
Montreal 1964 / Oct 21-23, 26-30, Nov. 2-6, 16-20, Dec. 14-18 / 1965 / Jan. 18-21 / Ottawa Sept. 8, 9 / Nov. 2

BETWEEN:

EDWIN J. PERSONS ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

AND

The said HER MAJESTY THE QUEEN, Constituting herself.. } CROSS-PLAINTIFF;

AND

The said EDWIN J. PERSONS ..... CROSS-DEFENDANT.

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Crown—Contract for construction of air base runway in Quebec—Whether default under—Adequacy of notice to take work away from contractor—Whether decision to cancel made by authorized official—Construction of confiscatory clause.

In June 1960 suppliant was awarded a contract by the Department of Transport for the construction of an air base runway at Three Rivers, Quebec, to be completed by October 31st 1961. Suppliant worked until the end of December 1960 and then ceased for the winter months. In April 1961 suppliant was told by Departmental officials that to avoid certain difficulties which had arisen the previous year he would be given a schedule of work to be done in the ensuring year. On June 1st 1961 suppliant, who had not yet started work on the contract, was notified by the Department's resident engineer pursuant to clause 18 of the contract to put an end to his default in diligently executing the works to be performed under the contract on or before June 12th 1961. On June 12th 1961 the Department's resident engineer handed suppliant's engineer a schedule of work "to be initiated immediately in the sequence listed". On June 13th suppliant was notified in writing by the Department's Director of Construction Branch that the work was being taken out of his hands for failure to put an end to the default pursuant to the notice of June 1st. Suppliant, who contended that the notice was illegal, continued to work on the contract until July 6th. The work was then completed by another contractor.

Held, suppliant was entitled to damages for breach of contract.

1. Suppliant was not in default under clause 18 of the contract consequent on the notice of June 1st until he had received the schedule of work promised by the Department's representatives.
2. The respondent having restricted the exercise of the power conferred by clause 18 to take the work out of the contractor's hands to the first case provided thereunder it was not sufficient to subsequently support the exercise of this power on any other default, delay or reason in complying with one of the requirements of the contract.
3. Further, it had not been established that the decision to take the work out of suppliant's hands had been made by the Minister of Transport or his Deputy as required by the terms of the contract. The decision to take the work out of suppliant's hands had been made by some other official.
4. The notice of June 1st was insufficient under clause 18 of the contract in failing to set out the specific defaults or delays charged to suppliant. *Boone v. The King* [1934] S.C.R. 457 at p. 469.
5. The effect of the delivery of the schedule of work to suppliant on June 12th was to suspend the operation of the notice of June 1st and to set a new departure date for the continuation of the work so as to require a new notice if respondent wished to apply clause 18 of the contract thereafter. A confiscatory clause must be construed against the party seeking to enforce it. Cf. *Neelon v. Toronto and E.J. Lennox* (1893-6) 25 S.C.R. 579.
6. *Semble,* in any event under the notice of June 1st giving suppliant until June 12th to end his default the six days' continued default called for by clause 18 did not commence to run until June 12th.

Crown—Constitutional Law—Construction contract with Crown—Assignment of sums due under contract to bank—Non-compliance with Part VIII A of Financial Administration Act, S. of C. 1960-61 c. 48—Compliance with Quebec law—Invalidity of assignment.

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Suppliant, a party to a construction contract with the Crown in right of Canada, assigned to a bank the sums due him under the contract. The assignment did not satisfy the requirements of Part VIII A of the *Financial Administration Act*, S. of C. 1960-1961 c. 48 but did meet the requirements of the law of Quebec respecting assignments.

Held, the assignment was ineffectual under s. 88D of the *Financial Administration Act*. The *Financial Administration Act* displaced any provincial law that might otherwise have been applicable, at least to the extent that it was inconsistent with the provincial law.

Crown—Damages—Construction contract in Quebec providing schedule of prices—Whether governed by Quebec Civil Code, Arts. 1690 and 1691 re extras—Damages recoverable—Restrictions on—Engineering and accounting expenses in preparing for trial—Right to recover.

A construction contract remunerated on the basis of a series of unit prices set forth in the contract is not a "*contrat à forfait*" and therefore not subject to Articles 1690 and 1691 of the Quebec Civil Code, which provide that extras cannot be claimed unless specified in writing and that on cancellation of the contract the damages recoverable are limited to actual expenses plus damages; and this is so even though the contract provides that extras may be authorized in writing. *Quebec v. Dumont* [1936] 1 D.L.R. 446 considered.

This does not mean however that the contractor is entitled to claim the cost of any additional work not provided for in the contract or the specifications as the rights of the parties must be determined having regard to the terms of the contract.

Held also, in the circumstances of this case suppliant was entitled to recover the engineering and accounting expenses which he necessarily incurred in preparing for trial.

PETITION OF RIGHT.

Alexander McT. Stalker, Q.C., and *Robert J. Stocks* for suppliant.

Louis Bloomfield, Q.C., Paul Ollivier, Q.C. and *Daniel Miller* for respondent.

NOËL J.:—The Suppliant, a contractor, by his petition of right seeks to recover from the Respondent the sum of $492,397.59 of which $180,397.59 is for work allegedly completed prior to December 31, 1960, and $312,000 for damages allegedly sustained as a result of the Respondent cancelling a contract for the construction of the Three Rivers, P.Q., air base runway on June 14, 1961, and ordering the Suppliant not to complete the work provided for under same, on the allegation that he was not diligently nor satisfactorily proceeding with the work, ordering him off the job site and negotiating a contract with H. J. O'Connell Limited, the second lowest bidder, for its termination. The Suppliant had obtained this work as the lowest bidder in June of the previous year and had worked thereon up until

the month of December 1960, when the job was shut down because of the winter season. The Suppliant, one of seventeen tenderers, produced a bid of $461,983.50 on a unit price basis, which was $109,683.50 lower than the second lowest bidder, H. J. O'Connell Limited and $48,016.50 (or even $226,016.50 if Ex. R-5 is relied on) lower than the amount estimated by the engineers of the Department of Transport, and there lies the cause of many of the difficulties encountered in the execution of this job.

The Respondent, on the other hand, counter-claims from the Suppliant, the Cross-Defendant, a sum of $131,495.45 as damages allegedly sustained as a result of the completion of the work by H. J. O'Connell Limited, made up as follows:

Net amount paid to Cross-Defendant (Suppliant) is $167,600 less hold back of $16,700	$150,840.00
Total amount paid or payable to H. J. O'Connell for completion of the project	$440,209 31
Total	$591,049 31
If Cross-Defendant had proceeded with the project to completion, total cost according to Cross-Defendant's unit price	$459,553 86
	$131,495 45

The cost of completing the work exceeded the Cross-Defendant's bid price because the latter's bid unit price for the supplying of the granular material to be placed in the fill of the paved area of the runway was not high enough to deal with the cost of transporting this material from sites several miles from the runway and also because on several items of the work performed by H. J. O'Connell the payment was made on a rental of machinery basis instead of on a unit price basis and, in some instances, on unit prices higher than the prices which applied to the Cross-Defendant.

The allocation of the work on a machine time rental basis appears to have been justified in some cases, where it was impossible or difficult to divorce the work done by the Cross-Defendant from that to be performed by H. J. O'Connell and, therefore, calculate exact quantities, and although, in other cases, this could have been done, it would have involved considerable minute and costly calculations.

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Subsequent to the taking of the present action and the production of the cross-demand, the Suppliant produced an incidental demand, claiming additional damages, allegedly incurred since the institution of the original action, in an amount of $152,800 and resulting from additional financial costs of the Suppliant in the amount of $2,800, representing 6 per cent interest on $70,000 for a period of eight months, which he had to borrow to use as security for a contract for which he was allegedly unable to secure a bond because of the present action and $150,000 loss of profit he would have allegedly sustained in not being able to bid, since the institution of the original action, on a number of Eastern Townships autoroute contracts because of the actions of the Respondent's representatives.

The parties by their respective counsel at the trial agreed that the evidence submitted would be common to the principal demand, the incidental demand and the cross-demand in so far as it would be applicable to each of them.

I should also, at this stage, deal with a matter that came out in evidence during the course of the trial and which raised some doubt as to the Suppliant's right to claim in the present action the receivables under the contract when Mr. Duke, the Suppliant's auditor, stated that on March 19, 1962 the Suppliant had executed a document purporting to assign to the Royal Bank of Canada certain specified "debts" under the Government construction contract under which the Suppliant claims relief in these proceedings and "all the debts growing due under" that contract and that, on March 20, 1962, the Royal Bank of Canada had written to a chief treasury officer of the Government of Canada a letter stating that there was being enclosed, *inter alia*, the bank's "form of Assignment of Contract" covering the contract in question. The only response from the chief treasury officer, according to the evidence, was a letter acknowledging receipt and stating that, according to the chief treasury officer's information, there was no money due under the contract.

This "assignment", and the correspondence to which I have referred, took place prior to the commencement of these proceedings.

The evidence to which I have referred raised in the mind of the Court the question whether the effect of the

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"assignment" had been to transfer to the Royal Bank of Canada a part or all of the Suppliant's cause of action so that the Suppliant was left, at the time of the commencement of these proceedings, with no legal basis for the relief claimed by his petition of right with regard to his receivables under the contract.

If the Respondent in these proceedings were any person other than the Crown, it would be clear that the Royal Bank of Canada, and not the Suppliant, is, by virtue of the laws that operate in the Province of Quebec, entitled to the relief sought in these proceedings.

At this point, it may be helpful background to refer to the situation as it existed before the decision of Thorson P. in *Bank of Nova Scotia v. The Queen*[1]. Prior to that decision, it appears that the Government of Canada took the position that there could not be an assignment of a claim against the Crown. This had been the position taken by that Government since Confederation and, as a result, a practice had grown up whereby the Government paid monies owing by it to persons holding powers of attorney from its creditors providing such powers of attorney were in prescribed form and complied with Treasury Board directions relating to such documents. The Government followed a practice of honouring such powers but consistently denied all responsibility for ensuring that the money got into the hands of the attorney rather than his principal, the Crown's creditor.

As a matter of fact, the Government so consistently paid in accordance with such powers of attorney that the chartered banks, as a general practice, accepted such powers of attorney as though they were legally binding assignments of the debts covered by them.

In addition, banks frequently took assignments of debts in their own forms and these assignments were, some times, attached to the powers of attorney that were placed by the banks in the hands of the Government's paying officers.

The *Bank of Nova Scotia case* decided in 1961 that the position taken by the Government of Canada over such a long period of time was erroneous and that claims against the Crown were assignable. Following that decision, Part

[1] (1961) 27 D.L.R. (2d) 120.

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VIIIA was added to the *Financial Administration Act* by chapter 48 of the Statutes of Canada of 1960-1961.

Part VIIIA does two things. On the one hand it spells out a procedure whereby a "Crown debt" may be made the subject matter of an "absolute assignment...not purporting to be by way of charge only", (section 88C). On the other hand, it provides that, except as provided by the *Financial Administration Act,* or some other Act,

> (*a*) a Crown debt is not assignable, and
>
> (*b*) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of such debt. (section 88B).

(By definition, section 88A(*d*), "Crown debt" includes any chose in action ("droit incorporel") in respect of which there is a right of recovery enforceable by action against the Crown).

The statutory procedure for assignment in so far as it is relevant for present purposes, requires that notice of an assignment be given "in prescribed form" to "a paying officer" and contemplates that there be an acknowledgement of the notice "in prescribed form" (section 88D). The Statute provides that the assignment is effectual in law to pass the creditors' rights "from the date service of such notice is effected" [section 88C(1)] and provides that service of the notice "shall be deemed not to have been effected" until the acknowledgement, in prescribed form, is sent to the assignee by registered post [section 88D(2)].

In this case, it would appear that the Royal Bank of Canada has dealt with the power of attorney and the assignment in the same manner as it was probably accustomed to deal with such documents before the 1961 amendment to the *Financial Administration Act.* It did *not* send notice of the assignment "in prescribed form" but it did send the power of attorney and assignment under cover of an ordinary letter of transmission. Presumably, for that reason, the treasury officer simply acknowledged the documents received and did not send an acknowledgement in prescribed form.

In the circumstances, it is clear that the assignment to the Royal Bank of Canada has not, as yet, become "effectual in law" by virtue of section 88C of the *Financial Administration Act* and, as far as I am aware, there is no

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other provision in that Act or in any other Act of the Parliament of Canada that would give it legal force. It therefore falls within the wording of section 88B of the *Financial Administration Act*, which provision reads as follows:

> 88B. Except as provided in this Act or any other Act of the Parliament of Canada,
>
> (*a*) a Crown debt is not assignable, and
>
> (*b*) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of such debt.

Without venturing into the very difficult and complex subject of the application of provincial laws to the determination of the rights and obligations of Her Majesty in Right of Canada, I feel confident that a law such as Part VIIIA of the *Financial Administration Act*, when enacted by Parliament, displaces any provincial law that might otherwise be applicable in the circumstances, at least to the extent that it is inconsistent with such provincial law. Section 88B therefore operates in accordance with its terms and clearly has the effect that, until the assignment here in question becomes effectual in law by virtue of section 88C, the claims of Persons against the Crown are not assignable and the assignment is not effective so as to confer any rights or remedies on the Royal Bank of Canada.

The call for tenders for the construction of the Three Rivers runway was made some time prior to May 1960 and the Suppliant's tender was received by the Department of Transport on May 3, 1960, together with a security deposit in the amount of $35,599.17.

The Suppliant's low bid, particularly with regard to the price of crushed gravel base (70 cents per ton), the granular base material (40 cents per ton), the 8″ metal pipe porous backfill, the manholes and for consolidating sub-soil base were immediately noted, as appears from a memorandum of the Chief Engineer, C. W. Smith, to the Director of Construction Branch (Ex. R-4) of May 5 and doubt was expressed as to whether the Suppliant understood the strict specifications as to the required percentage of fractured faces in the crushed material and as to sieve analysis on the granular sub-base.

I might inject here that adherence to the specifications regarding the density of materials which go into the

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construction of a landing strip, and particularly the paved area, is important and this was stressed by Mr. Connolly, Director of the Construction Branch of the Department of Transport when, at p. 593 of the transcript, he stated:

> A. Well, the only way I can answer is that we have spent thousands of dollars in research work since immediately after the war on the investigation of different pavements that had failed. And, we prepared very elaborate study, which incidentally, got the blue ribbon in Washington at the meeting of the highways states officials—and we had one of the best known engineers in Canada in soil mechanics to direct this study. We investigated every pavement failure in any of the airports in Canada and it all went back—practically all of the pavement failures were due to the failure of the sub-grade and the base course. At that time, while we made this extensive study, it was forecasted for commercial aviation, the aircrafts were going to get much larger and we determined to get what we could in the way of information. That is, what the forecast for the future was, so we devised our own formula for pavement design from that and we learned from our experience in our research work that the most important, or one of the most important factors was the density of that sub-grade material. And, in designing this whole thing, our objective was to reach a frost resistant material and we know from experience in the different —actually, we cut down into the pavement and the sub-grade of those that failed and took samples and we knew what loading this pavement had been subjected to over the years. We had records of all the landings and take-offs over a number of years and the aircraft types. It was proved that the sub-grade and the base course was the most important part in the pavement design.

The asphalt section of the runway, as specified, comprises 3½ inches of asphalt, underneath which there is a 9 inch layer of crushed gravel laid over a 22 inch layer of granular material on a 12 inch sub-graded consolidation. The specifications also required that the sub-grade was to be compacted to 95 per cent modified Proctor ASTM, the granular material 98 per cent and the crushed gravel to 100 per cent.

The sieving or size of the granular is dealt with in the specifications under *Granular Base Course* as follows:

> 2. The base course shall be of hard, durable granular run-of-the-bank materials or quarried or crushed stones from which all stones above three (3) inches in diameter have been removed. Material passing the two hundred (200) sieve must not exceed eight (8) per cent and not more than thirty (30) per cent passing the number forty (40) sieve.

On May 9, 1960, the Director of Construction Branch, H. J. Connolly, wrote (Ex. R-5) to the Assistant Deputy

Minister for Air, reporting on the seventeen tenders received for the Three Rivers strip and dealing particularly with the Suppliant's low bid.

