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<u>1928</u> Nov 26-30.	NATIONAL DOCK AND DREDGING CORPORATION LIMITED .....	} SUPPLIANT;
AND		
<u>1929</u> Jan. 8.	HIS MAJESTY THE KING .....	} RESPONDENT.

*Crown—Contract—Interpretation of Contract—Order in Council—  
Power of Minister*

*Held*, that an Order in Council authorizing the Minister to enter into a contract for the removal of clay, sand and gravel, tendered for at a given price, does not carry with it any authority to add anything to or to vary the scope of the contract beyond the ambit of the Order in Council. The introduction of a clause purporting to be part of the authorized contract, throwing upon the contractor the obligation to remove, at the same price, material of another class than that mentioned in the Order in Council, is beyond the authority conferred by said Order in Council.

2. However general the terms of a contract may be expressed, they extend only to the things concerning which it appears that the parties intended to contract, which, in the present case, was clay, sand and gravel.
3. Where under an executory contract, the Crown accepted the works done by the contractor, beyond its executed contract in writing, it must be taken to have ratified it, and such work and labour having accrued to its benefit, it becomes liable therefor, on a *quantum meruit* basis, as upon an implied contract.

(1) (1885) 12 S.C.R. 384, at pp. 388, 389.      (2) (1887) 120 U.S.R. 569.

PETITION OF RIGHT of the Suppliants to recover from the Crown the sum of \$98,478.35, under a contract.

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The action was tried before the Honourable Mr. Justice Audette, at Quebec.

*George Parent K.C.* and *Robert Taschereau* for suppliant.

*Hon. J. N. Francoeur K.C.* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (January 8, 1929), delivered judgment.

The suppliant, by its Petition of Right, seeks, *inter alia*, to recover the sum of \$98,478.35, as resulting from work done under a contract entered into between the parties herein for certain improvements by the Government in the harbour at Matane, P.Q., by way of dredging, in the channel and basin at Matane, P.Q., clay, sand and gravel, as more specifically described in the call for tenders and the submission of the same.

A call for such tenders was duly published in the usual manner (exhibit No. 39) with, among other things, the clause stating that

Tenders will not be considered unless made on the forms supplied by the department and according to conditions set forth therein.

The tenderer, the suppliant, or rather its predecessor in the contract, applied for such form and specification and the same was duly supplied to them as shewn by exhibit No. 1.

It will be observed that the department itself filled in the form of such tender which sets forth that the material to be dredged is *clay, sand and gravel*, and for that alone.

The price for the dredging of such material is shown on exhibit No. 1, under the general heading of "Price per cubic yard" and is extended mostly under the first of the two subdividing columns of Class "A" and Class "B," while, however, in the tender attached to the contract, it is all extended under Class "B."

Much argument was offered in this respect to show that the tender was for Class "B"; but under the circumstances the Court finds that the 37 cents per cubic yard must be read with the tender which is for removal of clay,

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sand and gravel (art. 1015 C.C.P.Q.). Indeed, if it had been for any other class than material described, the price would obviously be higher and this view is also confirmed by the several Orders in Council and the actions of all those dealing with the subject matter of this controversy to which reference will be hereinafter made.

The contract in writing, exhibit No. 2, is for work to be performed in the province of Quebec, and it was duly signed and entered into at Quebec; therefore the obligations resulting thereunder, as held in *The King v. Desrosiers* (1), must be determined by the laws of the province where the cause of action arose.

The acceptance of the suppliant's tender for the removal by way of dredging at Matane, of clay, sand and gravel was duly authorized by the Order in Council (exhibit No. 32) of the 14th March, 1923.

The Crown, as represented by the Executive Government, can only speak by Order in Council, and this Order in Council, circumscribes the authority to enter into a defined contract, and that is in respect of clay, sand and gravel, the very wording of the tender, and no more.

An Order in Council authorizing the Minister to enter into a contract for the removal of clay, sand and gravel, tendered for at a given price, does not carry with it any authority to add anything to or to vary the scope of the contract beyond the ambit of the Order in Council. The introduction of a clause purporting to be part of the authorized contract, throwing upon the contractor the obligation to remove at the same price material covered by another class (Class "B") is absolutely beyond the authority conferred by the Order in Council and is also beyond any offer expressed or implied in the tender of the suppliant. The authority for such view is to be found in the case of *The King v. The Vancouver Lumber Company* (2) and confirmed on appeal by the Supreme Court of Canada and by the Judicial Committee of the Privy Council (3); *The British American Fish Corporation Ltd. v. The King* (4).

