit, a total of $96,832.45.

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Vol. VI, p. 1256, ll. 20–32.

58. The judgment of the Superior Court allowed the additional cost as calculated by appellants, plus 15% additional instead of 37%, a total of $81,282.62.

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59. In the Court of King's Bench this claim was disallowed. Mr. Justice Letourneau in his Notes deals with this item as follows :—

Vol. IX, p. 131, ll. 33–40. p. 117, ll. 19–25. p. 144, ll. 1–12.

> "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'aggissait encore de ce qu'elle avait entrepis et
> " devait faire. Si c'est à cause du retard que les billots et les
> " difficultés de l'asséchement du lit de la rivière ont apporté, je
> " crois avoir déjà démontré qu'elle ne peut s'en prendre qu'à elle-
> " même.

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Similar reasons are given by Honourable Justices Rivard and Hall in their notes.

RECORD.

60. 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 18 months with winter conditions prevailing ordinarily for about two-thirds of that period. It will be submitted that Appellant Bishop must have expected that a large amount of this work would require to be done in winter and that under the contract the excess quantities of concrete and structural steel work were not in any way made dependent upon the weather that might be encountered.

10 61. Respondent will contend that under the law of the Province of Quebec (which in this respect does not differ from the law of England) there is no legal basis for Appellants' claim in this connection. Moreover, this claim being an accessory one, it cannot in any event be allowed unless Respondent should be held responsible for the delays upon which it is based.

CLAIM 9 :— OVERCHARGE ON LOGS.

62. This claim was allowed in part by the Superior Court, was conceded by the present Respondent in its factum before the Court of King's Bench and was maintained by the judgment of that Court. It is, therefore, no longer in issue. It might be stated that this claim is not based on the 20 construction contract and bears no relation to the other matters now at issue.

CLAIM 10 :— CEMENT FOR APRON IN BY-PASS CHANNEL.

63. In the month of March, 1930, when the work was nearing completion, the Engineer decided to place a " concrete apron " immediately below the dam in the by-pass channel. Appellants by their action claim that as a result of this decision they were obliged to bring in about 55 additional tons of cement in the spring of 1930, which cost more than if the work had been ordered earlier when the winter roads were in use, and they claim from Respondent the amount of this additional expense. Vol. I, p. 12, ll. 21-45.

64. The judgment of the Superior Court allowed the cost of this work 30 as alleged by Appellants plus 15 per cent. additional to cover overhead and profit, a total of $1,879.83. It was conceded by the Appellants in their factum before the Court of King's Bench that the amount awarded under this head should be reduced to $1,454.03. Vol. VI, p. 1256, ll. 40-44. Vol. IX, p. 85, l. 48.

65. In the Court of King's Bench this item was disallowed, Mr. Justice Letourneau in his Notes stating :— Vol. IX, p. 132, ll. 7-14.

> " 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.
>
> " D'ailleurs, au moment où ceci a été effectivement ordonné, 40 " 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."

RECORD.

Vol. IX, p. 163, ll. 32–35.

Mr. Justice St. Germain concurred with the majority of the Court in rejecting this item of the claim.

66. The authority of the Engineer to order this work has never been contested. The work involved a slight increase in the amount of rock excavation and in the amount of concrete work, for both of which Appellants have been paid at the unit prices provided in the contract for excess quantities of such work.

67. Respondent will contend that Appellants have been paid in accordance with the contract for this additional work and have no valid claim for any additional compensation, and further that in any event when this work was ordered the winter roads were still in use and Appellants had time to bring in the additional concrete necessary under winter conditions. 10

CLAIM 11 :—SHORTAGE IN PAYMENT FOR CLASS 1 CONCRETE.

Vol. VI, p. 1089, l. 40– p. 1090, l. 8.

68. The contract contemplated that some sections of the concrete work would contain boulders or stones referred to as "plums," thus reducing the amount of cement required. This claim arises because the Engineer ordered a substitution of concrete without plums for concrete with plums in certain portions of the work.

Vol. VI, p. 1098, paras. (j) & (k).

69. To compensate Appellants for the additional cement required, 20 Appellants were paid the difference between the unit price for Class 1 concrete with plums, $17.16 per cubic yard, and the unit price for Class 1 concrete without plums, $18.92 per cubic yard, namely the sum of $1.76 per cubic yard.

Vol. VI, p. 1256, l. 45– p. 1257, l. 19.