He stated therein that the Department's estimate for this work was $688,000 "somewhat higher than would have been estimated if we had been sure of the source of gravel that could be obtained for the work" and provision was therefore made for a source approximately 15 miles from the site. He added that the Suppliant had never worked for the Department before and that, in reviewing his unit prices for a number of items, it appeared that he was unfamiliar with the Department's rigid specifications and he suggested that the Suppliant be asked to come to Ottawa for the purpose of reviewing the tender with the engineers of the Department, which was agreed to and done.

The Suppliant met with Mr. Connolly who told him that he was extremely low in his bid and could lose a lot of money and suggested that he take his tender back and review all his prices and then return. He later returned with his engineer, a Mr. Potvin, and stated that he and his engineer had re-studied this job and that they definitely wanted it and the work was awarded to the Suppliant sometime in June 1960.

It may be useful at this stage to describe the reaction of the Department's resident engineer, Mr. Jos. F. Corish, to the awarding of the contract to the Suppliant, as he was the man who controlled the job from the very beginning and was involved in a number of decisions regarding the manner in which the work was to be conducted, the acceptance of material, the making of tests and, finally, he played some part in the decision that was later taken to replace the Suppliant by another contractor.

Questioned in this respect at p. 3095 of the transcript, he gave the following answers:

Q. What was your reaction, Mr. Corish, upon learning that the contract had been awarded to Mr. Persons?

A. My reaction was, I was most discouraged.

Q. Now, I think we would like to know why, Mr. Corish.

A. Well, I had been at that site in nineteen fifty-eight (1958) and had explored or had supervised the series of tests that were taken over two (2) lines extending ten thousand (10,000) feet and approximately southeast, northwest direction and northeast, southwest direction, twenty thousand (20,000) feet in all. Now, while these lines did not correspond with the base line or centre line or property

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line down the project on which I was engaged, nevertheless, I had arrived at the conclusion that there was no suitable material on or near the site other than for purpose of common fill, fill material, and I had been informed over the telephone by Mr. Davies—I haven't got that date—previous to my meeting Mr. Potvin, that the tenders had been opened in Ottawa and that the low bidder was Persons Construction. Mr. Davies had asked me if I had ever heard of him or had any knowledge of him. I said no. I asked him where the head office was and he said, "Sweetsburg". And, he said to me, "Where is that" and I said, "I don't know".

At p. 3100 of the transcript, Corish describes a conversation he had with another contractor interested in this job, a Mr. Franceschini and states that they both agreed that the granular item was "the guts of the job" and at p. 3101 of the transcript, he adds:

> So, after I had been sent to Three Rivers and had been informed by phone by Mr. Davies, that the low bidder was E. J. Persons Construction Company, that their price for granular was forty (.40) cents a ton, and to my remark that the Department would be very foolish to entertain a bid for this material at that price, he agreed and assured me that he was pretty sure the contract would not be awarded to the low tender, because of the low price for this particular item.

And at p. 3103 of the transcript, he stated:

> In the same conversation, I suggested to Mr. Davies that if he insisted or if the Persons Construction representative was insisting on the tender being considered, why did they not disclose their proposed site that I had a crew on the job and if I only knew where this material might be, we would examine it.
>
> I admitted to Mr. Davies, it is possible that they may have something. This is a big country, it is covered with bush and after all, I am not a wizard, but why do they not disclose?

He then referred to his diary where an entry therein indicates that he had marked down "I told RCE we would have trouble because of the low price".

It was under such circumstances that the Suppliant on June 22, 1960, started working on the construction of the Three Rivers airport and later, on August 5 of the same year, signed with the Respondent a contract produced as Ex. S-1, together with detailed specifications for same, produced as Ex. S-17. The time for completion of the airport is set down in the contract as October 31, 1961. He also supplied, as requested, a performance bond in the sum of $230,991.75 (Ex. S-2) and a labour material payment bond in the same amount (Ex. S-3).

For the proper understanding of the difficulties which later developed in the prosecution of this contract, it may be useful to deal briefly in a general way with the nature

and extent of the work to be performed by the contractor in building this strip. The development consisted of a runway 6,000′ X 600′, which comprised the paved area 150′ in width with 225′ right and left thereof, thus forming a total width of graded area of 600′, a parking area of 300′ X 300′ and a connecting taxiway and access road.

The general area, however, to be worked on covered borrow pits allowed to a line 325′ left and right of the runway paralleling both sides including the ditches on the graded area and also 100′ at the south end of the runway towards an existing ditch to be cleared and deepened, an area (for the easement ditch) of 40′ wide and at a point on the north side, an area which flared out and was wider than the 600′ from the centre line.

Exhibit S-17, plan Q-81-3-A, shows a line in the centre which indicates a limit graded area comprising basically the runway, the shoulder and the side strip outside of which appears a line consisting of long lines broken by two short lines which show the limit of clearing, stumping and grubbing covering a greater area than the limit of the grading. At each end there is a section enclosed by a broken line consisting of fairly long sections which are indicated as to be cleared only at the ratio of one and fifty (which refers to the glide slopes of an aircraft coming in and is meant to provide clearance for safety purposes for the landing of aircrafts by cutting the trees back in a slope) from the end of graded area which means that no grubbing or stumping are to be done in that section.

The part which had to be stumped and grubbed first was where the excavation and grading was to be done and this is where the Suppliant started on June 22, 1960.

The main work to be performed by the contractor in order to construct the airport was to clear, stump and grub the area, excavate or cut the graded area and smooth and roll it, drain by means of ditches to be excavated or to be cleaned and deepened, install 8″ and 10″ metal perforated pipe drains and 12″ non perforated pipe drains and concrete catch basins and finally, as already mentioned, lay down on the paved area of the runway 3½ inches of asphalt, over a 9-inch layer of crushed gravel over a 22-inch layer of granular material on a 12 inch sub-graded consolidation.

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The drawings attached to the contract show in detail the lines and grades, as staked out by the Department's engineers, to which the work is to be built by the contractor and the specifications require that if the amount of material to be excavated from the areas to be graded is not sufficient to bring the low places to the required grade, additional material shall be obtained in borrow pits in locations approved by the Department's engineer in the field and borrowed materials shall be paid on the same basis as grading excavation.

Under the specifications of the contract, common excavation applied to earth, muck, muskeg, clay, hard-pan, shale, silts, sand, cemented sand, quicksand, gravels and any other material which can be removed with heavy power grading or earth moving equipment and payment for excavation was to be made at the unit price tendered per cubic yard and include all costs entailed in carrying out these operations as well as the full and complete disposal of materials as specified or directed by the engineer.

In order to measure the quantities involved in the excavation of sections, bench marks are used which are correlated to sea levels. The contract plans show various levels and contours at different points. The dotted line is the existing ground and the solid line is the proposed runway. The high point on the solid line is the centre of the pavement and the low point at the end of the solid line is the edge of the pavement taken as a rule every 100 feet. A cross-section of the level of the ground before any work is done is made and then following the completion of the excavation or the fill, cross-sections are taken of the stage of the job at that point and by relating it to measurements, the quantities can be calculated. To obtain the area in cut which applies to all material taken out, the base line method is used as appears from Ex. S-34A. The total area of the whole of a particular station from the base line, right through to the original ground is first calculated in square feet. The final grade is indicated by a solid line on the plan and the area from the base line to the final is then calculated and by subtracting the latter from the total area, the cut area is determined. This is the manner in which the quantities were calculated during the construction of the strip.

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When borrow pit material was required as fill, a similar method was adopted to calculate the cut quantities as appears from Ex. S-35 where two sections were taken from borrow pit No. 5, situated right off the runway bordering the right ditch and running from station 110 plus 00. The walls of the borrow pit are ordinarily sloped before measurements are taken in order to facilitate same.

Common excavation, therefore, includes the removal of material from high points on the site and the placing of material in low points which have to be brought up to grade. The amount of fill is calculated from the amount of excavation which is done and shown on the sections and the amount of excavation done in the borrow pits.

The quantity of black muck and how it should be dealt with became a serious point of contention between the parties at the trial and as black muck was met with at least twice in substantial quantities on this job, on the east end and the west end, it would be useful to set out how Mr. Davies, the regional engineer, at p. 967 of the transcript, described the manner in which this material was calculated:

Q. So that in the case of black muck, assuming that the material is wasted...

A. Yes.

Q. There would be another stage of calculations?

A. That's correct.

Q. In other words, in effect, to establish a new starting line.

A. You have a new original and a new final to cover the organic material taken out in filled areas. The reason for doing that is that we do not want to build hard surface over organic material.

We have to pay the contractor for taking out organic material before we start depositing fill from the borrow, the good fill.

Mr. Silverwood, the Department's engineer, at p. 2951 of the transcript also described how black muck quantities were calculated:

Q. Now, would your sections be taken before that material was brought in?

A. Of course, sir because that is the way all our calculations are based on. We've got to, after the contractor has cleaned the unsuitable material to the satisfaction of the resident engineer, we sectioned that before they put any fill on there because if they would, we could not calculate nothing. That is the method of payment established by the Department of Transport.

And speaking of the black muck found at the west end, (which according to Mr. Davies, p. 970 of the transcript,

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extended 1,750 feet) and the time it would take to measure the quantities, Silverwood stated at p. 2952:

> A. Before, two (2) hours after they had finished cleaning this unsuitable material from one hundred and ten (110) to ninety-eight (98) ... it would take me two (2) or three (3) hours at the most.

Mr. Davies also stated at p. 970 of the transcript, and this also became a point of contention between the parties, that there was to be no excavation of black muck other than under the paved area as it was required only under the hard surface.

The Suppliant started working on June 22, 1960, and although there occurred a number of minor altercations between the Suppliant's representatives and Mr. Corish, the Department's resident engineer during this period, which indicate that from the very beginning up until the time the contractor was removed, there was a lack of that co-operation necessary for the proper prosecution of the job, the work appears to have progressed satisfactorily enough, at least in so far as it being completed on time was concerned, as even up to December 1960, when it was suspended for the winter months, Mr. Corish reported on progress report No. 12, dated December 15, 1960, that the anticipated completion date was still September 30, 1961, i.e., one month earlier than the completion date set down in the contract, although there is a notation that "on December 16, the contractor was found backfilling excavation around new manholes with loose sand in direct violation of contract requirements and the writer's specific directive of November 28 to his Mr. Dabrowski. Contractor unco-operative workmanship most unsatisfactory".

This alleged violation of the contract requirements, however, would seem to have been of a minor nature as during the lengthy evidence submitted at the trial, very little reference was made to it, the Suppliant explaining that the backfilling of the manholes in the fall was merely for the purpose of protecting them during the winter months. It also appears that, by that time, the relationship between the Department's engineer and the contractor, or his representatives, had deteriorated considerably due to

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some extent to the resident engineer's constant alertness in preventing a low bidder from cutting corners and to some extent to a number of incidents for which the suppliant or his men were not entirely responsible.

The first incident of this type took place at the early stages of the work while Corish discussed with a subcontractor engaged by the Suppliant to do the clearing, the stumping and grubbing, the price he was receiving for the work and disclosed to him the price the Suppliant obtained for the same work, which was $15 per acre more than he was paying the sub-contractor. This caused the latter to be dissatisfied with the price he was receiving for his work (although he should not have been, as a $15 mark up for supervision on a combined unit price of $160 was far from being out of line) thereby causing strained relations between the Suppliant and his sub-contractor.

It turned out also, and this did not help matters, that this sub-contractor had been introduced on the job without any reference to Corish and without his approval, as contemplated by the contract.

The Suppliant then irritated Corish further by installing a slab foundation under his garage, of which Corish was most critical, and on a location for which he had not obtained approval and although strictly speaking, the contractor was required to obtain prior approval from the resident engineer, the location chosen by the contractor caused no inconvenience and it would appear to me that the Suppliant's decision to lay down a slab foundation was not unreasonable.

Another incident occurred early in the work when Corish intervened and insisted that the access road level was 6 inches too low and that Mr. Swanson, the Suppliant's foreman be fired for incompetence, although it later developed at the trial that the Department had issued conflicting plans regarding the level of this road. This matter was referred to the Suppliant and the foreman was discharged.

The Suppliant sometime in July 1960 was delayed for a period of approximately three weeks when the city of Three Rivers could not obtain the easement for the drainage

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ditch running north and west from the westerly end of the runway. This is confirmed by Corish's progress report No. 3 of July 31, 1960, wherein it is stated that "Proposed easement for clearing existing ditch (shown in red) has not been secured by city of Three Rivers. This prevents start of essential drainage work, contractor complaining." This surely must have caused some delay to the contractor and although the obtaining of this easement right was the responsibility of the Department it is most surprising to see the reaction of Corish to the Suppliant's engineer's request that something be done to hasten this matter, when at p. 3114 *et seq.* of the transcript, he suggested to Potvin that he see the city authorities or the owners of the property himself in order to settle this matter.

Corish states that he suggested that pending the necessary easement rights the site could have been drained by pumping the water into the existing water course and that if this had been done he would have allowed an extra, but I cannot see how this could have been legally done without the consent of the riparian owners.

A further incident took place sometime in the fall of 1960 when the Suppliant set up a scale shack for the purpose of weighing the material placed on the site which Corish found to be too small and unsatisfactorily heated for the health of the Department's employees who would use it. However, after discussing the matter, the Suppliant complied with Corish's requirements and this matter was closed.

Until the paved area base had been prepared to receive the granular, which was some time in the fall of 1960, the difficulties between the contractor, his representatives and Corish were confined to skirmishes such as we have just seen. However, when time came to choose the granular, of which approximately 155,000 tons were required to fulfil the contract, the situation deteriorated into a real battle with the contractor attempting to get the resident engineer to accept material situated as close as possible to the site and in several instances from borrow pits alongside the runway, and the resident engineer refusing such material on the basis that it would not meet with the requirements of the contract.

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The resident engineer further took the firm position that the contractor should not only disclose the source of his material, its depth and quantity but also that he should make it possible for the Department's men to test it by opening the face of the pits to render the material available for testing.

The Suppliant appears to have first realized that the rigid requirements regarding the granular material would be an expensive item and entail a loss on September 20, 1960, when he spent a few days on the site, accompanied by a Mr. Leonard and met with Corish.

According to Corish, the Suppliant told him that he had made a personal inspection of the job and that he had been fooled, adding that if he proceeded with the work he would lose $80,000. He asked Corish what he should do. Corish's recommendation was that he should go to his friends in Ottawa and ask them to allow him to abandon the work. The Suppliant, according to Corish, thanked him and said "I am going to Ottawa".

The Suppliant admits that he had a conversation with Corish at the time, not entirely, however, along the lines indicated by Corish and says that he did not go to Ottawa. His version of the incident is that shortly before the meeting he had been approached by a Mr. Perron, who was from the Minister of Transport's law office in Three Rivers, asking whether he would be using more trucks and inquiring as to where the material would come from. Mr. Perron's inquiry in this regard, according to the Suppliant, was instigated by the fact that there were in the Three Rivers area at the time, between 50 and 60 trucks out of work and the suggestion was that if he abandoned the job the balance of the work could be done by day labour. It was under these circumstances, according to the Suppliant, that he went to Corish's office, and to use his own words, "to find out how much did he know about the pressure being put on me by not wanting to accept the material from the site and we had to get it off the site, we had to use trucks".

He claims that having inquired from Corish as to whether he had heard about his getting off the job and it being finished by day labour, Corish would have told him "I think if you want to get off the job it could be arranged,

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you will be paid for everything up to the end of the year and you will be able to get your tender cheque back and it would be finished up by the Department".

With respect to the loss of $80,000, he claims it would have been a loss of $20,000 only, on the basis of all the granular coming from the Paquette pit.

Nothing, however, came out of this meeting as the Suppliant did not go to Ottawa and continued to press on with the job, his men in the meantime searching right and left for suitable material.