(1) (1908) 41 S.C.R. 71, at p. 78.

(2) (1914) 17 Ex. C.R. 329.

(3) (1919) D.L.R. 6.

(4) (1918) 18 Ex. C.R. 230.

Moreover, under Arts. 1019 and 1020 C.C.P.Q., if any doubt could arise in so clear a tender drawn by the opposite party, such doubt must be interpreted against him who has stipulated and in favour of him who has contracted the obligation. And however general the terms of a contract may be expressed, they extend only to things concerning which it appears that the parties intended to contract,—in the present case, exclusively to clay, sand and gravel.

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Now the controversy in the present case, it is well to bear in mind, arises from the fact, duly confirmed by the suppliant and from most of the Crown's officials who saw the material dredged, that such material, for a quantity of 10,340 c.y., was not sand, clay or gravel, as mentioned in the tender, and in the Order in Council, but was of hard material which commanded a larger price than the material actually contracted for.

The bucket dredge used by the suppliant was duly approved both by the chief engineer and the Order in Council above cited and the contract was to be given subject to their getting that dredge which, at the origin, had cost \$165,000. This bucket dredge is the proper kind to dredge the material contemplated by both parties, and if the parties had not been induced into error as to the nature of the material, and had they known the actual kind, a shovel or dipper dredge would have been required and used.

The suppliant started work at Matane, on the 28th July, 1923, and contended that if the material had been as mentioned in the tender and contract for the same, they would have terminated the work before the time assigned, and the resident engineer confirms that view. They moreover seem to have substantiated that contention from the fact that, even with the Government dredge working, the new contractors who undertook to finish the works, have been working at it for several seasons. They further contend that the plan, exhibit A, supplied to them did not even show any borings or boulders in the cuts of the channel, and that is easily ascertained by referring to the plan. The party in charge of such borings, as shown on plan, deceived and misled both parties by its want of accuracy from the fact that the borings were made outside of the channel and very few in the basin.

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The entrance of the river Matane is at right angle with the St. Lawrence, facing the north, and is very much exposed to winds, storms and heavy seas which churn and disturb the very formation of the material of the beach and which may, as is well known, be very different at a few feet distant.

Very soon after the beginning of the works the suppliant complained to the resident and to the district engineers, who in turn advised the chief engineer, that the material encountered was quite different from that contemplated, that they were tearing their buckets on the hard material, that the material was hard, with many boulders, and as said by resident engineer, it was a very hard clay, coming out in large cakes or slabs which, with boulders, were blocking the buckets in the dredge and had the effect to break and wreck it by the end of September. The district engineer in the course of his testimony said "c'était des roches, boulders cimentés ensemble."

On the 14th August, 1923, the district engineer informs the chief engineer (exhibit No. 16) of the difficulty arising from the hardness of the material and says "This material is hard pan with cemented boulders." That is followed, on the 16th August, 1923, by a letter of the suppliant to the Deputy Minister complaining that the material he is dredging is not clay, sand and gravel, and asking for an estimate for this new encountered material. On the 15th September, 1923, Mr. Amiot writes to Mr. Décarie (exhibit No. 22) that

At the beginning, the material removed was consisting of clay and 45 per cent of boulders; this percentage was kept until the bar at the entrance of the harbour was passed, then, boulders are encountered less frequently.

Boulders small enough to go through the chutes of the dredge are allowed to be dumped from the buckets the ordinary way into the scows, but up to date 125 boulders ranging from one to three cubic yards were first picked up into bucket, then dredge stopped, the boulders were chained and removed by derrick into scow, sometimes requiring as long as an hour to do so.

Boulders too large to be removed by the dredge were blasted and removed. Up to date, five of them were blasted. A record as to the position and size of these boulders has been kept.

In conclusion, I should think that from the amount of material removed up to date, 25 per cent could be classed as Class "A" material and the balance as Class "B." It is my opinion that all what is shown on the boring plan as sand and gravel is of the Class "A."