70. In the Superior Court Appellants were awarded the sum of $31,549.15 in respect of this item, the judgment stating :—

> "Originally certain parts of the dam were designed to be built
> " of concrete with plums, then at a certain time the design was
> " changed to use concrete without plums, and defendant must
> " pay the difference provided by the contract $31,549.15 for which 30
> " plaintiff is entitled to judgment."

Vol. IX, p. 97, ll. 27–47. Vol. IX, p. 163, l. 40– p. 165, l. 8.

71. In the Court of King's Bench this item was disallowed on the ground that the substitution of one class of concrete for another did not constitute a "change of design" and Appellants were therefore not entitled to succeed. Mr. Justice St. Germain concurred with the majority of the Court in rejecting this item of Appellants' claim.

72. Respondent will contend that the unanimous judgment of the Court of King's Bench as regards this item is right and that Appellants cannot succeed on this claim because (*a*) the substitution of one class of concrete for another cannot be considered a change in design, the dam 40 being in either case built of concrete and the shape being the same, the only difference being that imbedded in the concrete and hidden from view,

are fewer boulders and stones than there might have been, and (*b*) because in any event Appellants have been compensated for the additional cement required on the basis provided in the contract.

RECORD.

CLAIM 12 :— PLANT REMOVAL.

73. This claim also is an accessory one, and is based upon delays alleged to have been caused Appellant 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. Appellants claim that Appellant Bishop was delayed approximately three months in the prosecution of the work for these reasons, which are attributed to Respondent, with the result that it was impossible to move out the heavy plant and equipment on the winter roads of January and February, 1930.

Vol. I, p. 14, ll. 10–45.

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74. In the Superior Court Appellants were awarded $5,823.49 under this head. However, Appellants in their factum in the Court of King's Bench admitted that the amount awarded should only have been $5,247.06.

Vol. VI, p. 1257, ll. 20–38. Vol. IX, p. 87, l. 31.

75. In the Court of King's Bench this item was disallowed on the ground that any delay in removing the plant was attributable to Appellants and not to Respondent. Mr. Justice St. Germain concurred with the majority of the Court in rejecting this item.

Vol. IX. p. 98, ll. 6–10. Vol. IX. p. 165, ll. 10–38.

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76. Respondent will contend that under the terms of the contract the removal of plant is expressly included in the principal sum and that no additional amount can be awarded Appellants under this head.

Vol. VI, p. 1099, l. 47, p. 1105, ll. 40–45.

77. Respondent will also contend that the delays to which Appellants attribute the additional expense of removing their plant were in any event due to Appellants and not to any fault of Respondent.

CLAIM 13 :— STANDBY AND OVERHEAD EXPENSE.

CLAIM 14 :— INTEREST ON DEFERRED PAYMENTS.

78. These claims were disallowed in the Superior Court and are no longer in issue.

30

ARBITRATION CLAUSE IN THE CONTRACT.

79. In paragraphs 44 to 52 of their declaration Appellants allege in effect that they desired to arbitrate these claims in accordance with the arbitration clause contained in the contract but that Respondent refused to do so.

Vol. I, pp. 16–18.

RECORD.

80. From his judgment the learned trial Judge would appear to have been influenced to no little extent by these allegations as the following passage from his judgment would indicate :-

Vol. VI, p. 1250, ll. 28–33.

" 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 plaintiff should have ceased " work and brought an action to set aside the contract."

81. As Appellants were obliged to concede, however, and as the judgment of the Superior Court found, the law of the Province of Quebec does not sanction a specific performance of this obligation by either party thereto, and Appellants did not in fact attempt to enforce their demand for arbitration. 10

82. Respondent will contend that these allegations are irrelevant to the matters in dispute and can have no possible bearing on the outcome of the present litigation; that whether the matter was before the Courts or before arbitrators, neither of them could change or add to the contract, they could only construe it and apply it to the facts as found.

COST OF THE WORK.

83. The judgment of the Superior Court accepted without question or comment the evidence offered by Appellants as to the actual cost of certain portions of the work, without any reference to the contentions of Respondent as to the sufficiency of this proof. 20

84. Respondent submitted in the Courts below and will if necessary contend that the proof made by Appellants in this respect was insufficient and was not the best evidence that could have been adduced.

THE CROSS-APPEAL.