Matters then deteriorated further around October 20, 1960 when, according to the Suppliant, he was called to the site by his engineer Potvin to straighten things out as the latter claimed that Corish was driving him crazy (cf. p. 1870 of the transcript). This visit of the Suppliant to the site did not, however, seem to help matters as, according to his evidence at pp. 1870-1871 of the transcript, he states:

> Then, it kept on and at the end of October, between the twentieth (20th) and the end of October, he was practically bogging the job down, refusing to do this, to inspect borrow pits, refusing to talk to my men and to my engineer and walking out on them on several occasions.
>
> He is the hardest man I ever ran against on every contract I have been on for twenty-five (25) years.

Now, although Corish was not the most co-operative nor the easiest man to get along with, he certainly was not what the Suppliant attempts to paint him.

He did, in one instance, refuse to test material three miles south of the runway, and in other instances he did refuse to test material close to the runway and his reasons for doing so appear to have been reasonable as it was either because it appeared clearly not to be suitable, or, if suitable, not to be in sufficient quantities, and in other cases because the Suppliant or his men did not open up the pits sufficiently to allow proper testing.

On the other hand he did on several occasions test material at the expense of the Department. Indeed, on one occasion, with his men he proceeded to a place in the vicinity of Les Forges where some man had stated that he thought he had coarse material. In this instance, he used the Department's crew on the Department's time, excavated and drilled holes and then tested without finding however suitable material. Borrow pit No. 3, alongside the air

strip, was also sieved by Corish's men after the contractor had provided a crane with a clam shell bucket, but here again the material could not be accepted. He further sampled material when Potvin the Suppliant's engineer, brought him a glass gallon jar on October 26, 1960, and he said: "Mr. Corish, this is a sample of granular we propose to supply, will you test it?", to which Corish is said to have answered: "Paul, that looks good, if you have got the quantity of that material, don't wait for our test. Get going and let's get the surface ready and the sub-grade ready and start hauling", insisting however that Potvin disclose the source of this material. Potvin however added that he could not tell the source, to which Corish answered: "I cannot test that on the official form of the Department of Transport. I cannot send to head office a record of that test because I will get the same question I am asking you 'what is the source'. What is it, because I, you, as you know, can go into that field and by selecting stone and certain sand we can get wonderful samples, 5 or 10 pounds."

On October 27, 1960, Potvin returned and pleaded with Corish to test the glass jar material, stating that Mr. Persons, the Suppliant, wanted to know. Corish then gave in and after testing the material himself, stated it was suitable, adding however he still wanted to know the source. He was informed of this source by Mr. Persons himself, on November 4, 1960, over the telephone, when he told him it was a mixture of $\frac{2}{3}$ from the site at 142 plus 00 left and $\frac{1}{3}$ from some other source and asked Corish to test the 142 plus 00 and the latter refused to do it on the basis that this area was on the site of the other projected runway and also because the sample involved had been secured by an individual by the name of Flanigan who had been falsely introduced to him as the Suppliant's project engineer but who, in fact worked for a material testing firm by the name of Warnock-Hersey.

On November 4, 1960, the Suppliant appears to have abandoned using material coming entirely from the site as he wrote to Mr. Davies, chief engineer, Department of Transport, Dorval, P.Q., (Ex. R.-22) the following letter:

Dear Sir:

Further to our telephone conversation of this day, pertaining to item No. 19 of the above-mentioned contract (granular materials) it is our intention to use a mix made up of approximately 65% coming

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from the site and 35% from a gravel pit off the site. This mix will in our opinion meet your laid down specifications.

Concerning the handling of these materials we will of course install the necessary scales and in so far as the mixing is concerned we would do this with graders using the blading process.

At any time that your project engineer wishes to discuss our plans and make the necessary tests of the materials we intend to use we will be very happy to show him our material sources.

The last paragraph of this letter, although innocuous looking, appears to have angered Corish considerably as upon receiving a copy of same, and in reporting to the Department, he referred to the Suppliant and his representatives as being dangerous men apparently because he thought that the paragraph insinuated that he was refusing to test material. The Department, however, appears to have taken the letter as a reasonable request and to have responded by a meeting on November 8 and a letter from R.L. Davies on November 9, 1960, which reads as follows:

Dear Sir:

We wish to acknowledge your letter of November 4, 1960, regarding granular materials for the above airport. In your letter, you state that it is your intention to use a mix containing 65% of materials from the site and 35% of materials from a gravel pit off the site.

Please be advised that if it is found feasible to proportion these materials and produce a suitable mixture, these proportions will be determined by our Resident Engineer after he has made the required sieve analysis on all materials. It will no doubt be necessary to vary the proportions from time to time depending on the gradation of the materials in the pits in order to adhere to specifications.

As mentioned to you during our meeting of November 8, we have an adequate materials laboratory on the site and our Resident Engineer is anxious to cooperate and is equipped to carry out all required testing.

This proposal to blend, however, was turned down on November 21, 1960, when Corish wrote to the Suppliant the following letter, (Ex. S-5):

Dear Sir:

With reference to your proposal dated Nov. 4th. ult. to blend material from Paquette farm with material from Three Rivers Airport site for purpose of supplying granular material to this project.

The writer has re-investigated and retested material from your proposed source at the airport site and your proposed source on the Paquette farm and regrets having to herewith confirm my verbal directives—to your Mr. Potvin on Sept. 9th and repeated to yourself and your Mr. Leonard on Sept. 28th—that specification bank run granular material exists in satisfactory quantity on the Paquette farm and that your proposed method of blending any portion of this Paquette material with material from the airport site would not satisfy your contract requirements.

On November 30, 1960, a change of heart appears to have taken place again when, following a meeting held at the airport on November 24, Mr. Davies wrote to the Suppliant the following letter, (Ex. S—6):

Dear Sir:

This is to confirm the conclusions of the meeting held at Three Rivers Airport on November 24th attended by:

Mr. E. J. Persons
Mr. B. Dabrowski (E. J. Persons Project Engineer)
Mr. Leonard (of E. J. Persons)
Mr. R. L. Davies (Regional Construction Engineer)
Mr. J. F. Corish (Resident Engineer)
Mr. W. G. Nurse (Regional Materials Engineer)

As previously advised by Mr. Corish the proposed granular sub-base material from Paquette's farm was accepted for use as granular fill.

The amount of sand obtained from the airport property which may be blended with forementioned granular material will be determined as follows:

Your firm will place a six inch loose lift of granular material obtained from Paquette's farm, on the runway. During placing Departmental Forces will obtain representative gradations of the forementioned material, as well as of the proposed blending sand.

On the basis of these tests our Resident Engineer will advise you of the approximate weight per cent of sand which may be blended However, final acceptance of the granular sub-base will be based on gradation tests of the blended material, sampled in place.

The blending sand will be deposited by scrapers and laid in a thin lift over the granular material, the thickness of which will be determined by the estimated allowable weight per cent of sand to be used. Rippers or other suitable equipment will be used to completely mix the two materials.

Should it be found that the thickness of the two materials is too great to obtain the specified density it will be necessary to decrease the initial lift thickness from that mentioned above.

Your firm will provide on the airport property the necessary certified scales for the weight measurement of both the blending sand and the granular material from Paquette's farm.

Since your firm has questioned our estimate of the quantity of common excavation performed to date, you were requested to have your Engineer present at the time final cross sections are taken on all borrow pits and graded areas. You were also requested to advise this office in writing as to your acceptance of these final cross sections.

It was agreed that existing borrow pits will not be disturbed, while obtaining blending sand from the airport property.

It was also established that the placing of the 22" granular sub-base course would be allowed to continue this season until weather conditions were such as to prevent obtaining the specified density.

Your firm will provide the Resident Engineer with information as to the source, and with crushed samples of the proposed material for use in the construction of the 9" crushed gravel base course.

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The Suppliant then prepared for the laying of the granular from the Paquette pit in accordance with the authorization laid down in the above letter when he was again prevented doing so by Corish revoking this authorization. Mr. Dabrowski, the Suppliant's engineer, who at that time had replaced Potvin, describes what took place on this occasion as follows (cf. p. 1574 of the transcript):

Q. Will you tell his Lordship just what happened on that occasion?

A. Once, he permitted and other times he did not permit. So, in the last moment, there was permission given and after a while he phones me, "Dabrowski, no gravel tomorrow". I had arranged everything so I could not revoke everything. So, I phoned Mr. Persons. Then, Mr. Corish told me: "On instructions from Mr. Davies, okay, put the gravel tomorrow". So, I put it.

Q. At what time of day did Mr. Corish tell you that you could not put the gravel on the next day?

A. Well, it was afternoon.

Q. Early afternoon, late afternoon?

A. Sometime after noon.

Q. And what time did he finally call you to tell you that you could go ahead?

A. I was getting all ready to go to bed.

. . .

A. Well, if you want so many questions, I tell you how it was already about the gravel. So, it was decided for some time we are putting the gravel. Then, it was hold up by Mr. Corish. Then, he mentioned permission. Then, it was bad weather. Then, it was the question of the cabin, then it was the problem of the cabin how that began.

Then, it was late. Then one day, finally, he decided, "okay". Then in the afternoon, he told me "no". And that night, at nine (9:00) o'clock, he said, "Okay".

So, we started around the next day.

. . .

Q. But this interruption of your delivery of gravel on the site, did that happen more than once?

A. It happened for a few days. It was on and off all the time, disputing. I don't know, I have nothing against Mr. Corish, he is an engineer, he knows his job very good, of course, but his behaviour was not so good.

Even when I went about that matter, he told me to leave his office, "get out, Dabrowski". So, I told Mr. Corish: "Everything in writing, no talk", because he was changing his mind here and there. I was really confused after he does that.

Q. Was he dissatisfied with the quality of the material?

A. I beg your pardon?

Q. Was he dissatisfied with the quality of the material?

A. Very dissatisfied, and the material was very good. But, he was very dissatisfied. He was never satisfied anyway.

It would seem here that Corish would have been concerned with the compaction of the sub-base but that he finally gave in and accepted the deposit of 6 inches of granular by the Suppliant upon the latter undertaking to compact the granular by means of a 50-ton roller the following year.

The Suppliant then delivered, between December 2 and December 15, 1960, approximately 26,000 tons of granular from the Paquette pit to the site, thus supplying about 6 inches out of 22 inches of the granular material required, which was approximately 155,000 tons during which time representative gradations of the material were taken by a departmental engineer by the name of Steve Bruneau and his assistants and a sieve analysis made, the Department finally deciding that the possibility of blending would depend upon the results of this sieve analysis.

Mr. Smith, the Department's engineer in Ottawa, admitted that there was nothing to prevent the contractor from taking a few thousands from one source and some from another as long as the Department was sure it was getting the proper supply. The result of this sieve analysis which, incidentally, was not communicated to the Suppliant until the trial, is contained in Ex. S-23 and indicates that the average percentage passing No. 40 sieve is 20.3 which means that 80 per cent of the material stayed on the sieve thereby allowing (based on 70.9 per cent airport sand passing the No. 40 sieve) 20 per cent to be added from the site as 30 per cent passing was acceptable and the material would still have been within the specifications as admitted by Mr. Smith, of the Department.

The blending of the Paquette material was, however, according to Mr. Davies, turned down on the basis that the Paquette material was borderline material and that there was not enough leeway to permit blending although the only tests produced regarding this material in the pit indicated a variation from 7.5 per cent to 19.9 per cent which was well within the specifications (cf. p. 729 of the transcript) Davies adding, however, that there were not enough tests made in this case to really form an opinion.

It would appear to me, however, that the real reason behind this refusal to blend was the firm stand taken by

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Corish in this regard, and this appears from his statement at p. 3476 of the transcript:

> Now, that is my personal decision, I told Mr. Smith, and I will not sanction it personally and I will not take the responsibility for what might happen if it is sanctioned by you or somebody over you.

Now the decision with respect to blending is under the contract, the responsibility of the engineer and I would not be prepared to say that he was wrong in this regard, nor would the mixing of the material, as required, have been economical if Davies's evidence is relied on, although this refusal to blend might appear to be somewhat arbitrary when consideration is given to the fact that when Persons was allowed to place material on the site, out of the 124 tests made, 7 only failed and that when O'Connell later was allowed to place material out of 179 tests, 68 failed (Ex. S-40). It did appear that in the latter case, 50 per cent of the tests were made of material from a pit which Corish cut off after 4,000 tons of unsuitable material had already been delivered on the strip.

It does, however, seem to me that having given consideration to the possibility of blending and having sampled the material from the Paquette pit, the decision not to allow the Suppliant to blend should have been communicated to him.

Mr. Davies is questioned in this regard at p. 735 of the transcript and from his answers does not appear to be too sure whether it was or not:

Q. Are you aware whether Mr. Persons was ever advised for whatever reason it was decided the blending of material from the site, would not be permitted.

A. If he ever was advised?

Q. Yes.

A. In other words, if he was ever advised that it would not be permitted?

Q. Yes.

A. I would have to check the records. I believe that he was advised.

Q. In what way?

A. By letter.

Q. Could you find such a letter?

A. I could, certainly, try, if you will give me a few minutes.

Q. During lunch hour, you may do that, Mr. Davies, and we will come back to that.

A. Yes.

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No letter, however, was produced and I therefore take it that the Suppliant, following the tests made on the Paquette material, was not informed in writing that he would not be allowed to blend. Davies however, later on at the trial, having obviously refreshed his memory, returned to say that at a meeting held at his office in Dorval, P.Q., on April 15, 1961, the Suppliant had been informed of the decision verbally (cf. p. 2249 of the transcript):

> Q. And do you remember whether the contractor was told that he could or that he could not blend?
>
> A. Yes, that was discussed. The contractor was told, at that time, on the basis of the tests made up to that point, that "he would not be permitted to blend".

Davies then admitted, in answer to a number of questions asked by the Court, that the question of blending was still open providing proper material was found.

The Suppliant on the other hand denies that he was ever told that he could not blend and that he was waiting for the Department's decision as to whether he would be allowed to blend or not and in what proportions (cf. p. 2082 and following of the transcript), together with instructions in writing or a schedule of work of what he was supposed to do in other respects when he went back to work in the spring of 1961.

Before proceeding to the spring of 1961 and to the month of June when the Suppliant was removed from the work, it may be useful to indicate here that in addition to the differences to which I have already referred, which occurred in the course of the work on this construction contract and which has given rise to a number of altercations, the situation had been aggravated further when, sometime at the end of November or beginning of December 1960, Corish, upon instruction from Davies, (which at the trial he said he followed reluctantly and against his better judgment) proceeded to a number of suppliers of the Suppliant, and particularly to a firm by the name of Loranger and Molesworth, of Three Rivers, P.Q., who had supplied the pipe for the air strip at a cost of approximately $32,000, for the purpose of suggesting that this firm file a claim with the Department, (incidentally telling the supplier that although "the work as it existed then was up to schedule" the future work to be done by the Suppliant would cause him to lose $100,000,) although the supplier

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had made no complaint to the Department in this regard and had, as a matter of fact, agreed with the Suppliant to wait until he was paid by the Department (which payment at the time was forthcoming but had not yet been made) and notwithstanding the fact that the suppliers were more than covered by the materials' bond supplied by the contractor at the signing of the contract of which, however, the suppliers were not informed.

The Suppliant's men had also questioned the estimates made by the Department's men of the amount of common excavation done particularly with regard to a large quantity of black muck which was found in the west end and which had not been indicated on the pre-tender plans by the Department, as well as the quantity of excavation in the borrow pits and on the access road and had requested payment for sub-grade consolidation of the granular laid by the Suppliant at the time. As a matter of fact, the major part of the evidence in this lengthy trial dealt with an attempt made by the Suppliant to establish by an examination of the Respondent's engineers that the cross-sections taken during the course of the work were defective and did not indicate the real quantities involved. These differences regarding quantities were carried into the year 1961 and around the 14th of April 1961 at a meeting in Mr. Davies's office in Dorval, P.Q., were the subject of lengthy discussions between the Suppliant's and the Department's engineers. This appears clearly from the evidence and also from a letter written to Persons on April 19, 1961 (Ex. R-11) which refers to this meeting. A memorandum to the Assistant Deputy Minister for Air from the Director of the Construction Branch (Ex. R-8) further deals with the meeting of April 14, 1961, and why it was called, as follows:

2. Many complaints were heard against the Resident Engineer, Mr. Corish, as to being non-cooperative, etc. but I think it was clear to the Minister, and certainly to the undersigned, that the chief complaint was that the contract would be completed at a considerable loss. To substantiate a claim for additional payment the Resident Engineer was accused of being responsible for the loss sustained to date and also that he would not pay for the work the Company had already completed.