Then the resident engineer advises the district engineer of the difficulty in the operation and the district engineer, in turn, writes to Mr. Décarie (exhibit No. 5), the superintendent engineer for the province, stating among other things, as follows:—

From the time of arrival of the dredge *New Welland* at Matane, I have always had an assistant engineer of my staff on the site of works in order to be kept regularly "au courant" of the prosecution of the dredging works; and from information supplied by Mr. Assistant Engineer L. de B. Roy, I have to state that although in the contract and specification the material to be excavated was set forth as being clay, sand and gravel, it was found in the course of the work to be much harder than ordinary clay.

The dredge started work on July ult. the 28th, beginning at the eight-foot contour line, some 1,200 feet from the northeast corner of the western breakwater, the width of the cut being the western half of the proposed channel; from this starting point to the 5-foot contour line, the material dug out was nothing else but boulders more or less large and stones.

From the 5-foot contour line to the south side of the bar at the harbour entrance or 100 feet inside the north face of western breakwater, depth of face increased varying from five to ten feet and the material excavated in that area consisted again in large boulders and stones with boulders cemented into the clay underlying the top layer which varied between 12 and 24 inches.

The amount of material taken out in the areas above described is 25,590 c.y. (place measurement); it is estimated that 25 per cent of this amount or 6,390 c.y. should be classified as Class "A" material, being boulders and that the balance or 19,200 c.y. is ordinary as Class "B" material. Such classification has been arrived at after a thorough and careful investigation of the material taken out and of the conditions into which the dredge has had to do this work.

As above mentioned, it is stated that the top layer of the area where dredging work has been done to date consisted in boulders and stones upon a depth varying between 12 and 24 inches; outside of this, many other boulders had to be derricked into the dumping scows which boulders were too large to go through the chutes; others had to be blasted and removed.

Moreover, in fairness to the contractors, allow me to state that the clay which was found underneath the top layer was indurated clay or hard pan of the hardest kind with cemented boulders; this material was so hard that the dredge could never move more than 1 foot at the time, the slices of material coming up into the buckets were blocking the chutes so that a six-inch jet of water could not dislodge any of it. Boulders coming up that were too large to go through the chutes were derricked into the scows. This, sometimes, took around one hour during which the dredge did not do any work.

Boulders over seven feet in any dimension could not be handled and eight or nine of these were blasted as per your instruction. Two of these large boulders were the cause of much delay to the contractors; they had to abandon their first cut and start on ahead of them.

On the 8th June, 1926 (exhibit No. 33), the superintendent under instruction from the chief engineer writes

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to him that "he concurs in Mr. Amiot's report, exhibit No. 5, above recited, excepting as to price, yet in exhibit No. 14, on the 3rd October, 1923, he recommends \$4.50 could be allowed for the 25 per cent of the material removed by the suppliant which is claimed to be of Class "A." See also, in this respect, another letter of the district engineer of the 15th September, 1923, to the superintendent (exhibit No. 22) dealing with the same matter. The resident engineer testified at trial that he confirms the opinion expressed in exhibit No. 5; that it expressed both his opinion and that of the inspector.

The resident engineer, on the 13th September, 1923 (exhibit No. 25), reports as follows:—

With reference to the material first removed, at least 45 per cent were boulders but as a deeper face was met, until the bar at the entrance of the harbour was passed this percentage was kept but has been reduced to 25 per cent, and boulders are encountered less frequently.

Boulders small enough to go through the chutes of the dredge were allowed to be dumped from the buckets the ordinary way into the scows, but a large number (125) up to date ranging from one cubic yard to three cubic yards, and depending upon their shape, these were first picked into a bucket, sometimes requiring as long as an hour to do so, then the dredge stopped, these boulders chained and removed by derrick onto a scow. It is worth noting that while trying to raise these large boulders into a bucket no other material was being removed, therefore causing much loss and delay.

Boulders too large to be removed by the dredge were ordered to be blasted and removed, as per your verbal instructions, and I beg to report that three boulders were blasted some three hundred feet back of the dredge and that this procedure has been used on two boulders ahead of the dredge, on the 12th instant.

In concluding my report, I would say that up to date 25 per cent of the material removed could be classed as Class "A" material and the balance of this present total above mentioned to be classed as Class "B."