85. In their cross-appeal to the Court of King's Bench Appellants claimed that they were entitled to interest on the whole amount of the judgment of the Superior Court from the date of service of the action, December 9th, 1930. Under the judgment they had been awarded interest from such date on all their claims excepting four, namely :—Claims 3, 8, 10 and 12 above referred to, on which interest only from date of judgment was allowed. 30

86. The learned trial Judge evidently considered these four items of the claim to be in the nature of damages and the other items as something due under the contract, This was apparently the basis of the distinction which he made as regards the date from which interest was to run.

87. Respondent will submit in case it should be found that Appellants are entitled to the whole or any part of the amounts awarded under these 40

four items, that the trial Judge was correct in awarding interest only from the date when these damages were liquidated, that is, the date of judgment in the Superior Court.

Respondent humbly prays that the judgments appealed from be affirmed and the appeal dismissed, for the following among other

REASONS.

1. Because there is a valid subsisting contract between the parties which Appellants have not repudiated and could not repudiate and because the respective rights and obligations of the parties hereto must be determined thereby.

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2. Because under said contract Appellant William I. Bishop Limited undertook to perform a certain work to the satisfaction of the Engineer for a certain consideration to be calculated in the manner therein provided, and because Appellants have been paid on the basis provided in said contract.

3. Because apart from said contract Respondent could only owe money to Appellants if Respondent or its authorized representative had committed a fault which had caused damage to Appellants, and because the evidence does not justify any such contention, and because in any event Appellants in the Courts below rested their claim on a contractual and not on a delictual basis.

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4. Because under the contract it was provided that the work to be performed by the Appellant William I. Bishop Limited would be paid for as and only as in the said contract provided, viz. :—(*a*) a lump sum, (*b*) unit prices for increased or decreased quantities and (*c*) cost and a percentage for extra work performed by virtue of a written authorization of the Engineer.

5. Because if said Appellant during the course of the work came to the conclusion that 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, and if the Engineer did not give an extra order or the owner a special contract, it could do nothing but refuse to proceed.

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6. Because said Appellant had agreed to do the work to the satisfaction of the Engineer and could not refuse to follow the instructions or directions of the Engineer on the ground that same were unreasonable, even if such had been the case.

7. Because any indications shown on the contract plans as to the nature of the river bottom did not constitute a representation or warranty upon which said Appellant was entitled to rely, and because in fact said Appellant did not rely upon and was in no way deceived by such indications.

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8. Because the clause in the specifications respecting first-class construction relied on by the learned trial Judge deals only with the quality of work and materials, and has no application to the compensation which Appellants became entitled to under the contract.

9. Because Appellants are not entitled to claim additional compensation not provided for in the contract in respect of work done in winter, particularly under the circumstances of this case where winter conditions ordinarily prevail for about two-thirds of the term of the contract. 10

10. Because Appellants are not entitled to be recouped for alleged losses on certain branches of the work while wholly disregarding other portions, and because it has neither been alleged nor proved whether on the work as a whole Appellants made a profit or sustained a loss.

11. Because the contract was not a severable one and no fixed proportion of the consideration can be assigned to any particular branch of the work, the division of the work made by the contract being merely for the purpose of monthly progress payments, and because the amounts with which 20 Appellants purport to credit Respondent on account of different branches of the work were in fact paid on account of the contract as a whole.

12. Because the arbitration clause in the contract invoked by Appellants was not enforceable under Quebec law and because no attempt was made by Appellants to enforce the same, and because in any event whether the matter was brought before the Court or before arbitrators neither of them could change or add to the contract.

13. Because even if it should be found that Appellants are entitled 30 to additional compensation in respect of any of the various branches of the work, the evidence offered by Appellants as to the amounts expended by them was not the best evidence and is insufficient.

14. Because the reasons given by the learned trial Judge in his judgment against Respondent were erroneous.

15. Because the reasons given by the Honourable Justices Rivard, Letourneau and Hall in the Court of King's Bench were right.

AIME GEOFFRION, 40

JOHN A. AYLEN.

In the Privy Council.

No. 72 of 1936.

ON APPEAL FROM THE COURT OF KING'S BENCH (APPEAL SIDE) PROVINCE OF QUEBEC.

BETWEEN

WILLIAM I. BISHOP LIMITED AND BANK OF MONTREAL

(Plaintiffs) Appellants

AND

THE JAMES MACLAREN COMPANY LIMITED

(Defendant) Respondent.

CASE FOR THE RESPONDENT.

CHARLES RUSSELL & Co.,
37, Norfolk Street,
Strand, W.C.2.
Solicitors for the Respondent.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C.4.