3. It was agreed that D.C.B. would arrange a meeting with the Contractor, Contractor's Superintendent, Regional Construction Engineer and the Resident Engineer in the Spring before work commenced to discuss all contentious points that had arisen or would be liable to arise during the new construction season to clear any possible misunderstanding in interpreting the contract and specifications.

4. A meeting was called on Friday, April 14th, in the Regional Engineer's office, Montreal, and in addition to the writer, the Regional Construction Engineer, the Resident Engineer, Mr. Persons had his solicitor, his Secretary-Treasurer, and his Superintendent present.

5. We were not able to obtain from the Contractor a schedule of operation for the coming year that he would follow to complete the work by the completion date of the contract which is the end of October, 1961. At first his reluctance to provide this information was said to be due to his inability to plan until he was assured of payment of his claim for additional quantities of excavation, etc. Needless to say we could not agree to this with so much in dispute.

6. The Contractor was not able to produce any documents, cross-sections or other data to substantiate his claim to us that we might compare his cross-sections with those of our own field staff. However he did say that the information required was available at his office. D C B. suggested that the Department would send an Engineer experienced in quantity survey to meet with their Engineer and endeavour to determine by comparing the cross-sections why there was such a terrific difference in the quantities determined by the D.O.T. Engineers and the Contractor's personnel.

7. Arrangements have been made for Mr. Dujay of our Headquarter's Engineering Staff to proceed to Three Rivers and make this independent study of the available cross-section and data and bring forward a recommendation.

8. On receipt of his recommendation it is the intention to advise the Contractor of the amount of money due to him for work done to date and instruct him to proceed and complete his contract. If he refuses the settlement it will be necessary to have our Legal Branch prepare an order to the Contractor instructing him to commence work within a specified time, failing which the Bond Company will be asked to take over.

As a result of this procedure, it would appear that the Suppliant's request for further quantities and additional payments met with some success as on May 18, 1961, H. J. Connolly wrote to Persons a letter explaining the manner in which progress payments on unit price contracts are calculated by the engineers of the Air Service Branch and informing the Suppliant that:

A report has now been received from our Engineer from Headquarters, who recently conducted an examination of the plans and cross-sections pertaining to this contract, and as a result of this report we are having a progress estimate prepared which we are ready to put forward for payment when actual physical work has commenced on the project. In this connection we understand that the site has been suitable for working for the past week and it would be to your interest to make an early start for the completion of the contract by October 31st, 1961, as there will be no extension of this date and any incompleted work at that time will be very costly.

This letter contained another paragraph where some response was given to the contractor's request for further payment and further quantities which reads as follows:

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In preparing a new progress estimate we will show a payment of $300.00 for removal of fences. This, as you know, was a controversial item during our discussion. Common excavation we are prepared to increase by 20,000 cu. yds.; ditching 18,000 cu. yds.; cleaning of ditches 3475 cu. yds. and for excavation of the entrance road we will be allowing 14,000 additional cu. yds. subject to remeasure as, due to winter conditions, accurate calculations were not possible. Smoothing and rolling we consider was adequately covered in our letter of April 19th.

Smith, however, one of the Department's engineers, stated that the additional quantities granted were based at the time on estimates only and that the final estimates (Ex. R-1) established, with respect to the 14,000 cubic yards of excavation allowed for the entrance road in addition to the 18,000 already granted, that the exact figure was 19,117.74 cubic yards which, therefore, was not too far from Corish's estimate.

During the winter months, a number of the Department's men, under the instructions of Corish, worked throughout the months of January, February, March, April and May 1961 in going over once again the sections already taken during the work performed by the Suppliant (and this must have been a very expensive procedure) because "it was his (Corish) solid judgment that this contractor would not complete the contract on the basis of what he had seen" (cf. p. 3222 of the transcript) and at p. 3226 thereof he further develops his assumption as follows:

A. ... "This man will not complete this job irrespective of his assets, his prices cannot produce a structure anywhere in conformity with this requirement of this contract". That is based entirely on my own knowledge and responsibility.

Now, although there is no question in my mind that the Suppliant, because of his low tender, could not make any profit on this job and would probably have sustained a loss, and on this subject I will say more later, the above statement would seem to indicate that its author was unmindful of the fact that the lowest bidder on any work is always entitled to lose money on a particular job and may I add as little as he possibly can, providing he produces and completes the work on time and in accordance with the requirements of the contract and its specifications. As a matter of fact, many jobs are taken by contractors at a loss, (although this is not the present case) merely to retain their key men or even sometimes to keep available

machinery busy; and it therefore appears to me that the mere fact a contractor might lose money on a job is not a good enough reason to remove him.

The Respondent, of course, does not rely on the fact that the Suppliant could not at his price, produce the required structure but, in his plea, takes the position (in section 46 thereof) "that the Petitioner failed to proceed with the construction diligently and in accordance with the terms of the said contract"; (in section 47) "that he failed or neglected to pay certain of the subcontractors to whom he was indebted;" (in section 54) "that no action was taken with respect to the foregoing consolidation of sub-grade and installation of ducts referred to in the preceding paragraph 53 by the Petitioner in December 1960, in May 1961 or during the first two weeks of June 1961; and in fact no such action was ever taken by the Petitioner;" (section 74) "that the Regional Construction Engineer made several attempts on May 19th, May 23rd and May 29th, 1961 to contact Petitioner at his office at Sweetsburg to obtain a schedule and to inquire when Petitioner intended to recommence operations" but to no avail; (section 84) "that the Project Engineer of the Petitioner, one Mr. Shinner, appeared on the construction site on June 8th, 1961, but without any knowledge of the works programme or specific instructions from the Petitioner on the manner of advancing the work and on the schedule of the said work, so as to complete the construction by the contracted completion date of October 31st, 1961;" (section 86) "that the equipment which Petitioner sent to the site on June 9th, 1961, consisted only of two bulldozers, only one of which was operational and neither of which was proper nor could it be used for these parts of the project most vital and urgent;" (section 90) "that Petitioner failed to diligently carry out the work required, the performance of which he contracted;" (section 93) "that up to the date of the said notice, the contractor had shown no desire to carry out the contract and it was evidenced from the organization and equipment planned for the job that the work could not possibly be completed by October 31st, 1961 in accordance with the terms of the contract;" and finally (section 99) "that the Petitioner evidenced no intention of recommencing work after the winter lay-off when time was opportune

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for doing so by May 15th, 1961, and not even after he was put in default to do so by the notice of June 1st, 1961".

I might say that of all the complaints raised in the plea, the only one, in view of what took place prior thereto, which might have justified the Respondent in taking advantage of section 18 of the contract at the time would be that the Suppliant "did not diligently execute the work to be performed under the contract and that he evidenced no intention of recommencing work after the winter lay-off when time was opportune for so doing by May 15, 1961 and not even after he was put in default".

As for diligently performing under the contract until the 30th of December 1960, (if I can deal with this at all, in view of the manner in which the Respondent exercised its rights under Clause 18 of the contract of which more later) I cannot in view of Ex. S-21, which is Corish's progress report No. 12, dated December 1, hold that the Suppliant was remiss in this respect in view of the Department engineer's statement that the completion date was September 30, 1961, i.e. one month before the completion date set down in the contract. It therefore follows that the only real issue here, and a crucial one, is whether when the Suppliant was informed by letter dated June 13th or 14th (Exs. S-12 and S-13) signed by H. J. Connolly, Director of the Construction Branch of the Department of Transport, that the work was taken out of his hands and turned over to another contractor, H. J. O'Connell Limited, he, the Suppliant was legally in default under clause 18 of the contract. The Respondent here takes the position that as attempts by the Department to reach the Suppliant during the months of April and May in order to find out when he would start working on the project, were unsuccessful and although the site was ready to be worked on at least as early as May 15, 1961, there was no sign of the Suppliant or of his men in Three Rivers as late as the 1st of June 1961, the Respondent had no alternative but to take advantage of clause 18 of the contract, which reads as follows:

18. In case the Contractor shall make default or delay in commencing or in diligently executing, any of the works or portions thereof to be performed, or that may be ordered under this contract, to the satisfaction of the Engineer, the Engineer may give a general notice to the Contractor requiring him to put an end to such default or delay, and should such default or delay continue for six days after such notice shall have been

given by the Engineer to the Contractor, or should the Contractor make default in the completion of the works, or any portion thereof, within the time limited with respect thereto in or under this contract, or should the Contractor become insolvent, or abandon the work, or make an assignment of this contract without the consent required or otherwise fail to observe and perform any of the provisions of this contract then, and in any such case, the Minister for and on behalf of Her Majesty, and without any further authorization, may take all the work out of the Contractor's hands and may employ such means as he, on Her Majesty's behalf, may see fit to complete the works, and in such case the Contractor shall have no claim for any further payment in respect of work performed, but shall be chargeable with, and shall remain liable for, all loss and damage which may be suffered by Her Majesty by reason of such default or delay, or the non-completion by the Contractor of the works, and no objection or claim shall be raised or made by the Contractor by reason or on account of the ultimate cost of the work, so taken over, for any reason proving greater than, in the opinion of the Contractor, it should have been; and all materials, articles and things whatsoever, and all horses, machinery, tools, plant and equipment and all rights, proprietary or otherwise, licences, powers and privileges, whether relating to or affecting real estate or personal property, acquired, possessed or provided by the Contractor for the purposes of the works, or by the Engineer under the provisions of this contract, shall remain and be the property of Her Majesty for all purposes incidental to the completion of the works, and may be used, exercised and enjoyed by Her Majesty as fully, to all intents and purposes, connected with the works as they might theretofore have been used, exercised and enjoyed by the Contractor, and the Minister may also, at his option, on behalf of Her Majesty, sell or otherwise dispose of, at forced sale prices, or at public auction or private sale or otherwise, the whole or any portion or number of such materials, articles, things, horses, machinery, tools, plant and equipment at such price or prices as he may see fit, and retain the proceeds of any such sale or disposition and all other amounts then or thereafter due by Her Majesty to the Contractor on account of, or in part satisfaction of, any loss or damage which Her Majesty may sustain or have sustained by reason aforesaid.

The following notice (Ex. S-9), dated June 1, 1961, was forwarded to the Suppliant:

Pursuant to clause 18 of the contract in writing between HER MAJESTY THE QUEEN IN RIGHT OF CANADA, represented by the Minister of Transport, and E. J PERSONS, doing business under the firm name and style of E. J. PERSONS CONSTRUCTION of Sweetsburg, in the Province of Quebec, dated August 5, 1960, bearing No. 64840 in the records of the Department of Transport, being in respect of the construction of a Runway 6,000′ × 150′, a Parking area 300′ × 300′, a connecting Taxiway and Access Road at Three Rivers Airport, Three Rivers, Province of Quebec, I hereby give you notice that I require you to put an end to your default and delay in diligently executing the works to be performed under the said contract.

And I have to advise you that in the event of failure on your part to comply with this notice on or before June 12, 1961, the works will be taken out of your hands and will be completed by the Department as may seem fit, and, in this connection, your attention is called to Clause 18 under which you will have no claim for any further payment, but you will

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be chargeable with and shall remain liable for all loss and damage suffered by Her Majesty and to clauses 48 and 50 under which the security deposit made by you will be forfeited.

This notice was acknowledged by the Suppliant's solicitor on June 7, 1961 by a letter of that date (Ex. S-10) which reads as follows:

Dear Sir:

On behalf of our client, Mr. E. J. Persons, we wish to acknowledge your notice of June 1st 1961 concerning the commencement of work in respect of the above noted Contract, by June 12th, 1961.

As you are undoubtedly aware, due to weather conditions and soil conditions, it was impossible up until a few days ago, for our client to commence work and be certain that it would be done to the proper standards. We wish to advise you that our client intends to commence work on or before the 12th of June 1961.

It is our understanding that it was agreed at our last meeting, between yourself and members of your Department, with our client and ourselves, that when Mr. Persons recommenced work in respect of the above Contract, you would send a new engineer on the job and so would our client. When our client commences work he will have a new engineer on the job and we presume that your Department will also present a new engineer. If this is not so, we would appreciate hearing from you in this regard on or before the 12th of June 1961.

This letter was followed by a wire from E. J. Persons, dated June 8th (Ex. S-11) which reads as follows:

RE THREE RIVERS AIRPORT PLEASE BE ADVISED THAT OUR ENGINEER MR. MIKE SHINNERS IS NOW AT AIRPORT SITE WILL BE READY TO RESUME WORK MONDAY JUNE TWELFTH

Mike Shinners, a professional engineer, then appeared on the site with two bulldozers, one which was stopped by Corish some time after it had started, on June 12, stumping, grubbing and pushing the stumps around and shaking them out, because it had a straight blade, the other continued working until the 6th of July, 1961. He also contacted Shell Oil Company for the supply of fuel oil and made the necessary arrangements to bring on to the site a back hoe to work on the trenches for the conduits on the runway and he stated that three half yard back hoes and one two yard back hoe as well as a wobbly wheel compactor were available at the site of another job in Three Rivers, where the Suppliant was working.

Shinners' instructions from the Suppliant when he proceeded to the site in June 1961 (of which I will say more later) were as follows, cf. p. 1014 of the transcript):

Q. And what instructions were you given by Mr. Persons in June 1961 when you went back on the job?

A. I was told to get a schedule of work as to how we would proceed from the Department of Transport and you know bring your equipment in, getting the work . . .

Q. In accordance with that schedule?

A. Yes.

Q. Were you to do anything particularly, in the meantime as far as the work was concerned, until you got this schedule and got the equipment back?

A. If we had the equipment in, we would be shaking out the stumps which had been placed the year before, on the site of the runway.

On June 12, 1961, Corish delivered to Shinners on the site, a memorandum (Ex. S-8) comprising a schedule of work which reads as follows:

1. Because of the confused and unsatisfactory manner in which the work on this project has hitherto been conducted by your principal and because of various unjust allegations (seriously reflecting on the writer's capacity and character) which have been addressed by Mr. E. J. Persons and his Mr. Leonard to my authorities, I am adopting this unusual and in my long experience, unique procedure of giving all of my directives to yourself and your principals in writing.

2. Accordingly I am requesting that you:—

(*a*) ask your principal to confirm to me personally or in writing, that you or such other suitable person as he may decide are in fact the "lawful representative of the Contractor" as set out in Item 13 of Contract Indenture.

(*b*) ask your principal to disclose to me his complete schedule of work, sources and samples of all materials he has contracted to supply to this project.

(*c*) ask your principal to expedite this information so as to give me adequate time to arrange for necessary staff, materials tests, etc. As of this date I am unaware of your principal intentions re his proposed schedule of work, the equipment he proposed to supply or the source & quality of all of the materials for which he is responsible.

3. (*d*) Assuming that you are now or are to be the representative of the Contractor, I am submitting for your information and action my requirements for the priority and sequence of work remaining to be done on this project:—

(*a*) Install all ducts across runway & taxi strip as specified.

(*b*) Excavate existing backfill material round all manholes, catchbasins and over pipes across runway & taxiway and replace backfill material to subgrade level in the manner & with the equipment specified.

(*c*) Compact 12" deep as specified runway subgrade extending 77' left from center line of runway between stations 155 00 & 124 00 and such other subgrade areas as may be indicated when tests are completed.

(*d*) Compact as specified loose layer of gradular material existing over entire runway, taxiway & apron subgrades.

(*e*) Supply, apply & consolidate as specified additional granular material required to bring compacted surface of this material to planned and given grade.

(*f*) Supply and apply crushed gravel base course as specified.

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(*g*) Apply priming material as specified (priming material to be supplied by the Dept.).

(*h*) Supply & apply as specified, 3½" asphaltic concrete (Asphalt cement to be supplied by the Dept.).

5. It is to be distinctly understood that these operations are to be initiated immediately, carried to completion before October 31st, 1961 and in the sequence as listed. Other works remaining to be done must also be completed in the stipulated time—on or before Oct. 31st, '61—provided always that the initiation or prosecution of any item not set out in the above directed schedule does not interfere in any manner whatsoever with the urgently required priority of the items listed.