This same officer, on the 26th September, 1923 (exhibit No. 24), writes to the district engineer as follows:—

From the 5 feet contour to the south side of the bar at the harbour entrance or 100 feet inside the north face of the West Breakwater, the face to cut through increased, varying from five to ten feet, and the material excavated in this area was still large boulders and the stones with boulders cemented into the clay underlying the top layer.

The amount of material excavated to this bar above referred to, shows that 25,500 cubic yards were removed and of this amount 25 per cent should be classed as Class "A" or 6,390 cubic yards, and the balance as Class "B."

Re the handling of the material excavated I may say that the clay removed was so tough that the dredge was never moved more than a foot at a time as the slices of material that came up would then block

the chutes even with a 6-inch jet of water pushing this material down the chutes. All boulders that could go through the chutes were allowed to dump the ordinary way, an occasional one blocking in the chutes, causing hours of delay. Boulders that came up and were found too large to be dumped through the chutes were brought up the level of the deck of the dredge, then the dredge stopped. This boulder had to be chained from the bucket and deposited on the deck or on a nearby scow, and the dredge again started. It is worth noting that while the dredge tried to raise a boulder no material came into the bucket as there was no lateral movement being done until this boulder was raised, or pushed along into a corner of the cut, sometimes requiring as long as an hour to do so.

Boulders over seven feet in any dimension could not be handled and eight or nine of these were blasted as per your instructions. Two of these large boulders occasioned the contractors much delay, in this way that they had to abandon their first cut, and start ahead of these boulders. These boulders have since been blasted but not removed from the cut.

It is shown by the Inspector's daily records that over forty hours were lost only in chaining and removing boulders from buckets, leaving alone the time lost in getting them into the buckets.

I may say also a few words with regard to the material removed, say 200 feet from the north end of the west breakwater, and which has proved to be very different from the material found on the north side of the bar, first being a softer clay with more gravel and sand, yet with boulders large enough that they were blasted to allow the dredge to proceed.

This is followed by the letter (exhibit No. 14) of the superintendent to the chief engineer, wherein Mr. Décarie says:—

From the 5-foot contour line to the south side of the bar at the harbour entrance, or 100 feet inside the north face of the western breakwater, the depth of face increased varying from 5 to 10 feet and the material excavated in that area consisted again in large boulders and stones cemented into the clay, forming what is generally called natural concrete or conglomerate. In other words, the bottom of the river was paved with stones and boulders cemented in a mixture of very hard clay, gravel and sand.

The buckets of the dredge would slip on these boulders and, sometimes, the dredge had to work an hour and more before being able to dislocate the stones and boulders in order to take them in the buckets. A quantity of the boulders were too large to go through the chutes. Some boulders were immensely large and could not be taken into the buckets. Mr. Assistant Engineer Roy, and the inspectors, affirmed that they had seen boulders 20 feet long. The boulders that could not go through the chutes of the dredge had to be removed with the help of a derrick, that is to say, the dredge had to be stopped, the boulders in the bucket had to be chained, removed from the bucket with the derrick, and placed on the scow.

Mr. Roy also informs that the clay found underneath the top layer was indurated clay of the hardest kind, absolutely dry, with a number of boulders of all kinds cemented into it. This underneath material was so hard that the elevator dredge could never move on its anchor more

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than one foot at a time and the material was coming into the buckets in large slices which were blocking the chutes so that a 6-inch jet of water could not dislodge any of it.

The removal of large boulders with the help of a derrick from the buckets of the dredge was a long operation taking about an hour of time during which the dredge was stopped.

\* \* \* \* \*

From the above it is evident that there is some of the material removed which must be classed in Class "A." Mr. Assistant Engineer Roy informs that about 25 per cent of the material excavated to date is of the Class "A."

\* \* \* \* \*

The department might consider that the lowest quotation received for Class "A" could be allowed to the contractors in this connection, and I would recommend the price of \$4.50 per cubic yard for Class "A" as being a fair and reasonable price.

The district engineer in his letter to the chief engineer, on the 13th December, 1923 (exhibit No. 15), says:—

"All what was possible, humanly, to go ahead with the work was done, I am a witness to that. \* \* \* All troubles \* \* \* due to the kind of material encountered.