The following day, H. J. Connolly, Director, Construction Branch, Department of Transport, forwarded copy of a letter dated June 13, 1961, addressed to E. J. Persons to the Fidelity-Phenix Insurance Co., whom he erroneously thought had issued the performance bond and the original of the same letter, but dated June 14th (Ex. 12) (the date appearing to have been changed) to E. J. Persons. This letter reads as follows:

E. J. Persons Construction,
67 Main Street,
Sweetsburg, Quebec.

Dear Sirs: Re: Contract No 64840 dated August 5, 1960, between the Department of Transport and E. J. Persons Construction for construction of a runway, parking area, connecting taxiway and access road at Three Rivers Airport.

Reference is made to my notice of June 1, 1961, addressed to E. J. Persons Construction giving notice pursuant to clause 18 of the above mentioned contract to put an end to the default and delay in diligently executing the works to be performed under the said contract.

In view of the fact that the work covered by Contract No. 64840 has not been proceeded with pursuant to my notice, aforesaid, of June 1, 1961, I have to advise E. J. Persons Construction that the *Department* is taking the work out of the said contractor's hands and has entered into a contract with another contractor, namely, H. J. O'Connell Limited, to complete the work covered by the said contract.

Yours truly,
Sgd. H. J. Connolly
(H. J. Connolly),
Director, Construction Branch.

c c. The Fidelity-Phenix Insurance Co.

H. J. Connolly explained how this was done at p. 551 and following of the transcript:

A. Yes, at that time, when I wrote the letter, it would be on June thirteenth (13th) with the intention of going down there to verify in my own judgment, whether I should cancel the contract. I took the letter. I had it typed by my stenographer in the office.

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Q. In Montreal?

A. No, Ottawa, sir. Then we had to arrange transportation to get down there. And, I found out the closest place we would get was to get our own aircraft and fly down to Cap de la Madeleine and we would have to drive from there.

I took this letter with me intending to serve it, if I found that our regional engineer was correct in what he was saying.

Then at p. 552:

There was no work being done. When I was convinced that they had not been doing any work, and did not appear to be wanting to do any work, then I sent the letter back by hand. But, the date was already on it. It was the day before. I sent this letter back to Montreal .... no, I am sorry, I left the letter in Montreal with the Regional Office and told them, if the conditions of the work were unsatisfactory when I got down there, I wanted them to take this by hand, with a witness and serve it by hand on the contractor at Sweetsburg.

Now, I said, "I will phone you and tell you whether this is to be sent". Now, I left it with them. When I got down to Three Rivers and the place was such a mess, there was no one there to talk to, I decided we would send the letter.

So, I called the Montreal Regional Office by telephone and asked them to send the letter down but to put the correct date on the letter.

So, I assumed they made the change on the date on the letter in the Montreal Office.

At p. 553 Connolly is asked the following:

Q. . . . in this letter Exhibit S12, it states near the end, "the Department is taking the work out of the said contractor's hands and has entered into a contract with another contractor, namely H. J. O'Connell Limited, to complete the work covered by the said contract".

He was then asked from the evidence which he gave earlier if this was correct and he answered:

A. In my opinion, I had a verbal contract with the representative of the O'Connell Company. Actually, what transpired down at the job, when we were looking it over, I said, "Now, the essence of this contract is speed and time".

And, I said, "Can you (the H. J. O'Connell representative) start immediately". He looked at his watch and it was twenty after twelve (12:20) and he said, "I cannot start to-day, but I can start tomorrow morning". He said, "We are working on a job up here a few miles up on the highway job and I will bring some equipment down from there".

I said, "Will you do that". And, I said, "I've got to get this job moving". He said, "Yes, I will bring some in the morning". So, I said, "Go ahead".

I had committed the Department to that contract.

Q. At that point, some of the prices had not been discussed or decided?

A. It had been agreed that we would give him some extra consideration for a number of what we considered low prices.

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Q. This letter, you say, was written the previous day?
A. That is correct.
Q. In your office? In Ottawa?
A. Yes.
Q. At that point, there was no contract with O'Connell, you had not even met Mr. Verge?
A. That's right. All I had at that time was they say, "they would be prepared to take it over at adjusted prices".

I have gone into the evidence here in some detail because the background which led to the Department taking advantage of clause 18 of the contract is necessary to properly deal with the question as to whether the Minister has validly taken "all the" work out of the contractor's hands pursuant to clause 18 of the contract.

In considering this question, it is important to have in mind the various alternative conditions precedent to the exercise of the power conferred by clause 18 to take the work out of the contractor's hands. These are:

(1) "In case (*a*) the contractor shall make default or delay in commencing or in diligently executing any of the works or portions thereof to be performed...to the satisfaction of the engineer; (*b*) the engineer gives a general notice to put an end to such delay or default, and (*c*) such delay or default continues for six days after such notice."

(2) "Should the contractor make default in the completion of the works or any portion thereof, within the time limited with respect thereto in or under this contract."

(3) "Should the contractor become insolvent,"

(4) "or abandon the work,"

(5) "or make an assignment of this contract without the consent required,"

(6) "or otherwise fail to observe or perform any of the provisions of the contract".

A comparison of these various classes of cases in which, if they arise, the Minister may take the work away from the contractor, makes it clear that while the Minister has authority under clause 18 to base the exercise of the power upon a "default in the completion of the works...within the time limited...in the contract" (No. 2 *supra*) or any failure to observe or perform any of the provisions of the contract (No. 6 *supra*) when as in the notice of June 1, 1961 (Ex. S-9) and the letter of June 14, 1961, (Ex. S-12)

as well as in the firm position its counsel took at the trial, the Respondent specifically bases Herself on No. 1 (*supra*) i.e., "default or delay in ...diligently executing any of the works or portions thereof to be performed...under this contract", She cannot rely on any other basis.

It therefore follows that the Respondent having thus restricted the exercise of the power conferred by clause 18 to take the work out of the contractor's hands to the first case provided thereunder, (No. 1 *supra*) it is not sufficient to subsequently support the exercise of this power on any other default, delay or reason in complying with one of the requirements of the contract.

The Respondent in basing Herself on No. 1 (*supra*) must show all of the following in order to validly take the work out of the contractor's hands pursuant to clause 18:

(*a*) that the contractor "to the satisfaction of the engineer" made a default or delay in "commencing" or "executing" some specific "work" or portion of work;

(*b*) that the engineer gave a general notice to the contractor to put an end "to such default or delay";

(*c*) a failure to put an end "to such default or delay" for six days after such notice.

The notice of June 1, 1961, does not comply with (*a*) or (*b*) (*supra*) of which I will say more later and it is even doubtful that it complies with paragraph (*c*) (*supra*) as appears hereunder.

Two main attacks were made by the Suppliant with respect to the notice given by the Respondent herein, as well as the letter given by Connolly taking the work out of the hands of the contractor in that (1) the Suppliant under the Respondent's notice (Ex. S-9) was entitled to correct any default or delay beyond June 12, 1961, and up to June 17, 1961, and (2) the Minister or Deputy Minister only were entitled to take the work out of the contractor's hands.

Clause 18 provides that if default or delay continues for six days after notice has been given, then the Minister can take all of the work out of the contractor's hands. In the present case, however, the Department's engineer having chosen to specify a date or a deadline for the commencement of the work and having granted a specific delay for

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compliance with the notice dated June 1, 1961, (Ex. S-9) namely that work was to be commenced on or before June 12, 1961, and not having simply required the contractor to get on with the work, in which case the six days' delay would have commenced when the notice was given, i.e., June 5, 1961, the delay here would have started running only on June 12, 1961, and the six days continuance of such default could not, therefore, have been completed until the end of June 17, 1961. Thus until June 17, 1961, as urged by counsel for the Suppliant, the Minister had no power under the contract to take the work out of the contractor's hands, and, therefore, the steps taken by the Department of Transport on or around June 14, 1961, were premature, not in accordance with the terms of the contract, and the work was illegally and improperly taken out of the Suppliant's hands.

Counsel for the Respondent on the other hand submits that as the notice was received by the Suppliant on June 5, 1961, the six days during which the latter remained in default ended on June 12 at which time the work could be removed from the contractor which however as already mentioned happened to be also the very day Corish delivered his schedule of work.

The language used in the notice cannot I believe, lead to this interpretation and I would incline towards the view that the six days of continued delay necessary under clause 18 of the contract would have commenced to run on the 12th of June and terminated on the 17th as submitted by the Suppliant. However, even if Respondent's interpretation of the said notice is the correct one and the Suppliant would have been in default on June 12, 1961, he still would not have been in default in view of Ex. S-8, Corish's instructions in writing to the contractor of June 12, 1961, wherein he determined the work to be done and the sequence to be followed and stated in paragraph 5 thereof that: "It is to be distinctly understood that these operations are to be initiated immediately, carried to completion before October 31st, 1961, and in the sequence as listed." These instructions of the resident engineer in conflict with Connolly's notice of June 1, 1961, would, in my view, supersede the latter, act in effect as a waiver thereof, set a new departure

for the continuation of the work and require a new notice again if the Respondent wanted to avail Herself of Clause 18.

The words of clause 18, under which the Department purported to act, is a confiscatory clause and as such should be strictly construed against the party seeking to enforce its provisions (cf. *Neelon v. City of Toronto and E. J. Lennox*[1] where it was held that a forfeiture provision [similar to the one dealt with here] is to be strictly construed and that where the building owner and architect dismissed the contractor, he must comply strictly with the requirements of the contract). I would nevertheless, in a case such as this, have hesitated to decide an action such as the present one on the sole basis that the Respondent had not taken a mere formal step required under the contract. There is, however, here such inconsistency, irregularity and non-compliance on the part of the Respondent in exercising its rights under clause 18 of the contract that I find myself unable to say that we are merely dealing here with a question of simple procedure or formality. I might further add that although the Court must not attempt to mitigate the hardship upon the contractor of such a clause, however oppressive it may be, it also follows, I believe, that care must also be taken not to add to its severity by making it available to unauthorized persons or by allowing it to be exercised in a manner which (through the very actions of the person or persons in whose favour such a clause is inserted) would not allow the contractor the opportunity contemplated by the contract to correct whatever default he is accused of.

On the basis of the evidence adduced, I would have been prepared to hold that the Respondent's engineers were entitled to assume from the inactivity of the Suppliant on the site of the work in the spring of 1961 that he was not diligently prosecuting the work and that there was great doubt that he would have terminated the job on time if at all, were it not for (1) the sending of the notice (Ex. S-9) by the Respondent which (and this was admitted by the Respondent's counsel during argument) indicates clearly that if upon receipt of same and within the period set down therein he diligently proceeded with the work notwithstanding what he had done prior thereto, the Department

[1] (1893-1896) 25 S C.R. 579.

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would not be able to take advantage of clause 18 as, once the notice was given, the Respondent's right to act on it depended not on its view of the Suppliant's conduct prior thereto but on whether, after receipt of the notice, he did or did not for six days make default in regularly proceeding with the works, and for (2) the schedule of work (S-8) produced by Corish on June 12, 1961, and the effect it had on waiving any rights the Respondent had under the notice of June 1, 1961, (if any) which I have just dealt with, and for (3) the position taken by the Suppliant that as a result of a number of discussions held with the Respondent's engineers and particularly a meeting held on April 14, 1961, attended by the Respondent's engineers and the Suppliant and his counsel, he had been promised a decision as to whether he could bury the stumps, or even merely push them (as O'Connell later was allowed to do) instead of burning them, whether he would be allowed to blend the granular, and in what proportion and finally that he would be given a schedule of work in order to avoid all the trouble he had experienced the preceding year with the Respondent's resident engineer, even suggesting that he would send in a new engineer if the Department would do likewise.

It therefore appears that the question as to whether the Suppliant was justified or not upon receipt of the notice of merely doing whatever work required no definite instructions, such as pushing stumps around, pending receipt of a written schedule of work, depends on whether this schedule of work had been promised to him or not. As the evidence on this subject is somewhat conflicting it will be necessary to review it in some detail in order to assess it properly.

Persons, at p. 1750 of the transcript, speaking of the meeting held in Davies' office on April 14, 1961, when trying to discuss the job in general to get some idea of what quantities the Department would allow him and to see what could be worked out for the coming year, asserted that:

> One thing was discussed, it was how we were going to proceed with the job and if we could not avoid trouble which we had been having in the past two (2) months from the fifteenth (15th) of October to the fifteenth (15th) of December, nineteen sixty (1960) and get on better relationship between my engineer and the site engineer, which we had somehow, some argument at that meeting.

As I remember, when Mr. Stalker started questioning Mr. Corish, he got up and tried to leave the room. He said, "He was not taking that kind of talk from that gentleman", and he walked to the door and Mr. Connolly said, "You come back and sit down. You've got to listen to this man and you've got to answer his questions".

So, Mr. Corish came back and sat down and then the meeting went on and we agreed that everything would be done in writing, all orders, instructions would be given in writing to us and we did agree that the schedule of work would not come from myself, it would come from Mr. Corish because I did not want any more of this stuff going around. When we decided to do something, he was out in the field to stop us. When he decided, it was much easier. So, I thought I would reverse the procedure and let him give the orders and we would try to get along with him the best way as possible.

I mentioned that I would bring a new engineer on the job and I was hoping and I asked them if they would not send a new engineer on the job and they said, they would think about it—they would discuss it.

I told him I thought it would be much better if we both sent a new engineer on the job and let them have a new start, that I thought the thing would work out okay.

When the job started, Mr. Corish came on the job. I was supposed to be notified when to go back to work. I could not go back to work on my own, I had to receive a letter from The Department of Transport and they were to notify me when their engineer would be there, ready to proceed with the work.

The attitude taken by the Department with regard to the schedule of work issued by Corish on June 12, 1961, was not too clear. It started out with a clear denial that it had ever been discussed at the meeting of March 14, 1961, and ended by an admission that the matter had been discussed. Corish's evidence on this matter is not too clear either, when at p. 3237 of the transcript he is asked the question:

Q. Did you do that at the request of Mr. Shinners?

A. No, I did it on my own initiative and for the record, because at the time I had been able to contact the RCE, he was up here and he said he had been instructed and I was awaiting instructions other than what he told.

And later cross-examined by Mr. Stalker, counsel for the Suppliant, at p. 3586 and p. 3587 of the transcript, these instructions would seem to have resulted from the meeting of April 14, 1961:

Q. Mr. Corish, on the twelfth (12th) of June nineteen sixty-one (1961) . . .

A. Yes.

Q. You handed to Mr. Shinners at Three Rivers ... I believe you also mailed to Mr. Persons a memorandum dated the same day, headed "Directive re: Prosecution of work on contract number 46840". This is produced as Ex. S-8.

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You referred to this in your evidence and this arose, as I recall and as I think your evidence stated, as an outcome of the meeting which was held in Mr. Davies office on the fourteenth (14th) of April of that year.

You referred to this in your examination in chief, as a series of questions to be directed to the contractor's representatives as to the prosecution of the work. But looking at both, from the title and from the wording, it is instructions rather than questions, is it not?

A. It is primarily a question and secondarily there are instructions based on a supposition that this contractor will go ahead with the work. You can interpret it—that was my intent and meaning.

Connolly at p. 561 of the transcript does not remember if the proposed schedule of work was discussed at the April meeting.

Davies on the other hand starts by denying that there was ever any question of supplying the Suppliant with a schedule of work and then ends up by admitting that the matter was discussed and this appears clearly from extracts of his evidence at pp. 2251-2252 of the transcript, where he answered as follows:

Q. At this meeting, was there any question of furnishing a work schedule to the contractor?

A. No, not to my knowledge.

Q. Was the question of the time, when the contractor should return on the job, discussed?

A. No, I do not recall that being discussed.

Q. Do you recall whether the contractor would have been told that he was not to return on the job until he heard from the Department?

A. Definitely not. I do not recall that at all.

Q. Was there any question of written instructions furnished to the contractor discussed?

A. No.

However, later Mr. Davies, on this rather important point, returned to the stand and while being examined by counsel for the petitioner, at pp. 3948 and 3949 of the transcript, stated the following:

Q. In your evidence, Mr. Davies, in discussing the meeting which was held in your office on the 14th of April, 1961, you stated more flatly than that, there was no discussion of furnishing of any written instructions or order of work to the contractor.