And by exhibit No. 23, we had a complete analysis of the situation by the district engineer, which reads as follows:—

In compliance with your instructions regarding the above subject, and with reference to the different interviews and discussions we did have together in connection with the claim of the National Dock and Dredging Corporation Limited, I beg to submit the following report embodying the conclusions arrived at during our discussions:—

During the summer season of the year 1922, when the survey and examination were made in order to prepare the contract plans and specifications for the dredging required at Matane, it was found that soft material composed of clay, sand and gravel only was to be removed by dredging. Consequently, the contract plans and specifications were prepared accordingly and we eliminated from the contract any other class of material.

Tenders were called on that assumption; a contract was entered into with the National Dock and Dredging Corporation Limited for the dredging of clay, sand and gravel amounting to 290,000 cubic yards. No mention was made of any other kind of material because, from the result of the survey and inspection, we were under the impression that soft material only was to be removed and that it could even be done with a suction dredge.

The contract was signed on the 15th April, 1923. The dredge *New Welland* arrived at Matane on the 26th July, 1923.

Immediately at the start, the hard material referred to in the claim of the National Dock and Dredging Corporation Limited was encountered. It was noticed by our inspector and by the assistant engineer who was in charge of the work, but no complaint was made because it was thought that the material would improve.

On the 9th August, 1923, the assistant engineer in charge of the work at Matane did inform me that the dredge *New Welland* was encountering hard material and a quantity of stones and boulders of all sizes, that from his observations, from the beginning of the work to date, the quantity of stones and boulders removed was a great percentage of the material being dredged.

I went to Matane to investigate by myself and I did find that a large percentage of the material removed was nothing else than concreted clay, sand, gravel, stones and boulders.

On the 14th August, 1923, I (did report) to the chief engineer on this question stating that a large percentage of the material dredged by the dredge *New Welland* was composed of a conglomerate or concreted clay, sand, gravel, stones and boulders of all sizes, etc.

On the 16th August, 1923, the National Dock and Dredging Corporation Limited (did send) a protest to the department claiming that the material encountered was not as specified in their contract.

On the 29th August, 1923, we went to Matane together where we (did have) opportunity to verify the accuracy of the facts referred to above, and from the information we have been able to gather on that date, it was shown to us by our inspector and assistant engineer in charge that at the beginning of the dredging operations, the material removed was consisting of indurated clay containing about 45 per cent of stones and boulders of all sizes, that this percentage was the same until the bar at the entrance of the river Matane was passed.

From there inwards, the percentage (did) decrease to quite an extent, but did not come under 25 per cent of the material removed.

I informed you that, on a previous visit of mine at Matane, I had personally seen a loaded scow containing not less than 90 per cent of stones and boulders of all sizes.

During the navigation season of 1924, the department, in order to verify the situation, did send two expert engineers, not connected with this department, in order to make a minute investigation on the situation at Matane and to report.

These two experts, Mr. A. E. Doucet, consulting engineer, and Mr. Victor Forneret, superintending engineer of the River St. Lawrence Ship Channel for the Department of Marine, went to Matane where they have made a very careful examination and investigation. All facilities and help were given to them and they have made their report to the department which confirms what had already been reported.

It is therefore evident that material other than what had been specified in the contract plans and specifications was encountered. The material in question cannot be classed in Class "B," and it is in my opinion a material that should be classed as Class "A."

With regard to the quantities of such material, from the result of the observations of the inspector and assistant engineer in charge at Matane, it was found that this hard material composed as described above was encountered on a length of 1,200 feet, starting from station 29 to station 17 on an average width of 116.4 feet as shown on the accompanying plan of cross section, by a thickness varying between 18 inches and 36 inches but having an average thickness of 24 inches, making an amount of 10,340 cubic yards place measurement, of material which, in my opinion, is of the Class "A."

As far as the price is concerned, I may say that, although the department when calling for tenders did eliminate Class "A," two of

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the tenderers did put in a price for Class "A," one at \$8 per cubic yard and the other one \$4.50 per cubic yard.

In my opinion, the lowest tender for Class "A," \$4.50 per cubic yard, is fair and reasonable and, from the result of my investigation and findings, this price of \$4.50 per cubic yard would be a fair and reasonable price to pay to the contractors for the material referred to above.