A. During that meeting?

Q. Yes at that meeting ...

A. I made the statement that there were no discussions of furnishing written instructions?

Q. Yes.

A. I do not recall making that statement, Mr. Stalker.

Q. Without going back into the evidence, if I were to ask you the question now, "was it discussed at that meeting" ...
A. I believe it was discussed at the time.
Q. Fine. I had a different note down I know now what it is.

It would seem that the situation created by the decision on June 13, 1961, to remove the contractor from the job a day after Corish had delivered his schedule of work resulted from a lack of coordination within the Department between Corish and Connolly and also because the latter either did not know or had forgotten that such a schedule of work had been promised. Now, for whatever reasons this was done, it does appear to me that I must, on the basis of the evidence before me, accept the Suppliant's contention that he was awaiting a promised schedule of work which arrived on June 12, 1961. In this respect, I go no further than say, and I do this without deciding whether the contractor was remiss in his duties to proceed diligently with the work or not, that under the circumstances, it is not possible to hold the contractor in default in not diligently proceeding with the work so as to allow the Respondent to take advantage of the confiscatory clause 18 of the contract (and which incidentally is an extraordinary measure to be exercised strictly within its terms) when the contractor having received a notice to correct a default from the head office of the owner is entitled to await written instructions promised either by the owner's representatives, Mr. Davies in the Montreal office or Mr. Corish on the job, and which was necessary to correct such default. How indeed is it possible to find the Suppliant in default on June 12, 1961, as urged by counsel for the Respondent, on the very day he received the written instructions he had been promised and was awaiting to proceed with the work.

There is, however, a further reason for holding that the Respondent could not, under the circumstances, avail Herself of clause 18 of the contract, in that the evidence is not sufficiently cogent that the decision to take the work out of the contractor's hands on June 13 or June 14 was taken by the Minister of Transport or the Deputy Minister, as required by the terms of the contract, particularly when all the evidence points to the decision having been taken by the Department through Mr. Connolly, its Director of Construction Branch.

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Clause 18 of the contract states at line 12 that "The Minister for and on behalf of her Majesty...may take all the work out of the Contractor's hands..." and under clause 1 of the contract "Minister" is defined as "the person holding the position, or acting in the capacity, of the Minister of Transport, for the time being and shall include the person holding the position, or acting in the capacity, of the Deputy Minister of Transport, for the time being" and at the relevant time the Minister here was the Hon. Mr. Balcer and Mr. John Baldwin was the Deputy Minister of Transport, and not Mr. H. J. Connolly who was by definition "the engineer" under the contract. That Connolly or some other departmental official would have taken this decision instead of the Minister or Deputy Minister appears from the letter forwarded by Connolly (Ex. S-13) wherein it is specifically stated that "the Department" is taking the work out of the contractor's hands as well as from his evidence at the trial.

Furthermore, although Mr. Balcer was called as a witness, he was never asked (although the validity and legality of the notice had been raised in the pleadings of the Suppliant and remained an issue during the whole trial) whether he had authorized the taking away of the work from the contractor merely stating that he was aware of this. Subsequently, in a letter to the Suppliant's counsel dated July 17, 1961, which letter was produced by consent at the argument as Ex. R-44 when this matter was debated by counsel, the statement is again made by the Minister at line 25 of p. 2 of this letter that "the Department may take the work out of the contractor's hands and have the work completed and, in such case, the contractor shall have no claim for any further payment in respect of work performed, but shall be chargeable with and shall remain liable for all loss or damage suffered by Her Majesty by reason of default or delay", although in the next paragraph he refers again to clause 18 of the contract and there correctly states that the Minister may take all the work out of the contractor's hands "and may employ such means as he, on Her Majesty's behalf, may see fit to complete the works" which, however, is mentioned only to deal with Persons submitting that he had no knowledge of the arrangements made

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by the Department to complete the work, and in no way establishes that the Minister or Deputy Minister took this work out of the contractor's hands.

As a matter of fact, Connolly's evidence in this respect, which has already been referred to, establishes that he alone took this decision when he went to Three Rivers on June 14, 1961, and caused same to be forwarded by letter, not only to the Suppliant but also to his bonder, and incidentally it was forwarded to the wrong bonding company at that.

Now, although ordinarily within the various Government departments, the Minister, or Deputy Minister, acts through his employees or servants, it would seem that on certain subjects involving matters of policy or of importance, the Minister, or Deputy Minister, alone is called upon to take the final decision. This appears to be the case within the Department of Transport as chapter 79 vol. II of the *Revised Statutes of Canada,* which sets up this Department, differentiates between the latter acting through its employees and the Minister and Deputy Minister when it spells out in sections 3, 4, 5 and 6 distinctive and various responsibilities of the Minister, Deputy Minister and engineers. The contract here (Ex. S-1) also distinguishes at various places between actions by the Minister and actions by the engineer and where specifically in clause 18 itself it provides that the final drastic step to be taken in order to remove the contractor from the job be taken by the Minister or (by definition) the Deputy Minister, then it appears clearly that he alone can take it. Now as such was the requirement of the contract, which as already mentioned must be strictly construed, it then became incumbent upon the Respondent to establish in a convincing manner that the decision to take the work out of the contractor's hands had been made by the Minister which, unfortunately, was not done in the present case, and the letter of June 14 (Ex. S-12) cannot be considered as a valid exercise of the powers conferred by clause 18 of the contract. In *Neelon v. The City of Toronto and E. J. Lennox* (*supra*) the Supreme Court of Canada held in a majority decision (on a strict interpretation of the confiscatory clause and the right of the person authorized to take advantage of it) that where the architect was given the power to dismiss the contractor

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and employ other persons to finish the work and did this on his own without the consent in writing of the Court House Committee or Commission, which was required under the general conditions which were specifically stated to form part of the contract except in so far as inconsistent therewith, that his decision was valid and that the architect had power to dismiss the contractor without the consent in writing of the Committee on the basis that this clause in the general condition was inconsistent with the contract and that the latter must govern.

I must, however, still go further on this matter of default, and hold for an additional reason that the Respondent did not bring Herself within the terms of clause 18 of the contract so as to effectively place the Suppliant in default in that (and I have already touched upon this subject *supra*) no specific default or delay was mentioned in the Respondent's notice of June 1, 1961, the latter merely requiring that he put an end to his default and delay in diligently executing the works to be performed under the contract.

Now, although as submitted by the Respondent, the Suppliant should have known what to do and did not have to await any instructions written or otherwise from the Respondent to proceed with the job, I still feel that the notice (Ex. S-9) in the very general terms it is couched, does not meet with the requirements of clause 18 of the contract and should have set down specifically the defaults or delays "in commencing or in diligently executing any of the works or portions thereof to be performed or that may be ordered under this contract to the satisfaction of the Engineer" and I say that this would apply particularly in the present instance when the Suppliant had been promised a schedule of work which, as already mentioned, arrived the very day the Suppliant was taken to be in default. In *Frank L. Boone v. His Majesty the King*[1] the Court, dealing with this very same clause, stated:

> On a fair construction of this language it must, I think, be taken to presuppose the existence of some specific, definite default or delay on the part of the contractors in diligently executing any of the works or portions thereof to the satisfaction of the Engineer, of which complaint has been made to them; otherwise what effect can be given to the words of the notice "to put an end of such default or delay"?

[1] [1934] S.C.R. 457 at 469.

and further down at p. 469:

> The words of clause 19, under which the Department purported to act, clearly contemplate that the contractor shall be made aware of the default or delay with which the Engineer is dissatisfied, otherwise, how could the contractor reasonably be expected to put an end to such default or delay within six days.

I would indeed think it reasonable that in the circumstances of the present case, the Respondent could have discharged the onus of justifying it was entitled to take advantage of clause 18, by including in the notice of June 1, 1961, the schedule of work set down in Corish's document of June 12, 1961.

Having thus determined that the Respondent has failed to bring Herself within the terms of clause 18 of the contract, it then follows that the ousting of the contractor from the work, becomes a breach going to the root of the contract and the remedy of the contractor in such a case is therefore to do what he did, i.e., bring an action for the actual value of the work and labour done and materials supplied up to the time his machinery was ordered off the site by the engineer, which here took place on July 6, 1961, and claim damages.

Before dealing with the amounts claimed for work completed prior to December 21, 1960, it would be in order, I believe, to point out here that the Suppliant is not entitled to a larger compensation than that stipulated in the contract and that the Court is governed by section 47 of *The Exchequer Court Act*, R.S.C. 1952, c. 98:

> 47. In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow
>
> (*a*) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, or
>
> (*b*) interest on any sum of money that the court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.

Counsel on both sides appear to have agreed that the cause of action having arisen in the Province of Quebec, wherein the work was to be performed, the law of that province applies. Counsel for the Respondent submitted in argument that they could rely on articles 1690 and 1691 of the *Quebec Civil Code* wherein it is stipulated

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(1) that a contractor cannot claim any additional sum upon the ground of the change from the plan and specifications of an increase in the labour and materials unless such change or increase is authorized in writing and the price thereof is agreed upon with the proprietor, in all cases where the construction of the works is by contract, upon a plan and specifications and at a fixed price, and

(2) (article 1691) "The owner may cancel the contract for the construction of a building or other works at a fixed price although the works have been begun, on indemnifying the workman for all his actual expenses or labour and paying damages according to the circumstances of the case"

which damages, in the case where the recourse under article 1691 is taken advantage of, are not the profit which the contractor could have made under the cancelled contract in the event the works would have been completed, but only the profit the contractor could have made on another contract which he might have executed but which he has missed because of the cancelled contract. The present contract, while a construction contract, is not a "contrat à forfait", to wit: a contract according to plan and specifications at a fixed price but one remunerated on the basis of a series of unit prices set forth in the contract. The contractor is, therefore, not subject to the provisions of article 1690 C.C. or article 1691 C.C. and I cannot accept the submission made by counsel for the Respondent that the case of *Quebec v. Dumont*[1] is an authority establishing the principle that when a contract is made at a unit price and not at a fixed price, the terms of article 1691 C.C. may still be applicable if the contract contains a clause providing that extras may be authorized in writing as I am not able to draw this conclusion from the reading of this decision.

This does not, however, mean that the Suppliant here is entitled to claim from the Respondent the cost of any additional work not provided for in the contract or the specifications which it may have performed as the rights of the parties must be determined having regard to the terms of the contract.

[1] [1936] 1 D.L.R. 446.

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I now turn to sections 33 and 34 of the Petition of Right where an amount of $180,397.59 is claimed for work completed prior to December 21, 1960. Section 34 reads as follows:

		VALUE OF THE WORK DONE
1	Stumping & grubbing	$ 14,260 00
2.	Removal of fences	300 00
3.	Common excavation	22,929 39
4	Smoothing & rolling	4,800.00
5.	Open ditch	3,943 20
6.	Clean & Deepen existing ditches	1,655.25
7.	Consolidating sub-soil	3,540 00
8	Access Road	3,500 00
9.	Hold back	16,760 00
10	Clean & Deepen existing ditches	4,965 75
11.	Re-excavate open ditches	9,471 50
12	Excavate black muck southwest end of runway	39,560 00
13.	Move black muck from stockpile & spread	27,412.50
14	Delay on Easement ditch	27,300 00
		$180,397 59

The amount was arrived at by using the quantities calculated by S. L. Toczyski & Associates, consulting engineers, and produced in a report as Ex. S-45. A summary of this claim (S-75) produced in connection with the assignment to the Royal Bank of Canada sets out a description of the contract, the quantities allowed by the Department, the quantities claimed by the Suppliant, the quantities claimed and not paid the unit cost and, finally, the total value of the claim.

Before going into the various items listed above, it would be useful to point out that the Suppliant here has the burden of justifying his claim of having been underpaid for work actually done and I may say that his evidence in this regard left much to be desired; he was not able to produce an actual calculation made by his engineers in the field and, therefore, could hardly show any errors in the complete books and records kept by the Respondent. As a matter of fact, the greater part of the evidence dealt with the examination or cross-examination of the Respondent's witnesses by counsel for the Suppliant in an attempt to either discredit the Respondent's records, the work done by its engineers or sometimes the engineers themselves.

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Taking this claim in order, and dealing with item No. 1 in paragraph 34 of the Petition of Right, "Stumping & grubbing—$14,260.00" which Mr. Toczyski calculated at 234 acres, it does appear that the latter was not too sure how he arrived at this figure as he states in volume 9, p. 1365 of the transcript:

> A. ...I think I am not sure, but we either roughly measured where they were beyond the area of the ditches pushed into the rough side.

He later, in cross-examination, admitted that the total time he spent on the site was one day, June 19, 1961 (cf. vol. 9, p. 1433) and that the specifications for stumping and grubbing called also for the disposal of the trees together with the taking out and disposal of roots (cf. vol. 9, p. 1434).

At p. 1436, volume 9 of the transcript, he stated, in answer to the following question:

> Q. How could you tell, say for example, the quantity of roots that still had to be removed? How could you estimate that?
>
> A I don't think I could estimate the quantity of roots to be taken out, if there were any to be taken out.

Dabrowski, one of the Suppliant's employees, also testified on this item. His evidence in this regard is not too satisfactory either, nor can he establish with any certainty the amounts of stumping and grubbing done by the contractor. He states that when he arrived on the site in September, 1960, there was some 10 per cent to 15 per cent to 25 per cent of stumping and grubbing still to be done. He then mentioned that some 6 to 7 acres were done while he was there without, however, being able to produce any calculations on which these figures were based. When he left the site on December 1960, there would have been, according to Dabrowski, 10 to 15 per cent of clearing to be done with some trees left and some 2,000 feet of stumping and grubbing. He also stated that there were also stumps left on the ground. Finally, in cross-examination, he indicated that perhaps 25 per cent stumping and grubbing could have remained to be done as of the date of his departure.

Brossard, an engineer of the O'Connell firm, which completed the contract, stated that the stumping and grubbing operation was done by his firm over a period of 26 days, which does not necessarily mean that there were 26 days of work to be done as the evidence also discloses that the

equipment for this work was used as it became available. It still indicates, however, that a good portion of stumping and grubbing was still required to be done.

Corish estimated that roughly half the amount of stumping and grubbing had been done by Persons. Actual measurements later showed that a total of 255.2 acres were done by both contractors and as Persons was credited and paid for the equivalent of 110 acres after taking into consideration the hold back of approximately 10 per cent, he would have received 47 per cent of the total on this item. In my view, the Suppliant has not been able, by cogent evidence, to establish that he is entitled to be paid for any additional acres to the 110 acres he has already been paid for.

Item No. 2, removal of fences in an amount of $300 was conceded by the Department in Connolly's letter of May 18, 1961, and the Suppliant is entitled to this amount.

The second contentious matter is item No. 3, "Common excavation" for which an additional $22,929.39 is claimed. This claim was also based largely on Toczyski's findings, (Ex. S-45-cf. vol. 9, p. 1422 *et seq.*) of quantities of 69,483 cubic yards at .33c. a yard.

Mr. Dujay, an engineer of the Department of Transport, gave evidence regarding Toczyski's basic calculations of 244,483 cubic yards and produced his comments and notations as Ex. R-41. Dujay in his evidence (cf. vol. 23, p. 3634 and following) pointed out a number of errors in addition and multiplication in Toczyski's figures, relating the fact that a planimeter had been used to calculate the areas on the drawings, which instrument is estimated as 5% inaccurate and is commonly used only for estimating rather than for final measurements. It also appears that Toczyski had added additional yardage for the removal of top soil (cf. pp. 3640-3643, vol. 23) thereby creating an excessive yardage of 2,560 cubic yards; he also added the quantities from seven borrow pits, whereas borrow pit No. 1 was used exclusively for the access road and also paid for under that contract item, thereby adding a quantity of 7,575 yards. Furthermore, instead of using the written elevation figures in calculating the borrow, Toczyski used the plotted figures (cf. vol. 23, pp. 3650-3654). A proper figure, therefore, for common excavation would be 213,214 cubic yards and not the figure 244,483 used by Toczyski in his report. The total

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quantities, however, claimed by Persons and which appear on Ex. S-75 are 287,483 and therefore in excess of those calculated by Toczyski. On the figures arrived at by Dujay, and assuming that Persons had completed the contract specifications for common excavation, he would be entitled to a payment of approximately $70,000, which in fact is less than the amount he received on estimate No. 6, which was $71,940. Consequently, the Suppliant can have no claim here, particularly in view of the fact, as testified by Davies, that the most expensive element in the specification for common excavation which was the bringing to grade (cf. vol. 6, p. 936) was not done by the Suppliant but by O'Connell.