I have the honour to be, sir,

Your obedient servant,

P. E. AMIOT,

*District Engineer.*

On 25th June, 1924, the Minister of Public Works (exhibit No. 8) writes to the contractor

that two engineers who have no connection with the Department of Public Works. \* \* \* Messrs. Forneret, superintendent engineer, River St. Lawrence Ship Channel, and Major Doucet, consulting engineer, Quebec, will be secured to make an inspection, during 15 working days, of the material, etc.

Thereupon the chief engineer instructed these two independent engineers as follows:—

It is desired that a report be furnished to the department as to whether or not there exists material to be dredged at Matane which was unexpected and could not be fairly within the description contained in the specification and plans of soundings and borings.

These two engineers, on the 16th October, 1924 (exhibit No. 12) report to the chief engineer, *inter alia*, as follows:—

\* \* \* we met here a lot of boulders, cemented into a hard crust some two feet in thickness. \* \* \*

\* \* \* Here we dug into the same hard cemented material as that found on Saturday. \* \* \* We are therefore of the opinion that the borings shown to the contractors do not altogether fairly represent the nature of a part of the material to be dredged since in no one instance do they mention the existence of the hard cemented crust filled with boulders overlaying the hard clay bed and again in no one instance is it stated that boulders of over stone size occur. Material to be dredged does exist at Matane which was unexpected and could not fairly be brought within the description contained in the specification and borings. The claim of the contractors that they encountered material different from that which they were led to expect by the information furnished them, is doubtless due to the facts mentioned above as well as to the material to be dredged being described in the form of sand or as clay, sand and gravel, and to the statement that should an hydraulic pipe line dredge be used, the dumping ground should be 3,600 feet away.

Had solid rock or boulders of solid rock size been expected, the clause relating to Class "A" material would not have been struck out in the Indenture and a pipe line could not have been considered when dealing with a hard crust of material filled with large and small boulders and a layer of tough clay in which large boulders were deeply imbedded. In our opinion, the borings in such a formation as that of Matane

should have been made with a core boring machine. An elevator dredge working in a shallow cut of such material as that described above could not be sufficient or economical work and the resulting loss was bound to give occasion to claims.

We are not able to state the quantities of the hard material met with, but the engineers in charge of the work when it was performed should be in a position to supply the necessary information.

The suppliant was offered to continue his works in 1924 at other figures which he declined.

In October, 1923, the dredge being broken and partly wrecked, the suppliant was allowed to leave the works at Matane for good and, as testified by witness Dussault, he said he understood that this step did put an end to the contract. The chief engineer heard as a witness confirms that statement. See also in that respect exhibits M., N., and O.

This was followed by the Order in Council of the 19th July, 1924 (exhibit No. 11), which declared the contract closed, stating further that steps were under way in the department to effect a settlement. This same Order in Council also states that the reported material, under the contract, consisted of clay, sand and gravel.

The closing of the contract by this Order in Council is also recognized by the chief engineer in his memorandum to the Deputy Minister, exhibit M.

After both Messrs. Forneret and Doucet had reported, an attempt of settlement was made by the Crown at the figure of \$2.21 for the material in question; but it was refused by the suppliant. This report was criticized by exhibit E, but it amounts to nothing but a *pro domo* plea after the event, to which I attach no importance.

These figures of \$2.21 were arrived at upon getting at the normal earning of the dredge in question at some other works, and, as put by the chief engineer, it was thought reasonable to pay that amount to the contractor, as checked by independent methods. However, the fallacy of this estimate falls to the ground since that was calculated when the dredge was working only in daytime, while at Matane it was working night and day with two shifts of men. Calculated on proper basis this \$2.21 should, under the circumstances of the case, be \$4.42, as the dredge was working night and day at Matane.

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On the 9th June, 1926, the chief engineer writes to the Deputy Minister (exhibit N.) among other things, viz:—

\* \* \* The National Dock and Dredging Corporation Limited, who had a contract with the department for dredging at Matane, entered a claim against the department for extra compensation due to the nature of material encountered when dredging at that place under this contract.

The District Engineer, Mr. Amiot, reported that the overlying layer of material difficult to dredge was removed to the extent of 10,340 cubic yards, place measurement, by the contractors, and Mr. Décarry recommended that the company be allowed a rate of \$2.21 per cubic yard, place measurement, for this quantity of material.