The next contentious item is No. 4 "smoothing and rolling" for which $4,800 is claimed by the Suppliant and for which no quantities have been allowed by the Department. Neither Biscari, Persons' foreman, (cf. vol. 1, p. 110) nor Potvin, the Suppliant's engineer (cf. vol. 2, p. 426) can remember whether the Suppliant had done any smoothing and rolling on this job. Davies on the other hand (cf. vol. 6, pp. 951-952) after examining the cross-sections taken after Persons had left the job stated that it appeared the grading had not been attained on the side strips. The only evidence adduced by the Suppliant in this regard is that of Toczyski and Dabrowski. Toczyski after stating that some 80% of the smoothing and rolling had been completed by the Suppliant, later in cross-examination had to admit that smoothing and rolling could take place only after the area had been brought to a certain contour and it would seem that the smoothing and rolling he was talking about was work done prior thereto and dealt with levelling off required either because of the weather or for other reasons. Dabrowski on the other hand, (cf. vol. 10, p. 1582) is not too helpful either:

BY MR. STALKER:

Q. Had any smoothing and rolling been done on the shoulders?

A. Yes, it was.

Q. Can you give us any estimate as to...

A. I don't remember now.

I must therefore conclude here also that the Suppliant has not succeeded in establishing this claim.

The next item to be dealt with is "open ditch" (item 5), "clean and deepen existing ditches" (item 6) and "access road" (item 8). The suppliant here relies on the evidence of Toczyski and on a letter of Connolly to Persons of May 18, 1961 (Ex. S-7) which has already been referred to.

Toczyski indicates at vol. 9, p. 1367 of the transcript, that the items "open ditch" and "clean and deepen existing ditch" were derived from calculations based on the progress drawings. Dujay, in Ex. R-41, as well as in his evidence (vol. 23, p. 3670 *et seq.* of the transcript) deals with the accuracy of these calculations. Here also there were errors in Toczyski's calculations and instead of 39,716 cubic yards for the item "open ditch", Toczyski should have arrived at the mathematical figure of 37,886 cubic yards. The Department's figure for this contract item based on actual measurements would be, however, 39,186 cubic yards and as the quantities allowed by the Department were 20,000 cubic yards the Suppliant would, therefore, be entitled to 19,186 cubic yards at 20 cents a yard, i.e., $3,837.20 for this item.

With respect to the item (6) "Clean and deepen existing ditch", there appears to be a very small difference between the Department's figure and that obtained by Toczyski and the Suppliant would, therefore, be entitled to the amount of $1,655.25 claimed for this item.

With respect to the access road, Toczyski indicated (cf. vol. 9, p. 1368) that he merely took the quantity allowed in Connolly's letter of May 18, 1961 (cf. Ex. S-7) and did not know where the additional 14,000 yards came from. The evidence discloses here that although Connolly, in his letter dated May 18, 1961, allowed an additional 14,000 yards for the access road, it is clearly stipulated in the paragraph which appears at p. 2 of this letter that the quantity allowed is "subject to remeasure as due to weather conditions, accurate calculations were not possible". It therefore appears that the quantity allowed is merely an estimate as explained by Connolly, made in an effort to induce the contractor to get back to work (cf. vol. 1, p. 297; vol. 3, p. 567; vol. 4, p. 788) and was subject to correction. It would indeed appear to me that this allowance of quantity was subject to an adjustment to be made from the final payment and cannot be construed as a commitment by the

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Department to pay these quantities to the Suppliant when the final measurement established that the exact figure was 19,117.74 cubic yards and not a total of 32,000 cubic yards arrived at by adding the 14,000 additional to the 18,000 already granted. The Suppliant here, therefore, would be entitled only to 1,117.74 additional yards at 25 cents a yard, i.e., $279.44.

The Suppliant's claim under item 7, paragraph 34, namely "Consolidating sub-soil", cannot be sustained either. It is based on the contractor's understanding that once he had been allowed a 6-inch layer of granular material in December 1960, the Respondent must have accepted the subbase as being compacted (cf. vol. 9, p. 1368). The evidence clearly establishes that there was no compaction by the Suppliant here of the 6-inch granular material which, in fact, was done later by O'Connell.

I now turn to items 10 and 11, "Re-Cleaning and deepening existing ditches" and "Re-excavate open ditches". Corish (cf. vol. 7, p. 1185; vol. 20, p. 3162 to 3164) and Silverwood (cf. vol. 19, 2947 and cross-examination p. 3028) who were both on the site constantly, denied that this work had even been done. Persons, on the other hand, stated that he had done this work (cf. vol. 11, p. 1676) although he admitted that he "never knew what the quantities were or what came out of those ditches, he never had any records".

Dabrowski testified that the Suppliant had dug and cleaned certain ditches but it is difficult to see how, having arrived on the job in September or October 1960, he would know that the work would be done for the second time (cf. vol. 10, p. 1549). Dabrowski further admitted that he took no measurements and that he would have to estimate. It would appear here that Toczyski merely used the Department of Transport cross-sections for excavation of ditches and presented them as a claim for re-excavation on the basis of the information given him by Dabrowski (cf. vol. 9, p. 1461, 1462 *et seq.*):

BY MR. OLLIVIER:

Q. This figure of 37,886?

A. This figure is based on the cross-sections of the open ditches.

Q. Before the subsidence?

A. I don't know when the subsidence took place.

Q. But you did not calculate a quantity of subsidence by cross-section, did you?

A. No.

...

Q. Did you have cross-sections before the filling in and after the filling in which would permit you to determine by cross-sections the quantity of filling in?

A. No.

The evidence, therefore, is insufficient to sustain the above claims for items 10 and 11. There is, however, a further reason for rejecting them in that even if the Suppliant had proven that this work had been done, the work being necessitated by the subsidence of material as a result of weather conditions, any claims, therefore, would be barred by the terms of article 20 of the contract which states that the risk thereof is to be borne by the contractor.

I now come to two items (12 and 13) which took up a considerable part of the evidence, namely, the question of black muck. Black muck, although a more expensive material to remove than earth or sand was paid as common excavation under item 14 of the specifications of the contract. Item 16 deals with what common excavation entails and states specifically that the unit price includes all cost in carrying out the operations as well as the full and complete disposal of all materials as specified or as directed by the engineers. The Department, in accordance with the above specifications, considered the black muck as an integral part of common excavation.

On these two items (item 12 "excavate black muck southwest end of runway" and item 13 "move black muck from a stockpile and spread") the suppliant submits (1) that as there was no indication of black muck on the west end in the prebid plans and although he and his men examined the site prior to tendering and estimated that there was a certain amount there, they did not and could not ascertain the large quantities of muck involved in this area; (2) he is entitled to the black muck removed from beyond the paved area; (3) the quantities of muck he removed were more than those allowed by the respondent and, finally, (4) he is entitled for the black muck that was moved from stockpiles and spread on the shoulders.

Suppliant's complaint that the prebid plans did not indicate that there was muck in the southwest area of the

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strip and that he is entitled to a claim under this heading cannot, in my view, be countenanced in the face of article 52 of the contract which clearly sets down that the contractor has the onus of fully investigating and satisfying himself with the character and topography of the ground and the nature of the work to be executed and cannot rely on "any statement, representation or information made, given by, or derived from quantities, dimensions, tests, specifications, plans, maps or profiles made, given or furnished by Her Majesty or any of Her officers, employees or agents; and...that no extra allowance will be made to the contractor by, and the contractor will make no claim against Her Majesty for any loss or damage sustained in consequence of, or by reason of, any such statement, representation or information being incorrect or inaccurate, or on account of excavating in rock or other difficult ground, or of unforeseen difficulties of any kind".

He cannot be successful either with respect to the black muck removed beyond the paved area of the strip as there is uncontradicted evidence on behalf of the Respondent that the black muck beyond the paved area was not required to be removed. Davies states that it should not have been removed beyond the paved area and so does Silverwood (cf. vol. 19, p. 3055):

BY MR. STALKER:

Q. What did he (Corish) want from the point of view...I am thinking now with reference to the removal of the black muck on the east end?

A. He wanted the black muck removed from underneath the hard surface.

Q. Not from the shoulders?

A. Definitely not.

BY THE COURT:

Q. Underneath the central portion?

A. Yes, underneath the hard surface, the 150 foot wide of asphalt.

Q. The instructions were to leave that on the shoulders?

A. Exactly.

BY MR. OLLIVIER:

Q. Do you know that?

A. Yes.

Q. Was that in fact what was done with it?

A. Well, the contractor's men seemed lost for a while until the resident engineer came down on the site himself and told them exactly, again on the site, what he wanted, because they had

> machinery completely out of the graded areas and they were pushing way out. So he told them that they were doing it the wrong way. So he explained to them again what he wanted done.

The Suppliant has also failed to establish that he was entitled to a greater quantity of black muck than the quantity allowed by the Department. The latter took actual measurements in the field evidenced by cross-sections produced whereas the Suppliant's evidence in this respect consists of the testimony of Suppliant's employees who in most cases estimated visually the extent of the muck. There was controversy regarding the depth of the muck removed but the figures stated by the Suppliant's witnesses cannot be accepted without qualification due to the fact, as testified by Corish, that in several instances the contractor went way beyond the depth necessary to remove muck and removed sand.

Biscari, one of the Suppliant's men, at p. 87 of the transcript, did not measure the black muck, merely saying:

> A. Really, I did not measure. But it was more than 2 or 3 feet. I did not measure, but it was high, all right.

It also appears that the figure of 43,000 cubic yards for which $39,560 is claimed under item 12 was based on what Toczyski called "Dabrowski notes" which appear from the evidence of Dabrowski himself to have been a doubtful basis for an accurate calculation. He is questioned on this point by respondent's counsel at p. 1531 of the transcript:

> Q. Now Mr. Dabrowski, what amount of black muck did you calculate or estimate whichever it was, was excavated from the southwest end of the runway?
>
> A. It was plenty anyway. I should say something about 40,000.
>
> Q. Something about 40,000?
>
> A. Around, it might be less, it might be more.
>
> Q. Was this...
>
> A. About 30,000 perhaps.
>
> Q. Can you tell us whether this...
>
> A. Anyway, plenty.

I must now deal with the last aspect of the muck question, which is the alleged stockpiling and double handling of the muck by the contractor. Although there was considerable and conflicting evidence on this point, it appears that the instructions of the resident engineer were that the muck be removed to a point outside of the line of the ditch which paralleled the edge of the area and wasted. This, for some reason, however, was not done and the

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resident engineer later allowed 95 per cent of this material to be placed on the shoulders under 2 feet of sand. The position taken here by the Department was that the incorporation of this dried up muck into the shoulders was a concession made to the contractor and that the latter was thus saved a further operation of obtaining fill from the borrow pits.

Now, although the above is true, it is also true that had the contractor delivered fill in lieu of this dried up muck, he would have been entitled to charge 33 cents a yard for it.

The Respondent also took the position here that the black muck taken out from under the paved area was considered as common excavation and was paid for and that it was not stockpiled and brought back in a second operation but merely spread over the shoulders. Now although this is partly true for the black muck stockpiled or laid on the shoulders, this cannot apply to that portion of the muck moved back on to the shoulders from beyond the ditches, as established by the evidence.

Dabrowski is examined in this respect at vol. 10, p. 1632 by counsel for the respondent and states:

Q What had been done with that quantity which was removed before you arrived? Where was it?

A. Well, some was piled up.

Q. Where was it piled?

A. Somewhere on the shoulders and then it was over here or somewhere and then it was partly dispersed on the shoulders when it was dried out, whatever was good.

Q. So it was on the shoulders, is that right?

A. The shoulders or the other side of the shoulders. They pushed it on the other side of the ditch, over here and there was one pile over here and here, somewhere.

Q. Well, that was roughly 20,000?

A. I did not weigh it. Roughly I should say, perhaps twenty perhaps twenty-five thousand.

Q. What proportion of that was on the shoulders and what proportion was beyond the shoulders?

A. I should say half and half.

It therefore appears to me that a reasonable appraisal of the dried muck moved from beyond the shoulders to the shoulders and usefully used in the Respondent's strip could be arrived at by taking Corish's estimate, that 95 per cent of the black muck had been usefully used in the strip of

which, if Dabrowski's figures are taken, half was brought back into the shoulders from beyond the ditches. On this basis it would then appear that the Suppliant here would be entitled on this item 13 to half of 95 per cent of 36,550 cubic yards at 33 cents a cubic yard, i.e., the sum of $5,762.21.

I now come to item 14, "Delay on easement ditch", which I have already touched upon and which relates to an occasion when, it would appear, the Suppliant did suffer some inconvenience. The latter here is claiming $27,300 for loss of time of approximately three weeks on the basis that the machinery on the job was not working during that period. Now although it does appear that the Suppliant was hindered somewhat because of this delay, and this appears from Corish's progress reports, he did not lose three weeks as submitted by the Suppliant. Corish indeed stated that there had been no delay on this job because of the easement ditch and that the contractor worked on other parts of the job such as the east end of the strip and the access road. Now, although Persons maintains that his machinery was inactive during the period of three weeks, his own witnesses state that during the work, there had been no unusual long delay which they could hardly have said if the machines had been stopped completely for three weeks. It is not therefore possible, in view of the evidence, to allow any amount under this heading.

The Suppliant, under paragraph 34 of the Petition of Right, would therefore be entitled to the following amounts:

Fences	$300 00
Open ditch	3,837.20
Clean and deepen ditches	1,655.25
Hold back	16,760.00
Access road	279.44
Move black muck and spread	5,762.21
	$28,594 10

I will now turn to paragraph 36 of the Petition of Right whereby the Suppliant claims damages in an amount of $312,000.00 "as consequences of the illegal and wrongful actions of the Minister of Transport, the Honourable Leon Balcer, and the said Department of Transport, its

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employees, officers and representatives representing the Respondent and as herein more fully set out the Suppliant has suffered and will suffer the following damages:

(*a*) Loss of profit which Suppliant would have made had the contract been carried through to completion	$45,000.00
(*b*) Value of work done in June and July, 1961	12,000.00
(*c*) Damages to reputation as a result of actions of Respondent's representatives	100,000.00
(*d*) Loss of profits on future contracts lost as a result of the actions of Respondent's representatives	100,000 00
(*e*) Additional financial costs incurred as a result of actions of Respondent's representatives and interest incurred on suppliers' accounts	30,000.00
(*f*) Engineer, Investigation and Legal Costs and Administrative Costs	25,000.00
	$312,000 00"

Before dealing with the various items listed under this heading, the following articles of the *Quebec Civil Code* which govern claims arising "*ex contractu*" should be set down. Articles 1073, 1074 and 1075 provide as follows:

Art. 1073 The damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he has been deprived; subject to the exceptions and modifications contained in the following articles of this section.

Art. 1074. 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.

Art. 1075. In the case even in such the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution.

Repeated enunciation of the case law on this subject of damages, and in some cases approved by the Supreme Court (*Société Naphtes Transport v. Tidewater Shipbuilders Limited*[1]) is to the effect that a claim for damages must be rejected in all cases where the prejudice alleged is not certain and where the claimant does not evaluate in figures what he considers to be the value of his real prejudice. In all cases where there is no fraud on the part of the debtor, damages are restricted to those only which the parties have foreseen at the time of contracting or which they might have foreseen at that time. In the case of fraud, however, the debtor is liable even for unforeseen damages.

[1] (1925) 40 Q.B. 151; [1927] S.C.R. 20.