10,340 cubic yards, P.M., at \$2.21 cubic yard..... \$22,851 40
Of this amount the company has already received payment at the rate of 37 cents per cubic yard, place measurement ..... 3,825 80

Which will leave a net payment of..... \$19,025 60 to the company in full and final settlement of their claim.

The company, in tendering on the work, proposed to use the bucket ladder dredge New Welland and borings taken by departmental officers had disclosed underlying clay with a surface layer of gravel and sand. The work consisted of dredging a basin on the inside to a depth of 15 feet at low tide, and an entrance channel 9 feet deep. It was considered that the material was not compacted in any way, but would allow of ready dredging either by a bucket type dredge or possibly by a hydraulic pipeline dredge.

The material was found when the dredge arrived to carry out the work to be unexpectedly difficult to dredge and the contractors' claim is based on misleading information supplied by the department.

It was believed that the borings and the description of material conveyed a reasonably true picture of the material to be encountered. Actually, the gravel contained a large proportion of large stones and a quantity of Class "A" boulders, which were the cause of a very material delay to the operations of the dredge.

The department had the claim of the contractors investigated by two engineers—Messrs. V. W. Forneret, superintendent engineer, St. Lawrence Ship Channel, and Col. A. E. Doucet, consulting engineer, Quebec, whose report substantiates the claim that the description and information furnished by the department did not give bidders a true picture of the material to be encountered.

The contractors excavated the first cut through the outer bar and, the season then being late, discontinued operations. They decided not to continue and their contract was closed out. The part of the work which they undertook to do first, the cut through the outer bar, was the most difficult of the whole work, and the work done was of value to operations subsequently carried on towards completion of this dredging.

After careful consideration of the circumstances I beg to concur in the recommendation of the superintending engineer that the contractors be allowed \$2.21 per cubic yard, place measurement, for the quantity of 10,340 cubic yards, place measurement, of harder material encountered.

All attempts at a settlement having failed, the present action was instituted.

We are therefore met with the consideration of both an executed and an executory contract.

The work done under the executed contract for the removal of clay, sand and gravel was duly paid for.

We have then to deal with the other works done "hors du contrat" not contemplated by the executed contract.

The suppliant has overwhelmingly proved his case in this respect, not only by its own witnesses, that is by persons who were actually on the dredge and engaged in the operations, but from the mouth of the Crown's employees and officers.

There is also spread upon the records much evidence by witnesses who did not see the material which was actually removed and whose evidence is based upon surmise and conjecture derived from other material seen afterwards at Matane. This class of testimony in face of the best evidence carries neither weight nor conviction. One among this latter class of witnesses has even ventured statements as to the size of the knives of the bucket—a matter evidently unknown to that deponent as he was entirely astray. This, however, was rectified by those who knew. That, however, would warrant the inference that it was done with a view to discredit the claim and to cover these laches of the officers who were in charge in making the borings and soundings that deceived both parties. (See art. 992 C.C.P.Q.)

The Order in Council of the 3rd March, 1927 (exhibit O), recites further, among other things, that, viz:—

That the contractors have entered a claim for extra compensation due to the nature of material encountered in the performance of the contract.

That the chief engineer of the Department of Public Works has stated that the contractors' claim that the description and information furnished by the department did not present a true picture of the material to be encountered is substantiated by reports submitted by Messrs. V. W. Forneret, superintending engineer of the St. Lawrence Ship Channel, and by Col. A. E. Doucet, consulting engineer of Quebec.

That the superintending engineer of the Department of Public Works states that, in his opinion, a price of \$2.21 per cubic yard would be a fair remuneration for the 10,340 cubic yards of concreted clay, sand and boulders removed by the contractors. That officer recommends that the contractors be paid at the rate of \$2.21 per cubic yard for this quantity of material as follows:—

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10,340 cubic yards, P.M., at \$2.21.....	\$22,851 40
Of this amount the company has already received payment at the rate of 37 cents.....	3,825 80
Which will leave a net payment of.....	\$19,025 60
to the company in full and final settlement of their claim.	

That the chief engineer and the Deputy Minister of Public Works concur in the above recommendation.

That provision for the settlement of this claim has been made in the Supplementary Estimates voted by Parliament for the fiscal year 1926-27 (vote 434) "Matane in full and final settlement of the claim of H. Dussault and Company in connection with their contract for dredging in 1923-24—\$19,025.60."

The Minister, therefore, recommends that authority be granted to pay to H. Dussault and Company the above-mentioned sum of \$19,025.60 in full and final settlement of their claim in connection with their contract for dredging at Matane, P.Q., during the year 1923-24.

This offer of \$19,025.60 is renewed in the respondent's statement in defence and is refused by the reply. Counsel for the Crown, in the course of the trial, stated that considering that the 10,340 cubic yards in question do not come under Class "A" or "B," an offer was made by the respondent to pay at the rate of \$2.21 per c.y. representing this sum of \$19,025.60.

Therefore, in the result, the claim means that under the executed contract, in writing, as above set forth, the suppliant was only bound to remove clay, sand and gravel, and any part of the contract beyond this scope and the ambit of the Order in Council authorizing the same was of no value and effect and comes within the ambit of its work done under an executory contract.

Then, under this executory contract, not in writing, the Crown, having accepted the works done by the suppliant beyond its executed contract, must be taken to have ratified it and such work and labour having accrued to its benefit, it becomes liable, on a *quantum meruit* basis as upon an implied contract. *Henderson v. The Queen* (1); affirmed on appeal to the Supreme Court (2); *Hall v. The Queen* (3); *The Gresham Blank Book Co. v. The King* (4); *Wood v. The Queen* (5); *The Queen v. Woodburn* (6); *May v. The King* (7); *Bernardin v. The Municipality of North Dufferin* (8).

(1) (1897) 6 Ex. C.R. 39.	(5) (1877) 7 S.C.R. 631, at p. 645.
(2) (1898) 28 S.C.R. 425.	(6) (1898) 29 S.C.R. 112.
(3) (1893) 3 Ex. C.R. 373.	(7) (1913) 14 Ex. C.R. 341.
(4) (1912) 14 Ex. C.R. 230.	(8) (1891) 19 S.C.R. 581.

From the perusal of exhibits 23, 33 and N, it must be found that the chief engineer, after accepting the finding of the superintendent who had concurred with the report of the district engineer Amiot, does find that, for a quantity of 10,340 cubic yards, the material encountered was harder than what was either mentioned or contemplated by the executed contract and that it should be paid at a higher price.

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In other words, this harder material is found to be outside of the executed contract and that it must be paid as upon a *quantum meruit* on an executory contract of which the Crown received the benefit. The price of \$2.21 mentioned by the engineer is not accepted as a sound *quantum meruit* for the reason above mentioned. Moreover, the chief engineer (exhibit N) finds that

the part of the work which they (suppliant) undertook to do first, the cut through the outer bar, was the most difficult of the whole work, and the work was of value to operations subsequently carried on towards completion of this dredging.

The evidence as to the ratio of remuneration per yard has been most satisfactorily established by those better able to speak upon the subject, such as the engineer in charge, confirmed as it is by several witnesses, and that ratio will be placed at \$4.50 per cubic yard. Answering a question put by the Court, the district engineer said:—

I was there, saw the material and say it is worth \$4.50—all of which is based upon my personal knowledge and that of the resident engineer and the inspector.

This witness impressed me as an honest man and as a person who would not give expression of opinion upon any matter without primarily considering it with great care from every angle.

The number of these cubic yards (outside of clay, sand and gravel) has, all through the trial, been accepted at 10,340.

These 10,340 at \$4.50 represent..... \$46,530 00

From which should be deducted 37 cents a  
 cubic yard already paid upon the same

quantity, i.e. .... 3,825 80

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\$42,704 20



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Following the decision of the Supreme Court of Canada in the case of *The Queen v. Henderson* (1) the cause of action having also arisen in the province of Quebec, the amount recovered will carry interest from the date the Petition of Right was left with the Secretary of State (sec. 4 Petition of Right Act). This date may be established by affidavit. Failing which the interest will run from the date the petition was filed in this court.

There are a few other items of claim mentioned in paragraph 18 of the Petition of Right which however were not pressed at trial. Suffice it to say in this respect that no ground of action has been shewn and that the suppliant cannot succeed in the recovery of the same.

Therefore there will be judgment declaring and adjudging that the suppliant is entitled to be paid by and recover from the respondent the said sum of \$42,704.20 with interest thereon at the rate of five per centum per annum from the date above mentioned to the date hereof. The whole with costs in favour of the suppliant.

*Judgment accordingly.*