The common law on the subject of damages "*ex contractu*" is similar to the above rule if one refers to the leading case of *Hadley and another v. Baxendale and others*[1] where it is stated:

...Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

Now, although subsequent thereto there were some variations therefrom, such as in *Weld Bendell v. Stephens*[2] where it was decided that even in matters *ex contractu* damages whether foreseen or foreseeable may be claimed as long as they flow directly from the breach in the chain of causality, the case law in England has now returned to the original view in a recent case of *Overseas Tankship v. Morts Dock*[3] where at p. 415 it is stated:

Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct". In doing so, they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen.

The reasoning in Quebec on this point, although expressed somewhat differently is very similar. The obligation to pay damages is based on a tacit clause by which the debtor is supposed to promise to indemnify the creditor of the damages caused by the failure to carry out the obligation and this presumed and tacit contract can only deal with those damages which would naturally be in the minds of the parties at the time of contracting.

Damages in Quebec are then limited also by article 1075 C.C. in that even in the case of fraud they are restricted to those which are an immediate and direct consequence of the failure to carry out the obligation. As pointed out by Mignault (cf. *Droit Civil Canadien* t. 5 (1901) p. 420):

[1] (1854) 9 Ex. C.R. 341 and 354.
[2] [1920] L.R.A.C. 956.
[3] [1961] 1 All E.R. 404 (PC).

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La loi ne veut pas que les juges, marchant de déductions en déductions, suivent le dol du débiteur dans toutes ses ramifications, ils doivent négliger les conséquences médiates et éloignées et ne s'attacher qu'au dommage auquel il a pu donner naissance, qui en est une suite directe et immédiate.

The first item to be dealt with under paragraph 36 of the petition is the amount of $45,000.00 claimed by the Suppliant (under art. 1073 C.C.) as the loss of profit he alleges he would have made had the contract been carried through the completion. The details of the method of calculation of this amount of $45,000.00 was explained primarily by Mr. Duke, the suppliant's auditor and accountant, and by Persons himself. Duke, in this connection, produced the result of his calculations on this item as Ex. S-61, which is obtained by adding the estimates allowed for the work done with non paid estimates claimed under the contract of $54,927 and then deducting therefrom costs to December 31, 1960 of $209,254, thus obtaining a profit to December 31, 1960 of $13,273 to which he added an anticipated net profit to complete contract of $45,000.00.

The $45,000.00 profit was arrived at by taking the estimated profit on asphalt which still remained to be done after December 31, 1960, deducting the estimated loss on granular and deducting $2,525 for contingencies.

It therefore appears that Duke's calculations under this heading are his estimates of the Suppliant's claims under the contract which he fixed at $54,927.00, but which, having now been established at $11,834.10 (i.e., $28,594,10 less $16,760 hold back) would, instead of being a profit of $13,273 to December 31, 1960, result in a loss of $30,978.78. This loss would be still greater if the unnecessary work done by Persons in excavating the black muck beyond the paved surface is considered. Furthermore, his estimates were calculated from quantities which he obtained from either Mr. Persons or his men and which he did not, and could not, verify himself. This indeed appears clearly from p. 2525 *et seq.* of the transcript:

> Q. Just two short questions, if I might. With reference to your statement S-61, which shows the forty-five thousand ($45,000) dollars anticipated profit on the remainder or balance of the contract, you said that this figure had been obtained three (3) or four (4) years ago in discussions and formed the foundation or part of the foundation of the claim. To reiterate, however, was this the

figure, which was, in fact, given you by Persons and his associates, or did you have any knowledge of the validity and work out the actual figures themselves.

A. We discussed the figures and worked them out.

Q. You discussed them, I know, but were you responsible for the figures or were these figures given to you and you just worked out the calculations?

A. I had to obtain the information to work out the figures, yes. The information was given to me.

And further down, at p. 2527 of the transcript, he confirms this in answer to the following question:

Q. But the information was given to you, it was not you who determined whether profit or losses were going to be made.

The cost of granular, including transport, together with the required compaction and levelling off would also have cost more than the estimated figures made by Duke in his calculations.

It also appears that the figure of $251,983, which he uses in Ex. S-67 as the costs to complete project, according to contract items if the Suppliant was allowed to finish schedule, must also be regarded with suspicion and, in my view, cannot and does not represent the amounts which would have been necessary to complete the job under the requirements of the contract. This figure also was calculated by Duke taking quantities from Persons and his men which, not being an engineer, he could not verify.

I must, therefore, under this heading, come to the conclusion not only that the amount of loss of profit claimed is too uncertain to be recovered, but even go to the extent of saying, and this, in my view, appears from the evidence reviewed in this lengthy case, that the Suppliant would have lost money on this job had he been permitted to terminate it. This amount of $45,000 cannot, therefore, be sustained.

The second item under paragraph 36 of the petition is an amount of $12,000.00 claimed for value of work done in June and July of 1961 prior to the notice of June 1 (Ex. S-9) and subsequent to the letter of June 13 by Connolly (Ex. S-13) stating that the Department was taking the work out of the hands of the contractor and giving it to H. J. O'Connell Limited. At the time of the receipt of the above letter, the Suppliant took the position that the notice was illegal as well as the letter and that, accordingly, he was entitled to

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continue to work on the contract and to be paid for work actually done in June and July of 1961. The illegality of the removal was brought to the attention of the respondent by a telegram on June 14, 1961 sent by the attorneys for E. J. Persons.

In view of the manner in which the Suppliant was put off the work, it does appear that he was entitled to consider the notice received as invalid and continue working up until the date he was told to remove his equipment from the site which occurred on July 6, 1961. This involves a period of one month for which the Suppliant claims $12,000.00 on a rental basis for the machinery on the site during this period, i.e., two bulldozers at $3,000.00 a piece per month for two months. At p. 2359 *et seq.* of the transcript, Duke admits that the period should be for six weeks and not two months which would reduce the claim here to $9,000.00. It also appears that the claim is based on a rental basis, and although the machines, prior thereto had been rented, in June and July 1961, they belonged to the Suppliant. To apply the full rental rate to the use of these two machines for six weeks when some of the time subsequent to the 13th of June 1961, they were not used but only remained available while awaiting whether the contractor would have to leave the job, would be unreasonable.

In view of the impossibility of determining exactly what work was done by the Suppliant during this period, as no sections were taken or hours of work recorded, it would seem that a reasonable indemnity for the work performed in June and July 1961 could be assessed at one-half of $9,000.00, which would be $4,500.00, and such is the amount allotted for this item.

Item (*c*) of paragraph 36 deals with a claim of $100,000.00 for "Damages to reputation as a result of actions of respondent's representatives" and although some evidence in this regard was given by Persons, Duke and Leonard, there was no specific evidence given as to the precise value of any damages suffered under this heading, the appreciation of the amount of damages, if any, being left to the Court.

Duke was examined on this point by counsel for the Suppliant and stated at p. 65 of vol. 13-A of the transcript

of November 16, 1964; the effect the cancellation of the contract would have on Persons' reputation:

A. With my own experience in connection with Mr. Persons' affairs, he certainly had no problems prior to nineteen sixty (1960) and nineteen sixty-one (1961).

As far as carrying on his various businesses, particularly his construction business, he had no particular problem with his suppliers. There were certainly slow payment periods, the same as any other contractor would have. But I think that his overall position and prestige was such that he could easily negotiate with suppliers and carry on his business.

However, when he was thrown off this contract, there was a completely different attitude developed toward him and he found it very difficult to carry on his construction business because many of the suppliers required cash for materials they were supplying.

The banks put a certain amount of pressure on him as far as extending a line of credit and I think...

However, as (from p. 67 of vol. 13-A of the transcript of November 16, 1964) it appears that this bank still maintained the same line of credit he had had previously, and in the same amount, it is difficult to see how his credit could have been affected:

Q. What was his line of credit with the bank, prior to nineteen sixty (1960)?

A. His personal line of credit was one hundred and fifty thousand ($150,000) dollars.

Q. And subsequent to the taking away of the contract, how much was this?

A. They would not extend this line of credit beyond the one hundred and fifty thousand ($150,000) dollars. I mean, this is what he used before.

. . .

A. It was still maintained at one hundred and fifty thousand ($150,000) dollars in his own personal name, yes.

With regard to the damages caused to the Suppliant with his suppliers, Duke was not able, from memory, to mention any suppliers being uncooperative because of the cancellation of the contract merely stating at p. 68 of vol. 13-A of the transcript:

A. I could not right off hand, but we could obtain a list of the suppliers that demanded cash for the materials they supplied.

This is the extent of the evidence adduced by the Suppliant with regard to the quantum claimed in paragraph (*c*) and it is obviously not sufficient to allow any determination of an amount under this heading although I might add that had an amount been established, it would have been of doubtful quality having regard to the opinion of

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this Court, which, however, at best is merely an assumption and cannot be anything else (as it will never be known whether the Suppliant would have corrected his default and proceeded with terminating the contract in accordance with its terms and to the satisfaction of the Respondent) that there is considerable doubt as to whether the Suppliant would have remedied his default of not proceeding diligently with the job if clause 18 of the contract had been properly exercised and he would have, through his own fault, therefore, been faced with the same situation he is in today. The damages claimed here are, therefore, in my view, too uncertain, are based on speculation, have not been established in any amount and, therefore, preclude any award being made.

Paragraph (*d*) claims another amount of $100,000.00 as "Loss of profits on future contracts lost as a result of the actions of Respondent's representatives".

The only evidence with regard to specific contracts lost because of the impossibility for the Suppliant to obtain bonds is given by Duke and deals with a number of contracts which a construction company called B & M, of which the Suppliant was the principal shareholder, could have obtained if performance bonds could have been procured. This company indeed was the lowest bidder on two jobs for the town of Bedford and had commitments as paving sub-contractors for Janin Construction Company and Atlas Construction Company which it lost because it could not, through the Suppliant, produce the required bonds because the bonding companies would no longer, because of the Three Rivers cancellation, issue a bond to the Suppliant or his construction company.

Now whether the above is true or not, it does appear that in any event the Suppliant cannot claim in the present action for a loss of profit sustained by another entity even though he might be its principal shareholder and this should be sufficient to deal with the claim. However, even if the proper party had claimed on the above loss of profit or the Suppliant were entitled to some compensation for no longer being able to obtain performance bonds necessary to obtain contracts, the company or the Suppliant would still have to establish that had he obtained the jobs he would have made a profit on them.

With respect to the paving contracts, Duke states that a profit of 10 percent would have been realized and he believes that some profit might have been made on the town of Bedford contracts. Now, although this might be so, it also appears that it is based on assumptions that because profits on other similar contracts had been made in the past, profits would also be realized on these contracts.

There is, however, also the possibility that money might also be lost on these jobs and bearing in mind Persons and his company's contracting activities and loss records in 1959 and 1960 as well as the low bid price on the present contract, a possible assumption that there might have been a loss sustained on these jobs instead of profits can be made.

I cannot find here that reasonable degree of certainty necessary to award damages even if the Suppliant has sustained damages through not being able to obtain bonds and any amount I might take would be mere speculation.

I now come to subparagraph (*e*) of paragraph 36 of the petition where the Suppliant claims $30,000.00 as "additional financial costs incurred as a result of actions of the respondent's representatives and interest incurred on suppliers' accounts". The amount of $2,800.00 claimed in the incidental demand as additional financial costs "representing 6% on $70,000 for a period of 8 months which suppliant had to borrow in order to use as security for a contract for which he was unable to secure a bond because of the present contract" might also be dealt with under this heading. Evidence under this item was given by Duke at p. 68 *et seq.* of the transcript of November 16, 1964, who stated that the Suppliant had to "personally put up $50,000 dollars for a sewer job that was being carried out by B & M Construction in Three Rivers and also because he could not obtain bonds, he had to put up an additional seventy thousand dollars ($70,000) on a penitentiary job in Cowansville. This was a personal guarantee that he had to give to the bank.

The above amounts were therefore borrowed from the bank by B & M Company and guaranteed by the Suppliant and although it may have cost the B & M Company more to proceed in this fashion than to obtain bonds (on which, however, there is no evidence) I fail to see, here also, how

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the Suppliant can claim any interest in this regard as it would appear that the only possible claimant here could be the B & M Company and not the Suppliant whose only interest can be that of a shareholder and whose loss (if any) qua shareholder must be established.

At p. 73 of vol. 13-A of the transcript, Duke further states that Persons, in 1961, borrowed $75,000 from a finance company which was used directly in his business at what he thought was 10 or 11 percent interest. He later explained that this amount had been borrowed:

> A. For the purpose of carrying on his construction activities and to ease the situation, his working capital position when he did not receive this money from the the Government.

He then, at p. 74 of vol. 13-A of the transcript, states that in connection with the $30,000.00 claimed in subparagraph (*e*) above:

> A. There was probably three (3) years on this loan at ten percent (10%).

It therefore appears that the basis of this claim is the allegation that the Department was illegally withholding a large amount claimed as work done prior to December 1960, i.e., $180,397.59. However, as the amount to which the Suppliant was entitled has now been reduced to $28,-594.10 it would seem that the Suppliant would still have had to borrow the amounts whether the amount he was entitled to was paid or not and here again this claim cannot be accepted.

The Suppliant's claim for $2,800 representing 6 percent interest on $70,000 for a period of eight months which Suppliant had to borrow to use as security for a contract for which he was unable to obtain a bond because of the present action, cannot be accepted either, as from the evidence of Duke it appears that this interest was the amount charged as the result of a loan made to B & M Construction by the bank which had been guaranteed by Persons. Here again, this may have cost the B & M Company more money than if it had obtained a bond (although even this, as already mentioned, is not certain, as there was no evidence adduced to indicate that a bond would be cheaper than a loan), but if any loss was sustained, it can be claimed by the company only and not by the Suppliant.

I now come to a last amount of $25,000 claimed by the Suppliant in subparagraph (*f*) of paragraph 36 of the petition as: "Engineer, Investigation and Legal costs and administrative costs", which comprises bills submitted by Mr. Duke, Toscan Design Services Ltd., amounts paid to Paul E. Lafontaine, Q.C., and Suppliant's counsel for a total amount of $23,343.95.

The amounts claimed under this heading are for engineering, negotiation with the Department of Transport, legal and accounting services rendered in connection with the Suppliant's difficulties with the Department with respect to the Three Rivers job.

In Quebec, where the services of experts are retained for purposes of pending litigation to support the claim of a party before the Court, the party who retains them, if successful, can recover from the opposite party only the fees prescribed by the tariff for expert witnesses.

The same rule applies to this Court where under the tariff experts (p. 125) may be granted a special *per diem* fee.

The above is the only provision where some compensation can be given either under Quebec law or under the rules of this Court, although in one Quebec case the fees of experts properly retained at the outset in order to supervise repairs following upon the wrongful act of another, were held to be recoverable as part of the damages resulting from the wrongful act even if they were called as witnesses at the trial (cf. *Gingras v. Quebec*[1]; *Laplante v. Deslauriers & Fils Ltée*[2]).

I however, feel that in the present case a certain proportion of some of the amounts claimed under paragraph 36(*f*), although they might be considered as expenses, could also be considered as a necessary and valid cost of obtaining justice in the present case, as some of the work of preparation of these experts was absolutely essential to the proper prosecution of the Suppliant's rights and would be a reasonable cost of the technical assistance required, commensurate with the remedy obtained and to which the Suppliant is entitled.

The Suppliant has been only partly successful in this case and having regard to this success, I would think that a

[1] [1948] Q.K.B. 171. [2] [1951] Q.S.C. 93.

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fair assessment of the value of what was essential to the proper prosecution of this case could be made in the amount of $5,000 which,under the authority of Rule 261 of the Rules of this Court I hereby establish in this amount.

In view of the maintenance of the principal action, rejection of the cross-demand follows.

There will, therefore, be judgment in favour of the Suppliant for the sum of $33,094.10 together with costs, an amount of $5,000 being awarded as part of the costs to cover the value of the engineering and accounting work done prior to trial and found necessary for the preparation for trial. The Suppliant was unsuccessful in his incidental demand and it will be rejected with costs; the Respondent was unsuccessful in Her cross-demand and it also will be rejected with costs. As the evidence, however, was common to the principal action, the incidental demand and the cross-demand, there will be one counsel fee at trial only.